tions about legislative denials of jurisdiction for judicial review of constitutional issues and construing statutes so as not to deny jurisdiction.[1214]

Ex parte McCardle[1215] marks the farthest advance of congressional imposition of its will on the federal courts, and it is significant because the curb related to the availability of the writ of *habeas corpus*, which is marked out with special recognition by the Constitution.[1216]

But how far did *McCardle* actually reach? In concluding its opinion, the Court carefully observed: "Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not exempt from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised."[1217] A year later, in *Ex parte Yerger*,[1218] the Court held that it did have authority under the Judiciary Act of 1789 to review on *certiorari* a denial by a circuit court of a petition for writ of *habeas corpus* on behalf of one held by the military in the South. It thus remains unclear whether the Court would have followed its language suggesting plenary congressional control if the effect had been to deny absolutely an appeal from a denial of a writ of *habeas corpus*.[1219]

[1214] Johnson v. Robison, 415 U.S. 361, 366–367 (1974); Weinberger v. Salfi, 422 U.S. 749, 762 (1975); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Webster v. Doe, 486 U.S. 592, 603 (1988). In the last cited case, Justice Scalia attacked the reservation and argued for nearly complete congressional discretion. Id. at 611–15 (concurring).

[1215] 74 U.S. (7 Wall) 506 (1869). For the definitive analysis of the case, *see* Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229 (1973).

[1216] Article I, § 9, cl. 2.

[1217] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 515 (1869). A restrained reading of *McCardle* is strongly suggested by Felker v. Turpin, 518 U.S. 651 (1996). A 1996 congressional statute giving to federal courts of appeal a "gate-keeping" function over the filing of second or successive *habeas* petitions limited further review, including denying the Supreme Court appellate review of circuit court denials of motions to file second or successive *habeas* petitions. Pub. L. 104–132, § 106, 110 Stat. 1214, 1220, amending 28 U.S.C. § 2244(b). Upholding the limitation, which was nearly identical to the congressional action at issue in *McCardle* and *Yerger*, the Court held that its jurisdiction to hear appellate cases had been denied, but, just as in *Yerger*, the statute did not annul the Court's jurisdiction to hear *habeas* petitions filed as original matters in the Supreme Court. No constitutional issue was thus presented.

[1218] 75 U.S. (8 Wall.) 85 (1869). *Yerger* is fully reviewed in C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOL. VI, PT. I: RECONSTRUCTION AND REUNION, 1864–88 (New York: 1971), 558–618.

[1219] *Cf.* Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C.Cir. 1949), *rev'd on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950). Justice Douglas, with whom Justice Black joined, said in Glidden Co. v. Zdanok, 370 U.S. 530, 605 n.11 (1962) (dissenting opinion): "There is a serious question whether the *McCardle* case