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Busing, and Abortion. by Edward Keynes with
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THE COURTS vs. CONGRESS: PRAYER, BUSING, AND ABORTION. By Edward Keynes¹ with Randall K. Miller.² Durham, N.C.: Duke University Press. 1989. Pp. xx, 400. Cloth, \$49.50; paper, \$16.95.

*George Steven Swan*³

Edward Keynes and his former student Randall K. Miller have produced a meritorious work divisible into two parts. The first addresses the constitutional and political history of congressional power over the federal judiciary, especially under article III's exceptions and regulations clause⁴ and section 5 of the fourteenth amendment.⁵ This is an extensively-researched, invaluable resource for scholars and lawyers. The latter portion reviews the more recent congressional efforts to check the federal judiciary by statutes dealing with school prayer, busing, and abortion.

Inevitably, even so fine a study must contain minor imperfections in the course of its 312 pages of text and eighty-eight pages of notes, cases, and indexing. Unfortunately, there is a pattern in the imperfections. Let a few examples suffice.

Keynes recounts how Radical Republicans in Congress reacted to *Ex parte Milligan*:⁶ "In the House, Representative John Bingham (R-Ohio) proposed legislation to abolish the Supreme Court's appellate jurisdiction entirely and a constitutional amendment to abolish the Court." Keynes nowhere else identifies Bingham. But Bingham was, of course, the author of the fourteenth amendment.⁷ Keynes's study is largely about that amendment: the relationship between the Court and Congress over school prayer, busing, and abortion. Bingham's beliefs about the scope of congressional authority over the judiciary might help to enlighten readers concerning Congress's power to curb the Court under section five of the fourteenth amendment. Keynes's omission of any digression on Bingham tends to favor the side of the Supreme Court in the debate over Congress's power to curb its jurisdiction.

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4. "[T]he Supreme Court shall have appellate Jurisdiction, both as to law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2.

5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

6. 71 U.S. 2 (1866).

7. I. BRANT, *THE BILL OF RIGHTS* 318-19 (1967).

In an excellent 1988 monograph⁸ Dean Ralph Rossum assailed the views of Irving Brant, who had taken a narrow view of Congress's power to influence policy by manipulating the Supreme Court's appellate jurisdiction. Brant had quoted Alexander Hamilton's Number 80 of *The Federalist*⁹ in support of Brant's position, but omitted this sentence from Hamilton's concluding paragraph, discussing the federal judiciary's constitutional powers: "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 prescribe such regulations as will be calculated to obviate or remove these inconveniences."¹⁰ Rossum said that Brant "engages in a form of academic gerrymandering and he conveniently overlooks this passage."¹¹

Keynes likewise cites Hamilton in Number 80, and like Brant he overlooks the passage emphasized by Rossum.

Keynes quotes Justice Douglas's footnote in a 1962 dissent concurred in by Justice Black, which casts doubt on the continuing vitality of *Ex parte McCordle*:¹² "There is a serious question whether the *McCordle* case could command a majority view today."¹³ Keynes treats that 1962 case as the last major one relating to questions of congressional power over the federal courts' jurisdiction. But he overlooks Douglas's 1968 concurrence in *Flast v. Cohen*:¹⁴ "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of section 2, Article III. See *Ex parte McCordle* . . ."¹⁵ Here again, Keynes's oversight tends to favor the side of the Supreme Court in the debate over the Congress-Supreme Court power relationship.

Keynes finds no binding Supreme Court decision sustaining the plenary theory of congressional power over the Court's appellate jurisdiction. The Court's various pronouncements suggesting a plenary congressional power are dicta because those cases turned on statutory construction rather than the Constitution. Co-author Miller finds that section 5 of the fourteenth amendment empowers

8. Rossum, *Congressional Control of the Judiciary: The Article III Option* (monograph published by The Center For Judicial Studies) (1988).

9. THE FEDERALIST, NO. 80 (A. Hamilton) (New American Library ed. 1961).

10. *Id.* at 481 (emphasis in original).

11. Rossum, *supra* note 8, at 15 n.99, citing Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 OR. L. REV. 3, 9 (1973).

12. 74 U.S. 506 (1869).

13. *Glidden Co. v. Zdzansk*, 370 U.S. 530, 605 n.11 (1962) (Douglas, J., dissenting).

14. 392 U.S. 83 (1968).

15. *Id.* at 109 (Douglas, J., concurring).

Congress to prevent state interference with constitutional rights, not to restrict the Supreme Court's interpretation of section 1.

Keynes and Miller submit that under section 5 Congress can only expand, never contract, fourteenth amendment rights. They repeatedly cite Justice Brennan's suggestion to that effect for the Court in *Katzenbach v. Morgan*.¹⁶ They neglect to note, however, that Brennan's *Katzenbach* suggestion was only a dictum.¹⁷ (Miller simply acknowledges in a footnote: "Some antibusing proponents have questioned the binding authority of this limitation.") Why do the authors treat dicta that favor the Court as binding, while dismissing dicta that favor Congress? Here again, the inconsistency tends to favor the side of the Supreme Court in the debate over the Congress-Supreme Court power relationship.

THE RIGHT TO PRIVATE PROPERTY. By Jeremy Waldron.¹ New York: Oxford University Press. 1989. Pp. viii, 469. \$59.00.

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Some years ago, when there was a plan in the works for tearing down a nice old church and replacing it with one of the undistinguished structures, part barn and part motel, that were the mainstay of ecclesiastical architecture at the time, I got together with a colleague from the Architecture School to try to put a Historic Preservation Ordinance through our City Council. At the time, the vicissitudes of local politics had put a Republican in the mayor's office and a majority of Republicans on the Council—something that had not happened before in my time, and was not to happen again. Our ordinance was working its way through the legislative process, slowed mainly by the natural *méfiance* between politicians and academics, when the mayor took a good look at it and decided that it interfered with rights of property. That was the end of it. The conservatism prevailing in city government at the time was not for conserving buildings, but for conserving property rights. The church came down and was replaced according to plan.

It is with the right that so concerned the city fathers that Professor Jeremy Waldron deals in this lucid and authoritative book.

16. 384 U.S. 641, 651-52 n.10 (1966).

17. Rossum, *supra* note 8, at 32.

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