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I

A DEMOCRATIC government such as ours, based upon the theory of popular sovereignty, presents many curious political phenomena. For example: in order to insure a proper balance of the powers, it has been necessary for the Supreme Court to assume the onerous task of passing upon the constitutionality of congressional legislation. It is unfortunate, but necessary, that the Court be obliged to exercise this power of judicial review at a time when the entire country is suffering from the effects of a severe and sustained economic depression. It is unfortunate, too, that the legislation under judicial examination should involve questions of great economic, social, and political consequence. How much simpler it would be for the personnel of the Court if they could shirk this duty, and by their evasion avoid the censure and criticism which seems of necessity to follow any decision involving momentous issues. That the Court has had the courage to see its duty and to discharge it, is a factor which has contributed in no small measure to the success of our experiment in "government by the people"—and it was an "experiment" at the time our Federal Constitution was drafted.

Today, whether one feels more or less kindly toward the Supreme Court is apt to depend upon whether one is a proponent or an opponent of the New Deal. At a White House press conference, held four days after the NIRA was invalidated by a unanimous Court,[1] President Roosevelt was reported to have termed the *Schechter* decision the most important rendered since that in the *Dred Scott* case[2] in 1857. The Washington correspondent for *The New York Times* reported that:

> "The right of the government to regulate nation-wide economic and social conditions in the United States was made the paramount political issue by President Roosevelt today. He thrust forward the problem which is expected to be fought on the field of the 1936 elections when . . . he said that the implications of the Supreme Court's NRA decision deprived the government of all control over economic and social conditions, by interpretation of

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[1] Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935).

[2] Dred Scott v. Sandford, 60 U. S. 393 (1857).

> the interstate commerce clause of the Constitution in the light of the 'horse-and-buggy' days of 1789 when it was written."[3]

In his annual message to Congress, January 3, 1936, the President, after a sustained and bitter attack on the groups which opposed his policies, said:

> "I am confident that the Congress of the United States well understands the facts and is ready to wage increasing warfare against those who seek a continuation of the spirit of fear. The carrying out of the laws of the land as enacted by the Congress requires protection until final adjudication by the highest tribunal of the land. *The Congress has the right and can find the means to protect its own prerogatives.*"[4]

This address was more than the traditional message to Congress; it was an appeal to the American people to stand shoulder to shoulder with the administration in carrying through its New Deal policies. The message was broadcast over the national network, and it was delivered in the evening in an effort to reach more people. Three days later, the Supreme Court declared the AAA unconstitutional as an invalid exercise of the taxing power of Congress.[5] A dissenting opinion by Justice Stone, concurred in by Justices Brandeis and Cardozo, held out some hope for New Deal enthusiasts.

Whatever the President may have meant by his reference to the "horse-and-buggy" days when the Constitution was drafted, whatever may be the portent of his assertion that "Congress has the right and can find the means to protect its own prerogatives," these statements are thought-provoking. And that illusory creature of the law — the average man — seems to be not a little concerned about the desirability of providing some check or curb on the Court's power to invalidate

[3] N. Y. TIMES, § 1, p. 1:8 (June 1, 1935).

[4] Italics mine. N. Y. SUN, § 1, p. 18:4 (Jan. 4, 1936). Under a caption entitled "Message Held a Presidential Political Talk," the *Sun* said: "Bewilderment and controversy were born of two passages in the message, in the first of which the President appeared to include the Supreme Court among the 'greedy,' 'self-seeking,' 'cowardly,' 'minority' that opposes his policies, and in the second of which his language was widely interpreted as suggesting the threat of legislative reprisals to the Supreme Court as well as to the lower courts. . . . The suggestion that the lower courts be estopped from granting injunctions against the Government on the grounds that an act of Congress is unconstitutional is clear. But beyond that, the suggestion that Congress might protect itself against the Supreme Court by diminishing its appropriations or enlarging the membership to permit the 'packing' of the court with 'liberals' also seems to have been intended." Ibid., p. 1:8; p. 18:6.

[5] United States v. Butler, (U. S. 1936) 56 S. Ct. 312.

federal legislation. While many are agreed that this power ought to to be curbed, opinions differ as to the means through which it is to be effected. One group of extremists proposes, through constitutional amendment, to deprive the Court completely of this power. It has been suggested that such an amendment would not accomplish its purpose, inasmuch as the power of review would still remain in the state courts and in the lower federal courts; that instead of one interpretation of the Constitution, there might be many.[6] Another plan, indorsed by some of the representatives of Labor, provides for a constitutional amendment to empower Congress to override the "veto power" (as it is termed) of the Supreme Court. By this means it is proposed that a statute, enacted once and held invalid by the Court, may be made constitutional through its being enacted a second time by at least a two-thirds majority of both Houses. This is a case, it has been tersely put, where "a bad statute shall become good by repetition."[7] A third proposal has as its goal a congressional act requiring that seven out of the nine justices shall concur in pronouncing an act of Congress unconstitutional.[8] Aside from the question whether an amendment to the

[6] WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 136, 137 (1925). See chapters V and VI for an excellent discussion of the various proposals to curb the Court's powers of judicial review.

[7] Ibid., 139.

[8] In the white heat of Reconstruction politics (January, 1868) the Radical majority in the House succeeded in tacking an amendment on a perfectly innocent bill referred to them by the Senate. This amendment provided that, in order to declare a federal law invalid, two-thirds of the justices of the Supreme Court must concur in the opinion. During the debate on this amendment, in the House, Mr. Williams (Pennsylvania) proposed another amendment which would have required a unanimous Court to invalidate federal legislation. Mr. Maynard (Tennessee) suggested that this proposal be moderated so as to require a concurrence of only three-fourths of the Court. While he did not want to debate the question, he did want to suggest that the effect of Mr. Williams' amendment would be to "enable an eccentric or pragmatic man upon the bench to control the operations of the court." Fortunately, the Senate had the good taste to let this amended bill die. CONG. GLOBE, 40th Cong., 2d Sess., pp. 478, 479, 489, 503 (1868). In February, 1923, and again in December, Mr. Borah (Idaho) introduced a bill in the Senate, providing that seven of the nine justices must concur in declaring acts of Congress unconstitutional. Both of these bills were referred to the Committee on the Judiciary, but neither was reported out of the Committee. 64 CONG. REC. 3004 (1923); 65 CONG. REC. 303 (1923). During the debate on Senator Black's (Alabama) "6-hour day or 5-day week" bill (April, 1933), Senator Borah expressed a doubt as to the value of 5-to-4 decisions as a guide for future legislation. He said: "I desire to repeat that I have never felt myself bound by a 5-to-4 decision when it comes to legislating. . . . I am perfectly willing to have the question resubmitted to the Supreme Court of the United States in view of these divided decisions." To which Senator Barkley (Kentucky) replied: "the 5-to-4 decision is not the thing that bothers me. It is a perfectly legal and binding decision, just as a law passed

Constitution might not be necessary in order to require more than a majority of the Court to concur in declaring federal acts invalid, such an act would invest in a minority of the Court the power to control the Court's decisions. One other plan deserves notice, namely, the proposal to enlarge the membership to permit the packing of the Court, in order to insure a majority of voices in support of any measure which the party politically dominant at that time might enact. In several respects this proposal is the least justifiable of any, and its chief danger lies in the fact that it can be accomplished through congressional act. While there is nothing sacred about the number "nine"—the number of justices on the Supreme Bench has been changed five times since our Federal Government was established,[9]— to deliberately pack the Court with party puppets would be as speedy and as certain a way to destroy the present balance of powers as human ingenuity could devise.

by the Senate and the House by a majority of one is just as binding on the people as if it had been passed unanimously. . . . I have just as much respect for a decision of the Supreme Court whether it is unanimous or whether it is rendered by a majority of 5 to 4, because it is binding; and under our theory of the rule of the majority, I think the Court is just as much justified in having its decisions by a majority of one respected as we would be justified in having the people respect our statutes which are passed by a majority of 1." 77 CONG. REC. 1185 (1933).

[9] By the Judiciary Act of 1789, Congress fixed the membership of the Supreme Court at six justices, i.e., one chief justice and five associate justices. As the Republic grew, the work of the Court increased, and, from time to time, Congress found it necessary to increase the membership of the Court. In 1807, one associate justice was added; in 1837, two more; and in 1863, still another—at this time the Court comprised ten justices. Even then the Court was overworked, with business flooding in upon it from all sections of the country and with its jurisdiction being extended, almost daily, to new subjects. It is somewhat surprising, then, to find that, in 1866, Congress passed an act which provided: "That no vacancy in the office of associate justice of the supreme court shall be filled by appointment until the number of associate justices shall be reduced to six; and thereafter the said supreme court shall consist of a chief justice of the United States and six associate justices, any four of whom shall be a quorum. . . ." 14 Stat. L. 209 (1866). The explanation is that this act was a political measure designed to prevent President Johnson, whose chronic feud with Congress was to culminate in his unsuccessful impeachment, from filling any vacancies upon the Supreme Bench. When, in 1869, Congress increased the number of associate justices to eight, it was necessary to make only one appointment. Since that time, the number has not been changed. 1 Stat. L. 73 (1789); 2 Stat. L. 421 (1807); 5 Stat. L. 176 (1837); 12 Stat. L. 794 (1863); 16 Stat. L. 44 (1869). In a debate on the floor of the Senate (April, 1933), Mr. Long (Louisiana) interrupted Mr. Black (Alabama) to say: "Our Constitution simply provides for the creation of the Supreme Court. It is possible for the Congress to enlarge it, diminish it, or to make itself a part of the court. The time might come in America when Congress itself would be in the same position in which the House of Parliament in England is, particularly if the Supreme Court were out of touch with what was necessary for the public at the time." 77 CONG. REC. 1125 (1933).

Perhaps it is a natural concomitant of great economic crises that advanced thinking—liberal to the point of radicalism—should find an accepted place. Perhaps, too, it should serve to remind us that our political thinkers and leaders have feet of clay. One can only hope that the good sense of the American people will prevent them from acting rashly and unwisely in this matter. It is regrettable, though, that the rationale of the Court's decisions should be the measure of its popularity; that because of any opinion which it may hand down, its staunch friends of today should become its severe critics of tomorrow.

Despite the popular concern about the Court's powers of judicial review, Congress is not at the mercy of the Supreme Court. On the contrary, Congress very definitely has the whip hand. While most of the proposed limitations would require an amendment to the Constitution, and for this reason are not at the command of Congress, the Constitution does vest in Congress the power to regulate and make exceptions to the appellate jurisdiction of the Supreme Court. In view of the constitutional interpretation which the Court itself has made, the writer submits that Congress, through the exercise of its power to regulate and make exceptions to the Court's appellate jurisdiction, can deprive the Court of appellate jurisdiction in a case, even though the Court has already taken jurisdiction, has heard the argument, and has taken the case under advisement. The following discussion will be limited to an inquiry into the existence of the *power;* whether or not the exercise of this power by Congress is politically expedient or morally justifiable is a problem beyond the scope of this paper.

II

The Constitution provides that:

> "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."[10]

[10] Constitution, Art. III, § 2, cl. 2. The "cases before mentioned" are to be found in clause 1: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of

The records of the Federal Convention of 1787, which drafted the Constitution, throw little light on the scope and meaning of this clause. On May 29, 1787, Edmund Randolph submitted fifteen propositions to the Convention. These resolutions, known as the Virginia Plan, comprised the basic principles of the Constitution. Other plans submitted were the Pinckney Plan and the Patterson Resolutions (New Jersey Plan). Alexander Hamilton read, but did not move the adoption of, eleven propositions which he stated he would probably offer as amendments to the Randolph Resolutions. On June 19th, the Virginia, New Jersey, and Pinckney Plans were referred to the Committee on Detail; this committee reported back, August 6th, the first draft of the Constitution.[11] The draft comprised twenty-three articles; Article

different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects."

[11] Randolph's ninth resolution provided:

"that a National Judiciary be established; to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature; to hold their offices during good behaviour, and to receive punctually, at stated times, fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine, in the first instance, and of the supreme tribunal to hear and determine, in the dernier resort, all piracies and felonies on the high seas; captures from an enemy; cases in which foreigners, or citizens of other States, applying to such jurisdictions, may be interested; or which respect the collection of the national revenue; impeachments of any national officers, and questions which may involve the national peace and harmony." 2 THE PAPERS OF JAMES MADISON, Gilpin ed., 733 (1840).

Article IX of the Pinckney Plan provided that:

"The Legislature of the United States shall have the power, and it shall be their duty, to establish such courts of law, equity, and admiralty, as shall be necessary.

"The judges of the courts shall hold their offices during good behaviour; and receive a compensation, which shall not be increased or diminished during their continuance in office. One of these courts shall be termed the Supreme Court; whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, other public ministers and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction. In cases of impeachment affecting ambassadors, and other public ministers, this jurisdiction shall be original; and in all other cases appellate.

"All criminal offences, except in cases of impeachment, shall be tried in the State where they shall be committed. The trials shall be open and public, and shall be by jury." 2 ibid. 743.

Patterson's fifth resolution provided:

"that a Federal Judiciary be established, to consist of a supreme tribunal, the Judges of which to be appointed by the Executive, and to hold their offices during good behaviour; to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made so as to

XI, divided into five sections, concerned the Judiciary.[12] For more than a month, the Convention discussed and debated the proposed articles, and on September 8th the articles, as amended and agreed to, were referred to the Committee on Revision (called also the Committee on Style). Four days later, this committee reported back the second and final draft of the Constitution, which was accepted by a unanimous vote (September 15th) after it had been debated and amended.[13]

Returning now to the matter of the appellate jurisdiction as described in the Constitution, Justice Story saw an interesting problem of construction, and posed the question "whether the appellate jurisdiction attaches to the Supreme Court, subject to be withdrawn and modified by Congress, or whether an act of Congress is necessary to

affect the persons actually in office at the time of such increase or diminution. That the Judiciary so established shall have authority to hear and determine, in the first instance, on all impeachments of Federal officers; and, by way of appeal, in the dernier resort, in all cases touching the rights of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested; in the construction of any treaty or treaties, or which may arise on any of the acts for the regulation of trade, or the collection of the Federal revenue: that none of the Judiciary shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for ——— thereafter." 2 ibid. 865.

Hamilton's seventh proposition provided that:

"The supreme Judicial authority to be vested in Judges, to hold their offices during good behaviour, with adequate and permanent salaries. This court to have original jurisdiction in all causes of capture, and an appellative jurisdiction in all causes in which the revenues of the General Government, or the citizens of foreign nations, are concerned." 2 ibid. 891.

These *Papers* contain Madison's reports of the debates in the Federal Convention. Mr. Max Farrand cautions us that, more than thirty years after the Convention was held, Madison revised the manuscript and made many changes, upon insufficient data, which seriously impaired the value of his work. 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION vii (1911).

[12] Art. XI, § 3: "The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting ambassadors, other public ministers and consuls; to the trial of impeachments of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard territory or jurisdiction); between a state and citizens of another State; between citizens of different States; and between a state, or the citizens thereof, and foreign states, citizens or subjects. In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, this jurisdiction shall be original. In all the other cases beforementioned, it shall be appellate, with such exceptions, and under such regulations, as the Legislature shall make. . . ." 2 THE PAPERS OF JAMES MADISON, Gilpin ed., 1238 (1840).

[13] 3 ibid. 1543. It should be noted that the State Delegations voted as units.

confer the jurisdiction upon the court."[14] In his discussion of this question, he said:

> "If the former be the true construction, then the entire appellate jurisdiction, if Congress should make no exceptions or regulations, would attach *proprio vigore* to the Supreme Court. If the latter, then, notwithstanding the imperative language of the Constitution, the Supreme Court is lifeless until Congress have conferred power on it. And if Congress may confer power, they may repeal it. So that the whole efficiency of the judicial power is left by the Constitution wholly unprotected and inert, if Congress shall refrain to act. There are certainly very strong grounds to maintain that the language of the Constitution meant to confer the appellate jurisdiction absolutely on the Supreme Court, independent of any action by Congress; and to require this action to divest or regulate it. The language as to the original jurisdiction of the Supreme Court admits of no doubt. It confers it without any action of Congress. Why should not the same language, as to the appellate jurisdiction, have the same interpretation? It leaves the power of Congress complete to make exceptions and regulations; but it leaves nothing to their inaction."[15]

Chancellor Kent, per contra, interpreted the clause to mean that:

> "The appellate jurisdiction of the Supreme Court exists only in those cases in which it is affirmatively given. In the case of *Wiscart v. Dauchy*, the Supreme Court considered that its whole appellate jurisdiction depended upon the regulations of congress, as that jurisdiction was given by the constitution in a qualified manner. The Supreme Court was to have appellate jurisdiction, 'with such exceptions, and under such regulations, as congress should make;' and if congress had not provided any rule to regulate the proceeedings on appeal, the court could not exercise an appellate jurisdiction; and if a rule be provided, the court could not depart from it. . . ."[16]

This question, however, is largely academic, for the first session of the first Congress enacted the Judiciary Act[17] which, as John Marshall

[14] 2 STORY, COMMENTARIES ON THE CONSTITUTION, Cooley ed., 538 (1873).

[15] Ibid.

[16] 1 KENT, COMMENTARIES ON AMERICAN LAW, 1st ed., 303 (1826). In the case cited, Wiscart v. Dauchy, 3 Dall. (3 U. S.) 321 at 327 (1796), Elsworth, C. J., delivered the opinion of the court.

[17] 1 Stat. L. 73 (1789).

said, "described" the jurisdiction of the Supreme Court. In his opinion, in *United States v. More,* Chief Justice Marshall said:

> "But as the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described."[18]

In his opinion, in *Durousseau v. United States,* he further elaborated this doctrine:

> "It is contended that the words of the constitution vest an appellate jurisdiction in this court, which extends to every case not excepted by congress; and that if the court had been created without any express definition or limitation of its powers, a full and complete appellate jurisdiction would have vested in it, which must have been exercised in all cases whatever.
>
> "The force of this argument is perceived and admitted. Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court as ordained by the constitution; and, in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.
>
> "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

[18] United States v. More, 3 Cranch (7 U. S.) 159 at 173 (1805). This doctrine that affirmative words infer a negative by implication was first advanced by Marshall in the case of Marbury v. Madison. By the Judiciary Act of 1789 (see note 17, supra) Congress had undertaken to confer upon the Supreme Court other original jurisdiction than that described in the Constitution. The Court concluded that the affirmative words describing the Court's original jurisdiction properly included the negative that it should not possess any other. In the opinion, Marshall said:

> "Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.
>
> "It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it. . . ." Marbury v. Madison, 1 Cranch (5 U. S.) 137 at 174 (1803).

> 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." [19]

It would seem that Marshall, by asserting that the affirmative description of the Court's appellate jurisdiction by act of Congress *negatives* the exercise of any other appellate power not comprehended in the act, is in effect saying that the Court has only such appellate jurisdiction as Congress, by affirmative act, has given it. By his dictum to the effect that, had the Court been created without any express definition or limitation of its powers, a full and complete appellate jurisdiction must have vested in it, he is advancing the proposition that Congress cannot deprive the Supreme Court of *all* appellate jurisdiction. This interpretation was adopted by Justice Story.

Chief Justice Taney went further than Marshall, in his interpretation of the second clause. In *Barry v. Mercein*, he said:

> "By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes." [20]

The learned Chief Justice cited no authority in support of his statement, but the language is unequivocal and, if construed literally, clearly means that the Court was rejecting the Marshall dictum. In effect, Taney is saying that Congress can deprive the Supreme Court of *all* its appellate jurisdiction. He may have been influenced by Kent's *Commentaries*, published twenty years before. Certainly his interpretation squares with that of the Chancellor. Inasmuch as Con-

[19] Durousseau v. United States, 6 Cranch (10 U. S.) 307 at 313 (1810). In discussing the opinion of this case, Story, in support of his thesis, stressed Marshall's dictum that *if* the Judiciary Act had created the Supreme Court without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the Constitution assigns to it. 2 STORY, COMMENTARIES ON THE CONSTITUTION, Cooley ed., 538 (1873). Kent, per contra, stressed the assertion that the Court's appellate powers *were* limited by the judiciary statutes, which were understood as making exceptions to the appellate jurisdiction of the Court and to imply a negative on the exercise of all powers not affirmatively given and described by statute. 1 KENT, COMMENTARIES ON AMERICAN LAW, 1st ed., 304 (1826).

[20] Barry v. Mercein, 5 How. (46 U. S.) 103 at 119 (1847).

gress *had* prescribed regulations for the exercise of the Court's appellate jurisdiction, the question whether the Court might have exercised general appellate jurisdiction under rules prescribed by itself, had Congress made no exceptions and no regulations, was wholly academic. Given such regulation by Congress, Marshall and Taney were agreed that the Supreme Court could exercise only such appellate jurisdiction as Congress, by affirmative act, had given it.

Both *Durousseau v. United States* and *Barry v. Mercein* were cited as authority in *Ex parte Vallandigham* and *United States v. Young*. In the former case Justice Wayne said:

> "The appellate powers of the Supreme Court, as granted by the Constitution, are limited and regulated by the acts of Congress, and must be exercised subject to the exceptions and regulations made by Congress." [21]

In the latter case Chief Justice Waite said:

> "We have only such appellate jurisdiction as has been conferred by Congress, and in the exercise of such as has been conferred we can proceed only in the manner which the law prescribes." [22]

While it may be difficult to reconcile the implications of the above, in a practical sense there is very little difference between a statement that the Court's appellate powers must be exercised subject to the exceptions and regulations of Congress, and one to the effect that the Court has only such appellate jurisdiction as has been conferred by Congress. And the cases are in agreement that the Court's appellate powers are so limited.[23] Admitting that Congress can deprive the Court of appellate jurisdiction in a class of cases, there is the further question whether, after the Court has allowed the appeal in a case, Congress can deprive the Court of appellate jurisdiction in that case. With this question in mind, it is proposed to examine the case of *Ex parte McCardle*.[24]

[21] Ex parte Vallandigham, 1 Wall. (68 U. S.) 243 at 251 (1863).

[22] United States v. Young, 94 U. S. 258 at 259 (1876).

[23] United States v. Curry, 6 How. (47 U. S.) 106 at 113 (1848); Forsyth v. United States, 9 How. (50 U. S.) 570 at 572 (1850); Daniels v. R. R., 3 Wall. (70 U. S.) 250 at 254 (1865); Ex parte Yerger, 8 Wall. (75 U. S.) 85 at 98 (1868); Nat. Exchange Bank v. Peters, 144 U. S. 570 at 572, 12 S. Ct. 767 (1891); American Construction Co. v. Jacksonville, T. & K. W. Ry., 148 U. S. 372 at 378, 13 S. Ct. 758 (1892); Colorado Central Consolidated Mining Co. v. Turck, 150 U. S. 138 at 141, 14 S. Ct. 35 (1893).

[24] 7 Wall. (74 U. S.) 506 (1868).

III

The *McCardle* case must be interpreted in the light of Reconstruction politics. It might be well to recall that the Thirteenth Amendment, which abolished negro slavery, was ratified by the required number of states in December, 1866. And that the South, true to its tradition of "White" supremacy, almost immediately adopted the so-called "Black Codes" which, it was charged, substituted for slavery a system of peonage. In order to protect the newly created Freedman, as well as persons from the Northern states who were sojourning in the South, Congress passed the Act of February 5, 1867, designed to empower the federal courts to provide relief to any person who might be "restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[25]

While this act was in force, one McCardle, alleging unlawful restraint by military force, petitioned the Circuit Court for the Southern District of Mississippi for a writ of habeas corpus. The writ issued and a return was made, admitting the restraint but denying that it was unlawful. It developed that McCardle was not in the military service, and that he was held in custody by the military authorities for trial before a military tribunal. And this, because of the publication, in a newspaper of which he was the editor, of certain articles alleged to be incendiary and libellous. The custody was alleged to be under authority of the Reconstruction Act of March 2, 1867.[26] Upon hearing, the court decided that the restraint was lawful and the petitioner was remanded to the custody of the military. McCardle prayed an appeal, under the Act of February 5, 1867, to the Supreme Court of the United States. The appeal was allowed and perfected, and upon motion to dismiss the appeal, the motion was denied.[27] The case was then argued at the bar, and, the argument having been concluded on the 9th of March, 1868, the case was taken under advisement by the Court. While the cause was in this position, and before the Court had arrived at a decision, Congress passed the Act of March 27, 1868—an act

[25] 14 Stat. L. 385 (1867). The act empowered the federal courts to grant writs of habeas corpus in all such cases. It further provided that an appeal from the decision of any judge, justice, or court, inferior to the circuit court, might be taken to the circuit court of the United States for the district in which the cause was heard, and from the judgment of the circuit court to the Supreme Court.

[26] 14 Stat. L. 428 (1867).

[27] In December, 1867, the Supreme Court unanimously held that it had jurisdiction of the appeal in the McCardle case, under authority of the Act of February 5, 1867. Ex parte McCardle, 6 Wall. (73 U. S.) 318 (1867).

designed to deprive the Court of jurisdiction in the *McCardle* case.[28]

As originally introduced, the Act of March 27, 1868,[29] was a revenue measure drawn up in the Treasury Department, and it merely provided that, in any action against a revenue officer for the recovery of money paid to him, an appeal to the Supreme Court would lie from any judgment in a circuit court. The bill was introduced into the Senate by the chairman of the Committee on Finance, was referred to that committee, reported favorably, passed, and sent to the House. There it was amended, and it was this amendment which was designed to relieve the Court of jurisdiction in the *McCardle* case. The amendment, proposed by James F. Wilson (Iowa), Chairman of the Judiciary Committee, provided that:

> "so much of the act approved February 5, 1867, entitled 'An Act to amend an act to establish the judicial courts of the United States, approved September 24, 1789', as authorizes an appeal from the judgement of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is hereby, repealed."[30]

On March 12th (1868), the amended bill was read and passed by the House, and the concurrence of the Senate was sought. The same day, the Senate, without any debate, concurred in the amended bill.[31]

Two days later, Benjamin M. Boyer (Pennsylvania), a Democrat

[28] O. H. Browning, Johnson's Secretary of the Interior, wrote in his Diary, while the case was pending:

> "Dined with Mr. Dicks with Montgomery and Frank Blair and Judges Field and Olin. Judge Field said the McCardle case had not been decided—that the judges had refused to take it up for consideration in the consultation room on the ground that they did not wish to run a race with Congress, where it was understood a bill was pending to take away their jurisdiction—Grier and Field opposed this view and wished to proceed, which it was clearly the duty of the Court to do, but they were overruled by the others. This exhibition of cowardice on the part of the Court, and their readiness to surrender the inalienable rights of the citizen to the usurpation and tyranny of Congress is among the alarming symptoms of the times.
>
> "Field says that if the Court could have been brought to a decision the rights of the citizen would have been sustained by all the Court except Swayne." 2 DIARY OF ORVILLE HICKMAN BROWNING 191 (1925).

[29] 15 Stat. L. 44 (1868).

[30] CONG. GLOBE, 40th Cong., 2d Sess., 1847 at 1860 (1868). Note that the amendment is so worded as to deprive the Court of jurisdiction over appeals already allowed.

[31] Ibid., p. 1847. Note that the argument in the McCardle case was concluded on March 9th.

and a member of the minority, arose to explain to the House that the bill:

> "was passed without any objection solely because it was introduced in a manner calculated to deceive and to disarm suspicion of its real design and effect . . . that had it been known what the real nature of the amendment was and to what it actually did refer, it could never have been passed in the manner in which it was suffered to pass at that time without opposition." [32]

After pointing out that the act would operate to prevent the Court from handing down a decision in the *McCardle* case, he concluded:

> "it must be because they [the Radicals] are afraid to submit them [Reconstruction Acts] to the test of judicial inquiry that, in that covert way, by artful approaches and by disguises not easily seen through at the moment, a measure was smuggled through, which, if it produces the effect for which it was intended, will, perhaps, prevent the constitutionality of the reconstruction acts from being tested in the manner in which the question is now being tested in the McCardle case, now pending before the Supreme Court of the country." [33]

The amendment was ably defended by Robert C. Schenk (Ohio), who scored the Democratic minority for having been caught napping—no objections to the bill having been interposed at the time it was passed.[34] The attitude of the majority was perhaps best expressed by Horace Maynard (Tennessee) when he said:

> "this McCardle case was brought up for no purpose in the world except to test and settle political questions. It is a political suit; that and nothing else, and brought for that purpose alone." [35]

[32] Ibid., p. 1881.

[33] Ibid., p. 1882.

[34] Schenk launched into a tirade against the Court, in which he said: "I have lost confidence in the majority of the Supreme Court of the United States. . . . I believe that they usurp power whenever they dare to undertake to settle questions purely political, in regard to the status of States, and the manner in which those States are to be held subject to the law-making power. And if I find them abusing that power by attempting to arrogate to themselves jurisdiction under any statute that happens to be upon the record, from which they claim to derive that jurisdiction, and I can take it away from them by a repeal of that statute, I will do it. . . . I hold it to be not only my right but my duty, as a Representative of the people, to clip the wings of that court whenever I can, in any attempt to take such flights." CONG. GLOBE, 40th Cong., 2d Sess., p. 1883 (1868).

[35] Ibid., p. 2064. Because the business of impeachment occupied the full talents of the House, further discussion of the Wilson Amendment was postponed until March 21st.

In the van of the attackers was Fernando Wood (New York) who had the clerk read an article clipped from a current issue of *The New York Times*, reputed to be a Republican sheet, wherein the editor, Henry J. Raymond, denominated the passage of the bill as a "sharp practice."[36] Apparently the country was being aroused.

On March 25th, the amended bill was returned to the Senate with President Johnson's veto. Concerning the Wilson Amendment, he said:

> "It cannot fail to affect most injuriously the just equipoise of our system of Government; for it establishes a precedent which, if followed, may eventually sweep away every check on arbitrary and unconstitutional legislation. Thus far during the existence of the Government the Supreme Court of the United States has been viewed by the people as the true expounder of their Constitution, and in the most violent party conflicts its judgments and decrees have always been sought and deferred to with confidence and respect. In public estimation it combines judicial wisdom and impartiality in a greater degree than any other authority known to the Constitution; and any act which may be construed into or mistaken for an attempt to prevent or evade its decisions on a question which affects the liberty of the citizens and agitates the country cannot fail to be attended with unpropitious consequences. It will be justly held by a large portion of the people as an admission of the unconstitutionality of the act on which its judgment

[36] It was stated in this editorial that: "nobody not in the secret understood the game, and the bill, as amended, passed at once. . . . A trick it is, and as a trick it will be remembered, but it is a trick by which Congress is enabled to forestall the action of the Supreme Court, and prevent an adverse decision on the merits of reconstruction by limiting the jurisdiction of the court. Unless the court refuses to be so restrained, and thus comes into direct collision with Congress, all chance of obtaining a judgment is destroyed. Whether the reconstruction law is constitutional or otherwise is no longer a matter of moment to sufferers from its provisions. They are denied the privilege of testing the validity of the law by a proceeding which is virtually retroactive, and which renders the administration of justice subordinate to partisan ends.

"The shamelessness with which the thing is done suggests a humiliating commentary upon the temper of Congress and the effect of its legislation upon the most cherished institutions of the country. In better days changes affecting the judiciary were discussed calmly, carefully, and with no immediate reference to their effect upon parties. They were, in fact, discussed and settled on their merits. Now, we have a measure arresting justice in its course, forcing out of court a case rightfully there, awaiting argument and judgment, and forbidding the recognition of cases affecting the constitutionality of statutes under which the States are to be brought into the Union: and this measure not subjected to examination, not debated or explained, not understood or even known, but hurried through both Chambers almost with the quickness of lightning, and for a purpose of which the ruling party are ashamed." CONG. GLOBE, 40th Cong., 2d Sess., p. 2064 (1868).

> may be forbidden or forestalled, and may interfere with that willing acquiescence in its provisions which is necessary for the harmonious and efficient execution of any law." [37]

Within two days, the bill was passed over the President's veto—the Radical leaders in both Chambers having had little difficulty in commanding the necessary majority.[38] The debate which preceded the final vote was bitter, and feeling ran high. Whatever charges of "sharp practice" and subterfuge may have been justified by the manner in which the bill was introduced and originally passed, no such criticism can be applied to the final passage over the President's veto. The purpose of the bill was open and notorious, and the members of both Houses knew the bill for what it was. It is sufficient to say that the bill was attacked as a party measure, and that it was defended on the principle that "God has given; God has taken away."

The Supreme Court dismissed the case of *Ex parte McCardle* for want of jurisdiction.[39] Mr. Chief Justice Chase delivered the opinion of the Court; he said:

> "The first question necessarily is that of jurisdiction; for, if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

[37] Ibid., p. 2094. Note that at this time the President was standing trial for "High crimes and misdemeanors." On February 24th, the House moved the impeachment of President Johnson; on March 2d, the formal articles of impeachment were drafted; and on March 4th, they were submitted to the Senate. Chief Justice Chase presided at the trial.

[38] CONG. GLOBE, 40th Cong., 2d Sess., pp. 2128, 2170 (1868).

[39] That this decision came somewhat as a shock to members of the "official family" can readily be understood. The Supreme Court, their last hope, had failed them. Gideon Welles, who was Secretary of the Navy under Lincoln and Johnson, wrote in his Diary while the decision was pending:

> "It is evident that the Radicals in Congress are in a conspiracy to overthrow not only the President but the government. The impeachment is but a single act in the drama. Alabama is to be admitted by a breach of faith and by violence to honest, fair legislation. By trick, imposition, and breach of courtesy an act was slipped through both houses repealing the laws of 1867 and 1789, the effect of which is to take from the Supreme Court certain powers, and which is designed to prevent a decision in the McCardle case. Should the Court in that case, as it is supposed they will, pronounce the Reconstruction laws unconstitutional, the military governments will fall and the whole Radical fabric will tumble with it."

After the decision, Welles wrote:

> "The Judges of the Supreme Court have caved in, fallen through, failed, in the McCardle case. Only Grier and Field have held out like men, patriots, judges of nerve and honest independence.
>
> "These things look ominous and sadden me. I fear for my country when I

"It is quite true . . . that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred 'with such exceptions and under such regulations as Congress shall make.'

"It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction . . . [quoting from *Durousseau v. The United States*].

"The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

"The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

"We are not at liberty to inquire into the 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.

"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 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. . . .

"It is quite clear, therefore, that this court cannot proceed to pronounce judgement in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by de-

see such abasement. Fear of the usurping Radicals in Congress has intimidated some of these Judges, or, like reckless Democratic leaders, they are willing their party should triumph through folly and wickedness.

"These are indeed evil times! Seward has on more than one occasion declared that he controlled Judge Nelson. Whether he is, or has been, intriguing in this matter, or taken any part, is a problem." 3 DIARY OF GIDEON WELLES 314, 320 (1911).

clining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer." [40]

When this opinion was written, there was already adequate authority for the doctrine that, in cases where the Court's appellate jurisdiction was dependent upon an act of Congress, the repeal of the act served to deprive the Court of its jurisdiction — even as to decisions actually pending. In 1850, in the case of *United States v. Boisdore's Heirs,* Chief Justice Taney said:

> "It is true that this court can exercise no appellate power over *this case,* unless it is conferred upon it by act of Congress. And if the laws which gave it jurisdiction in such cases have expired . . . its jurisdiction over them has ceased, although this appeal was actually pending in this court when they expired." [41]

The same year, this statement was quoted with approval in *McNulty v. Batty* by Justice Nelson, who said:

> "In the case of the United States *v.* Boisdore's heirs, (8 Howard, 121,) it is said, that, as this court can exercise no appellate power *over cases,* unless conferred upon it by act of Congress, if the act conferring the jurisdiction has expired, the jurisdiction ceases, although the appeal or writ of error be actually pending in the court at the time of the expiration of the act." [42]

It would seem that the difference in phraseology (the words italicized) is significant. It is one thing to say that the Court has no appellate jurisdiction over *this case,* unless conferred by act of Congress; and an entirely different thing to say that the Court can exercise no appellate jurisdiction *over cases,* unless conferred by act of Congress. The latter statement, if construed literally, means that Congress can deprive the Court of appellate jurisdiction in any case before it, simply by repealing the act conferring such jurisdiction. But, as the *Boisdore* case was

[40] Ex parte McCardle, 7 Wall. (74 U. S.) 506 at 512-515 (1868). Referring to the Act of March 27th and its effect on the McCardle case, Chase, C. J., said:

> "The effect of the act was to oust the court of its jurisdiction of the particular case then before it on appeal, and it is not to be doubted that such was the effect intended. Nor will it be questioned that legislation of this character is unusual and hardly to be justified except upon some imperious public exigency.
>
> "It was, doubtless, within the constitutional discretion of Congress to determine whether such an exigency existed; but it is not to be presumed that an act, passed under such circumstances, was intended to have any further effect than that plainly apparent from its terms." Ex parte Yerger, 8 Wall. (75 U. S.) 85 at 104 (1868).

[41] United States v. Boisdore's Heirs, 8 How. (49 U. S.) 113 at 121 (1850). Italics mine.

[42] McNulty v. Batty, 10 How. (51 U. S.) 72 at 79 (1850). Italics mine.

decided in the January Term (1850) of the Court, and the *McNulty* case in the December Term, Justice Nelson presumably sat in both cases; and certainly he was competent to state the Court's construction in the former case. One must conclude that both opinions are authority for the proposition that Congress can deprive the Court of appellate jurisdiction in any particular case. Moreover, Chief Justice Taney had already expressed that interpretation, in his opinion in *Barry v. Mercein.*[43]

A statement by Chief Justice Waite is also pertinent here. In *Railroad Co. v. Grant,* he said:

> "The single question presented by this motion is whether there is any law now in force which gives us authority to re-examine, reverse, or affirm the judgment in this case. Nearly seventy years ago, Mr. Chief Justice Marshall said, in *Durusseau v. United States* . . . that this 'court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of those powers. Thus a writ of error lies to the judgment of a circuit court, where the matter in controversy exceeds the value of $2,000. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the circuits where the matter in controversy is of less value and implies negative words.' There has been no departure from this rule, and it has universally been held that our appellate jurisdiction can only be exercised in cases where authority for that purpose is given by Congress.
>
> "It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law."[44]

In *The "Francis Wright."*, Chief Justice Waite again undertook a discussion of the Court's appellate powers. After quoting from Marshall's opinion in *Durousseau v. United States,* he said:

"What those powers shall be, and to what extent they shall be

[43] 5 How. (46 U. S.) 103 (1847), quoted at p. 659, supra.

[44] Railroad Co. v. Grant, 98 U. S. 398 at 400 (1878). Cited as authority in Sherman v. Grinnell, 123 U. S. 679 at 680, 8 S. Ct. 260 (1887); Gurnee v. Patrick County, 137 U. S. 141 at 144, 11 S. Ct. 34 (1890); and Nat. Exchange Bank v. Peters, 144 U. S. 570 at 572, 12 S. Ct. 767 (1891). In Norris v. Crocker, 13 How. (54 U. S.) 429 at 440 (1851), the plaintiff's right to recover depended upon a statute which the Court held was repealed, by implication, by a later statute. Catron, J., said: "As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject-matter." This case was cited with approval in Insurance Company v. Ritchie, 5 Wall. (72 U. S.) 541 at 544 (1866); The

> exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. . . ." [45]

These cases impliedly establish the proposition that the Supreme Court shall have only such appellate jurisdiction as Congress, by affirmative act, shall give it; and expressly state that, in cases where the Court's jurisdiction is dependent upon an act of Congress, the repeal of the act will deprive the Court of jurisdiction.

There is also adequate authority for the statement of Chief Justice Chase (in *Ex parte McCardle*) that the Court was not at liberty to inquire into the *motives* of the legislature, but must confine itself to inquiring into the *power* of the legislature under the Constitution. The Court has consistently subscribed to this doctrine since Chief Justice Marshall delivered the opinion in *Fletcher v. Peck* in 1810.[46]

The writer concludes that the cases have established the following propositions: (1) that the Supreme Court may exercise only such appellate jurisdiction as Congress, by affirmative act, has given it; (2) that Congress, by repealing the act conferring the appellate jurisdiction, can deprive the Court of such jurisdiction, even though the Court has already allowed the appeal in a case, has heard the argument, and has taken the case under advisement; and (3) that the Court will not inquire into the motives of the legislature but will inquire only into the power, and that the power to make exceptions to the appellate jurisdiction of the Court is one expressly granted to Congress in the Con-

Assessors v. Osbornes, 9 Wall. (76 U. S.) 567 at 574 (1869); and United States v. Tynen, 11 Wall. (78 U. S.) 88 at 94 (1870).

[45] The "Francis Wright.", 105 U. S. 381 at 386 (1881). This statement was quoted by Mr. Justice Van Devanter, in Luckenbach Steamship Company v. United States, 272 U. S. 533 at 537, 47 S. Ct. 186 (1926).

[46] Fletcher v. Peck, 6 Cranch (10 U. S.) 87 at 130 (1810); Munn v. Illinois, 94 U. S. 113 at 132 (1876); Doyle v. Continental Insurance Co., 94 U. S. 535 at 541 (1876); Antoni v. Greenhow, 107 U. S. 769 at 775, 2 S. Ct. 91 (1882); United States v. Des Moines Navigation & Ry., 142 U. S. 510 at 544, 12 S. Ct. 308 (1891); New Orleans v. Warner, 175 U. S. 120 at 145, 20 S. Ct. 44 (1899); McCray v. United States, 195 U. S. 27 at 56, 24 S. Ct. 769 (1903); Weber v. Freed, 239 U. S. 325 at 330, 36 S. Ct. 131 (1915); and Hamilton v. Kentucky Distilleries, 251 U. S. 146 at 161, 40 S. Ct. 106 (1919). See also, COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, 5th ed., 222 (1883). Though an act of a state legislature was challenged in Fletcher v. Peck, the case has been cited as authority where acts of Congress were involved.

stitution. From this, it is not necessary to conclude that Congress can deprive the Court of all appellate jurisdiction, though there is authority to support an inference to that effect. Nor does the admission that, in a strict sense, Congress does not confer any appellate jurisdiction upon the Supreme Court in any way vitiate the above propositions. The seeming inconsistency was ably explained by Chief Justice Chase in his statement that, having established the proposition that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.[47] Certainly the Court has not always been careful to make this distinction. In a series of lectures delivered after his resignation from the Supreme Bench, Justice Curtis invariably referred to the Court's appellate jurisdiction as having been conferred or given by act of Congress.[48]

Whether the Court will be willing in all cases to admit the logical consequences of these doctrines which it has established, is a matter for speculation. That the Court did go the entire way in the *McCardle* case is beyond question. President Johnson's apprehension that Congress might eventually succeed in sweeping away every check on arbitrary and unconstitutional legislation was no idle fear.[49] That Congress has not attempted to upset the tripartite balance of powers has not been due to a lack of power; the power is there, and with it the danger. This proper use of what might otherwise be an arbitrary power is a happy commentary on the soundness of our basic principles of government. The fact that our legislators are answerable to the electorate has undoubtedly exerted a moderating influence. Should the power be again put to the test, perhaps the Court, like Congress, "has the right and can find the means to protect its own prerogatives."

[47] See quotation, p. 666, supra.

[48] CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES, 2d ed., 25, 34, 61 (1896). Because of a bitter correspondence which resulted from his famous dissenting opinion in the case of Dred Scott v. Sandford, 19 How. (60 U. S.) 393 at 564-633 (1856), Benjamin R. Curtis resigned from the Supreme Court. This opinion was given to newspapers in advance of official publication, and, to meet its arguments, Taney, C. J., revised the opinion which he had read from the bench. An unpleasant exchange of opinions ensued between Taney and Curtis, and Curtis resigned from the Court, assigning as a reason the smallness of the salary he received as a Justice. 4 DICTIONARY OF AMERICAN BIOGRAPHY 610 (1930).

[49] See p. 664, supra.