

A CRITICAL GUIDE TO EX PARTE McCARDLE

William W. Van Alstyne*

It is commonplace that the Constitution of the United States restricts democratic government,¹ and that it does so as determined by the Supreme Court pursuant to its power of substantive constitutional review.² Although this power of the Court is nowhere explicitly granted in the Constitution³ and often has been questioned in theoretical discussions,⁴ most of us are reconciled to it and even are occasionally grateful that it exists. We doubtless agree that certain limitations should be respected by democratic majorities, whatever our differences as to what they should be.⁵ Where those limits have been set, subject to change only by extraordinary processes of amendment, provision for an independent judiciary with the power of constitutional review has generally been accepted in this country as both wise and prudent. Among its other virtues, an independent judiciary may sometimes furnish an important alternative to the anguish of civil disobedience and the desperation of violence in the adjudication of fundamental rights.

Unquestionably, there have been occasions when opinions of constitutional interpretation by the Supreme Court have been extremely unpopular, doubtless even wrong and unjust. Even with respect to decisions widely believed to be of this nature, however, the general immunity of the Court from expedient means of swift and easy correction has seemed important to preserve. Hence with rare exception,⁶

* Professor of Law, Duke University. LL.B. 1958, Stanford University.

1. *But see* E. ROSTOW, *THE SOVEREIGN PREROGATIVE* 83-192 (1962).

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

3. *See, e.g.*, L. HAND, *THE BILL OF RIGHTS* 3-30 (1958).

4. For a selected bibliography, see Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 45-47.

5. For a fascinating treatment of this age-old problem, see J. RAWLS, *A THEORY OF JUSTICE* (1971).

6. There have been only three amendments to the Constitution adopted in response to specific decisions of the Supreme Court. U.S. CONST. amend. XI, *superceding* *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); U.S. CONST. amend. XIII,

we have relied upon new appointments to the Court as the principal means of assuring its continuing identification with the felt necessities of the times.⁷ The dependency of the Court upon the President and Congress to make its constitutional interpretations effective beyond a given case has been more commonly exploited, but seldom has it been effective in causing the Court to reverse a decision at a later date. Nor was the impeachment power⁸ ever intended to be employed to subject judges to trial for the "high crime" or "misdemeanor" of disagreeing with Congress as to the constitutionality of its acts. In short, only the processes of amendment in article V of the Constitution clearly provide the means by which constitutional interpretations by the Supreme Court may be specifically overruled.

Within the past two decades, however, members of Congress have taken repeated recourse in another approach to controlling the Court and blunting its power of constitutional review: the congressional power to make exceptions to the appellate jurisdiction of the Supreme Court. In the late 1950's Congress considered a proposal to remove certain internal security laws from the possibility of Supreme Court invalidation.⁹ Somewhat later, it proposed the immunization of existing legislative apportionment arrangements from effective constitutional challenge.¹⁰ About the same time, another resolution attempted to foreclose judicial review of anti-obscenity laws on the one hand,¹¹ and religious school exercises on the other.¹² Finally, Congress has had before it bills designed to avert review of certain police techniques of criminal investigation¹³ and the perpetuation of racial segregation in the public schools.¹⁴

To be sure, these bills would not have directly "overruled" the Supreme Court or "amended" the Constitution, and no startling dis-

superceding *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); U.S. CONST. amend. XVI, superceding *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429 (1895).

7. Since article III establishes no set number, Congress may provide for the appointment of additional justices at any time, but the idea of political proliferation seldom has been regarded as appropriate. With rare exception, enlargement of the Court has merely kept pace with the growth of the country and the establishment of additional circuits. For an exhaustive statistical analysis of this development, see Blaustein & Mersky, *The Statistics on the Supreme Court*, in IV THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 3187-3239 (L. Friedman & F. Israel ed. 1969).

8. U.S. CONST. art. II, § 4 provides: "[A]ll civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

9. S. 2646, 85th Cong., 1st Sess. (1957).

10. H.R. 11926, 88th Cong., 2d Sess. (1964).

11. S. 4058, 90th Cong., 2d Sess. (1968).

12. H.R. 6501, 92d Cong., 1st Sess. (1971).

13. S. 1194, 90th Cong., 1st Sess. (1967).

14. H.R. 13916, 92d Cong., 2d Sess. (1972) (busing moratorium bill); H.R. 10614, 92d Cong., 2d Sess. (1972). See also H.R. 1228, 85th Cong., 1st Sess. (1957).

covery of such a power in Congress has been claimed. Still, it is obvious that the objective was the same. Specifically, these bills sought to deaden the effect of particular Supreme Court decisions and to forestall their possible extension or additional application by enacting certain "exceptions" to the appellate jurisdiction of the Supreme Court: to stop the Court by an enforced silence.

The constitutional source for this power is thought to lie in the exceptions clause of article III, which prescribes the Court's appellate jurisdiction in the following language: "In all the other cases before mentioned [save those few committed to its original jurisdiction], 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.*"¹⁵ As none of the recent attempts to draw upon this clause has yet succeeded, it is unsurprising that the exceptions clause is not well known. It has received substantial attention in professional books and journals,¹⁶ however, and as recently as 1968 it was the subject of unhurried discussion in the Hearings before the Senate Subcommittee on Separation of Powers.¹⁷

The views which have been expressed on the scope and meaning of the exceptions clause are by no means unanimous.¹⁸ On the other

15. U.S. CONST. art. III, § 2 (emphasis added).

16. See, e.g., R. BERGER, CONGRESS V. THE SUPREME COURT (1969); I W. CROSSKEY, POLITICS AND THE CONSTITUTION 616-19 (1953); C. FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, Part One, in VI HISTORY OF THE SUPREME COURT OF THE UNITED STATES 413-601 (P. Freund ed. 1971); J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, in I HISTORY OF THE SUPREME COURT OF THE UNITED STATES 204-50, 282-83, 299-300, 313-19, 330-33, 383-86, 431-49, 729 (P. Freund ed. 1971); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 288-340 (1953); III J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 449-56, 648-50 (1833); Forkosch, *The Exceptions and Regulations Clause of Article III and a Person's Constitutional Rights: Can the Latter be Limited by Congressional Power Under the Former?*, 72 W. VA. L. REV. 238 (1970); Grinnell, *Proposed Amendments to the Constitution: A Reply to Former Justice Roberts*, 35 A.B.A.J. 648 (1949); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Lenoir, *Congressional Control Over the Appellate Jurisdiction of the Supreme Court*, 5 U. KAN. L. REV. 16 (1956); Meiry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1 (1949); Strong, *Rx for a Nagging Constitutional Headache*, 8 SAN DIEGO L. REV. 246 (1971); Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 BOSTON U.L. REV. 1 (1951); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965); Comment, *Removal of Supreme Court Appellate Jurisdiction: A Weapon Against Obscenity?*, 1969 DUKE L.J. 291; Comment, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court: A Reappraisal*, 22 N.Y.U. INTRA. L. REV. 178 (1967); Note, *Limitations on the Appellate Jurisdiction of the Supreme Court*, 20 U. PITT. L. REV. 99 (1958). For articles significantly related to this subject, see Dellinger, *Of Rights and Remedies: The Constitution As a Sword*, 85 HARV. L. REV. 1532 (1972); Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605; Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

17. *Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968).

18. For a sample of differences, see the various interpretations cited note 95 *infra*.

hand, virtually everything written about this clause has shared in common at least one important reference other than to the bare language of the clause itself: a reference to *Ex parte McCardle*.¹⁹ Though more than a century old, *McCardle* still stands as the leading case regarding the extent to which Congress may use the exceptions clause to oust the Court of its appellate power even as to the substantive constitutionality of acts of Congress. While *McCardle*'s petition for habeas corpus was being reviewed on appeal in the Supreme Court, Congress adopted an amendatory act clearly intended to remove the Court's jurisdiction to prevent it from examining the constitutionality of the controversial Military Reconstruction Act. The Court unanimously sustained the Repealer Act and at once dismissed the case "for want of jurisdiction."²⁰ If *Marbury v. Madison*²¹ is justly famous because it appeared to settle the primacy of the Supreme Court in interpreting the Constitution and resolving all cases within the judicial power of the United States, *Ex parte McCardle* is equally important because it appeared to settle the authority of Congress to make exceptions to the Supreme Court's appellate jurisdiction.

In addition to its constitutional significance, *McCardle* also provides an extraordinary insight into one of the many political crises of the First Reconstruction.²² The first part of this article attempts to provide a glimpse of that era as background to the decision and as an aid to understanding the full intention of Congress in adopting the Repealer Act of 1868²³ which was construed and applied in *McCardle*. The second part provides a critical review of the Supreme Court's opinion, concluding with the disconcerting suggestion that the Court may have erred in associating the Repealer Act with the power of Congress to make exception to the appellate jurisdiction of the Supreme Court: whatever exceptions may have existed to that jurisdiction as originally conferred directly by article III, they arose not from enactment of the Repealer Act but from other sources not then in controversy before the Court. Indeed, there was no exception then applicable to bar the Court from deciding *McCardle*'s constitutional claims. Rather than drawing upon this observation subsequently to argue that *McCardle* is of very little importance as a matter of technical legalism, however, part

19. 74 U.S. (7 Wall.) 506 (1869).

20. *Id.* at 515.

21. 5 U.S. (1 Cranch) 137 (1803).

22. Charles Fairman reviews much more of that crisis in his recent excellent book than one can find room to remember in a critical guide to a single case. C. FAIRMAN, *supra* note 16, at 413-601. See also Kutler, *Ex Parte McCardle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered*, 72 AM. HIS. REV. 835 (1967).

23. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

three attempts to show how the general position of the *McCardle* Court conforms entirely with virtually every other judicial construction previously and subsequently associated with the exceptions clause, how the view that the clause vests a plenary authority in Congress best fits the presuppositions of federalism generally animating the original plan of the Constitution and the original Judiciary Act of 1789, and how that view is nonetheless compatible with the integrity of the judicial power and the continuing protection of civil liberties by state and national courts.

HISTORICAL BACKGROUND AND DECISION

The immediate origins of *Ex parte McCardle* are bound up in the Reconstruction revisions of federal habeas corpus and necessarily require a brief review of that famous writ in terms of its availability in 1867. The writ in its most important form—*habeas corpus ad subjiciendum*—is directed to the person having custody of the petitioner, to produce him in court and to answer to allegations that the custody in which he is held is without legal justification.²⁴ So very important was it seen to be in the protection of personal liberty that its general availability in England had been memorialized by Parliament in the Habeas Corpus Act of 1679,²⁵ subsequently referred to by Blackstone in his first American edition of his *Commentaries* as "another Magna Carta."²⁶ In 1787, even before consideration and ratification of the Bill of Rights, the privilege of habeas corpus was written into article I, section 9, of the Constitution.²⁷ Nevertheless, as late as 1867, federal statutes provided for writs of habeas corpus in courts of the United States in only three sets of circumstances, and Congress otherwise relied upon state courts to make such writs available in other circumstances.²⁸

The earliest federal provision for habeas corpus was made in section 14 of the original Judiciary Act of 1789 which permitted the federal courts, including the Supreme Court, to issue the writ only on behalf of prisoners held "in custody, under or by colour of the authority of the United States"²⁹ Thus, persons held in jail or otherwise detained by *state* or *local* authority could not secure a speedy determi-

24. See R. SOKOL, *FEDERAL HABEAS CORPUS* 35-37 (2d rev. ed. 1969).

25. 31 CAR. II, c.22.

26. BLACKSTONE'S *COMMENTARIES* *135 (Am. ed. 1832).

27. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

28. See OAKS, *The "Original" Writ of Habeas Corpus In The Supreme Court*, 1962 SUP. CT. REV. 153. For changes in the statute from 1789 to 1867, see Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 131 F.R.D. 407 (1953).

29. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81.

nation of the legality of their detention through *federal* court petition.³⁰ In 1833, Congress approved habeas access to federal courts for persons confined under the authority of a state, but only insofar as such persons were detained "for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof"³¹ Except for an additional, modest extension of federal habeas in 1842,³² to protect foreign citizens acting under a claim of national authority or international law, the doors of the federal courts remained closed to state prisoners.

The severe disadvantage of this arrangement was most acutely felt in the aftermath of the Civil War. State prisoners were unable to obtain federal habeas corpus relief even when held in violation of the Constitution or federal laws such as the newly ratified thirteenth amendment or the Reconstruction statutes providing for equal civil rights.³³ Finally, on February 5, 1867, the Reconstruction Congress expressly confirmed the power of all federal courts and judges to issue writs of habeas corpus in any case, state as well as federal, where custody was challenged on grounds of national law. Specifically, the new Act provided that the federal courts had "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States."³⁴

Senator Lyman Trumbull of Illinois, a Radical Republican who drafted this Act as well as several other major pieces of Reconstruction legislation, subsequently explained the necessity and purposes of the Act in these statements to the Senate:

The act of 1789 authorized the issuing of all such writs in cases where persons were deprived of their liberty under authority or color of authority of the United States. Why, then, was the Act of 1867 passed? It was passed to authorize writs of *habeas corpus* to issue in cases where persons were deprived of their liberty under State laws or pretended State laws. It was the object of the act of 1867 to confer jurisdiction on the United States courts in cases not before provided for, and it was to meet a class of cases which was arising in the rebel States, where, under pretense of certain

30. For a brief period in 1801, however, habeas corpus was made more widely available. See the Judiciary Act of 1801, ch. 4, § 2, 2 Stat. 89, *as amended*, Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132.

31. Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634.

32. Act of August 29, 1842, ch. 257, 5 Stat. 539.

33. Most of these statutes have been carried forward to the present. See 42 U.S.C. §§ 1981 *et seq.* (1970) (corresponds to Act of May 31, 1870, ch. 114, § 6, 16 Stat. 144); 18 U.S.C. §§ 241 *et seq.* (1970) (corresponds to Act of May 31, 1870, ch. 114, § 6, 16 Stat. 141).

34. Act of Feb. 5, 1867, ch. 28 § 1, 14 Stat. 385.

State laws, men made free by the Constitution of the United States were virtually being enslaved, and it was also applicable to cases in the State of Maryland where, under an apprentice law, freedmen were being subjected to a species of bondage. The object was to authorize a *habeas corpus* in those cases to issue from the United States courts, and to be taken by appeal to the Supreme Court.³⁵

Thus for the first time, general federal court power to issue writs of *habeas corpus* in behalf of persons held in custody under state or local authority was firmly established in the federal judiciary, with express right of appeal to the Supreme Court.

Senator Trumbull's reference to that portion of the Act of 1867 authorizing a right of appeal to the Supreme Court pertained specifically to the second paragraph of section 1:

From the final decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court of the United States for the district in which said cause is heard, and from the judgment of said circuit court to the Supreme Court of the United States³⁶

This provision of the Act was thought to be necessary because of a shortcoming which had developed as the result of judicial interpretation of section 22 of the Judiciary Act of 1789. Section 22 authorized review by the Supreme Court by writ of error from the judgments of inferior federal courts in all civil actions and suits in equity only when the matter in dispute exceeded the sum of \$2,000.³⁷ In 1847, in *Barry v. Mercein*,³⁸ a denial of *habeas corpus* relief was brought to the Court by writ of error. The Court held that while petitions for *habeas corpus* were a form of civil action, no appeal could lie under section 22 from the judgment of an inferior federal court disposing of a *habeas* application unless the jurisdictional amount was satisfied.³⁹ The Act of 1867 overcame this obstacle by providing a right of direct appeal to

35. CONG. GLOBE, 40th Cong., 2d Sess. 2096 (1868).

36. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386.

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

38. 46 U.S. (5 How.) 103 (1847). *Barry* involved a *habeas corpus* suit in a federal circuit court brought by a husband to secure custody of a child from the wife. The petition was disallowed by that court and the appeal was dismissed by the Supreme Court for lack of jurisdiction under section 22. It should be noted that *Barry* was not dispositive of the question whether a federal *habeas* petitioner could seek Supreme Court review when he was held in federal custody claimed to be unlawful under national law; petitioner's daughter was not held in federal custody, and lower court jurisdiction had been based solely on diversity of citizenship.

39. Even prior to 1867, however, appeals could be taken from state court judgments in *habeas* claims raising federal questions, without regard to any dollar amount in controversy, under the same sections of the Judiciary Act of 1789 as those involved in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). See Ratner, *supra* note 16, at 193-201.

the Court which was no longer dependent on satisfying the jurisdictional amount.

This statutory enlargement of federal habeas corpus relief was not, however, the only important legislation adopted by the Reconstruction Congress. In addition to enacting the thirteenth, fourteenth and fifteenth amendments, it adopted far-reaching substantive statutes to secure the federal protection of civil rights and civil liberties. Partially to enforce those measures, Congress also adopted the Military Reconstruction Act of March 2, 1867, to "regularize" federal military jurisdiction in the South by dividing the region into districts subject to military command.⁴⁰ Ironically, it was the clash between the Military Reconstruction Act and the Habeas Corpus Act of 1867 that was to produce the crisis of *Ex parte McCardle*.

The immediate events leading to the *McCardle* decision commenced on November 12, 1867, when the federal circuit court for the district of Mississippi issued a writ of habeas corpus directing Major General Ord, the Commander of the Fourth Military District, to deliver William H. McCardle to the United States Marshal, pending disposition on the merits of McCardle's claim that he was being held in military custody in violation of the Constitution.⁴¹ McCardle, editor of the *Vicksburg Times*, had been arrested by Major General Alvin Gilem acting pursuant to the Military Reconstruction Act. At the time of his petition, McCardle was held in military custody awaiting trial by military commission for four alleged offenses, none of which appeared to be military in nature. He was charged with disturbing the peace, inciting to insurrection and disorder, libel, and impeding reconstruction, solely on the basis of several vituperative, anti-reconstructionist editorials he had authored and published in the *Times*.⁴²

40. Act of March 2, 1867, ch. 153, 14 Stat. 428.

41. *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 320-21 (1868), setting forth the pertinent facts.

42. On November 6, 1867, McCardle had editorialized in the *Times*:

We said a few days since that to be a military satrap, in the poor down-trodden South, was, ex necessitate rei, to be a scoundrel . . . there is not a single shade of difference between Schofield, Sickles, Sheridan, Pope, and Ord and . . . they are each and all infamous, cowardly, and abandoned villains who, instead of wearing shoulder straps and ruling millions of people, should have their heads shaved, their ears cropped, their foreheads branded, and their persons lodged in a penitentiary.

Additionally, McCardle urged whites to boycott an election called to authorize a state constitutional convention, offered to pay one dollar for the name of any white known to have voted and promised to publish the names in the *Times*.

A sample of a later editorial appears in the *Congressional Globe* of 1868, written by McCardle while he was free on bail and awaiting the outcome of his appeal to the Supreme Court. The editorial is dated January 21, 1868:

There is not a man who will pay any tax imposed by this convention [the Mississippi state constitutional convention then in session], and if their tax collectors undertake to enforce collection, by seizing and selling the

On November 25, 1867, the federal circuit court denied McCardle's application for habeas corpus, but ordered him released on a \$1,000 bond pending the outcome of his appeal to the Supreme Court pursuant to the appeals section of the Habeas Corpus Act of 1867. Immediately after his appeal had been docketed in the Supreme Court, however, a motion to dismiss for want of jurisdiction was filed on three grounds by counsel for the government⁴³ (including Senator Trumbull).

First, the government argued that since McCardle was held in custody under federal rather than state authority, the circuit court's jurisdiction must have been based upon the Judiciary Act of 1789 rather than upon the Act of 1867. Although conceding that the circuit court's jurisdiction under the Act of 1789 was proper, the government contended (presumably under *Barry v. Mercein*) that no appeal could be taken to the Supreme Court under that Act. Nor could an *appeal* be taken on the basis of the 1867 Act. While it was true that the language of the 1867 Act extended habeas jurisdiction to "all cases" where custody was attacked on a constitutional basis and authorized an appeal to the Supreme Court from any final decision by the circuit court, the government urged that in order to avoid redundancy insofar as federal prisoners were concerned and to maintain the limited reconstruction purpose of the 1867 Act, it ought to be construed to apply only to persons in state custody. The Supreme Court unanimously rejected this argument, however, noting that the Act of 1867 was

of the most comprehensive character. It brings within the *Habeas Corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.

*And it is to this jurisdiction that the system of appeal is applied.*⁴⁴

The government's second, more technical argument asserted that appeals under the 1867 Act could be taken to the Supreme Court from circuit court judgments only when the circuit court had considered a habeas case on appeal from a district court, rather than as an exercise of the circuit court's original jurisdiction. This position was also rejected unanimously by the Court. Finally, the government sought to

property of the people, they will be shot down like dogs, as they are!
... They know that Ord's convention has no power or authority to tax them,
and they are determined not to be robbed! The men who attempt it will
certainly get hurt, for they will be treated as all robbers and highwaymen
deserve to be treated.

CONG. GLOBE 40th Cong., 2d Sess. 2061 (1868).

43. See *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 320-21 (1868).

44. *Id.* at 325-26 (1868) (emphasis added).

distinguish the case as one involving a person "charged with [a] military offense" which section 2 of the 1867 Act explicitly excepted from the section 1 right of appeal. In response, the Supreme Court simply observed that it would review that issue once the merits of the circuit court's decision were under consideration, although it clearly appeared that the argument was bound to fail since *McCardle* was not charged with any offense that could reasonably be called "military" in nature. Accordingly, on February 17, 1868, the government's motion to dismiss was denied.

As a result of the Supreme Court's unanimous decision upholding its jurisdiction in *McCardle I*,⁴⁵ an important anomaly had developed under the Reconstruction Congress' powerful contribution to federal habeas corpus. The Military Reconstruction Act, intended principally to protect Blacks and loyal whites against harassment by southern state authority, but drafted in far more comprehensive terms, had become a federal sword in the hands of an unreconstructed Mississippi editor. Even "worse," the Habeas Corpus Act, intended by its sponsors to establish habeas appellate jurisdiction principally to enable the Supreme Court to review *state* laws impeding reconstruction and subordinating federal rights, was about to be used with the immediate prospect that a *federal* statute deemed vital to reconstruction might be held unconstitutional. This latter issue, after all, was precisely the issue already set for argument on the merits in the Supreme Court. *McCardle* contended that his trial by court martial would violate his fifth and sixth amendment rights under the Constitution; that exigent circumstances did not warrant the use of martial rule and suspension of the right to trial by jury; that application of the Reconstruction Act to his editorials would violate the first amendment; and finally, that so much of the Act of Congress of March 2, 1867, which placed ten states under military jurisdiction was itself unconstitutional!⁴⁶ In sum, the irony of the situation in *McCardle* was that the Habeas Corpus Act, designed to effecuate reconstruction policies, was about to be used to attack the Military Reconstruction Act itself.⁴⁷

45. *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868). Hereafter referred to as *McCardle I*.

46. In light of the fact that Civil War hostilities ended in 1865, and that the civil courts were functioning in conformity with the fifth and sixth amendments (albeit not necessarily with impartiality), there was considerable reason to suppose that the Supreme Court would have decided against the constitutionality of courts martial for civilians. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Within 3 weeks of the final decision in *McCardle II*, Chief Justice Chase wrote to a friend: "I may say to you that had the merits of the *McCardle* case been decided the Court would doubtless have held that this imprisonment for trial before a military commission was illegal." C. FAIRMAN, *supra* note 16, at 494.

47. See Kutler, *supra* note 22, at 842.

On March 9, 1868, 3 months after *McCardle I*, oral argument on the merits of the case was concluded in the Supreme Court with Senator Trumbull again participating for the government. Three days later, on March 12, a rider was introduced in the House of Representatives, and then it was inconspicuously tacked onto an uncontroversial tax appeals bill which had already passed the Senate. Without any special note being taken of the rider, the bill as amended was adopted virtually without debate. Late on the same day, the amended bill was passed by the Senate.⁴⁸ Section 2 provided:

And be it further enacted, That so much of the act approved February [5, 1867], entitled "An act to amend 'An act to establish the judicial courts of the United States,' approved September [24, 1789]," as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed.⁴⁹

This amendment was added, of course, to strike at *McCardle's* pending case. As stated by Representative James Wilson of Iowa when called upon to explain his objective in having introduced the Repealer Act, his amendment had been aimed at "striking at a branch of the jurisdiction of the Supreme Court of the United States . . . thereby sweeping the [*McCardle*] case from the docket by taking away the jurisdiction of the court . . . [to] prevent the threatened calamity falling upon the country."⁵⁰ The calamity which Wilson feared was, in his own words, "that the *McCardle* case was to be made use of to enable a majority of that Court to determine the invalidity and unconstitutionality of the reconstruction laws of Congress."⁵¹

Nonetheless, the effort did not succeed without resistance. On March 25, the Bill was returned to both Houses with a strongly worded veto message by President Johnson. The message is not without its own interest since Johnson's impeachment trial formally commenced only 5 days later, pursuant to articles of impeachment which had already been reported against him. Thus, as he penned his veto, Johnson was aware that he was about to be tried by the very body whose legislation he again had presumed to condemn. He stated in part:

I cannot give my assent to a measure which proposes to deprive any person restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States, from the

48. C. FAIRMAN, *supra* note 16, at 465.

49. Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44.

50. CONG. GLOBE, 40th Cong., 2d Sess. 2062 (1868).

51. *Id.*

right of appeal to the highest judicial authority known to our government. To secure the blessings of liberty to ourselves and our posterity is one of the declared objects of the Federal Constitution. To assure these guarantees are provided in the same instrument, as well against 'unreasonable searches and seizures' as against the suspension of the 'privilege of the writ of *habeas corpus*,' unless when, in cases of 'rebellion or invasion, the public safety may require it.' It was doubtless to afford the people the means of protecting and enforcing these inestimable privileges that the jurisdiction which this bill proposes to take away was conferred upon the Supreme Court of the nation. The act conferring that jurisdiction was approved on the 5th of February, 1867, with a full knowledge of the motives that prompted its passage, and because it was believed to be necessary and right. Nothing has since occurred to disprove the wisdom and justness of the measures; and to modify it as now proposed would be to lessen the protection of the citizen from the exercise of arbitrary power and to weaken the safeguards of life and liberty, which can never be made too secure against illegal encroachments.

. . . .

The legislation proposed in the second section, it seems to me, is not in harmony with the spirit and intention of the Constitution. It cannot fail to affect most injuriously the just equipoise of our system of government; for it establishes a precedent which, if followed, may eventually sweep away every check on arbitrary and unconstitutional legislation. Thus far during the existence of the Government the Supreme Court of the United States has been viewed by the people as the true expounder of their Constitution, and in the most violent party conflicts its judgments and decrees have always been sought and deferred to with confidence and respect. In public estimation it combines judicial wisdom and impartiality in a greater degree than any other authority known to the Constitution; and any act which may be construed into or mistaken for an attempt to prevent or evade its decisions on a question which affects the liberty of the citizens and agitates the country cannot fail to be attended with unpropitious consequences.⁵²

The veto was predictably overridden in the Senate on March 26 and in the House on March 27. The brief discussion in both Houses fully confirmed the President's specifications of the amendment's design: to deny to the Supreme Court authority to exercise its power of substantive constitutional review. The Repealer Act was intended to prevent the Court from determining whether *McCardle* was being held in military custody in violation of the Bill of Rights and to preclude the

52. *Id.* at 2165.

possibility that the Military Reconstruction Act of March 2, 1867, imposing martial rule, would be declared unconstitutional.⁵³ Immediately following its passage by the requisite majorities in both Houses, the Repealer Act was filed in the Supreme Court. A decision as to the effect of the Act on McCardle's then-pending case was postponed and the Court called for new arguments on the jurisdictional issue.

The chronology of events thus associated with McCardle's claim on the merits in the United States Supreme Court was this:

- February 5, 1867: Act of Congress expands habeas jurisdiction of inferior federal courts with right of appeal to Supreme Court.
- March 2, 1867: Reconstruction Act of Congress establishes military districts, and provides for military jurisdiction in a 10-state

53. *Id.* at 2062-2120, including the following remarks:

Senator Doolittle. [T]he honorable Senator from Illinois [Trumbull, who had just spoken and who had described the repealer bill as "of very little importance"] is altogether mistaken in the view which he now presents. . . . The honorable Senator himself, as counsel in that court, if I am correctly informed, with other counsel made a motion to dismiss a case pending in the Supreme Court, or alleged to be pending under this act, and the court refused to dismiss it. . . . We all know, the whole world knows, that this case of McCardle is pending in the Supreme Court, brought up on appeal, under the act of 1867, from the circuit court of Mississippi, and that that case has been argued by eminent counsel, and that it is pending.

Senator Hendricks. [T]he Senator from Nevada [Stewart] was compelled to admit that the court was not crowded; and when I asked him the question how many cases of this sort and under this law had come into that court he could name but one—the McCardle case. . . . Will senators be good enough to recollect of a single instance in the history of any free Government where, for proper purposes, the jurisdiction of an appellate court has been taken away from a cause after that jurisdiction had attached? . . .

But it is done here; and why? It is to reach the McCardle case. . . . [W]hy should he not be heard in that court? Had not the Supreme Court of the United States, with great unanimity, decided that a military commission could not try a citizen in a time of peace for an ordinary civil offense that the Constitution had guaranteed to that citizen a trial before a jury with full opportunity for defense? For what purpose has the Supreme Court of the United States been established? Does not the Constitution contemplate that all legislation shall undergo the test of the Supreme Court of the United States? Marshall thought so; Taney thought so. I cite the lights of the law. Marshall, probably the greatest jurist our country has produced, freely discussed all constitutional questions, and contributed more to establish the meaning and proper construction of the Constitution than any other man of the country. . . .

Senator Johnson (Maryland): Congress has been passing acts of legislation which were supposed to be questionable; the power to pass them doubted. The President of the United States sought to prevent them by messages containing an argument to demonstrate the want of authority to pass them. Congress passed the act of February 5, 1867, and under that act a case finds its way into the Supreme Court, was argued several days or a week or more prior to the 11th of March, 1868, and rumor had it that it was to be decided. The court had no authority to decide it except by virtue of that act; and the bill repealing it, without original explanation of its purpose, was passed by both Houses in two days. Will not the historian say that those who were engaged in such legislation either knew or apprehended that the highest court in the land would or might hold the laws to be unconstitutional?

- area, authorizing trial by military commission.
- November 2, 1867: United States circuit court issues writ to produce McCardle challenging military authority to arrest and to try him for state offenses without trial by jury. Validity of Military Reconstruction Act is also drawn into question.
- November 25, 1867: Circuit court denies McCardle's application for habeas relief, but orders him released on \$1,000 bail pending outcome of appeal to Supreme Court.
- February 17, 1868: Motion to dismiss appeal in Supreme Court for want of jurisdiction is unanimously denied, and the case is set for consideration on the merits—*McCardle I*.
- March 9, 1868: Argument on the merits of McCardle's appeal is concluded in the Supreme Court.
- March 12, 1868: Act is adopted by both Houses to repeal that portion of 1867 Act under which McCardle's case had been heard in Supreme Court.
- March 25, 1868: President Johnson returns the Repealer Act to both Houses with message of veto.
- March 27, 1868: Veto is overridden in the Senate and House.
- April 12, 1869: Following delayed argument in Supreme Court on the effect of the Repealer Act on the Court's jurisdiction to decide McCardle's appeal on the merits, the Supreme Court announces its unanimous decision—*McCardle II*.

The unanimous decision of the Court in *McCardle II*⁵⁴ on April 12, 1869, was virtually anticlimactic. Terse and dryly matter-of-fact, Chief Justice Chase's opinion for the Court contrasted greatly with the style Chief Justice John Marshall had employed in *Marbury v. Madison*,⁵⁵

54. 74 U.S. (7 Wall.) 506 (1869).

55. 5 U.S. (1 Cranch) 137 (1803).

which *Ex parte McCardle* is thought to affect so importantly. Where Marshall raised, and resolved by dicta, virtually every claim pressed by Marbury, Chase carefully avoided any equivalent discussion of the many claims raised by McCardle. Even the issue which has identified the historical significance of the case—the power of Congress over the appellate jurisdiction of the Supreme Court—was treated without rhetorical flourishes as a rather straightforward and perfectly well-settled proposition. Indeed, finding support for its position in another opinion by Marshall, the Chase Court recorded its *ratio decidendi* in the following few paragraphs:

It is quite true, . . . 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.'

. . . .

. . . In the case of *Durousseau v. The United States* [6 Cranch, 312; *Wiscart v. Dauchy*, 3 Dallas, 321], particularly, the whole matter was carefully examined [by Chief Justice Marshall] and the court held, that while 'the appellate powers of this court are not given by the judicial act, but are given by the Constitution;' they are, nevertheless, 'limited and regulated by that act, and by such other acts as have been passed on the subject.' The court said, further, that the judicial act was an exercise of the power given by the Constitution to Congress 'of making exceptions to the appellate jurisdiction of the Supreme Court.' 'They have described affirmatively,' said the court, 'its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it.'

. . . .

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. . . .

. . . .

It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.⁵⁶

So the case came to an end. In its denouement, *Ex parte McCordle* had two character traits shared with *Marbury v. Madison*, apart from the additional coincidence that it derived its basic reasoning from an opinion by John Marshall. First, the immediate, substantive constitutional issues which generated great political interest in the case at the time were altogether avoided, even more completely than in *Marbury*. Second, whereas *Marbury* would be read to declare that "while we are under a Constitution, the Constitution is what the judges say it is,"⁵⁷ *Ex parte McCordle* appeared to lay down a very sobering afterthought: Congress may prevent the Supreme Court from saying anything at all, at least where its appellate jurisdiction is concerned.

A CRITICAL REVIEW OF THE *McCordle* OPINION

Criticism of *Ex parte McCordle* has not been in short supply. At the level of judicial policy, it has been suggested that the Supreme Court either should have disregarded the 1868 Repealer Act altogether (having already determined its jurisdiction to proceed in *McCordle I*), or should have held the Act inapplicable to *McCordle's* case since it became effective only after argument had already been heard on the merits. Had the Court proceeded according to either of these alternatives, it would have avoided inflicting upon itself the fateful holding of its jurisdictional subordination to the will of Congress. Indeed, it would have avoided the necessity of confronting two difficult and highly charged issues of constitutional significance: whether applicability of the Repealer Act to a case already sub judice violated the constitutional imperative of separated powers;⁵⁸ and whether operation of

56. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512-15 (1869).

57. Hughes, *Speech Before the Elmira Chamber of Commerce*, ADDRESSES AND PAPERS 133, 139 (1908).

58. Compare the statement by Mr. Justice Harlan in *Glidden Co. v. Zdanok*, 370 U.S. 530, 567 (1962), that "Congress has consistently with [article III] withdrawn the jurisdiction of this Court to proceed with a case then *sub judice*, *Ex parte McCordle* . . .", with Mr. Justice Douglas' view that "[t]here is a serious question whether the *McCordle* case could command a majority view today." *Id.* at 605, n.11 (dissenting opinion). From the context in which it was offered, Mr. Justice Douglas' caveat was possibly limited to the issue of removing jurisdiction over a case already sub judice. On the broader issue, he has said: "[a]s respects our appellate jurisdic-

the Act to frustrate national substantive constitutional review was not among the kinds of "exceptions" Congress is permitted to make to the appellate jurisdiction of the Supreme Court pursuant to article III. In keeping with well-supported canons of judicial construction, the avoidance of such highly sensitive issues as these might itself have provided an additional justification for the Court to limit the effect of the Repealer Act short of *McCardle's* case.

Against this suggested recourse, however, is first of all the very emphatic language of the Repealer Act itself ("... appeals *which have been*, or may hereafter be taken")⁵⁹ and a legislative record unmistakably attaching the Act specifically to *McCardle's* then-pending appeal. Second, there is the fact that the Court had neither reached a decision on the merits of the case, nor even considered the case in conference, as of the time the Repealer Act became law. In conference, on March 21, 1868, the Court decided to postpone consideration of *Ex parte McCardle*, notwithstanding opposition by Justices Grier and Field.⁶⁰ This decision almost certainly removed the substantiality of the issue that holding the Repealer Act applicable to the yet-undecided case would trespass upon the judicial power respecting the finality of judgments. Chief Justice Chase's subsequent perfunctory discussion of the sub judice issue in *McCardle II* appears to have been quite correct, given the fact that the case had not come to decision by the date the Act became effective. Similarly, had the Court moved quickly to decide the case (as it could have between March 9 when argument was concluded and March 27 when the Act became law), it would then have been thrown into confrontation with the very substantial questions presented by the merits: the unconstitutionality of the Military Reconstruction Act in light of *Ex parte Milligan*⁶¹ and the first, fifth and sixth amendments. Thus, avoidance of highly sensitive federal questions was scarcely a compelling reason either to have hurried the decision or to have given the Act a willfully tortured construction in order to deny its intended application to *McCardle's* case.⁶²

A more telling line of criticism, however, has suggested that even conceding the applicability of the Repealer Act to *McCardle's* appeal insofar as jurisdiction was based solely on the repealed portion of the 1867 Habeas Corpus Act, the Supreme Court could readily have con-

tion, Congress may largely fashion it as Congress desires by reason of the express provisions of § 2, Art. III. See *Ex parte McCardle*" *Flast v. Cohen*, 392 U.S. 83, 109 (1968).

59. Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44 (emphasis added).

60. C. FAIRMAN, *supra* note 16, at 467.

61. 71 U.S. (4 Wall.) 2 (1866).

62. See also Kutler, *supra* note 22.

sidered the case under another unrepealed source of appellate jurisdiction—as the Court itself perfectly well knew. Dismissal “for want of jurisdiction” was therefore an unworthy evasion of its constitutional obligation and insensitive to McCardle’s personal predicament as a federal prisoner. Specifically, section 14 of the Judiciary Act of 1789 continued to provide that “all the before-mentioned courts of the United States [including the Supreme Court], shall have power to issue writs of . . . *habeas corpus*.”⁶³ As early as 1795, moreover, the Supreme Court had permitted this section to be used by persons held “under or by colour of the authority of the United States,” independent of section 22 of the same Act which generally confined an appeal in civil actions arising in the inferior federal courts to cases involving more than \$2,000. Section 14 cases fell within the “appellate jurisdiction” of the Supreme Court because they called upon the Court to revise a judgment of an inferior tribunal;⁶⁴ but since they arose in the Supreme Court on petition for an original writ of habeas corpus, they did not involve the particular form of an “appeal” to which the limitations of section 22 applied.⁶⁵

Had McCardle’s counsel brought the case to the Supreme Court by this means, instead of (or merely in addition to) utilizing the broader provision of the newly-minted appeals section of the 1867 Act, presumably McCardle would have been entitled to a decision on the merits. In fact, less than 1 year later another unreconstructed Mississippi newspaper editor in identical circumstances of military custody⁶⁶ invoked this very means of access to the Supreme Court to raise many of the issues involved in *McCardle*. Without the least hesitation, the Supreme Court unanimously sustained its jurisdiction and proceeded to the merits.⁶⁷

As strange as this alternative may seem in light of the congressional discussion which rather clearly assumed that jurisdiction in McCardle’s case depended solely on the 1867 Act, it was apparent to the Justices even at the moment they dismissed McCardle’s case for “want of jurisdiction.” Their unanimous opinion in *McCardle I* just the year before reviewed this use of habeas corpus as a confirmed mode of ap-

63. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82.

64. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). *But see* Paschal, *supra* note 16.

65. *See, e.g., In re Kaine*, 55 U.S. (14 How.) 103 (1852); *Ex parte Burford*, 7 U.S. (3 Cranch) 447 (1806); *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795).

66. Except that the substantive charge was murder, rather than varieties of seditious libel.

67. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869). Once again, however, the case was mooted when the government arranged to transfer custody of Yerger to state civil authority.

pellate jurisdiction.⁶⁸ Furthermore, the final paragraph in *McCardle II* again adverted to this alternative procedure, more or less anticipating the holding in *Ex parte Yerger*:

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The 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.*⁶⁹

Given this consideration, should not the Court have proceeded to reach the merits, acknowledging that the technical basis on which appeal had been perfected from the circuit court had been withdrawn by Congress, but declining to reject the case in view of the existing alternative basis for retaining jurisdiction as confirmed by section 14 of the Judiciary Act of 1789? In favor of this result it might be observed that the Supreme Court has generally not been overly technical in holding parties to the particular source of appellate jurisdiction they have invoked.⁷⁰ Surely it was understandable that McCardle's counsel had not thought to invoke the more obscure procedure when he first filed under the then-apposite provision of the 1867 Act. The Court could not suppose that there had been sufficient oversight by counsel to prejudice his client's standing. And while an "appeal" might ordinarily provide a wider scope of review than a habeas proceeding in the Supreme Court, that would not be true where, as here, the appeal was itself from a habeas proceeding. The claims which McCardle had raised were entirely questions of law which went directly to the jurisdiction of a military commission to try him on the stated charges. Thus, the case was well within the scope of section 14 of the Judiciary Act of 1789. Finally, John Marshall had presumably indicated what the Court should do in such circumstances when he observed nearly a half-century earlier: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."⁷¹

Given these several considerations, perhaps the Court might have proceeded to reach a decision on the merits of the case despite the Repealer Act, and arguably it should have done so notwithstanding the possible reaction in Congress. Yet the reasonableness of that recourse, like the reasonableness of the position of Justices Grier and Field who

68. 73 U.S. (6 Wall.) at 324.

69. 74 U.S. (7 Wall.) at 515 (citation omitted, emphasis added).

70. Even today, parties mistakenly taking an "appeal" are frequently treated as though they had petitioned for "certiorari." See 28 U.S.C. § 2103 (1970).

71. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

had urged the Court to decide the case even before the Repealer Act became effective, scarcely demonstrates that the course the Court chose instead to pursue was unprincipled. As the Court knew, *McCardle* was in no personal jeopardy at the moment. Indeed, following his release on bail by the circuit court, he had again been writing flaming editorials for the *Vicksburg Times*. In addition, the Court was aware of other congressional action which had been taken in mistrust of the judiciary.⁷² There was good reason, therefore, not to alienate Congress further. Self-interest quite aside, the Court was also aware of the congressional belief that a decision invalidating the Military Reconstruction Act would be a devastating blow to the capacity of the country to secure the protection of Blacks and loyalists in the South in the aftermath of bloody Civil War. Furthermore, since the effect of the 1867 Habeas Corpus Act and of the Repealer Act on section 14 of the Judiciary Act had not been specifically addressed in the several *McCardle* arguments, it is hardly surprising that the Court declined to reach out in what might have seemed to be a gratuitous fashion to hold onto the *McCardle* case. As it was, the final paragraph of the opinion suggested that only delay in decision was involved, and not self-abnegation of the power to decide.

There was, as a consequence, nothing clearly subject to censure in the decision of the Court not to proceed on the merits pursuant to the alternative source of appellate jurisdiction provided by section 14 of the Judiciary Act of 1789. Nor, as we have seen, was the Court necessarily wrong in granting full effect to the Repealer Act as applied to a case as yet undecided on the date when the Act became law. Were these the only features of the Court's reaction to the political and judicial circumstances of 1868, it is surely doubtful whether *Ex parte McCardle* would ever have come under intense criticism as a precedent in American constitutional law.

Rather, what has made *Ex parte McCardle* so much the sword of damocles is its *ratio decidendi* in respect to the basis and scope of congressional authority to adopt the Repealer Act and to "make exceptions" to the appellate jurisdiction of the Supreme Court. The truly significant part of the case seems to be tightly packed into the following few lines:

72. Congress had already reduced the Supreme Court from ten to seven members. Act of July 23, 1866, ch. 210, § 1, 14 Stat. 209. Compare 3 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 144-45 (1923), with S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 59-60 (1968). In addition, a bill which had already cleared the House proposed to require an extraordinary majority vote of the Justices to invalidate an act of Congress. H.R. 379, 40th Cong., 2d Sess. (1868). See 3 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 188-93 (1923).

The exception to appellate jurisdiction in the case before us . . . is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. . . . It is hardly possible to imagine a plainer instance of positive exception.

. . . .

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.⁷³

As to this, however, possibly an important objection *can* be offered: not merely that the Repealer Act was not an exception "made in terms" or an instance of "positive exception," but that in fact it made *no* exception and possibly is not even correctly identified to the proper constitutional clause. The objection to be examined is intended to be different from several qualifying observations which have been made along similar lines in other treatments of *Ex parte McCardle*, however, and correspondingly to be more muted in its ultimate effect. At the same time, it may suggest an actual error was committed in the *McCardle* Court's formulation of its *ratio decidendi*.

It has elsewhere been pointed out that the *McCardle* decision, taken in context, did not in fact oust the Court from the power to perform any of its "essential" or "minimum" functions under *Marbury v. Madison*, *Fletcher v. Peck*, *Martin v. Hunter's Lessee*, or *Cohens v. Virginia*:⁷⁴ that is, to adjudicate the substantive constitutionality of Acts of Congress (or of the several states) in all cases or controversies where that question had been appropriately raised and pressed through whatever courts the litigants might first have had to pursue, and to establish a uniform construction for federal laws (including treaties) similarly drawn into controversy. It did not do so because, as anticipated by dicta in the case itself and as subsequently confirmed in the holding of *Ex parte Yerger*, there remained available an alternative recourse by means of which the substantive constitutionality of the controverted Act of Congress, the Military Reconstruction Act, could be brought within the Supreme Court's power of constitutional review. *McCardle*, in short, upheld only an inessential exception to the Supreme Court's jurisdiction, and did not curtail any of its important authority.⁷⁵

73. 74 U.S. (7 Wall.) at 513-14.

74. Respectively at 5 U.S. (1 Cranch) 137 (1803); 10 U.S. (6 Cranch) 87 (1810); 14 U.S. (1 Wheat.) 304 (1816); 19 U.S. (7 Wheat.) 264 (1821).

75. See, e.g., R. BERGER, *supra* note 16; B. SCHWARTZ, *CONSTITUTIONAL LAW* 15-20 (1972); Forkosch, *supra* note 16; Ratner, *supra* note 16; Note, *supra* note 16.

But respectfully, even this technical revisionism of *McCardle* may concede too much in one respect and tends, in a different respect, to generate a number of very serious questions which would appear to be virtually intractable under the broad language of the "exceptions" clause. (For instance, what is to be the basis for declaring that some exceptions are legitimate because they are relatively unimportant, and how can one's preference be reconciled with the unqualified provision in article III? Why, especially if the point were felt to be important, did the *McCardle* Court itself make no mention of any such limiting principle and, indeed, why to the contrary did the Court speak as though there were no such distinction?) A different point may be offered, however, by suggesting that it was simply incorrect to say, as the Court did say in *McCardle*, that Congress, by repeal of the appeals section of the 1867 Act, thereby made at least some exception to the appellate jurisdiction of the Supreme Court, at least for some cases arising under at least one federal law. It did not do so because no case arising under the Habeas Corpus Act of 1867 (or any other Act) was, by force of the *Repealer Act of 1868*, placed beyond the appellate jurisdiction of the Supreme Court.

What was involved in *McCardle* was merely the congressional reconsideration and repeal of a special statutory right of access which had previously granted to a certain class of litigants a guaranteed "appeal" to the Supreme Court. Wholly unaffected by rescission of that statutory provision per se, however, was the judicial power conferred upon the Court by force of article III itself or as confirmed by several acts of Congress. Correspondingly, whatever diminution or "exception" might exist with respect to the Court's article III appellate jurisdiction, it would result only from the negative implications from *other* Acts of Congress as previously construed by the Court (as in *Barry v. Mercein*), and not by any provision of the *Repealer Act* itself. And as the Court declined to consider its jurisdiction under any statute save only that which had been withdrawn, it had no occasion whatever to discuss the character and scope of Congress' power to "make exceptions." That power was simply not involved in *McCardle's* case.

All that the *Repealer Act* did was to repeal "so much of the act approved February 5, 1867 . . . as authorized an appeal."⁷⁶ Notwithstanding the design of Congress to have accomplished more than this, nothing more was done. That it did nothing more, and specifically that it made no "exception" from the appellate jurisdiction of the

76. Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44.

Supreme Court of cases arising under the Habeas Corpus Act of 1867, is conclusively evidenced by the unanimous holding in *Ex parte Yerger* 1 year later—a case which arose under the same Habeas Corpus Act of 1867 and which was unanimously held to come readily within the appellate jurisdiction of the Supreme Court subject only to limitations provided by sections 14 and 22 of the Judiciary Act of 1789: that appellate jurisdiction could not be exercised by entertaining an “appeal” in a civil case not involving more than \$2,000, but that it could be exercised through issuance of an original writ of habeas corpus.⁷⁷

Indeed, for the Repealer Act of 1868 to reflect a claim of congressional authority to make “exception” to the Supreme Court’s article III appellate jurisdiction to review cases arising under the Habeas Corpus Act of 1867, it would have had to be framed in much different terms, such as:

No case arising under the Habeas Corpus Act of 1867 shall be subject to the appellate jurisdiction of the Supreme Court.

Or:

A final decision of a circuit court in cases arising under the Habeas Corpus Act of 1867 shall not be subject to review in any other court.

But, of course, it did neither of these and, in light of *Yerger*, it cannot be pretended to have done so even by implication. To be sure, the Repealer Act was not trivial legislation and it did effectively strip a certain class of parties of an important statutory right they formerly enjoyed under the Habeas Corpus Act of 1867: a statutory right to be heard on full and direct *appeal* from an adverse decision by a federal circuit court in respect to the lawfulness of custody in which they might be held by state or federal officials in alleged violation of the Constitution. Nevertheless, extinguishment of that procedural right left no gap in the appellate jurisdiction of the Supreme Court in the exercise of judicial power either regarding its power to entertain all such cases

77. This point was well expressed in *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1869):

These words [of the Repealer Act] are not of doubtful interpretation They reach no Act except the Act of 1867.

It has been suggested, however, that the Act of 1789, so far as it provided for the issuing of writs of habeas corpus by this court, was already repealed by the Act of 1867. We have already observed that there are no repealing words in the Act of 1867. If it repealed the Act of 1789, it did so by implication

Repeals by implication are not favored [T]he provision of a new and more convenient mode of its exercise [of appellate jurisdiction] does not necessarily take away the old; and that this effect was not intended is indicated by the fact that the authority conferred by the new Act is expressly declared to be ‘in addition’ to the authority conferred by the former Acts. Addition is not substitution.

originally arising under the Habeas Corpus Act of 1867 or, indeed, regarding its power to determine any issue of law appropriately framed in such cases. All of this is implicit in the Court's saving reference in *McCardle* to the power of review preserved by section 14 of the Judiciary Act of 1789, and explicit in its very next holding, in *Ex parte Yerger*, that as the appeals section of the Habeas Corpus Act of 1867 was an addition to rather than a displacement of that section, its repeal left that section intact as a confirmation and regulation of the Court's appellate jurisdiction. Plainly, of course, the Repealer Act of 1868 had no effect at all on the appellate jurisdiction of the Supreme Court concerning any cases other than those arising under the Act of 1867, and thus, as it established no "exception" of these, it established no exception at all.

This held true, incidentally, even as applied to persons originally held in custody under state, rather than federal, authority who, having petitioned for a writ of habeas corpus in a federal circuit court as provided by the first section of the 1867 Act, were unsuccessful and who were then remanded to the custody of state officials. To be sure, until 1867 such persons could not get into federal courts, because section 14 of the Judiciary Act of 1789 was deemed to limit federal court power to issue writs of habeas corpus to those in custody "under the authority of the United States." But as the 1867 Act gave them access to the lower federal courts, the Supreme Court was to hold that the "custody" in which they would subsequently be held would necessarily be "under the authority of the United States" as defined by section 14 of the Judiciary Act of 1789 insofar as the immediate "authority" for that custody would necessarily be an order by a federal court, even if the "order" was merely one remanding them to state custody. The impression is confirmed again by dicta in *Yerger*:

We are obliged to hold, therefore, that in *all* cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.⁷⁸

Thus, repeal in 1868 of the appeals section of 1867 not only made no exception to the Supreme Court's appellate jurisdiction concerning cases arising under the unaffected portion of the 1867 Act dealing with per-

78. *Id.* at 103 (emphasis added).

sons originally held in federal custody (such as *McCardle*); it did not even establish an exception-by-implication with respect to persons originally held in state custody.

At the very most, the operative effect of the Repealer Act of 1868 was solely to limit the *scope* of Supreme Court review in cases formerly entitled to be heard on direct and full appeal. By extinguishing the litigant's procedural right of "appeal," and by forcing him to fall back upon a petition for habeas corpus as the means to invoke the Supreme Court's appellate jurisdiction, the Repealer Act may have had the effect of foreclosing a re-examination of certain issues of fact which, as an original proposition, article III commits to the appellate jurisdiction of the Supreme Court subject, however, to exception by Congress: "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."⁷⁹ Even as to this, strictly speaking the "exception" to the scope of review would arise *not* by force of the Repealer Act of 1868, but solely by implication from the Judiciary Act of 1789; insofar as *that* Act addressed itself affirmatively to the appellate jurisdiction of the Supreme Court, the scope of that jurisdiction was deemed to be affirmatively limited pursuant to the "exceptions" clause.⁸⁰ Moreover, where as in *McCardle* an "appeal" might previously have been taken under the appeals section of the 1867 Act, but the appeal was itself from a habeas proceeding, it is not at all clear that the scope of judicial review would have been in *any* respect broader than that already provided for under section 14 of the Judiciary Act of 1789.

The point to be made about *McCardle*, however, is not the more difficult one of determining the knitting and fitting together of *other* cases and *other* acts of Congress. It is, rather, the simpler point that the 1868 Act of Repeal neither was, nor purported on its face to be, an exercise of whatever power Congress may (or may not) possess to make "exceptions" to the Supreme Court's appellate jurisdiction. Indeed, the constitutional source of the power to repeal a portion of the 1867 Act creating a special right of "appeal" was presumably simply the same source of power previously involved in the enactment of the very provision to be repealed. Quite clearly that specification of statutory right was not based to any degree upon the "exceptions" clause (especially as the Court stated that the 1867 Act itself did not limit, even by implication, any means persons aided by its provisions could otherwise use to invoke the Court's appellate jurisdiction); correspond-

79. U.S. CONST., art. III (emphasis added).

80. See *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810).

ingly, neither did its repeal per se. Thus, while the Court committed no error in sustaining the constitutionality of the Repealer Act and in declining to proceed with *McCardle's* case under another confirmed statutory heading of its appellate jurisdiction, it may have been in error in its *ratio decidendi*: whatever its true or authentic meaning, the "exceptions" power of Congress may not have been involved in *Ex parte McCardle*.

Measured criticism of *Ex parte McCardle* is thus to be found not in contending that the Supreme Court was necessarily in error in upholding the constitutionality of the Repealer Act as applied to a case sub judice, or in its decision to decline to proceed to a decision on the merits of the case involving the constitutionality of the Military Reconstruction Act. Rather, it is based on the unguarded suggestion by the Court that the case was dismissed for "want of jurisdiction" when, according to the Court's own observations, it had adequate jurisdiction to proceed but simply declined, under the circumstances, to proceed sua sponte on a different jurisdictional basis than that previously relied upon by a party in no immediate danger of irreparable harm. And it is based, too, on the criticism that the Court treated the Repealer Act as though the Act (which was the only statute immediately in controversy before the Court) itself established some "exception" to the Court's article III appellate jurisdiction when in fact the Repealer Act evidently created no exception to that jurisdiction and may not have been based on that clause at all. Whatever the incidental correctness or incorrectness of the Court's discussion of that clause, it is a major irony of the case that the entire discussion was quite possibly but an advisory opinion of a constitutional clause not essential in disposing of the case at hand.

THE CONTINUITY OF *McCardle* AND THE ESSENTIAL CORRECTNESS OF FIRST IMPRESSIONS

In spite of the foregoing criticisms, it is honestly doubtful whether the constitutional significance of *Ex parte McCardle* is at all diminished by them or that the case can so simply be dismissed by means of an ulterior analysis contending that it was merely a minor decision involving the unremarkable rescission of a supplementary procedure briefly made available to a special class of litigants by a year-old statute. Rightly or wrongly, the Supreme Court identified the Repealer Act to the "exceptions" clause of article III and proceeded to address itself directly to the import of *that* clause. Whatever the factual and technical niceties of the Repealer Act (including the fact that it

evidently did not withdraw *any* act of Congress from the possibility of constitutional review in the Supreme Court), it is surely more precious than useful to conclude that the Court therefore meant to imply that it really did not think that the clause was made of real stuff or, rather, that the clause really does not cover very much. There is, after all, a fairly plain significance that flows easily from the whole opinion, especially in the larger context of previous and subsequent constructions of the clause—a significance little affected, if at all, by the precaution of Justice Chase's concluding paragraph that the particular statute in issue did not "affect the jurisdiction [of the Court] which was previously exercised."

It is a significance that continued an unwavering line through five consecutive Chief Justices including John Marshall who, as Chief Justice Chase noted in his reference to *Durousseau v. United States*, had declared:

The appellate powers of this court are not given by the judicial act. They are given by the Constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.

When the first legislature of the Union proceeded to carry the third article into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. . . .⁸¹

Marshall's statements, moreover, were but an elaboration of his opinion delivered 5 years earlier in *United States v. More*: "As the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, *prohibiting the exercise of other powers than those described*."⁸² This is scarcely different in substance from the observation of his predecessor, Chief Justice Oliver Ellsworth, that "even the appellate jurisdiction is . . . qualified; inasmuch as it is given 'with such exceptions, and under such regulations, as [C]ongress shall make.'"⁸³ It is manifest as well, albeit in the different setting of original jurisdiction in a federal circuit court, in the reluctant con-

81. *Id.* at 313-14. Interestingly enough, Marshall had also adverted to the exceptions clause in the course of the Virginia ratification debates:

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.

3 ELLIOT'S DEBATES 560 (2d ed. 1888) (Virginia Convention, June 20, 1788).

82. 7 U.S. (3 Cranch) 159, 173 (1805) (emphasis added).

83. *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321, 327 (1796).

cession by Mr. Justice Story⁸⁴ who felt as strongly as anyone on the subject:

The constitution declares, that it is mandatory to the legislature, that the judicial power of the United States shall extend [to all cases and controversies described in article III]. That serious mischiefs have already arisen, and must continually arise from the present very limited jurisdiction of these courts, is most manifest to all those, who are conversant with the administration of justice. But we cannot help them. The language of the act is so clear, that there is nothing on which to hang a doubt.⁸⁵

Marshall's successor, Chief Justice Taney, in spite of the strongest expression that any Justice has ever put forward about the essentiality of the Supreme Court as "the tribunal which is ultimately to decide all judicial questions confided to the Government of the United States,"⁸⁶ had also acknowledged the utter dependency of appellate jurisdiction upon acts of Congress:

By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes.

. . . .

. . . And since this court can exercise no appellate power unless it is conferred by act of Congress, the writ of error in this case must be dismissed.⁸⁷

True, none of these cases involved a particular "exception" which Congress had made or implied in reference to what many would think of as an "essential" function of the Supreme Court—such as its ulti-

84. See Justice Story's opinion for the Court in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 449-56 (1833). See also W. CROSSKEY, *supra* note 16.

85. *White v. Fenner*, 29 F. Cas. 1015-16 (No. 17,547) (C.C.D.R.I. 1818). See also *Lockerty v. Phillips*, 319 U.S. 182 (1943); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 7 (1799).

In his commentaries, Mr. Justice Story also observed that while in his view the "exceptions" clause requires affirmative action by Congress (rather than exceptions by inaction or by implication), it is a broad power:

. . . It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable congress to regulate and restrain the appellate power, as the public interests might, from time to time, require.

. . . It [the provision of Article III in respect to appellate jurisdiction] leaves the power of [C]ongress complete to make exceptions and regulations; but it leaves nothing to their inaction.

J. STORY, *supra* note 84, at 453, 469.

86. *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864).

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

mate capacity to pass upon the substantive constitutionality of a state or federal law, or to render a binding (and uniform) construction of a federal law. But this fact may simply attest more to a sense of sound congressional opinion against the general wisdom of making such exceptions than to any impression that it lacked the power to do so—as clearly it believed itself sufficiently empowered in disposing of *Ex parte McCardle*, in spite of the fact that the Act it adopted fortuitously fell short of its object. Indeed, as such exceptions create the possibility of unresolvable conflicts of interpretation among lower federal courts with finality of jurisdiction, or similar conflicts of interpretation among state courts with finality of jurisdiction (should Congress also oust the lower federal courts), or even of vertical conflicts within a single state (depending upon whether the case might originate in either a state or federal court, but not be subject to federal court review by removal or otherwise), one would scarcely expect such legislation routinely to issue from Congress. In no opinion by the Supreme Court touching upon the subject, however, is there any express or implied suggestion that the power to “except” is limited to making “inessential” exceptions.⁸⁸ Nor does the final paragraph in *Ex parte McCardle* fairly express such a thought.

Rather, *Ex parte McCardle*, far more than was true of *Marbury v. Madison*, was not written on a clean slate. Basically, the same Supreme Court had observed only 4 years earlier:

The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and the legislative department of the government can enlarge neither one nor the other. But it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation.⁸⁹

Only a dozen years after *McCardle*, moreover, Chief Justice Waite went even further in behalf of an equally unanimous Court by stating, “[n]ot 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.”⁹⁰ Even for some of the exceedingly thoughtful critics who would qualify this view, at least so

88. *But see* *Glidden Co. v. Zdanok*, 370 U.S. 530, 589-606 (1962) (Douglas, J., dissenting, which might be read this way); (*cf.* note 58, *supra*) *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321, 324-37 (1796) (Wilson, J., dissenting in part).

89. *Daniels v. Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1865) (footnotes omitted).

90. The “Francis Wright,” 105 U.S. 381, 386 (1881).

far as the selective removal of *constitutional* issues might be involved by a "regulation" or "exception" otherwise confirming appellate jurisdiction,⁹¹ the general scope of the exceptions clause has been regarded as settled by *McCardle*. Thus, dissenting on other issues in *Yakus v. United States*, Mr. Justice Rutledge nevertheless observed by way of introduction that "[C]ongress has *plenary* power to confer or withhold appellate jurisdiction, cf. *Ex parte McCardle*. . . ."⁹² Similarly, in the view of Mr. Justice Frankfurter:

Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*. *Ex parte McCardle*. . . .⁹³

These impressions do, after all, seem to be by far the more natural understanding of the entire *McCardle* opinion. Understood in this unstrained manner, certain portions of the opinion that might otherwise seem puzzling and self-abnegating yield a firm and consistent understanding that the congressional power is plenary, even as Mr. Justice Rutledge understood it to be. Specifically, the *McCardle* Court went out of its way to observe: "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."⁹⁴ Read as implying that the Court must somehow bow to an "exception" even when frank assessment of the legislative record readily demonstrates that the particular statute is not an *authorized* exception, this passage seems odd and artificially self-stultifying of the Court's capacity to decide real cases. Thus, it would seem at once to say that perhaps the congressional power to "except" from the appellate jurisdiction is limited to certain minimum uses originally discussed in the Constitutional Convention of 1787 and in the process of ratification;⁹⁵ but that, even so,

91. If given the power to decide at all, the Courts must, consistent with the oath of office provided in article VI, be free to decide in favor of the Constitution. See *Yakus v. United States*, 321 U.S. 414, 472 (1944) (Rutledge, J., dissenting); Hart, *supra* note 16, at 1402 ("[J]urisdiction always is jurisdiction only to decide constitutionally"). See also *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), and discussion in text accompanying note 114 *infra*.

92. 321 U.S. 414, 472-73 (1944) (emphasis added).

93. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (dissenting opinion).

94. 74 U.S. at 514.

95. It has been argued, for example, that Congress has the power to "except" only findings of fact determined by a jury. See R. BERGER, *supra* note 16, at 286-89; Merry, *supra* note 16. But see J. GOEBEL, *supra* note 16, at 240, 247; and Strong, *supra* note 16. It has been contended that exceptions can be made of certain "cases" enumerated in article III, but not of any of the "questions" which the enumerated "cases" comprehend. W. CROSSKEY, *supra* note 16, at 617-18. Others have suggested,

the Court must wear blinders and decline to consider the validity of a given use as not within that intention even when the evidence may be readily ascertainable and superabundant (as, arguably, it was in the legislative record of the Repealer Act itself).

But this reading of the Court's dictum seems entirely too strained. Taken exactly at face value, the statement declares that the manner in which Congress may presume to use its exceptions power in article III is simply no more subject to constitutional objection than the manner in which it presumes to use any of its other powers as granted by the Constitution. For instance, the unwillingness of the Court to question the use of congressional power to regulate interstate commerce in determining whether a given statute is authorized by article I, section 8, is well established—it is not perceived at all as an instance of putting on judicial blinders or of abdicating the duty of constitutional review. Rather, the Court has already held, in the course of providing substantive constitutional review, that the commerce clause commits to Congress a *plenary* authority over the subject matter of the clause. The power to regulate interstate commerce is simply the power "to prescribe the rule by which [that] commerce is to be governed."⁹⁶ Accordingly, Congress may "regulate" that commerce whether or not the effect of such regulation is to diminish (rather than to enhance) its free circulation, and whether or not the palpable objective of the regulation has little or nothing in common with any particular use that some

however, that exceptions can more generally be made so long as they do not affect the hard core of the national judicial power and are not incompatible with the "essential constitutional functions of the Court." Ratner, *supra* note 16, at 168-73. Possibly, "exceptions" may be made with respect to various modes of review, but only so far as an "irreducible minimum" of appellate jurisdiction is retained adequate to resolve "inconsistent or conflicting federal or state judicial interpretations of federal law, and to uphold the supremacy of federal law over the states in any conflict with state law or authority," and to bring within protective reach of the Court "a citizen's total personal constitutional rights." Forkosch, *supra* note 16, at 256-57. Still again, an exception might be made of certain cases otherwise within the appellate jurisdiction of the Supreme Court by relocating that jurisdiction "at the lower level of judicial administration," in one or more inferior federal courts. J. GORBEL, *supra* note 16, at 247.

Still another possibility is to suggest that Congress may "except" from the Supreme Court's appellate jurisdiction only to insure greater attention to a given case by requiring that it be considered as matter of original jurisdiction, with the result that all of "the judicial power of the United States *shall* vest in one Supreme Court." But unfortunately, the entire history of the clause does not support this interpretation. A final possibility would have been to regard article III as wholly self-executing once the Supreme Court was established with the Court itself initially the master of the occasions for the use of its own judicial power—exactly as articles I and II vest certain powers in Congress and the President but do not on that account establish any enforceable claims to their particular exercise. Then, reading the "exceptions and regulations" clause as a positive check against the possibility of judicial self-abnegation or refusal to exercise the judicial power, the power to "except" and to "regulate" might mean merely that Congress could *require* the exercise of the judicial power by statute in instances where it disagreed with the Court's refusal to exercise power. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). But again, the whole history of the clause is against this idea.

96. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

may originally have imagined in contemplation of providing for that power.⁹⁷ It may, of course, always be a matter of interest to know what the Founders believed to require the inclusion of a given power among the enumerated powers of Congress, but that is scarcely dispositive of the different question respecting the breadth of the power thus given. The "best" or the "wisest" ends that the Founders may have believed impossible to secure without including the commerce power may well explain why the power was provided; they were not, however, simultaneously enacted into the Constitution as positive law restrictions upon its possible use.⁹⁸ That there may be (and are) restrictions lying *outside* the clause, and that these may be of the utmost importance and effect (such as the Bill of Rights or article I, section 9), is certainly not to be denied in determining whether a statute, valid insofar as authorized by the commerce clause, is nonetheless unconstitutional because of some other consideration. But that, of course, is quite a different matter.

On balance, there seems to be little reason to depart from this same approach in respect to the exceptions clause, even as suggested by Justice Rutledge in *Yakus* and as declared rather plainly by the Court in *McCardle*, echoing five generations of Supreme Court statements on the subject. The power to make exceptions to Supreme Court appellate jurisdiction is a plenary power. It is given in express terms and without limitation, regardless of the more modest uses that might have been anticipated and, hopefully, generally to be respected by Congress as a matter of enlightened policy once the power was granted, as it was, to the fullest extent. In short, the clause is complete exactly as it stands: the appellate jurisdiction of the Supreme Court is subject to "such Exceptions and under such Regulations as the Congress shall make."

This view of the matter is by no means disrespectful of scholarly inquiries into the possible interests of the Founders in an exceptions clause, and indeed there is nothing explicit in those inquiries which in-

97. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971); *United States v. Darby*, 312 U.S. 100 (1941); *Caminetti v. United States*, 242 U.S. 470 (1917); *Hoke v. United States*, 227 U.S. 308 (1913); *Lottery Case (Champion v. Ames)*, 188 U.S. 321 (1903). See also Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. — (1973).

98. Chief Justice Marshall went on to say in *Gibbons v. Ogden*:

This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse.

22 U.S. (9 Wheat.) at 196-97.

exorably supports a different or more limited view of the clause. Rather, they tend to show only that certain uses of the clause were readily anticipated (and at once put into effect in the Judiciary Act of 1789), even without purporting to exhaust the power. For example, some (perhaps most) evidently believed it to be a useful clause principally as a means of safeguarding the finality of jury verdicts in regard to primary adjudicative facts: of safeguarding the right to trial by jury insofar as article III itself would authorize *de novo* redeterminations of fact in the Supreme Court were no "exception" made by Congress.⁹⁹ Others evidently saw additional utility at least in keeping from the Court innumerable civil claims arising in the inferior courts but involving amounts in controversy too small to warrant appellate jurisdiction in the Supreme Court, especially since the physical inaccessibility of the Court might make such appeal of skewed advantage to a given class of litigants.¹⁰⁰ Both of these views are well reflected in the Judiciary Act of 1789.¹⁰¹ It is clear, moreover, that pursuant to that Act certain cases plainly within "the judicial power of the United States" as described in article III did not vest in *any* federal court, whether originally, by removal or by any other mode of appellate review.¹⁰² Indeed, even federal question jurisdiction (committed for purposes of original jurisdiction almost exclusively to the state courts for the first century following the adoption of the Constitution) could come within the "appellate jurisdiction" of the Supreme Court only under specified

99. Professor Goebel points out that the exceptions and regulations clause "was not debated" in the Constitutional Convention, and suggests in passing that "in contemporary state practice, regulation had been confined largely to such details as setting appealable minima or periods of limitation, and 'exceptions' of certain proceedings where neither a writ of error nor certiorari had been traditionally available." J. GOEBEL, *supra* note 16, at 240. Subsequently, when the proposed Constitution came under attack partly on the basis that the provision for Supreme Court appellate jurisdiction over matters of fact as well as law threatened the "right" to trial by jury, the exceptions clause was adverted to as one means of allaying that anxiety. See Merry, *supra* note 16. The references, however, scarcely go so far as to suggest that that is *all* the clause would reach. See, for instance, Marshall's statement in the Virginia Convention, *supra* note 81. Similarly, speaking to the same issue, Governor Randolph hardly limited the potential reach of the clause to such matters when, with specific reference to the exceptions clause, he observed: "It would be proper to refer here to any thing that could be understood in the federal court. They [Congress] may except generally both as to law and fact, or they may except as to the law only, or fact only." III ELLIOT'S DEBATES 572 (2d ed. 1888) (Virginia Convention, June 21, 1788).

100. See Warren, *supra* note 16.

101. For example, provision was made for cases within the original jurisdiction of the Supreme Court for jury trial of issues of fact, and the Court's appellate jurisdiction was generally confined to writs of error. Diversity appellate jurisdiction in the Supreme Court was limited to claims exceeding \$2,000, and diversity jurisdiction was limited in the lower courts to exclude creditor-assignees.

102. For example, diversity cases involving less than \$500 could not originate in any federal court nor be removed to such a court and a *fortiori* could not come within the appellate jurisdiction of the Supreme Court by that route. To the extent that such cases originated only in state courts and failed to raise any federal question, neither could they reach the Supreme Court by that route.

circumstances far short of the complete authorization in article III that "all Cases . . . arising under this Constitution [or] the laws of the United States" might come within that appellate jurisdiction had Congress not made exceptions. Thus, under the Judiciary Act of 1789, state court interpretations of federal statutes and the Constitution were made unreviewable by the Supreme Court as a general matter, assuming only that the interpretation of the state court favored, rather than disfavored, the party relying on that source of authority. In these and a variety of other ways,¹⁰³ "exceptions" were made that may or may not have altogether harmonized with the personal desires of each individual voting for the "exceptions" clause anticipating its practical use for only one or two purposes, but who nonetheless approved it in its more general form.

Accordingly, in this light the Supreme Court was speaking neither disingenuously nor thoughtlessly when it said, as it did in *McCardle*, that it was not at liberty to inquire into the motives of Congress, but rather was restricted to examining the express power of Congress under the Constitution to make exceptions. At the same time, with all of the thorough scholarship that has sifted through the very slight debates originally attending the exceptions clause, no single and unequivocal utterance has been discovered sufficient to raise a serious question about this matter. It may be true that the lack of attention received by the clause was in significant measure due to the dimness of recognition respecting the judicial power of substantive constitutional review. It is also possible that the review power sprang full blown neither from settled provisions or settled understandings of the proposed Constitution nor, indeed, even from the pen of John Marshall with the relatively early decision in *Marbury v. Madison*. It does, however, appear to be more than a passingly strange argument to suggest that because the full evolution of substantive constitutional review may itself have been exogenous to the Constitution, the power of Congress to make exception of any appellate jurisdiction described in article III therefore does not extend to such review; as though the power to make exceptions applies to any appellate jurisdiction granted by article III, but not to that judicial power which the Supreme Court simply evolved in the full-

103. For example, federal criminal cases were committed exclusively to the lower federal courts, with no provision for review in the Supreme Court by appeal or writ of error. While recourse to the Court's appellate jurisdiction was provided by means of habeas corpus (and some measure of review was possible upon certification of questions by the lower courts), the means thus provided fell short of confirming the Court's appellate jurisdiction in respect to *all* cases arising under the laws of the United States because habeas corpus would not reach all such cases. See Ratner, *supra* note 16, at 195-201.

ness of time.¹⁰⁴

Finally, however, no more than is true of the commerce power or any other power of Congress, does any of this imply an absence of constitutional limitations lying outside the exceptions clause but still fully applicable to its every use. Without doubt, the Bill of Rights applies as do the several limitations flowing from article I, section 9.¹⁰⁵ To exclude from review the claims of a readily identifiable group determined by the Court to have been disfavored by Congress as a device of legislative punishment, for instance, might be held to offend the ban on bills of attainder.¹⁰⁶ An "exception" precluding redetermination in the Supreme Court of an alleged "fact" of obscenity when the Court regards the matter as one of "constitutional" fact might be held not to state an instance of excepting a case from appellate jurisdiction, but of impermissibly foreshortening the decisional process in a manner the Court would feel obliged to disregard in light of the first amendment. An exception to the scope of review applicable only in cases where the defendant availed himself of his right to trial by jury, but not when he agreed to a bench trial, moreover, might be held to offend the sixth or fourteenth amendments' protections of the right to trial by jury.¹⁰⁷ Perhaps the simplest illustration would be an "exception" of cases based upon the appellant's race: an exception certain to be held offensive to the fifth amendment's dimension of equal protection.¹⁰⁸ Expanding upon this example, one may plausibly argue that *whatever* basis of classification for excepting certain cases from the Court's appellate jurisdiction Congress may have used, it is necessarily subject to review to determine whether the class thus described is "arbitrary" or "invidious" in the sense condemned by whatever standards of equal protection ap-

104. Cf. Strong, *supra* note 16.

105. Consider also the possibility that the exceptions clause might not apply in respect to the "Privilege of the Writ of Habeas Corpus," suspension of which is specifically forbidden by article I, section 9 (except under the extraordinary circumstances mentioned in that provision). Recent study suggests that "the Constitution's habeas corpus clause is a directive to all superior courts of record, state as well as federal, to make the habeas privilege routinely available," that, notwithstanding Marshall's opinion in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the power of the Supreme Court to issue the writ arises within its original jurisdiction (which is not subject to the exceptions clause) by force of the habeas clause, that its use is not contingent upon any confirming act of Congress, and that "[i]ts use by courts cannot . . . be constitutionally abridged by Executive or by Congress." *Johnson v. Eisentrager*, 339 U.S. 763, 798 (1950) (Black, J., dissenting). See Paschal, *supra* note 16.

106. Cf. *United States v. Brown*, 381 U.S. 437 (1965); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867).

107. See Comment, *Removal of Supreme Court Appellate Jurisdiction: A Weapon Against Obscenity?*, 1969 DUKE L.J. 291; cf. *United States v. Jackson*, 390 U.S. 570 (1968).

108. This intriguing possibility I first heard suggested years ago by Mr. Lawrence Wallace (formerly of the Duke faculty and currently with the Office of Solicitor General).

propriately applies to the subject matter.¹⁰⁹

Where the class of excluded cases involves the exercise of "fundamental rights," the appropriate standard of judicial review is the more taxing one which denies any presumption of constitutionality and requires that the government justify the exceptional treatment of the class by demonstrating an imperative connection between the basis for singling out that class and a highly compelling, as well as licit, governmental interest. Arguably, this standard of fifth amendment equal protection review would be applicable to cases "excepted" from the appellate jurisdiction involving criminal convictions under anti-obscenity statutes punishing varieties of speech or expression claimed to be protected by the first amendment—as simply one illustration of a class of cases involving "fundamental" rights.

Accordingly, the class of cases thus "excepted" by Congress should be sustained if (but only if) the government can articulate an imperative connection between that class of cases and a reason for excepting that class which is both licit and compelling. Plainly, considerations of alleged "judicial economy" or similar makeweights ought not be enough in respect to such cases, and the question must inevitably arise whether the most obvious reason would be deemed either licit or compelling by the Court: that Congress excepted that particular class of cases *precisely because it was dissatisfied with the manner in which the Supreme Court had been deciding them in the exercise of its power of substantive constitutional review*. Exactly at this juncture, the Court might again find itself involved in an additional investigation of the functions of the exceptions clause itself, but this time in a different way in order to resolve the fifth amendment objection to the manner in which Congress exercised its power.

If the exceptions clause meant to permit Congress to "check" the Court *specifically in the exercise of substantive constitutional review*, then the categorical exception of any group of cases made by Congress for that very reason cannot possibly be deemed offensive to the fifth amendment's equal protection concern: the exceptions clause *itself* would provide the source for the government's argument that that reason is both licit and compelling enough. If the clause is not seen as approving such a use of the exceptions power, on the other hand, it is difficult to imagine any other basis sufficient for the purpose. At this point, therefore, one's interest in the original understanding of the functions of the exceptions clause takes on a very different impor-

109. See generally Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973).

tance: not to determine what kinds of "exceptions" Congress may make under the clause *without reference to the fifth amendment*, but what kinds of exceptions Congress may make *given* the subsequent ratification of the fifth amendment *and its requirement of equal protection*? Correspondingly, there is no embarrassment if the answer that now emerges may be a different answer than the Court provided in *Ex parte McCardle*, which was decided long before judicial doctrine had evolved in this aspect of the fifth amendment. Specifically, the fact that consideration of the "exceptions" clause was apparently very casual, and that the examples of its appropriate use never involved any suggestion that it meant to provide a check against felt excesses of the Court in the exercise of substantive constitutional review, and the absence of expressed concern that Congress needed a means of curbing that review (except as to findings of fact), all may be useful to show that such a use is not made a licit and compelling reason by the clause itself. Thus, the use by Congress of the exceptions power to single out a class of cases involving fundamental rights, withdrawn from the Supreme Court's appellate jurisdiction only from dissatisfaction with the Court's exercise of its power of substantive constitutional review in respect to such cases, may, ironically, today be subject to fifth amendment challenge. On the other hand, a bill adopted from motives of retaliation against the Supreme Court would not necessarily betray that purpose on its face and might enable the government to argue that consistent with the face of the bill, it may have been the purpose of Congress simply to leave finality of decision with state courts—a purpose that does find some substantial measure of support in the origins of the exceptions clause and the Judiciary Act of 1789.

Nothing in the plenitude of the exceptions clause itself, moreover, nor in combination with any other provision in article III, implies that Congress could fashion a law enabling the government to deprive any person of life, liberty or property without due process; that is, without a fair opportunity to test any nonfrivolous objection to the government's action in an adversary adjudicative forum, including any substantive constitutional objections.¹¹⁰ Every case sustaining the

110. See *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948). The case upheld an act of Congress barring a certain class of claims from *any* court, federal, state or territorial, but only under circumstances where the court had already determined: (a) that such claims were entirely the product of a federal statute; (b) Congress had ample authority to abolish such claims; (c) Congress had in fact abolished them; and (d) the substantive elimination of the claims did not deprive the claimants of substantive due process. As an added precaution, the Court observed:

We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the [f]ifth [a]mendment. That is to say, while Congress has the undoubted power

power of Congress to forbid the adjudication of a federal question by the state judiciary has been at pains to note that in such circumstances another forum had been provided which the Court deemed sufficient in respect to procedural due process.¹¹¹ Similarly, while plenary congressional authority over the jurisdiction of inferior federal courts, when combined with plenary congressional power to make exception to the appellate jurisdiction of the Supreme Court, may provide a possible means to oust certain cases entirely from the federal judiciary, the residual constitutional obligation of state judges "to support this Constitution" would then be drawn into play, exactly as Henry Hart quite properly observed.¹¹²

But the point is not to exhaust the myriad ways in which the Bill of Rights or other parts of the Constitution function as a set of affirmative restrictions upon the exceptions power or upon any other power of Congress. Nor is it to suggest a sense of complacency that such safeguards are necessarily sufficient as a substitute for additional restrictions that some might prefer to add by amending the exceptions clause itself.¹¹³ To the contrary, it is only to indicate again that indeed they lie outside the clause.

As suggested by one of the preceding illustrations, however, it may happen that what Congress would *claim* to be a statute enacting an "exception" does not in fact except the case from the Court's appellate jurisdiction at all, but rather leaves it within that jurisdiction while attempting to dictate the outcome of a constitutional decision. In such a case, the statute may fail simply for want of power to adopt it,¹¹⁴ or as an unpermitted corruption of the judicial power to decide the case

to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court [in respect to the Supreme Court's original jurisdiction], it must not so exercise that power as to deprive any person of life, liberty or property without due process of law or to take private property without just compensation

Thus, regardless of whether subdivision (d) of section 2 [which removed jurisdiction of the claims from all courts] had an independent end in itself, if one of its effects would be to deprive the appellants of property without due process or just compensation, it would be invalid.

Id. at 257 (footnotes omitted).

What the Supreme Court may deem sufficient to satisfy the fifth amendment requirement of procedural due process is, of course, a separate question. Occasionally, it has taken very little indeed. *See, e.g.,* *Fein v. Selective Serv. Sys. Local Bd. No. 7*, 405 U.S. 365 (1972); *Estep v. United States*, 327 U.S. 114 (1946); *Falbo v. United States*, 320 U.S. 549 (1944); *Murray's Lessee v. Hoboken Land and Imp. Co.*, 59 U.S. (18 How.) 272 (1855); *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845).

111. *See Yakus v. United States*, 321 U.S. 414 (1944).

112. *See Hart, supra* note 16, at 1401.

113. *See Roberts, supra* note 16.

114. Congress is nowhere authorized to adopt laws interpreting the Constitution and binding upon the courts in respect to that interpretation. The claim of such a power is in no sense a lesser-included power of that to make "exceptions" to and "regulations" of jurisdiction. This much is settled by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

consistent with the Constitution,¹¹⁵ or both. Indeed, even a statute wholly ousting a case from further consideration by the Court, but only after the decisional process had gone forward to determine a particular matter of fact, was rejected by the Supreme Court.¹¹⁶ It may also happen that a case is not excepted and substantive rules of decision are not imposed contrary to the Constitution, but that an attempt is made to regulate the Court by restricting the *remedy* identified to the very substance of the constitutional right itself. In such an instance, the Court might appropriately determine whether the improper limitation upon its decisional power is severable from the statute otherwise confirming its appellate jurisdiction and simply proceed as it believes to be required, or whether the remedial limitation is so integral to the statute that it must decline to proceed with the case at all, as in instances where Congress has sought advisory opinions.¹¹⁷ It is at these frontiers that sharp questions must continue to arise with sharp practices.

CONCLUSION

There are several very substantial limitations upon the power of Congress to curb or to control the Supreme Court.¹¹⁸ First, as Congress may not overrule or reverse a decision of that Court on any matter involving an interpretation of the Constitution, neither may it seek to direct the outcome of constitutional adjudication by legislating a rule of decision which, if applied, would produce a judgment that the Constitution forbids. Nor may Congress accomplish that result by legislating the selective removal of constitutional questions while other-

115. See *Yakus v. United States*, 321 U.S. 414, 472-73 (1944) (Rutledge, J., dissenting) ("While Congress has plenary power to confer or withhold appellate jurisdiction, *cf. Ex parte McCordle*, 7 Wall. 506, it has not so far been held, and it does not follow, that Congress can confer it, yet deny the appellate court power to consider constitutional questions relating to the law in issue"); *accord*, *Payne v. Griffin*, 51 F. Supp. 588, 591 (M.D. Ga. 1943):

If Congress prohibits an inferior court from trying a case, the court cannot entertain it and, if Congress confers jurisdiction to try a case, the court cannot refuse to accept jurisdiction . . . But, having directed the court to try the case, Congress has no authority also to direct the court to render judgment in accordance with the terms of a void act in disregard of the supreme law of the land. The distinction is that, while Congress can determine what cases a court can try, it cannot direct what law shall control the decision.

See also Hart, *supra* note 16, at 1402.

116. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

117. See, e.g., cases and references collected in *Muskrat v. United States*, 219 U.S. 346, 352-60 (1911). An illustration of this problem may well have been present in one or another of the proposed anti-busing bills urged upon Congress by the President in the summer of 1972. See text of note 14 *supra*. See also *Hearings on H.R. 13916 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972).

118. Consistent with these limitations, it is frankly doubtful whether any of the bill referred to in the text accompanying notes 9-14 *supra*, would have survived constitutional challenge.

wise providing that an affirmative decision shall issue on the merits of the case. Nor may it so drastically restrict the character of any remedy which the Court would otherwise be free to provide that the result in a particular case would involve the Court in an affirmative denial of a constitutional right or in the affirmative application of an unconstitutional law. None of these devices is a "lesser-included" power of the power to make exceptions to the appellate jurisdiction of the Supreme Court. Rather, each involves a different claim to power nowhere granted to Congress: to press the processes of the Court into service as an active agent of government action inconsistent with a valid constitutional claim. Viewed as a "regulation" of the Supreme Court's appellate jurisdiction (rather than as an "exception"), moreover, each device should fail for the reason that the power to decide at all must include the power to decide according to the Constitution, consistent with the judicial duty and oath of office to support that Constitution.¹¹⁹

Second, such "exceptions" as Congress shall deem necessary and proper to make within its authorized power are nonetheless fully subject to review under article I, section 9, the Bill of Rights and other constitutional provisions uniformly applicable to *all* acts of Congress. Granted that the power to except is as plenary as the power to regulate commerce among the several states, for instance, there is no reason to suppose that it is less subject to the first or the fifth amendments than would be true of a regulation of commerce.¹²⁰

Third, even in combination with all other powers of Congress, the power to make exceptions of certain cases in the Supreme Court does not mean that Congress may act to deprive any person of life, liberty or property without due process of law. Due process does not require either a hearing or an appeal in the Supreme Court. It does require, however, at least one fair hearing in a judicial setting which, in light of the claim that is asserted, conforms to the Supreme Court's stated requisites of procedural due process. Presumably, Congress may reserve certain claims to particular inferior federal courts, or innovate

119. This is not to deny, however, that constitutional questions may be reserved to some special proceeding. See *Yakus v. United States*, 321 U.S. 414 (1944).

120. While the question is less free from doubt given the heavy weight of judicial precedent as against the apparent plain meaning of the clause plus recent scholarly research, it is arguable that the habeas corpus clause of article I, section 9, lies beyond the power of Congress to make exceptions to the jurisdiction of the Supreme Court. If the suggestion is correct that the power to issue that writ runs directly to the Supreme Court's original jurisdiction (rather than to its appellate jurisdiction), the exceptions clause does not even purport to reach it. Even assuming that the "privilege of the writ" is in whole or in part a function of the Court's appellate jurisdiction, it remains arguable that its independent provision in the Constitution states a positive exception, limiting the authority to suspend it to the particular circumstances stated in the clause: "when in Cases of Rebellion or Invasion the public Safety may require it."

other federal courts, and deny review in the Supreme Court pursuant to the exceptions clause. Alternatively, it may fail to vest original jurisdiction in any inferior federal court and except to any appellate jurisdiction by the Supreme Court. In that event, however, the residual obligation of the state judiciary to provide a forum consistent with procedural due process would be triggered. Correspondingly, the omission of any state forum under the circumstances would be subject to successful challenge as a denial of procedural due process.

In addition to these considerations, the general inexpediency of a headless inferior federal judiciary or an array of final state courts—brought about by lopping off the means of reconciling conflicting interpretations of national law and of the Constitution short of the Supreme Court—must not be discounted as a major restraining influence upon the practical use of the exceptions clause. As to this, however, *Ex parte McCardle* does provide an instance when Congress once believed that it would prefer that course, and there is ultimately very little on which to stand in disagreement with those who decline to cavil with its meaning. As Professor Wechsler put the matter less than a decade ago:

I see no basis for this view [that the exceptions clause has a narrow meaning, not including cases of constitutional dimension] and think it antithetical to the plan of the Constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹²¹

This does appear to be the most accurate statement of the matter. Consistent with the plan, and subject to the limitations reviewed,¹²² Congress may make exception to the appellate jurisdiction of the Supreme Court even of cases of constitutional significance. By reposing finality of such decisions in a number of other courts, it might thereby give the Constitution a number of different heads on the order of the mythical Hydra, however peculiar we might think the result to be in the dimming twilight of federalism.

121. Wechsler, *supra* note 16, at 1005-06.

122. See especially text and footnote discussion at note 106 *supra*.

