

Review

Exceptions and the Rule

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Congress v. The Supreme Court. By Raoul Berger. Cambridge: Harvard University Press, 1969. Pp. xiii, 424. \$15.00.

Almost half a century has gone by since Justice Frankfurter opined that Beard's researches had scotched, once and for all, the heresy that judicial review was a power usurped by Chief Justice Marshall rather than one foreseen and intended by the Framers.¹ But heresies die hard. Corwin, in writings spanning a quarter of a century, argued both sides of the issue. Louis Boudin popularized the attack on the judiciary. And, in 1953, Crosskey—having canvassed the Convention and ratifying debates, and other original sources, as Beard and Corwin had done before him—added his not considerable weight to the ranks of the iconoclasts: in Crosskey's view, judicial authority to invalidate acts of another branch of government was confined to those instances in which the integrity of the judicial power was in jeopardy.

On this issue—as on others upon which Crosskey turned his visionary and revisionary gaze—he won some minor converts. More to the point, however, Crosskey brought on himself the prompt thunder of the late Henry Hart.² And one might have thought Hart's rebuttal would end the matter. The verdict rendered by Alexander Bickel seemed conclusive: “[I]t is as clear as such matters can be that the Framers of the Constitution specifically, if tacitly, expected that the federal courts would assume a power—of whatever exact dimensions—to pass on the constitutionality of actions of the Congress and the President”³

But Raoul Berger, a lawyer of great ability and pertinacity, was reluctant to let the debate rest at that point. He wanted to find out for himself—once and for all—whether Beard or Crosskey was right.

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1. Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1003 n.4 (1924).

2. Hart, *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456 (1954), reviewing 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953).

3. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 15 (1962).

He wanted to settle the matter because of its bearing on a related constitutional issue, the extent of Congress's authority, under Article III, to make "exceptions" to the Supreme Court's appellate jurisdiction—an authority conventionally characterized, ever since *Ex parte McCordle*,⁴ as without limit. For if Beard's (and Marshall's) understanding was correct—namely, that the Framers expected the federal judiciary to act as a check on the unconstitutional behavior of the elective branches—what sense would it make to authorize Congress to frustrate the mechanism by curtailing, or perhaps abolishing entirely, the Supreme Court's appellate jurisdiction? The nagging sense that such a reading of the "exceptions" clause would make the Constitution a potentially self-defeating document is only underscored (as Berger fully appreciated) by the settled understanding that Congress is not obliged to create any inferior federal courts⁵ and by the very limited nature of the Supreme Court's original jurisdiction. Putting these ingredients together, it would appear that Congress could, in theory, liquidate all federal courts other than the Supreme Court and reduce that Court to inconsequentiality by abolishing its power to review state courts.⁶ Yet this, as Hart argued in his superb "Dialectic" in 1953, would appear to be an inadmissible conclusion.⁷ For Berger, the dilemma was such as to force him to reexamine the dilemma's premise—the validity of judicial review. This is the starting point for the book Berger has written—and which, very properly, he dedicated to Hart.

Berger's reexamination of the bases of Marshall's opinion in *Marbury v. Madison*⁸—and of its corollary, Justice Story's opinion in *Martin v. Hunter's Lessee*,⁹ declaring the Court's power to review state courts—is an heroic enterprise. Taking nothing for granted, Berger devotes over two hundred and fifty pages to the painstaking

4. 74 U.S. (7 Wall.) 506 (1869). Under the 1867 Habeas Corpus Act, McCordle sought habeas corpus in the circuit court to challenge his military confinement prior to trial by a military commission established under the authority of certain Reconstruction statutes. After losing in the circuit court, McCordle appealed to the Supreme Court. Subsequent to argument, but before decision, Congress—understandably lacking confidence that the Court would sustain the challenged Reconstruction statutes—enacted, in 1868, a new law withdrawing the Supreme Court's appellate authority to review circuit court dispositions of habeas corpus applications authorized by the 1867 Act. The Court held that the 1868 Act prevented it from proceeding further with respect to McCordle's appeal. *But cf.* *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

5. Justice Story to the contrary notwithstanding. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

6. *Cf. id.*

7. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

8. 5 U.S. (1 Cranch) 137 (1803).

9. 14 U.S. (1 Wheat.) 304 (1816).

tracking of the same prey Beard and Corwin and Crosskey pursued through the same forest primeval. Berger is intrepid, remorseless, and at last triumphant.

One, two! One, two! And through and through
The vorpal blade went snicker-snack!
He left it dead and with its head
He went galumphing back.

“And hast thou slain the Jabberwock?
Come to my arms, my beamish boy!
O frabjous day! Callooh! Callay!”

For our era, Jabberwock can now be counted as really dead. No one, it would seem, will feel called upon to save judicial review again.

If the more than two hundred and fifty pages vindicating Marshall and Story are a species of historical over-kill, they are balanced (if that be the correct word) by the dozen pages spent on the “exceptions” clause: Berger shows that, in the ratification debates, there was extensive discussion of the “exceptions” clause, but all of it was addressed to the concerns of those who feared that the Supreme Court, in the exercise of its appellate authority “both as to Law and Fact,” would be free to overturn jury determinations. The “exceptions” clause was relied on by proponents of the Constitution to show that Congress could preclude such appellate interference with the trial process (the reassurance seems only to have been partially effective, wherefore the Seventh Amendment). From this Berger infers that the Framers did not regard the “exceptions” clause as a method of confining, let alone altogether undercutting, the Supreme Court’s power of judicial review. Thus we are led to Berger’s principal conclusion:

Once the legitimacy of judicial review and its central role in the Constitutional scheme are granted, the power of Congress to make “exceptions” to the Supreme Court’s appellate jurisdiction cannot properly be given unlimited scope. There is no indication whatever that the Founders conceived the “exceptions” clause as a check on the Court’s Constitutional decisions. It seems hardly reasonable to conclude that they designed an effective curb on Congressional excesses and simultaneously furnished Congress with an easy means of circumventing it. To attribute that dual intention to the Founders is to charge them with chasing their tails around a stump. So far as can be gathered from the intensive discussions of the “exceptions” clause in the Ratification conventions, its purpose was narrow and altogether unrelated to a power to deprive the Court of jurisdiction of Constitutional claims. And as is the case with other powers, the “exceptions” power cannot override the

guarantees of the Fifth Amendment, which without judicial enforcement are mere "parchment" barriers.¹⁰

With all respect, the assertion that the "exceptions" clause "cannot properly be given unlimited scope" does not bring analysis of the ultimate problems beyond where Henry Hart took it in 1953. Thus (to take one crucially important example) we can be reasonably confident that the "exceptions" clause and the power to disestablish inferior federal courts cannot, even in combination, obliterate the right of one in federal custody to present his claims, via habeas corpus or an equivalent writ, to some federal judge: this is so because, through explicit reference to habeas corpus, the Constitution has established that a *judicial* remedy for illegal detention is indispensable. But it does not seem quite so clear that the Constitution insists upon a *judicial* remedy for all other deprivations of constitutional right. By way of illustration: it would seem open to real doubt—the Fifth Amendment notwithstanding—that there can be judicial enforcement of the right to just compensation except as Congress authorizes a court to render money judgments against the United States.¹¹ Indeed, *Marbury v. Madison* itself stands for the proposition that, absent a (constitutional) legislatively created remedy, official illegality is, from a court's perspective, *damnum absque injuria*.¹² And even the Congress which drafted the First Judiciary Act—the Congress led by Ellsworth and Madison and others of the Framers—conferred on the new lower federal courts, and on the new Supreme Court (in its appellate authority over federal and state courts), only a portion of the jurisdiction contemplated by Article III. It is, in short, a familiar fact that for substantial periods of our national experience there have been constitutional questions of great moment which—although they presented themselves in an appropriate "case" or "controversy"—could not reach the Supreme Court. If we add this history to the history so patiently explored by Berger, the full complexity of the issues begins to emerge.

It may be useful to recall, for example, that only since 1914 has the

10. R. BERGER, *CONGRESS V. THE SUPREME COURT* 336-37 (1969) [hereinafter cited as BERGER].

11. Berger's attack on sovereign immunity as an overrated concept does not, it is submitted, yield a different conclusion. See BERGER ch. 10.

12. Cf. *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838). It is of course true that the illegality in *Marbury* was a violation of a statutory, not a constitutional, obligation owing to the plaintiff; the point is simply that no inexorable logic requires that the judiciary be available to vindicate *every* departure from the law's requirements. Other agencies of government may also be capable of remedial action. Sometimes (e.g., when it is asserted that a war is "unconstitutional") the political process may be the best, or only, remedy.

Supreme Court had power to review state court decisions denying the validity of state laws challenged on federal constitutional grounds. Is there serious doubt that Congress could quite constitutionally put the Supreme Court's appellate jurisdiction back in its *status quo ante* 1914, notwithstanding that, in the absence of such revisory authority, state supreme courts could without hindrance strike down state laws on the basis of what might frequently be rather parochial constructions of the Constitution?¹³ The problem would of course become more difficult if Congress withdrew from the Supreme Court appellate cognizance of *all* state cases in which a state law was challenged on federal constitutional grounds, whether the state courts sustained or invalidated the disputed provisions of state law. One may grant that such an arrangement—with its open invitation to disuniformity in the enforcement of federal guarantees—would be wildly imprudent (and especially so if the lower federal courts were also to have their jurisdiction over such cases withdrawn). But is it clear that such a narrowing of the Supreme Court's appellate authority would be unconstitutional?¹⁴

The question which chiefly concerns Berger would become most acute if Congress were to attempt drastically to curtail the opportunities of state and federal courts, including the Supreme Court, to review *federal* legislation. In such an event—as would not be the case in the instances involving state legislation—Congress would seem to be undertaking to frustrate the very mechanism by which it was intended to be policed.¹⁵

One can, of course, postulate federal laws, passed pursuant to the "exceptions" clause, purporting to withdraw from Supreme Court review vast domains of litigation challenging state and federal action—all church-state cases, for example, or all reapportionment cases. But laws of such breadth are likely to provoke the coalescing opposition of many interest groups, and hence are extremely difficult of enactment. A far more likely legislative effort is that which seeks to "overrule" a particular disfavored decision. For example, it was the express intention of the Senate Judiciary Committee, in the version of Title II of the Omni-

13. Compare *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911), with *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 149 Colo. 259, 363 P.2d 970, *rev'd*, 372 U.S. 714 (1963).

14. Whether or not "unconstitutional," such an "exception" would certainly be what might be termed "anti-constitutional"—flagrantly contemptuous of what Madison and others in the Convention saw as a central part of the constitutional plan.

15. But recall Holmes's markedly contrasting view:
I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.

O.W. HOLMES, *Law and the Court*, in *COLLECTED LEGAL PAPERS* 295-96 (1920).

bus Crime Control bill of 1968 brought to the Senate floor, to legislate *Miranda*¹⁶ out of existence: the device sought to be utilized was to deny to any federal court, including the Supreme Court, power to "reverse, vacate, modify, or disturb in any way" (a) a federal trial court's ruling that a confession is "voluntary" and hence admissible where "such ruling is supported by any competent evidence admitted at the trial" or (b) a comparable ruling of a state trial court "affirmed or otherwise upheld by the highest court of the State having appellate jurisdiction of the cause." Whether viewed as limitations on the appellate authority of the Supreme Court (or lower federal courts) or as limitations on the authority of a federal court sitting in habeas corpus, these provisions would have been unconstitutional—not so much because they were attempted withdrawals of jurisdiction to hear constitutional cases as because they were attempted invasions by the legislature of the judicial province. So long as a federal court is not ousted of its authority to hear a case or class of cases, it may—indeed it constitutionally must—resist legislative instruction with respect to the mode and scope of its adjudication of the constitutional issues which the case presents. Justice Rutledge put the matter succinctly a quarter of a century ago:

It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. . . . There are limits to the judicial power. Congress may impose others. And in some matters Congress or the President has the final say under the Constitution. But whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it.¹⁷

What Rutledge postulated was soon reduced by Hart to a phrase—". . . jurisdiction always is jurisdiction only to decide constitutionally."¹⁸ And to this must be added Hart's statement of the measure of the "exceptions" clause: "The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."¹⁹ Of this latter axiom Berger's book is a valuable annotation.

16. *Miranda v. Arizona*, 384 U.S. 436 (1966).

17. *Yakus v. United States*, 321 U.S. 414, 468 (1944) (dissenting opinion).

18. Hart, *supra* note 7, at 1402.

19. *Id.* 1365. Query whether the radical "exception" conjectured about p. 977 *supra*, could pass muster under Hart's standard.