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## The Jurisdiction of the Court The United States Supreme Court

by Professor Eugene Gressman\*

### I. INTRODUCTION

**T**HANK YOU VERY much, Professor Jacoby. I am very happy to be here. My subject this morning is discussing the so-called mundane topic of jurisdiction of the Supreme Court of the United States. The Supreme Court of the United States wears a jurisdictional coat of many colors. Some of those colors have been woven into the coat by the framers of the Constitution, while other colorations have been added by the Congress and by the Court itself.

The significance of this jurisdictional garment involves something more than a mere appreciation of all of its various hues and colors. What has become increasingly apparent and therefore important is that the Supreme Court has both the power and the disposition to decline to exercise vested jurisdiction in all but the most compelling of circumstances. In other words, the Court has come a long way from John Marshall's dictum in *Cohens v. Virginia*<sup>1</sup> that the Court "must decide" a case which is properly brought before it, and that the Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given," the one or the other of which "would be treason to the Constitution."<sup>2</sup> That broad proposition is no longer universally true, if it ever was. If for no other reason, the modern need to control and limit the decisional input of cases at the Supreme Court level compels the Court to resist the efforts of the legal community to exploit to the hilt every facet of jurisdiction which is given to the Court. Notions of judicial prudence and sound discretion have become dominant in the Court's determination of which cases brought before it pursuant to vested jurisdiction it will actually hear and determine. Rare indeed is the case falling within some aspect of the Court's jurisdiction that is totally assured of plenary consideration and resolution by the Supreme Court.

As the following summary of the Court's jurisdiction indicates, prudential and discretionary restraints mark the exercise of every facet of the Court's constitutional and statutory jurisdiction. The Court no longer looks solely to compliance with jurisdictional statutes or requirements. It also asks whether its exercise of the invoked jurisdiction is really necessary in the national interest or whether there are alternative forums somewhere in the American legal system where final resolution of a particular legal controversy may safely be lodged.

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<sup>1</sup> 6 Wheat. 264, 404 (1821).

<sup>2</sup> *Id.*

## II. THE CONSTITUTIONAL SOURCES OF THE SUPREME COURT'S JURISDICTION

The Supreme Court of the United States is the only judicial tribunal created and vested with jurisdiction by the Constitution. Article III, Section 1 provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." That reference to "one supreme Court" has generally been thought to have at least two important consequences. One is that the one Supreme Court must act as a single collegial unit in exercising its judicial power. This precludes any division or fragmentation of that power among panels of Justices or among the individual Justices.

Second, this concept of one Supreme Court has also been thought to preclude any division or fragmentation of the Court's vested jurisdiction or exercise of that jurisdiction by creating and delegating some of the Supreme Court's functions to a secondary or inferior tribunal. A second Supreme Court is contrary to the constitutional plan. Upon this rock of "one supreme Court" have floundered various proposals over the past ten years for the creation of a national court of appeals as a surrogate court to exercise some of the vested functions and jurisdiction of our "one supreme Court."

Article III, Section 2 continues the constitutional scheme by vesting the Supreme Court with two basic types of jurisdiction, original and appellate. The Constitution spells out the precise limit of the original jurisdiction of the Court in terms of all cases affecting ambassadors, other public ministers and counsels and those in which a State shall be party. I might add here that rarely, if ever, does any ambassador or public minister come before the Court in pursuance of the original jurisdiction. I think we can safely disregard that in our discussion here this morning, concentrating instead upon the cases in which a State shall be party.

Congress cannot add to, or subtract from, that constitutional description of original jurisdiction. Nor can Congress attempt to dictate how the Court shall exercise or administer this relatively small pocket of original jurisdiction over cases in which a State shall be a party.

As for appellate jurisdiction, that is defined in Article III in terms of all other cases described in the first paragraph of Section 2 that reflect the defined "judicial Power of the United States." There are six categories or general types of judicial power of the United States which are recognized in the Constitution. These descriptive jurisdictional elements can be given to any inferior court as Congress sees fit. It is these types of cases over which the Supreme Court is given appellate jurisdiction, subject to such exceptions and regulations as the Congress shall make.

What emerges from this constitutional delineation of appellate jurisdiction is the critical fact that it is the Congress, not the Constitution or the Court, that defines the precise metes and bounds of appellate jurisdiction. Within the broad range of these six categories or cases and controversies that constitute the judicial power of the United States, the Congress may select the types of cases and controversies that may be reviewed by the Supreme Court in exercise of its appellate jurisdiction. Congress has

consistently made known its intentions in this respect. Ever since the First Judiciary Act of 1789 it has established a very firm pattern of the type of cases that can come before the Supreme Court. Indeed, the pattern as originally established in the 1789 statute remains essentially the same to this very day.<sup>3</sup>

It is from this fount of congressionally designated appellate jurisdiction that comes the Court's power and authority to review specified classes of cases arising in the lower federal courts. It is also the source of the Court's power to review those decisions of the highest state courts that somehow implicate the Constitution or laws of the United States. This latter power of review over state court decisions, of course, reflects the federalism concept embodied in the Supremacy Clause of the Constitution. It obligates the states and their courts to respect the primacy of the Federal Constitution and the Supreme Court's role in maintaining that primacy.

As the Constitution makes clear, Congress can make exceptions to this appellate jurisdiction. Thus, it can withhold certain classes of cases from the arena of appellate jurisdiction. At one time there was no provision made by Congress for Supreme Court review of most federal criminal convictions and review of civil cases in the lower federal courts was for a long time limited to those in which the matter in dispute exceeded \$2000. It is doubtful, however, that Congress could create such exceptions as would hobble or prevent the Supreme Court from implementing its role as the nation's prime arbiter of constitutional rights and privileges. One must question, for example, whether one proposal currently before the Congress that would strip the Supreme Court of all appellate jurisdiction to review any state or federal court decision involving voluntary school prayer in public buildings could pass constitutional muster as a legitimate "exception."

This brief description of the constitutional sources of the Supreme Court's jurisdiction makes one conclusion crystal clear. At no point does the Constitution command the Supreme Court to exercise its vested jurisdiction in every case that comes before it. Nor has Congress so dictated in its legislative dealings with the Court's appellate jurisdiction. All that Article III does is to vest or to confer these two types of jurisdiction, original and appellate, on the Court, with the implicit admonition that they be exercised only in the context of cases or controversies.

### III. THE "CASE OR CONTROVERSY" LIMITATION ON JURISDICTION

The Article III reference to cases or controversies which is part of the definition of the judicial power of the United States, has cast an important though sometimes confusing predicate to the Court's exercise of any kind of vested jurisdiction. In original proceedings, for example, the Court has consistently said that "our constitutional authority to hear the case and

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<sup>3</sup> See 28 U.S.C. §§ 1251-1258.

grant relief turns on the question whether the issue framed by the pleadings constitutes a justiciable 'case' or 'controversy' within the meaning of the constitutional provision."<sup>4</sup> And in all matters arising under the Court's appellate jurisdiction, the Court has been equally insistent that these Article III case or controversy limitations be rigidly respected.<sup>5</sup>

These limitations, often spoken of as a constitutional requirement of justiciability, permeate the entire federal judicial system which operates pursuant to Article III. No federal court, including the Supreme Court, can exercise any part of the federal judicial power except within the context of a justiciable case or controversy. The Supreme Court feels bound to respect these justiciability requirements, not so much as limitations specifically directed at the exercise of the Court's jurisdiction, but as limitations that are written into the constitutional fabric of the judicial power of the United States.

The case or controversy concept has various manifestations, including the inability of the federal courts to render advisory opinions or decide political questions. Mootness, ripeness, and a host of other concepts come to mind when one considers the case or controversy provision. Affirmatively the case or controversy requirement means that the Supreme Court, like any other federal court, can only decide "definite and concrete [controversies] touching the legal relations of parties having adverse legal interests."<sup>6</sup>

Chief Justice Warren once observed that beneath the surface simplicity of these concepts are "submerged complexities which go to the very heart of our constitutional form of our government . . . [and which] define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude in areas committed to other branches of government."<sup>7</sup> Justiciability also serves the companion purpose of giving the federal judiciary, and the Supreme Court in particular, the means and excuse for interposing the judiciary's own prudential rationalization for not exercising judicial power in a given case. In effect, the Supreme Court has interpreted the case or controversy concept of Article III to create a reserved power in the judiciary to decline to exercise a particular vested jurisdiction.

This prudential power of judicial declination can and does have significant repercussions on the speed and the paths of development of national law, particularly in federal constitutional areas. By injecting justiciability doctrines such as standing or political question into its determination whether to resolve the merits of a constitutional problem otherwise within its jurisdiction, the Supreme Court can exert great influence on the development or the non-development of that particular constitutional problem. By denying standing to large groups of litigants who may be the only ones

<sup>4</sup> *Texas v. Florida*, 306 U.S. 398, 405 (1939).

<sup>5</sup> *See, e.g., Flast v. Cohen*, 392 U.S. 83, 94-101 (1968).

<sup>6</sup> *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 229, 240-41 (1937).

<sup>7</sup> *Flast v. Cohen*, 392 U.S. at 94-95.

capable of instituting suit, the Court may be attempting to cause appreciable reductions in the lower court dockets and ultimately in the Supreme Court's own docket.

The Article III case or controversy notions have indeed given the Supreme Court a powerful device for controlling when and under what circumstances an otherwise vested jurisdiction is to be exercised.

#### IV. THE COURT'S EXERCISE OF ORIGINAL JURISDICTION

With respect to original jurisdiction cases, basically those in which a state shall be a party, the Supreme Court has shown an increasing reluctance to exercise that original jurisdiction save only in appropriate cases. The Court in 1972 stated that:

It has long been this Court's philosophy that "our original jurisdiction should be invoked sparingly." [citation omitted]. our original jurisdiction should be invoked. We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of original jurisdiction so that our increasing duties with the appellate docket will not suffer. [citation omitted].<sup>8</sup>

The Court's philosophy with respect to its original jurisdiction is yet another recognition of a reserved power to exercise that jurisdiction only in appropriate cases. It accordingly asks itself in every invocation of an original proceeding involving a state whether "recourse to that jurisdiction is necessary for the State's protection."<sup>9</sup> What is necessary turns on an examination of whether there is some other suitable federal or state forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had, subject ultimately, of course, to the exercise of appellate jurisdiction by the Supreme Court over the decision of that forum. If there is such a forum, particularly one in which there is already pending an appropriate action, the Supreme Court will decline to proceed further in execution of its original jurisdiction over the matter.

Such an inquiry and such a response have been especially evident in original cases before the Court during the past decade involving suits by a state against a citizen of another state,<sup>10</sup> and suits by one state against another.<sup>11</sup> In the latter type of suit, the alternative suitable forum need not necessarily implicate only two contesting states. It is enough if some proper

<sup>8</sup> *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972).

<sup>9</sup> *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939).

<sup>10</sup> See *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971).

<sup>11</sup> See *Arizona v. New Mexico*, 425 U.S. 794 (1976).

party may bring an action in the other forum "in which the *issues* tendered here may be litigated."<sup>12</sup>

The important point is that the Court treats its original jurisdiction as obligatory in nature only when it is satisfied that there is a true want of another suitable forum. Normally there is such a real want only in those suits between states that raise issues that cannot be litigated by the real parties in interest (*i.e.*, the states), in any other state or federal forum. As to all other cases defined as within its original jurisdiction, the Court feels free to refrain from exercising its decisional powers. It feels itself free to do so in the name of protecting "our increasing duties with the appellate docket." The Court's exercise of its original jurisdiction has thus come to be equated in large part with effective administration of its appellate docket.

## V. THE COURT'S EXERCISE OF APPELLATE JURISDICTION

The great bulk of the Supreme Court's decisional work stems from the exercise of its appellate jurisdiction. Generally speaking, the scope of that jurisdiction and the procedural paths to invoking jurisdiction are determined by Congress, acting pursuant to the broad authorization in Article III, Section 2, of the Constitution.

Congress for nearly 200 years has provided for appellate review by the Supreme Court in two basic types of decisions: (a) virtually all kinds of judicial orders and decrees that may be appealed up through the federal court system; and (b) final decisions of state courts that implicate federal laws or the Constitution. There is, however, a striking difference between the types of cases that come from the federal and state courts in this connection. The Court's jurisdiction to review decisions of the designated lower federal courts is remarkably free of jurisdictional hurdles aside from filing time requirements. The Court can review, for example, both civil and criminal cases in the federal courts of appeals without regard to the subject matter or finality of the decision. There is virtually no jurisdictional limitation on the kind of case that can be reviewed by the Supreme Court once it is fitted within a jurisdictional statute enacted by Congress. All such cases are considered subject to the Supreme Court's ultimate responsibility for supervising the administration of justice in the federal courts.

In contrast, Congress has built into its statutory authorization for review of state court decisions a series of somewhat formidable jurisdictional requirements. Pursuant to 28 U.S.C. § 1257, before a decision becomes reviewable there must be a final judgment rendered by the highest state court capable of passing on that particular question and the decision must involve and rest upon a properly raised substantial federal question. Decisions that rest solely or adequately on state law are beyond the jurisdictional ken of the Supreme Court. All of these jurisdictional thorns in the sides of state court cases are reflective of the fact that our federal

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<sup>12</sup> *Id.* at 797.

system of government contemplates no federal judicial review or control of what is deemed to be the proper concern of the fifty states. Each state is free to develop its own state and local jurisprudence, being subordinate to the federal government only as to matters arising under the Constitution, laws and treaties of the United States.

There is another vastly important factor that runs through appellate jurisdiction, the procedural statutes created by Congress. Historically, Congress has provided two means to open the door to such review, appeal as of right and review as a matter of discretion. In modern parlance, an aggrieved party may be given either an absolute right of appeal to the Supreme Court or the privilege of filing a petition for writ of certiorari, which is a request that the Court grant review in its discretion.

Any assessment of the Court's present-day capacity to control the destinies of its appellate jurisdiction must commence with a brief review of the role that so-called obligatory appellate jurisdiction has played in the Court's execution of its functions. One must understand something that has been lost in history. Any appeal to a federal appellate court, including the Supreme Court, is solely a matter of legislative choice.<sup>13</sup> There is no constitutional compulsion to provide an absolute right to appeal from any kind of decision, federal or state. Congress is not compelled by Article III or by the dictates of due process to provide a litigant an absolute right to take an appeal to the Supreme Court.<sup>14</sup> In delineating the Court's appellate jurisdiction, Congress can confer as much or as little compulsory jurisdiction as it deems necessary and proper. It may make the Court's jurisdiction totally obligatory or totally discretionary in nature. That is solely a matter of legislative judgment.<sup>15</sup>

It also must be appreciated that in the federal judicial system an appeal in the statutory sense has always been reflective of a universal understanding that an aggrieved party has somehow an absolute right to call upon an appellate court to review and resolve the merits of a lower court's ruling. The old saying that "I will take my case to the Supreme Court" is reflective of a common understanding that one has a right to appeal all the way through the judicial system to the Supreme Court. Such an appeal as of right exemplifies virtually all appeals from the district courts to the federal courts of appeals. The right to invoke the appellate court's decisional powers is conditioned solely on compliance with formal requirements established by statute or rule, such as timely filing and finality of the decision below.

The Supreme Court has always conceived of statutes conferring such an absolute right to appeal as also conferring upon the Court a correlative obligation to rule on the merits of the questions involved in the appeal. This concept of an absolute right to appeal and the corresponding duty to decide the merits of an appeal appear to have evolved out of the early days

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<sup>13</sup> *Heike v. United States*, 217 U.S. 423, 428 (1910).

<sup>14</sup> *District of Columbia v. Clawans*, 300 U.S. 67, 627 (1927).

<sup>15</sup> *See Ex parte McCordle*, 7 Wall. 506 (1869).



of the federal judiciary when there was ample time to dispose of every appeal on its merits and when there was no need to develop discretionary limitations and shortcuts to dispose of enormous case filings. It is from those halcyon days when there was no docket crisis that developed this notion in the legal community that a statutory appeal invokes and involves the obligatory jurisdiction of the appellate court, presumably obliging the court to hear and decide the case on its merits. Such a resolution of the merits is frequently said to be unavoidable. As the Supreme Court has consistently said with respect to its disposition of appeals, "we had no discretion to refuse adjudication of the case on the merits . . . we were required to deal with its merits."<sup>16</sup>

The Supreme Court has long possessed such an obligatory appeal jurisdictional as a component of its appellate jurisdiction. Indeed, during the first century of its existence, from 1789 to 1891, the Court's appellate jurisdiction was exclusively obligatory in nature. The Judiciary Act of 1789<sup>17</sup> provided that specified types of federal and state court cases could be reviewed by the Supreme Court only upon a writ of error, which was the original term for invoking obligatory appellate jurisdiction. This pattern of obligatory jurisdiction established by the first Judiciary Act was to remain long in effect. During the century following the 1789 statute, the Court was obliged to decide every writ of error that came before it.

Thus during the nineteenth century every litigant who came before the Supreme Court was entitled to have his case argued and decided in some manner by the Supreme Court. Nearly every case had to be thoroughly briefed, argued and resolved on the merits, although some of the Court's written dispositions were mercifully short.

But the pressures of the obligatory functions of the Court began to prove excessive by 1891, when the Supreme Court faced its first docket crisis. Litigants were literally waiting two and three years in order to have their cases heard and determined by the Supreme Court. Congress sought to address the crisis by creating an intermediate federal appeals system, hoping that the attrition rate would suffice to reduce the obligatory docket of the Supreme Court. But it was another 1891 reform which ultimately provided relief for the Court's crowded docket. This innovation was the concept of certiorari or discretionary jurisdiction, which was applied to a small number of cases coming from the new federal courts of appeals.

From that very small beginning of certiorari jurisdiction in 1891 came gradual accretions to the Court's power to control the destiny of its appellate jurisdiction by use of its own discretion. Finally, in 1925, came a major certiorari explosion in Congress. At that time the dockets of the Court were so clogged that the litigants were again waiting two and three years to have their cases decided. In the Judiciary Act of 1925, written largely at the suggestion of the Supreme Court, Congress transferred large segments of appellate jurisdiction from the obligatory to the discretionary category.

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<sup>16</sup> *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

<sup>17</sup> 1 Stat. 84-86.

Fully eighty percent of the Court's docket was thereafter of the certiorari variety, leaving only a minority of cases to be treated as obligatory appeals necessitating plenary consideration on the merits.

The minority of cases left on the obligatory docket continued to pose problems for the Court in the years following 1925. Appeals were still possible in certain kinds of cases arising in both the lower federal courts and the highest state courts. Prime among these appeal categories were, (a) injunctive proceedings brought before special three-judge federal district courts to test the constitutionality of state or federal legislation, (b) decisions of the highest state courts sustaining the validity of state statutes in light of federal constitutional claims, and (c) a miscellany of special statutory proceedings in a variety of federal courts wherein Congress authorized a direct appeal to the Supreme Court. Some of these appeal categories contained many cases that were too unimportant to warrant Supreme Court attention, yet the Court was obliged to treat these cases on their merits.

Another complicating factor respecting the treatment of appeals arose soon after the 1925 certiorari revolution. Certiorari as we know it is basically a conditional two-step procedure. First is the filing of a petition for certiorari. Then, if the court grants certiorari, the parties proceed to a plenary review on the merits. Appeals are traditionally a unitary operation; plenary consideration automatically follows the filing of a timely notice of appeal. Such was indeed the appeal procedure in the Supreme Court for generations, until 1928 when the Court amended its rules to require that a so-called "jurisdictional statement" be filed prior to full briefing and oral argument.

This rather subtle change in the Court's appeal procedure has made it a two-step procedure, virtually indistinguishable from the two-step certiorari procedure. The jurisdictional statement, under the Court's rules, is almost the precise counterpart of the petition for certiorari. And the Court summarily disposes of most appeals on the basis of the jurisdictional statement and the opposing motion alone. As is true to an even larger extent in certiorari cases, most appeals are summarily treated without ever being fully briefed and argued before the Court.

This metamorphosis in the appeal procedure has made it possible for the Court to inject a large element of docket control into its administration of the so-called obligatory jurisdiction. In a word, the Court has so acted as to pour a large amount of certiorari-like discretion into the bottles of obligatory appeals. Summary treatment of appeals, usually in the form of an order affirming the judgment below or dismissing the appeal for want of a substantial federal question, is as effective as an ordinary denial of certiorari in controlling and limiting the number of cases to be fully heard and determined by the Court.

The Court's difficulty has been, however, that it dare not deny the traditional notion that all appeals are obligatory in nature and must be resolved on their merits. The result has been the development of a strange jurisprudence respecting the meaning and precedential effect of these summary appeal dispositions. The Court has insisted that these summary

dispositions are truly decisions on the merits and are binding on state courts and other federal courts.<sup>18</sup> The Court more recently has had the good sense to acknowledge, in a letter to Congress, that "our summary dispositions often are uncertain guides to the courts bound to follow them and not infrequently create more confusion than clarity."<sup>19</sup> But the confusion and uncertainty still exist.

The obligatory aspects of the Court's appellate jurisdiction have become anachronistic, burdensome and confusing. The past decade has seen a renewal of the congressional effort to cut back drastically on the types of cases that can be appealed as of right to the Supreme Court. Beginning in 1970, Congress enacted four statutes eliminating four categories of direct appeals to the Court from certain lower federal courts, including the special three-judge courts. The effect has been to cut the Court's obligatory jurisdiction over federal courts to the bone, leaving only a small handful of federal case categories subject to appeal.

In 1978 and again in 1979 bills were introduced in Congress which would still further dilute the number of direct appeals to the Court from lower federal courts, and which would totally eliminate all appeals from the highest state courts. Enactment of this proposal, its latest manifestation being known as the Supreme Court Jurisdiction Act of 1979, would effectively transform the Court's appellate jurisdiction into a virtual all-certiorari one. The proposal has received the unanimous endorsement of the nine Justices, who see it as a means of achieving complete docket control of cases within the Court's appellate jurisdiction, as well as a means of eliminating the embarrassing confusion that has surrounded the summary disposition of appeals.

If this current proposal becomes law, the Supreme Court will indeed have come a long ways from John Marshall's dictum that the Court must decide every case properly before it. It will then have before it the fullest possible opportunity to select and concentrate on those relatively few cases on the appellate docket that are of truly national import. In that way the Court can best achieve its manifest destiny as primary arbiter of constitutional and federal law.

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<sup>18</sup> See *Mandel v. Bradley*, 432 U.S. 173 (1977); *Hicks v. Miranda*, 422 U.S. 332 (1975).

<sup>19</sup> See 65 A.B.A.J. 1328 (Sept. 1979), where a letter, signed by all nine Justices, to the Senate Judiciary Committee on June 22, 1978, is reproduced. See also Gressman, *Requiem for the Supreme Court's Obligatory Jurisdiction*, 65 A.B.A.J. 1325 (Sept. 1979).