

Chaining the Court to the Constitution

R A N D A L L R. R A D E R

HAS THE SUPREME COURT acted unconstitutionally? If this nation's highest court is the sole arbiter of whether actions legally comply with the Constitution, what prevents the Court itself from acting beyond constitutional limits? This is not an idle hypothetical question. In its 1938 decision, *Erie Railway Company v. Tompkins*,¹ the Supreme Court branded its own course of conduct for nearly a century as unconstitutional. In fact, the Court called its own doctrine "an unconstitutional assumption of power by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."² If the Court, by its own admission, had unconstitutionally assumed power for nearly 100 years, perhaps other high judicial dogma need constitutional review.

If the Supreme Court has confessed one instance of stepping beyond the bounds of the Constitution, we are justified in asking what it may not have yet admitted. For instance, a single amendment to the Constitution has been stretched by the Court into several popularly questioned opinions. The words "equal protection" in that amendment have been used to wrest from states and localities the decision of which school a child should attend.³ The same words have been construed to permit programs favoring one race over another⁴ and to overturn more than 150 years of exclusive state power over apportionment of congressional districts.⁵ On occasion, this judicial body has not even bothered to interpret the Constitution itself, but only its "penumbras," to declare that children are not persons before birth.⁶

These interpretations are not defended as the intent of those who drafted the Constitution. Instead they are proclaimed as evidence that, in the hoary words of Chief Justice John Marshall, "[The Constitution must] be adapted to the various crises of human affairs."⁷ Raoul Berger probably

responded to this argument most succinctly by stating that "at best Marshall's dictum represents a self-serving claim of power to amend the Constitution."⁸

The Framers of the Constitution did not pretend that their work was infallible. On the contrary, they provided within the document itself a framework for amendment. Article V, however, does not include a provision for five out of nine men on the Supreme Court to restructure the Constitution. Nonetheless a mere majority of the Court has been rewriting the Constitution for decades under the guise of interpretation. Washington was the first to warn against this in his Farewell Address:

If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.⁹

The "People" may change the constitution by the Article V method, but other revisions, such as by an interpreting tribunal, are "usurpations" in Washington's mind. Yet today the Supreme Court claims the right to disregard the express or implied intent of the Framers of the Constitution, leaving only a constitutional amendment by the prescribed Article V method as a sufficient means to alter the doctrines promulgated by five of nine men in black robes.

This calls forth our original question: Is there no effective check on usurpations of constitutional authority by the Supreme Court? Surely the approval of two-thirds of Congress and three-fourths of the states is not the only way to prevent the Court from overstepping its bounds. Indeed the

framers of the Constitution did provide a more effective check on the judiciary. They authorized Congress to withdraw particular subjects or cases from the appellate jurisdiction of federal courts.

Article III, Section 2

ARTICLE III OF the Constitution gives Congress authority over the appellate jurisdiction of federal courts. Section 2 lists the original jurisdiction of the Supreme Court and then proceeds: "In *all* the other cases before mentioned, the supreme court shall have appellate jurisdiction, *with such exceptions, and under such regulations as the Congress shall make.*" (Emphasis added.) Congress, therefore, is fully empowered by the Constitution to both "make exceptions" in and "regulate" Supreme Court jurisdiction in "all" cases beyond its original jurisdiction. With this language, the Constitution authorized Congress to decide which disputes were to be settled by state and local governments.

Under Article III, Congress may carve out narrow exceptions in Supreme Court appellate jurisdiction to prevent "unconstitutional assumptions of power." Congress could decide, for example, to deny the Court any jurisdiction to hear appeals in cases involving busing of school children, or reapportionment, or abortion, or voluntary prayer in public buildings. The resolution of these disputes would then be left to state and local courts.

The plain meaning of the constitutional language, however, is not the only indication that the Framers of the Constitution intended to give Congress this power to check the Supreme Court. Alexander Hamilton summarized the federal judicial power in the *Federalist Papers* and simultaneously reassured those who feared its reach:

From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that depart-

ment and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations as will be calculated to obviate or remove these inconveniences. (Emphasis original) ¹⁰

In Hamilton's estimation, a mere "inconvenience" would warrant an exception in federal court appellate jurisdiction.

Acting within the letter and spirit of the Constitution and Hamilton's explanation of the congressional check on the judiciary, Congress passed the monumental Judiciary Act of 1789. This Act created the lower federal courts and concurrently limited the appellate jurisdiction of all federal tribunals, including the Supreme Court. Congress specified that the Supreme Court could only accept appeals in civil cases if more than \$2,000 was in contention. Moreover, Congress denied the Supreme Court any authority to hear appeals in criminal cases—an exception not altered by Congress until 1889. The Judiciary Act of 1789 was carefully crafted to ensure that most cases and controversies would be handled in state courts.

The Supreme Court itself has shown a clear understanding of its complete reliance on Congress for appellate jurisdiction. For instance, Chief Justice Oliver Ellsworth, a member of the Constitutional Convention Committee on Detail and later an author of the Judiciary Act of 1789, stated in *Wiscart v. D'Auchy*:

Here, then, is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise our appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of appellate jurisdiction, is simply, whether Congress has established any rules for regulating its exercise.¹¹

This eminent authority on the meaning of Article III made it undeniably clear that the Supreme Court hears appeals only with the permission of Congress.

Chief Justice Ellsworth was not alone in his reading of Article III. Chief Justice John Marshall, who seven years earlier delivered the opinion in *Marbury v. Madison*,¹² concurred with Ellsworth's sweeping analysis of the exceptions clause:

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 acts as have been passed on the subject. 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.¹³

The Supreme Court accepts as well today as one hundred years ago the principle that Congress rules with respect to the Court's appellate jurisdiction. Chief Justice Earl Warren affirmed in 1957 that "the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute."¹⁴

This review of comments on the meaning of Article III demonstrates that the words "exceptions and under such regulations as Congress shall make" have been construed with remarkable uniformity for the nearly two hundred years they have been in effect. To question a congressional withdrawal of appellate jurisdiction would require a constitutional interpretation far beyond the plain meaning or consistent historical understanding of those words. Congress has the power to hold the federal judiciary in check.

Recent Attempts to Withdraw Jurisdiction

DURING RECENT SESSIONS, Congress has entertained several bills to limit federal

court appellate jurisdiction. While these bills have occasionally been approved by one house of Congress, they have only rarely been enacted.

In the 96th Congress, the Senate passed a bill withdrawing federal court appellate jurisdiction over voluntary prayer in public buildings. When the House Judiciary Committee scheduled hearings on the measure, the Justice Department took it upon itself to send a memorandum criticizing the bill as unconstitutional. Despite the plain intent of Article III, the Justice Department found an innovative interpretation (Is not this the problem in the first place?) of those precise words in the writings of Professor Henry M. Hart, Jr.

Professor Hart contends that the word "exceptions" implies that Congress could not authorize "exceptions which engulf the rule."¹⁵ In other words, Professor Hart argues that when the Constitution says that Congress can make "exceptions" to the appellate jurisdiction of the Court, it implies that there must be some aspect of the jurisdiction which Congress could not touch. While we might agree that Congress could not completely extinguish all federal court appellate jurisdiction when making "exceptions," we have to wonder how the Justice Department could conclude that the specific jurisdiction under consideration by the Committee must be just those kind of cases that the Framers of the Constitution meant to be beyond the power to except.

Even if we accept the Justice Department's reading between the lines of the Constitution, we surely should not fail to read the rest of the clause that Professor Hart and the Department seemed to overlook. The Constitution states that Congress may not only "make exceptions," but may also "regulate" appellate jurisdiction. The word "regulate" grants Congress the power to contract as well as expand appellate jurisdiction in the federal judiciary. Federal regulations in this day and age manage to take nearly everything away from many struggling businessmen. Surely the power of congressional regulation will encompass taking away jurisdiction over

narrowly circumscribed classes of cases, such as those concerning busing of school children or voluntary prayer.

The Supreme Court itself parts company with the Justice Department's reading of the exceptions clause. In addition to the cases already mentioned, the Court acknowledged the congressional power to limit its appellate jurisdiction when it happened in 1867. This was the famous *McCordle* case. In this instance, a Southern editor held in military custody appealed from a denial of habeas corpus and threatened to undermine Congress' post-Civil War reconstruction program by challenging the constitutionality of the Military Reconstruction Act. Congress was acting to prevent a constitutional ruling by the Supreme Court. Despite the questionable motives of the bill, the Supreme Court could only dismiss the case for want of jurisdiction:

We are not at liberty to inquire into the motive of the legislature. We can only examine into its power under the Constitution, and the power to make exceptions to the appellate jurisdiction of this Court is given by express words. What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause.¹⁶

The Supreme Court apparently takes exception to the Justice Department's reading of the exceptions clause.

The Justice Department's memorandum cited *U.S. v. Klein*¹⁷ in an attempt to bolster their argument that the Supreme Court did not always honor the congressional prerogative to regulate appellate jurisdiction. *Klein* dealt with the validity of Lincoln's pardon of Confederates. Congress attempted to remove jurisdiction over cases pertaining to the pardon. The Court was not dealing with the exceptions clause alone, but also the pardoning power of the

President in Article II of the Constitution. Also, unlike the *McCordle* case, Congress was trying to dictate the outcome of a case by eliminating some of the evidence—a matter peculiarly within the judicial province. Finally the Court in *Klein* stated unequivocally that "If it [the Congress] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as it should seem expedient...."¹⁸

Klein would have no application to a congressional withdrawal of appellate jurisdiction to hear busing or abortion or reapportionment cases. These specific restrictions do not tamper with evidential matters preeminently within the scope of judicial activity. Moreover they are specific limitations on the "right of appeal in a particular class of cases." Therefore, to quote the *Klein* reasoning, "there can be no doubt that it must be regarded as an exercise of the power of Congress to 'make exceptions.'"

Finally, we should consider the logical implications of the Justice Department's reasoning. The Justice Department argues that abridging appellate jurisdiction, while perhaps permissible in statutory cases, could not be permitted in cases with constitutional issues. If Congress accepted the Justice Department distinction between cases springing from the Constitution and cases springing from federal statutes, the Supreme Court could defeat a jurisdiction removal simply by invoking the Constitution. In effect, the Court would enjoy the heady position of determining the extent of its own "power to declare the law." In other words, the Justice Department would make the Article III, Section 2, exceptions clause meaningless surplusage in the Constitution. The check on the Supreme Court would be lost. While the Justice Department may have no qualms about writing out of our nation's supreme document after 200 years a critical check on the judiciary, Congress should recognize, with Hamilton, Ellsworth, Marshall, Warren, and the rest, that the exceptions clause means what it says.

Before eliminating this check on federal court supremacy, the Justice Department should recall that the Supreme Court once ruled that a black man is not a person (similar to the ruling about unborn children) and could be regarded as property.¹⁹ More recently the Court allowed Japanese-Americans to be incarcerated during World War II on the basis of their national origin.²⁰ If a future federal court wanted to return to these precedents, we would all be more secure knowing that Congress could halt the legal abrogation of rights.

The beauty of our Constitution is that no branch of government is unlimited. Each branch has the constitutional responsibility to monitor the others to prevent what Hamilton euphemistically called "inconveniences" in his *Federalist Papers* essay. If the Justice Department wants to eliminate a key congressional check on the judiciary, it had better recommend a constitutional amendment rather than just sending a memorandum to the Judiciary Committee chairman. Furthermore Congress should not sit comfortably back and let an Executive Branch memorandum tell it to quietly ignore its constitutional powers. Congress has every right to inform the Executive Branch that this is none of its business.

Congress simply should not avoid confrontation by allowing the Supreme Court unrestricted power to declare what the Constitution means. Congress has the authority and the implied obligation within the Constitution, specifically found in the exceptions clause, to let the Court know how the representative branch of government interprets the document. Congress has done so in the past, not only in the *McCardle* situation, but on other occasions it has stepped forward to abridge the Court's voice on specific problems. In 1839, Congress removed from federal court jurisdiction the decisions of the Secretary of Treasury on tax disputes.²¹ In 1867, Congress provided that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."²² In 1932, Congress structured

the Norris-LaGuardia Act to deprive lower federal courts of the power to issue injunctions in certain labor disputes.²³ In 1934, Congress used the Johnson Act to qualify the power of the courts to enjoin public utility rates ordered by state agencies.²⁴ In 1942, Congress limited injunctions under the Emergency Price Control Act to an emergency court of appeals.²⁵ In 1974, Congress barred court challenges to the Alaska pipeline for crude oil based on environmental grounds.²⁶ While several of these restrictions apply solely to lower federal courts, the same principle applies to constitutional review by the Supreme Court as illustrated by the *McCardle* case. Congress needs a little more constitutional backbone. Another successful removal of appellate jurisdiction would supply a good stiff shot of calcium to Congress' rather gelatinous constitutional vertabrae.

Unfounded Fears

THE PROSPECT THAT an Article III exception might be made in federal court jurisdiction has aroused unfounded fears about its effect. Actually such an exception would be a simple statute. Because it is a statute, Congress has a unique ability to monitor its effect. If, in the opinion of Congress, the Supreme Court's jurisdiction over busing or abortion appeals should be restored at some future date, another simple statute will achieve that objective. Congress has the power to state what cases the Court hears on appeal from State courts.

Critics also fear that an exception would result in each state interpreting constitutional pronouncements uniquely, that fifty states could reach fifty different conclusions on the question of abortion or reapportionment. Frankly, this is precisely the result contemplated by the Constitution when it vested in Congress the exceptions power. The Framers of the Constitution trusted Congress to ensure that state and local consensus is respected.

The possibility of differing state interpretations of past Supreme Court rulings should not trouble us. In the words of Thomas Jefferson, "I consider the founda-

tion of the Constitution to be laid on this ground—that all powers not delegated to the United States, by the Constitution, nor prohibited by it to the states, are reserved to the states or to the people. To take a single step beyond the boundaries thus specifically drawn...is to take possession of a boundless field of power, no longer susceptible of any definition."²⁷ Nowhere in the Constitution is education policy specifically delegated to the Federal Government. Nowhere in the Constitution is authority given to the Federal Government to dictate suffrage qualifications or to apportion representatives. These are matters left to the states by the Tenth Amendment to the Constitution. In other words, there cannot be fifty different interpretations of the Constitution on these questions, as some fear, because no constitutional issue is involved. The states and localities should be free to address those policy decisions left to them by the Constitution. Congress, by employing its exceptions power, could restore that balance to national policy. Congress could return to states that which is constitutionally theirs anyway. The Tenth Amendment to the Constitution, which reserves to the states and the people all matters not specifically delegated by the Constitution to the national government, would be restored to its proper role in the American constitutional framework.

¹904 U.S. 64 (1938). ²*Erie Railway Company v. Tompkins*, supra at 79. ³*Brown et al. v. Board of Education of Topeka et al.*, 347 U.S. 483 (1954). ⁴*United Steelworkers of America, AFL-CIO-CLC v. Weber et al.*, 443 U.S. 193 (1979). ⁵*Baker et al. v. Carr et al.*, 369 U.S. 186 (1962). ⁶*Roe et al. v. Wade, District Attorney of Dallas County*, 410 U.S. 113 (1973). ⁷*M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819) at 407. ⁸Raoul Berger, *Government by Judiciary, The Transformation of the Fourteenth Amendment* (Cambridge, Mass. and London, England: Harvard University Press., 1977). ⁹5 G. Washington, *Writings* 228-229 (J. Fitzpatrick ed. 1940). ¹⁰Alexander Hamilton, John Jay, James Madison, *The Federalist Papers* (The New American Library of World Literature, 1961), see number 81. ¹¹*Wisart v. D'Auchy*, 3 Dall. 321, 326. ¹²*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). ¹³*Durousseau v. U.S.*, 6 Cranch 307, 313. ¹⁴*Carroll v. U.S.*, 354

In Conclusion

THE FEDERAL JUDICIARY has been courting constitutional disaster by reading its own social predilections into the nation's foundational document. The Supreme Court is the body charged with policing the confines drawn by the Constitution. When the policeman becomes a violating criminal, a higher authority must undertake enforcement. In this instance, the Constitution itself is the higher authority and has outlined the means to prevent the Supreme Court from revising the document. Jefferson provided the most graphic expression for this situation:

It is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power.... In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.²⁸

The Framers of the Constitution forged a strong chain to bind the Supreme Court down to its circumscribed role in constitutional government. That chain, the power to make exceptions in and regulate federal court appellate jurisdiction, will only restrain, however, if laid on the Court's shoulders. Congress must execute its duty.

U.S. 394, 399 (1957). ¹⁵*The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise of Dialectic*, 66 *Harvard Law Review* 1362, 1364 (1953). ¹⁶*Ex Parte McCordle*, 7 Wall. 506, 514-515. ¹⁷*U.S. v. Klein*, 13 Wall. 128. ¹⁸*U.S. v. Klein*, supra at 142. ¹⁹*Dred Scott v. Stanford*, 60 U.S. 393 (1857). ²⁰*Korematsu v. U.S.*, 323 U.S. 214 (1944). ²¹Fifth United States Statutes at Large, p. 339. ²²Fourteenth United States Statutes at Large, p. 475. ²³Title 29, United States Code, Section 107. ²⁴Title 28, United States Code, Section 1341. ²⁵Title 50, United States Code Appendix, Section 901. ²⁶Title 43, United States Code, Section 1651. ²⁷Thomas Jefferson, "Opinion on the Constitutionality of the Bank," [February 15, 1791], *Documents of American History*, 8th ed., Henry Steele Commager (New York, 1968), pp. 159-160. ²⁸4 Jonathan Eliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 543 (1836).