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CONGRESSIONAL POWER OVER THE APPELLATE JURISDICTION OF THE SUPREME COURT

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The Constitution gives the Supreme Court appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make" over all cases within the judicial power of the United States originating in state or lower federal courts.¹ From time to time since 1796 the Supreme Court has used language in its opinions suggesting that by virtue of the exceptions and regulations clause its ap-

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¹ U.S. Const. art. III, § 2. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). After defining the judicial power of the United States, the section provides that the Supreme Court shall have original jurisdiction in certain specified cases and appellate jurisdiction "in all the other Cases before mentioned." The original jurisdiction thus granted is not exclusive; state and lower federal courts may constitutionally exercise a concurrent jurisdiction in such cases. *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511 (1898); *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449 (1884); *Börs v. Preston*, 111 U.S. 252 (1884); *United States v. Ravara*, 2 U.S. (2 Dall.) 297 (C.C.D. Pa. 1793). See 28 U.S.C. §§ 1251, 1331-32, 1345, 1350-51 (1958); Act of Sept. 24, 1789, ch. 20, §§ 9, 11, 13, 1 Stat. 77, 78, 80. The judiciary acts have always authorized Supreme Court review of "original jurisdiction" cases brought in lower federal courts, see 28 U.S.C. §§ 1252-56 (1958), as amended, 28 U.S.C. § 1252 (Supp. 1959); Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84, and of those brought in state courts that involved a question of federal law. See 28 U.S.C. § 1257 (1958); Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 85. The Court has indicated that its appellate jurisdiction may constitutionally be extended to such state court cases even if no federal question is presented. See *Plaquemines Tropical Fruit Co. v. Henderson*, *supra* at 520-21. See also *Cohens v. Virginia*, *supra* at 413-23. The clause "in all the other Cases before mentioned" thus apparently means "in all the cases before mentioned other than those which are in fact brought originally in the Supreme Court" rather than "in all the cases before mentioned other than those which may be brought originally in the Supreme Court." Cf. *Martin v. Hunter's Lessee*, *supra* at 337-38.

pellate jurisdiction is subject to unlimited congressional control,² and this language has generally been regarded as establishing that Congress has such power.³

Constitutional authority to create and abolish inferior federal courts gives Congress plenary control over their jurisdiction.⁴ If Congress also has plenary control over the appellate jurisdiction of the Supreme Court, then Congress may constitutionally do any of the following:

(1) Deprive the Supreme Court of all appellate jurisdiction and abolish the lower federal courts, thereby confining the judiciary of the United States to a single court exercising original jurisdiction over cases affecting ambassadors, public ministers, and consuls, or in which a state is a party.⁵

(2) Deprive the Supreme Court of appellate jurisdiction and other federal courts of all jurisdiction over cases involving the validity, under the Constitution, of state statutes or the conduct of state officials, thereby leaving to the highest court of each state the final determination of such questions.

(3) Deprive the Supreme Court of appellate jurisdiction over any case arising under the Constitution, laws, or treaties of the United States, thereby allowing the federal courts of appeals and the highest state courts to become, in their respective jurisdictions, the final interpreters of federal law.

If such legislation is permissible, Congress can by statute profoundly alter the structure of American government. It can all but destroy the coordinate judicial branch and thus upset the delicately poised constitutional system of checks and balances. It can distort the nature of the federal union by permitting each state to decide for itself the scope of its authority under the Constitution. It can reduce the supreme law of the land as defined in article VI to a hodgepodge of inconsistent decisions by making fifty state courts and eleven federal

² See cases cited notes 75, 81, 91, 93, 113-17, 119-21 *infra*.

³ See BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION* 99 (1922); CORWIN, *CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 614 (1953); GERSTENBERG, *AMERICAN CONSTITUTIONAL LAW* 97-98 (1937); ROTTSCHAEFER, *AMERICAN CONSTITUTIONAL LAW* 418 (1939); I WILLOUGHBY, *CONSTITUTIONAL LAW OF THE UNITED STATES* 40-41 (2d ed. 1929); Roberts, *Now Is The Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1, 3-4 (1949); Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 B.U.L. REV. 1 (1951).

⁴ Lockerty v. Phillips, 319 U.S. 182 (1943); Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

⁵ U.S. CONST. art. III, § 2. The original jurisdiction of the Supreme Court under the Constitution is not subject to congressional control. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

courts of appeals the final judges of the meaning and application of the Constitution, laws, and treaties of the United States.⁶

It is, of course, unlikely that a majority of both houses of Congress and the President, or two-thirds of both houses, would ever take such action. Yet as early as 1830 congressional legislation was introduced which proposed to eliminate the Supreme Court's appellate jurisdiction over state court decisions,⁷ and as recently as 1958 the Senate gave serious consideration to a bill designed to deprive the Court of appellate jurisdiction over all cases involving the validity of: (1) contempt proceedings against witnesses before congressional committees; (2) dismissal of government employees on security grounds; (3) state laws for the control of subversive activities; (4) regulations relating to subversive activities of public school teachers; and (5) state requirements for admission to the practice of law.⁸ This measure, which was introduced in the House the following year,⁹ reflected its supporters' dissatisfaction with Supreme Court decisions in the enumerated areas.¹⁰

The 1830 proposal would have allowed the state courts to determine for themselves the meaning of the Constitution, laws, and treaties of the United States; under the more recently proposed legislation, that meaning would be finally determined by each of the eleven courts of appeals and by the highest court of each state in cases involving the specified subjects.¹¹ Those bills were not enacted,

⁶ See the testimony of J. L. Rauh in *Hearings on the Limitation of Appellate Jurisdiction of the United States Supreme Court Before a Subcommittee of the Senate Committee on the Judiciary*, 85th Cong., 1st & 2d Sess., pt. 2, at 39-70 (1958); Roberts, *supra* note 3, at 4; Tweed, *supra* note 3, at 33-46.

⁷ 77 CONG. DEB. 532 (1831) [1824-1837]. The bill proposed to repeal § 25 of the Judiciary Act of 1789, ch. 20, 1 Stat. 85. In the period from 1821 to 1882 numerous resolutions were introduced in Congress for constitutional amendments designed to curtail the appellate jurisdiction of the Supreme Court. See Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act* (pts. 1-2), 47 AM. L. REV. 1, 25-34, 161 (1913).

⁸ S. 2646, 85th Cong., 1st Sess. (1957). See also the bill introduced by Senator Johnston of South Carolina in the second session proposing to deprive the Supreme Court of appellate jurisdiction in any case wherein the action of a state concerning its public schools is attacked on grounds other than "substantial inequality of physical facilities and other tangible factors." S. 3467, 85th Cong., 2d Sess. (1958).

⁹ H.R. 634, 86th Cong., 1st Sess. (1959).

¹⁰ See *Hearings*, *supra* note 6; Freund, *Storm Over the American Supreme Court*, 21 MODERN L. REV. 345 (1958).

¹¹ See the statement by Senator William Jenner, sponsor of the bill, in *Hearings*, *supra* note 6, pt. 2, at 38-39: "The purpose of this provision [U.S. CONST. art. III, § 2, para. 2] could only have been to put the Congress in a position to divest the Supreme Court of its appellate jurisdiction, when, in the discretion of Congress, circumstances required such action There is no need for any national uniformity with respect to these matters. They are things for each State to decide for itself. Leaving the decisions in each State to the highest court of the State, and taking from the Supreme Court of the United States any power to step in and impose an arbitrary rule, can only be a salutary thing" See also *New York Times*,

but apprehension of severe legislative limitations on the jurisdiction of the Supreme Court led in 1950 to a recommendation by the American Bar Association that congressional control over the Supreme Court's appellate jurisdiction in cases arising under the Constitution be eliminated by constitutional amendment,¹² and a joint resolution for such an amendment was introduced in the Senate in 1959.¹³

Does the exceptions and regulations clause confer power of such magnitude upon Congress? The answer requires an analysis of the function of the Supreme Court as a part of the governmental structure created by the Constitution.

ESSENTIAL FUNCTIONS OF THE SUPREME COURT

Functions Indicated by the Constitution

One of the most significant aspects of the federal union is disclosed by the declaration in article VI of the Constitution that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This constitutional mandate requires (a) that there shall be one supreme federal law throughout the land and (b) that in the event of conflict between that law and the law or authority of any state, the federal law shall prevail.

The supremacy clause standing alone, however, is no more than an exhortation. A tribunal with nationwide authority is needed to interpret and apply the supreme law. Such a tribunal is created by article III, which vests the judicial power of the United States in one Supreme Court and such inferior courts as Congress may establish and extends that power to every case involving the supreme law of the land. The only court created by the article is designated as supreme in contrast to the inferior courts which Congress in its discretion may establish. That court alone is expressly given appellate jurisdiction over cases involving the supreme law of the land whether those cases are initiated in state or federal courts. It is thus the constitutional

July 27, 1958, p. 35, col. 3, quoting Senator Jenner as saying that as he reads the words of article III, they told the Congress that it had "full, unchallengeable power to pass laws immediately which would deprive the Supreme Court of appellate jurisdiction both as to law and fact" in the areas covered by the bill.

¹² 75 A.B.A. REP. 115-16 (1950); 36 A.B.A.J. 948, 957-58 (1950). See 74 A.B.A. REP. 436, 438-40 (1949); 34 A.B.A.J. 1069, 1072-73 (1948). See also HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 339 (1953) [hereinafter cited as HART & WECHSLER]; Roberts, *supra* note 3; Tweed, *supra* note 3, at 33-46.

¹³ S.J. Res. 57, 86th Cong., 1st Sess. (1959).

instrument for implementing the supremacy clause.¹⁴ As such, its essential appellate functions under the Constitution are: (1) to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts, and (2) to provide a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authority.

The process of carrying out these functions is necessarily a flexible one. A Supreme Court decision is not required in every case that involves a state challenge to federal law or an interpretation of federal law in conflict with other cases. A measure of inconsistency in the interpretation and application of federal law is inevitable, and immediate correction is not always imperative. But some avenue must remain open to permit ultimate resolution by the Supreme Court of persistent conflicts between state and federal law or in the interpretation of federal law by lower courts. For this purpose discretionary review through certiorari can be as effective as mandatory review by writ of error or appeal. Although these essential functions would not ordinarily be disrupted by a procedural limitation restricting the availability of Supreme Court review in some but not all cases involving a particular subject, legislation denying the Court jurisdiction to review any case involving that subject would effectively obstruct those functions in the proscribed area.

Functions Contemplated by the Framers of the Constitution

The nature of these essential Supreme Court functions is confirmed by the proceedings of the Constitutional Convention. The framers were unanimously agreed from the start that the Constitution should establish a federal supreme court.¹⁵ But a provision to establish inferior federal courts, though initially approved,¹⁶ was subsequently rejected,¹⁷ and constitutional reference to inferior courts was retained only through a compromise which left the creation of such courts to the discretion of Congress.¹⁸ In successfully opposing the constitutional establishment of inferior federal courts, Rutledge of South Carolina, a strong states-rights advocate, urged that "the State

¹⁴ See 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 7, 14-16 (rev. ed. 1947). See also 1 CROSSKEY, *POLITICS AND THE CONSTITUTION* 612-13 (1953).

¹⁵ 1 FARRAND, *RECORDS OF THE CONSTITUTIONAL CONVENTION* 21, 95, 104, 244, 292 (1911) [hereinafter cited as FARRAND]; 2 FARRAND 37, 432; 3 FARRAND 600. See FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 79 (1913); HART & WECHSLER 9, 17; WARREN, *THE MAKING OF THE CONSTITUTION* 325 (1928).

¹⁶ 1 FARRAND 95, 104-05, 119.

¹⁷ 1 FARRAND 124-25.

¹⁸ 1 FARRAND 125; 2 FARRAND 38-39, 45-46, 424. See HART & WECHSLER 17-18.

Tribunals might and ought to be left in all cases to decide in the first instance *the right of appeal to the supreme national tribunal* being sufficient to secure the *national rights & uniformity* of Judgmts.”¹⁹ This explicit assumption that the Supreme Court would exercise appellate jurisdiction over state court judgments was unchallenged.

As a result of the decision not to create inferior federal courts, the essential functions of the federal judiciary necessarily centered upon the Supreme Court. As the sole tribunal established by the Constitution, it provided the only certain instrumentality for securing “national rights & uniformity of Judgmts.”

Proposals that the Supreme Court, acting with the Executive,²⁰ be given power to veto congressional legislation²¹ and that Congress be given power to veto state legislation,²² though vigorously urged, were ultimately defeated²³ in large part by the force of the argument that Supreme Court review of cases involving the constitutionality of either state or federal statutes would constitute a sufficient check upon the legislative power.²⁴ The premise that the Supreme Court would have such jurisdiction was accepted by proponents and opponents alike.²⁵

¹⁹ 1 FARRAND 124. (Emphasis added.)

²⁰ Sometimes referred to as a council of revision.

²¹ 1 FARRAND 21, 97-104, 108-10, 138-40; 2 FARRAND 73-80, 298. See HART & WECHSLER 13-14.

²² 1 FARRAND 21, 54; 2 FARRAND 27-29, 390-91. See WARREN, *op. cit. supra* note 15, at 164-71, 316-24.

²³ See notes 21 and 22 *supra*. Because the Supreme Court was the only constitutionally established tribunal, the possible future existence of inferior courts being dependent upon the discretion of a still-to-be-elected Congress, references during the convention discussions to the “Judiciary” or “Judges” generally designated the Supreme Court, unless otherwise specified.

²⁴ See FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 119-20 (1913). The judicial power to declare state and federal statutes unconstitutional has been considered at length elsewhere. See BEARD, *THE SUPREME COURT AND THE CONSTITUTION* 21, 29-36 (1938); CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 41-45 (1914); HART & WECHSLER 14-16, 92-95; McLAUGHLIN, *THE COURTS, THE CONSTITUTION, AND THE PARTIES* 30-107 (1912); 1 MORISON & COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 294-95 (1942); WARREN, *op. cit. supra* note 15, at 245, 248, 317-24. *But cf.* 1 BEARD & BEARD, *THE RISE OF AMERICAN CIVILIZATION* 322-24 (1927); BOUDIN, *GOVERNMENT BY THE JUDICIARY* 102-04 (1932); CARR, *THE SUPREME COURT AND JUDICIAL REVIEW* 44-47 (1942); DAVIS, *THE JUDICIAL VETO* 121 (1914). That power is supported by many of the quotations set forth in note 25 *infra*. They are there cited, however, to indicate the framers’ conception of the function of the Supreme Court, as distinguished from state and lower federal courts, in interpreting the Constitution, laws, and treaties of the United States.

²⁵ Thus, in discussing the creation of a council of revision, see note 20 *supra* and accompanying text, Gerry of Massachusetts doubted “whether the Judiciary ought to form a part of it, as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality.” 1 FARRAND 97. Wilson of Pennsylvania “moved that the (supreme) Natl Judiciary should be associated with the Executive in the Revisionary power,” arguing that although “it had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights . . . this power of the Judges did not go far enough.” 2 FARRAND 73. In opposing a proposal of this nature, King of Massachusetts thought that “the Judicial

Having agreed "that a national judiciary be established to consist of One supreme tribunal" and "that the national Legislature be empowered to appoint inferior Tribunals,"²⁶ the Convention, sitting as a committee of the whole, accepted Randolph's suggestion that "it will be the business of a sub-committee to detail" the powers of the Judiciary, and approved his motion to establish the principle "that the jurisdiction of the national judiciary shall extend to all cases of national revenue, impeachment of national officers, and questions which involve the national peace and harmony."²⁷ Sitting in plenary session, however, the Convention unanimously adopted a revised provision which stated "that the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony."²⁸ In this form it was submitted to the Committee on Detail.²⁹

The Committee on Detail reported back to the Convention a complete draft of a proposed constitution. Included in that draft was

ought not to join in the negative of a Law, because the Judges will have the expounding of those Laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the Constitution." 1 FARRAND 109. Also in opposition to such a proposal, Martin of Maryland urged that "as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative," 2 FARRAND 76, to which Mason of Virginia, supporting the proposal, rejoined "that in this capacity they could impede in one case only the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust, oppressive, or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course." 2 FARRAND 78. Mercer of Maryland, newly arrived during the eleventh week of the convention, 2 FARRAND 177, voiced the only dissent when, in supporting a council of revision, he remarked that "he disapproved of the doctrine that the Judges as expositors of the Constitution should have authority to declare a law void . . ." Dickinson of Delaware responded that he "was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute." Whereupon Morris of Pennsylvania commented that he "could not agree that the Judiciary . . . should be bound to say that a direct violation of the Constitution was law." 2 FARRAND 298-99.

In support of the unsuccessful proposal for a Congressional veto over state legislation, Wilson urged that "the firmness of Judges is not of itself sufficient. Something further is requisite—It will be better to prevent the passage of an improper law, than to declare it void when passed." 2 FARRAND 391. And Madison, replying to the question of what redress would be available if a state imposed prohibited export duties, stated: "There will be the same security as in other cases—The jurisdiction of the Supreme Court must be the source of redress. So far only had provision been made by the plan against injurious acts of the States. His own opinion was that this was insufficient,—A negative on the states laws alone could meet all the shapes which these could assume. But this had been overruled." 2 FARRAND 589. The overruling to which Madison referred manifested the opinion of the delegates that the appellate jurisdiction of the Supreme Court under the Constitution was an adequate safeguard against abuse of the state legislative power. See FARRAND, *op. cit.* *supra* note 24, at 119-20.

²⁶ 1 FARRAND 95, 104-05, 230-31; 2 FARRAND 37-39.

²⁷ 1 FARRAND 223, 232, 238.

²⁸ 2 FARRAND 39, 46.

²⁹ 2 FARRAND 132-33.

a section which defined the jurisdiction of the national judiciary in terms of the jurisdiction of the Supreme Court:

The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects. In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the 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.³⁰

A number of amendments to the provision were promptly submitted.³¹ Johnson's motion to insert the words "this Constitution and the" before the word "laws" was carried unanimously;³² immediately thereafter, "on motion of Mr. Rutledge [*sic*], the words 'passed by the Legislature' were struck out, and after the words 'United States' were inserted . . . the words 'and treaties made or which shall be made under their authority'—conformably to a preceding amendment in another place."³³ The Supreme Court was thereby expressly given appellate jurisdiction over all cases arising under the Constitution, laws, and treaties of the United States.

Thereafter, "The judicial power" was substituted for "The jurisdiction of the Supreme Court" at the beginning of the section, thus making the specified jurisdiction also available to such inferior courts as Congress might establish.³⁴ As a result, express reference to the jurisdiction of the Supreme Court was confined in the final draft to a specification of original jurisdiction followed by a provision for

³⁰ 2 FARRAND 186. See 2 FARRAND 146-47, 157, 172-73; 4 FARRAND 47-48.

³¹ Motions to eliminate impeachment of officers and to include controversies to which the United States is a party were passed. 2 FARRAND 423, 430-31.

³² 2 FARRAND 430.

³³ 2 FARRAND 423-25, 431. See text following note 39 *infra*.

³⁴ 2 FARRAND 425, 431. The last sentence, permitting Congress to assign any part of the jurisdiction to inferior courts, thus became superfluous and was deleted. *Ibid.* "The Supreme Court shall have appellate jurisdiction" was then substituted for "it shall be appellate." 2 FARRAND 434, 437.

appellate jurisdiction "in all other cases before mentioned,"³⁵ and the section's initial purpose of designating the Supreme Court's jurisdiction became obscured.

The resolutions giving the Court appellate jurisdiction over all cases arising under the Constitution, laws, and treaties of the United States are of added significance when considered with the concurrent development of the supremacy clause.³⁶ Pursuant to a motion by Martin, offered as a substitute for the defeated congressional veto over state legislation,³⁷ the Committee on Detail reported to the Convention a provision stating: "The Acts of the Legislature of the United States made in pursuance to this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the several states, and of their citizens and inhabitants" ³⁸

On a motion by Rutledge, the Convention amended this article to provide: "This Constitution and the laws of the United States made in pursuance thereof and all treaties made under the authority of the United States shall be the supreme law of the several States" ³⁹ That was the "preceding amendment in another place" referred to in Rutledge's motion extending the Court's jurisdiction to cases arising under treaties as well as the Constitution and laws of the United States;⁴⁰ taken together, these resolutions evidence the Convention's purpose to make the Supreme Court the principal instrumentality for implementing the supremacy clause.⁴¹

³⁵ 2 FARRAND 576, 600-01, 661.

³⁶ See FARRAND, *op. cit. supra* note 24, at 209; WARREN, *op. cit. supra* note 15, at 319-22.

³⁷ 2 FARRAND 22, 28-29.

³⁸ 2 FARRAND 183.

³⁹ 2 FARRAND 381, 389. In the final draft of the Committee on Style, adopted by the Convention, the article assumed its ultimate form, the last significant alteration being a change from "the supreme law of the several states" to "the supreme law of the land." 2 FARRAND 603, 663.

⁴⁰ See text accompanying note 33 *supra*.

⁴¹ The writings of Madison and Hamilton in THE FEDERALIST (Ford ed. 1898) provide further confirmation of the essential functions of the Court. *Madison, in No. 22*: "If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice." *Id.* at 140. *Madison, in No. 39*: "It is true that in controversies relating to the boundary between the two jurisdictions [nation and state], the tribunal which is ultimately to decide is to be established under the general government Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact." *Id.* at 251. *Hamilton, in No. 80*: "If there are such things as political axioms, the propriety of the judicial power of the government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." *Id.* at 531-32. *Hamilton, in No. 81*: "That there ought to be one court of supreme and final juris-

Functions Recognized by the Supreme Court

From an early date the Supreme Court itself has explicitly recognized that its indispensable functions under the Constitution are to resolve conflicting interpretations of the federal law and to maintain the supremacy of that law when it conflicts with state law or is challenged by state authority. These functions were delineated in three notable decisions which confirmed the Court's statutory jurisdiction to review cases originating in state courts.

In *Martin v. Hunter's Lessee*,⁴² Story, holding that the Supreme Court could constitutionally review state court decisions involving federal questions as provided by section 25 of the Judiciary Act,⁴³ noted "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." Without a reversing authority to harmonize discordant judgments, he declared, "the laws, the treaties and the constitution of the United States would be different, in different states The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed, that they could have escaped the enlightened convention which formed the Constitution [T]he appellate jurisdiction must continue to be the only adequate remedy for such evils."⁴⁴

In *Cohens v. Virginia*,⁴⁵ Marshall, upholding the Court's authority to review on writ of error a criminal conviction by a state court involving the interpretation of a federal statute, stated:

[T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal, the power of deciding, in the last resort, all cases in which they are involved

. . . [The framers of the Constitution] declare, that in such cases, the supreme court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction.⁴⁶

diction, is a proposition which is not likely to be contested." *Id.* at 539. *Hamilton, in No. 82*: "[T]he national and state systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union and an appeal from them will as naturally lie to that tribunal [the Supreme Court of the United States] which is destined to unite and assimilate the principles of national justice and the rules of national decision." *Id.* at 553.

⁴² 14 U.S. (1 Wheat.) 304 (1806).

⁴³ REV. STAT. § 709 (1875) (now 28 U.S.C. § 1257 (1958)).

⁴⁴ 14 U.S. (1 Wheat.) at 347-48. (Emphasis added.)

⁴⁵ 19 U.S. (6 Wheat.) 264 (1821).

⁴⁶ *Id.* at 416-18. The opinion then quoted with approval Hamilton's statements in No. 82 of *The Federalist*. See note 41 *supra*.

And in *Ableman v. Booth*,⁴⁷ Taney, holding that state courts had no jurisdiction to issue habeas corpus for persons in federal custody and that the Supreme Court could review by writ of error the issuance of habeas corpus by state courts in such cases, stated:

But the supremacy thus conferred on this Government [by the supremacy clause] could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place . . . and the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that . . . a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; [and] to make the Constitution and laws of the United States uniform, and the same in every State⁴⁸

Martin v. Hunter's Lessee, *Cohens v. Virginia*, and *Ableman v. Booth* upheld the Court's jurisdiction to review state court decisions under section 25 of the Judiciary Act not only because that jurisdiction was authorized by the Constitution, but also because it was required by the Constitution. The implication of these decisions is that Congress could not constitutionally deny such jurisdiction to the Court.⁴⁹

⁴⁷ 62 U.S. (21 How.) 506 (1858).

⁴⁸ *Id.* at 517-18.

⁴⁹ Two other Supreme Court cases contain equally strong language. In *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855), the Court stated: "[O]ur national union would be incomplete and altogether insufficient for the great ends contemplated, unless a constitutional arbiter was provided to give certainty and uniformity, in all of the States, to the interpretation of the constitution and the legislation of congress [T]he framers of the constitution, and the conventions which ratified it, were fully aware of the necessity for . . . a department . . . to which was to be confided the final decision judicially of the powers of that instrument, and the conformity of laws with it, which either congress or the legislatures of the States may enact, and to review the judgments of the state courts, in which a right is decided against, which has been claimed in virtue of the constitution or the laws of congress. . . ." *Id.* at 350-51. "Without the supreme court, as it has been constitutionally and legislatively constituted, neither the constitution nor the laws of congress passed in pursuance of it, nor treaties, would be in practice or in fact the supreme law of the land" *Id.* at 355. And in *Gordon v. United States*, 117 U.S. 697, 699-701 (1864), the Court, holding Congress could not constitutionally give it jurisdiction to review decisions of the Court of Claims at a time when that court could not render

THE MEANING OF "EXCEPTIONS AND REGULATIONS"

These functions of the Supreme Court, however, even though essential to the federal system, may nevertheless be exercised only with legislative consent if the words "with such Exceptions, and under such Regulations as the Congress shall make" mean that the legislature may abolish any part or all of the Court's appellate jurisdiction.

Usage

Dictionaries in existence at the time of the Constitutional Convention defined an "exception" as an exclusion from the application of a general rule or description. Thus, Ash's *Dictionary of the English Language*, published in London in 1775,⁵⁰ described the term as "an exclusion from a general rule or law." According to Dyche's *New General English Dictionary*,⁵¹ an exception was "something taken out of a number of other things, and differing in some particular . . .," and Samuel Johnson said it meant "exclusion from the things comprehended in a precept, or position; exclusion of any person from a general law."⁵² In the first edition of Noah Webster's *American Dictionary of the English Language*, published in New York in 1828, exception was defined as:

The act of excepting, or excluding, from a number designated, or from a description; exclusion. All the representatives voted for the bill with the exception of five. All the land is in tillage with an exception of two acres. 2. Exclusion from what is comprehended in a general rule or proposition. 3. That which is excepted, excluded, or separated from others in a general description; the person or thing specified as distinct or not included. Almost every general rule has its exceptions⁵³

a final, enforceable judgment, stated: "The Supreme Court does not owe its existence or its powers to the Legislative Department of the government. . . . The existence of this Court is . . . as essential to the organization of the government established by the Constitution as the election of a president or members of Congress. . . . [T]here was . . . an absolute necessity, in order to preserve internal tranquillity, that there should be some tribunal to decide between the Government of the United States and the government of a State whenever any controversy should arise as to their relative and respective powers in the common territory. The Supreme Court was created for that purpose, and to insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of Congress and the Executive. Hence the care with which its jurisdiction, powers, and duties are defined in the Constitution, and its independence of the legislative branch of the government secured."

⁵⁰ ASH, *DICTIONARY OF THE ENGLISH LANGUAGE* (1775).

⁵¹ DYCHE, *NEW GENERAL ENGLISH DICTIONARY* (1781).

⁵² JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (1755).

⁵³ For other examples, see BAILEY, *UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY* (1789); BARCLAY, *ENGLISH DICTIONARY* (1774); BARLOW, *COMPLETE ENGLISH DICTIONARY* (1772); BELLAMY, *ENGLISH DICTIONARY* (1764); FENNING, *ROYAL ENGLISH DICTIONARY* (1763); MARTIN, *A NEW UNIVERSAL ENGLISH DICTIONARY* (1749); SHERIDAN, *DICTIONARY OF THE ENGLISH LANGUAGE* (1789); WALKER, *A CRITICAL PRONOUNCING DICTIONARY* (1807).

According to these definitions, an exception cannot nullify the rule or description that it limits. In order to remain an exception, it must necessarily have a narrower application than that rule or description.

In legal terminology, a provision in a deed or lease withholding certain property from the operation of the conveyance is an exception,⁵⁴ and this use of the word was common among lawyers at the time of the Convention.⁵⁵ Ever since 1582, when an exception in a lease was held void by the Queen's Bench "because it goeth to the whole thing demised; otherwise of an exception of part,"⁵⁶ courts and commentators have been agreed that an exception in a deed or lease could not include all of the property otherwise conveyed.⁵⁷ Nor could such an exception extend to an essential part of the property conveyed.⁵⁸ *Sheppard's Touchstone of Common Assurances*, published in eight editions from 1648 to 1826 and in its fifth edition at the time of the Constitutional Convention, stated:

An exception is a clause of a deed whereby the feoffer, donor, grantor, lessor, etc. doth except somewhat out of that which he had granted before by the deed In every good exception these things must always concurr, 1. This exception must be by apt words. 2. It must be of part of the thing granted and not of some other thing. 3. It must be of part of the thing only, and not of all, the greater part, or the effect of the thing granted. 4. It must be of such a thing as is severable from the thing which is granted, and not of an inseparable incident [I]f the exception be such as it is repugnant to the grant, and doth utterly subvert it, and take away the fruit of it, as if one grant a manor

⁵⁴ See BOUVIER, LAW DICTIONARY (6th ed. 1940); CYCLOPEDIA LAW DICTIONARY (1940); 16 AM. JUR. *Deeds* §§ 298-319 (1938); 26 C.J.S. *Deeds* §§ 137-40 (1956); authorities cited in notes 55-60 *infra*. An exception is also an objection to the ruling of a court or to a pleading or other proceeding, and it may be used with reference to contracts, other documents, and statutes. See 15A WORDS AND PHRASES 82-87, 103-09 (1950).

⁵⁵ See COKE, LITTLETON § 47a (8th ed. 1792); 7 PETERSDORFF, ABRIDGEMENT 673-75 (1827); SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES 77-80 (London, 5th ed. 1784); WOODFALL, LANDLORD AND TENANT 12 (1802).

⁵⁶ *Dorrell v. Collins*, 1 Cro. 6, 78 Eng. Rep. 273 (Q.B. 1582).

⁵⁷ See *Brown v. Allen*, 43 Me. 590, 599 (1857); *State v. Wilson*, 42 Me. 9, 21 (1856); *Winthrop v. Fairbanks*, 41 Me. 307, 311 (1856); *Payne v. Parker*, 10 Me. 178, 181-82 (1833); *Darling v. Crowell*, 6 N.H. 421, 423 (1833); *Cutler v. Tufts*, 20 Mass. (3 Pick.) 272, 277-78 (1825); 2 DEVLIN, DEEDS § 979, at 1346 (2d ed. 1897); 16 AM. JUR. *Deeds* § 304 (1938); 26 C.J.S. *Deeds* § 139(c) (1956); authorities cited in notes 55 *supra* and 60 *infra*.

⁵⁸ See SHEPPARD'S TOUCHSTONE, *op. cit. supra* note 55, at 77-79; authorities cited in note 60 *infra*; *Brown v. Goldsmith*, Hob. 108, 80 Eng. Rep. 257 (K.B. 1615); *Robert Acton's Case*, 3 Dyer 288b, 73 Eng. Rep. 647 (Q.B. 1570); *Clifford v. Wariner*, 1 Dyer 96b, 97a, 73 Eng. Rep. 210 (Q.B. 1553). See also *Wright v. Smith*, 257 Ala. 665, 667, 60 So. 2d 688, 689 (1952); *Stratford v. Lattimer*, 255 Ala. 201, 204, 50 So. 2d 420, 422 (1951); *Horticultural Dev. Co. v. Lark*, 224 Ala. 193, 198, 139 So. 229, 234 (1932); *Associated Oil Co. v. Hart*, 277 S.W. 1043, 1044 (Tex. Comm'n App. 1925); *cf. Hardy Bros. v. Galloway*, 111 N.C. 519, 523-24, 15 S.E. 890 (1892).

or land to another, excepting the profits thereof; or make a feoffment of a close of meadow or pasture, reserving or excepting the grasses of it; or grant a manor excepting the services; these are void exceptions.⁵⁹

The detailed analysis of the *Touchstone* has been extensively cited and its language has been used to characterize exceptions from the eighteenth century to the present day.⁶⁰ That language indicates that in a legal context an exception cannot destroy the essential characteristics of the subject to which it applies.

A "regulation" in the latter part of the eighteenth century, as today,⁶¹ was a rule imposed to establish good order. Dyche's *New General English Dictionary*⁶² defined it as "a putting or setting things in order or to rights." The definition in Ash's *Dictionary of the English Language*⁶³ was: "Regulate. To adjust or to direct according to rule." "Regulation. The act of regulating; that which is regulated; method, order." And Perry's *English Dictionary*⁶⁴ stated: "Regulate. To adjust by rule or method, to methodise, to dispose in order, to direct." "Regulation. The act of regulating, adjustment or proper disposition of any thing." Noah Webster said: "Regulate. 1. To adjust by rule, method, or established mode, as to regulate weights and measures 2. To put in good order; as to regulate the disordered state of a nation or its finances. 3. To subject to rules or restrictions, as to regulate trade" "Regulation. The act of regulating or reducing to order" ⁶⁵

⁵⁹ SHEPPARD'S TOUCHSTONE, *op. cit. supra* note 55, at 77-79.

⁶⁰ See *Washington Mills Emery Mfgs. Co. v. Commercial Fire Ins. Co.*, 13 Fed. 646, 649 (C.C.D. Mass. 1882); *Bowman v. Wathen*, 3 Fed. Cas. 1076, 1082 (No. 1740) (D. Ind. 1841), *aff'd*, 42 U.S. 189 (1843); *Frank v. Meyers*, 97 Ala. 437, 442-43 (1892); *Maker v. Lazell*, 83 Me. 562, 565 (1891); *Federal Land Bank v. Cooper*, 190 Miss. 490, 200 So. 729 (1941); *Moore v. Lord*, 50 Miss. 229, 234 (1874); *Goodrich v. Eastern R.R.*, 37 N.H. 149, 167 (1858); *Cocheco Mfg. Co. v. Whittier*, 10 N.H. 305 (1839); *Craig v. Wells*, 11 N.Y. 315, 321-22 (1854); *Dee v. King*, 77 Vt. 230, 233 (1905); *Fischer v. Laack*, 76 Wis. 313 (1890); *Rich v. Zeilsdorff*, 22 Wis. 544 (1868); 4 KENT, COMMENTARIES 467-68 (1848); 2 HILLIARD, ABRIDGEMENT OF THE AMERICAN LAW OF REAL PROPERTY 358 (1829); 7 PETERSDORFF, *op. cit. supra* note 55, at 674-75; 2 WASHBURN, TREATISE ON AMERICAN LAW OF REAL PROPERTY 640 (1862); WOODFALL, *op. cit. supra* note 55, at 12, 77-78. See also BOUVIER, *op. cit. supra* note 54; 26 C.J.S. *Deeds* § 139(c) (1956); CYCLOPEDIA OF LAW (1940).

⁶¹ 4 WEBSTER, NEW INTERNATIONAL DICTIONARY 2099 (2d ed. 1956): "Regulation. 1. Act of regulating or state of being regulated 2. A regulating principle or law; specif., a rule or restriction prescribed and enforced by constituted authority for the sake of order, uniformity, discipline, etc.; as the regulations of a school or society."

⁶² DYCHE, *op. cit. supra* note 51.

⁶³ ASH, *op. cit. supra* note 50.

⁶⁴ PERRY, ENGLISH DICTIONARY (1805).

⁶⁵ WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

Regulations usually specify conditions for engaging in certain conduct and sometimes forbid a particular act, but authority to prescribe them does not ordinarily include the power to prohibit the entire sphere of activity that is subject to regulation.⁶⁶

Thus, construed on the basis of general usage, the exceptions and regulations clause does not give Congress plenary control over the appellate jurisdiction of the Supreme Court. General usage, however, cannot provide a definitive interpretation. The meaning of the clause depends upon its purpose, and that purpose must be determined in the context of the entire constitutional plan and the circumstances of its formulation.

The Constitutional Purpose

In contrast with its original jurisdiction, the Supreme Court's appellate jurisdiction under the Constitution is an extensive one, arising not only from the presence of federal questions but also from the status or citizenship of the parties, encompassing issues of both law and fact,⁶⁷ and extending to cases which originate in state as well as federal courts. Orderly procedures for invoking that jurisdiction and a method of adjusting it to changing social needs and political attitudes are required. It is reasonable to conclude, therefore, that the Convention gave Congress authority to specify such orderly procedures and

⁶⁶ See, e.g., *Arkansas R.R. Comm'n v. Independent Bus Lines*, 172 Ark. 3, 285 S.W. 388 (1926); *State ex rel. Hollywood Jockey Club v. Stein*, 133 Fla. 530, 182 So. 863 (1938); *State v. Calloway*, 11 Idaho 719, 84 Pac. 27 (1906); *Curless v. Watson*, 180 Ind. 86, 102 N.E. 497 (1913); *McPherson v. State*, 174 Ind. 60, 90 N.E. 610 (1909); *State ex rel. Sheffel v. McCammon*, 111 Mo. App. 626, 86 S.W. 510 (1905); *City of Butte v. Paltrovich*, 30 Mont. 18, 75 Pac. 521 (1904); *Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829 (1902); *Borough of Belmar v. Prior*, 81 N.J.L. 254, 79 Atl. 1032 (Sup. Ct. 1911); *Richards v. City of Bayonne*, 61 N.J.L. 496, 39 Atl. 708 (Sup. Ct. 1898); *Institute of Metropolis v. University of N.Y.*, 159 Misc. 529, 289 N.Y. Supp. 660 (Sup. Ct. 1936), *aff'd*, 274 N.Y. 504, 10 N.E.2d 521 (1937); *Frecker v. City of Dayton*, 88 Ohio App. 52, 85 N.E.2d 419 (1949), *aff'd*, 153 Ohio St. 14, 90 N.E.2d 851 (1950); *Blumenthal v. City of Cheyenne*, 64 Wyo. 75, 186 P.2d 556 (1947); *New Memphis Gas & Light Co. v. City of Memphis*, 72 Fed. 952, 955 (C.C.W.D. Tenn. 1896). Cf. *Lottery Case*, 188 U.S. 321 (1903), *Reid v. Colorado*, 187 U.S. 137 (1902), and *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850), which hold that the power to regulate interstate commerce permits Congress to remove from such commerce specified articles whose presence in interstate traffic is against public policy.

⁶⁷ See THE FEDERALIST No. 81, at 548-49 (Ford ed. 1898) (Hamilton): "To avoid all inconveniences, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction, both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security. This view of the matter, at any rate, puts it out of all doubt that the supposed abolition of the trial by jury by the operation of this provision is fallacious and untrue." See also Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 102-03 (1923). The appellate jurisdiction "both as to law and fact" is subject to the provision of the seventh amendment that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." See also note 77 *infra*.

to modify the jurisdiction from time to time in response to prevailing social and political requirements, within the limits imposed by the Court's essential constitutional role. It is not reasonable to conclude that the Convention gave Congress the power to destroy that role. Reasonably interpreted the clause means "With such exceptions and under such regulations as Congress may make, not inconsistent with the essential functions of the Supreme Court under this Constitution."⁶⁸

Action taken by the Constitutional Convention while specifically considering the exceptions and regulations clause lends support to this interpretation. The language "with such exceptions and under such Regulations as Congress may make" first appeared in the draft which the Committee on Detail reported to the Convention.⁶⁹ Following adoption of those amendments which extended the Supreme Court's jurisdiction to cases arising under the Constitution and treaties of the United States,⁷⁰ the Convention proceeded to consider the clauses of the draft that expressly delineated the original and appellate jurisdiction of the Court. A motion was passed to insert after "appellate" the words "both as to law and fact."⁷¹ "The Supreme Court shall have original jurisdiction" was substituted for "this jurisdiction shall be original."⁷² A motion was then made that the next sentence—"In all the other cases before mentioned, it shall be appellate both as to law and fact with such exceptions and under such regulations as the legislature shall make"—be amended to provide: "In all the other cases before mentioned the judicial power shall be exercised in such manner as the legislature shall direct."⁷³

⁶⁸ See HART & WECHSLER 312: "A. You would treat the Constitution, then, as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether. How preposterous! Q. If you think an 'exception' implies some residuum of jurisdiction, Congress could meet that test by excluding everything but patent cases. This is so absurd, and it is so impossible to lay down any measure of a necessary reservation, that it seems to me the language of the Constitution must be taken as vesting plenary control in Congress. A. It's not impossible for me to lay down a measure. The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the Constitutional plan . . ." See also the testimony of J. L. Rauh in *Hearings on the Limitation of Appellate Jurisdiction of the United States Supreme Court Before a Subcommittee of the Senate Committee on the Judiciary*, 85th Cong., 1st & 2d Sess. pt. 2, at 39-70 (1958); cf. 1 CROSSKEY, POLITICS AND THE CONSTITUTION 616-20 (1953).

⁶⁹ See text accompanying note 30 *supra*. The Committee on Detail kept no record of its proceedings, and there is no evidence apart from the draft itself as to how the language originated.

⁷⁰ See text accompanying notes 31-33 *supra*.

⁷¹ 2 FARRAND 424, 431; see note 67 *supra*. The Convention then voted to reconsider the entire section, and a motion to substitute the words "The Judicial Power" for the words "The jurisdiction of the Supreme Court" at the beginning of the section was unanimously passed. 2 FARRAND 425. See note 34 *supra* and accompanying text.

⁷² 2 FARRAND 425.

⁷³ *Id.* at 425, 431.

This proposed amendment was defeated by a vote of six delegations to two.⁷⁴ Its passage would have given Congress plenary control over the appellate jurisdiction of the Supreme Court. Had the Convention desired to give Congress such power, the reasonable course would have been to adopt the unequivocal language of the amendment in place of the more ambiguous phrasing of the Committee's draft. The defeat of the amendment thus may reasonably be construed as a rejection by the Convention of plenary congressional control over the appellate jurisdiction of the Court and as indicating that the purpose of the clause was to authorize exceptions and regulations by Congress not incompatible with the essential constitutional functions of the Court.

This interpretation does not prevent the exceptions and regulations clause from providing a legislative check or balance upon the power of the Supreme Court. Checks and balances are intended to restrain, not to negate, the authority of governmental institutions. As long as essential constitutional functions are not impaired, Congress may in the exercise of its political discretion expand or contract the appellate jurisdiction of the Court. A broad sector of that jurisdiction thus remains subject to congressional control. Within that sector the Court's exercise of authority must be supported not only by the Constitution but also by the consent of the legislature.

Judicial Interpretation

Many cases have dealt with statutory limitations upon the appellate jurisdiction of the Supreme Court. A few contain broad language referring to unlimited congressional control over that jurisdiction. But none unequivocally holds that Congress has power to impair the Court's essential constitutional functions. In every case the Court either found no limitation on its jurisdiction or upheld a limitation which did not impair those functions.

The first decision containing such language was *Wiscart v. D'Auchy*.⁷⁵ The Judiciary Act of 1789⁷⁶ authorized the Supreme Court to review on writ of error (that is, on questions of law) circuit

⁷⁴ *Ibid.* The following day, "the Supreme Court shall have appellate jurisdiction" was substituted for "it shall be appellate," and in this form the clause was approved by the Committee on Style and finally adopted by the Convention. See notes 34-35 *supra*.

⁷⁵ 3 U.S. (3 Dall.) 321 (1796). The case involved a writ of error from a circuit court equity decree and presented the issue of whether the Supreme Court was bound by factual recitations in the decree. In its opinion, however, the Court also considered an issue raised in *Pintado v. Bernard*, which had been argued a few days previously but not reported, concerning the nature of its appellate jurisdiction in admiralty cases. *Id.* at 324. The important aspects of the opinion thus related to the latter case.

⁷⁶ Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

court decisions "in civil actions," but made no express reference to review of admiralty cases. The Court held that admiralty cases were "civil actions" and therefore reviewable only by writ of error under the statute and not by an appeal both as to law and fact⁷⁷ directly under the Constitution.⁷⁸ The Court did not face the constitutional issue which would have been presented had the Judiciary Act been interpreted as failing to provide for Supreme Court review in admiralty cases, but the opinion declared: "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."⁷⁹ The second half of the statement decided the case; the first half was unnecessary to the decision. The dissenting judge, on the other hand, concluding that the phrase "in civil actions" did not extend to admiralty matters, derived jurisdiction for an appeal on both law and fact directly from the Constitution.⁸⁰

⁷⁷ "An appeal is a process of civil law origin, and removes a cause entirely; subjecting the fact, as well as the law, to review and a retrial: but a writ of error is a process of common-law origin, and it removes nothing for re-examination but the law." 3 U.S. (3 Dall.) at 327. In connection with this early distinction between an appeal and a writ of error, it should be noted that: (1) the seventh amendment prevents the federal appellate courts from retrying issues of fact that have been decided by a jury; (2) sufficiency of the evidence to support a judgment is a question of law; (3) modern statutory appeals do not ordinarily involve a retrial of issues of fact, although under FED. R. CIV. P. 52(a), which provides that in nonjury cases "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," appellate review of factual findings based on documentary evidence may be broader than review of findings based on oral testimony. See FIELD & KAPLAN, MATERIALS ON CIVIL PROCEDURE 1114-15 (1953).

⁷⁸ The Supreme Court has appellate jurisdiction "both as to Law and Fact" under U.S. CONST. art. III, § 2, para. 2.

⁷⁹ 3 U.S. (3 Dall.) at 327.

⁸⁰ *Id.* at 326-27. Seven years later, in *Clarke v. Bazadone*, 5 U.S. (1 Cranch) 212 (1803), the Supreme Court was asked to review by writ of error a judgment of the general court of the Northwest Territory in an action on a foreign attachment. The court in a brief per curiam statement quashed the writ of error "on the ground, that the act of congress had not authorized an appeal or writ of error from the general court of the North-western Territory." The Northwest Ordinance, ch. 8, § 1 Stat. 50 (1789), enacted under the Articles of Confederation, had established the territorial court with authority to exercise a common-law jurisdiction and the territorial legislature with authority to make laws for the territory. The case on its merits raised only local common-law issues and did not present a question arising under the Constitution, laws, or treaties of the United States. Not only were the essential constitutional functions of the Court unaffected by this refusal of appellate jurisdiction, but it is doubtful if the jurisdiction of the Court could constitutionally have extended to such a case, unless a diversity of citizenship is to be inferred because the action involved a foreign attachment. See *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828); *cf.* *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949); *O'Donoghue v. United States*, 289 U.S. 516, 537-38 (1933); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929).

Also to be noted is *Turner v. Bank of No. America*, 4 U.S. (4 Dall.) 8 (1799), in which the Supreme Court reversed a circuit court judgment in favor of the assignee of a promissory note because the record did not show diversity of citizenship between the assignor and the debtor as required by statute. In the course of oral argument the attorney for appellee stated that "the judicial power is the grant of the constitution; and congress can no more limit, than enlarge the constitutional grant" *Id.* at 10. Whereupon Justice Chase remarked: "The notion has frequently been

In *Ex parte Bollman*,⁸¹ the Supreme Court was asked to determine whether it could issue a writ of habeas corpus to test the legality of a circuit court order holding the petitioners for trial on criminal charges. The issue presented was succinctly described by Marshall: "The inquiry . . . on this motion will be, whether by any statute, compatible with the Constitution of the United States, the power to award a writ of *habeas corpus* in such a case . . . has been given to this court."⁸² The answer was clear. Such authority was given to the Court as part of its appellate jurisdiction by section 14 of the Judiciary Act.⁸³ Marshall, however, took the occasion to comment:

Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction [T]he power to award the writ by any of the courts of the United States, must be given by written law

It may be worthy of remark, that . . . [the judiciary] act was passed by the first congress of the United States, sitting under a constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.' Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of *habeas corpus*.⁸⁴

Marshall thus indicated that the Court could not issue writs of habeas corpus without initial statutory authorization, which he found in the Act of 1789. Whether his holding would have been the same as his dictum had Congress failed to provide for issuance of habeas corpus by the Supreme Court is a matter for speculation. But Marshall did not say that the Supreme Court could exercise *no* appellate jurisdiction in the absence of statute. Although his language may be susceptible of

entertained that the federal courts derive their judicial power immediately from the Constitution; but the political truth is that the disposal of judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise" *Id.* at 10 n.a. In contrast were the restrained comments of Chief Justice Ellsworth: "How far is it meant to carry this argument? Will it be affirmed, that in every case, to which the judicial power of the United States extend, the federal Courts may exercise a jurisdiction, without the intervention of the legislature, to distribute, and regulate, the power?"

⁸¹ 8 U.S. (4 Cranch) 75 (1807). See note 217 *infra*.

⁸² *Id.* at 94.

⁸³ Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81.

⁸⁴ 8 U.S. (4 Cranch) at 93-95.

that interpretation, just two years earlier, in *United States v. More*,⁸⁵ he acknowledged that if Congress had not described the jurisdiction of the Court, "the constitution would then have been the only standard by which its powers could be tested, since there would be clearly no congressional regulation or exception on the subject,"⁸⁶ and three years later, in *Durousseau v. United States*,⁸⁷ he stated:

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

The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.⁸⁸

If the Supreme Court may exercise its full constitutional jurisdiction in the absence of congressional limitation, then clearly its jurisdiction is not dependent upon the existence of a written statute.

In *Durousseau*, the Court considered its jurisdiction to review a decision of the United States District Court for the newly created Territory of Orleans. The statute creating the Orleans court gave it the jurisdiction of the District Court of Kentucky but made no reference to Supreme Court review. Supreme Court review of the Kentucky court's decisions was authorized by the Act of 1789. The Court construed the two statutes as authorizing it to review decisions of the Orleans court. A contrary construction would, in Marshall's words, have made "the court of Orleans . . . a supreme court,"⁸⁹ but the constitutional issue which would then have been presented was not decided. In the course of the opinion Marshall asserted, as a rule of statutory interpretation, that the affirmative grant of appellate jurisdiction in the Act of 1789 implied a denial of jurisdiction in those cases not mentioned:

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

⁸⁵ 7 U.S. (3 Cranch) 159 (1805).

⁸⁶ *Id.* at 172.

⁸⁷ 10 U.S. (6 Cranch) 307 (1810).

⁸⁸ *Id.* at 313-14.

⁸⁹ *Id.* at 318.

have not, indeed, made these exceptions in express terms. They have not declared, that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.⁹⁰

That interpretation was supported by the act's comprehensive scope, which manifested the legislative purpose of excepting from the appellate jurisdiction of the Supreme Court those cases not affirmatively designated. But it does not follow that Congress, by virtue of its power to make exceptions and regulations, may withhold all appellate jurisdiction from the Court, and nowhere did Marshall say that Congress could do so.

On the basis of his opinions in *Bollman*, *More*, and *Durousseau*, Marshall's views appear to have been that: (1) Congress has a wide discretion in legislating exceptions to the constitutional jurisdiction of the Court; (2) if Congress does not exercise that discretion the Court retains its full constitutional jurisdiction; (3) if Congress exercises the discretion by specifying the cases to which the jurisdiction extends, those cases not designated are impliedly excepted. Marshall did not in these cases determine the constitutional limits of that discretion.

Thirty-seven years after *Durousseau*, in *Barry v. Mercein*,⁹¹ the Supreme Court was asked to review by writ of error a circuit court decision denying habeas corpus to a father who claimed diversity of citizenship and sought the custody of his child from its mother. The Court held such review was unavailable because the proceeding did not involve the minimum monetary value required for a writ of error by section 22 of the Judiciary Act. On its merits, the case involved local family law and presented no question arising under the Constitution, laws, or treaties of the United States. The denial of jurisdiction, therefore, did not affect the essential constitutional functions of the Court. Nor did the appellant assert that the Court could exercise jurisdiction contrary to the provisions of the act, his contention being that, properly construed, section 22 authorized a writ of error in such cases. In its opinion, however, the Court stated: "By the constitution of the United States, the Supreme Court possesses no appellate power

⁹⁰ *Id.* at 314. See *United States v. More*, 7 U.S. (3 Cranch) 159 (1805), where, without discussing constitutional issues, the Court held that it was not authorized by the Act concerning the District of Columbia, ch. 15, § 8, 2 Stat. 106 (1804), to review a judgment of the District of Columbia Circuit Court sustaining a demurrer to a criminal indictment, because the affirmative grant of jurisdiction to review civil cases implied a denial of jurisdiction to review criminal cases. The problem of appellate review in federal criminal cases is considered in the text accompanying notes 195-222 *infra*.

⁹¹ 46 U.S. (5 How.) 103 (1847).

in any case, unless conferred upon it by act of Congress”⁹² No cases were cited in support of this dictum which was directly contrary to Marshall’s statements in *More* and *Durousseau* that in the absence of statute the Supreme Court could exercise its full constitutional jurisdiction.

A similar statement was made in *Daniels v. Railroad Co.*,⁹³ decided in 1865. The Court, refusing to exercise jurisdiction because a certificate of division in a circuit court did not set forth the questions in dispute as required by statute, announced: “In order to create such appellate jurisdiction in any case, two things must concur: the Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority.”⁹⁴ *Marbury v. Madison*⁹⁵ and *Sheldon v. Sill*,⁹⁶ given as authority for the assertion, do not support it. The Court, citing *Durousseau*, *More*, and *Barry*, stated further: “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” Construed consistently with *Durousseau* and *More*, this dictum simply recognizes that the constitutional jurisdiction of the Court is subject to congressional exceptions and regulations; construed as a recognition of plenary congressional control, it is supported only by the dictum of *Barry*.

Four years after *Daniels* the Court decided *Ex parte McCordle*.⁹⁷ In 1867 Congress had authorized an appeal to the Supreme Court from circuit court decisions denying habeas corpus.⁹⁸ Previously the Court could review such decisions only by issuing an original writ of habeas corpus⁹⁹ under the authority granted by section 14 of the Act of 1789.¹⁰⁰ *McCordle*, a civilian convicted by a military commission of obstructing reconstruction, asserted the unconstitutionality of the Reconstruction Acts and took an appeal to the Supreme Court, as authorized by the Act of 1867, from the denial of habeas corpus by a circuit court. After a government motion to dismiss the appeal was

⁹² *Id.* at 119.

⁹³ 70 U.S. (3 Wall.) 250 (1865).

⁹⁴ *Id.* at 254.

⁹⁵ 5 U.S. (1 Cranch) 137 (1803).

⁹⁶ 49 U.S. (8 How.) 441 (1850).

⁹⁷ 74 U.S. (7 Wall.) 506 (1869).

⁹⁸ Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386. See text accompanying notes 206-09 *infra*.

⁹⁹ The common-law writ of certiorari was simultaneously issued to bring up the record of the court below. See cases cited note 203 *infra*.

¹⁰⁰ Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81. See notes 202-05 *infra* and accompanying text.

denied,¹⁰¹ but before decision on the merits, Congress, fearing the Court was about to invalidate the Reconstruction Acts, repealed that portion of the Act of 1867 authorizing such appeals.¹⁰² The Court upheld the validity of the repealing statute and dismissed the appeal, stating that "it is hardly possible to imagine a plainer instance of positive exception. . . . Without jurisdiction the court cannot proceed at all in any cause."¹⁰³ But the Court carefully pointed out that the repeal did not affect its jurisdiction to issue writs of habeas corpus under section 14 of the Act of 1789:

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 [repealing] act of 1868 does not except from that jurisdiction any cases but appeals from the Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.¹⁰⁴

That statement was confirmed a few months later when, in *Ex parte Yerger*,¹⁰⁵ the Supreme Court reviewed on petition for habeas corpus¹⁰⁶ a circuit court decision denying the writ to a civilian awaiting trial by a military commission for violating the Reconstruction Acts. The Court held that the repealing act of 1868 did not affect its authority to issue the writ under the Judiciary Act of 1789¹⁰⁷ and strongly intimated that Congress lacked the power to deprive it of all habeas corpus jurisdiction.¹⁰⁸ According to Marshall's dictum in *Ex*

¹⁰¹ *Ex parte McCordle*, 73 U.S. (6 Wall.) 318 (1867).

¹⁰² Act of March 27, 1868, ch. 34, 15 Stat. 44. See HART & WECHSLER 292 n.1; 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 466-81 (rev. ed. 1947). The provision was restored by Act of March 3, 1885, ch. 353, 23 Stat. 437.

¹⁰³ 74 U.S. (7 Wall.) at 514. The Court also stated: "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.' It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. . . . 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." *Id.* at 512-14.

¹⁰⁴ *Id.* at 515.

¹⁰⁵ 75 U.S. (8 Wall.) 85 (1869). See *Ex parte Royall*, 112 U.S. 181 (1884).

¹⁰⁶ See note 99 *supra*.

¹⁰⁷ The Court further held that its issuance of habeas corpus after denial of the writ by a circuit court was an exercise of appellate jurisdiction even though the petitioner was in custody under military rather than judicial authority. 75 U.S. (8 Wall.) at 102. See *In re Kaine*, 55 U.S. (14 How.) 103 (1852); cf *In re Metzger*, 46 U.S. (5 How.) 175 (1847).

¹⁰⁸ "It would have been, indeed, a remarkable anomaly if this court, ordained by the Constitution for the exercise, in the United States, of the most important powers in civil cases of all the highest courts of England, had been denied, under a constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint, which the

parte Bollman,¹⁰⁹ the constitutional provision enjoining suspension of the privilege of the writ of habeas corpus except in cases of rebellion or invasion confers no jurisdiction upon any court to issue the writ but simply forbids interference with the availability of the writ in a court having such jurisdiction. *Ex parte Yerger*, however, suggests that by virtue of the constitutional provision the jurisdiction of the Supreme Court to issue the writ, once conferred, cannot be withdrawn by Congress in the absence of rebellion or invasion, despite its power to make exceptions and regulations.

Clearly the language of *Ex parte McCardle* does not sanction congressional impairment of the essential constitutional functions of the Supreme Court; but because the statute there upheld withdrew jurisdiction to review *pending* habeas corpus appeals, the case has been viewed as acknowledging the existence of congressional power to thwart the Supreme Court's appellate jurisdiction through *ad hoc* legislation withdrawing authority to review any particular pending case. The statute, however, did not deprive the Court of jurisdiction to decide *McCardle's* case; he could still petition the Supreme Court for a writ of habeas corpus to test the constitutionality of his confinement. The legislation did no more than eliminate one procedure for Supreme Court review of decisions denying habeas corpus while leaving another equally efficacious one available.

By contrast, three years later in *United States v. Klein*,¹¹⁰ the Court denied the power of Congress to prescribe the decision in a pending case by withdrawing jurisdiction. A Civil War statute authorized recovery of captured property in the Court of Claims by owners who were loyal or had received a presidential pardon, and *Klein*, having received a pardon reciting his previous disloyalty, recovered judgment under the statute. While an appeal was pending in the Supreme Court, Congress withdrew the jurisdiction of both the Supreme Court and the Court of Claims in all cases where the claimant's pardon contained a recital of previous disloyalty, and directed that such actions be dismissed. The Court held that the attempted

Habeas Corpus Act of Charles II expressly declares those courts to possess. . . . We agree that [the jurisdiction] . . . is given subject to exception and regulation by Congress; but it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases 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. . . . These considerations forbid any construction giving to doubtful words [in the statute] the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of the jurisdiction even were the reasons for affirming it less cogent than they are." 75 U.S. (8 Wall.) at 96-103.

¹⁰⁹ See text accompanying notes 81-84 *supra*.

¹¹⁰ 80 U.S. (13 Wall.) 128 (1872).

restriction on its jurisdiction violated the principle of separation of powers despite congressional authority to make exceptions and regulations: "It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power. It is of vital importance that these powers be kept distinct."¹¹¹

In *Klein*, Congress attempted to dictate the result in a case which involved the government as a party. But the constitutional principle there asserted would preclude any congressional attempt to control the decision in a particular case through the guise of a jurisdictional limitation; nor may Congress by denying jurisdiction in a given case prevent the Court from considering the validity of that denial.¹¹²

The Supreme Court's strongest pronouncement on the extent of congressional control over its appellate jurisdiction came twelve years after *McCardle* in *The Francis Wright*.¹¹³ The decision merely reaffirmed the power of Congress to confine Supreme Court review in admiralty cases to questions of law,¹¹⁴ but the Court, after first quoting from *Wiscart v. D'Auchy*,¹¹⁵ asserted:

[W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those [appellate] powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not.¹¹⁶

Since the challenged jurisdictional limitation did not affect the essential functions of the Court, those functions were not mentioned in this broad declaration, which went far beyond the issues presented for decision.

¹¹¹ *Id.* at 146-47.

¹¹² *Lockerty v. Phillips*, 319 U.S. 182 (1943); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948).

¹¹³ 105 U.S. 381 (1881).

¹¹⁴ See note 77 *supra* and accompanying text.

¹¹⁵ 3 U.S. (3 Dall.) 321 (1796). See text accompanying note 75 *supra*.

¹¹⁶ 105 U.S. at 385-86.

The language of *The Francis Wright* was quoted at length in *Luckenbach S.S. Co. v. United States*,¹¹⁷ which upheld a statute limiting Supreme Court review of Court of Claims decisions to questions of law.¹¹⁸ As in *The Francis Wright*, the jurisdictional limitation was not a serious one.¹¹⁹ The Court in *Luckenbach* also stated that "an appellate review is not essential to due process of law, but is a matter of grace."¹²⁰ The degree of protection given to individuals by the due process clause, however, does not fix the extent of congressional power over the constitutional jurisdiction of the Supreme Court.

The most recent suggestion of plenary congressional control was made in a dissenting opinion in *National Mut. Ins. Co. v. Tidewater Transfer Co.*¹²¹ A majority of the Court held that Congress could give federal district courts outside the District of Columbia jurisdiction over nonfederal question cases in which a resident of the District is a party. In dissenting, Justice Frankfurter casually remarked: "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*."¹²²

None of the opinions which suggest that the Supreme Court's appellate jurisdiction is subject to unlimited congressional control gives any consideration to the contrary implications of *Martin v. Hunter's Lessee*, *Cohens v. Virginia*, and *Ableman v. Booth*.¹²³ In contrast to such uninhibited dicta, other cases using more restrained language have

¹¹⁷ 272 U.S. 533, 537 (1926).

¹¹⁸ Act of Feb. 13, 1925, ch. 229, § 2(b), 43 Stat. 939.

¹¹⁹ Another case with broad language and a narrow holding is *American Constr. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372 (1893), in which the Court held that it could not issue mandamus and would not issue certiorari to review a circuit court of appeals decision reversing a district court interlocutory order in a diversity of citizenship case, but said: "This court . . . can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by Congress." *Id.* at 378. Perhaps this statement meant no more than that the jurisdiction of the Court was defined and prescribed by existing statutes; such would seem to be the implication of the comment in *Colorado Cent. Consol. Mining Co. v. Turck*, 150 U.S. 138 (1893), that "from *Wisart v. D'Auchy* . . . to *American Construction Co. v. Jacksonville &c. Railway Co.*, . . . it has been held in an uninterrupted series of decisions that this court exercises appellate jurisdiction only in accordance with the acts of Congress upon the subject." *Id.* at 141.

¹²⁰ 227 U.S. at 536.

¹²¹ 337 U.S. 582 (1948).

¹²² *Id.* at 655. The opinion continues: "But when the Constitution defined the ultimate limits of judicial power exercisable by courts which derive their sole authority from Article III, it is beyond the power of Congress to extend those limits. If there is one subject as to which this Court ought not to feel inhibited in passing on the validity of legislation by doubts of its own competence to judge what Congress has done, it is legislation affecting the jurisdiction of the federal courts." *Ibid.* The last sentence evokes the tantalizing question of whether, in the Justice's opinion, Congress could deprive the Supreme Court of jurisdiction to resolve conflicting interpretations by lower federal courts of legislation affecting their jurisdiction.

¹²³ See text accompanying notes 42-49 *supra*.

simply acknowledged that Congress has a wide, but not necessarily unlimited, power to regulate that jurisdiction.

Thus, in *United States v. Bitty*,¹²⁴ the Court, upholding a provision for review of circuit court decisions dismissing criminal indictments on the basis of the invalidity or construction of the statute involved, stated: "we can exercise appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make What such exceptions and regulations should be it is for Congress, in its wisdom, to establish, having of course due regard to all the provisions of the Constitution."¹²⁵

And in *St. Louis, I.M. & So. Ry. v. Taylor*,¹²⁶ the Court, holding that a state court decision interpreting a federal statute could be reviewed at the request of any party adversely affected by the interpretation, stated:

But the appellate jurisdiction of this court must be exercised 'with such exceptions and under such regulations as the Congress shall make.' . . . Congress has regulated and limited the appellate jurisdiction of this court over the state courts by § 709 of the Revised Statutes, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power.¹²⁷

THE SCOPE OF STATUTORY LIMITATIONS ON JURISDICTION

The extent of congressional power over the appellate jurisdiction of the Supreme Court has never been judicially determined because the

¹²⁴ 208 U.S. 393 (1908).

¹²⁵ *Id.* at 399-400.

¹²⁶ 210 U.S. 281 (1908).

¹²⁷ *Id.* at 292. See also *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863), in which the Court, holding it could not review by writ of certiorari the jurisdiction of a military commission to try a civilian for sedition in time of war, stated: "The appellate powers of the Supreme Court, as granted by the Constitution, are limited and regulated by the acts of Congress, and must be exercised subject to the exceptions and regulations made by Congress." *Id.* at 251. The Court concluded that since a military commission did not perform "judicial" functions, direct Supreme Court review would necessarily be an exercise of original rather than appellate jurisdiction and therefore beyond its constitutional authority. Had he remained in custody, the defendant could have tested the commission's jurisdiction by petition for habeas corpus in the circuit court, followed by a petition to the Supreme Court for the writ if denied by the circuit court. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). At the time of the Supreme Court proceedings, however, the defendant was no longer in custody, having been placed beyond the Union lines in Confederate territory after commutation of his sentence by the President. Similar language is found in *National Exch. Bank v. Peters*, 144 U.S. 570 (1891), in which the Court, dismissing an appeal from a circuit court which should have been taken to the newly created Circuit Court of Appeals, said: "Although the appellate powers of this court are given by the Constitution, they are nevertheless limited and regulated by acts of Congress." *Id.* at 572. In *United States v. Young*, 94 U.S. 258 (1876): "We have only such appellate jurisdiction as has been conferred by Congress, and in the exercise of such as has been conferred we can proceed only in the manner which the law prescribes." *Id.* at 259. And in *Stephan v. United States*, 319 U.S. 423, 426 (1943): "[O]ur appellate jurisdiction is defined by statute. . . ."

jurisdictional statutes have always allowed the Court to carry on its essential constitutional functions with reasonable effectiveness. Early judiciary acts restricted the avenues of review in some areas but did not prevent the Court from ultimately maintaining the uniformity and supremacy of federal law. Subsequent legislation has increasingly facilitated the full exercise of the Court's essential functions by expanding its discretionary jurisdiction¹²⁸ and eliminating restrictions upon its availability as a tribunal of last resort.¹²⁹

Review of State Court Decisions

Every Judiciary Act has preserved the Supreme Court's function of maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authority. Section 25 of the Act of 1789¹³⁰ and its subsequent counterparts¹³¹ have authorized Supreme Court review of state court decisions:¹³² (a) upholding a state statute or the conduct of a state official against a claim of inconsistency with the Constitution, laws, or treaties of the United States; (b) invalidating a statute or treaty of the United States or the act of a federal official; (c) denying a "title, right, privilege, or immunity specially set up or claimed by either party" under the Constitution or a law, treaty, or commission of the United States.¹³³ The same statutory provisions

¹²⁸ See FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 140-41 (1928); HART & WECHSLER 37-42, 1313-17.

¹²⁹ See 28 U.S.C. §§ 1251-57 (1958), as amended, 28 U.S.C. § 1252 (Supp. 1959).

¹³⁰ Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85.

¹³¹ Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385; REV. STAT. § 709 (1875); Judicial Code of 1911, ch. 231, § 237, 36 Stat. 1156, as amended, ch. 2, 38 Stat. 790 (1914), as amended, ch. 448, § 2, 39 Stat. 726 (1916), as amended, ch. 54, 42 Stat. 366 (1922), as amended, ch. 229, § 1, 43 Stat. 937 (1925), as amended, § 1, 45 Stat. 54 (1928), 28 U.S.C. § 1257 (1958). See ROBERTSON & KIRKHAM, *JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES* 931-41 (Wolfson & Kirkham ed. 1951).

¹³² *I.e.*, a final judgment of the highest available state court.

¹³³ The Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 86, provided for Supreme Court review, *inter alia*, "where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission. . . ." The Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386, amended the provision to read: "where any title, right, privilege, or *immunity* is claimed under the constitution, or any treaty or statute of, or commission held, or *authority exercised* under the United States, and the decision is against the title, right, privilege, or *immunity* specially set up or claimed by either party under such constitution, statute, treaty, commission, or *authority*. . . ." (Emphasis added.) The addition of the word "authority" may have increased the scope of the provision to some extent, but its essential meaning was not altered by the amendment. "Exemption" and "immunity" are substantially synonymous, and whenever a right, title, privilege, or immunity is claimed under the Constitution, or a statute, treaty, commission, or authority of the United States, the construction of some portion of the constitution, law, treaty, or authority is necessarily drawn in question. See *Montgomery v. Hernandez*, 25 U.S. (12 Wheat.) 129 (1827), holding that the above-

have also enabled the Court to function as a tribunal for the final resolution of conflicting interpretations of federal law by state courts.

In early cases the Supreme Court interpreted section 25 as withholding authority to review state court decisions which upheld the validity of a federal statute or construed it favorably to the party claiming the benefit of its provisions.¹³⁴ The Court did not perceive, in those cases, the full scope of the third clause of the section. It failed to recognize that a state court decision upholding the constitutionality of a federal statute necessarily denies to the party attacking the statute an asserted right under the Constitution to have a judgment in his favor or an asserted immunity under the Constitution from having judgment entered against him on the basis of the statute,¹³⁵ and that a state court decision construing a federal statute in favor of the party claiming its benefits necessarily denies to the losing party an asserted immunity under federal law from having a judgment based on the statute entered against him.¹³⁶ Later cases, however, apparently accepting the full implications of the third clause, sustained the Court's authority to review state court decisions that upheld the constitutionality of a federal statute or construed it in favor of the party affirmatively claiming a right thereunder.¹³⁷

The early rule did not obstruct the Court's essential functions. A state court decision upholding a right claimed under a federal statute

quoted provision of the Act of 1789 gave the Court jurisdiction to review a state court decision denying a defense based upon a federal statute of limitations, although the pivotal issue was not the meaning of the statute but the date when plaintiff's cause of action accrued. The Court construed the Act of 1789 as authorizing appellate jurisdiction "where the party claims some title, right, privilege, or exemption under an act of Congress and the decision is *against* such right, title, privilege, or exemption." *Id.* at 132. (Emphasis added.) This language is essentially the language later used in the Act of 1867.

¹³⁴ *Baker v. Baldwin*, 187 U.S. 61 (1902); *De Lamar's Gold Mining Co. v. Nesbitt*, 177 U.S. 523 (1900); *Jersey City & B.R.R. v. Morgan*, 160 U.S. 288 (1895); *Missouri v. Andriano*, 138 U.S. 496 (1891); *Ryan v. Thomas*, 71 U.S. (4 Wall.) 603 (1866); *Roosevelt v. Meyer*, 68 U.S. (1 Wall.) 512 (1863); *Reddal v. Bryan*, 65 U.S. (24 How.) 420 (1860); *Burke v. Gaines*, 60 U.S. (19 How.) 388 (1856); *Linton v. Stanton*, 53 U.S. (12 How.) 422 (1851); *Strader v. Baldwin*, 50 U.S. (9 How.) 261 (1850); *Fulton v. Morgan*, 41 U.S. (16 Pet.) 149 (1842); *Gordon v. Caldcleugh*, 7 U.S. (3 Cranch) 268 (1806).

¹³⁵ See *Illinois Cent. R.R. v. McKendree*, 203 U.S. 514, 524-26 (1906).

¹³⁶ See *St. Louis I.M. & So. Ry. v. Taylor*, 210 U.S. 281, 292-93 (1908).

¹³⁷ *St. Louis, I.M. & So. Ry. v. Taylor*, 210 U.S. 281, 292-93 (1908); *Illinois Cent. R.R. v. McKendree*, 203 U.S. 514, 524-26 (1906). See *Southern Ry. v. Crockett*, 234 U.S. 725 (1914); *St. Louis, I.M. & So. Ry. v. McWhirter*, 229 U.S. 265, 275 (1913); *Seaboard A.L. Ry. v. Duvall*, 225 U.S. 477, 485-86 (1912); *Nutt v. Knut*, 200 U.S. 12, 18-19 (1906); *cf. Strauss v. American Publishers' Ass'n*, 231 U.S. 222, 233-34 (1913); *Palmer v. Hussey*, 119 U.S. 96, 98 (1886). These cases stress the importance of specifically asserting the federal claim in the lower court, a requirement which may have been neglected by the litigants in some of the earlier cases cited in note 134 *supra*. See also *ROBERTSON & KIRKHAM, op. cit. supra* note 131, at 34: "The refusal of a state court to give a federal statute the construction insisted upon by a party which would lead to a judgment in his favor is a denial to him of a right or immunity under the laws of the United States. . . ."

does not challenge the supremacy of federal law. Any conflict between such a decision and a prior one, not reviewed by the Supreme Court could ultimately be resolved by review of a succeeding decision in accord with the first. If all subsequent decisions followed the second, the accumulated weight of such authority would resolve the conflict without the necessity of Supreme Court review. Under the later rule, any state court decision in conflict with the decision of another state or federal court as to the meaning or constitutionality of a federal statute could be reviewed by the Supreme Court¹³⁸ and the conflict resolved.

Early cases also held that section 25 did not authorize Supreme Court review of state court decisions holding state statutes invalid under the federal constitution.¹³⁹ Although this rule delayed Supreme Court consideration of important questions of constitutional interpretation,¹⁴⁰ no essential function of the Court was impaired, because the supremacy of federal law is not challenged by a state court decision invalidating a state statute,¹⁴¹ and conflict between such a decision and a prior one, not reviewed by the Supreme Court, upholding a similar statute, could be ultimately resolved by review of a subsequent decision like the first.

The later expanded construction of the third clause of section 25 would logically have supported Supreme Court review of decisions holding state statutes unconstitutional. When a state court construes the Constitution as invalidating a state statute, it denies to the party urging the validity of the statute an asserted constitutional privilege to receive the benefits of the legislation or an asserted constitutional immunity from an adverse judgment based on the Constitution. This contention, however, was never presented to the Supreme Court, probably because most state court decisions invalidating state statutes involved the state as well as the federal constitution and thus were supported by independent nonfederal grounds.¹⁴² There appears to have been no case in which a state court persisted in holding a state statute invalid under the federal constitution in the face of a Supreme Court

¹³⁸ Provided it was a final decision by the highest available state court and met the other requirements for Supreme Court review such as justiciability, standing to litigate, substantiality, proper preservation of federal questions, and absence of an independent nonfederal ground for decision.

¹³⁹ *Walker v. Taylor*, 46 U.S. (5 How.) 64 (1847); *Commonwealth Bank v. Griffith*, 39 U.S. (14 Pet.) 55 (1840).

¹⁴⁰ See Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 3 (1913).

¹⁴¹ Nullification of a state statute by a final state court decision, in apparent deference to the federal constitution, restores the situation which existed before enactment of the statute, and thus eliminates the source of the alleged conflict between state and federal law.

¹⁴² See, e.g., *Ives v. South Buffalo Ry.*, 201 N. Y. 271, 94 N.E. 431 (1911).

decision upholding the validity of a like statute.¹⁴³ Confronted with such a situation, the Court might well have accepted jurisdiction under an expanded interpretation of section 25.

Historical materials do not disclose whether the members of the First Congress were aware of the broad scope of appellate jurisdiction implicit in the third clause of section 25.¹⁴⁴ Oliver Ellsworth, a Federalist and the principal drafter of the bill,¹⁴⁵ may have employed the clause as a subtle means of extending the Court's appellate jurisdiction beyond the limits contemplated by the Antifederalists, who wished to minimize the power of the national judiciary.¹⁴⁶ On the other hand, the absence of an express provision for review of state court decisions upholding a federal statute or right, or invalidating a state statute, may have evidenced a legislative purpose to exclude such decisions from the Court's jurisdiction, perhaps in deference to the political strength of the states-rights advocates.¹⁴⁷ In any event, the essential functions of the Court were implemented by the legislation.

In none of the cases giving a narrow construction to section 25 were conflicting decisions urged as a basis for Supreme Court review. Attention was not focused on the problem of resolving inconsistent state court interpretations of the Constitution until 1911 when the New York Court of Appeals outraged popular sentiment by holding the first state workmen's compensation act invalid under the due process clause of both state and federal constitutions in *Ives v. South Buffalo Ry.*¹⁴⁸ The losing party, evidently considering Supreme Court review unavailable, made no attempt to obtain it, and when in the same year the highest court of Washington upheld a similar work-

¹⁴³ See, e.g., *Jensen v. Southern Pac. Co.*, 215 N.Y. 514, 524-25, 109 N.E. 600, 603 (1915), *rev'd on other grounds*, 244 U.S. 205 (1917).

¹⁴⁴ See House Debates of Aug. 24, 29, 31, 1789, 1 ANNALS OF CONG. 782-85, 796-834 (1879). Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

¹⁴⁵ See 1 WARREN, *op. cit. supra* note 102, at 8 n.1; Warren, *supra* note 144, at 59-60.

¹⁴⁶ Section 23 of the draft bill reported out by the Senate committee appears to have been in Ellsworth's handwriting. Warren, *supra* note 144, at 50. It was enacted as § 25 of the statute with but one change, not here material. *Id.* at 104. James Jackson of Georgia, who opposed the section in the House, may have had the scope of the third clause in mind when he stated in reference to the provisions of the entire section: "Sir, in my opinion, and I am convinced experience will prove it, . . . there will not, neither can there be any suit or action brought in any State courts, but may, under this clause, be reversed or affirmed by being brought within the cognizance of the Supreme Court." 1 ANNALS OF CONG. 815 (1789). See 1 WARREN, *op. cit. supra* note 102, at 8-11.

¹⁴⁷ Since no changes material to this discussion were made in the section on the floor of Congress, see Warren, *supra* note 144, at 104, if a compromise of this nature was worked out, it must have been in the Senate committee, which kept no minutes. See *id.* at 60-63.

¹⁴⁸ 201 N.Y. 271, 94 N.E. 431 (1911).

men's compensation statute,¹⁴⁹ Congress, perceiving that the existing rule impeded prompt and authoritative resolution of important constitutional issues, responded to demands from the President, the press, and the bar by enacting legislation which authorized Supreme Court review by certiorari of state court decisions invalidating a state statute on federal grounds, upholding a federal statute, or enforcing a right, title, privilege, or immunity claimed under federal law.¹⁵⁰

The *Ives* case, although at variance with the philosophy of previous Supreme Court cases construing the due process clause,¹⁵¹ did not create a direct conflict by its interpretation of that clause because no prior court had passed upon the constitutionality of a state workmen's compensation statute.¹⁵² Conflict was created by the later Washington decision upholding such a statute.¹⁵³ That decision was reviewable by the Supreme Court, but no review was requested. Subsequently, the New York Court of Appeals, acknowledging that "upon the question whether an act offends against the Constitution of the United States the decisions of the United States Supreme Court are controlling,"¹⁵⁴ upheld the validity under the fourteenth amendment of a new compensation act enacted pursuant to a state constitutional amendment.¹⁵⁵ The Supreme Court approved this determination upon review of a later New York case involving the same issue,¹⁵⁶ thereby demonstrating its capacity ultimately to resolve such conflicts even under the old rule. The episode, however, revealed a widespread conviction that the Supreme Court should be promptly available to resolve conflicting interpretations of federal law and that impediments to that function should be removed.¹⁵⁷

Review of Federal Court Decisions

The First Congress exercised its "constitutional option"¹⁵⁸ to create lower federal courts,¹⁵⁹ although the jurisdiction of those courts

¹⁴⁹ State *ex rel.* Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101 (1911).

¹⁵⁰ Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. See FRANKFURTER & LANDIS, *op. cit.* *supra* note 128, at 193-98; WARREN, *supra* note 140, at 2.

¹⁵¹ See Noble State Bank v. Haskell, 219 U.S. 104 (1911); Muller v. Oregon, 208 U.S. 412 (1908).

¹⁵² Even under the new legislation the decision probably would not have been reviewable because it rested on an independent, nonfederal ground—the state constitution.

¹⁵³ State *ex rel.* Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101 (1911).

¹⁵⁴ Jensen v. Southern Pac. Co., 215 N.Y. 514, 524, 109 N.E. 600, 603 (1915), *rev'd on other grounds*, 244 U.S. 205 (1917).

¹⁵⁵ Jensen v. Southern Pac. Co., *supra* note 154.

¹⁵⁶ New York Cent. R.R. v. White, 243 U.S. 188, 195-96 (1917).

¹⁵⁷ See FRANKFURTER & LANDIS, *op. cit.* *supra* note 128, at 193-98.

¹⁵⁸ See HART & WECHSLER 38; text accompanying note 18 *supra*.

¹⁵⁹ Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

over cases arising under the Constitution, laws, and treaties of the United States was narrowly restricted.¹⁶⁰ Limited provisions for review of their decisions by the Supreme Court inhibited to some extent, but did not prevent, the exercise of the Court's essential constitutional functions.

The Act of 1789 gave the district courts:¹⁶¹ (1) exclusive jurisdiction over admiralty cases¹⁶² (including seizures under federal laws of impost, navigation, or trade made on waters navigable from the sea by vessels of more than ten tons), seizures under federal law on land or shallower waters,¹⁶³ and suits for penalties and forfeitures incurred under the laws of the United States;¹⁶⁴ (2) jurisdiction concurrent with state and circuit courts over suits at law by the United States for more than \$100¹⁶⁵ and suits by aliens for torts in violation of treaties or international law;¹⁶⁶ (3) jurisdiction concurrent with circuit courts over suits against consuls and vice consuls¹⁶⁷ and over minor federal crimes.

The circuit courts were given jurisdiction to try federal criminal cases,¹⁶⁸ and civil cases at common law or in equity involving more than \$500 where there was diversity of citizenship¹⁶⁹ or where the United States was a plaintiff.¹⁷⁰ The circuit courts could also review

¹⁶⁰ The jurisdiction of the lower federal courts in federal question litigation was confined to cases falling into one of the limited categories specified in the act. See text accompanying notes 161-71 *infra*. Most private civil litigation involving such questions, therefore, could be initiated only in state courts, subject to ultimate review by the United States Supreme Court. See text accompanying notes 130-43 *supra*.

¹⁶¹ Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76.

¹⁶² But "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

¹⁶³ After 1789 state and circuit courts were given concurrent jurisdiction from time to time in some cases involving such matters. Act of July 6, 1797, ch. 11, § 20, 1 Stat. 532; Act of March 8, 1806, ch. 14, § 2, 2 Stat. 354; Act of March 3, 1815, ch. 101, § 1, 3 Stat. 244.

¹⁶⁴ See statutes cited note 163 *supra*.

¹⁶⁵ Circuit court jurisdiction was concurrent only in suits by the United States involving more than \$500.

¹⁶⁶ Circuit court jurisdiction was concurrent only in suits to which an alien was a party involving more than \$500.

¹⁶⁷ Circuit court jurisdiction was concurrent only in suits involving more than \$500 to which an alien was a party and over minor federal crimes. The circuit courts had exclusive jurisdiction over the trial of consuls and vice consuls for serious federal crimes.

¹⁶⁸ This jurisdiction was concurrent with district courts as to minor offenses. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78.

¹⁶⁹ That is, in a suit between a citizen and noncitizen of the forum state, or to which an alien was a party. Jurisdiction was concurrent with state courts in these cases, which could be filed originally in a circuit court or removed from a state court upon timely motion by a defendant who was an alien or a noncitizen. In cases where title to land was in dispute, such removal could also be obtained by a party claiming under a grant from a nonforum state if the other party claimed under a grant of the forum state. Act of Sept. 24, 1789, ch. 20, § 12, 1 Stat. 80.

¹⁷⁰ When the United States was a plaintiff, jurisdiction was concurrent with state and district courts.

district court decisions—by writ of error in civil cases involving more than \$50 and by appeal in admiralty cases involving more than \$300.¹⁷¹

Section 22 of the act gave the Supreme Court jurisdiction to review by writ of error final circuit court judgments in civil cases brought in such courts either originally, by removal from a state court, or by *appeal* from a district court, where the matter in dispute exceeded the value of \$2,000.¹⁷² The Court was also authorized to issue writs of habeas corpus, prohibition, mandamus, scire facias, and other necessary writs, in the exercise of its appellate jurisdiction.¹⁷³ In 1802 Congress supplemented this jurisdiction by providing for certification to the Supreme Court, at either party's request, of questions of law upon which a circuit court was divided.¹⁷⁴ The provision was enacted to avoid impasses in the circuit courts, which were limited to two permanently assigned judges—one from the Supreme Court and the other from a district court.¹⁷⁵

¹⁷¹ Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84. See note 77 *supra*.

¹⁷² Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84. In 1803 the Supreme Court was authorized to review by *appeal* circuit court judgments in equity, admiralty, and prize cases involving more than \$2,000. Act of March 3, 1803, ch. 40, § 2, 2 Stat. 244. See also note 77 *supra*. For discussion of the subsequent transition from mandatory review by writ of error or appeal to discretionary review by certiorari, see FRANKFURTER & LANDIS, *op. cit. supra* note 128, at 190-91; HART & WECHSLER 42-47, 1313-21.

¹⁷³ Act of Sept. 24, 1789, ch. 20, §§ 13, 14, 1 Stat. 81. See *Ex parte Republic of Peru*, 318 U.S. 578 (1943). The writ of habeas corpus is discussed in text accompanying notes 202-19 *infra*.

¹⁷⁴ Act of April 29, 1802, ch. 31, § 6, 2 Stat. 159. The section also provided that "nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, farther [*sic*] proceedings can be had without prejudice to the merits: and provided also, that imprisonment shall not be allowed, nor punishment in any case be inflicted, where the judges of the said court are divided in opinion upon the question touching the said imprisonment or punishment." Act of April 29, 1802, ch. 31, § 6, 2 Stat. 160-61. The enactment was not applicable to the circuit court for the District of Columbia, *Ross v. Triplett*, 16 U.S. (3 Wheat.) 600 (1818), but all final judgments of that court in which the matter in dispute exceeded \$100 were reviewable by the Supreme Court by writ of error or appeal. Act of Feb. 27, 1801, ch. 15, § 8, 2 Stat. 106.

¹⁷⁵ Act of April 29, 1802, ch. 31, §§ 4-5, 2 Stat. 157. *Cf.* Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 74; Act of March 2, 1793, ch. 22, § 2, 1 Stat. 334; Act of April 10, 1869, ch. 22, § 2, 16 Stat. 44. See *United States v. Rider*, 163 U.S. 132 (1896); *United States v. Daniels*, 19 U.S. (6 Wheat.) 542, 548 (1821); Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 11-12 (1949). In circuit court cases coming from a district court, § 5 of the statute directed that judgment be entered in accordance with the opinion of the Supreme Court justice certification in such cases thus apparently being unavailable. Act of April 29, 1802, ch. 31, § 5, 2 Stat. 158. There appears to have been no case which considered the effect of this requirement upon the provision for certification in § 6. In 1872 Supreme Court review by writ of error or appeal was authorized without regard to jurisdictional amount upon certification of a circuit court division, after judgment was first entered in accordance with the opinion of the presiding judge. Act of June 1, 1872, ch. 255, § 1, 17 Stat. 196. See Moore & Vestal, *supra* at 13-14; note 187 *infra*. But in 1875 the previous method of certification was restored in criminal cases. REV. STAT. §§ 651, 697 (1875). In 1891 the newly created circuit courts of appeal were authorized to certify questions to the Supreme Court at their discretion in lieu of previous procedures. Act of March 3, 1891, ch. 517, § 6, 26 Stat. 828. See 28 U.S.C. §§ 1254(3), 1255(2) (1958); SUP. CT. R. 28, 29; Moore & Vestal, *supra* at 14-17. Circuit courts could still certify questions of jurisdiction directly to the Supreme Court. Act of March 3, 1891, ch. 517, § 5, 26 Stat. 827.

Cases Originating in District Courts

Section 22 made no provision for Supreme Court review of those cases originating in district courts which were reviewable in the circuit courts by writ of error but not by appeal.¹⁷⁶ Although no case had raised the issue, Congress removed this hiatus in 1803 by providing "that from all final judgments or decrees in any of the district courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the circuit court" ¹⁷⁷ As indicated in *United States v. Goodwin*,¹⁷⁸ this legislation together with section 22 of the Act of 1789 permitted Supreme Court review of any district court civil case involving more than \$2,000, if it was first taken by appeal to a circuit court.

Twenty years later, however, in *United States v. Nourse*,¹⁷⁹ the Supreme Court, strangely misconstruing the *Goodwin* case, declared, in a discussion unnecessary to its decision, that the quoted provision of the Act of 1803 referred solely to admiralty cases.¹⁸⁰ Under this

¹⁷⁶ See notes 77, 171-72 *supra*. See also Warren, *supra* note 144, at 102.

¹⁷⁷ Act of March 3, 1803, ch. 40, § 2, 2 Stat. 244. See note 172 *supra*. The same provisions, along with an alternative provision for direct Supreme Court review of district court decisions in cases at common law involving more than \$2,000, had been included in the Act of Feb. 13, 1801, ch. 4, 2 Stat. 98, known as the "Law of the Midnight Judges," passed by the Federalists in the last days of the Adams administration, but that legislation was repealed the following year by the incoming Antifederalists. Act of March 8, 1802, ch. 8, 2 Stat. 132. See *United States v. Goodwin*, 11 U.S. (7 Cranch) 107 (1812); FRANKFURTER & LANDIS, *op. cit. supra* note 128, at 24-30; HART & WECHSLER 42.

¹⁷⁸ 11 U.S. (7 Cranch) 107 (1812). The Court refused to review a circuit court decision unfavorable to the United States in a case brought to the circuit court by writ of error from a district court, but indicated that Supreme Court review would have been available under the Act of 1803 if the circuit court review had been by appeal instead of by writ of error. *Id.* at 110-11. Supreme Court review thus remained unavailable if the losing party in a district court case chose to proceed in the circuit court by writ of error rather than by appeal—an improbable choice though one which was made, perhaps inadvertently, by the government in *Goodwin*—but any conflict in interpretation of federal law created by a circuit court decision in such a case could be ultimately resolved by Supreme Court review of a case presenting the same issue brought in a circuit court either originally, by removal from a state court, or by appeal from a district court.

¹⁷⁹ 31 U.S. (6 Pet.) 470 (1832).

¹⁸⁰ In the *Nourse* case, a district court had permanently enjoined federal treasury officials from seizing property under the Act of May 15, 1820, which authorized the Treasury Department to issue a warrant for seizure of the property of any federal officer who failed to account for government funds, but allowed the officer, upon furnishing a bond, to obtain an injunction from a district court staying the seizure, with the right of appeal to a circuit court if the injunction were denied or thereafter dissolved. The government appealed first to a circuit court, which affirmed, and then to the Supreme Court which held that the circuit court lacked jurisdiction because the Act of 1820 controlled the right to appeal in such proceedings to the exclusion of the Act of 1803 and did not authorize a government appeal from the granting of the injunction. *Id.* at 491-95. After thus deciding the case, the Court went on to declare: "The act of 1803, which provides, that, 'from all final judgments or decrees in any of the district courts, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the circuit court;' made no alterations in the law of 1789, as it respects

interpretation all district court cases except those in admiralty would have again been reviewable only by writ of error in the circuit courts and not at all in the Supreme Court.

The Court did not consider the constitutional implications of such a jurisdictional limitation, which would have impeded resolution of conflicting interpretations of federal law in nonadmiralty cases within the exclusive jurisdiction of the district courts.¹⁸¹ Where district court jurisdiction was concurrent with state or circuit courts, conflicting lower court interpretations of federal law could be ultimately re-

appeals to the circuit court, except in reducing the sum or matter in controversy from three hundred to fifty dollars, on which such appeals shall be allowed. The above provision had no reference to a chancery proceeding, as the district court is not vested with chancery powers; and the words, 'final judgments or decrees,' refer to judgments and decrees in cases of admiralty and maritime jurisdiction. It, therefore, follows, that in such cases only, has the law authorized an appeal from the district to the circuit court." The proceedings brought in the district court under the Act of 1820 were for equitable relief, and the quoted remarks were primarily concerned with the right of appeal in that kind of case. To the extent that they interpreted the Act of 1803 as being inapplicable to equitable actions, these remarks may be regarded as alternate grounds of decision. But the statement that "final judgments or decrees" referred only to admiralty cases was not only dictum but apparently was made because the Court overlooked the district courts' jurisdiction in cases at law, see text accompanying notes 161-67 *supra*, to which the act also clearly applied. The *Nourse* holding, that the 1820 act (now 31 U.S.C. §§ 506-73 (1958)) did not permit a government appeal from the granting of such an injunction, restricted the availability of Supreme Court review in that situation, but conflicting interpretations of federal law by lower federal courts could be ultimately resolved by Supreme Court review of a judgment denying or dissolving an injunction or of a judgment in an action at law brought by the government to recover funds withheld by a federal officer, involving the disputed issue. See Act of March 3, 1797, 1 Stat. 512, as amended, 31 U.S.C. § 505 (1958).

¹⁸¹ That is, suits to enforce seizures under federal law on land or shallow waters and suits for penalties and forfeitures incurred under the laws of the United States. See notes 161 and 163 *supra* and accompanying text. From the *Nourse* dictum to the subsequent statutory change, see text accompanying note 182 *infra*, no case presented the issue. There were other possible avenues for Supreme Court resolution of conflicting decisions on these matters. Actions to replevy property seized by federal officers without statutory authority and actions for damages against such officers could be brought in state courts, *Buck v. Colbath*, 70 U.S. (3 Wall.) 334 (1865); *Teal v. Felton*, 53 U.S. (12 How.) 284 (1851); *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1 (1817); see *Scranton v. Wheeler*, 179 U.S. 141 (1900); HART & WECHSLER 389, and presumably when diversity of citizenship existed. In addition, since the Act of 1789 did not confer chancery powers upon the district courts, see *United States v. Nourse*, 31 U.S. (6 Pet.) 470 (1832), Equity R. 32, 33, 20 U.S. (7 Wheat.) xvii (1822), equitable actions to enjoin federal seizures, penalties, and forfeitures (other than petitions by federal officers for injunctions under the Act of 1820, see note 180 *supra*) could be brought, if at all, only in state courts, or in circuit courts when the necessary diversity of citizenship existed. Whether state courts could have entertained such actions is disputed. See *Brooks v. Dewey*, 313 U.S. 354 (1941); *Keely v. Sanders*, 99 U.S. 441, 443 (1878); *Lewis Publishing Co. v. Wyman*, 152 Fed. 200 (E.D. Mo. 1907); *In re Turner*, 119 Fed. 231 (S.D. Iowa 1902); HART & WECHSLER 389-90; *Bishop, Judicial Control of Federal Officers*, 9 COLUM. L. REV. 397, 407 (1909); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 358 (1930); 36 MICH. L. REV. 1344 (1938). But the diversity jurisdiction of the circuit courts might have extended to such cases despite inhibitions on state courts. Thus, conflicting interpretations of the federal law on seizures, penalties, and forfeitures by lower federal courts during this short period might have been ultimately resolved, in some instances, by Supreme Court review of a state or circuit court suit for replevin, damages, or possibly an injunction against a federal officer involving the disputed issue.

solved by Supreme Court review of cases presenting the disputed issues originating in state or circuit courts.

The narrow construction given the Act of 1803 by the *Nourse* dictum was manifestly contrary to the clear language and purpose of that act, and eight years later Congress put the matter at rest by extending Supreme Court review to circuit court judgments in civil cases brought by writ of error from a district court.¹⁸²

The Value of the Matter in Dispute

Section 22 of the Act of 1789 also limited Supreme Court review of circuit court cases to those in which the value of the matter in dispute exceeded \$2,000, and statutory provisions specifying minimum jurisdictional amounts were retained for over a century,¹⁸³ their apparent purpose being to contain the Court's work load¹⁸⁴ and to protect small litigants from costly appeals.¹⁸⁵ The limitation was never applicable to petitions in the Supreme Court for habeas corpus¹⁸⁶ nor to certification of questions upon a division in a circuit court,¹⁸⁷ and review without regard to jurisdictional amount was extended to many other cases by later acts.¹⁸⁸ These jurisdictional restrictions were upheld by

¹⁸² Provided the value of the matter in dispute exceeded \$2,000. Act of July 4, 1840, ch. 43, § 3, 5 Stat. 393. See Warren, *supra* note 144, at 102.

¹⁸³ See Act of Feb. 16, 1875, ch. 77, § 3, 18 Stat. 316, increasing the amount to \$5,000; Act of March 3, 1891, ch. 517, § 6, 26 Stat. 829, reducing the amount to \$1,000. With respect to the District of Columbia, see note 174 *supra*.

¹⁸⁴ The first Judiciary Act required the Supreme Court Justices to sit also as circuit court judges, thereby imposing a heavy work load upon them, and the problem of alleviating that load was given early consideration by Congress. See FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 14-30 (1928).

¹⁸⁵ While the Judiciary Act was pending, Madison introduced in the House a proposed constitutional amendment denying the Supreme Court appellate jurisdiction in any case involving less than \$1,000. He stated in support of the amendment that many citizens were under "the greatest apprehension that persons of opulence would carry a cause from the extremities of the Union to the Supreme Court, and thereby prevent the due administration of justice. . . ." 1 ANNALS OF CONG. 755 (1789). See Warren, *supra* note 144, at 118-19. The amendment did not pass the Senate, *id.* at 125-31, but the \$2,000 limitation in § 22 of the Judiciary Act apparently reflected the same purpose. See 1 ANNALS OF CONG. 802-03, 818-19 (1789). That purpose, however, was vitiated to some extent by the provisions of § 25 of the act, which authorized the Supreme Court to review state court decisions without regard to jurisdictional amount. Not only was the expense of defending a Supreme Court appeal equally burdensome whether the case originated in a state or federal court, but parties to state court litigation were subjected to the expense of two appeals—first to the state appellate court, then to the Supreme Court—whereas parties to a federal circuit court case involving less than \$2,000 could obtain no appellate review at all. The distinction probably reflected congressional attitudes as to the importance of a final decision by a federal tribunal in cases involving federal questions.

¹⁸⁶ See Act of Sept. 24, 1789, ch. 20, § 16, 1 Stat. 81; *Ex parte* Bollman, 8 U. S. (4 Cranch) 75 (1807).

¹⁸⁷ See text accompanying notes 174-75 *supra*. Under the acts of 1872 and 1875, see note 175 *supra*, after certification of a circuit court division and entry of judgment in accordance with the opinion of the presiding judge, Supreme Court review by writ of error or appeal was available as to the questions certified, without regard to jurisdictional amount. *United States v. Rider*, 163 U.S. 132, 136-38 (1896).

¹⁸⁸ See statutes collected in HART & WECHSLER 44-45. In the Act of March 3, 1891, ch. 517, § 5, 26 Stat. 826, review without regard to jurisdictional amount was

the Supreme Court on the principle of *Durousseau* that the affirmative grant of jurisdiction in cases exceeding the minimum necessarily implied a denial of jurisdiction in cases below that amount, but without discussion of the effect of such limitations on its essential constitutional functions.¹⁸⁹

The requirement interfered to some extent with the Court's function of maintaining the supremacy of federal law over conflicting state law, by preventing review of unanimous circuit court decisions on the constitutionality of state statutes or the conduct of state officials¹⁹⁰ where less than the necessary amount was involved. But ultimate Supreme Court consideration of these issues could be obtained in a subsequent case which involved the required amount, resulted in a circuit court division, or originated in a state court.¹⁹¹ In 1891 Congress provided for direct Supreme Court review of circuit and district court judgments in all such cases and exempted them from the minimum amount requirement.¹⁹²

The Court's function of resolving conflicting interpretations of federal law by lower federal courts was also impeded in cases involving less than the jurisdictional amount; but here, too, the issue could be ultimately resolved by review of a subsequent case which involved the required amount, resulted in a circuit court division,¹⁹³ or originated in a state court.

In 1925 Congress further facilitated the full exercise by the Court of its constitutional functions by removing all monetary limitations on

extended to jurisdictional questions and to cases involving prize, construction or application of the Constitution, the constitutionality of any law of the United States, the validity or construction of a treaty, the constitutionality of a state law, and conviction of a capital or otherwise infamous crime. See HART & WECHSLER 1313-14.

¹⁸⁹ *Cross v. Burke*, 146 U.S. 82 (1892); *Railroad Co. v. Grant*, 98 U.S. 398 (1878); *Merrill v. Petty*, 83 U.S. (16 Wall.) 338 (1872); *De Krafft v. Barney*, 67 U.S. (2 Black) 704 (1862); *Pratt v. Fitzhugh*, 66 U.S. (1 Black) 271 (1861); *Barry v. Mercein*, 46 U.S. (5 How.) 103 (1847); cf. *Kurts v. Moffitt*, 115 U.S. 487 (1885); *Lee v. Lee*, 33 U.S. (8 Pet.) 44 (1834).

¹⁹⁰ Before 1875 the circuit courts could acquire jurisdiction in such cases only if there was the necessary diversity of citizenship or the United States was a party; after 1875 general federal question jurisdiction was applicable. Act of March 3, 1875, ch. 137, 18 Stat. 470.

¹⁹¹ The requirement was never applicable to review of state court cases. See notes 130-31, 185 *supra*.

¹⁹² Act of March 3, 1891, ch. 517, §§ 5-6, 26 Stat. 827. See HART & WECHSLER 1313-14.

¹⁹³ In cases below the jurisdictional amount, certification of a circuit court division was sometimes *pro forma*, *i.e.*, without a real difference of opinion, to permit Supreme Court review of important issues. See *United States v. Fisher*, 109 U.S. 143 (1883); *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847); cf. *United States v. Gleason*, 124 U.S. 255 (1888). The Supreme Court, however, from time to time indicated disapproval of certification where a real division of opinion did not exist. See *Waterville v. Van Slyke*, 116 U.S. 699 (1886); *Webster v. Cooper*, 51 U.S. (10 How.) 54 (1850); *Nesmith v. Sheldon*, 47 U.S. (6 How.) 41 (1848); *White v. Turk*, 37 U.S. (12 Pet.) 238 (1838); *Saunders v. Gould*, 29 U.S. (4 Pet.) 392

its jurisdiction.¹⁹⁴ These limitations had not prevented the Court from performing those functions because the minimum amounts imposed were reasonable. Excessive minimums, however, would have seriously obstructed the essential work of the Court.

Criminal Cases

Section 22 of the Act of 1789¹⁹⁵ made no provision for Supreme Court review in criminal cases. Thus a criminal conviction in a lower federal court could not be reviewed by the Supreme Court on either writ of error or appeal; nor, under *United States v. More*,¹⁹⁶ could the government obtain Supreme Court review of a lower federal court judgment dismissing a criminal indictment.

In *More*, the Court held that it could not review a decision of the circuit court for the District of Columbia sustaining a demurrer to a criminal indictment, because the affirmative grant of jurisdiction to review civil cases implied a denial of jurisdiction to review criminal cases. Eighty-seven years later, in *United States v. Sanges*,¹⁹⁷ the Court ruled that it had no authority to review a circuit court judgment quashing a criminal indictment on constitutional grounds, despite a provision in the Act of 1891 for review of cases involving the construction or application of the Constitution, because only an explicit statutory declaration could overcome the long tradition against government appeal of judgments favoring defendants in criminal cases.¹⁹⁸ Constitutional issues were not considered.¹⁹⁹

In omitting provision for review of circuit court decisions in criminal cases, the Act of 1789 reflected then-existing English practice, which allowed a defendant no appeal from a conviction of felony and allowed the Crown no appeal from a decision in his favor.²⁰⁰ Despite this statutory restriction, however, avenues for Supreme Court review in federal criminal cases were available to resolve conflicting interpretations of federal law.

(1830); Moore & Vestal, *supra* note 175, at 12-14. See also *United States v. Rider*, 163 U.S. 132, 137-38 (1896); *Dow v. Johnson*, 100 U.S. 158, 163-64 (1879). After 1891 certification of questions to the Supreme Court was at the discretion of the circuit court of appeals. See note 175 *supra*.

¹⁹⁴ Act of Feb. 13, 1925, ch. 229, 43 Stat. 936.

¹⁹⁵ Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84.

¹⁹⁶ 7 U.S. (3 Cranch) 159 (1805). See Act of Feb. 27, 1801, ch. 15, § 8, 2 Stat. 106; text accompanying note 85 *supra*.

¹⁹⁷ 144 U.S. 310 (1892).

¹⁹⁸ See also *United States v. Dickinson*, 213 U.S. 92 (1909). The constitutional provision against double jeopardy is not applicable because a defendant has not been placed in jeopardy when the indictment against him is dismissed without trial.

¹⁹⁹ The Court's statement in *United States v. Sanges* that "the appellate jurisdiction of this court rests wholly on the acts of Congress" appears to have been simply an acknowledgement that its appellate jurisdiction was defined by existing legislation. 144 U.S. at 319.

²⁰⁰ See *United States v. Sanges*, 144 U.S. 310 (1892); PLUNKNETT, A CONCISE HISTORY OF THE COMMON LAW 213 (1956).

Certification of questions occurred frequently in criminal cases.²⁰¹ A persistent conflict in lower court decisions could be expected to result, sooner or later, in a divergence of opinion among the judges on one of the circuit courts, permitting the question to be certified to the Supreme Court for resolution.

Supreme Court review in federal criminal matters could also be obtained by a petition for habeas corpus to test, in some respects, the legality of confinement. Pursuant to section 14 of the act of 1789,²⁰² a person confined under color of federal authority and denied release by a circuit court could petition the Supreme Court for a writ of habeas corpus, and for the common-law writ of certiorari to bring up the record of the court below.²⁰³ In such proceedings, civil in nature, the

²⁰¹ See *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Reese*, 92 U.S. 214 (1875); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); *United States v. Bailey*, 34 U.S. (9 Pet.) 267 (1835); *United States v. Randenbush*, 33 U.S. (8 Pet.) 288 (1834); *United States v. Brewster*, 32 U.S. (7 Pet.) 164 (1833); *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833); *United States v. Kelly*, 24 U.S. (11 Wheat.) 417 (1826); *United States v. Daniel*, 19 U.S. (6 Wheat.) 542 (1821); *United States v. Holmes*, 18 U.S. (5 Wheat.) 412 (1820); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820); *United States v. Tyler*, 11 U.S. (7 Cranch) 285 (1812). See also *United States v. Rider*, 163 U.S. 132, 136-38 (1896); *United States v. Sanges*, 144 U.S. 310, 319-23 (1891).

²⁰² Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81: "That all the before-mentioned courts of the United States, shall have power to issue writs of . . . *habeas corpus*, and all other writs not specially provided for by statute, which shall be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court . . . shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. *Provided*, That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." The writ was made available in 1833 to persons confined for acts done pursuant to federal law or under the authority of a federal court, Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634, and in 1842 to aliens confined for acts done under color of foreign authority or international law, Act of Aug. 29, 1842, ch. 257, 5 Stat. 539.

²⁰³ *Ex parte Yenger*, 75 U.S. (8 Wall.) 85 (1868); *In re Kaine*, 55 U.S. (14 How.) 103 (1852); *Ex parte Watkins*, 32 U.S. (7 Pet.) 568 (1833); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806); *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795). Circuit court decisions *granting* release on habeas corpus were reviewable by the Supreme Court only on a certificate of division in the circuit court. See *Ex parte Mulligan*, 71 U.S. (4 Wall.) 2 (1866). See also *Ex parte Tim Tong*, 108 U.S. 556 (1883), discussing the special requirements of the Act of 1878. If such a decision conflicted with a prior one, not reviewed by the Supreme Court, denying habeas corpus in a similar situation, the conflict could be ultimately resolved, even without a certificate of division, by Supreme Court review of a subsequent decision like the first. If the circuit courts thereafter granted habeas corpus in all such cases, the conflict would disappear. A certificate of division also provided the only method for review of circuit court decisions granting or denying release on habeas corpus in cases involving confinement outside the scope of the federal habeas corpus statutes, such as child custody cases based on diversity of citizenship. See *Barry v. Mercein*, 46 U.S. (5 How.) 103 (1847); text accompanying note 91 *supra*; *cf. De Krafft v. Barney*, 67 U.S. (2 Black) 704 (1862). The jurisdiction of the lower federal courts to entertain petitions for habeas corpus in such diversity cases has never been confirmed by the Supreme Court. See *Matters v. Ryan*, 249 U.S. 375 (1919); *In re Burrus*, 136 U.S. 586, 593-94 (1890). In *Barry v. Mercein*, *supra*, the jurisdictional amount requirement forestalled Supreme Court consideration of this issue. Habeas corpus proceedings

Court exercised an appellate jurisdiction independently of section 22,²⁰⁴ although the minimum amount requirement of section 22 prevented review *by writ of error* of circuit court decisions granting or denying release on habeas corpus.²⁰⁵ In 1867 Congress made the federal writ available to all persons restrained of their liberty in violation of the Constitution, laws, and treaties of the United States, and in addition authorized *an appeal* to the Supreme Court from circuit court judgments granting or denying the writ.²⁰⁶ Jurisdiction to hear such appeals, withdrawn in 1868,²⁰⁷ was restored in 1885,²⁰⁸ but the Court's authority to issue the original writ continued unimpaired.²⁰⁹

in state courts involving federal questions could be reviewed by writ of error in the Supreme Court without regard to jurisdictional amount, see *Kurtz v. Moffitt*, 115 U.S. 487, 489, 498 (1885), thereby providing a further avenue for ultimate Supreme Court resolution of any conflicting circuit court interpretations of federal law in the diversity cases. Ordinarily, of course, such cases did not present issues of federal law. See *Barry v. Mercein*, *supra*. As to later legislation authorizing Supreme Court review by appeal of circuit court habeas corpus decisions, see text accompanying notes 206-08 *infra*.

²⁰⁴ *Ex parte Yerger*, *supra* note 203; *In re Kaine*, *supra* note 203; *Ex parte Bollman*, *supra* note 203; *cf. In re Metzger*, 46 U.S. (5 How.) 176 (1847).

²⁰⁵ *De Krafft v. Barney*, 67 U.S. (2 Black) 704 (1862) (release denied by circuit court of District of Columbia); *Pratt v. Fitzhugh*, 66 U.S. (1 Black) 271 (1861) (release granted by circuit court); *Barry v. Mercein*, 46 U.S. (5 How.) 103 (1847) (release denied by circuit court). See *Cross v. Burke*, 146 U.S. 82 (1892) (release denied by circuit court); *Kurtz v. Moffitt*, 115 U.S. 487 (1885). *But cf. Lee v. Lee*, 33 U.S. (8 Pet.) 44 (1834), where the denial of habeas corpus by the circuit court to petitioners, who claimed to be illegally held in slavery, was reviewed by writ of error in the Supreme Court, jurisdiction being upheld on the ground that the great value of freedom to petitioners was sufficient to meet the minimum amount requirement.

²⁰⁶ Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. Before the Act of 1867, a person restrained of his liberty in violation of the federal constitution, laws, and treaties by anyone not acting under color of federal authority could petition for habeas corpus or other appropriate remedy only in a state court, but upon denial of relief by the highest available state court he could obtain Supreme Court review by writ of error under § 25 of the Act of Sept. 24, 1789, ch. 20, 1 Stat. 85.

²⁰⁷ Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44. See note 102 *supra*; text accompanying notes 97-104 *supra*.

²⁰⁸ Act of March 3, 1885, ch. 353, 23 Stat. 437.

²⁰⁹ See *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 515 (1863); text accompanying notes 104-07 *supra*. U.S. CONST. art. I, § 9, para. 2, authorizes suspension of the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it." Relying on this provision, Lincoln in 1861 authorized the commanding general of the Army to suspend the writ along any military line between Philadelphia and Washington. 7 MESSAGES AND PAPERS OF THE PRESIDENTS 3219 (1897). In *Ex parte Merryman*, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861), Taney, sitting as a circuit judge, declared that Lincoln's order was unconstitutional because only Congress could suspend the writ. He cited: (a) Marshall's statement in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), that "if at any time, the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so"; (b) Story's statement that "as the power is given to congress to suspend the writ of habeas corpus in cases of rebellion or invasion, . . . the right to judge, whether exigency had arisen must exclusively belong to that body," 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1336, at 209 (1833); (c) the English rule that the writ may be suspended only by an act of Parliament, 1 BLACKSTONE, COMMENTARIES *136; (d) the location of the provision in article I of the Constitution, which deals with the powers of the legislature; and (e) Jefferson's action in referring to Congress the question of suspension of the

Habeas corpus is not a substitute for a writ of error in criminal cases.²¹⁰ It has often been described as available only to test the jurisdiction of the court ordering the confinement.²¹¹ But the scope of the inquiry in federal courts has extended beyond strict jurisdiction over person and subject matter to the constitutionality of the penal statute as drawn and as applied in the particular case,²¹² the constitutionality of the procedures leading to conviction,²¹³ the existence of probable cause to support a commitment order before trial,²¹⁴

writ at the time of the Burr conspiracy. Attorney General Bates vigorously defended the President's action, 10 ATT'Y GEN. OPINIONS 74, 85-89 (1861), arguing that the President could not be compelled to respond to a writ of habeas corpus concerning persons detained by his order, that power to suspend the writ is a necessary part of his war powers, that Marshall's statement in *Bollman* meant simply that Congress could suspend *statutory authorization* for issuance of the writ if the public safety required it, and that the President had the power to deny to individuals the *privilege* of the writ in appropriate circumstances without having to wait for congressional action. See CORWIN, CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 315 (1953); RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 118-39 (2d rev. ed. 1951). In the Act of March 3, 1863, 12 Stat. 755, Congress expressly provided "that, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof." The act further provided that lists of all citizens of the United States held as prisoners under the authority of the President, otherwise than as prisoners of war, should be furnished within twenty days after arrest to the judges of the circuit and district courts in whose jurisdiction such persons resided (provided the administration of federal law by such courts remained unimpaired) and that if any person thus held was not indicted by a grand jury he should on petition to the court be discharged at the termination of the grand jury session, subject to conditions which the court might impose. By proclamation of Sept. 15, 1863, 13 Stat. 734, Lincoln, citing the statute as authority, suspended the privilege of the writ as to prisoners of war, spies, aiders and abettors of the enemy, members of the armed forces, draft evaders, and persons guilty of military offenses or subject to military law. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Supreme Court held that this proclamation was limited by the provisions of the Act of 1863 and that the federal courts retained jurisdiction under that act to issue the writ on behalf of citizens not held as prisoners of war and not indicted by a grand jury within the time specified. *Id.* at 114-17, 130-31.

²¹⁰ *McNally v. Hill*, 293 U.S. 131 (1934); *Ex parte Siebold*, 100 U.S. 371 (1879); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830).

²¹¹ *Harlan v. McGourin*, 218 U.S. 442, 448 (1910); *Ex parte Siebold*, *supra* note 210, at 377.

²¹² *In re Coy*, 127 U.S. 731, 758 (1888); *Ex parte Yarbrough*, 110 U.S. 651, 654 (1884); *Ex parte Siebold*, 100 U.S. 371, 376 (1879). See Note, 35 COLUM. L. REV. 404 (1935).

²¹³ *Waley v. Johnston*, 316 U.S. 101 (1942); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

²¹⁴ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *Ex parte Jones*, 96 Fed. 200 (C.C.N.D. Ala. 1899). Habeas corpus is also available to test, in some respects, the legality of other preliminary orders resulting in confinement. With regard to extradition to a foreign country, see *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Fernandez v. Phillips*, 268 U.S. 311 (1925); *In re Kaine*, 55 U.S. (14 How.) 103 (1852). Concerning interstate rendition, see *Biddinger v. Commissioner of Police*, 245 U.S. 128 (1917); *Drew v. Thaw*, 235 U.S. 432 (1914); *Roberts v. Reilly*, 116 U.S. 80 (1885). As to denial of bail, see *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795); HART & WECHSLER 1240. Concerning removal to another district for trial, see *Tinsley v. Treat*, 205 U.S. 20 (1907); although 28 U.S.C. § 2253 (1958), eliminated appeals from district court habeas corpus proceedings testing the legality of removal, a petition for the writ in a higher court will apparently still lie under 28 U.S.C. § 2241 (1958), as amended, 28 U.S.C. § 2241 (Supp. 1959).

and in a few "exceptional circumstances" to important questions of law.²¹⁵

Thus, despite the limitation on appellate review of federal criminal cases, a petition to the Supreme Court for habeas corpus after denial of release by a circuit court provided a method for ultimate resolution of conflicting lower court decisions on jurisdictional and constitutional issues. Although nonjurisdictional questions of statutory interpretation could not ordinarily be raised by habeas corpus after conviction,²¹⁶ under the rule of *Ex parte Bollman*²¹⁷ they could

²¹⁵ Since appellate review became available in federal criminal cases, the Supreme Court ordinarily has refused to review by habeas corpus jurisdictional or constitutional issues which could have been raised on appeal. See *Sunal v. Large*, 332 U.S. 174 (1947); *Glasgow v. Moyer*, 225 U.S. 420 (1912); *Toy Toy v. Hopkins*, 212 U.S. 542 (1909); *In re Lincoln*, 202 U.S. 178 (1906); cf. *Waley v. Johnston*, 316 U.S. 101 (1942); *Johnson v. Zerbst*, 304 U.S. 458 (1938). In "exceptional circumstances," however, jurisdictional and constitutional issues which could have been raised on appeal have been reviewed by habeas corpus, the exceptional circumstances sometimes being a conflict between state and federal authority. Thus, in *Bowen v. Johnson*, 306 U.S. 19 (1939), the Supreme Court permitted review by habeas corpus of defendant's contention that his conviction in a federal court of a crime committed in a national park was invalid because the state retained criminal jurisdiction over the area. And see *Matter of Heff*, 197 U.S. 488 (1905), as explained in *In re Lincoln*, 202 U.S. 178, 183 (1906).

The Supreme Court has also justified on "jurisdictional" grounds the use of habeas corpus to review important nonconstitutional issues which were not strictly jurisdictional. See *Ex parte Hudgins*, 249 U.S. 378 (1919); *In re Sawyer*, 124 U.S. 200 (1888); *Ex parte Rowland*, 104 U.S. 604 (1882). In *Hudgins*, the Court reviewed on habeas corpus a district court order holding petitioner in contempt because his testimony as a witness was perjured. Holding that perjury per se was not contempt, the Court stated: "In view of the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected, we are of opinion that the case is an exception to the general rules of procedure to which we have at the outset referred, and therefore that our duty exacts that we finally dispose of the questions in the proceeding for habeas corpus which is before us." 249 U.S. at 384-85. See *Aderhold v. Schiltz*, 73 F.2d 381 (5th Cir. 1934); *White v. Levine*, 40 F.2d 502 (10th Cir. 1930); *Mackey v. Miller*, 126 Fed. 161 (9th Cir. 1903); *Waugh v. Aderholt*, 52 F.2d 702 (N.D. Ga. 1931). See also *McNalley v. Hill*, 293 U.S. 131 (1934). In *Sunal v. Large*, 332 U.S. 174, 181-84 (1947), see note 218 *infra*, the Supreme Court acknowledged that "exceptional circumstances" could justify review by habeas corpus of important questions of law which were neither jurisdictional nor constitutional. See also *Manning v. Biddle*, 14 F.2d 518 (8th Cir. 1926); note 218 *infra*.

²¹⁶ *In re Coy*, 127 U.S. 731 (1888); *Ex parte Parks*, 93 U.S. 18 (1876); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830). See *Knewel v. Egan*, 268 U.S. 442 (1925); *Goto v. Lane*, 265 U.S. 393 (1924); *In re Eckert*, 166 U.S. 481 (1897); *Cohen v. Biddle*, 12 F.2d 704 (8th Cir. 1926). *But cf.* *Aderhold v. Schiltz*, 73 F.2d 381 (5th Cir. 1934); *White v. Levine*, 40 F.2d 502 (10th Cir. 1930); *Manning v. Biddle*, 14 F.2d 518 (8th Cir. 1926); *Mackey v. Miller*, 126 Fed. 161 (9th Cir. 1903); *Waugh v. Aderholt*, 52 F.2d 702 (N.D. Ga. 1931), all holding that habeas corpus was available to release a defendant convicted under an indictment which did not charge an offense within the meaning of the pertinent statutes. *McNally v. Hill*, 293 U.S. 131 (1934), supports this position. See Note, 35 COLUM. L. REV. 404, 409 (1935).

²¹⁷ 8 U.S. (4 Cranch) 75 (1807). The Supreme Court, on petition for habeas corpus to test the validity of a circuit court order committing the defendants for trial on treason charges, released the defendants because the evidence presented in the circuit court did not show a violation of the treason statute. The Court was of the opinion that the evidence probably showed a violation of a statute prohibiting

be raised by a petition for habeas corpus before trial questioning the existence of probable cause to support a commitment order. In addition, Supreme Court review by habeas corpus of a nonappealable conviction and confinement resulting from an interpretation of federal law that conflicted with other decisions might have been allowed on the basis of what later decisions have called "exceptional circumstances."²¹⁸ The issue of conflicting lower court decisions was not raised by the cases in which the Court refused to review nonjurisdictional questions

the instigation of military expeditions against countries at peace with the United States but concluded that the defendants could be tried for such an offense only in the place where they were apprehended. In further confirmation of its authority to resolve questions of statutory interpretation in such habeas corpus proceedings, the Court remarked concerning the latter offense: "The act of congress, which the prisoners are supposed to have violated, describes as offenders those who begin or set on foot, or provide, or prepare, the means for any military expedition or enterprise to be carried on from thence against the dominions of a foreign prince or state with whom the United States are at peace. There is a want of precision in the description of the offense which might produce some difficulty in deciding what cases would come within it. But several other questions arise, which a court consisting of four judges finds itself unable to decide, and therefore, as the crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged." *Id.* at 135-36. See also note 214 *supra* and text accompanying note 81 *supra*.

²¹⁸ See cases cited note 215 *supra*. In *Manning v. Biddle*, 14 F.2d 518 (8th Cir. 1926), the defendant had been convicted of aiding and abetting the commission of a crime by Eckert. On appeal Eckert's conviction of the crime was reversed on the ground that the acts charged were not illegal. Defendant, who had not appealed his conviction, petitioned for habeas corpus. The court of appeals ordered him released because his indictment charged an "impossible offense" under the laws of the United States: *i.e.*, aiding and abetting acts which were not crimes. The court stated: "There seems to be presented a rare and unusual instance of misapprehension of the law, leading, in the case of Eckert, to errors properly corrected on review, but proceeding in this case much farther to long imprisonment and heavy penalty inflicted upon the relator without any legal justification or sanction in law Save for the writ prayed for, no legal remedy of any kind exists. On account of the extraordinary situation presented by the record, the obvious absence of just cause for detention of the prisoner, and the lack of any other remedy, we think the trial court erred in denying the writ of habeas corpus." *Id.* at 519.

Sunal v. Large, 332 U.S. 174 (1947), also lends support to the suggestion. *Sunal* and *Kulick* had been convicted of resisting army induction, the trial court having refused to consider their claim of improper classification by the draft board. They did not appeal. After the time for appeal had passed, the Supreme Court in another case ruled that such defenses should be considered by the trial court. On petition for habeas corpus the Court held these circumstances were not sufficiently "exceptional" to justify review, because the defendants chose not to appeal. The Court did indicate, however, that an unsuccessful appeal followed by a change in the rule probably would have constituted "exceptional circumstances." Douglas, for the majority, stated: "Of course, if *Sunal* and *Kulick* had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an error of law in excluding the defense which was tendered. That error did not go to the jurisdiction of the trial court These registrants had available a method of obtaining the right to defend their prosecutions under § 11 on that ground. They did not use it. And since we find no exceptional circumstances which excuse their failure, *habeas corpus* may not now be used as a substitute." *Id.* at 181-84. The two courts of appeals below thought the facts presented "exceptional circumstances" justifying review by habeas corpus, as did three Supreme Court dissenters.

on petition for habeas corpus after conviction, and the contention was never presented to the Court.²¹⁹

The restrictions upon Supreme Court review in criminal cases have also given way before the legislative trend toward increasing the availability of the Court as a tribunal of last resort. In 1891 a writ of error to the Supreme Court was authorized in "cases of conviction of a capital or otherwise infamous crime."²²⁰ Such review was later made discretionary and extended to all criminal convictions.²²¹ Finally, provision was made for review, upon government request, of decisions dismissing an indictment or information, arresting a judgment of conviction, or sustaining a motion in bar by a defendant who had not been placed in jeopardy.²²²

TESTING THE VALIDITY OF JURISDICTIONAL LIMITATIONS

Despite some impediments in early statutes, the Supreme Court from its inception has performed the essential constitutional functions of maintaining the uniformity and supremacy of federal law. These functions provide a standard for testing the validity of legislation limiting the Court's appellate jurisdiction. Even though the legislation may narrowly restrict the procedures for obtaining Supreme Court review, constitutional limitations are not transgressed so long as the Court remains available ultimately to resolve conflicts between state and federal law and conflicting interpretations of federal law by lower courts. But legislation that precludes Supreme Court review in every case involving a particular subject is an unconstitutional encroachment on the Court's essential functions. Thus, the 1957-1958 bill which proposed to eliminate Supreme Court review in all cases involving one of five enumerated subjects²²³ was clearly invalid. Its enactment would

²¹⁹ See cases cited at note 216 *supra*.

²²⁰ Act of March 3, 1891, ch. 517, § 5, 26 Stat. 826. A writ of error in capital cases had been authorized in 1889. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655. "Infamous crimes" was interpreted to include all offenses punishable by penitentiary confinement in *In re Claasen*, 140 U.S. 200 (1891). See Act of Jan. 20, 1897, ch. 68, 29 Stat. 492, amending Act of March 3, 1891, ch. 517, 26 Stat. 826. In 1885 Congress again authorized an appeal to the Supreme Court from circuit court judgments granting or denying habeas corpus. Act of March 3, 1885, ch. 353, 23 Stat. 437, amending REV. STAT. § 764 (1875). See note 102 *supra*.

²²¹ 28 U.S.C. §§ 1254, 1291 (1958). A conviction by military court martial resulting in confinement, however, is ultimately reviewable in the Supreme Court only through habeas corpus to test "jurisdiction" in the expanded sense (including constitutional issues); if the conviction results in loss of pay or reduction in rank without confinement, Supreme Court review of "jurisdictional" issues can be obtained only through an action for back pay. See *Wales v. Whitney*, 114 U.S. 564 (1885).

²²² Act of March 2, 1907, ch. 2564, 34 Stat. 1246; 28 U.S.C. §§ 1254, 1291, 3731 (1958). See FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 113-19 (1928). As to appeals in habeas corpus proceedings, see note 220 *supra*, and 28 U.S.C. §§ 2241, 2253, 1254 (1958), as amended, 28 U.S.C. § 2241 (Supp. 1959).

²²³ See text accompanying note 8 *supra*.

have allowed the courts of each state to determine for themselves the constitutionality of state statutes and regulations on the specified subjects and would have permanently foreclosed Supreme Court resolution of inconsistent state and federal decisions concerning the application of the federal constitution and laws to such matters. The exceptions and regulations clause does not give Congress power thus to negate the essential functions of the Supreme Court.