What Congress Can Do for This American

The right to life. The Ten Commandments. Prayer in schools. Flag desecration. Same-sex marriage.

As the federal courts consider cases that involve the most deep-seated convictions of Americans and issues upon which Americans are sharply divided, they understandably strike raw nerves. Public frustration is redoubled because, of the three branches of government, the judiciary is the farthest removed from popular election and public influence. It seems to many that the nation is being governed by the "majority vote of a nine-person committee of lawyers, unelected and holding office for life," as Professor Lino Graglia has said.

As the federal courts render decisions that usurp powers never delegated to them by the people through the Constitution, concerned citizens look for ways to curb the court's power. Perhaps the most commonly promoted remedy is to amend the Constitution to end this or that judicial abuse. A basic problem with this approach is that the Constitution is very difficult to change. Both houses of Congress must pass a constitutional amendment by a two-thirds majority vote in order to submit the proposed amendment to the states for ratification, and three-fourths of the states must then ratify the amendment for it to become a part of the Constitution. Since the Constitution was adopted, it has been amended in this manner only 27 times, including the first 10 amendments (the Bill of Rights).*

But there are other concerns regarding the constitutional amendment approach besides the difficulty of amending the Constitution. Is it wise, we should ask ourselves, to call for a constitutional amendment every time the federal judiciary oversteps its constitutional authority? If the "remedy" is to change the Constitution, does that not imply that the judicial abuse may be constitutional? Does that not send a signal to the federal courts that they can impose whatever rulings they want, no matter how outrageous, until such time as they are stopped by a constitutional amendment?

Moreover, since much of the judicial activism has entailed usurping powers that have belonged to the states, we should be very wary of national "solutions" that end up transferring state powers to the federal government.

Fortunately, the Founding Fathers not only divided federal powers among three branches of government, they also embedded our Constitution with checks and balances to prevent any of the branches — including the judiciary — from usurping powers. One such check is that judges may be impeached. Another check — the focus of this article — is that Congress may limit the Supreme Court's appellate jurisdiction (the court's jurisdiction to hear appeals) pursuant to the "Exceptions Clause" in Article III, Section 2 of the Constitution. Congress could do so simply by passing legislation, *without having to resort to the exceedingly more difficult constitutional-amendment approach!*

In theory, this would be easy to execute. To effectively overturn the 1973 *Roe v. Wade* decision, which federalized the abortion issue and legalized abortion on demand, and to allow states to again determine their own abortion policies, the House and Senate merely need to tell the federal judiciary that it can no longer hear abortion cases.

Many judicial activists, who are accustomed to using the Judiciary as the primary avenue for social activism, claim that the use of the Exceptions Clause to curb their activism would be unconstitutional. But the judicial activists are wrong, as we shall see. Not only were the Founding Fathers clear in their intent regarding the Exceptions Clause, but Congress has applied it in the past to limit the Supreme Court's appellate jurisdiction.

Intent of the Founders

The relevant part of Article III, Section 2 of the Constitution reads:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. 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.

The words "with such Exceptions, and under such Regulations as the Congress shall make" constitute the Exceptions Clause. For a correct understanding of what these words mean, we need to examine the original intent.

On August 6, 1787, the Committee on Detail presented its proposed draft to the Constitutional Convention. Article XI of the proposed constitution read in part:

> In cases of impeachment, cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the legislature shall make.

The Exceptions Clause appears above in much the same form as that finally adopted. On August 27, the Convention considered the proposed Article XI. According to Madison's *Notes*:

> Mr. Govr. MORRIS wished to know what was meant by the words "In all the cases before mentioned it [jurisdiction] shall be appellate with such exceptions &c," whether it extended to matters of fact as well as law — and to cases of Common law as well as Civil law.
>
> Mr. WILSON. The Committee he believed meant facts as well as law & Common as well as Civil law. The jurisdiction of the federal Court of Appeals had he said been so construed.
>
> Mr. DICKINSON moved to add after the word "appellate" the words both as to law & fact which was agreed to.

James Wilson's answer to Gouverneur Morris suggests that the delegates intended the Exceptions Clause to empower Congress to limit the Supreme Court's appellate jurisdiction over substantive issues of law, common and civil, as well as to empower Congress to withdraw from the court the power to disturb jury verdicts.

After various amendments were proposed and defeated or withdrawn, the delegates turned their attention to other portions of the proposed draft. On September 8, they chose a Committee on Revision, sometimes called the Committee on Style, to prepare a final draft of the proposed constitution. On September 12 the committee presented its Revised Draft of the Constitution. No records of the committee's deliberations are available; but the language of Article III (The Judiciary) was in almost exactly the form that was finally adopted.

After the Constitution was signed on September 17, "in the Year of Our Lord" 1787, it was sent to the states for ratification. The ratification debates provide further helpful insights into the meaning of the Exceptions Clause.

The Federalist Papers, a series of 85 essays written in 1787 and 1788 by John Jay, Alexander Hamilton, and James Madison, were published in newspapers to explain the proposed Constitution and persuade people to support its adoption. In *The Federalist*, No. 80, Hamilton set forth the various aspects of Supreme Court jurisdiction, and then concluded that essay by saying, "From this review of the particular powers of the federal judiciary … it appears, that they are all conformable to the principles which ought to have governed the structure of that department, 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 provide such regulations, as will be calculated to obviate or remove these inconveniences."

In Essay No. 81, Hamilton described the Exceptions Clause as a protection against judicial abuse: "A very small portion of original jurisdiction has been reserved to the supreme court, and the rest consigned to the subordinate tribunals; that the supreme court will possess an appellate jurisdiction, both as to law and fact, in all the cases referred to them, but subject to any *exceptions* and *regulations* which may be thought advisable; that this appellate jurisdiction does, in no case, *abolish* the trial by jury."

In Essay No. 80, Hamilton said the Exceptions Clause empowers Congress to limit the court's appellate jurisdiction over substantive matters of common and civil law, and in No. 81 he said the Exceptions Clause empowers Congress to limit the court's authority to review jury determinations. This is consistent with the explanation James Wilson gave to Gouverneur Morris at the Convention: that the Exceptions Clause includes the power to limit the court's appellate jurisdiction over civil and common law, and also includes the power to limit the court's appellate jurisdiction over jury determinations.

The Anti-Federalists (those who opposed ratifying the Constitution, fearing that it would create too strong a federal government), agreed with the Federalists (those who supported ratification) that the Exceptions Clause provided an answer to judicial abuse, though they expressed reservations about how well it would function. "Brutus" (probably Robert Yates of New York), an Anti-Federalist writer, addressed the Exceptions Clause in a March 6, 1788 letter: "The natural meaning of this paragraph seems to be no more than this, that Congress may declare, that certain cases shall not be subject to the appellate jurisdiction, and they may point out the mode in which the court shall proceed in bringing up the causes before them, the manner of their taking evidence to establish the facts, and the method of the courts proceeding."

At Virginia's ratifying convention, anti-Federalist Patrick Henry agreed with Federalist (and convention president) Edmund Pendleton that Congress could limit the court's appellate jurisdiction and that this is a substantial power. Henry said it could be used to prevent sheriffs from engaging in unlawful searches and seizures. But they disagreed as to whether this was an adequate check upon judicial abuse. Pendleton said that because congressmen represent the states and the people, they could be trusted to protect their constituents from judicial abuses. Henry said it is naïve to rest our liberties on the assumption that our leaders will be virtuous.

George Mason, one of the Constitutional Convention delegates who had refused to sign the Constitution, argued that the appellate jurisdiction of the Supreme Court could be abused by appeals

that would be vexatious to people who could not afford the costs of litigation. James Madison answered the objection with the Exceptions Clause: "As to vexatious appeals, they can be remedied by Congress."

On June 20 Mason again objected to the powers of the judiciary. John Marshall, later to become Chief Justice of the Supreme Court, answered, "What is the meaning of the term *exception*? Does it not mean an alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people."

During the ratification process, supporters and opponents generally agreed that Congress could use the Exceptions Clause to limit the court's authority to overturn jury verdicts (although Brutus and Patrick Henry questioned that), and even seemed to agree that this congressional check on the court went beyond the questions of jury verdicts. But they disagreed as to whether the Exceptions Clause provided an adequate remedy. Hamilton and Madison viewed the clause as a general power to limit appellate jurisdiction, and Marshall believed Congress' authority to limit appellate jurisdiction extends as far as Congress shall determine that the interest of the people requires.

The Case Law

The best-known case involving the Exceptions Clause is *Ex parte McCardle*, an 1868 Supreme Court case involving a Mississippi newspaper editor who was detained by occupying federal military authorities for writing and publishing "incendiary and libelous" articles critical of Reconstruction and military rule of the South following the War Between the States. McCardle filed a petition for a writ of habeas corpus, claiming that his imprisonment was unconstitutional and that an 1867 statute authorized the Supreme Court to hear appeals from denials of writs of habeas corpus. The United States argued that the 1867 act applied only to state prisoners, not federal prisoners. The Supreme Court rejected this proposition and set the case for argument.

The *McCardle* case was argued March 9, 1868. On March 12, Congress repealed the provision of the 1867 act that gave the Supreme Court appellate jurisdiction over writs of habeas corpus. Several members of Congress clearly stated that their purpose was to prevent the Supreme Court from deciding *McCardle* and thereby hinder Reconstruction. One congressman declared that the legislation was "aimed at striking at a branch of the jurisdiction of the Supreme Court … thereby sweeping the case from the docket by taking away the jurisdiction of the Court." President Andrew Johnson vetoed the bill on March 25, and Congress overrode his veto on March 27.

A few months after *McCardle*, the Supreme Court decided *Ex parte Yerger*, another case of a newspaper editor challenging the Military Reconstruction Act. On the surface, this may appear as if the Supreme Court had defiantly challenged Congress' power to limit its appellate jurisdiction. But a careful reading of this case shows that the court did not directly contradict or overrule Congress in its handling of *McCardle*; the court instead heard Yerger's case based on a technical point, noting that the 1867 act that repealed its appellate jurisdiction over writs of habeas corpus did not affect its jurisdiction over writs of certiorari. Put simply: The court narrowly defined what limits Congress had set upon the court, not what Congress has the power to do.

The fact that the Supreme Court did not dispute Congress' actions in *McCardle* is not surprising, given the great deal of deference it had previously shown toward congressional power. In fact, prior to *McCardle* the court had taken a very narrow view of its own jurisdiction and a broad view of the power of Congress to define and limit its jurisdiction. In earlier years the court seemed to believe its powers of

jurisdiction were not self-executing. Rather, even in those areas in which the Constitution gives the court original or appellate jurisdiction, the court can exercise that jurisdiction only pursuant to an act of Congress.

In *Turner v. Bank of North America* (1799), Justice Samuel Chase wrote, "The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise: and if Congress has not given the power to us, or to any other Court, it still remains at the legislative disposal."

In 1881, the court considered *The Francis Wright*, another Exceptions Clause case, and simply ruled: "While the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe.... What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control."

Two leading 20th-century cases also addressed the Exceptions Clause. Both acknowledged that Congress had the authority to limit the appellate jurisdiction of the Supreme Court. In 1995, in *Plaut v. Spendthrift Farm, Inc.*, the court heard a challenge to an act of Congress that had the effect of overturning a previous Supreme Court decision. Though the court held the act unconstitutional under the Separation of Powers doctrine, it stipulated Congress' authority to limit cases the court could hear. Speaking for the court majority, Justice Antonin Scalia acknowledged that if a new law "makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly."

In 1996, the Supreme Court considered *Felker v. Turpin*. Felker had been convicted of murder and sentenced to death; his state court appeals had been denied; and his petition for writ of habeas corpus (his appeal for a hearing) in federal district court had been denied as well. He then brought a second habeas corpus petition in federal court, but while it was pending, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996. This act provides that after a first petition for writ of habeas corpus has been denied, subsequent petitions for writs of habeas corpus must be dismissed unless the law under which the petitioner had been convicted has been changed, or unless new evidence has been discovered that could not previously have been known, and no reasonable fact-finder would have convicted the petitioner if this evidence had been presented at the trial.

Felker argued that the 1996 act unconstitutionally usurped the appellate jurisdiction of the federal courts. But Chief Justice William Rehnquist ruled that the act is constitutional. He noted that the act did not deprive the court of its jurisdiction to hear the first petition for writ of habeas corpus, and further, that the act did not deprive the court of its authority to hear original petitions for writs of habeas corpus.

Exceptions Clause Today

If we are truly interested in reining in our out-of-control federal judiciary on issues such as abortion, we should work to take the powerful congressional "Exceptions Clause" off the shelf and put it into practice.

In fact, there is now legislation before Congress to do exactly that. Last year, Congressman Ron Paul (R-Texas) introduced the Sanctity of Life Act (H.R. 2597) and the "We the People Act" (H.R. 300) to limit

the jurisdiction of the federal courts in certain areas. The Sanctity of Life Act, as the name implies, would limit the appellate jurisdiction of the Supreme Court and the jurisdiction of federal district courts to prevent them from adjudicating abortion cases. The "We the People Act" would prevent the federal judiciary from adjudicating not only cases concerning "reproduction" but also same-sex marriage and state or local policies concerning the free exercise or establishment of religion. Others have proposed to eliminate the Supreme Court's jurisdiction over cases involving same-sex marriage, the display of the Ten Commandments, and other controversial subjects.

Congress can and should use its power under the Exceptions Clause to effectively eliminate *Roe v. Wade* and to end other abuses by the federal judiciary as well. But it will not happen until we inform many more of our fellow citizens about the existence of this power and put pressure on Congress to apply it.

* The only other way to amend the Constitution is for two-thirds of the states to call a convention for proposing amendments. We have not had a constitutional convention since the original one of 1787, but if a modern-day convention were called, it could probably propose any number of amendments including a new Constitution.

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