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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?

MORRIS D. FORKOSCH*

Congressional power to fix or change the scope of the substantive and procedural appellate jurisdiction of the Supreme Court under the exceptions and regulations clause in article III, section 2, clause 2, second sentence, or to deny it any such jurisdiction, has never been finally determined by either Congress or the Supreme Court. Separate, and in view of the Court's liberal decisions in the area of personal constitutional rights, but with the current atmosphere pervading the nation and the Congress, is the clause to be accorded a broad or a narrow and circumscribed interpretation and application?

In examining the language of the clause in the light of these questions there is a preliminary and associated question involving the Court's original jurisdiction, which may somewhat illuminate the answers, namely, has Congress the ability to tamper with,

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1 The treatment of the subject matter by Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157 (1960), as well as its tentative examination in Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, The Supreme Court, 90th Cong., 2d Sess. (1968), do not, however, discuss the aspects now highlighted. Ratner's analysis will not be repeated; his main thrust is to point up the Court's "essential Constitutional functions" (see also last paragraph of text herein) which, he concludes, cannot be negated by Congress's power over appellate jurisdiction. I W. CROSSKEY, POLITICS AND THE CONSTITUTION 616-18 (1955), argues against any possible total curtailment because, at the least, the founding fathers desired state courts to be subject to the reviewing powers of the Supreme Court.
e.g., increase, it. This question resulted in Marbury's Case in 1803.\(^2\) There Marshall alleged the Court had power to review the constitutionality of the acts and conduct of the other two departments, but such power of judicial review has never been wholeheartedly accepted by either Congress or the President in all its ramifications. All that Marshall legally decided was that Congress could not enlarge the Court's original jurisdiction so as to permit it to issue original writs of mandamus,\(^3\) i.e., not in aid of its appellate jurisdiction so as to review lower court decisions; the reason given for denying this increase in original jurisdiction power was that the first sentence in article III, section 2, clause 2 limited such original jurisdiction to that specified there and to no other.\(^4\)

Does the meaning, interpretation, and application of this first sentence, and its history subsequent to Marshall's pronouncement, have any bearing upon or influence the analogous interpretation and application of the second sentence? Generalized, Marbury's Case "settled the question [of judicial review] ... and it has long been the established doctrine, and we believe [it is] now assented to by all who have examined the subject ...."\(^5\) Of course the quoted statement, in the light of history, is judicial rhetoric and should be

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\(^2\)Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). One other case seeking such a writ appears in the reports. In 1817 one Harper moved the Court for a writ of mandamus to issue to the defendant as register of a land office, commanding him to enter plaintiff's application for certain tracts of land, and citing an 1800 federal statute on the substantive right thereto; the only factual quirk was a prior like application in the rejection by the Ohio Supreme Court, which plaintiff said now gave the United States Court appellate jurisdiction which permitted it to use such writ in aid thereof; the motion was denied without opinion, the bench including Marshall and Bushrod Washington from the 1803 group. M'Cluny v. Silliman, 15 U.S. (2 Wheat.) 369 (1817). For John Marshall's Defense of McCulloch v. Maryland, see that title (G. Gunther, ed. 1969).

\(^3\)The famous § 13 of the first Judiciary Act of 1789 gave the Supreme Court "power to issue writs of prohibition ... to the district courts ...; and writs of mandamus ... to any courts appointed, or persons holding office, under the authority of the United States." Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73.

\(^4\)By dictum, the Court stated that such grant of original jurisdiction implied a prohibition against its concurrent exercise by any other court. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). See on the Court's original jurisdiction, M. Forkosch, Constitutional Law § 38 (2 ed. 1969).

amended at least to "all justice and judges,"6 and, perhaps, to include "many" or "most" writers on the subject;7 the open defiance of the Court's power by several Presidents,8 and the (political) questions raised and not yet determined by Powell v. McCormack,9 should not, however, result in any constitutional amendment—at least so this writer believes. Can we now proceed to the Court's appellate jurisdiction and state that established doctrine and public policy indicate that while Congress has a great deal of control over it still, over some part no such power exists or should exist or be exercised? Put differently, has Congress the power to control absolutely the appellate jurisdiction of the Supreme Court so as to prevent any and all final judicial determinations by the latter body in the exercise of such jurisdiction?

A necessary distinction must immediately be made, namely, that the Supreme Court's appellate jurisdiction embraces: (1) problems of (federal and state) statutory (or executive order, or state constitutional) construction where no question of federal unconstitutionality arises, and also the actions and conduct of officials

6 Even "all," as so amended, is incorrect. See, e.g., Gibson's stinging dissent in Eakin v. Raub, 12 S. & R. 230, 344-58 (Pa. 1825); see also 1 C. Warren, THE SUPREME COURT IN UNITED STATES HISTORY 453, 555-56, 740 (1922). But cf. the strong language in support of Marshall's position, at least where states were involved, in Cooper v. Aaron, 358 U.S. 1, 18 (1958).

7 For one dissenting view to the quotation see, e.g., the late Prof. Corwin's views in M. FORKOSCH, supra note 4, at 38 n.13, and at 40 n.18. Even the first Congressional examination of the subject decided against the constitutionality of § 25 of the 1789 Judiciary Act, i.e., that the Supreme Court could not exercise any power of reviewing state court determinations. H. R. REP. No. 43, 21st Cong., 2nd Sess. (1831). It should also be noted that the House body felt itself (the House and Congress) just as capable of determining the constitutionality of its own statutes as was the Supreme Court.

8 On the views of the Presidents, see e.g., 8 T. Jefferson, Works 310-11 (1897) (Thomas Jefferson); 4 J. Elliot, Debates on the Adoption of the Federal Constitution 549-50 (1836) (James Madison); Jackson's Veto of the Bank Bill, in 2 J. Richardson, Messages & Papers of Presidents 576-82 (1896) (Andrew Jackson); Lincoln's First Inaugural Address, in 6 J. Richardson, Messages & Papers of Presidents 9-10 (1896) (Abraham Lincoln); Franklin Roosevelt's reputed message of defiance if the Gold Clauses had been differently decided, as noted, in M. FORKOSCH, supra note 4, at 273. See also note 13, infra.

9 395 U.S. 486 (1969). If Congressional power under the Exceptions and Regulations Clause were absolute, or at least with respect to the judicial review ability of the Supreme Court procedurally (on both of which aspects see also penultimate text paragraph herein, and number 6 thereof), then the Members could simply act under this clause to prevent further High Court or intermediate court review and, if there is no original jurisdiction in the Supreme Court, withdraw all inferior federal court ability to entertain any suit by Powell. Whether, in the light of the 1969 decision, this can now be done may be separately questionable, even in the light of Ex parte McCordle, 74 U.S. (7 Wall.) 506 (1869).
and others under and by virtue of (admittedly) constitutional statutes; and (2) analogous problems but where are (solely or also) involved such questions of constitutionality. In the first area the Supreme Court has no ultimate and final power, e.g., the body promulgating the basic statute may thereafter amend, or the state's judiciary may interpret its local statute, as desired. It is the second area which commands our attention. Here, regardless of whether it be federal or state legislative, executive, or agency or official acts or conduct, the Federal Constitution's grants and limita-

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30 These problems in both areas may arise in all types and forms of suits between or among private, public and departmental bodies. For example, the case of Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), was overturned by the civil war; the case arose on a writ of error issued by the Supreme Court to review a judgment of the lower court based upon a jury's verdict. Quaere: if Congress had exercised its Constitutional power to make "Exceptions" to this exercise of appellate jurisdiction, as it did a decade later in Ex parte McCardle, would the Civil War have been averted? Would the Court have permitted this denial of its exercise of appellate jurisdiction? These hypothetical questions make for fascinating problem-games and may be encompassed by the conclusions reached below.


32 E.g., in Wichita R.R. & Light Co. v. Pub. Util. Comm'n, 260 U.S. 48, 59 (1922), Chief Justice Taft held that "[A]n express finding of unreasonableness by the Commission was indispensable under the statutes of the State" (that the existing rates were unjust or unreasonable, etc.), and that such lack could not be overcome "by implication and by reference to the averments of the petition invoking the action of the Commission." But thereafter the Kansas Supreme Court repudiated this federal construction of its state law since the statute did "not say that the finding shall be incorporated in the order," Consolidated Flour Mills Co. v. Kansas Gas & Elec. Co., 119 Kan. 47, 49, 51, 237 P. 1037, 1039 (1923). Of course for the federal jurisdiction the Taft requirement may hold true, e.g. City of Yonkers v. United States, 320 U.S. 685 (1944); but perhaps the best rejoinder to this insistence upon such procedural formality (not regularity), where not really necessary (e.g., perhaps as Douglas felt in this Yonkers case), is supplied by Frankfurter's dissent, that upon remand the agency would supply the talismanic formula, with a second review occurring, "thus marching the king's men up the hill and then marching them down again..." Id. at 694. Why Frankfurter then remarked that "Of course when a statute makes indispensable 'an express finding,' an express finding is imperative," citing the Wichita case, supra, when the Consolidated Flour reversal of this view was unquestionably before him, is a mystery, although of course Taft's admonition as a general principle is correct (if one assumes, as Frankfurter did, that such indispensability is present).
tions must be interpreted, and under *Marbury's Case* it is apparently the Supreme Court which has this ultimate power. Is there any impediment to, or limitation upon, the Court's appellate ability so to interpret?

Putting aside all questions of politics and emergencies, we are left with the second sentence in article III, section 2, clause 2, which states that "In all the other Cases before mentioned, the supreme court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make." This sentence in clause 2 is not to be treated in isolation. It is preceded not only by a first sentence in its clause but also by a first clause in the same section 2. That first clause of section 2 defines and enumerates at length the instances or "Cases" to which the "judicial Power" shall extend," with a portion of it specifically referring to three named classes of participants. The second clause of section 2 in effect then breaks up all these enumerated "Cases" into two parts, one of which involves the aforesaid specifically named class of three participants; the first sentence of clause 2 now throws this specifying or naming part of the judicial power into the Court's original jurisdiction, and in its second sentence throws "all the other Cases before mentioned" in the first clause of the second section into the Court's appellate jurisdiction.

The only interpretation possible, therefore, is that the Constitution grants the Court a total judicial power defined in section 2, clause 1, which total judicial power is divided into two parts in clause 2; and that one (specified or named) part is granted as original jurisdiction, and the other part ("all the other Cases" left) is then granted as appellate jurisdiction — but in both grants

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At first the words "and applied" were included in the text so as to follow "interpreted," but in view of the Lincoln-Roosevelt defiances (note 8 *supra*), and Jackson's famous "John Marshall has made his decision now let him enforce it," these words were deleted (Jackson's statement was provoked by the Cherokee Indian land decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 [1832]). Of course Eisenhower's troop-enforcement of the Court's educational decisions is the coin-face, and perhaps the combined force of tradition, public opinion, inertia, and the lack of any alternative, is most important.

E.g., whether it is the Court's original or appellate jurisdiction which is invoked, a degree of "control" over the judiciary may be found in Congress's general purse-power, the President-Senate appointing-power, and the foreign-affairs and emergency (or war) situations in which a good deal of judicial deference is accorded the other branches. See, e.g., the *Japanese Relocation Cases*, in M. *Forkosch, supra* note 4, at 161.

Which by § 1 is "vested in one supreme Court," plus inferior courts.
to the Supreme Court it is the Constitution, not the Congress, to
which the Court looks for its granted jurisdiction, original or ap-
peallate. And, as a consequence, if the first part of such jurisdiction
is untouchable by Congress, so is the second part, save as the
same granting Constitution otherwise provides. Which, of course,
is the question here being explored, namely, to what extent and
degree is the final qualifying language in the second sentence of
clause 2 a limitation so as to enable Congress to tamper com-
pletely with the Court's appellate jurisdiction?

It would be incongruous to say that the Congress has an ab-
solute and complete power to limit and control the Court's appellate
jurisdiction if the language of the two clauses is examined as
above. For the founding fathers could have easily said so by chang-
ing the last two words in the second sentence of clause 2 from "with
such Exceptions, and under such Regulations as the Congress shall
make," either to "shall grant" or to "shall grant or make." That is,
if that is what Congress had in mind, but the contrary definitely
appears. Without repeating Ratner's references, quotations, and
discussion, it may not be amiss to add the fact that the Randolph
(or Virginia) Plan, proposed May 29, 1787, in its paragraph 9,
resolved, among other things, to give the inferior tribunals juris-
diction "in the first instance, and of the supreme tribunal to hear
and determine in the dernier resort . . ." the matters falling with-
in the judicial power. Immediately after Randolph presented
his views, Pinckney, of South Carolina, also presented a plan, that
as printed by Farrand is questioned by the latter as being authen-
tic; its paragraph 9 contained language which also gave one
Supreme Court both original and appellate jurisdiction. The
Patterson (or New Jersey) Plan, presented June 15 as a substitute
for the Randolph one, in its paragraph 5 created one federal judi-
ciary which included "a supreme Tribunal" which was to have
original jurisdiction of "all impeachments of federal officers, &

16Ratner, supra note 1, at 171-73 discusses the work of the Constitutional
Convention and, at 172-73 quotes a proposal, defeated by a vote of 6-2 delegations,
to substitute the words "In all the other cases before mentioned the judicial
power shall be exercised in such manner as the legislature shall direct," which,
as the author states, "would have given Congress plenary control over the
appellate jurisdiction. . . ."
18See 3 M. Farrand, Records of the Federal Convention, Appendix D, 595
(rev. ed. 1937).
by way of appeal in the dernier resort in all cases touching the rights of Ambassadors" etc.\textsuperscript{19}

These reference add fuel to the conclusions here urged as to the Supreme Court's constitutional appellate jurisdiction, as Randolph made the Court solely only one of appellate jurisdiction, and Patterson gave it only one type of original jurisdiction, namely, impeachment. Randolph included this in the appellate jurisdiction. (The final and adopted Constitution, in article 1, section 3, clause 6 gives the Senate power to try after the House impeaches, the latter authority being given by article 1, section 2, clause 5). Both plans therefore had their Constitutions granting only appellate jurisdiction (save as noted in the impeachment aspect of the latter plan), and if the proponents of these views had thought that it was Congress which was to have power to tamper with this jurisdiction, then their language would have been more pithily expressive of this fact. This conclusion is furthered by reference to the Judicial Article submitted by the Committee on Detail on August 6.\textsuperscript{20} In section 3 there were four sentences. The first enumerated the Court's jurisdiction, which included impeachments, among other things; the second sentence granted the Court original jurisdiction in language identical with that found today in article III, section 2, clause 2, sentence 1, but also included such impeachments; the final two sentences were:

In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.

The finally adopted Constitution deleted the impeachment aspect; save for a minor restructuring of “it shall be appellate” to today's “the supreme Court shall have appellate Jurisdiction,” and now adding to this “both as to Law and Fact” (which was to prevent ambiguities), the Committee's language is identical, and

\textsuperscript{19} 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 244 (rev. ed. 1937).

\textsuperscript{20} 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 186-87 (rev. ed. 1937).
its views are therefore entitled to considerable weight.\(^2\)

Then what did its last sentence in section 3 mean? Simply that in the three sentences discussed above it was the Supreme Court's general jurisdiction, and then original and appellate jurisdictions, which were granted, and so the inferior courts (permitted by section 1 to be "constituted by the Legislature") now had to be given jurisdiction; but the fourth sentence's reference to "any part of the jurisdiction above mentioned" refers to the first sentence, and not to the second or third, else why the parenthetical exception?

So that the Committee on Detail must also have felt the Courts appellate jurisdiction to be a grant of the Constitution, not by the Congress. Thus the only reasonable conclusion from all of the preceding is that the Supreme Court has been granted an appellate jurisdiction by the Constitution which Congress cannot do away with entirely or regulate so as likewise to so do away with entirely, and that the Court must always retain appellate jurisdiction to some as yet undefined extent until constitutionally amended.\(^2\)

\(^{21}\) On a "conspiracy" within the Committee on Detail, headed by Governor Morris, see M. FORKOSCH, \textit{Who are the "People" In the Preamble to the Constitution?}, 19 CASE W. RES. L. REV. 644, 693 (1968).

This inclusion of "law and fact" jurisdiction aroused the ire of Patrick Henry, among others, and he, in the Virginia Ratifying Convention of 1788, on June 20, argued against James Madison's support of the Judiciary Article by inveighing against this grant of power to the Supreme Court because it "will, in its operation, destroy the trial by jury." 3 J. ELLIOT, \textit{DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION} 540 (1836). \textit{Inter alia} he then continued: "But we are told that Congress are to make regulations to remedy this. I may be told that I am bold; but I think myself, and I hope to be able to prove to others, that Congress cannot, by any act of theirs, alter this jurisdiction as established. It appears to me that no law of Congress can alter or arrange it. It is subject to be regulated, but is it subject to be abolished? If Congress alter this part, they will repeal the Constitution. Does it give them power to repeal itself? . . . When Congress, by virtue of this sweeping clause, will organize these courts, they cannot depart from the Constitution; and their laws in opposition to the Constitution would be void. If Congress, under the specious pretense of pursuing this clause, altered it, and prohibited appeals as to fact, the federal judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void. In every point of view, it seems to me that it will continue in as full force as it is now, notwithstanding any regulations they may attempt to make." \textit{Id.} at 540-41. The respected Edmund Randolph, on June 10, also harangued against the judiciary which "is drawn up in terror . . . I object to the appellate jurisdiction as the greatest evil in it." \textit{Id.} at 205.

\(^{22}\) For practical purposes it is the Court's appellate jurisdiction (federal and state) which supplies it with that quantity and quality of litigation enabling it to be in the forefront of change; \textit{i.e.}, a successful Congressional challenge to the Court's ability to accept appellate jurisdiction since 1954 probably would have emasculated its ability to affect the nation as it did.
Superficially, *McCardle's Case* may seem to deny the preceding conclusion, and permit one to say that acting under the “Exceptions” term in the second sentence of clause 2, Congress may control absolutely the appellate jurisdiction of the Supreme Court; this appears to be the conclusion of some few earlier writers. This conclusion and the case, however, have been questioned, and its facts do not justify its blossoming coverage. The case involved the appellate jurisdiction of the Supreme Court in habeas corpus matters. Before 1867 it had “exercised appellate jurisdiction over the action of inferior courts by habeas corpus,” but this appellate power “was attended by some inconvenience and embarrassment. It was necessary to use the writ of certiorari in addition to the writ of habeas corpus, and there was no regulated and established practice for the guidance of parties invoking the jurisdiction.” To relieve the Court of this exasperating two-writ problem, and to provide a decent procedure, Congress, in 1842, authorized an appeal to the Supreme Court from the intermediate federal courts “in a small class of cases arising from committments for acts done or omitted under alleged authority of foreign governments. . . .” On February 5, 1867, Congress now “transferred [this provision], with some modification,” to a general and comprehensive statute bringing “within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the Na-

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23 *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

24 See Ratner, *supra* note 1, at 158 n.3; H. Rottschaefer, *Handbook of American Constitutional Law* 418, 438, 776 (1939). C. Gerstenberg, *American Constitutional Law* 98 (1937), states that “By virtue of this clause and of its power over the jurisdiction of inferior federal courts, Congress has plenary power over the appellate jurisdiction of the Supreme Court, It could thus deprive that court of all such jurisdiction and make final the decisions of the inferior courts.” The latter author footnotes the *McCardle* case, and also a 1936 law review article wherein three propositions are given, the first here pertinent, “that the Supreme Court may exercise only such appellate jurisdiction as Congress, by affirmative act, has given it. . . .” *Id.*, n.82. Compare *Hearings, supra*, note 1, where at 14 one of the witnesses did not distinguish clearly between the power of Congress over the Court's appellate jurisdiction and the different power to withdraw a pending case (*McCardle's facts*), giving the impression that Congress had “an almost unlimited power” in both.

25 See, *e.g.*, *Hearings, supra* note 1, at 9, 14.

26 *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 324 (1868).

27 *Id.*

28 *Id.* at 325.
tional Constitution, treaties, or laws. It is impossible to widen this jurisdiction.”

There can be no question but that these two statutes were promulgated under Congress’s power derived from the second sentence of clause 2, but under the term “Regulations” and not “Exceptions.” This is a significant statement, for if acceptable then all McCardle ever decided was that Congress has an unlimited yo-yo procedural power over the Court’s appellate jurisdiction under “Regulations” — provided, of course, as the opinions examined below indicate, that the Court’s appellate jurisdiction is not thereby emasculated substantively. Nevertheless, the substantive and the procedural distinction between “Exceptions” and “Regulations” must not be overlooked, for the Justices do not make careful references, but usually point generally to the second clause. McCardle’s Case illustrates these problems.

McCardle, a Mississippi editor, who had been arrested and was being held for trial by the military under the alleged authority of the Reconstruction Acts and charged with disturbing the peace, etc., invoked the jurisdiction of an intermediate circuit, not district, court, citing the 1867 statute; that court thereafter adjudged that McCardle be remanded to the custody of the military, from which he appealed to the Supreme Court; now the authorities moved to dismiss this appeal and the High Court unanimously denied the motion. Inter alia Chief Justice Chase held that the 1867 act did not require a prior appeal from a federal district court to its circuit court before an appeal from the latter to the Supreme Court would lie, but that each district and circuit court “may exercise the original jurisdiction.” The reason was that if the prior district-circuit appeal was a jurisdictional prerequisite for a second appeal to the Supreme Court, then the anomalous result would be that a district court writ would provide a party with two appeals, whereas an original circuit court writ would preclude even one ap-

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29 Id. at 325-26. It may be poetic justice, as the McCardle story unfolds, to note that this 1867 statute was enacted for the better enforcement of the Civil Rights Act of 1866 (for details see M. Forkosh, supra note 4, at 364-65); the second McCardle decision might have overturned the Reconstruction Acts and Congressional program (see also note 33, infra), using the 1867 act as the vehicle, so that Congress was now compelled to deny the beneficiaries of this statute its appellate infringement.

30 Chase did not dominate this bench. Upon it were, e.g., Bradley and Field, and in Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869), Miller, J., dissented.

31 Ex parte McCardle, 73 U.S. (6 Wall.) 318, 326 (1868).
peal. Thus, "If any class of cases was to be excluded from the right of appeal, the exclusion would naturally apply to cases brought into the Circuit Court by appeal rather than to cases originating there."\(^2\)

The appellate jurisdiction being so procedurally upheld by the Court, argument on the merits was subsequently heard and the appeal taken under advisement; before any conference by the Justices to decide the merits was held, Congress, because of its fears of an adverse decision,\(^3\) enacted, over a Presidential veto, the statute of 1868. The second section of this act amended the 1867 law by repealing so much of the latter "as authorized an appeal from the judgment of the circuit court to the Supreme Court of the United States, for the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken. . . ."\(^3\) As discussed earlier, the "Exceptions" and "Regulations" distinction on a substantive and procedural basis is here illustrated, for by withdrawing appellate jurisdiction as such the Congress acted superficially under its "Exceptions" power but, as shortly seen, really under its "Regulations" power.

Because of this 1868 statute the Court now heard argument a second time, but this time directed to its jurisdictional ability to continue with the appeal on the merits.\(^3\)\(^5\) In its second reported decision and opinion (which is the one generally cited and quoted), it upheld the 1867 act, said it could no longer have or exercise jurisdiction save to declare this, and dismissed McCardle's appeal because of a want of jurisdiction. Chase again wrote for a second unanimous bench. He first pointed out that the Court's appellate jurisdiction was, "strictly speaking, conferred by the Constitu-

\(^2\) Id.

\(^3\) The newly-elected Reconstruction Congress met on March 7, 1867, and among its first acts was the March 23d supplementary reconstruction act of the preceding Congress (of March 2d, passed over Johnson's veto), both of which now replaced the civil administration of the defeated Southern states by military rule. Five military districts were to be governed by five general officers under Grant, and each was delegated wide powers, invoked in the McCardle case. See, e.g., the description by S. Morison, Oxford History of the American People 716-20 (1955); the denial of an injunction to restrain the President from their enforcement, Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867); Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867); and historic discussion and cases in M. Forrosch supra note 4, at 363-68. Any judicial overturning of the several Acts would thus wreck the legislative program and, in this "imperious public emergency" (Chase's term, in Ex parte Yerger, 75 U.S. (5 Wall.) 85, 104 (1869)), the repealing act was passed.

\(^3\) Act of March 27, 1868, ch. 34, 15 Stat. 44.

\(^5\) Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869).
tion" although Congress had power to make exceptions to and regulations for its exercise; thus the first Judiciary Act of 1789 "provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction." He then adverted to two earlier cases and quoted that in deciding affirmatively the Court's jurisdiction, the Congress thereby implied "a negation of the exercise of such appellate power as is not comprehended within it." So, continued Chase, from this principle "an almost necessary consequence" resulted, that such act "should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it."

In so commenting Chase did not distinguish between the substantive withdrawal of appellate jurisdiction and its procedural

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28 Id. at 512-13.
27 Id. at 513.
25 Durousseau v. United States, 10 U.S. (6 Cranch) 312 (1810); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321 (1796).
29 Ex parte McCord, 74 U.S. (7 Wall.) 506, 513 (1869).
30 Id.
31 Id. In J. KENT'S COMMENTARIES 348-49 (11th ed. 1867) the view is expressed that the appellate jurisdiction was given to the Court "in a qualified manner." The qualification is that "if Congress had not provided any rule to regulate the proceedings on appeals, the court could not exercise an appellate jurisdiction; and if a rule be provided, the court could not depart from it." Thus the Supreme Court's appellate jurisdiction is "limited entirely by the judiciary statutes . . . and to imply a negative on the exercise of such a power, in every case but those in which it is affirmatively given and described by statute." Four early cases, among others, are cited, but this writer feels that the COMMENTARIES are incorrect, at least in the first above qualification before the semi-colon. In the first such early case, Wiscart v. Dauchy, supra, it is only Ellsworth's individual opinion (at 327) which so remarks, and, based upon the facts and holding, it appears to be obiter. In Clarke v. Bazadone, 5 U.S. (1 Cranch) 212 (1803), a writ of error to the general court of the Northwestern Territory was quashed as Congress had not authorized any such review, but may be noted that a possession is different from a state. In United States v. More, 7 U.S. (3 Cranch) 159 (1805), it was the District of Columbia which was involved, and Congress had affirmatively provided the cases in which review could be had, so that Marshall rejected any other method (during the Virginia debates Marshall pussy-footed, or at least skimmed, on the particular question here discussed; see 3 J. ELLiot, supra note 21, at 559-60). In Durousseau v. United States, 10 U.S. (6 Cranch) 312, 315-14 (1810), Marshall expressly stated that the Court's appellate jurisdiction is given to it by the Constitution, subject to being limited and regulated by Congress, i.e., "The appellate powers of this court are not given by the judicial act (of Congress). They are given by the Constitution." In other words, regardless of any Congressional act or omission to act, the Court possesses an appellate jurisdiction, but its exercise may be channelled by Congress — could Congress deprive the Court of all appellate jurisdiction? On the preceding, the answer must be no (see also note 21, supra). For if Congress does not act to set up a procedure, the Court exercises "powers undiminished." By acting, Congress may diminish the scope of the exercise of these appellate powers, but may not so act as to have them diminished to zero — this is the logical result.
regulation. In the next paragraph he continued this confusion of terms by speaking of "The exception to appellate jurisdiction in the case before us,"\textsuperscript{42} then referring to "[t]he provision of the Act of 1867..." and concluded that "[i]t is hardly possible to imagine a plainer instance of positive exception."\textsuperscript{43} He erred egregiously in overlooking the following historic facts and conclusions therefrom: as disclosed above, the Court had originally exercised a portion of its appellate jurisdiction by the two-writ habeas corpus plus certiorari procedure; the 1842 procedural reform, \textit{i.e.}, under the "Regulations" power of Congress, had eliminated the necessity for the latter writ from this method of review; the 1867 statute had later "transferred" this provision from its special use "in a small class of cases" to a general and comprehensive statute, \textit{i.e.}, still under the "Regulations" power of Congress; thus the 1868 repeal of this authorized procedure was again a "Regulations" power so exercised, and did not affect the substantive appellate jurisdiction of the Court under its earlier two-writ procedure.\textsuperscript{44}

Then why did the Court not exercise its substantive appellate jurisdiction to determine the McCardle matter? Because, Chase implied, the matter had come up pursuant to the 1867 procedures, now repealed, and the Court's substantive jurisdiction stemmed only from proper procedural techniques being utilized; put differently, if McCardle had ignored the 1867 procedures and used the two-step method the Court would have had substantive jurisdiction. But would not McCardle have read himself out of Court? A statutory and proper procedure has to be utilized, where the scope of review is now sufficient, otherwise, a motion to dismiss is granted — which impaled McCardle upon the horns of a dilemma damning him in either situation. Regardless of Chase's misuse of terms, he did imply that, acting under its "Exceptions" power, Congress would be able to make specific and express exceptions to the Court's substantive appellate jurisdiction, and that this exercise of power would ordinarily be upheld. But, it must be added immediately, this does not mean

\textsuperscript{42} \textit{Ex parte} McCardle, 74 U.S. (7 Wall.) 506, 513 (1869).

\textsuperscript{43} \textit{id.} at 514. The full paragraph is: "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 \textit{habeas corpus} is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception."

\textsuperscript{44} Chase conceded this in his last paragraph, stating that the 1868 repealing
that Congress additionally has such power to do away completely with the Court's appellate jurisdiction.

Six months later another case of a civilian arrested by the Reconstruction military in Mississippi was presented to the Court, but now via the habeas corpus-certiorari procedure. Eight Justices again upheld the Court's power so to issue the Great Writ in aid of its appellate jurisdiction.\(^4\) Chase's opinion first justified the Court's habeas corpus jurisdiction as one of the "immemorial rights descended to them" [the colonists] "from their [English] ancestors."\(^5\) He then continued "[n]aturally . . . this great writ found prominent sanction in the Constitution. . . . The terms of this provision necessarily imply judicial action. . . . We find, accordingly, that the first Congress"\(^6\) included, in the 14th section of the 1789 Judiciary Act's jurisdictional provisions for the federal courts, the power to issue all writs, and specifically including habeas corpus, "'which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.'"\(^7\) Thus, concluded the Chief Justice, "It would have been, indeed, a remarkable anomaly if this court . . . had been denied"\(^8\) such power.

Next, however, Chase bent the judicial knee to the great Marshall by referring to \textit{Ex parte Bollman}\(^9\) where, as the \textit{Yerger} opinion put it, the construction given to the 14th section's habeas corpus jurisdiction by the Supreme Court was that it was to be exercised only in aid of its appellate jurisdiction.\(^10\) The respect accorded his predecessor is not worthy in view of Chase's language and, in effect, his holding. A subtle difference, if not change, in language, and thereby an extension of power, is to be discerned in the approaches of the two Chief Justices. The significance of this divergence for the Court's untouchable appellate jurisdiction necessitates its clarification.

In \textit{Bollman} the 4-2 split between those upholding the Court's Constitutional habeas corpus-certiorari appellate jurisdiction, and those denying it, is high-lighted by the dissenting opinion of John-

\(^{4}\) Act "does not affect the jurisdiction which was previously exercised." \textit{Id.} at 515.
\(^{45}\) \textit{Ex parte Yerger}, 75 U.S. (8 Wall.) 95 (1869).
\(^{46}\) \textit{Id.} at 95-96.
\(^{47}\) \textit{Id.} at 96.
\(^{48}\) \textit{Id.}
\(^{49}\) With \textit{Ex parte Swartout}, 8 U.S. (4 Cranch) 75 (1807).
\(^{50}\) 75 U.S. (8 Wall.) 85, 97-98 (1869).
son. What seems to have occurred is a four-Justice middle ground position; i.e., Marshall used queasy language either to disguise the split or else to obtain a majority. Either way, sixty years later Chase rejected this compromise and went to the extreme of upholding such jurisdiction. Marshall’s language is therefore important. Bollman and Swartout had been separately committed by the same circuit court on like charges of treason, and each separately moved the Supreme Court for combined habeas corpus certiorari writs. Marshall granted their motions in a combined opinion. He first properly distinguished between the jurisdiction given the English courts by their common law and that given to our federal courts by the written law, and then concluded that “the power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law.”\(^5\) This was a generalized reference to all federal courts, including the Supreme Court, for he then asked “whether by any statute compatible with the constitution of the United States, the power . . . of habeas corpus . . . has been given to this court.”\(^6\) His opinion now dealt with the interpretation of section 14, that is, whether the writ was to be issued by any one of the Justices or by the Court as such, and he then again inquired whether this act which “gives” such power is “compatible with the constitution.”\(^7\) He pointed out that Marbury’s Case dealt with the Court’s original jurisdiction whereas section 14 covered only appellate jurisdiction, and that habeas corpus as now used under that section was in aid only of the latter type of jurisdiction.\(^8\)

Marshall’s language permits us to ask why he first wrote that the power to grant habeas corpus “must be given by written law”\(^5\) for “given” and “law,” when so used, may be interpreted as “granted by a written statute.” Later he again speaks of “gives” and asks

\(^5\) Id. at 94.

\(^6\) Id.

\(^7\) Id. at 100. He also writes, “If” this power “is given to this court . . .” and states separately that one clause in § 33 of the 1789 Judiciary Act “obviously proceeds on the supposition that this power was previously given, and is explanatory of the 14th section.” Id.

\(^8\) “But this point also is decided in Hamilton’s Case and in Burford’s Case.” Id. at 101; the latter is reported at 7 U.S. (3 Cranch) 448 (1809), and the former is referred to in Johnson’s dissenting opinion in Ex parte Bollman, 8 U.S. (4 Cranch) 75, 103 (1807), as having “occurred . . . in 1795 . . .”, while the Burford opinion (at 449) specifically refers to United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795).

\(^5\) Ex parte Bollman, 8 U.S. (4 Cranch) 75, 94 (1807).
if the statute is “compatible” with the Constitution, i.e., in the light of Marbury's Case, which had rejected a Congressional grant of a writ (of mandamus) in the Court's exercise of original jurisdiction, was a Congressional grant of a writ (of habeas corpus) in the Court's exercise of its appellate jurisdiction likewise unconstitutional? Regardless of his answer, the point here made is that the formulation of such a question indicates the views of the questioner, namely that the Supreme Court had no independent (of Congress) appellate jurisdiction to be exercised despite the lack of Congressional authorization. And his reference to Burford's Case as authority, so as to imply full-bench support, was rejected by Johnson. The latter, in a dissent “supported by the opinion of one of my [absent] bretheren,” now stated that in the Burford case he had “apprized [the Court] of my objections to the issuing of the writ of habeas corpus.”

His present objection, so far as here relevant, was couched in a general question, “Does this court possess the power generally of issuing the writ of habeas corpus?” His answer was based upon the assumption that the Hamilton decision.

The court does not assign the reasons on which it founds its decision, but it is fair to presume that they adopted the idea which appears to have been admitted by the district attorney in his argument, to wit, that this court possessed a concurrent power with the district court in admitting to bail. Now a concurrent power in such a case must be an original power, and the principle in Marbury v. Madison applies as much to the issuing of a habeas corpus in a case of treason, as to the issuing of a mandamus in a case not more remote from the original jurisdiction of this court.

Even though his conclusion stemmed from a questionable premise, i.e., what he “presume[d],” still, as none in the four-man majority disputed this, the only question would be whether there was logic in his argument; and here again none disputed him. All this highlights Marshall’s broad language and why, as suggested above, the Chief Justice equivocated. Furthermore, the forcefulness of Johnson's argument should have pushed Marshall into a second declaration of a statute's unconstitutionality within four years after his first great decision, a palpably unpalatable and unpotic act.

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57 Id. at 107.
58 Id. at 102.
59 United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795).
60 Ex parte Bollman, 8 U.S. (4 Cranch) 75, 104-05 (1807).
The basis for this assertion is that if section 14 of the 1789 Act really did contain "a substantive grant of" power to the Supreme Court to issue a writ of habeas corpus, then its exercise, if it resulted in original conduct by the Court, would run afoul *Marbury's* views; Johnson so felt, contending that in conjunction with section 33 such an unconstitutional grant resulted, for the latter section granted the Court power to bail a prisoner just as a district or circuit court had like original power thereby to do; and this argument was never directly answered, was indeed factually accepted by Marshall, i.e., the Court's ability under the act to so use such a power to bail, and was therefore denied *sub rosa*.

Chase's bending of the judicial knee in *Yerger* to Marshall's opinion in *Bollman* is therefore error. The latter Chief Justice never did directly hold as the former said he did, and the latter furthermore equivocated, understandably, for the *Marbury* repercussions were still with him. Thus it is really Chase who explicitly and impliedly upholds the Constitutional inviolability of the Court's appellate jurisdiction, at least in some irreducible minimum, and who would declare unconstitutional a Congressional statute removing all appellate jurisdiction from the Supreme Court, i.e., thereby permitting the Court to exercise only its original jurisdiction.

The meaning and effect of all these opinions has probably not received its just due. Besides those aspects covered above, and as

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1. *Id.* at 94. His words were, "The 14th section . . . has been considered as containing a substantive grant of this power." See also note 40, *supra.* He never did get around to examining this statement to determine its accuracy, and never did flatly accept or reject it. Whether or not not deliberately so written, the opinion can be castigated for its several flaws by those who demand perfection — but Marshall was, at heart, a politician, for whom compromise was an art practiced daily. See this writer's views on his opinion in *Marbury's Case,* in M. Forkosch, *supra,* note 4, at 36-40.

2. Johnson quoted from *Marbury* so as to support his contention that § 14, "if it vests any power at all, it is an original power." *Ex parte Bollman,* 8 U.S. (4 Cranch) 75, 106 (1807).

3. *Id.* at 106. Johnson quoted the clause of § 33 so enabling the Court to do, and (at 106-07) discussed it and concluded his argument. In the opinion of the Court in the same case, Marshall (at 100) stated: "The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by the writ now applied for." (Emphasis added). After the delivery of this main-decision in *Bollman,* the District of Columbia marshal made a return to the writ and further argument before the Court occurred, Swartout's attorney requesting bail (at 108) and Marshall, during the argument, stating, *inter alia,* that "this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done." *Id.* at 114. See also his second opinion, and now, after this hearing, (apparently) the entire Court concurred in discharging the prisoners, *Id.* at 125.
this writer reads the opinions and holdings, the Court necessarily stated or upheld: (1) the Constitutional substantive appellate jurisdiction of the Supreme Court as an affirmative grant of power which is conferred by the Constitution, and not by Congress;64 (2) that this independently held (from the Constitution) substantive appellate jurisdiction is not derived from the common law, as with the English courts, and hence is not inherent, i.e., which can be exercised originally;65 (3) the 1868 repealing Act indicated no "intention to withhold [all] appellate jurisdiction in habeas corpus cases from this court, or to abridge the jurisdiction derived from the Constitution and defined by the Act of 1789;"66 (4) further, that the 1868 Act affected only one procedural method of obtaining review in the Supreme Court, repealed the 1867 procedural reform, and did not effect any substantive exception in and to the Court's habeas corpus-certiorari method of review; (5) that at least where habeas corpus is necessary for the Court's appellate jurisdiction so as to protect a citizen7 in his constitutional rights, this appellate jurisdiction must be independent of Congressional ability completely to except it from being exercised in some manner, e.g., habeas corpus plus certiorari;68 (6) or, generalized, there is a

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64 In Ex parte Yerger, 75 U.S. (8 Wall.) 85, 101 (1869), Chase said that "The jurisdiction [to issue the writ of habeas corpus under the 14th section of the 1789 Judiciary Act] thus given in law to the Circuit and District courts is original; that given by the Constitution and the law to this court is appellate." The careful use of "law" and "original" for the inferior courts, but "Constitution and the law" and "appellate" for the Supreme Court, is of magnified significance in the context of these several opinions.

65 Id. at 96-97. By "originally" we here mean external to the Constitution and encompassed as a power inherent in the Supreme Court; e.g., as a power to punish for a contempt is when committed in the presence of the court. See discussion and citations in M. Forrosch, supra note 4, at 131-34.

66 Ex parte Yerger, 75 U.S. (8 Wall.) 85, 102 (1869) (emphasis added). Under the initial statute the Court utilized the combined writs of habeas corpus and certiorari.

67 Why does Chase use "citizen" and impliedly restrict the coverage, (e.g., aliens do not come within the term) unless, of course, one must bend temporarily so as to assuage Congressional ire and, through "citizen," wave the flag and point to the freed Negroes for whose benefit the 1867 statute had been enacted.

68 In line with the preceding note's comment, Chase said that if the Court were denied appellate jurisdiction in this class of cases then it "must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction . . . ." Ex parte Yerger, 75 U.S. (8 Wall.) 85, 103 (1869). Or, if Congress desired the Negroes uniformly to receive the same personal rights as did the whites, then the Court's appellate jurisdiction had to be inviolable—at least in a minimum and irreducible degree.
"congressional power to thwart the Supreme Court's appellate jurisdiction through ad hoc legislation withdrawing authority to review any particular pending case" where there remains a sufficient other method to permit the exercise of the Court's irreducible minimum substantive power; so that at least in one irreducible aspect the Court's substantive appellate jurisdiction has to be inviolable. Futhermore, and bringing this overall approach into current events, if the criterion of "one irreducible aspect" is a citizen's total personal constitutional rights then, although from one point of view habeas corpus may be said to be the greatest and most indispensable of them all, still, in accordance with the modern constitutional approach, the numerous personal rights and freedoms embraced by the several amendments and constitutional clauses today qualify as being likewise required so to be protected; and, pari passu, if the extensibility of these personal rights and freedoms continues apace, albeit the composition of the High Court may give pause, then the Supreme Court becomes as omnipotent and Delphic fount as its here-unlimited substantive appellate jurisdiction cannot be circumscribed in this area in any significant manner by Congress; which means that the Court has lifted itself by its judicial bootstraps, i.e., interpreting and applying its own substantive (appellate) jurisdictional powers.

While this writer uses "irreducible minimums" to indicate the point of no Congressional power to except from the Court's appellate jurisdiction, Ratner speaks of "essential Supreme Court..."
functions." He begins with the supremacy clause of article VI of the Constitution and states this requires there be but one supreme federal law throughout the nation, so that in the event of any federal-state conflict the former must prevail; this hortatory clause requires one national tribunal, now created by article III, to implement its mandate, and so the Court's "essential appellate functions under the Constitution" are 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. Thus "irreducible minimums" and "essential functions" do not necessarily jibe; the former comprehends the latter, but not so in reverse. The reason is that the former embraces personal constitutional rights which, as even Marshall never disputed, must be protected by the Supreme Court, and in today's climate of opinion there might be a freezing, not merely chilling, effect upon them if not so embraced by the substantive appellate jurisdiction of article III. Ratner's extensive examination of the exceptions and regulations clause is for the purpose of determining whether Congress may utilize it to prevent the Supreme Court from performing its "essential constitutional functions of maintaining the uniformity and supremacy of federal law," and it is these goals which he uses as "a standard for testing the validity of legislation limiting the Court's appellate jurisdiction." This writer's standard extends to and includes a person's substantive Constitutional rights, which Ratner does not touch upon. The latter's conclusion is that the Clause here examined "does not give Congress power . . . to negate the essential functions of the Supreme Court." This writer agrees, save that his conclusion utilizes the expanded "irreducible minimums" as here examined.

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"Ratner, supra note 1, at 160-67. See also note 53, supra.
"Ratner, supra note 1, at 201.
"Id.
"Id. at 202.