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MAJORITARIAN CONSTRAINTS ON JUDICIAL REVIEW:
CONGRESSIONAL CONTROL OF SUPREME COURT
JURISDICTION *

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MAJORITARIANISM AND JUDICIAL REVIEW

DOES THE CONSTITUTION PERMIT CONGRESS to so constrict the appellate jurisdiction of the United States Supreme Court as to impair the federal judicial power to declare state and national regulation unconstitutional? The answer turns on the scope of constitutional checks on that power. It is too late in the day to challenge the constitutionality of the power itself. *Marbury v. Madison*,¹ has been accepted for 179 years because it is sound.

Of course, given the inevitable uncertainty of communication, alternative interpretations can be constructed for the constitutional provisions that most strongly support the judicial power to invalidate federal as well as state regulation — article III extending the judicial power of the United States to all cases “arising under this Constitution”² and article VI declaring that “[T]his Constitution and the laws of the United States . . . made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby any thing in the Constitution or Laws of any State to the Contrary notwithstanding.”³

But the *Marbury* interpretation is confirmed by the context of a constitution, and promptly adopted amendments,⁴ designed to protect minorities, including individuals, from oppressive majority action⁵ (and of numerous Convention statements recognizing Supreme Court authority to constitutionally invalidate state and

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
2. U.S. CONST. art. III, § 2.
3. U.S. CONST. art. VI, para. 2.
4. U.S. CONST. amends. I-X.
5. See THE FEDERALIST No. 51 (J. Madison).

federal legislation).⁶ Judicial review effectuates the minority-protection function. Minorities are scarcely shielded from excessive majoritarian legislation by a constitution that appoints as their guardians the elected representatives of the majority.⁷ If all governmental action should be subject to constitutional constraints and the majoritarian branches ought not define the constraints on their own power, that function must be performed by the judiciary, "the least dangerous branch."⁸

The minority protections and their enforcement by a non-majoritarian institution are not, however, inconsistent with majoritarian democracy. The majority has imposed these limitations on its own short-term authority, and appointed a nonmajoritarian institution to enforce them, for its own long-term benefit. Such limitations ameliorate 1) the discontent, disruption, breakdown of communication, and the consequent inefficiency in public and private ordering, that result from excessive inhibition of minority action, and 2) the trauma of a shift from majority to minority status: because majorities are but shifting coalitions, a majority today may be a minority tomorrow.⁹

But the power becomes countermajoritarian if transformed into the power to substitute judicial for legislative short term social-policy preferences. To inhibit that transformation, exercise of the power is constrained by checks and balances, formal and informal. As a consequence, judicial constitutional interpretations cannot long survive without majoritarian acceptance or acquiescence.

AVAILABLE CHECKS ON JUDICIAL REVIEW

The Supreme Court has the power of neither purse, sword, nor administrative control; its membership reflects executive choice; its size is subject to legislative variation,¹⁰ and enforcement of its orders may require executive action. It lacks a political constituency, and it is subject to social pressures from the community of which it is a part.¹¹

6. 1 M. FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION 21, 73-80, 97-104, 108-10, 298-99, 391, 589 (1911).

7. Ratner, *Constitutions, Majoritarianism, and Judicial Review: The Function of a Bill of Rights in Israel and the United States*, 26 AM. J. COMP. L. 373, 374 (1978).

8. See THE FEDERALIST No. 78 (A. Hamilton); A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

9. Ratner, *supra* note 7, at 382.

10. See note 42 *infra*.

11. See A. BICKEL, *supra* note 8, at 24-26, 37-42, 254-72.

To circumvent a decision of the Court, legislatures may persist with new enactments that more effectively articulate and implement the regulatory purpose. Professional and media criticism may intensify. Congress may adopt a resolution of disapproval or censure¹² and even resort to impeachment.¹³ Normal attrition or an increase in size may bring new members less committed to old doctrine. The Constitution may be amended not only by a national supermajority but by a uniformly-distributed minimal majority: approval by two-thirds of both houses, or by a convention requested by two-thirds of the states, and ratification by three-fourths of the states all can be achieved through the electoral action of a bare majority in the requisite number of congressional districts and states. Ultimately, a majoritarian convention, though unauthorized by the existing constitution, may adopt and implement a new constitution, as when, in the "second American revolution", the Constitutional Convention replaced the Articles of Confederation with the Constitution.¹⁴

These constraints are not ineffective. The infrequency of their use confirms the strength rather than the weakness of the system.¹⁵ Four Supreme Court decisions have been negated by constitutional amendments.¹⁶ An 1870 resignation and an increase in the size of

12. After termination of the war with Mexico, the House of Representatives resolved that "the war was unnecessarily and unconstitutionally begun by the President." CONG. GLOBE, 30th Cong., 1st Sess. 95 (1848). A resolution of censure for unconstitutional action could also be directed at the Supreme Court.

13. See R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 49 n.5 (1978); Ervin, *Separation of Powers: Judicial Independence*, 35 LAW. & CONTEMP. PROBS. 108 (1970); Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969).

Federal judges hold their offices "during good behavior." U.S. CONST. art. III, § 1. They are also "civil Officers of the United States" and as such are subject to removal from office "on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." *Id.* art. II, § 4. L. TRIBE, *supra*, at 49 n.5. The content of "good behavior" may be "derived from the definition of high crimes and misdemeanors, or left to the discretion of the Senate when sitting as a court of impeachment." Kurland, *supra*, at 697.

14. ARTICLES OF CONFEDERATION art. XIII (1778). "And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State." *Id.*

15. *But see* Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 845-58 (1974).

16. *Id.* at 849. Amendment XI (1795) negating *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); Amendment XIV, § 1 (1868) negating *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); Amendment XVI (1913) negating *Pollack v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); Amendment XXVI (1971) negating *Oregon v. Mitchell*, 400 U.S. 112 (1970).

the Court produced a prompt overruling of *Hepburn v. Griswold*¹⁷ in the *Legal Tender Cases*.¹⁸ The economic policy decisions of the Court in the thirties yielded to widespread criticism culminating in a presidential proposal to add more Justices.¹⁹ Though Congress rejected that proposal, the threat remained.²⁰ Ensuing retirements and replacements solidified the new interpretations.

The viability of Supreme Court decisions depends on persuasiveness and respect. The Court's essentially educational function is to persuade the majority that its own interests are better served by subordinating short-term legislative goals to long-term constitutional goals. Traditional deference to the written Constitution, and to the Supreme Court as its interpreter, may induce at least tentative acquiescence for a critical period of discussion, testing, and further litigation.²¹ That process has ratified the one person-one vote standard for legislative apportionment²² and the invalidation of de jure segregation.²³ It has induced a retreat from invalidation of capital punishment.²⁴ De facto segregation, abortion, and voluntary school prayers are still in the crucible.

THE JURISDICTIONAL CHECK: EXCEPTIONS AND REGULATIONS V. ESSENTIAL FUNCTIONS

A profound check on the Supreme Court's power of judicial review is derived by some from the second sentence of article III, section 2, which provides: "In all the other cases before mentioned [i.e. in all cases within the judicial power of the United States] the

17. 75 U.S. (8 Wall.) 603 (1870).

18. 110 U.S. 421 (1884). See also *Choper, supra* note 15, at 851.

19. See Stern, *The Commerce Clause and the National Economy*, 1933-1946, 59 HARV. L. REV. 645, 677 (1946).

20. *Id.* at 681-82.

21. See Ratner, *supra* note 7, at 383.

22. See cases collected in W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 1414-44 (5th ed. 1980).

23. *Id.* at 1264-1333.

24. Compare *Furman v. Georgia*, 408 U.S. 238 (1972) (an arbitrarily and randomly administered death penalty violates eighth amendment) with *Gregg v. Georgia*, 428 U.S. 153 (1976) (a particularized statute specifying 10 aggravating circumstances for imposition of the death penalty does not, under all circumstances, violate the eighth amendment). See also *Lockett v. Ohio*, 438 U.S. 586 (1978) (state must consider all mitigating factors before imposing death penalty); *Coker v. Georgia*, 433 U.S. 584 (1977) (death sentence for rape violates eighth amendment); *Roberts v. Louisiana*, 431 U.S. 633 (1977) (mandatory death penalty without consideration of mitigating factors violates eighth amendment); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (mandatory death penalty violates eighth amendment).

Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."²⁵ That clause, it is asserted, authorizes Congress to withhold from the Court appellate jurisdiction to decide constitutional cases,²⁶ and from time to time congressional legislation has been introduced, though not passed, that would eliminate Supreme Court jurisdiction over appeals originating in state courts or involving particular subjects with constitutional significance.²⁷

The language, though not the holdings, of some earlier Supreme Court cases suggests that the exceptions and regulations clause gives Congress unlimited control over the appellate jurisdiction of the Court.²⁸ But such an interpretation is not consistent with the constitutional plan of judicial review, and modern judicial approval is doubtful.²⁹ Checks inhibit but do not stultify constitutional au-

25. U.S. CONST. art. III, § 2, para. 2.

26. See C. BLACK, DECISIONS ACCORDING TO LAW 17-19, 37-39 (1981); Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 257 (1973); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1004-05 (1963).

27. See, e.g., state court appeals: 7 CONG. DEB. 532 (1831); subversive activity: S. 2646, 85th Cong., 1st Sess. (1957); school segregation: S. 3467, 85th Cong., 2d Sess. (1958); voluntary school prayers: S. 481, 97th Cong., 1st Sess. (1981); H.R. 2347, 97th Cong., 1st Sess. (1981); H.R. 1335, 97th Cong., 1st Sess. (1981); H.R. 989, 97th Cong., 1st Sess. (1981); H.R. 865, 97th Cong., 1st Sess. (1981); H.R. 408, 97th Cong., 1st Sess. (1981); H.R. 325, 97th Cong., 1st Sess. (1981); H.R. 72, 97th Cong., 1st Sess. (1981); racial school assignments: H.R. 869, 97th Cong., 1st Sess. (1981); school busing for racial integration: S. 1147, 97th Cong., 1st Sess. (1981); S. 1005, H.R. 1180, 97th Cong., 1st Sess. (1981); H.R. 1079, 97th Cong., 1st Sess. (1981); H.R. 761, 97th Cong., 1st Sess. (1981); H.R. 340, 97th Cong., 1st Sess. (1981); H.R. 327, 97th Cong., 1st Sess. (1981).

See also Elliott, *Court-Curbing Proposals in Congress*, 33 NOTRE DAME LAW. 579 (1958); Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States*, 47 AM. U. L. REV. 1, 25-34 (1961).

28. See, e.g., *The Francis Wright*, 105 U.S. 381, 386 (1881) ("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."); *Daniels v. Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1865) ("But it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects, it is wholly the creature of legislation."); *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847) ("By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred on it by act of Congress."); *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321, 327 (1796) ("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."). See also 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 453 (1833).

29. See Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 OR. L. REV. 3 (1973); Forkosch, *The Exceptions & Regulations Clause of Article III & a Person's Constitutional Rights: Can the Latter be Limited by Congressional Power Under the Former?*, 72 W. VA. L. REV. 238 (1970); Hart, *The Power of Congress to Limit the Jurisdiction of Federal*

thority, and plenary congressional control over the Court's appellate jurisdiction could negate the Court's crucial constitutional role.

With plenary control over the appellate jurisdiction of the Supreme Court and over the jurisdiction of lower federal courts, derived from the power to create them, Congress may constitutionally do the following:

1) Eliminate the appellate jurisdiction of the Supreme Court and abolish the lower federal courts, thereby reducing the judiciary of the United States to one court exercising original jurisdiction when a state or a ranking foreign diplomat is a party.³⁰

2) Deprive the Supreme Court of appellate jurisdiction and other federal courts of all jurisdiction over cases involving the constitutionality of state statutes or the conduct of state officials, thus leaving final determination to the highest court of each state.

Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1365 (1953); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Sedler, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 20 U. PITT. L. REV. 99 (1958); Strong, *Rx for a Nagging Constitutional Headache*, 8 SAN DIEGO L. REV. 246 (1971); Speech by Senator Thomas Kuchel, Shall the Federal Judiciary Become Subservient to the Congress, 88th Cong., 2d Sess., 110 CONG. REC. 172, Sept. 9, 1964; *Hearings on the Limitation of Appellate Jurisdiction of the United States Supreme Court Before a Subcomm. of the Senate Committee on the Judiciary*, 85th Cong., 1st & 2d Sess., pt. 2, at 39-70 (1958) (testimony of J.L. Rauh) [hereinafter cited as *Hearings*]; Glidden Co. v. Zdanok, 370 U.S. 530 (1960) (Douglas, J., dissenting) ("There is a serious question whether the *McCardle* case [upholding a narrow limitation on the Supreme Court's appellate jurisdiction] would command a majority today"). See also Roberts, *Now Is The Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 3-4 (1949); Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 Bos. U.L. REV. 1 (1951).

But see Wechsler, *supra* note 26, at 1005 ("Congress has broad power to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court's appellate jurisdiction."); Van Alstyne, *supra* note 26, at 233 (the exceptions clause vests a plenary power in Congress to control the jurisdiction of the Supreme Court); Black, *supra* note 26, at 16 ("I would despair of defending the judicial power, . . . if I believed that the national Congress had no choice but to let the courts perpetually enjoy such power as the courts themselves might hold to be theirs. My own position is . . . that Congress does have very significant power over the courts' jurisdiction). See also *Flast v. Cohen*, 392 U.S. 83, 109 (1968) (Douglas, J., concurring) ("As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of § 2, Art. III."); *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 665 (1949) (Frankfurter, J., dissenting) ("Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred"); *Yakes v. United States*, 321 U.S. 414, 472-73 (1944) (Rutledge, J., dissenting) ("Congress has plenary power to confer or withhold appellate jurisdiction").

30. U.S. CONST. art. III, § 2, para. 2: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be Party, the Supreme Court shall have original Jurisdiction." *Id.*

3) Deprive the Supreme Court of appellate jurisdiction over cases arising under the Constitution, laws, or treaties of the United States, thereby designating the federal courts of appeals and the highest state courts as the final interpreters of federal law.

Such legislation would distort the nature of the federal union by permitting each state to decide for itself the scope of its authority under the Constitution. It would reduce the supreme law of the land to a hodgepodge of sometimes inconsistent decisions by fifty state supreme courts and/or twelve federal courts of appeals. It would thereby fragment and vitiate constitutional protections.

A critical aspect of the federal union is disclosed by the declaration in article VI that the federal Constitution, laws, and treaties shall be the supreme law of the land, binding on the judges in every state notwithstanding contrary provisions of state law. This constitutional mandate requires *one* federal law throughout the land and the subordination of state to federal law in the event of a conflict. The purposes of judicial review cannot be effectively implemented without uniformity as well as supremacy of federal law.

Standing alone, however, the supremacy clause is only an exhortation. A tribunal with nationwide authority is needed to interpret and apply the supreme federal law.³¹ That 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.

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 instrument for implementing the supremacy clause. As such, its essential functions under the Constitution are: 1) ultimately to resolve inconsistent or conflicting interpretations of federal law, and particularly of the Constitution, by state and federal courts; 2) to maintain the supremacy of federal law, and particularly the Constitution, when it conflicts with state law or is challenged by state authority. Interpreted in this context, the exceptions and regula-

31. See 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 7, 14-15 (rev. ed. 1932).

[A] supremacy of the Constitution and laws of the Union "without a supremacy in the exposition and execution of them would be as much a mockery as a scabbard put into the hands of a soldier without a sword in it. I have never been able to see that, without such a view of the subject, the Constitution itself could be the supreme law of the land; or that the uniformity of the Federal authority throughout the parties to it could be preserved; or that, without this uniformity, anarchy and disunion could be prevented."

Id. at 14-15, quoting James Madison.

tions clause means, as Henry Hart first suggested: with such exceptions and under such regulations as Congress may make, not inconsistent with the essential functions of the Supreme Court under this Constitution.³²

These functions are necessarily flexible. A Supreme Court decision is not required in every case that presents a constitutional question. Some inconsistency is inevitable, and immediate correction is not always imperative. But an avenue must remain open to permit ultimate resolution by the Supreme Court of persistent conflicts between the Constitution and state 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, thereby altering the constitutional relationship of nation and state and seriously undermining the effectiveness of judicial review.

JURISDICTIONAL RESTRAINTS AND PRIOR DECISIONS

The precedential effect of pre-existing Supreme Court decisions would scarcely ameliorate the divisive impact of such jurisdiction-obstructing legislation. *Stare decisis* is not constitutionally compelled,³³ and the deference accorded higher courts by lower courts

32. See Hart, *supra* note 29, at 1364-65:

A. You would treat the Constitution, then, as authorizing exceptions which engulf the rule, even to the point of elimination of 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 a measure of a necessary reservation, that it seems to be 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.

For the first full exposition of the essential functions rationale, see Ratner, *supra* note 29.

33. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-411 (1931) (Brandeis, J., dissenting) ("*Stare decisis* is not . . . a universal, inexorable command . . . [I]n cases involving the Federal Constitution . . . [t]he Court bows to the lessons of experience and the force of better reasoning"); *Hertz v. Woodman*, 218 U.S. 205, 212 (1910) ("The rule of *stare decisis* . . . is not inflexible. Whether it shall be followed or departed from is a question entirely

is primarily a consequence of appellate jurisdiction. Congress may not overrule Supreme Court decisions, but a plenary exceptions and regulations check permits Congress to give other judges the last word. Those judges, bound by oath to support the Constitution and subject to no higher review, would, like Supreme Court Justices, be constrained only by conscience and majoritarian checks.

Even in the presence of higher appellate jurisdiction, the obligation of a lower court to follow a prior appellate decision may depend on the lower court's perception of the higher court's continued commitment to that decision. Confronted with a United States Supreme Court case of dubious cogency, Justice (later Chief Justice) Roger Traynor of the California Supreme Court stated: "[W]e are not required to forecast the overruling of the [Supreme Court] case and to act on that basis [T]his case is . . . distinguishable" ³⁴ In the absence of Supreme Court appellate jurisdiction (and particularly after a change in the Court's personnel), the no-longer-lower courts of last resort could justifiably perceive their constitutional role as an independent one, with prior Supreme Court decisions being perhaps persuasive or worthy of stare decisis respect but not per se controlling. ³⁵

The proposition that Supreme Court decisions are somehow frozen into the Constitution by removal of the Court's appellate jurisdiction attempts to preserve the essential functions of the Court

within the discretion of the court, which is again called upon to consider a question once decided"); *The Passenger Cases*, 48 U.S. (7 How.) 282, 470 (1849) (Taney, C.J., dissenting) ("The construction of the Constitution is always open to discussion when it is supposed to have been founded in error").

34. *Atkinson v. Superior Court*, 49 Cal. 2d 338, 348, 316 P.2d 960, 966 (1957).

35. Compare Sager, note 29, at 40-41 and Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 925-26 (1982) with Rice, *Congress and Supreme Court Jurisdiction*, 27 VILL. L. REV. 959, 984-85 (1982).

Professor Sager suggests that state courts of last resort might disregard their "constitutional obligation" [presumably to follow Supreme Court decisions] in response to the "lewd wink" from Congress implicit in withdrawal of Supreme Court jurisdiction. Sager, *supra* note 29, at 41, 68-69. Professor Rice approves state court disregard of "erroneous" Supreme Court decisions. Rice, *supra*, at 984. Professor Redish asserts that *Marbury v. Madison*, the obligation of state courts under the supremacy clause to enforce the Constitution, and the lack of congressional power to overrule Supreme Court decisions, establish the "unwavering obligation [of state courts] to enforce pre-existing constitutional holdings of the Supreme Court," despite congressional removal of that Court's appellate jurisdiction. Redish, *supra*, at 925-26. But the state court obligation under the supremacy clause to uphold "this Constitution" and *Marbury's* emphasis on the judicial oath to support the Constitution (taken by all judges) point in another direction.

despite plenary exceptions and regulations control, but only appellate jurisdiction preserves those functions.³⁶

THE FUNCTION OF THE EXCEPTIONS AND REGULATIONS CLAUSE

A nonplenary interpretation does not nullify the exceptions and regulations clause nor destroy its function to check, but not checkmate, the judicial review power of the Supreme Court.

Contrasting with its original jurisdiction, the Court's appellate jurisdiction 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, and extending to cases which originate in state as well as federal courts. The clause authorizes Congress to provide orderly procedures for invoking that jurisdiction and to adjust, without stultifying, it from time to time in response to social needs and political attitudes.

Detailed procedures may be specified. Review of diversity cases may be eliminated. Review of factual issues may be narrowly circumscribed.³⁷ Review of less consequential cases may be eliminated by a minimum limit on the amount in controversy, provided the same federal issues can arise in cases that exceed the limit.³⁸ Perhaps "expert" appellate courts may be established with final authority to interpret federal legislation in a specialized area such as taxation or patents.³⁹

Decisions on critical constitutional issues may be expedited, or postponed to a politically more propitious time. In 1802 the Anti-federalist Congress, by eliminating the current term of the Supreme Court, delayed a constitutional attack on a newly enacted statute

36. See *Gordon v. United States*, 117 U.S. 697, 699-701 (1864); *Ableman v. Booth*, 62 U.S. 506, 517-18 (1858); *Dodge v. Woolsey*, 59 U.S. 331, 350-51, 355 (1855); *Cohens v. Virginia*, 19 U.S. 264, 416-18 (1821); *Martin v. Hunter's Lessee*, 14 U.S. 304, 347-48 (1806).

37. See R. BERGER, *CONGRESS V. THE SUPREME COURT* 285-96 (1969); Brant, *supra* note 19; Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 3 (1962), contending that the congressional exceptions and regulations power extends only to Supreme Court review of factual issues. This interpretation would invalidate all portions of the first and subsequent judiciary acts that regulate any aspect of non-factual review. See Sager, *supra* note 29, at 30-32.

38. See Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84 (at least \$2,000 in dispute). See also text at note 98 *infra*.

39. For proposals to create "expert" intermediate federal appeals courts, see Kennedy, *The Federal Courts Improvement Act: A First Step for Congress to Take*, 63 JUD. 9 (1979) (taxation and patents).

repealing a prior increase in the number of federal judges.⁴⁰ In 1868 Congress delayed a constitutional attack on the Reconstruction Acts by removing Supreme Court jurisdiction to hear habeas corpus "appeals," thereby nullifying a pending appeal and requiring the appellant to petition the Court anew for an original writ.⁴¹

Nor is a nonplenary exceptions and regulations clause inconsistent with congressional power to increase the number of Justices. That check on judicial review does not impair the Court's essential functions. Congress may legislate an increase, but the President must appoint, though not without Senate approval. The appointees may be attuned to the medley of current majoritarian views, but their constitutional decisions are scarcely predictable. The Court's ability to maintain the supremacy and uniformity of the Constitution is unaffected.⁴²

"PLAIN MEANING" V. CONSTITUTIONAL PURPOSE

It is said that the plain meaning of the exceptions and regulations clause allows Congress to impair the Court's essential functions.⁴³ In fact, a narrower interpretation is supported by dictionaries and treatises in use at the time of the Convention. They indicate that in a legal context neither an exception nor a regulation can destroy the essential characteristics of the subject to which it applies.⁴⁴

40. Act of Apr. 29, 1802, ch. 31, § 1, 2 Stat. 156, *repealing in part* Act of Sept. 24, 1789, ch. 20, § 1, 2 Stat. 132, *repealing* Act of Feb. 13, 1801, ch. 4, § 1, 2 Stat. 89. See C. WARREN, *supra* note 31, at 222-23 (1922); Choper, *supra* note 15, at 849.

41. See *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1869); notes 92-95 and accompanying text *infra*.

42. Congressional authority to fix the size of the Court is derived from article III, section 1 of the Constitution, which provides for a Supreme Court but does not specify its size, and the second portion of the necessary and proper clause giving Congress power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, para. 18.

The change in structure and function that would result from a very large increase in the size of the Court, e.g., to 100 members, would probably transcend the kind of judicial institution implied by "one Supreme Court" and the judicial power conferred upon it.

43. See Redish, *supra* note 36, at 906-07. Professor Redish insists that neither the essential functions of the Court nor constitutional convention statements confirming those functions should be considered in interpreting an exceptions and regulations clause that is "seemingly unambiguous", "explicit", "relatively unambiguous", and one of "the admittedly rare case where no ambiguity can be found." *Id.* at 907-08.

44. See ASH, *DICTIONARY OF THE ENGLISH LANGUAGE* (1775); DYCHE, *NEW GENERAL ENGLISH DICTIONARY* (1781); JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (1775); PERRY, *ENGLISH DICTIONARY* (1805); WEBSTER, *AMERICAN*

Language, particularly constitutional language, however, is inherently ambiguous, and constitutional issues cannot be effectively resolved by mechanically defining the ambiguous words of those who may not have anticipated the later problem. The exceptions and regulations clause has no plain meaning. It must be interpreted in the context of the overriding constitutional plan. Thus interpreted, it does not confer upon Congress unlimited control over the Court's appellate jurisdiction.

Others admonish that the exercise of such plenary congressional power, while valid, would violate the "spirit of the Constitution,"⁴⁵ i.e., would be "anticonstitutional but nonetheless constitutional."⁴⁶ But the spirit of the Constitution, i.e., the plan and goals of the Constitution, is the essence of the Constitution and sustains the less expansive interpretation. The reasons for anticonstitutionality support unconstitutionality.

NONUNIFORM CONSTITUTIONAL INTERPRETATION

It has been suggested that not all constitutional provisions require a uniform national interpretation—that in some areas the federal system can operate effectively with state interpreted federal constitutional controls.⁴⁷ The constitutional system of federalism permits the states to experiment with common law and enacted policy: to choose local solutions, observe the results, and make

DICTIONARY OF THE ENGLISH LANGUAGE (1828). A treatise in common use 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 concur, 1. This exception must be by apt words. 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 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.

SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES 77-80 (5th ed. 1784).

45. See Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1041 (1982).

46. See Proceedings of American Enterprise Institute, Conference on "Judicial Power in the U.S.: What Are the Appropriate Constraints?" (Comments of Prof. Paul Mishkin, Oct. 2, 1981, unpublished report available in the Villanova Law Library).

47. See Bator, *supra* note 45, at 1038-39; Proceedings of American Enterprise Institute, *supra* note 46.

desired changes. It does not authorize state variations in the "supreme law of the land".

The Constitution makes us one nation. It is the symbol of our shared purposes. If interpretation of that overriding document, which manifests our agreement on long term associational values, varies from state to state, respect for and confidence in the document is undermined. The nature of our governmental structure and its implications for all citizens become indistinct. Uncertainty and discontent proliferate.

Particularly indistinct are the attributes of the constitutional limitations that do not require a uniform national interpretation. Do those limitations include due process, equal protection, and the first amendment? Are constitutional purposes implemented if each state decides for itself the constitutionality of public school prayers, public school segregation, sanctions for inaccurate criticism of state officials, disproportionate legislative districts, and anti-abortion laws? Answers are likely to be parochial, i.e., to turn on whether existing Supreme Court resolutions are consistent with local attitudes.

As final deciders of "nonuniform" constitutional issues, state supreme courts also require checks and balances. Presumably state legislatures, as well as Congress, may express disapproval of unpopular decisions. May the legislatures also withdraw jurisdiction, leaving the ultimate decision to lower state courts? Can a state constitutional amendment change a state court interpretation of the national constitution? Or is a national constitutional amendment required? What is the effect of state judicial elections on federal minority protection? Transfer of ultimate constitutional authority to state supreme courts fragments the judicial review function and remedies neither overreaching nor underreaching exercise of judicial review power.

AN ESSENTIAL-FUNCTIONS VARIATION

The essential-functions interpretation of the exceptions and regulations clause has received extensive support from commentators⁴⁸—most recently from Professor Lawrence Sager, whose

48. See Brant, *supra* note 29, at 28; Forkosh, *supra* note 29, at 257; Kuchel, *supra* note 29; Sager, *supra* note 29, at 43-57, 67-68; Sedler, *supra* note 29, at 115; Strong, *supra* note 29, at 263, 273. See also *Hearings, supra* note 29; Tweed, *supra* note 29, at 40-41; W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 616 (1953); J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, ANTECEDENTS AND BEGINNINGS TO 1801*, 240-43 (P. Freund gen. ed.) (1971). But see C. BLACK, *supra* note 26; Van Alstyne, *supra* note 26; Wechsler, *supra* note 26. Professor Redish states "the 'essential functions' thesis is little more than constitutional wishful thinking, and it is thus not surprising that leading

Harvard Law Review article⁴⁹ favors a narrowed version of that interpretation. The Supreme Court must remain available, he suggests, to review state court, though not federal court, constitutional decisions, unless Congress "has made other adequate provisions for . . . federal judicial review of these state court decisions".⁵⁰ Ultimate resolution by a federal appellate court, he emphasizes, will 1) protect the Constitution from debilitating and varying state court interpretations,⁵¹ and 2) reduce the constitutional tension that results from constitutional decisions by state judges who, unlike federal judges, are not insulated from political pressures by the tenure and compensation provisions of article III.⁵²

Ignored, however, is the lack of uniformity that would result from diverse and inconsistent final constitutional decisions by lower federal courts.⁵³ Twelve courts of appeal can provide substantial disparity in constitutional interpretation, and a Congress dissatisfied with Supreme Court doctrine might opt for the uncertainty of conflicting lower federal court resolutions.⁵⁴ The confusion, discontent, and lack of respect for the Constitution engendered by such uncertainty would vitiate judicial review and undermine the federal system.

The appellate jurisdiction of the Supreme Court alone preserves both the supremacy and uniformity of the Constitution,⁵⁵ while supporting initial constitutional adjudication by state judges who lack the tenure and compensation protections of article III.

LEGISLATIVE HISTORY

A. Numerous statements at the Constitutional Convention recognized the Supreme Court's appellate jurisdiction as constitu-

commentators have long rejected it", citing Professors Wechsler and Van Alstyne. Redish, *supra* note 35, at 911. He neglects to mention those who have supported this thesis over the past two decades.

49. Sager, *supra* note 29.

50. *Id.* at 56-57, 60.

51. *Id.* at 52, 54-57.

52. *Id.* at 61-68.

53. Congress can correct conflicting judicial interpretations of federal law but not of the Constitution.

54. A National Court of Appeals, proposed to relieve the work load of the Supreme Court, see Sager, *supra* note 49, at 56; P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973) (1981 Supp. 2-6), would also create constitutional nonuniformity unless ultimate Supreme Court resolution of conflicting constitutional interpretations remained available.

55. See note 36 *supra*; notes 79-82 *infra*; notes 87-91 and accompanying text *infra*.

tionally essential to maintain the uniformity and supremacy of the federal constitution and laws.⁵⁶

1) In discussing proposals to give the Supreme Court a veto over congressional legislation and Congress a veto over state legislation, proponents and opponents alike agreed that the Court would have ultimate authority to decide the constitutionality of state and federal legislation.⁵⁷

2) In successfully opposing the constitutional establishment of inferior federal courts, Rutledge of South Carolina, a strong states-rights advocate, urged that "the state tribunals might and ought to be left in all cases to decide in the first instance; the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of judgments."⁵⁸

3) 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."⁵⁹

B. After designating the Constitution, laws, and treaties of the United States as the supreme law of the land,⁶⁰ the Convention specifically extended the jurisdiction of the Supreme Court to cases

56. See Ratner, *supra* note 29, at 161-65; Sager, *supra* note 29, at 46-47, 49-50. But see Redish, *supra* note 35, at 908-13, rejecting as "speculative" or "useless" evidence, Convention statements confirming the role of the Court to review state constitutional decisions, because the statements: 1) refer to the "judicial branch" or "the judges," rather than to the Supreme Court, 2) do not *obligate* Congress to use the Court as a check on the states, and 3) do not expressly mention the exceptions and regulations clause. *Id.* at 908-09. But: 1) both Madison and Rutledge specifically referred to the Supreme Court, see notes 58 & 59 and accompanying text *infra*; other statements were in response to proposals that the Supreme Court act as a "Council of Revision", see note 57 and accompanying text *infra*, and article III, as proposed and ultimately adopted, created only the Supreme Court. See 2 M. FARRAND, *supra* note 6, at 186, 576, 600-61; Ratner, *supra* note 29, at 163-65. 2) The statements explicated a constitutionally necessary Supreme Court role and contemplated no congressional discretion to negate that role; the argument that Congress was not obligated by the statements to use the Court as a check on the states assumes that Congress was given plenary control over the Court's jurisdiction, i.e., assumes the fact in issue. 3) The statements identified the role of the Supreme Court under the proposed constitution, which included article III and the exceptions and regulations clause.

57. See 1 M. FARRAND, *supra* note 6, at 21, 54, 97-104, 108-10, 138-40. See also Ratner, *supra* note 29, at 162-63.

58. 1 M. FARRAND, *supra* note 6, at 124.

59. 2 M. FARRAND, *supra* note 6, at 589. See also Ratner, *supra* note 29, at 163 n.25.

60. See 2 M. FARRAND, *supra* note 6, at 381, 389.

arising under the federal Constitution and treaties, as well as under federal laws, to conform that jurisdiction with the language of the supremacy clause.⁶¹ The Convention thereby manifested the purpose of utilizing the Court's jurisdiction to implement that clause.⁶²

C. The Convention rejected an explicit statement of plenary congressional power over the Court's appellate jurisdiction by defeating a motion to replace the grant of appellate jurisdiction subject to congressional exceptions and regulations with language stating: "In all the other cases before mentioned the judicial power shall be exercised in such manner as the legislature shall direct."⁶³ Plenary power over the lower federal courts having previously been given to Congress,⁶⁴ the apparent purpose of this amendment was to replace the ambiguous exceptions and regulations clause with a firm declaration of unrestricted congressional control over the Supreme Court's appellate jurisdiction.⁶⁵

The defeat of the amendment can hardly be explained as reflecting a desire "to leave the 'inertia' of jurisdiction with the Supreme Court, requiring Congress to take affirmative steps (i.e., make exceptions) to limit it, rather than require Congress to set out the Court's jurisdiction in the first place and thus make exceptions merely by a failure to delineate".⁶⁶ The difference between making plenary exceptions to existing jurisdiction and setting out the jurisdiction in the first place is ephemeral. Both are affirmative acts that accomplish the same thing. Thus, the First Congress, which included many of the Framers, made exceptions to the Court's appellate jurisdiction by affirmatively delineating the authorized jurisdiction.⁶⁷ In *Durousseau v. United States*⁶⁸ Chief Justice Marshall confirmed that "this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it."⁶⁹

Leaving "the 'inertia' of jurisdiction with the Supreme Court" seems to suggest the amendment was defeated because the Framers were reluctant to delay exercise of the Court's appellate jurisdiction

61. *Id.* 423-25, 430, 431.

62. See Ratner, *supra* note 29, at 164-65; Sager, *supra* note 29, at 48-51.

63. See 2 M. FARRAND, *supra* note 6, at 425, 431.

64. See 1 M. FARRAND, *supra* note 6, at 125; 2 M. FARRAND, *supra* note 6, at 38-39, 45-46, 424, 425, 431.

65. See Sager, *supra* note 29, at 49-50 n.95.

66. Redish, *supra* note 35, at 910.

67. Act of Sept. 24, 1789, ch. 20, 1 Stat. 84 (1789).

68. 7 U.S. (3 Cranch) 159 (1805).

69. *Id.* at 314.

pending congressional action. But the Court could in no event exercise jurisdiction until Congress by legislation fixed the number of Justices, as was done in the First Judiciary Act.⁷⁰ And a clear statement of plenary congressional control, if preferred, need not have been sacrificed to a dubious concern with "inertia" or possible congressional delay.

Any such concern could have been assuaged by integrating the proposed amendment with the adopted text⁷¹ and by adding a clause that preserved the constitutional jurisdiction pending congressional action, as follows: In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, which shall be exercised as the Congress shall direct, and in the absence of such direction in accordance with this Constitution. Ascribing rejection of the amendment to acceptance of the view that the adopted wording of the clause—"with such exceptions and under such regulations as the legislature shall make"—clearly meant "as the legislature shall direct"⁷² attributes to most of the Framers an obtuseness not shared by the proponents of the amendment.

It has also been suggested that the proposed amendment "might have [been] understood . . . to allow Congress to increase the original jurisdiction of the Supreme Court . . . and repudiated on this ground",⁷³ even though the immediately preceding sentence in the Constitution specified the cases in which "the Supreme Court shall have original jurisdiction."⁷⁴ But the grant of original jurisdiction plus the exceptions and regulations clause contained the same ambiguity.⁷⁵ Consequently, it was not avoided by defeat of the amendment. Marshall laid the uncertainty to rest in *Marbury v. Madison*⁷⁶ by holding that Congress had power, under article III, neither to increase nor decrease the Court's original jurisdiction. And a concern with original jurisdiction could also have been alleviated by combining, as suggested above, the amendment with the adopted text.

70. See note 67 *supra*.

71. See 2 M. FARRAND, *supra* note 6, at 434, 576, 600-01, 661.

72. See Redish, *supra* note 35, at 909.

73. Sager, *supra* note 29, at 50 n.95.

74. U.S. CONST. art. III, § 2. For the text of article III, section 2, see note 30 *supra*.

75. See *Constitutional Restraints on the Judiciary: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981)* (statement of Prof. William Van Alstyne).

76. 5 U.S. (1 Cranch) 137 (1803). See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 332 (1816); Sager, *supra* note 29, at 24.

Of course, the actual motivations for defeat of the amendment cannot be authoritatively ascertained; nor can that defeat alone determine the purpose and meaning of the exceptions and regulations clause. But the amendment suggests the ambiguity of the clause, and its defeat helps to resolve the ambiguity, particularly in the context of the tensions between plenary congressional control and the Court's function to maintain the supremacy and uniformity of federal law.⁷⁷

D. The writings of Madison and Hamilton in *The Federalist* reiterate the essential uniformity-supremacy functions of the Court.

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.

. . . .

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.

. . . .

The mere necessity of uniformity in the interpretation of the national laws decides the question [of federal judicial power]. 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.

. . . .

77. The mind of Professor Redish, who favors the inertia and no-difference-in-meaning explanations for the defeat, is "boggled" by the "leaps of logic and faith" that result in the drawing of "irrebuttable conclusions [as to more limited congressional control] from the amendment's rejection". Redish, *supra* note 35, at 910. But those "leaps", in a prior article, merely proposed that "the defeat of the amendment . . . may reasonably be construed as a rejection by the Convention of plenary congressional control over the appellate jurisdiction of the Court. . . ." Ratner, *supra* note 29, at 173 (emphasis added). No "irrebuttable conclusions" were asserted. Minds, of course, may differ as to the reasonableness of an explanation. Perhaps the Redish explanations boggle someone's mind.

That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested.

. . . .

[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.⁷⁸

JUDICIAL INTERPRETATION

From an early date the Supreme Court itself has explicitly recognized that its indispensable functions under the Constitution are to resolve conflicting interpretations of federal law and to maintain the supremacy of that law when it conflicts with state law or is challenged by state authority.⁷⁹ 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*⁸⁰ Story, holding that the Supreme Court could constitutionally review state court decisions involving federal questions as provided by section 25 of the Judiciary Act, emphasized "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution."⁸¹ Without a reversing authority to harmonize discordant judgments, he declared:

78. THE FEDERALIST PAPERS NOS. 22 & 39 (J. Madison); *id.* Nos. 80, 81 & 82 (A. Hamilton). In discussing the purpose of the exceptions clause, Hamilton stated:

To avoid all inconveniencies [sic], 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 manner as will best answer the ends of public justice and security . . . [T]his appellate jurisdiction does in no case *abolish* the trial by jury, and . . . an ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniencies [sic] which have been predicted from that source.

Id. No. 81 (A. Hamilton) (emphasis in original).

Avoidance of "inconveniencies" scarcely suggests impairment of essential Supreme Court functions.

79. See Ratner, *supra* note 29, at 166-68, 173-83; Sager, *supra* note 29, at 54-55.

80. 14 U.S. (1 Wheat.) 304 (1806).

81. *Id.* at 347-48.

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.⁸²

Marshall's early position, as indicated in *Ex parte Bollman*,⁸³ *United States v. More*,⁸⁴ and *Durousseau v. United States*,⁸⁵ was that: 1) Congress has broad discretion in legislating exceptions to the Court's appellate jurisdiction; 2) if Congress does not exercise that discretion the Court retains its full constitutional jurisdiction; 3) if Congress exercises the discretion by specifying cases to which the jurisdiction extends, those cases not designated are impliedly excepted.⁸⁶ Marshall did not state that the discretion is unlimited

82. *Id.*

83. 8 U.S. (Cranch) 75 (1807). Concerning the jurisdiction of the Court to issue writs of habeas corpus, Marshall stated:

The power to award the writ [of habeas corpus] must be given by written law . . . [The judiciary] act was passed by the first congress . . . 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 [including the Supreme Court when exercising appellate jurisdiction] the power of awarding writs of *habeas corpus*.

Id. at 92-93.

84. 7 U.S. (3 Cranch) 159, 173 (1805) ("[If Congress had not described the jurisdiction of the Court] [t]he 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.").

85. 10 U.S. (6 Cranch) 307 (1810).

When the first legislature of the Union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared, that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

Id. at 314.

86. See Ratner, *supra* note 29, at 175-77.

nor undertake to determine its constitutional limits. But eleven years later in *Cohens v. Virginia*,⁸⁷ which upheld Supreme Court review of a state criminal conviction involving the interpretation of a federal statute, he declared:

[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.⁸⁸

And in *Ableman v. Booth*,⁸⁹ Taney, holding that state courts lacked habeas corpus jurisdiction over persons in federal custody and that the Supreme Court could review issuance of the writ 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

87. 19 U.S. (6 Wheat.) 264 (1821).

88. *Id.* at 416-18, quoting THE FEDERALIST No. 82 (A. Hamilton). See also text accompanying note 78 *supra*.

89. 62 U.S. (21 How.) 506 (1858).

laws of the United States uniform, and the same in every State. . . .⁹⁰

The foregoing cases 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.⁹¹ The implication of these decisions is that Congress could not constitutionally deny such jurisdiction to the Court.

*Ex parte McCordle*⁹² is the case most frequently said to authoritatively uphold plenary congressional power, but it does not. In 1867 Congress had authorized an appeal to the Supreme Court

90. *Id.* at 517-18.

91. Two other Supreme Court cases contain similar 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.

The Court further stated: "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.

In *Gordon v. United States*, 117 U.S. 697 (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 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 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.

Id. at 699-701.

92. 74 U.S. (7 Wall.) 506 (1869).

from circuit court decisions denying habeas corpus. Previously the Court could review such decisions only by issuing an original writ of habeas corpus under the authority granted by section 14 of the Judiciary Act of 1789. *McCardle*, 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 had been denied, but before decision on the merits, Congress, apprehensive that the Court was about to invalidate the Reconstruction Acts, repealed the portion of the Act of 1867 authorizing such appeals. 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 case."⁹³ 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 earlier Judiciary 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 jurisdiction any cases but appeals from the Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.⁹⁴

Clearly the language of *Ex parte McCardle* does not sanction congressional impairment of the essential constitutional functions of the Supreme Court. Rather, it pointedly precludes the exception from affecting those functions. The repealing statute did not deprive the Court of jurisdiction to decide *McCardle's* case. *McCardle* 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 efficacious, but slower, one available.⁹⁵

93. *Id.* at 514.

94. *Id.* at 515.

95. By contrast, three years later in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), the Court denied the power of Congress to prescribe the decision in a pending case by retroactively withdrawing all judicial jurisdiction. *Id.* at 140. 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,

A few months later in *Ex parte Yerger*,⁹⁶ the Court affirmed its jurisdiction to review on direct petition for habeas corpus the constitutionality of a circuit court decision denying the writ, despite the congressional withdrawal of habeas corpus appeals, and strongly intimated that Congress lacked the power to impair the essential appellate function of the Court by depriving it of all habeas corpus jurisdiction, stating:

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 . . . seriously hinder the establishment of that uniformity . . . 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 jurisdiction even were the reasons for affirming it less cogent than they are.

There is broad language in some of the cases referring to unlimited congressional control over the Court's appellate jurisdiction, but the statements are generalized dicta.⁹⁷ No case holds that Congress has the power to impair the Court's essential uniformity-supremacy functions. *Ex parte Yerger* emphatically rejected such an impairment.

SCOPE OF THE JURISDICTIONAL STATUTES

In fact, all of the jurisdictional statutes enacted by Congress have allowed the Court to perform its essential constitutional functions with reasonable effectiveness.

recovered judgment under the statute. *Id.* at 132. 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. *Id.* at 133-34. The Court held that the attempted restriction on its jurisdiction violated the principle of separation of powers despite congressional authority to make exceptions and regulations, stating:

"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 had inadvertently passed the limit which separates the legislative from the judicial power. It is of vital importance that these powers be kept distinct."

Id. at 146-47.

96. 75 U.S. (8 Wall.) 85, at 102-03 (1869).

97. See cases cited at note 28 *supra*.

Although federal criminal cases (tried in two-judge circuit courts) could not be appealed to the Supreme Court before 1891,⁹⁸ avenues for Supreme Court review remained available in such cases to resolve conflicting federal-court interpretations of the federal constitution and laws: ⁹⁹ 1) where the circuit judges were divided, they were required to certify the disputed question to the Supreme Court; 2) a habeas corpus petition could be filed in the Supreme Court to test (a) constitutionality after conviction, (b) probable cause for pre-trial commitment, which encompassed statutory, as well as constitutional, interpretation, and 3) according to later cases, habeas corpus could be utilized in "exceptional circumstances."

Early statutes authorizing Supreme Court review of state court decisions that upheld the constitutionality of a state law, denied the constitutionality of a federal law, or rejected a claim under federal law, were initially interpreted to preclude Supreme Court review of state court decisions that denied the constitutionality of a state law or upheld the constitutionality of a federal law. Such decisions, however, did not challenge the supremacy of federal law, and uniformity could be preserved by Supreme Court review of a case upholding a similar state law or invalidating the federal law.¹⁰⁰ Later cases, recognizing the implications of the third clause, sustained the Court's authority to review state court decisions upholding the constitutionality of federal laws.¹⁰¹

Those statutes also precluded Supreme Court review of federal circuit court cases involving no more than \$2000. But the limitation did not apply to habeas corpus petitions nor to certification of questions upon a circuit court division. In addition, inconsistent decisions could be resolved by Supreme Court review of a subsequent case that involved the required amount or originated in a state court.¹⁰²

THE SIGNIFICANCE OF OTHER CONSTITUTIONAL LIMITATIONS

Although a plenary congressional check on the Supreme Court's judicial-review jurisdiction reduces the effectiveness of constitutional limitations on majoritarian regulation, the existence of such a check

98. See Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84; Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826.

99. See cases and authorities collected in Ratner, *supra* note 29, at 195-201.

100. *Id.* at 184-88.

101. *Id.* at 185.

102. *Id.* at 193-95.

turns primarily on interpretation of the exceptions and regulations clause. Diminished effectiveness of the limitations is relevant to the interpretation but is not a ground for attacking the check, once recognized.

If authorized by the clause, a shift of ultimate judicial-review authority from the Supreme Court to state or lower federal courts, some with congressionally preferred constitutional views, is not per se contrary to separation-of-powers constraints or otherwise constitutionally suspect. The clause, itself, allocates authority between the two branches, and the congressional intrusion on judicial decision-making would then be justified by the purpose of the constitutional check.¹⁰³

Of course, such congressional power, like all congressional power, is subject to Bill of Rights limitations, including the equal protection constraint implicit in the fifth amendment due process clause. A congressional enactment depriving the Supreme Court of appellate jurisdiction when review is requested by blacks or atheists would not survive equal protection scrutiny, because the apparent purpose for such a distinction is the invidious, constitutionally impermissible one of denying a Supreme Court remedy to those minorities.

The transfer to other courts of jurisdiction over certain constitutional issues that are identified with the minorities, such as school segregation or school prayers, when prior Supreme Court solutions are congressionally disapproved, is more effectively and less invidiously achieved by specifying the issues without resort to the invidious racial or religious classification. For that purpose, the invidious classification is both underinclusive and overinclusive. It precludes Supreme Court jurisdiction when review of *any* issue is requested by a member of either minority and preserves Supreme Court jurisdiction to reject or apply the disapproved solutions at the request of others.

But removal of school desegregation or school prayer cases from the Supreme Court's appellate jurisdiction, *if otherwise authorized by the exceptions and regulations clause*, would not violate equal protection, because the purpose, not achievable by a less intrusive alternative, would then be the constitutionally approved and necessarily "compelling" one of checking congressionally disapproved Supreme Court doctrine. Ensuing decisions by the newly-designated

103. Compare *United States v. Klein*, 80 U.S. 128 (1871), described at note 91 *supra*. In *Klein*, Congress withdrew jurisdiction to decide *from all courts*, thereby deciding the case while it was pending.

courts of last resort would provide constitutionally authoritative interpretations, whatever their "impact" on minorities.¹⁰⁴

Congressional power to establish lower federal courts implies plenary control over their jurisdiction, and congressional withdrawal of their judicial-review authority does not stultify the judicial-review function as long as the Supreme Court retains appellate jurisdiction over state court decisions in such cases. The function is stultified, however, if the courts of a state also lack the necessary jurisdiction. The combined withholding of federal and state jurisdiction eliminates the judicial forum required to challenge the constitutionality of state or federal law.¹⁰⁵ And preclusion of the plaintiff's claim with no opportunity to be heard denies due process of law.¹⁰⁶ Consequently, in the absence of a federal forum the denial of a state forum could be contravened by the Supreme Court on appellate review.

SECTION FIVE OF THE FOURTEENTH AMENDMENT AS A CHECK ON JUDICIAL REVIEW

Section five of the fourteenth amendment does not imply congressional power to reverse Supreme Court decisions. That section gives Congress "power to enforce" the provisions of the amendment by appropriate legislation. Such power to enforce permits Congress to invalidate unconstitutional state policy, i.e., to supersede state policies that are inconsistent with the amendment. When Congress invalidates before judicial action, Congressional resolution of disputable constitutional facts and congressional choice of remedies are entitled to judicial deference in subsequent constitutional litiga-

104. *But see* Van Alstyne, *supra*, note 29, at 263-65; Sager, *supra* note 29, at 68-77; Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 488, 528-29 (1974).

105. *See* United States v. Klein, 80 U.S. 128 (1871); Sager, *supra* note 19, at 80-86; Redish & Woods, *Congressional Power to Control the Jurisdiction of the Lower Federal Courts; A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 76-108 (1975). *See also* Tarble's Case, 80 U.S. (13 Wall.) 397 (1871).

106. *See* Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law . . .

169 F.2d at 257. *See also* Dombrowski v. Pfister, 380 U.S. 479 (1965); Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968).

tion.¹⁰⁷ But Congress is not authorized to *validate* state regulation held unconstitutional by the Court. As stated in *Katzenbach v. Morgan*:¹⁰⁸

Correctly viewed, section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment. . . . Contrary to the suggestions of the dissent, section 5 does not grant Congress power to exercise discretion to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court."¹⁰⁹

Ever since *Marbury v. Madison* the Supreme Court, as the constitutional enforcer of constraints on the majority, has had the ultimate power, subject to nonstultifying majoritarian checks, to interpret the Constitution.¹¹⁰ Section five does not authorize Congress to nullify judicial review by overturning such interpretation.

SUMMARY

Judicial power to declare state and national regulation unconstitutional implements the constitutional plan of subjecting state authority to federal constraints and of protecting individuals and minorities from oppressive majoritarian action. The effective exercise of that power requires a single federal tribunal of last resort to provide a uniform authoritative interpretation of the Constitution and to subordinate contrary state policy to that interpretation.

The supremacy clause of article VI mandates one supreme federal law throughout the land, and article III establishes the Supreme Court as the constitutional instrument for implementing that clause by conferring on the Court jurisdiction to maintain the supremacy and uniformity of federal law. That jurisdiction is the linchpin of the federal system. Without it the Constitution is fragmented by inconsistent final decisions of state and/or lower federal courts and may be subordinated to state authority. Uncertainty and discontent then proliferate; respect for and confidence in the Constitution are undermined, and Bill of Rights protections become less effective.

107. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966). See also *Oregon v. Mitchell*, 400 U.S. 112 (1970).

108. 384 U.S. 641 (1966).

109. *Id.* at 651.

110. See *Powell v. McCormick*, 395 U.S. 486 (1969).

Nevertheless, early Supreme Court dicta has indicated, and members of Congress have urged, that article III, section 2, which subjects the Court's appellate jurisdiction to "such exceptions and . . . regulations as the Congress shall make" authorizes Congress to abolish all or any part of that jurisdiction. Some commentators justify such plenary congressional power as a constitutionally authorized majoritarian check on the overreaching exercise of judicial power to declare legislation unconstitutional. No jurisdictional statute enacted by Congress, however, has prevented the Court from performing its essential constitutional functions with reasonable effectiveness.

A narrower interpretation of "exceptions and regulations" is supported by usage, which indicates that in a legal context neither an exception nor a regulation can destroy the essential characteristics of the subject to which it applies. But language and usage are ambiguous. Meaning depends on purpose and context. Emphatic declarations at the Constitutional Convention, rejection there of a motion to give the Court such appellate jurisdiction "as the legislature shall direct", statements in the Federalist Papers, and several notable Supreme Court decisions all recognize 1) the essential constitutional functions of the Court to maintain the supremacy and uniformity of federal law, and 2) that a plenary exceptions-and-regulations power is not consistent with the constitutional plan. Interpreted in the context of that plan, the clause authorizes jurisdictional exceptions and regulations by Congress that are not inconsistent with the Court's essential constitutional functions.

The power of judicial review is subject to other effective majoritarian checks, including intense political, professional, and media criticism; legislative reenactments; Congressional censure; impeachment; attrition and new appointments; executive reluctance to enforce; legislative increase in the Court's size; and constitutional amendment. The exceptions and regulations clause permits Congress to check the Court by specifying procedures, expediting or retarding the flow of cases, eliminating review of diverse-citizenship cases, limiting review of less consequential cases, and inhibiting review of factual issues.

Not every constitutional case must be reviewed by the Court. The Court's essential functions are not impaired as long as some avenue remains open for ultimate resolution of persistent conflicts between the Constitution and state law or in constitutional interpretation by lower courts. Retention by the Court of this jurisdiction confirms the traditional power of Congress to restrict the

jurisdiction of lower federal courts.

The exercise of plenary congressional control over the Court's appellate jurisdiction would not be vitiated by other constitutional limitations nor by the precedential effect on lower courts of pre-existing Supreme Court decisions. The cost of such majoritarian control is a weakening of American constitutional democracy. The Constitution does not authorize that cost.