COMMENTS AND NOTES

REMOVAL OF SUPREME COURT APPELLATE JURISDICTION: A WEAPON AGAINST OBSCENITY?

Despite various possible interpretations of the exceptions and regulations clause, certain dicta by the Supreme Court admit to plenary congressional control of the Court's appellate jurisdiction. Nevertheless, Congress' reluctance to exercise such power has prevented a direct holding which might take cognizance of limitations on the power to eviscerate appellate review. If passed into law, the recent Dirksen bill, limiting Supreme Court jurisdiction to review both federal jury and state court determinations of obscenity, may well precipitate such a decision. This comment intends to explore the limitations which may be placed upon congressional action based on the exceptions and regulations clause, particularly as that action is related to the review the Court has exercised and the tests it has sought to formulate to afford maximum first amendment protection in the area of obscenity.

DURING THE heated debates surrounding the attempted elevation of Mr. Justice Fortas to the position of Chief Justice, Senator Everett Dirksen introduced a bill[1] designed, in part, to blunt charges that Fortas and the Supreme Court were "soft on obscenity."[2] Dirksen's bill sought in the first instance to make the determination of obscenity in federal trials primarily a question of fact for the jury,[3] whose decision no federal court would have

[1] S. 4058, 90th Cong., 2d Sess. (1968); *see* 114 CONG. REC. S11,000 (daily ed. Sept. 18, 1968).

[2] N.Y. Times, Sept. 17, 1968, at 34, col. 3. The issue of obscenity was involved in the Fortas debates due to testimony presented to the Senate Judiciary Committee by the Citizens for Decent Literature. N.Y. Times, July 23, 1968, at 11, cols. 2-3. Dirksen, an early supporter of Fortas, later dropped his support when Fortas' chances for elevation grew slim. Newsweek, Oct. 7, 1968, at 42.

[3] S. 4058 would have added § 1466 to the federal obscenity statutes, 18 U.S.C. §§ 1461-65. This new section entitled "Determinations of Fact" would have provided: "In every criminal action arising under this chapter or under any other statute of the United States determination of the question whether any article, matter, thing, device, or substance is in

jurisdiction "to review, reverse, or set aside,"[4] and secondly, to remove federal court jurisdiction "to review, reverse, or set aside" state court determinations on the issue of obscenity.[5] Although this effort to curb the appellate jurisdiction of the Supreme Court[6] failed to reach the floor of the Senate, similar proposals will almost certainly come before Congress in the future.[7] The ramifications of such proposals touch on far more than the "flood of filth" supposedly inundating our nation. Thus it is the purpose of this comment to explore the possibility of congressional removal of the Supreme Court's appellate jurisdiction in general, as well as its appellate review of obscenity cases in particular.

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fact obscene, lewd, lascivious, indecent, vile, or filthy shall be made by the jury, without comment by the court upon the weight of the evidence relevant to that question, unless the defendant has waived trial by jury."

[4] The bill proposed amending 28 U.S.C. by the addition of chapter 176 entitled "Actions Involving Obscenity," including § 3001(a) entitled "Judicial Review" which would read: "(a) In any criminal action under any statute of the United States for the prosecution of any person for the possession, sale, dissemination, or use of any obscene, lewd, lascivious, indecent, vile, or filthy article, matter, thing, device, or substance, no court of the United States or of the District of Columbia shall have jurisdiction to review, reverse, or set aside a determination made by a jury on the question whether such article, matter, thing, device, or substance is in fact obscene, lewd, lascivious, indecent, vile, or filthy."

[5] The bill further proposed amending 28 U.S.C. by the addition of § 3001(b) which would read: "(b) In any criminal action arising under any statute of any State or under any law of any political subdivision of any State for the prosecution of any person for the possession, sale, dissemination, or use of any obscene, lewd, lascivious, indecent, vile, or filthy article, matter, thing, device, or substance, no court of the United State [sic] shall have jurisdiction to review, reverse, or set aside a determination made by a court of such State on the question whether such article, matter, thing, device, or substance is in fact obscene, lewd, lascivious, indecent, vile, or filthy." Although phrased to remove the jurisdiction of *all* federal courts to review the findings of state courts, it is clear that in all but habeas corpus reviews, the Supreme Court is the federal court primarily affected.

[6] Although S. 4058 purported to remove the jurisdiction of *all* federal courts, the scope of this comment is limited to the denial of the Supreme Court's jurisdiction. Not only was the Supreme Court the primary federal court upon whom congressional attention was focused at the introduction of the bill, see notes 2 & 5 *supra*, but the congressional power to establish inferior federal courts, U.S. CONST. art. III, § 1, would appear at least to assure more congressional power to manipulate the jurisdiction of lower federal courts than that of the constitutionally-based Supreme Court. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850). *See also, e.g.*, Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101-115 (1964) (restricting the jurisdiction of federal courts to issue injunctions in "labor disputes" and from enforcing "yellow dog" contracts). Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938), upheld this provision.

[7] A letter to the *Duke Law Journal* from Senator Sam J. Ervin, Jr., dated September 24, 1968, indicated that Senator Dirksen would reintroduce his bill during the following session of Congress. The device of achieving political ends by procedural means, in particular by the removal of the Supreme Court's appellate jurisdiction, has been recently attempted in several other fields. See note 12 *infra*.

SUPREME COURT APPELLATE JURISDICTION

Article III of the Constitution provides only a skeletal framework for the federal judiciary, but it begins by assuring that "[t]he judicial power shall be vested in one supreme Court."[8] By subsequent provision, this judicial power is broadly defined to include "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."[9] The Constitution further adumbrates the manner in which this judicial power will be exercised by providing for a small segment of cases in which the Court has original jurisdiction,[10] with the residue of judicial power to be exercised as "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[11] It is upon this latter provision that bills[12] such as Dirksen's recent proposal have been based. Nevertheless, the meaning of this clause has yet to be defined to the satisfaction of many constitutional scholars,[13] and a precise understanding of Congress' power over the exercise of appellate

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[8] U.S. CONST. art. III, § 1, cl. 1.

[9] *Id.* § 2, cl. 1.

[10] *Id.* cl. 2 provides: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. . . ."

[11] *Id.*

[12] *E.g.*, S. 1194, 90th Cong., 1st Sess. (1968) (Senator Ervin) (sought withdrawal of appellate jurisdiction in order to reinstate voluntariness as the test to determine admissibility of a criminal confession); H.R. 11,926, 88th Cong., 2d Sess. (1964) (Congressman Tuck) (sought to withdraw appellate jurisdiction in reapportionment cases); S. 2646, 85th Cong., 1st Sess. (1957) (Senator Jenner) (sought to remove appellate jurisdiction to review practices by congressional committees, practices by executive agencies dealing with subversion among employees in the executive branch, state and school board efforts to deal with subversion, and finally state bar admission regulation); H.R. 1228, 85th Cong., 1st Sess. (1957) (Congressman Rivers) (sought to deny appellate review of matters pertaining to public schools). None of these bills was enacted into law. *See also* Elliott, *Court-Curbing Proposals in Congress*, 33 NOTRE DAME LAW. 597 (1958); McKay, *Court, Congress, and Reapportionment*, 63 MICH. L. REV. 255 (1964); Talmadge, *School Systems, Segregation, and the Supreme Court*, 6 MERCER L. REV. 189 (1955).

[13] *E.g.*, Hart, *The Power of Congress to limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960).

jurisdiction is lacking, despite numerous Supreme Court comments upon this relationship.[14]

The wording itself of this troublesome clause is open to various interpretations, not all of which have been discussed by the Supreme Court. One such interpretation would emphasize that since article III clearly vests the judicial power of the United States in the Supreme Court and in such inferior courts as Congress may establish,[15] Congress may remove no judicial power from the Supreme Court without disregarding this constitutional mandate.[16] This analysis further contends that the constitutional founders provided that the judicial power should be exercised at times as original jurisdiction of the Supreme Court and that all other exercises of judicial power were to be pursuant to appellate jurisdiction.[17] Under this view Congress could allocate certain types of cases between the appellate and the original jurisdiction of the Court,[18] perhaps because it deemed some cases to be of sufficient import to merit original Supreme Court consideration. However, Congress could never *totally* remove any of these cases from the high court's jurisdiction. The *only* effect of excepting appellate jurisdiction would be to allocate that subject matter to the original jurisdiction of the Court.[19]

This interpretation would appear to be entirely consistent with the wording of article III and would give meaning to each section pertaining to the judicial branch. However, the argument appears

[14] Note, *Limitations on the Appellate Jurisdiction of the Supreme Court*, 20 U. PITT. L. REV. 99 (1958). See cases cited and discussed notes 40-63 *infra* and accompanying text.

[15] U.S. CONST. art. III, § 1.

[16] The judicial power of the United States is actually "vested in one supreme Court, and in such inferior Courts as the Congress may . . . ordain and establish." U.S. CONST. art. III, § 1. Since *and* links one supreme court to the inferior federal courts, rather than *or*, a reasonable interpretation might be that concurrent use of the judicial power between lower federal courts and the highest court is contemplated by the Constitution. Thus, Congress, by this analysis, may not take judicial power from the Supreme Court by legislative action and give it *solely* to inferior federal courts. It appears established, however, that Congress may create and destroy inferior federal courts and their jurisdiction without violating this provision of article III. Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). See note 6 *supra*.

[17] U.S. CONST. art. III, § 2, cl. 2. *See generally Hearings Before the Subcomm. on Separation of powers of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. at 169-70 (1968) (remarks of Mr. Van Alstyne) [hereinafter cited as *Hearings on Separation of Powers*]. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 30-33.

[18] Cases which the Constitution specified to be within the original jurisdiction of the Court would, of course, not be subject to this manipulation.

[19] See note 17 *supra*.

precluded in a large part by the venerable case of *Marbury v. Madison*,[20] where in striking down the original jurisdiction given the Supreme Court to issue writs of mandamus, Chief Justice Marshall clearly decided that the Constitution had determined what jurisdiction would be original and what jurisdiction would be appellate.[21] If Congress could alter this constitutional distinction, Marshall maintained, "the distribution of jurisdiction, made in the constitution [would be] form without substance."[22] Marshall's conclusion is, of course, subject to question, as the above argument indicates. Moreover, it is ironic that in strengthening judicial power through the vehicle of judicial review, Marshall would at the same time read article III in such a way as to foreclose an argument that might be used to prevent evisceration of that judicial power by congressional action.[23]

A second interpretation of the exceptions and regulations clause which has never been discussed by the Supreme Court concerns the relation of appellate jurisdiction to the right of trial by jury.[24] The exceptions and regulations clause, as was much of article III, was the result of work by the five-man Committee of Detail.[25] Immediately after providing for broad judicial power[26] and wide appellate jurisdiction as to law and fact,[27] the Committee sought to ensure that the common law right to a trial by jury would be retained, although only in criminal cases.[28] This lack of a jury guarantee for all cases, coupled with the Supreme Court's appellate

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[20] 5 U.S. (1 Cranch) 137 (1803). *See generally Hearings on Separation of Powers* at 169 (remarks of Mr. Van Alstyne).

[21] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174-75 (1803). Another Marshall opinion, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 394 (1821), affirms this statement in dicta.

[22] 5 U.S. (1 Cranch) at 174.

[23] *See* Van Alstyne, *supra* note 17, at 32. Although *Marbury v. Madison* purportedly was overruled in part as recently as 1926 by Chief Justice Taft in Myers v. United States, 272 U.S. 52, a reversal on this issue would be less likely, as it would go directly to the merits of a semi-sacred piece of judicial handiwork.

[24] *See* Merry, *supra* note 13.

[25] The Committee of Detail was composed of John Rutledge (South Carolina), Edmund Randolph (Virginia), Nathaniel Gorham (Massachusetts), Oliver Ellsworth (Connecticut), and James Wilson (Pennsylvania). It met between July 26 and August 6, 1787. Merry, *supra* note 13, at 57 & n.20.

[26] U.S. CONST. art. III, § 1.

[27] *Id.* § 2, cls. 1-2.

[28] "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." *Id.* cl. 3; *see* Merry, *supra* note 13, at 57-63.

jurisdictional power to review a wide variety of cases—including facts found in jury trials—was criticized by many of the convention delegates.[29] However, countervailing the general desire to have juries make final findings of fact rather than some far-off high court, was the differing nature of the jury trial guarantee among the states.[30] Consequently, if any provision finalizing jury fact findings for cases other than in the criminal area was to be included in article III, a long and bitter debate as to the merit of such a provision for various types of cases lay ahead of the delegates.[31] Thus, it has been submitted that to avoid this debate the framers decided to leave to Congress the problem of Supreme Court review of jury findings of fact, and that consequently, the exceptions and regulations clause applies *only* to Congress' power to limit or enlarge the ambit of review of jury findings in non-criminal cases.[32]

This proposition may be supported by the writings of Alexander Hamilton appearing as part of the *Federalist Papers*.[33] Recognizing the diversity of state practice regarding review of jury findings in civil cases, Hamilton concluded that a blank check to juries and a denial of Supreme Court appellate jurisdiction as to jury findings of fact might preclude such review in some cases where it might be proper.[34] To prevent such a result, Hamilton stressed that Congress had been given the power by the exceptions and regulations clause to modify the Supreme Court's review of *factual* issues.[35] Nevertheless, so to limit the meaning does not comport with the actual language of the clause, for the phrase "with such

[29] Merry, *supra* note 13, at 59.

[30] For example, some states apparently utilized juries in equity and maritime cases, while other states denied jury trials in these instances. 5 ELLIOT'S DEBATES 144 (1866) (remarks of Richard Spaight, delegate from North Carolina). Alexander Hamilton suggested that jury determinations of fact might not be proper in all instances when, in reference to certain admiralty cases, he noted that judicial review of fact "might he essential to the preservation of public peace." THE FEDERALIST No. 81, at 490 (The New Am. Library 1961).

[31] Merry, *supra* note 13, at 60.

[32] *Id.* at 63.

[33] THE FEDERALIST PAPERS (The New Am. Library 1961).

[34] THE FEDERALIST No. 81, at 488-90 (The New Am. Library 1961).

[35] *Id.* at 490. Hamilton also stressed the importance of independence of the judicial branch of government from the legislative branch. *Id.* No. 80, at 476. Such an argument indicates that in Hamilton's mind the exceptions and regulations clause was not to be read as granting plenary congressional power over Supreme Court appellate review of law. To interpret the clause otherwise would deny a judicial power coextensive with legislative power, an idea recognized as a "political axiom" by Hamilton. *Id.*

Exceptions, and under such Regulations as the Congress shall make" appears to modify "appellate Jurisdiction," which has been granted "*both* as to *Law and* Fact."[36]

Rather than embrace these possible interpretations of the exceptions and regulations phrase, the Supreme Court has consistently opted for interpretations which admit the plenary power of Congress to determine what appellate jurisdiction the Court shall have.[37] An examination of Supreme Court decisions reveals that three basic, occasionally interwoven threads of analysis have been utilized in dealing with the power of Congress over the appellate jurisdiction of the Supreme Court.

One train of thought, which has been entertained but rejected by the Supreme Court, would require positive exceptions by Congress to divest the Court of its constitutionally-based appellate jurisdiction. This argument was first reported in the dissenting opinion of *Wiscart v. Dauchy*.[38] In *Wiscart*, admiralty cases were held to be civil cases under the Judiciary Act of 1789, and as such, were found to be before the Court upon writ of error—a procedure allowing review only as to questions of law. Justice Wilson, long an advocate of judicial review of admiralty facts,[39] was prompted to dissent. Wilson argued that admiralty cases were not intended to be civil cases, reviewable only by writ of error, but that since Congress was silent on admiralty review, pursuant to the constitutional grant of appellate jurisdiction, the Supreme Court had appellate

[36] U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

In addition to ignoring the grant of appellate jurisdiction to law, it might be argued that applying the phrase solely to appellate review of fact does not square easily with the admitted power of Congress to regulate the procedures through which Supreme Court jurisdiction is perfected. 28 U.S.C. §§ 1251-57 (1964). However, the exceptions and regulations clause need not be the only constitutional authorization for Congress to regulate procedures of Supreme Court review. Such procedures might also be sustained pursuant to the "necessary and proper" clause or as implied powers to provide for the operation of the Court and the constitutionally mandated judicial power. *See* Merry, *supra* note 13, at 69. Recognition of these additional constitutional authorizations for congressionally mandated procedure would seem even more reasonable in light of the fact that original jurisdiction is also affected, although the exceptions and regulations clause applies only to appellate jurisdiction. *See* 28 U.S.C. § 1251 (1964).

[37] "[T]he governmental body most ready to assert the power of Congress to deprive the Court of its appellate jurisdiction has been the Court itself." Comment, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court: A Reappraisal*, 22 N.Y.U. INTRA. L. REV. 178, 183 (1967).

[38] 3 U.S. (3 Dall.) 321 (1796).

[39] *See generally* Merry, *supra* note 13, at 63-68.

jurisdiction, both as to law and fact.[40] The *Wiscart* majority was, however, not persuaded by Wilson's view.[41]

The idea that positive congressional exception was required to divest the Supreme Court of appellate jurisdiction was again rejected in a series of decisions by Chief Justice Marshall, as he formulated a second interpretation of the exceptions and regulations clause. In *United States v. More*,[42] Marshall laid the framework for a "negative pregnant" doctrine of congressional exceptions to the appellate jurisdiction of the Court. The question involved in *More* was whether criminal cases could be reviewed by the Supreme Court even though the Judiciary Act of 1789 did not provide for criminal review. The Attorney General contended, as did the dissent in *Wiscart*, that the Court could take jurisdiction, arguing that appellate jurisdiction was conferred by the Constitution and unless an exception had been specifically made by Congress, the Court's jurisdiction was not circumscribed.[43] Marshall, however, refused to accept this view of the relationship of Congress to the Court's appellate jurisdiction. He admitted that the argument might have some weight if Congress had not seen fit to confer any appellate jurisdiction upon the Court. However, because Congress had described the jurisdiction of the Court in affirmative terms, Marshall concluded all jurisdiction not positively conferred must be implicitly prohibited.[44]

Marshall later reaffirmed his theory of implied exception[45] but was careful to point out that the Constitution, not Congress, conferred appellate jurisdiction upon the Court.[46] In later years,

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[40] 3 U.S. (3 Dall.) at 325-26. Review of admiralty fact was recognized by Congress a few years after *Wiscart* interpreted the Judiciary Act of 1789 as authorizing only review of law by writ of error. Appeal was made the means of obtaining Supreme Court review in the Act of March 3, 1803, sec. 2, 2 Stat. 244.

[41] See note 49 *infra*.

[42] 7 U.S. (3 Cranch) 159 (1805).

[43] *Id.* at 172-73.

[44] *Id.* at 173. Marshall analogized this theory to the jurisdictional amount then required to allow Supreme Court review of a civil circuit court case. The requirement is positively stated, but it is inferred that jurisdiction as to civil cases less than this amount does not exist. *Id.*

[45] In Durousseau v. United States, 10 U.S. (6 Cranch) 307 (1810), Marshall again rejected that analysis which would require positive congressional exception to divest the Court of appellate jurisdiction. Again he conceded that this jurisdiction emanated from the Constitution, *id.* at 314, but he implied congressional exceptions to the Court's appellate jurisdiction by the affirmative actions of the Judiciary Act of 1789 and other congressional affirmations of jurisdiction. *Id.* at 315.

[46] Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810).

however, beginning under the auspices of Chief Justice Taney, the constitutional foundation for the Court's appellate jurisdiction was largely ignored and a third and final analysis of the exceptions and regulations clause was entertained by the Supreme Court. Unlike either the rejected interpretation which would have required positive congressional action to remove appellate jurisdiction or Marshall's accepted "negative pregnant" doctrine which admitted implicit congressional exceptions, the third analysis, accepted in dicta, apparently recognized no constitutional basis for appellate jurisdiction.[47] Thus, for example, in *Barry v. Mercein*,[48] Taney remarked that "this court can exercise no appellate power unless it is conferred by act of congress."[49]

The distinction between Marshall's "negative pregnant"

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[47] This third analysis might actually be said to have begun with Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321 (1796). After Wilson's dissent suggested positive congressional action was necessary to except cases from the Court's appellate review, Chief Justice Ellsworth, as was customary practice at the time, filed a rebuttal opinion. Merry, *supra* note 13, at 67. Ellsworth laid the foundation for plenary congressional control of Supreme Court appellate jurisdiction when he remarked, "[I]f Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it." Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796). To decide the case Ellsworth needed to say no more than the latter phrase, so his pronouncement indicating that appellate jurisdiction depended upon congressional authorization may be disregarded as dictum. Ratner, *supra* note 13, at 174. Nonetheless, its implications were certainly manifested in those later cases, following Marshall, which recognized congressional action, not the Constitution, as the basis of the Supreme Court's appellate jurisdiction.

It should be noted that both Ellsworth and Wilson were members of the Constitutional Convention's Committee on Detail, see note 27 *supra*, which authored the exceptions and regulations clause. Therefore, to look to the legislative intent of this Committee appears to result in a "Mexican Standoff," as both expressed totally different views of the meaning of the clause in *Wiscart*.

[48] 46 U.S. (5 How.) 103 (1847).

[49] *Id.* at 120-21. *Barry* involved a petition for custody of a child pursuant to a writ of *habeas corpus ad subjiciendum*. *Id.* at 119. The Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 84, provided that decrees in civil actions by a circuit court could be reviewed by the Supreme Court if the matter in dispute exceeded the sum of $2000. Since no money was involved in the controversy, the matter in dispute could not be reviewed before the Supreme Court as a civil action. Thus, the holding in *Barry* might well be limited to demanding the proper jurisdictional amount in order to comply with the manner of appeal deemed appropriate by Congress. At any rate, the point was not contested by the appellant in the case, nor were any cases cited to support the dicta. Ratner, *supra* note 13, at 177-78.

The prerequisite of congressional action in order to cloak the Court with appellate jurisdiction was further emphasized in later dicta. Thus, for example, in Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250 (1865), the Court remarked: "In order to create [appellate jurisdiction] in any case, two things must concur: the Constitution must give the capacity to take it, *and* an act of Congress must supply the requisite authority." *Id.* at 254 (emphasis added).

interpretation of the exceptions and regulations clause and that interpretation which requires specific congressional approval for the Court's exercise of appellate jurisdiction would be of no practical consequence unless Congress had remained silent on the subject.[50] In such an instance Marshall's theory would have the Court exercise full appellate jurisdiction whereas the latter interpretation would deny any such exercise. Of course, this situation has never existed, since the first Congress provided for the Court's appellate jurisdiction with the Judiciary Act of 1789. Nonetheless, the distinction between the two is theoretically important, in that isolating the source of the Court's appellate review power may lead to jurisdiction based either upon the benevolence of Congress or, more firmly, upon the Constitution itself.

Despite their differences as to the relation between Congress and appellate review by the Supreme Court, all three views of the Court recognize potential plenary congressional power over appellate jurisdiction, for all three views—including the rejected view of the *Wiscart* dissent—recognize the power of Congress at least to make *positive* exceptions to Supreme Court appellate jurisdiction. However, it was not until *Ex parte McCardle*[51] that the Court was faced with such a situation. Although all other Supreme Court observations as to the power of Congress over appellate jurisdiction may be dismissed as dicta or as involving questions of no constitutional stature,[52] *McCardle* will not be so easily explained away.

Incarcerated as a result of the Reconstruction Acts following the Civil War, McCardle petitioned for a writ of habeas corpus to the Circuit Court, pursuant to the Act of February 5, 1867.[53] Upon denial of his petition McCardle appealed, under the same act, to the Supreme Court. After determining that it did have jurisdiction,[54] the Court proceeded to hear arguments on the merits—which went to the constitutionality of the Reconstruction Act under which McCardle was held.[55] After the case had been heard on the merits but before a decision had been handed down,

[50] See text accompanying note 60 *infra*.
[51] 74 U.S. (7 Wall.) 506 (1868).
[52] Ratner, *supra* note 13, at 173-74.
[53] Act of Feb. 5, 1867, to Amend the Judiciary Act of 1789, 14 Stat. 385.
[54] *Ex parte* McCardle, 73 U.S. (6 Wall.) 318 (1867).
[55] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 508 (1868).

Congress, fearing their Reconstruction scheme would be held unconstitutional by the Court, repealed that portion of the Act of February 5, 1867, which authorized appeal from Circuit Court habeas corpus hearings to the Supreme Court.[56]

The Court for the first time was squarely confronted with a positive congressional exception to appellate jurisdiction. It responded to the challenge by stating that "it is hardly possible to imagine a plainer instance of positive exception . . . . Without jurisdiction the court cannot proceed at all in any cause."[57] After recognizing Congress' power to make positive exceptions to appellate jurisdiction, *McCardle* sought to explain away the broad statements of decisions which indicated congressional action was a prerequisite for appellate jurisdiction. Thus, Marshall's implied exception theory was accepted with the explanatory notation:

> [I]t was an almost necessary consequence that acts of Congress,

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[56] Act of March 27, 1868, ch. 34, 15 Stat. 44.

On January 6, 1868, Senator Williams reported an innocuous bill from the Senate Committee on Finance which was designed to broaden the Supreme Court's jurisdiction in certain revenue cases. S. REP. No. 213, 40th Cong., 2d Sess. (1868). The bill passed the Senate on March 11, 1868, without discussion. 39 CONG. GLOBE 1807 (1868). The following day Congressman Schenck gained the floor to introduce the bill in the House, assuring his colleagues that "[t]here can be no possible objection to it." *Id.* at 1859. Once he had gained the floor Schenck yielded to Congressman Wilson for an amendment, whereupon the provision removing the Supreme Court's jurisdiction in *McCardle* was added. The bill, as amended, was immediately passed without discussion. *Id.* at 1860. Two days later, the opposition to the amended bill rose to the surface in the House, blasting the procedural shennanigans which facilitated ready passage of the bill. These remarks were chided for their lateness by Schenck and other supporters of the bill who accused opponents of the measure of being asleep when it was passed. Schenck, in support of the limitation placed on the Court's jurisdiction, blasted the Supreme Court for usurping power and delving into political matters. *Id.* at 1882-85.

The Senate passed the amended bill of March 12, the same day as the House passage. Again there was no discussion; indeed, a motion to postpone consideration of the measure to allow study of it was rejected. *Id.* at 1847. The bill was sent to the President for his signature.

Although under impeachment charges, President Andrew Johnson left the bill unsigned for the maximum period in hopes that the Court would act on the merits of *McCardle* before the jurisdictional limitation could be passed. When the Court failed to act, Johnson vetoed the bill on March 25, 1868, *Id.* at 2166.

The Senate passed the bill over the President's veto on the following day, ignoring the warnings of the opposition that the measure would set a dangerous precedent. *Id.* at 2115-28. Within a day of the Senate, the House also overrode the Presidential veto after a short discussion. *Id.* at 2166-70. *See generally* 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 455-97 (1932).

[57] 74 U.S. (7 Wall.) at 514.

> providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.[58]

Nevertheless, subsequent courts were either unaware of the theoretical distinction which placed appellate jurisdiction upon a constitutional basis, felt such a concession unimportant, or disagreed without comment on the principle.[59] The Court, however, recognized that this distinction was of no concern in *McCardle*, for the exception under consideration was not a negative inference based on an affirmative grant of appellate jurisdiction but rather a positive exception made in explicit terms.[60] Nonetheless, to read *McCardle* as authority for Congress to make any positive exception to appellate jurisdiction insulates the decision from the turmoil of the times when it was decided[61] and the Court's limitations on the holding that quickly followed the case.

McCardle itself alluded to one such limitation when it asserted, in dicta, that the entire habeas corpus jurisdiction of the Court had not been removed by the Repeal Act of 1868, but only jurisdiction to hear appeals from Circuit Court habeas decisions which had previously been granted under the Act of 1867.[62] Indeed, in *Ex parte Yerger*,[63] faced with a petitioner in substantially the same circumstances as had been McCardle, the Supreme Court held that the Repealing Act of 1868 affected only *appellate* habeas corpus jurisdiction while it left untouched the jurisdiction of the Court to issue an *original* habeas corpus petition pursuant to the Judiciary Act of 1789. Consequently, McCardle could still have applied for habeas corpus relief, if he had done so under the Judiciary Act of 1789. It is this crucial fact which places one of the largest limitations upon the holding of the *McCardle* case, since in conjunction with

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[58] *Id.* at 513.

[59] See notes 49-51 *supra* and accompanying text, noting this misunderstanding of Marshall's analysis which developed into a separate interpretation of the exceptions and regulations clause.

[60] See text accompanying note 57 *supra*.

[61] *See* Grinnell, *Proposed Amendments to the Constitution: A Reply to Former Justice Roberts*, 35 A.B.A.J. 648, 650 (1949). *McCardle* is described as limited to "an exceptional and extreme situation—an incident of the ruthless political struggle of a headstrong congressional majority, thirsting for power which they abused when they took it." *Id.* See also note 58 *supra* and accompanying text.

[62] 74 U.S. (7 Wall.) at 515.

[63] 75 U.S. (8 Wall.) 85 (1868).

Yerger it may be seen that all the *McCardle* Court did was to uphold a congressional exception of one procedure through which relief could have been afforded McCardle.[64]

Nevertheless, both *Yerger* and *McCardle* dealt with the writ of habeas corpus, a procedure grounded in the Constitution[65] and thus involving an area of appellate procedure which will receive special consideration. *Yerger* goes to great lengths to explain the special nature of the procedure and poses the unanswered query of whether appellate jurisdiction by habeas corpus extends to all cases of confinement by the authority of the United States—subject to *no* exceptions made by Congress.[66] Recognizing, however, the limitation on habeas relief set forth in *McCardle*, the *Yerger* court looked to the particular act that limited jurisdiction in that case and the "peculiar" circumstances surrounding it.[67] Since legislation such as the Repeal Act of 1868 was "unusual and hardly to be justified except upon some imperious public exigency," the Court did not hesitate to limit the effect of *McCardle* to appeals taken under the act of 1867.[68]

The bounds of the *McCardle* holding were further mapped in *United States v. Klein*.[69] Pursuant to a Presidential pardon for disloyalty,[70] Klein, the administrator of the pardoned's estate, brought suit in the Court of Claims to recover the confiscated

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[64] Ratner, *supra* note 13, at 180. *See also* Wall Street Journal, May 27, 1968, editorial. The point was raised repeatedly at the recent hearings of the Senate Judiciary's Subcommittee on Separation of Powers. *Hearings on Separation of Powers* at 12 (remarks of Mr. Abraham); 123 (remarks of Mr. Pritchett); 168-69 (remarks of Mr. Van Alstyne). *Contra, Hearings on Separation of Powers* at 16-17 (remarks of Mr. Gunther); 22-24, 132-33, 138, 196 (remarks of Senator Ervin); 97 (remarks of Mr. Kurland).

[65] U.S. CONST. art. 1, § 9, cl. 2. The argument has been made that this section of the Constitution guarantees that some federal court will sit to determine the constitutional claims of aggrieved individuals. Hart, *supra* note 13, at 1397-1401. If this argument is valid, and that section of Dirksen's bill which denies federal court jurisdiction to review state court determinations of obscenity is interpreted to include a denial of habeas corpus jurisdiction, it would seem to follow that this denial would violate the habeas corpus guarantee of article 1, section 9 of the Constitution. *Cf.* Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233, 243-44 n.6 (1968) (concurring opinion of Harlan, J.)

[66] 75 U.S. (8 Wall.) at 99.

[67] *Id.* at 103.

[68] 75 U.S. (8 Wall.) at 103-05.

[69] 80 U.S. (13 Wall.) 128 (1871).

[70] Proclamation of Dec. 8, 1963, 13 Stat. 737 (1863) (Abraham Lincoln).

property of the deceased.[71] The Court of Claims granted recovery, whereupon the United States appealed to the Supreme Court for dismissal. While the case was pending, Congress passed a bill providing, in essence, that the Supreme Court should have no jurisdiction to allow those receiving executive pardon for acts of disloyalty to recover a judgment against the United States on a claim of confiscation and that any pardon accepted was to be conclusive proof as to guilt for the acts pardoned.[72] Noting that "Congress had inadvertently passed the limit which separates the legislative from the judicial power,"[73] the Supreme Court held the act unconstitutional.[74] The end which Congress had sought to achieve by removing appellate jurisdiction was to limit the effect of Presidential pardons,[75] as the Court had adjudged that effect to be.[76] Thus, Congress was seeking to overrule what the Court conceived as its duty in protecting the executive power under the Constitution, and the exceptions and regulations power would not give effect to the attempt.

The essential question is whether the exceptions and regulations clause was intended to be a limitation on the judiciary as part of the system of checks and balances set up under the Constitution. Those who choose so to read the clause find support from the interpretations of the Supreme Court as expressed in language from *Wiscart* to the present,[77] but a close examination of

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[71] This suit was authorized by the Act of March 3, 1863, 12 Stat. 820, in conjunction with the Act of July 17, 1862, 12 Stat. 589.

[72] Act of July 12, 1870, 16 Stat. 235. The Court characterized the act as providing "that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it." United States v. Klein, 80 U.S. (13 Wall.) at 144.

[73] 80 U.S. (13 Wall.) at 147.

[74] "[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end." *Id.* at 145. The Court observed that the "end" which was contemplated by the statute involved in *Klein* infringed on the Presidential pardoning power granted by article II, section 2 of the Constitution. Thus the doctrine of separation of powers had been violated twice, once by the legislative branch's effort to prescribe a rule for the judiciary, see note 76 *infra* and accompanying text, and secondly by the legislative effort to change the executive branch's power to pardon. 80 U.S. (13 Wall.) at 147-48.

[75] U.S. CONST. art. II, § 2, cl. 1. See note 76 *infra*.

[76] 80 U.S. (13 Wall.) at 145; *see* United States v. Padelford, 76 U.S. (9 Wall.) 531 (1869).

[77] *E.g., Hearings on Separation of Powers*, 22-23, 133 (remarks of Senator Ervin). See cases cited notes 40-63 *supra* and in accompanying text.

these cases indicates that such sweeping possibilities of limitation may not in fact exist. Indeed, since Congress has never sought to exercise plenary removal power over the appellate jurisdiction of the Supreme Court, every Court statement supporting such a position may be limited by the fact that such a statement was really unnecessary to the outcome of the case.[78]

Moreover, if the phrase were actually intended to be a check on the use of judicial power, this intention could have been made clearer. If plenary control were intended, rather than granting the Supreme Court original jurisdiction for a particular group of cases and then providing for "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make,"[79] it is reasonable to assume that the drafters might have agreed on a clause providing that appellate jurisdiction "shall be exercised in such manner as the legislature shall direct." However, precisely such a clause, which would plainly have subjeeted appellate jurisdiction to legislative direction, was defeated by the delegates to the Constitutional Convention.[80] It appears not unreasonable to read the defeat of this clause as one sign that legislative manipulation of appellate jurisdiction was not intended by the founders as a check on the judiciary.

Furthermore, the words "exception" and "regulation" imply a residuary from which to except and which to regulate.[81] The choice of these words, coupled with the rejection of a clause which would clearly vest the legislature with plenary power over appellate jurisdiction, indicates, at the least, an intent on the part of the framers not to allow complete congressional control of appellate jurisdiction. Moreover, in order to give this intent meaning, it would appear that interpretation of this clause might mean that in no issue over which the Supreme Court has been given appellate jurisdiction may ultimate review by the Court be denied by congressional action.[82] Thus, the exceptions and regulations clause

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[78] Ratner, *supra* note 13, at 173-74; *Hearings on Separation of Powers*, 201 (remarks of Mr. Van Alstyne).

[79] U.S. CONST. art. III, § 2, cl. 2.

[80] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 425 (1911); Ratner, *supra* note 13, at 172.

[81] Ratner, *supra* note 13, at 168-70.

[82] Hart, *supra* note 13, at 1364-65. Consequently, Congress could not, under this view of the clause, remove appellate jurisdiction to all but patent cases. To allow it to do so would

of the Constitution may be read as authority for Congress to make reasonable procedural regulations for the appellate jurisdiction of the Supreme Court,[83] but not as authority to exclude a class of cases involving constitutional questions from Court review solely because of subject matter.[84] Such an interpretation, although flying in the face of certain broad statements by the Supreme Court,[85] is not precluded by the narrow holdings of the cases in which the exceptions and regulations clause has been examined.

Furthermore, to read the troublesome clause in such a manner as to deny Congress the power totally to remove a certain constitutional question from the appellate jurisdiction of the Supreme Court is consistent with another line of cases outlining the purpose of the Court in the constitutional scheme. The Supreme Court has long been recognized as the constitutional implementation of the supremacy clause,[86] which means that the

be to allow "exceptions" and "regulations" to engulf the appellate jurisdiction upon which they were intended to act.

[83] See note 64 *supra* and accompanying text.

[84] Hart, *supra* note 13, at 1372; Ratner, *supra* note 13, at 171-72.

[85] *E.g.*, The "Francis Wright," 105 U.S. 381, 385-86 (1881): "What [the appellate jurisdiction of the Supreme Court] shall be, and to what extent [it] shall be exercised, [is], and always [has] been, [the] proper [subject] of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not." The narrow holding of this decision affirmed Congress' power to limit Supreme Court jurisdiction to review questions of admiralty fact. See notes 47-49 *supra* and accompanying text.

[86] U.S. CONST. art. VI, cl. 2. This thought was expressed throughout THE FEDERALIST No. 22 (The New Am. Library 1961). *See, e.g.*, page 150: "To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice." In THE FEDERALIST No. 39, at 245-46 (The New Am. Library 1961), James Madison echoed a similar sentiment: "It is true that in controversies relating to the boundary between the two jurisdictions [nation and state], the tribunal which is ultimately to decide is to be established under the general government . . . . Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact." Hamilton further argued in THE FEDERALIST No. 80, at 476 (The New Am. Library 1961), that "[i]f there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed." *See also* THE FEDERALIST Nos. 81-82 (Hamilton).

essential function of the Court is to maintain the supremacy of federal over state law and the priority of the Constitution respecting both.[87] In *Marbury v. Madison*[88] Chief Justice Marshall recognized that the particular duty of the judiciary was to maintain the supremacy of the Constitution.[89] Nevertheless, Marshall was addressing himself to the judiciary in general, not to the Supreme Court in particular, and it was for Justice Story in *Martin v. Hunter's Lessee*[90] to wed this maxim with the need for *uniformity* of constitutional decisions throughout the country.[91] Despite Marshall's interpretation of the exceptions and regulations clause in which he recognized that certain appellate jurisdiction could be removed from the Supreme Court's appellate purview,[92] the Chief Justice was not faced with a situation in which the Court was being denied every opportunity to decide an issue involving a constitutional guarantee. In fact, in *Cohens v. Virginia*[93] Marshall indicated if such were the situation before the Court he might well modify his interpretation of congressional power over the Court's jurisdiction.[94] Some years later, Chief Justice Taney, having previously conceded Congress sweeping powers over the exercise of Supreme Court appellate jurisdiction,[95] tempered his stand. In *Ableman v. Booth*[96] Taney upheld the power of the Supreme Court to review a state court's issuance of habeas corpus relief to persons in federal custody. In dicta Taney concluded that the appellate power given the Supreme Court was designed to insure the supremacy of the national government and the uniformity of its Constitution and laws.[97]

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[87] Ratner, *supra* note 13, at 166.

[88] 5 U.S. (1 Cranch) 137 (1803).

[89] *Id.* at 177. See notes 17-25 *supra* and accompanying text questioning Marshall's constitutional interpretation as to the law he declared unconstitutional.

[90] 14 U.S. (1 Wheat) 304 (1816).

[91] *Id.* at 348. To harmonize varying interpretations of the laws and treaties of the United States, as well as the Constitution, the appellate jurisdiction of one Supreme Court was "the only adequate remedy for such evils." *Id.*

[92] Cases cited notes 42-46 *supra* and accompanying text.

[93] 19 U.S. (6 Wheat.) 264 (1821).

[94] *Id.* at 415-18. Upholding the Court's authority to review a state court's interpretation of federal statute, Marshall recognized: "[T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved." *Id.* at 416.

[95] See notes 47-49 *supra* and accompanying text.

[96] 62 U.S. (21 How.) 506 (1858).

[97] *Id.* at 517-18.

Although *Martin, Cohens,* and *Ableman* all merely upheld the Supreme Court's jurisdiction under section 25 of the Judiciary Act of 1789, dicta in the opinions indicate a possible constitutional basis for their results.[98] These cases involved the Court's jurisdiction over state court interpretations of the Constitution, laws, and treaties of the United States, but the thrust of the logic used in their resolution is certainly applicable to any attempt to deny appellate review of lower federal court interpretations of these same documents. The opinions reason that it is *one* Supreme Court that is contemplated by the Constitution,[99] and to leave final interpretations to many lesser federal or state judicial bodies is to create multiple supreme courts, where basic federal guarantees become one thing in one jurisdiction and another thing in another—a result which does indeed seem repugnant to a government bottomed on one Constitution.[100] Thus, *Martin, Cohens* and *Ableman* are very significant in eviscerating other dicta regarding the power of Congress to deny appellate review.

To date, a resolution of the conflicting language in cases such as *McCardle* and *Ableman* has been unnecessary, for Congress has never sought to exclude one constitutional issue from the appellate jurisdiction of the Supreme Court. Since the Judiciary Act of 1789 the Supreme Court has essentially exercised authority to review every issue arising under the Constitution. Even in *McCardle,* ultimate review of the rights involved could have been had by another procedure.[101] In *Klein,* the one case where it may be said

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[98] Ratner, *supra* note 13, at 167. This adumbrated constitutional basis would be the supremacy clause. U.S. CONST. art. VI, § 2.

[99] U.S. CONST. art. III, § 1 (emphasis added).

[100] In Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1855), the Supreme Court further emphasized the constitutionally-based nature of Court review. The Court noted that its functions as determined by the framers of the Constitution included appellate review to re-examine the merits of decisions by lower tribunals, to secure the privileges and immunities of citizens according to the Constitution, art. IV, § 2, cl. 1, and to assure that the Constitution and federal laws and treaties would be the supreme law of the land. *Id.* at 354-55. *See also* Ferris v. Coover, 11 Cal. 175, 179 (1858).

[101] See notes 62-64 *supra* and accompanying text. Indeed, the viability of *McCardle* has been doubted as recently as 1962 by at least one member of the Supreme Court. In Glidden Co. v. Zdanok, 370 U.S. 530 (1962), Justice Douglas remarked that "[t]here is a serious question whether the *McCardle* case could command a majority view today." *Id.* at 605 n.11 (dissenting opinion). Douglas' dictum is considerably undercut, however, by Flast v. Cohen, 392 U.S. 83, 109 (1968) (concurring opinion), where, citing *McCardle,* Douglas remarked that "[a]s respects our appellate jurisdiction, Congress may largely fashion it as Congress desires . . . ."

that Congress attempted to deny appellate jurisdiction entirely as to one type of subject matter, the Court found congressional action violative of the Constitution. In light of past practices, the purpose of the Supreme Court as it relates to the supremacy clause, the holding in *Klein*, and other limitations placed on *McCardle*, it appears reasonable to expect that any congressional action pursuant to the exceptions and regulations clause must be designed only to regulate, or except, certain *procedures* to which parties must turn in order to bring their constitutional grievances before the Supreme Court through its appellate jurisdiction.

THE DIRKSEN BILL

Before examining the development of the respective roles of the Supreme Court, lower federal courts, state courts, and juries in determining obscenity, mention should be made of several other lines of constitutional analysis which raise questions about the validity of the Dirksen bill's effort to curtail Supreme Court appellate jurisdiction in obscenity cases.

In *United States v. Jackson*[102] the Supreme Court held that the punishment provision of the Federal Kidnapping Act[103] was an unconstitutional impairment of the right to a jury trial in that it forced the defendant to subject himself to the risk of capital punishment as the price for asserting the right to trial by jury.[104] Although the case may be limited to situations involving the risk of death as the price for asserting a jury trial, the logic of *Jackson* would appear to extend to any statutory provision which places an added burden upon a defendant seeking a trial by jury.[105] In the Dirksen bill, a defendant under obscenity charges would face the choice of either exercising his sixth amendment right to a jury trial—without the safeguards inherent in judicial review of the jury

[102] 390 U.S. 570 (1967).

[103] 18 U.S.C. § 1201(a) (1964).

[104] The statute provided for the death penalty "if the . . . jury shall so recommend." If the defendant waived his right to be tried by a jury he would be assured that he would not be executed, but if the defendant sought to assert this right he was forced to subject himself to the possibility of capital punishment. Thus the statute discouraged the defendant from exercising his fifth amendment right to plead "not guilty" and also his sixth amendment right to demand a jury trial. United States v. Jackson, 390 U.S. 570, 581 (1967).

[105] *Id.* at 592 (White, J., dissenting). The majority opinion is careful to speak of the death penalty as the burden upon the right to trial by jury which makes the procedure unconstitutional, but nowhere does the Court specify this limitation.

decision—or foregoing the trial by jury in order to be assured that his case might be reviewed by a higher court. The irony of such a result is manifested in the fact that few defendants seek jury trials of obscenity charges.[106] Nevertheless, if on its face a statute provides for a greater burden to attach to a trial by jury, such a statute may be unconstitutional under the reasoning of *Jackson*, since it "chills" a defendant's right to a jury trial. However, this possible defect would be curable by amending the Dirksen bill to allow only jury trials on federal obscenity charges, thus removing the inequity which may fall within *Jackson*. Since there is no constitutional right to waive a jury trial,[107] by removing the possibility of waiver by a defendant the Dirksen bill would at least foreclose a disparity-of-treatment argument based on *Jackson*.

But other disparity-of-treatment arguments, based on the equal protection clause of the fourteenth amendment as applied to the federal government through the fifth amendment's due process clause,[108] preserve a constitutional attack on bills such as Dirksen's without reaching the issue of the relative role of judge and juror in obscenity cases.[109] Assuming that Congress does have the power to remove the Supreme Court's appellate jurisdiction, the equal protection clause guarantees that the exercise of this power must be rationally connected to a legitimate legislative purpose.[110] In the case of the Dirksen bill, there is a question as to what legitimate legislative purpose is served by a denial of Supreme Court review of state court or federal jury determinations on obscenity. If the legislative purpose is to prevent the Supreme Court from applying first amendment standards to certain materials, it may be doubted that this is a legitimate goal. Persons tried for obscenity law violations might receive a lesser degree of first amendment protection than those facing charges of unlawful assembly,

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[106] *See, e.g.*, Bromberg, *Five Tests for Obscenity*, 41 CHI. B. RECORD 416, 418 (1960). *But cf.* Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 36 & n.174 (1960) (one reason prompting an expanded venue for federal obscenity violations was "liberal" juries).

[107] Singer v. United States, 380 U.S. 24 (1965).

[108] Bolling v. Sharpe, 347 U.S. 497 (1954).

[109] Dirksen's bill directly affects the relative roles of judge and juror only in federal obscenity trials. See notes 3-5 *supra* and accompanying text.

[110] *E.g.*, Morey v. Dowd, 354 U.S. 457 (1957); Williamson v. Lee Optical Inc., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

incitement to riot, libel, and other areas closely connected with first amendment freedoms which would continue to receive the protection of Supreme Court review.[111] To protect against this unequal treatment of those claiming violations of their first amendment rights, perhaps Congress would have to provide that *all* first amendment claims should be tried by a federal jury or a state court without judicial review by the Supreme Court.

However, even assuming such a result to be politically feasible, the equal protection argument would still not be answered. The question would then become what the legitimate purpose is in denying Supreme Court review of first amendment claims since claimants seeking to assert other constitutional protections need not rely solely on a jury trial or a state court determination without Supreme Court review. The argument continues to expand as the protection of additional rights is placed solely within the power of the jury or of each state. Essentially, the question is whether the piecemeal denial of the ability to present certain constitutional claims before the Supreme Court may be a denial of equal protection under the fifth amendment.[112]

The complete denial of the Supreme Court's appellate jurisdiction would not appear to violate this interpretation of the equal protection clause since all constitutional claims would be treated equally. On the other hand, although complete denial of appellate jurisdiction would not deny equal protection in this sense, another facet of equal protection may be denied. If constitutional rights are to be finally determined by a jury or by a state court there is no actual equal protection under the law. Federal rights would become dependent on the place where that right was asserted, and without Supreme Court review to establish a national standard to resolve conflicting lower court interpretations and jury results, the idea of a national Constitution guaranteeing national rights would be totally undercut.[113]

Obscenity cases provide an excellent example of how the locale of a prosecution may determine a defendant's first amendment rights. For example, before the Supreme Court reviewed the obscenity prosecution of the book *Fanny Hill*,[114] the Massachusetts

[111] See cases cited notes 166-68 *infra* and accompanying text.

[112] *See generally Hearings on Separation of Powers*, 170-71 (remarks of Mr. Van Alstyne).

[113] *Id.* at 171.

[114] Memoirs v. Massachusetts, 383 U.S. 413 (1966).

Supreme Judicial Court had concluded that the work was obscene,[115] while in neighboring New York the Court of Appeals had found the book protected by the first amendment.[116] Furthermore, Congress apparently was recognizing this geographical variance in 1958 when it passed an expanded venue measure which authorized the prosecution of a mailer of obscene material not only at the place of deposit, but also at any place through which the material was mailed or at the place of receipt.[117] Thus, areas of more "sophisticated" courts and jurors could be avoided in an effort to obtain a higher rate of federal convictions for the mailing of obscene matter.[118]

In certain respects the Supreme Court has indicated that what constitutes obscenity may be a varying standard. Dissemination of certain materials to children may be prohibited by carefully drawn obscenity statutes which do not prevent distribution of the same materials to adults.[119] Furthermore, the manner in which a work is advertised may either extend material beyond the borderline of obscenity or assure its protection.[120] However, despite these holdings the Court has not yet accepted the notion that the standards should vary with the place of prosecution,[121] and unless the Court would

[115] Attorney Gen. v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure," 349 Mass. 69, 206 N.E.2d 403 (1965).

[116] Larkin v. G.P. Putnam's Sons, 14 N.Y.2d 399, 200 N.E.2d 760, 252 N.Y.S.2d 71 (1964).

[117] Prior to this expansion, prosecution for the mailing of obscene matter had been limited to the place of deposit. United States v. Ross, 205 F.2d 619 (10th Cir. 1953). In 1958 the general federal obscenity statute, 18 U.S.C. § 1461 (1964), was amended to strike the provision penalizing "[w]hoever knowingly deposits for mailing or delivery, anything . . . [obscene]" and to substitute a provision penalizing "[w]hoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything [obscene]." 72 Stat. 962 (1958). The purpose of this amendment was to make the use of the mails for the dissemination of obscene material a continuing offense from the time and place of deposit, throughout transit, to the time and place of delivery. The constitutionality of this expanded venue provision was upheld in Reed Enterprises v. Clark, 278 F. Supp. 372 (1967) (three-judge district court), *aff'd per curiam*, 390 U.S. 457 (1968).

[118] The Post Office and Justice Departments supported the measure. *See generally* Lockhart and McClure, *supra* note 106.

[119] Ginsberg v. New York, 390 U.S. 629 (1968).

[120] Ginzburg v. United States, 383 U.S. 463 (1966). *See also* Redrup v. New York, 386 U.S. 767 (1967).

[121] Such a variation has, however, been proposed by some justices. Justice Harlan would allow a variation of state results on obscenity—subject to Supreme Court review. See note 143 *infra* and accompanying text. In Jacobellis v. Ohio, 378 U.S. 184 (1964), Justices Warren and Clark accepted local community standards as a valid element in determining

adopt a geographic variation test to determine obscenity, the fluctuation of first amendment rights based on the place of prosecution might be precluded as violative of equal protection.

It is arguable, therefore, that the Dirksen bill might be found violative of the Constitution without an examination of what the Court has assumed to be its duty to protect first amendment claims in obscenity convictions via judicial review. Like the supremacy clause, the equal protection clause of the fourteenth amendment, as read into the fifth amendment's due process provision, may temper the exceptions and regulations power given Congress under article III. Both provisions may demand that some reasonable procedural path be left open to obtain Supreme Court review of all constitutional claims. Reliance upon such an argument, however, assumes that the exceptions and regulations clause was not intended as a congressional check on the Supreme Court. If the clause were indeed designed to allow Congress to combat a line of Supreme Court holdings on matters of fact or law, its exercise in this manner as to obscenity decisions could hardly be labeled "invidious" and violative of equal protection.[122] Nonetheless, to accept the clause as a blank check for Congress to limit, reverse or ignore Supreme Court interpretations of the Constitution would seem to ignore the limitations adumbrated in *Klein*.

It is likely that legislation designed to remove a particular type of case or constitutional issue from the ambit of Supreme Court review will prompt an investigation by the Court into the scope of review it has exercised in the past regarding the subject of such legislation. Just as *Klein* dealt with an attempt to overrule the Supreme Court's interpretation of the Presidential pardoning power under article II,[123] so might the Dirksen bill be an attempt to overrule the Court's interpretation of the relationship of the first amendment to obscenity. Consequently, if passed and tested before the Court, the bill would likely precipitate a decision defining the role of Supreme Court review in obscenity matters.

Characteristic with their obscenity decisions, the Court has

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what is obscenity. This element of the test for obscenity remains in doubt. *Jacobellis*, a highly fragmented decision which evoked seven separate opinions by the Court, dealt in part, and inconclusively, with the issue of community standards. See note 138-39 and accompanying text.

[122] *See generally Hearings on Separation of Powers*, 171 (remarks of Mr. Van Alstyne).

[123] See note 76 *supra* and accompanying text.

struggled, to no avail, to develop a clear understanding of its role in reviewing lower court and jury findings. Since its landmark decision in *Roth v. United States*,[124] the Court has periodically reviewed obscenity convictions from lower courts, often remarking on both its role and the role of the jury in an obscenity case.[125] In enunciating the now classic *Roth* test of obscenity—"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"[126]—the Court indicated that a sizeable role in determining the issue of obscenity was to be left to the jury. The *Roth* decision stamped approval on the lower court's jury instructions as to the test for obscenity, which provided in part:

> [Y]ou [the jury] determine [the questioned material's] impact upon the average person in the community . . . . You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community . . . . In this case, ladies and gentlemen of the jury, *you and you alone are the exclusive judges of what the common conscience of the community is*, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children.[127]

If, however, one thing is certain about obscenity standards as they have evolved since *Roth*, it is that a full retreat from this position has been sounded.[128]

The attacks on the pre-eminence accorded the jury in *Roth* were not long in coming. Justice Harlan, dissenting in *Roth* and concurring in the companion state obscenity case of *Alberts v. California*, rejected the majority's implication that obscenity was a

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[124] 354 U.S. 476 (1957).

[125] The Dirksen bill sought to remove Court review of both federal jury findings and state court determinations of obscenity. The remaining portion of this comment will emphasize removal of the appellate jurisdiction to review jury determinations, examining in particular the respective roles of the jury and the Supreme Court in defining obscenity.

[126] 354 U.S. at 489.

[127] *Id.* at 490 (emphasis added). Recognizing the prospect of criticism that jury determinations would declare the same material obscene in one locality and protected by the first amendment in another, the Court responded by noting that "different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." *Id.* at 492 n.30. However, it is doubtful that the Court will now consider obscenity convictions the same as convictions under "any criminal statute." See textual paragraph *infra* accompanying notes 165-171.

[128] See notes 138-142 *infra* and accompanying text.

question of fact. He preferred to label the determination of the issue of obscenity "a question of constitutional judgment of the most sensitive and delicate kind," noting that each suppression of allegedly pornographic material raised individual constitutional problems "in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards."[129]

Roth had laid down an ambiguous test of obscenity.[130] As this test was applied it was redefined until three elements were isolated which were said to coalesce in obscene matter.[131] In *Memoirs v. Massachusetts*[132] this reworked *Roth* test was promulgated, requiring that to find obscenity the dominant theme of the material must appeal to the prurient interest in sex, the material must be patently offensive to contemporary community standards, and the work in question must be utterly without redeeming social value.[133] Although arguably as vague as *Roth* and subject to many perplexing questions, this standard, at least as applied by the Court, may be said to reach only "hard core" pornography,[134] assuming

[129] 354 U.S. at 497, 498 (Harlan, J., dissenting) (emphasis in original). "[T]he constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves." *Id.*

In Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959), Harlan reiterated his demand for individual case-by-case judicial examination of allegedly obscene material. This time his effort was joined by the concurrence of two of *Roth's* majority, Justices Frankfurter and Whittaker, who apparently had begun to doubt the assertions of jury expertise they assumed without question in *Roth*.

[130] See text accompanying note 126 *supra*.

[131] *E.g.*, Memoirs v. Massachusetts, 383 U.S. 413 (socially redeeming value); Jacobellis v. Ohio, 378 U.S. 184 (1964) (patently offensive to contemporary community standards); Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (patently offensive to contemporary community standards).

[132] 383 U.S. 413 (1966).

[133] *Id.* at 418.

[134] *Cf.* Redrup v. New York, 386 U.S. 767, 770-71 (1967). *See generally* Lockhart & McClure, *supra* note 106, at 59-60. Hard core pornography was defined by Justice Stewart in his dissenting opinion in Ginzburg v. United States, 383 U.S. 463 (1966): "Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. . . ."

that the defendant is guilty of no aggravating conduct.[135]

One element of this tripartite test is "contemporary community standards," an element dealt with extensively—although inconclusively—in *Jacobellis v. Ohio*.[136] The problem of particular concern with regard to community standards was whether this part of the evolving three-part *Roth* test centered upon national or local community standards. The resolution of this issue would apparently define the role of the jury in determining obscenity since if local standards must be affronted to constitute obscenity, it is certain that the jury's role would be considerably enhanced. The jurors' judgment of the standards of their community could be expected to stand strong against the judgment of a single judge and, even more likely, be superior to that of the Supreme Court, a group having no knowledge of one particular community's standards. On the other hand, if national standards were to be the guide, no local jury could claim special knowledge. *Jacobellis*, nevertheless, shed no light as to the meaning of "contemporary community standards," as the Court was divided evenly (two-two) on the issue.[137]

Although failing to define contemporary community standards, *Jacobellis* did sound the death knell for *Roth's* broad deference to jury decisions. Without mention of his *Roth* opinion, Justice Brennan reversed field from the broad authority he had earlier accorded the jury in obscenity cases.[138] He called for national

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[135] See text accompanying notes 119-20 *supra* and notes 181-83 *infra*.

[136] 378 U.S. 184 (1964).

[137] Of the four judges addressing themselves to the meaning of contemporary community standards, Brennan and Goldberg opted for national standards emphasizing the need of *one* test in which the limits of constitutional expression did not vary with state lines. *Id.* at 192-95, 197-98. Warren and Clark emphasized that communities are different and should be allowed different standards as to obscenity. In their view a national community standard was indefinable. *Id.* at 200-03.

[138] See notes 139-42 *infra* and accompanying text. In a decision contemporary with *Roth*, Brennan dissented in a case upholding New York's procedure for enjoining pendente lite the sale of allegedly obscene books: "I believe the absence in this New York obscenity statute of a right to jury trial is a fatal defect . . . . The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene." Kingsley Books, Inc. v. Brown, 354 U.S. 436, 447-48 (1957). In United States v. A Motion Picture Film Entitled "I Am

community standards, emphasizing, as Harlan had previously,[139] that to consider a jury's verdict on obscenity to be a conclusive factual judgment was an appealing suggestion, but one that could not be accepted without an "abnegation of judicial supervision . . . inconsistent with our duty to uphold the constitutional guarantees."[140] Speaking for those members of the Court preferring local community standards as an element of the modified *Roth* test, Chief Justice Warren, another member of the *Roth* majority, expressed views on the role of the jury closest to those in *Roth*, but nevertheless admitted the necessity for *some* judicial review in order to find "suffieient evidence" on the record upon which a conviction could be based.[141] Thus, *Jacobellis* represents a major erosion of the great leeway given juries by *Roth* to convict pursuant to proper instructions. Taken in context with the subsequent summary reversals of lower court obscenity convictions,[142] it may be said with confidence that a majority of the Court refuses entirely to trust lower court applications of the three-part obscenity test.

It appears improbable that even those justices who contemplate the more lenient standard of review, the so-called "sufficient

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Curious—Yellow," 404 F.2d 196 (2d Cir. 1968), Chief Judge Lumbard, dissenting, relied heavily on Brennan's opinion expressed in *Kingsley Books*. The Chief Judge, however, chose to ignore Brennan's subsequent reversal on the role of the jury in his *Jacobellis* opinion.

[139] See note 129 *supra*.

[140] 378 U.S. at 187-88. Another member of the *Roth* majority had backed off from the implications of that decision on the role of the jury in obscenity convictions. Justices Frankfurter and Whittaker, two more of the six-man *Roth* majority, had already agreed with Harlan's position on this subject in Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959). See note 129 *supra*.

[141] 378 U.S. at 203. He was joined in this view by another member of the *Roth* majority, Justice Clark. The final member of the six-man *Roth* majority, Justice Burton, had been replaced by Justice Stewart. Although Stewart was virtually silent on the duty of the Court to review jury and lower court findings, one might draw the inference from his statement in *Jacobellis*, "I know it when I see it," *id.* at 197, that he also felt a case-by-case review of the material to be necessary to determine obscenity.

[142] *E.g.*, Schackman v. California, 388 U.S. 454 (1967); Mazes v. Ohio, 388 U.S. 453 (1967); A Quantity of Copies of Books v. Kansas, 388 U.S. 452 (1967); Rosenbloom v. Virginia, 388 U.S. 450 (1967); Books, Inc. v. United States, 388 U.S. 449 (1967); Corinth Publications, Inc. v. Wesberry, 388 U.S. 448 (1967); Aday v. United States, 388 U.S. 447 (1967); Avansino v. New York, 388 U.S. 446 (1967); Sheperd v. New York, 388 U.S. 444 (1967); Cobert v. New York, 388 U.S. 443 (1967); Ratner v. California, 388 U.S. 442 (1967); Friedman v. New York, 388 U.S. 441 (1967); Keney v. New York, 388 U.S. 440 (1967). *Contra*, Landau v. Fording, 388 U.S. 456 (1967). All these were per curiam decisions without opinion, most of which cited Redrup v. New York, 386 U.S. 767 (1967), as authority for reversal.

evidence" standard, would accept no judicial review as sufficient protection for first amendment claims on obscenity cases—the result contemplated by the Dirksen bill. Justice Harlan, who has long adhered to case-by-case review of the materials under attack, has adopted a "middle view" in which he would apply a stricter de novo standard of review to federal obscenity convictions and a more lenient "sufficient evidence" review to state cases.[143] However, Harlan has long rejected the idea that obscenity is a question of fact solely for a jury and, furthermore, has voted to overturn state decisions when the material involved did not conform to his definition of obscenity.[144]

Of course, Congress has never passed a statute denying the Supreme Court the jurisdiction to review certain findings on obscenity, and perhaps such a statute would be acceptable—at least to those judges who are loath to review the findings of juries or state courts. However, in upholding such a statute the Court would then be paving the way for incorrectable infringements on the first amendment rights of various individuals. For example, had Dirksen's bill been the accepted law, the petitioner in *Kingsley Pictures Corp. v. Regents*[145] might have been denied the right of Supreme Court review, since the state's denial of a license to show its picture was confirmed by the highest court of New York.[146] Yet in *Kingsley Pictures*, the Supreme Court by a unanimous vote declared the lower court decision violative of the petitioner's first amendment rights.[147] A statute designed to deny the Court's

[143] This bifurcated standard was first laid down in Harlan's opinions in the *Roth-Alberts* cases. It appears to be based in large part on Harlan's view of federalism in which obscenity is primarily of concern to states and not the federal government. 354 U.S. at 505-06. But a practical expedient also underlies Harlan's reasoning. As he noted in Interstate Circuit v. Dallas, 390 U.S. 676 (1967), "the current approach has required us to spend an inordinate amount of time in the absurd business of perusing and viewing the miserable stuff that pours into the Court, mostly in state cases, all to no better end than second-guessing state judges." *Id.* at 707. Consequently, Harlan would reduce this "inordinate amount of time" spent reviewing obscenity materials by relaxing review as to state convictions.

[144] *E.g.*, Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 702-08 (1959).

[145] *Id.*

[146] Kingsley Pictures Corp. v. Regents, 4 N.Y.2d 349, 151 N.E.2d 197, 175 N.Y.S.2d 39 (1958).

[147] Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959). In like manner such a law would have removed the Court's jurisdiction in the per curiam decisions following *Redrup* which reversed state court holdings. See note 179 *infra* and accompanying text. Thus what the Court declared to be constitutionally protected free speech would have been "censored" by state court convictions.

jurisdiction to review jury findings on obscenity would essentially change the test of obscenity that the Court has been attempting to mold, consistent with their interpretation of the first amendment, to a test that obscenity is what a jury says it may be. A statute designed to deny the Court's jurisdiction to review state findings on obscenity likewise creates various new standards according to what the states say obscenity is. Congress would seem precluded from redefining what the Court perceives as its first amendment constitutional duty by manipulation of appellate jurisdiction.[148]

The justice most critical of the Court's review of lower court findings would appear to be Justice Black, who along with Justice Douglas considers all obscenity statutes and convictions as violations of the first amendment's guarantees of freedom of speech and press.[149] Justice Black first leveled his standard attack on Supreme Court review of lower court obscenity convictions in *Kingsley Pictures Corp. v. Regents*.[150] Accusing his brother justices of substituting their own judgments of morality for the judgments of others,[151] he issued a ringing warning that "[i]f . . . this Nation is to embark on the dangerous road of censorship, my belief is that this Court is about the most inappropriate Supreme Board of Censors that could be found."[152] Black's criticisms of Supreme Court review of obscenity convictions seem questionable, however, for his real concern is with maximizing the protections of the first amendment, not narrowing Court review.[153] Indeed, in his joint dissent with Douglas in *Roth*, attacking the majority's test, it was noted that "juries can censor, suppress, and punish what they don't like, provided the matter relates to 'sexual impurity' . . . . This is community censorship in one of its worst forms."[154] Furthermore,

[148] United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). See notes 73-76 *supra* and accompanying text.

[149] These are the only two justices to subscribe to such a view, but they have religiously adhered to it since obscenity became a concern of the Court in *Roth*. It is questionable, however, whether Black's counterpart Douglas agrees with his criticisms of Supreme Court review. Smith v. California, 361 U.S. 147, 169 (1959) (Douglas, J., concurring). See text accompanying notes 154 *infra*.

[150] 360 U.S. 684 (1959).

[151] *Id.* at 690-91.

[152] *See id.* at 690. Black reiterated his stand in Smith v. California, 361 U.S. 147, 159 (1959), and Mishkin v. New York, 383 U.S. 502, 516-17 (1966).

[153] *Cf.* Strong, *The Persistent Doctrine of "Constitutional Fact,"* 46 N.C.L. REV. 223, 270 (1968).

[154] 354 U.S. at 512.

the term "Supreme Board of Censors" has a hollow ring to it. If the Court were overturning jury or lower court acquittals of obscenity violations, the charge would have more substance, but it is only after some lower court action has resulted in a *conviction* on obscenity charges, and thus "censorship," that the Court has reviewed obscenity cases. A more realistic view is that instead of denying the public access to certain works, the Court has "forced" works on an unwilling locality. Until the Court actually reviews and denies access to materials "approved" by virtue of lower court acquittals, it is doubtful that it is actually performing what is suggested by the term "Supreme Board of Censors." Its record in obscenity review suggests the antithesis of censorship.[155]

The competency of a jury to decide what constitutes obscenity has been questioned in the obscenity decisions which have thus far been handed down. One segment of the Court doubts the jury's ability to determine what should be protected and what can be constitutionally prohibited.[156] Another view would accord the jury's determination greater weight by reviewing findings in light of a "sufficient evidence" test.[157] However, no Supreme Court justice has yet suggested that jury determination as to the issue of obscenity be finalized without review. Indeed, the theory closest to the denial of all Supreme Court obscenity, the "Supreme Board of Censors" theory, was argued by a justice who would strike down all obscenity legislation as unconstitutional.[158]

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[155] *See, e.g.*, cases cited note 142 *supra*.

[156] Of the Justices presently on the Court, this includes Justice Brennan and probably Justice Stewart. Jacobellis v. Ohio, 378 U.S. 629, 672 (1964) (opinions of Brennan, J. and Stewart, J.). Justice Harlan expressed similar sentiments in Roth v. United States, 354 U.S. 476 (1957). His views, however, are tempered by his view of federalism, as he would be quicker to overrule a federal lower court than a state decision.

[157] Chief Justice Warren is the only Justice now sitting on the Court who has espoused this position for all obscenity review. *See* Jacobellis v. Ohio, 378 U.S. 184 (1964). Justice Harlan would, however, subscribe to such a "sufficient evidence" standard for review of state court convictions. See note 143 *supra*.

[158] This is, of course, Justice Black. See notes 149-52 *supra* and accompanying text. The *political wisdom* of the suggested statute may well be doubted. Justice Harlan in Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959), while reiterating his belief that a case-by-case examination of material was constitutionally required, limited this demand when he said such was the requirement short of holding all "censorship" laws unconstitutional. If the Court were to recognize that Congress might limit its appellate jurisdiction as suggested, a desire to avoid puritanical jury and lower court "censorship" via obscenity convictions

If, however, obscenity is decided to be a question of "fact," it would appear to follow that the jury would be the most competent body to make the determination.[159] Furthermore, if the issue is one of pure fact, the primary role of the Supreme Court would not be diminished by denying judicial review of facts by means of the exceptions and regulations power.[160] However, the fact-law distinction, often hazy, is never fuzzier than in the area of obscenity.[161] It may be argued that obscenity is basically a question of law—a constitutional issue;[162] on the other hand, it may be labeled a question of "constitutional fact" subject to review by the Court since the determination of fact profoundly influences constitutional rights.[163] Finally, obscenity may represent neither a question of law nor a question of fact, but rather something in between—an application of the law to the facts.[164] Selection of one of these labels is not significant, however, as all allow the Court to review jury and lower court findings.

The question is not resolved by conclusory labeling of an issue as fact—and thus not subject to review—or as law—and thus

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might conceivably lead to an overthrow of all obscenity statutes as violative of the first amendment. This possibility is not precluded by Dirksen's bill—nor could it be under our system of judicial interpretation of statutes and the Constitution.

[159] For the strongest weight recently placed upon the jury's findings on obscenity, see United States v. A Motion Picture Film Entitled "I Am Curious—Yellow," 404 F.2d 196 (2d Cir. 1968) (Lumbard, C.J., dissenting).

[160] *See generally* Merry, *supra* note 13.

[161] This is evident from the divergent views taken by various Justices on the proper scope of Supreme Court review of obscenity convictions. See notes 156-57 *supra* and accompanying text.

[162] *See* Lockhart and McClure, *supra* note 106; Comment, *The Scope of Supreme Court Review in Obscenity Cases*, 1965 DUKE L.J. 596, 598.

[163] Kalven, *The Metaphysics of the Law of Obscenity*, 1960 S. CT. REV. 1, 21. *See generally* Strong, *supra* note 153. The doctrine enabling Court review of so-called "fact" issues under the label "constitutional fact" was originated in order to allow judicial review of the findings of administrative agencies. *See generally* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Crowell v. Benson, 285 U.S. 22 (1932); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920). The doctrine has been widely criticized as applied to judicial review of the fact findings of these agencies. *E.g.*, K. DAVIS, ADMINISTRATIVE LAW TEXT § 29.09 at 535 (1959 ed.); W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 472-92 (4th ed. 1960); Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determination of Questions of "Constitutional Fact,"* 80 U. PA. L. REV. 1055 (1932). No such criticism has, however, followed the review of "constitutional fact" in civil liberty cases. Strong, *supra* note 153, at 280.

[164] 8 U.C.L.A.L. REV. 634, 635 (1961).

subject to Supreme Court scrutiny. The problem is rather essentially one of jury competency to reach a conclusion on an issue. Regardless of the reverence held for juries, there are certain areas in which their decisions must be based on highly circumscribed evidence or, at least, subject to close trial judge and appellate court review. For example, the competency of the jury to determine whether or not a confession is voluntary has long been suspect, and as such subject to careful judicial scrutiny.[165] The reason is apparently based on a feeling that jurors might be unable to grasp the subtle importance underlying certain constitutional rights, such as the exclusion of a corroborated confession which, although psychologically or physically coerced, appears to be truthful. Another example closer to the problem at hand, is the judicial willingness to review a first amendment claim more completely than other constitutional questions. Consequently, criminal convictions bearing on the issue of freedom of assembly[166] or speech[167] have been carefully scrutinized. Furthermore, Court review of fact in first amendment cases has been extended to civil libel suits,[168] even though jury fact determinations have been emphasized in this area because of the specific jury trial guarantee in the seventh amendment.[169] Like the other areas surrounded by

[165] *E.g.*, Jackson v. Denno, 378 U.S. 368 (1964), overthrew a New York procedure which allowed the same jury to determine guilt of the crime confessed to as well as voluntariness of the confession. Only after judicial acceptance of a confession was limited in *Miranda* and *Escobedo* has judicial review actually been relaxed in this area. Strong, *supra* note 153, at 260.

[166] *E.g.*, Edwards v. South Carolina, 372 U.S. 229, 235 (1963); Feiner v. New York, 340 U.S. 315, 316 (1951); Niemotko v. Maryland, 340 U.S. 268, 271 (1951).

[167] One example would be contempt of Court or similar "obstructions" to the administration of justice, Pennekamp v. Florida, 328 U.S. 331, 335 (1946); Bridges v. California, 314 U.S. 252, 271 (1941); Strong, *supra* note 153, at 262-63. Another type review touching on free speech would be "incitement" charges. Herndon v. Lowry, 301 U.S. 242 (1937).

[168] *E.g.*, New York Times v. Sullivan, 376 U.S. 254, 285 (1964).

[169] U.S. CONST. amend. VII. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law." This extension of the Court's review of facts, and the potential clash with the seventh amendment did not go without criticism by Justice Black. Curtis Publishing Co. v. Butts, 388 U.S. 130, 171 (1967). Altbough Black criticized the Court for "getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity," *id.*, his views on judicial review in this area are subject to the same criticisms as his views on obscenity fact review. Like obscenity laws, Black considers libel actions to be forbidden by the first amendment. His real concern is more

first amendment protection, regulation of obscenity has enjoyed a full measure of Supreme Court supervision.[170] The underlying rationale for this review may be based, at least in part, upon a feeling that the jury is incompetent to be given the final determination as to the ambit of first amendment protection. Jury members are likely to be subject to various local pressures and community sentiment which they may be unable to ignore, partly because they have less independence than a Supreme Court Justice appointed for life, and partly because they are likely to be less sensitive to basic values of freedom of expression which underlie first amendment standards.[171]

A bill demanding the "sufficient evidence" standard of obscenity review would appear to have a better chance of incurring judicial favor than Dirksen's bill, which would deny Supreme Court review entirely. Several members of the Court have advocated a "sufficient evidence" standard, and it does allow for some first amendment judicial protection in determining the issue of obscenity. It is doubtful, however, that the "sufficient evidence" scope of review would release the Court from the time-consuming task of reviewing materials adjudged to be obscene by the court or jury below. Once the power to review obscenity convictions is recognized, it is difficult to imagine what guideline the term *sufficient evidence* offers. If the Court is to continue to utilize the three-pronged test that has evolved from *Roth*[172] in reviewing allegedly obscene material, the failure of any one of these elements will bring the questioned material within the protection of the first amendment. Thus, unless the dominant theme of the material appeals to the prurient interest in sex, unless the material is patently offensive to contemporary community standards, and unless the material is utterly without redeeming social value, the work will not be declared obscene.[173] In applying this test, it is

likely broadening first amendment protections, not ending judicial review. See note 153 *supra* and accompanying text.

[170] *E.g.*, see cases cited note 142 *supra*.

[171] Lockhart & McClure, *supra* note 106, at 119. "If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression. Their decisions must be subject to effective, independent review . . . under the guidance of the Supreme Court." *Id.*

[172] See note 131 *supra* and accompanying text.

[173] Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966). This is not to imply that the obscenity of a particular work may not vary with the manner in which it is sold. See notes 121-22 *supra* and 181-83 *infra* and accompanying text.

necessary that the Court closely review the record and the materials,[174] at least to determine the dominant theme of the material attacked, as well as to assure itself that the work is *utterly* without redeeming social value.[175] Particularly in light of the fact that a sufficient evidence standard has not been accepted by most members of the Court, such an imposition by Congress may violate the principles enunciated in *Klein*, since such a bill would be an effort by Congress to direct the Court to exercise its constitutionally perceived duty in a particular manner.[176] If such a lesser standard is imposed by Congress, it may weaken first amendment protections which the Court has felt compelled to provide.

CONCLUSION

Despite cases which indicate plenary congressional power to limit Supreme Court appellate jurisdiction, it is doubtful that the Court will sustain a limitation which will deny its role in protecting first amendment freedoms. Although justices have disagreed as to the amount of Supreme Court review necessary in an obscenity case, not one has yet suggested that no review would be a permissible alternative. Congressional effort to foreclose such review, if not aborted in the legislative process, therefore seems highly subject to valid constitutional attack in the Court. However, congressional frustration with obscenity standards is not altogether unjustified. The Court has been slow to set firm standards, in an area where sensitive and *precise* tools are demanded,[177] and has instead relied extensively upon judicial review to prevent

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[174] If the review contemplated by the sufficient evidence standard is merely a review of the record below—not an examination of the questioned material—the general administrative law standard would be satisfied. W. GELLHORN & C. BYSE, *supra* note 163, at 453. However, judicial review in the first amendment and civil liberties areas of the law has generally been accorded a higher standard than mere review of the record. See notes 163, 165-71 and accompanying text.

[175] *See* Comment, *The Scope of Supreme Court Review in Obscenity Cases*, 1965 DUKE L.J. 596, 607. Thus, even if the expertise of the jury is recognized for determining community standards—even *local* community standards—judicial review would still be necessary under the present Court-developed definition of obscenity as to the remaining two elements of the evolved *Roth* test.

[176] See notes 69-76 & 123 *supra* and accompanying text.

[177] NAACP v. Button, 371 U.S. 415, 438 (1963); Speiser v. Randall, 357 U.S. 513, 525 (1958).

misapplication of the nebulous outlines it has supplied. When more precise standards are developed, however, the need for extensive de novo review will be less pressing, as lower courts should be better able to apply the clearer mandates.[178] Perhaps such standards are now being accepted. *Redrup v. New York*,[179] a per curiam decision evidencing unusual unity for an obscenity decision, indicates that a strict "hard core" definition will be given obscenity in the future.[180] Any other obscenity prosecution must be supported by certain aggravating features which *Redrup* enumerates. Prosecution may be based on materials sold to children—if pursuant to a statute expressing a "specific and limited state concern for juveniles."[181] Furthermore, successful prosecution may be supported by the fact that dissemination of the material is "in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."[182] Finally, for sexually oriented material that is less than "hard core," a conviction may be sustained by evidence of "pandering" to fancies, desires or sexual weaknesses of the public.[183] As these standards are molded and become set, the need for Supreme Court review of obscenity cases will decrease, but by the Court's own volition rather than by congressional compulsion.[184] And unlike the contemplation of the Dirksen bill, the possibility of Supreme Court review will keep lower court "censorship" in check. By accepting the vital role of the Supreme Court in protecting constitutional guarantees from legislative encroachment, Congress can then concentrate on aiding the Court in shaping the developing standards in the field of obscenity.

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[178] *Cf.* Strong, *supra* note 153, at 249-61 (similar observation made relating to confession cases, *i.e.*, the clearer the standards, the less need for review).

[179] 386 U.S. 767 (1967).

[180] *Cf. id.* at 770-71.

[181] *Id.* at 769. *See also* Ginsberg v. New York, 390 U.S. 629 (1968).

[182] 386 U.S. at 769. Thus the right to privacy must in effect be balanced against the first amendment rights to speech and press.

[183] *Id.* Ginzburg v. United States, 383 U.S. 463 (1966). "Pandering" and invasion of privacy may be so closely related as to be part of the same package.

[184] Justice Fortas, dissenting in Ginsberg v. New York, 390 U.S. 629, 674 (1968), presaged this demise of judicial review with the concurrent development of more certain standards. "If this statute [New York statute designed to protect juveniles] were confined to the punishment of pushers or panderers of vulgar literature I would not be so concerned by the Court's failure to circumscribe state power by defining its limits in terms of the meaning of 'obscenity' in this field. The State's police power may, within very broad limits, protect parents and their children from public aggression of panderers and pushers."