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LEGISLATIVE CURTAILMENT OF JURISDICTION OF FEDERAL COURTS

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A spate of bills has been presented to Congress containing provisions limiting, in one way or another, the jurisdiction of the federal courts.¹ These provisions appear in bills aimed at undoing the effects of controversial Supreme Court rulings in such areas as abortion, busing, and school prayer.² For example, H.R. 761 denies jurisdiction to all United States courts, including the Supreme Court, "to make any decision, or issue any order, which would have the effect of requiring any individual to attend any particular school."³

However noble some of the ultimate goals of these bills may be, they should be viewed with the utmost circumspection. In their fervor to offer a "quick fix" for some of the social problems engendered by these controversial decisions of the Court, they do great damage to fundamental aspects of our system of law which outweigh any benefit they could bestow.⁴

The curtailment of jurisdiction as a means of nullifying unpopular

¹ See, e.g., S. 951, 97th Cong., 2d Sess. § 2.5 (1982), 128 CONG. REC. S393 (daily ed. Feb. 4, 1982); S. 1741, 97th Cong., 1st Sess. (1981), 127 CONG. REC. S11,514 (daily ed. Oct. 15, 1981); H.R. 867, 97th Cong., 1st Sess. (1981), 127 CONG. REC. H116 (daily ed. Jan. 16, 1981).

² S. 1741, a bill introduced by Senator Helms, would, if enacted, eliminate the jurisdiction of lower federal courts to issue any order in any case involving a state or local statute that protects the rights of persons between conception and birth, limits or regulates abortion, or provides funding or other assistance for abortions. See S. 1741, 97th Cong., 1st Sess. (1981), 127 CONG. REC. S11,514 (daily ed. Oct. 15, 1981). H.R. 867 would remove from the jurisdiction of the Supreme Court and the lower federal courts cases arising out of either any "[s]tate statute, ordinance, rule, regulation, or any part thereof" which relates to abortion or any "Act interpreting, applying or enforcing" any such state act." Committee on Federal Legislation, *Jurisdiction-Stripping Proposals in Congress: The Threat to Judicial Constitutional Review*, 36 REC. A.B. CITY N.Y. 557, 558, 564 (1981).

³ H.R. 761, 97th Cong., 1st Sess. (1981), 127 CONG. REC. H73 (daily ed. Jan. 6, 1981).

⁴ Moynihan, *Constitutional Crisis*, 27 CATH. LAW. 271, 282 (1982).

Supreme Court holdings is not a new idea.⁵ Although attempts have been made before, there is little by way of case law establishing the extent to which the judicial power granted by the Constitution is subject to control by Congress.

The landmark case of *Ex parte McCardle*⁶ presented an egregious example of Congress' exercise of its power to restrict the appellate jurisdiction of the Supreme Court. An act passed in 1867 had given the Supreme Court appellate jurisdiction in habeas corpus cases.⁷ Previously, the Court had jurisdiction to grant only original writs of habeas corpus, but it had used this power, aided by its power to grant writs of certiorari, to review a denial of habeas corpus by a lower court. Although McCardle was not in the military service, he was held in custody by military authority upon charges founded on his publication of an article alleged to be "incendiary and libelous."⁸ Upon denial of the writ by the United States circuit court, he appealed to the Supreme Court.⁹ While his case was pending before the Court, Congress, fearing that the Court would reverse and thus invalidate much reconstruction legislation, passed a statute that removed the Court's new appellate jurisdiction in habeas corpus cases, including those that were pending.¹⁰

The Court held that the case was fully governed by the power of Congress under article III of the Constitution to regulate and make exceptions to the appellate jurisdiction of the Supreme Court, stating, "We are not at liberty to inquire into motives of the Legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."¹¹ The one encouraging aspect of the case comes at the very conclusion. The Court noted that the effect of the repealing act was not to deny the whole appellate power of the Court in habeas corpus cases, but only to deny appeals from circuit courts under the act of 1867.¹² The device previously used by the Court to review denials of habeas corpus by lower courts, namely, original writs of habeas corpus, aided by a writ of certiorari, could continue to be used.

A number of considerations support the conclusion that the proposed curtailments of Supreme Court appellate jurisdiction would probably be

⁵ See Freund, *Storm Over the American Supreme Court*, 21 MOD. L. REV. 345, 345-58 (1958). For a collection of attempts to limit the appellate jurisdiction of the Supreme Court, see Elliott, *Court-Curbing Proposals in Congress*, 33 NOTRE DAME LAW. 597, 597-612 (1958).

⁶ 74 U.S. (7 Wall.) 506 (1868).

⁷ *Id.* at 507.

⁸ *Id.* at 508.

⁹ *Id.*

¹⁰ *Id.* at 514.

¹¹ *Id.*

¹² *Id.* at 515.

unconstitutional. First, it is far from clear that the result in *McCardle* can be analogized to the total excision of Supreme Court jurisdiction proposed by the subject bills.¹³ Persons seeking habeas corpus relief because of deprivation of their constitutionally protected liberty could obtain review of denials of such relief both before and after *McCardle* through the means of an original petition for a writ of habeas corpus in the Supreme Court aided by a writ of certiorari.¹⁴ In contrast, the removal of all Supreme Court jurisdiction attempted by the subject bills would, if effective, prevent that Court from ever reviewing cases involving the excepted matter by any means, thereby preventing the ultimate vindication of constitutional rights by the tribunal established for that purpose.

An important if not essential basis for the constitutional establishment of a Supreme Court with the power of appellate review is to ensure, in the words of Hamilton, "uniformity in the interpretation of the national laws."¹⁵ As Hamilton further observed, "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."¹⁶

Recently, the Conference of Chief Justices expressed "serious concern" over the subject bills and the impact that they would have on state courts.¹⁷ Characterizing the legislation as "a hazardous experiment with the vulnerable fabric of the nation's judicial system," the chief justices observed that "[w]ithout the unifying function of United States Supreme Court review, there inevitably will be divergence in state court decisions, and thus the United States Constitution could mean something different in each of the fifty states."¹⁸

In addition to arguments based on the awesome implications of an unbridled power in Congress to excise from the Supreme Court's appellate jurisdiction cases involving the vindication of fundamental constitutional rights, as well as arguments for the need for uniformity, respectable arguments have been advanced that it simply was never the purpose of the exceptions and regulations clause to confer upon Congress the power to curtail the Court's power to review questions of law, but rather that the purpose was simply to give Congress the power to limit review of

¹³ Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 179-80 (1960).

¹⁴ *Id.* at 180. "The statute, however, did not deprive the Court of jurisdiction to decide *McCardle's* case The legislation did no more than eliminate one procedure for Supreme Court review of decisions while leaving another equally efficacious one available. *Id.*

¹⁵ THE FEDERALIST No. 80, at 535 (A. Hamilton) (J. Cooke ed. 1961).

¹⁶ *Id.*

¹⁷ Editorial Opinion & Comment, *The Chiefs Speak*, 68 A.B.A. J. 386, 386 (1982).

¹⁸ *Id.*

questions of fact.¹⁹ A study of what took place at the federal convention and ratification debates fails to disclose anything to indicate that it was the intent of the Framers to confer so broad a power in Congress as to enable it to curtail the Supreme Court's appellate jurisdiction with respect to constitutional issues.²⁰ Contemporaneous interpretations given to the regulations and exceptions clause likewise support the proposition that what the Framers contemplated was simply a power to limit the Court's jurisdiction with respect to matters of fact.²¹

Perhaps the most important argument that can be made against the subject bills is their obvious disingenuous nature. Under the guise of merely "regulating" the jurisdiction of the courts, they are in reality aimed at undoing or preventing holdings of the Supreme Court. The Framers went to great pains to include a cumbersome, and as Justice Frankfurter called it, "leaden footed," mechanism for amending the Constitution, for the very purpose of requiring that alteration be effectuated only pursuant to the will of more than a mere majority of Congress.²² Professor Henry M. Hart, Jr. has called it a "monstrous illogic" to assume that the power to regulate jurisdiction is actually a power to regulate rights.²³

No one familiar with the workings of the Constitution would assert that any one constitutional provision can have the effect of negating other provisions.²⁴ The conclusion that commands greater respect is that, while Congress has the power to regulate and make exceptions to federal jurisdiction, that power should be exercised in such a way as not to negate other provisions of the Constitution. As stated by Robert Meserve on behalf of the ABA in congressional testimony on these bills, "[o]nce we start down this road, only an unusual sense of self-restraint may stand in the way of a wide negation . . . of constitutional guarantees. Congress should not go this way."²⁵ Elimination of established constitutional rights at the will of bare congressional majorities clearly should not be the chosen

¹⁹ Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 68 (1962).

²⁰ See Ratner, *supra* note 13, at 171-72.

²¹ See *supra* note 19 and accompanying text.

²² See U.S. CONST. art. V.

²³ See H. HART & H. WECHSLER, *THE FEDERAL COURTS & THE FEDERAL SYSTEM* 317 (1953).

²⁴ See, e.g., Note, *Removal of Supreme Court Jurisdiction: A Weapon Against Obscenity?*, 1969 DUKE L.J. 291, 309-13; see also *Constitutional Restraints Upon the Judiciary: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess., 32, 34 (statement of Prof. Paul M. Bator, Harvard University) ("the power of Congress to regulate jurisdiction cannot be exercised in a manner which violates some other constitutional rule").

²⁵ *Hearings Before the Subcomm. on Separation of Powers*, 97th Cong., 1st Sess. 411-12 (1981) (statement of Robert Meserve).

path. For the above reasons, these legislative proposals should be rejected by all who are committed to the orderly and deliberate development of our constitutional law.