



CONGRESS AND PROCEDURES FOR THE SUPREME COURT'S ORIGINAL JURISDICTION CASES

REVISITING THE QUESTION

Stephen R. McAllister

IN *KANSAS V. COLORADO*¹ the Supreme Court declined to “decide whether Kansas is correct in contending that Article III of the Constitution does not permit Congress to impose” procedural requirements on the Supreme Court when that Court is exercising its original jurisdiction. Two Justices (the Chief Justice and Justice Souter) concurred separately to state their view that Congress cannot impose procedures on the Court in original cases.² I then wrote an article in the *Green Bag* examining that claim and agreeing with it in large part.³

Stephen McAllister is the E.S. & Tom W. Hampton Distinguished Professor of Law at the University of Kansas. He also serves, on a part-time basis, as the Solicitor General of Kansas, assisting the Attorney General's office in cases in the Supreme Court of the United States, including original cases to which Kansas is a party. Any views expressed in this article are McAllister's personal views and do not represent any official position of the Kansas Attorney General. Likewise, McAllister alone is responsible for any errors or omissions in the article.

¹ 556 U.S. 98 (2009).

² *Id.* at 109-110.

³ Stephen R. McAllister, *Can Congress Create Procedures for the Supreme Court's Original Jurisdiction Cases?*, 12 *GREEN BAG* 2D 287 (2009).

The bible of Supreme Court practice and procedure, however, subsequently expressed at least considerable skepticism about, if not ultimate rejection of, the proposition that Congress lacks the constitutional authority to mandate procedures in the Supreme Court's original jurisdiction cases.⁴ This article responds to that critique, considering each argument *Supreme Court Practice* posits as undermining or contrary to what I will refer to as the Chief Justice Roberts position on this question.

Supreme Court Practice first observes that “Chief Justice Roberts has contended that because Article III gives Congress the power to make exceptions to and regulations of the Supreme Court’s appellate jurisdiction, Congress has no power to regulate its original jurisdiction.”⁵ The book then observes that “[a]lthough Chief Justice Roberts’ view has been endorsed by Professor McAllister, there is substantial reason to doubt it.”⁶ Three reasons for such doubt are offered:

First, Chief Justice Roberts does not so much as mention *prior Supreme Court opinions pointing in the other direction*, including one from 1796. (Professor McAllister discusses these cases, but distinguishes the relevant language as dicta.)⁷

Second, neither Chief Justice Roberts nor Professor McAllister addresses *the Necessary and Proper Clause . . .*⁸

Third, there are a host of *provisions in the Judicial Code that have either long been understood to apply to the Supreme Court or would seem to properly apply*, even when exercising original jurisdiction, starting with the most basic provision establishing the size of and quorum rule for the Supreme Court. Others include provisions governing the Court’s term, the precedence of Justices, the required oath, disqualification, payment of expenses, the services of the Clerk, Marshall [sic], Librarian, Reporter,

⁴ S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, *Supreme Court Practice* (10th ed. 2013) at 620 n.5.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* (emphasis added).

⁸ *Id.* (emphasis added).

law clerks, secretaries, printing and binding, foreign sovereign immunities, writs, process, in forma pauperis proceedings, It would be quite revolutionary to hold that none of these applied to the Supreme Court when exercising its original jurisdiction.⁹

I will address each of these arguments in turn. Ultimately, I am unconvinced that the Chief Justice is wrong, at least not when the claim about Congress's lack of constitutional authority is properly framed and described.

I.

PRIOR SUPREME COURT OPINIONS POINTING IN THE OTHER DIRECTION

This argument I will address only briefly because I treated it extensively in my previous article on this topic¹⁰ and have little to add to that discussion. I readily admit that some older cases, including *Grayson v. Virginia*,¹¹ state without explanation or qualification that the Court's original jurisdiction practices are "subject to the interposition, alteration, and controul, of the Legislature."¹² But as I explained previously, the Court's cases since at least 1860 seem to take a stronger view of the Court's exclusive authority over original

⁹ *Id.* (emphasis added).

¹⁰ McAllister, *supra* note 3, at 289-297.

¹¹ 3 U.S. (3 Dall.) 320 (1796).

¹² Another potential tidbit is *New Jersey v. New York*, 30 U.S. (5 Pet.) 284, 287-288 (1831), in which Chief Justice Marshall observes that "Congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state, or in any suit in which the supreme court is to exercise the original jurisdiction conferred by the constitution," while also pointing out that "[a]t a very early period in our judicial history, suits were instituted in this court against states" One might read Marshall to be implying or suggesting that Congress could enact procedures for original jurisdiction cases, but Congress had not done so, and there was no question before the Court whether it would have to follow a rule of Congress had one been enacted because, in fact, Congress *never* has purported to mandate the procedures used in original cases in the Supreme Court. See the final section of this article below.

jurisdiction procedures. Moreover, no case in which the Court has ever commented on its authority has involved a situation in which Congress purported to impose a procedure on the Court, and the Court thus has never actually decided whether or not it would be bound to follow such a statutory directive.¹³

Thus, I don't argue with the observations in *Supreme Court Practice* that the Chief Justice did not mention or discuss these cases in his *Kansas v. Colorado* concurrence, nor do I disagree that at least a couple of older cases may point in a direction contrary to the Chief Justice's position. These, cases, however, hardly settle the matter conclusively, and I do take issue with the other rationales *Supreme Court Practice* offers for rejecting the Chief Justice's view.

II.

THE NECESSARY AND PROPER CLAUSE

In some ways, the most aggressive assertion *Supreme Court Practice* makes is that Congress has authority to regulate the Supreme Court's original jurisdiction procedures because of the Necessary and Proper Clause. I see at least three possible flaws with this assertion.

First, as the *Supreme Court Practice* quote of the Clause makes clear, the Clause does give Congress power to make laws necessary and proper to execute not only its own powers but also "all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." But I am not certain that *Supreme Court Practice* is completely correct when it reads this language as the "aspect of the Necessary and Proper Clause that enables Congress to enact, for example, the Judicial Code." It would seem that, at least with respect to the lower federal courts, a

¹³ McAllister, *supra* note 3, at 297 ("even accepting that the cases are a bit mixed, and conceding that it may give some Justices pause that the oldest cases may suggest that Congress has the power to regulate procedures in original cases, the better overall reading of the limited precedents includes two conclusions: (1) the Court has never actually held, as opposed to suggested in dicta, that Congress has such authority; and (2) the Court's original cases since at least 1860 seem to support consistently the literal reading of Article III").

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clear source of power to enact the Judicial Code is the combination of Congress's Article I power to "constitute Tribunals inferior to the supreme Court" with the Necessary and Proper Clause provision that Congress can "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers."

The *Supreme Court Practice* argument may well justify Congress in adopting the numerous provisions of the Judicial Code that *Supreme Court Practice* cites, such as the size of the Supreme Court, the Court's term, Court officials, and so forth, all of which relate to activities that are essential to operating a Court. After all, the Supreme Court could not create itself and spring forth from nothing, ready to do business. But, importantly, the numerous Judicial Code provisions *Supreme Court Practice* cites do not go directly to the manner in which the Court actually decides cases.

If *Supreme Court Practice* perceived my previous article as taking an extreme view that Congress could not regulate the Court in any way that might affect the Court's original jurisdiction cases, that was not my intended position, nor do I suspect the Chief Justice intended to stake out such an extreme position. What I was concerned with was the question whether Congress might directly intrude into the handling of original jurisdiction cases, such as by prohibiting the use of Special Masters or requiring jury trials in such cases, not whether Congress could regulate how many law clerks a Justice has, clerks who of course will work on original cases. In other words, my focus was on congressional efforts to regulate original jurisdiction procedures *per se*, not general congressional regulation of the Court itself, regulation which may indirectly and as a practical matter apply when the Court is deciding original cases.

What troubles me most about the Necessary and Proper Clause suggestion is that *Supreme Court Practice* apparently views the latter portion of the Clause as giving Congress the power to do *anything* with respect to the Supreme Court because the Court has "powers vested by this Constitution in the Government of the United States," or perhaps also because the Court is a "Department" or the Justices are "Officers" of the federal government. The Court certainly exercises "powers vested by the Constitution," and even as-

suming that the Court is viewed as a “Department” and the Justices are “Officers” of the government, the separation of powers necessarily must limit the ability of Congress to regulate the operation of the Court, just as Congress is limited in regulating the operation and procedures of the Presidency. Indeed, there is no logical stopping point to the *Supreme Court Practice* suggestion in this regard because any entity or officer of the federal government presumably exercises “powers vested by the Constitution.”

Furthermore, it is not apparent that Congress could connect the Necessary and Proper Clause to any of its own powers with regard to the Supreme Court and original jurisdiction. Certainly, Congress is given explicit power to “constitute Tribunals inferior to the supreme Court,” but nothing in Article I, § 8 gives Congress the express power to regulate the Supreme Court in any fashion, at least not directly as opposed to regulating on subject areas to create laws that the Supreme Court may apply in cases that arise involving those areas of law (such as interstate commerce, immigration, bankruptcy and so forth).

Second, although the Court generally has given the Necessary and Proper Clause broad effect, the Clause is not without limits, and it requires that the actions of Congress be both “necessary” and “proper,” as at least one recent case has made clear.¹⁴ Even if in some sense it might be “necessary” for Congress to regulate the Supreme Court’s original jurisdiction procedures, an argument could be made that doing so would not be “proper,” depending on the circumstances and the nature and extent of the attempted regulation. Separation of powers principles and historical practices might well be significant in determining whether such regulation was “proper” even if in some sense necessary or helpful.

Third, the Necessary and Proper Clause does not purport to override other provisions in the Constitution. Thus, Congress could

¹⁴ *NFIB v. Sebelius*, 567 U.S. ____ (2012) (majority holding that, even if individual mandate to buy health insurance was “necessary” to regulation of interstate commerce, requiring individual citizens to buy such insurance was not a “proper” method of regulation under the Clause).

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not rely on the Clause to pass a bill of attainder or an *ex post facto* law in violation of explicit prohibitions, even if such a law might be “necessary” in implementing a power of Congress or the federal government. There is not an explicit prohibition on Congress regulating the Court’s original jurisdiction, but the Chief Justice’s point and mine is that there is an *implicit* such prohibition.

If that conclusion is correct, then the Necessary and Proper Clause argument still must contend with the text of Article III, which pointedly and purposely gives Congress the power to regulate and make exceptions to the Supreme Court’s appellate jurisdiction but is silent about any such power over the Court’s original jurisdiction. As Justice O’Connor observed, “in what is effectively its narrowest delegation, Article III is silent regarding Congress’ authority to make exceptions to or regulations regarding cases in the original jurisdiction”¹⁵ She further commented that although “the original history of Article III is sparse, what is available indicates that these textual differences were purposeful on the Framers’ part.”¹⁶ Again, if one is not persuaded that Article III contains an implicit prohibition on congressional regulation of original jurisdiction, then the Necessary and Proper Clause argument may well carry the day. But if one reads the Article III text as the Chief Justice did, then the argument probably is not resolved by resort to the Necessary and Proper Clause.

Perhaps the Necessary and Proper Clause and Article III ultimately could and would be interpreted by a majority of the Court to give Congress the power to regulate the Court’s procedures in original jurisdiction cases. But I, for one, do not find that conclusion to

¹⁵ *South Carolina v. Regan*, 465 U.S. 367, 396 (1984) (O’Connor, J., concurring in the judgment).

¹⁶ *Id.* Her main evidence of the Framers’ intent appears to be Federalist No. 81, in which Hamilton discusses the Article III distinction between original and appellate jurisdiction cases. Although Hamilton does discuss the two types of jurisdiction, and certainly seems to support Justice O’Connor’s assertion that the distinction between the two was purposeful, nothing in Federalist No. 81 speaks directly to the issue addressed in this article, i.e., whether Congress could regulate the Court’s original jurisdiction procedures.

be self-evident nor, more importantly, am I confident that a majority of the Court would see it that way. I give *Supreme Court Practice* credit for highlighting the latter part of the Necessary and Proper Clause, which would seem to be a strong justification for Congress to enact a wide variety of provisions creating, organizing, and regulating the Supreme Court, its Justices, and its officials and staff. But I am unconvinced that the Necessary and Proper Clause, and certainly not alone, answers the question the Chief Justice addressed in *Kansas v. Colorado* and that I addressed in my previous article.

III.

PROVISIONS IN THE JUDICIAL CODE THAT HAVE EITHER LONG BEEN UNDERSTOOD TO APPLY TO THE SUPREME COURT OR WOULD SEEM TO PROPERLY APPLY

The third argument *Supreme Court Practice* makes as a basis for rejecting the Chief Justice's position is that numerous provisions of the Judicial Code regulate the Supreme Court in ways large and small, and "[i]t would be quite revolutionary to hold that none of these applied to the Supreme Court when exercising its original jurisdiction."¹⁷ My responses to the Necessary and Proper Clause argument already have foreshadowed my evaluation of this claim, which is two-fold. First, I did not think I was taking and never intended to take the "revolutionary" position that no provisions of the Judicial Code apply to the Supreme Court when it exercises its original jurisdiction. I seriously doubt the Chief Justice so intended either. Thus, the "revolutionary" claim is a straw man that vastly overstates any claim the Chief Justice or I have made.

Instead, my concern was congressional regulation that might seek to directly alter, constrain, change, or influence the Supreme Court's handling of original jurisdiction cases. In other words, my focus was legislation that would target original cases specifically, or

¹⁷ *Supreme Court Practice*, supra note 4, at 620 n.5.

possibly even legislation that applied to appellate jurisdiction as well but in which Congress expressly included original cases and sought to change existing procedures or impose new ones. Thus, I never had in mind laws that regulate the size of the Court, the dates of its term, whether it has a Clerk, a Marshal and a Reporter, whether it has law clerks and, if so, how many, and so on.¹⁸

What I did contemplate was hypothetical statutes that might, for example, prohibit the awarding of damages in original cases, or require jury trials, or limit or change the use of Special Masters, or in other respects intrude fundamentally into the ways the Supreme Court now long has handled such matters and the wide, equitable discretion the Court has exercised in such cases. Although I admit there could be some line-drawing challenges and reasonable debate over the dividing line between all of the Judicial Code provisions *Supreme Court Practice* cites and the kinds of potential congressional regulation about which I am concerned, there must be a fundamental line that Congress probably cannot cross, or else the textual distinction in Article III between Congress's power to regulate appellate but not original jurisdiction is rendered a nullity.

IV.

OTHER POSSIBLE

ARGUMENTS AND CONSIDERATIONS

After writing the first article, reading the *Supreme Court Practice* response, and considering the issues more over time, I offer a few more possible arguments and considerations that might be relevant in ultimately resolving the issue whether Congress has the power

¹⁸ Even the citation to and parenthetical quote that *Supreme Court Practice* uses from *Hart And Wechsler's The Federal Courts and the Federal System* seems to be referring only to "general legislation" that might incidentally regulate original jurisdiction cases, *Supreme Court Practice* at 620-621 n.5, not a statute that might target original jurisdiction cases in particular. That said, even such "general" legislation could raise Article III issues, in my view, if for example the application of a general rule might dramatically alter the Court's exercise of its original jurisdiction.

to regulate or is limited in regulating the Supreme Court's original jurisdiction procedures. Three of these considerations I discussed in the first article, and so I will only reiterate them briefly here.

First, *longstanding congressional practice* perhaps cuts both ways on the question, although I am of the view that such practice cuts most strongly in favor of Congress leaving the Court's original jurisdiction procedures alone. It is true that the very first Congress, in Section 13 of the Judiciary Act, addressed the Supreme Court's original jurisdiction, making such jurisdiction exclusive for certain categories and concurrent with the lower federal courts for others. Further, the Supreme Court long has apparently acquiesced in that provision and the distinction it makes.¹⁹

Nonetheless, the question of exclusive versus concurrent jurisdiction in original cases strikes me as fundamentally different than whether Congress could direct the Court to use jury trials in original cases, for example. For one thing, I suspect at least the current Justices (if not the Justices going all the way back to 1789) welcome the ability of litigants in all original jurisdiction cases besides those between two or more states to file suit in federal district courts ra-

¹⁹ See, e.g., *Bors v. Preston*, 111 U.S. 252, 258-259 (1884) (recognizing that the Court's "decision in [*Davis v. Packard*, 32 U.S. (7 Pet.) 276 (1833)] may be regarded as an affirmation of the constitutionality of the act of 1789, giving original jurisdiction in [cases involving consuls and other foreign officials] also to the district courts of the United States"); *Ames v. Kansas*, 111 U.S. 449, 464 (1884) ("It thus appears that the first congress, in which there were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the constitution by the states, and with the objections urged against it, did not understand that the original jurisdiction vested in the supreme court was necessarily exclusive."); *id.* at 447 ("In view of the practical construction put on this provision of the constitution by congress at the very moment of the organization of the government, and of the significant fact that from 1789 until now no court of the United States has ever in its actual adjudications determined to the contrary, we are unable to say that it is not within the power of congress to grant to the inferior courts of the United States jurisdiction in cases where the supreme court has been vested by the constitution with original jurisdiction."). The current version of the statute is 28 U.S.C. § 1251(a), which now provides that the Supreme Court's only exclusive original jurisdiction is for cases between two or more States.

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ther than adding them to the Supreme Court's docket. I have a hard time seeing any of the Justices complain because they no longer "get to" decide several categories of original cases as an initial matter. They still have appellate jurisdiction over those cases, and their workload is reduced to the extent those cases go to federal district court first where the trial level litigation can take place.

More importantly, perhaps, and more of a legal justification for reading congressional practice to favor the Chief Justice's position is that the *only* aspect of original jurisdiction that Congress has ever explicitly purported to regulate is the exclusive versus concurrent jurisdiction distinction. Since 1789, Congress pointedly has *not* enacted statutes entitled "original jurisdiction procedure" and attempted to mandate rules, procedures, or practices for the Supreme Court to follow in original cases. In some instances, perhaps the lack of regulation might not be read as implying any sort of constitutional bar to the exercise of regulatory authority. But I would argue that, in this context, much as in the recent decision in *NFIB v. Sebelius*, the failure of Congress to exercise a particular power for well over 200 years very plausibly could be read as an understanding both at the Founding and over time that Congress lacks such a power.

Second, Supreme Court practice and tradition favor the conclusion that the Court, not Congress, controls original jurisdiction procedures. Ironically, perhaps, not even the Court itself adopted any explicit "rule" (other than practices and procedures established through opinions in decided original cases) for original cases until 1939, when the Court first published a rule titled "Original Actions."²⁰ The rule was short and only addressed limited aspects of the Court's original cases, a description that still fits Rule 17 today, which frankly is not much longer or different than in 1939. That the Court itself has handled original cases as a sort of *sui generis* category of litigation using broad equitable powers argues against permitting Congress to intrude with statutory procedures. In fact, the Court's exercise of original jurisdiction over cases between States largely has been successful in eliminating violent confrontations between States over

²⁰ McAllister, *supra* note 3, at 299.

matters of great concern to them, an outcome the Framers sought and perhaps at least in part a direct result of giving the Court wide discretion in handling such cases.

Third, the *parade of horribles* one can envision if Congress has the power *Supreme Court Practice* asserts on its behalf may be enough to give many Justices great pause, if not send them running in the other direction. I keep beating this drum, but I have a hard time imagining any Justice voting to allow Congress to require the Court to have jury trials in original cases, or not to use Special Masters, or intruding in any other way that would make such cases even more onerous and time-consuming for the Court. I was a law clerk once, and though my bosses both enjoyed original cases in some instances, my co-clerks and I certainly never argued over who would get to work on the original cases.²¹

Finally, I believe that the Chief Justice's position has a solid basis in sensible *separation-of-powers principles*. By way of analogy and relying on explicit constitutional text, Article I, § 5 provides that "Each House may determine the Rules of its Proceedings," an explicit acknowledgment that determining the rules for doing business are fundamental to the legislative branch, and why should the same not be true of the judicial branch? It is true that the lower federal courts have an elaborate rule-making process that is authorized by Congress and involves Congress, but the lower federal courts are not the head of the judicial branch. In fact, they exist at the discretion of Congress, given the power explicitly granted to Congress in both Article I and Article III to create such inferior courts as Congress may decide appropriate.

²¹ I clerked for two terms for Justice White, who in particular seemed to enjoy the interstate river disputes, presumably because water and water rights were important to him as someone who grew up working in the sugar beet fields in a small town in Colorado. Indeed, I have thought of Justice White often as I have been working on *Kansas v. Nebraska and Colorado*, Orig. No. 126, a pending original jurisdiction dispute over water in the Republican River Basin. I also clerked for Justice Thomas, who had a different background than Justice White, but also grew up working the land at times and appreciating the importance of natural resources and state claims to the same.

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Assuming the Supreme Court cannot tell the Senate to eliminate a “filibuster” or “cloture” rule – an assumption that seems on solid ground²² – should Congress nonetheless be able to prohibit the Supreme Court from utilizing some particular procedure in original cases that the Court long has used? Or to mandate the use of a procedure that the Court has never used and does not want to use? In a related vein, if the Supreme Court is unwilling to mandate to the Senate how the latter body shall “try” an impeachment case,²³ when the Court surely is more expert than the Senate on trials, legal proceedings and due process, then why should Congress be permitted to tell the Court how to conduct and resolve an original jurisdiction case when the Constitution does not give Congress such authority explicitly? If nothing else, respect for the spirit and purposes of the separation of powers should cause Congress to stay its hand with respect to original jurisdiction procedures in the Supreme Court.

I will close by reiterating what I believe are two very likely propositions regarding the issues addressed in my first article, the *Supreme Court Practice* footnote, and this response: (1) Congress is very unlikely to enact a statute targeting the Supreme Court’s original jurisdiction cases and requiring or prohibiting the use of any particular procedures (two hundred and twenty-five years of history make this a fairly safe assertion); and (2) if Congress ever does so in any way that affects the Court’s current original jurisdiction procedures in more than the most minimal fashion, I for one won’t be surprised if the Court declares such an effort unconstitutional as a violation of Article III.



²² See, e.g., *Page v. Dole*, 1996 WL 310132 (D.C. Cir. 1996) (claim challenging Senate procedures dismissed as moot).

²³ *Nixon v. United States*, 506 U.S. 224 (1993).