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MEMORANDUM

Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments

There are currently pending in Congress over twenty bills which would divest the Supreme Court (and, in most instances, lower federal courts as well) of jurisdiction to hear certain types of controversies, ranging from school prayer and desegregation cases to abortion cases. Proposals of this sort have been commonplace in Congress for at least thirty years, covering such diverse subject matter areas as subversive activities, S. 2646, 85th Cong., 2d Sess. (1958), reapportionment, H.R. 11926, 88th Cong., 2d Sess. (1964), and the admissibility of confessions, S. 917, 90th Cong., 2d Sess. (1968). None of the proposals prompted by specific Supreme Court decisions, however, have been enacted into law.

The Office of Legal Counsel has prepared an opinion concluding that such proposals are probably unconstitutional. Since that time, several developments have occurred which are worthy of review. Specifically, the question of the constitutionality of such proposals has been the subject of recent scholarly activity, particularly in the form of testimony before congressional committees and participation at a recent conference sponsored by the American Enterprise Institute for Public Policy Research. The theme of the A.E.I. Conference, chaired by Professor Gunther, was "Judicial Power in the United States: What are the Appropriate Constraints?" Most of the participants at the Conference recognized a serious problem in the current exercise of judicial power, epitomized in the lower courts by intrusive remedial orders and in the Supreme Court by what is broadly perceived to be the unprincipled jurisprudence of Roe v. Wade. The power of Congress to remove the jurisdiction of the lower federal courts over particular classes of cases in response to this problem was generally accepted; more importantly, a number of distinguished commentators recognized a similar power with respect to the appellate jurisdiction of the Supreme Court. Based on the A.E.I. Conference, congressional testimony, and earlier writings, the list of those who consider Congress to have the constitutional authority to divest the Supreme Court of appellate

jurisdiction over certain classes of cases includes Professors Wechsler, Mishkin, Bator, Scalia, Redish and Van Alstyne.

In light of the recent activity on the subject, Ken Starr recommended that a memorandum be prepared that marshals arguments in favor of Congress' power to control the appellate jurisdiction of the Supreme Court. Thus, in order to assist in the process of analysis, this memorandum is prepared from a standpoint of advocacy of congressional power over the Supreme Court's appellate jurisdiction; it does not purport to be an objective review of the issue, and should therefore not be viewed as such. The memorandum does not consider specific proposals but rather the general question of congressional power, particularly in light of the developments summarized above.

I.

The source of Congress' power to remove certain classes of cases from Supreme Court appellate review is found in Article III, Section 2, Clause 2:

> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be Party, the supreme Court shall have original jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." (Emphasis supplied).

The underscored language stands as a plenary grant of power to Congress to make exceptions to the appellate jurisdiction of the Supreme Court. The exceptions clause by its terms contains no limit; the power to make exceptions to the Court's appellate jurisdiction exists by virtue of the express language of the clause over questions of both law and fact.

This clear and unequivocal language is the strongest argument in favor of congressional power and the inevitable stumbling block for those who would read the clause in a more restricted fashion. The clause does not say that Congress may make such exceptions as do not impair the essential functions of the Supreme Court, see, e.g., Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157 (1960), however those "essential functions" may be defined, nor does the clause grant the exception power only as to questions of fact, see, e.g., Berger, Congress v. The Supreme Court 285-296 (1969); Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 47 Minn. L. Rev. 53 (1962).

As Professor Van Alstyne has put it:

> "The power to make exceptions to Supreme Court appellate jurisdiction is a plenary power. It is given in express terms and without limitation, regardless of the more modest uses that might have been anticipated, and hopefully, generally to be respected by Congress as a matter of enlightened policy once the power was granted, as it was, to the fullest extent. In short, the clause is complete exactly as it stands: the appellate jurisdiction of the Supreme Court is subject to 'such exceptions and under such regulations as the Congress shall make.'" Van Alstyne, A Critical Guide to Ex Parte McCardle, 15 Ariz. L. Rev. 229, 260 (1973).

Professor Bator, although believing that withdrawal of Supreme Court appellate jurisdiction would violate the "spirit" of the Constitution and would be bad policy, nonetheless concluded that Congress did possess this power under the exceptions clause and that "the arguments which would place serious limits on the power of Congress to make exceptions are not persuasive." Hearings Before the Subcommittee on the Constitution of the Senate Judiciary Committee. His conclusion was based, in large part, on the plain language of the exceptions clause:

> "The text of the Constitution provides that the appellate jurisdiction of the Supreme Court shall be subject to 'such exceptions, and under such Regulations as the Congress shall make'. This language plainly indicates that if Congress wishes to exclude a certain category of federal constitutional (or other) litigation from the appellate jurisdiction, it has the authority to do so. If the Constitution means what it says, it means that Congress can make the state courts -- or, indeed, the lower federal courts -- the ultimate authority for the decision of any category of case to which the federal judicial power extends." Id.

Nor has the impact of the plain language been lost on members of Congress. As Senator Ervin noted during hearings on the exceptions clause, "I don't believe that the Founding Fathers could have found any simpler words or plainer words in the English language to say what they said, which was that the appellate jurisdiction of the Supreme Court is dependent entirely upon the will of Congress." Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 22 (1968).

This focus on the plain language of the exceptions clause is not a simplistic approach. The Framers were not inartful draftsmen and can be expected to have known how to express the more restricted interpretations advanced by modern commentators had such constructions in fact been intended. In this regard it is important to recognize that we are not considering a constitutional clause that is by its nature indeterminate and incapable of precise or fixed meaning, such as the due process clause or the prohibition on unreasonable searches and seizures.

II.

The history of the drafting and enactment of the exceptions clause is not particularly revealing and does not justify a departure from the plain meaning of the words. According to Professor Goebel, the exceptions clause "was not debated" by the Committee of Detail which drafted it or the whole Convention, Antecedents and Beginnings to 1801, in I History of the Supreme Court of the United States 240 (P. Freund, ed., 1971). Nonetheless, several commentators have sought to limit its scope by arguing that it was included for the sole purpose of permitting Congress to prohibit the Supreme Court from reviewing jury determinations of fact. See, e.g., Berger, Congress v. The Supreme Court (1969); Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 47 Minn. L. Rev. 53 (1962). The primary support for this argument is found in the ratification debates. Opponents of ratification criticized Supreme Court appellate jurisdiction "both as to law and fact" on the ground that it would permit the Court to violate the right to jury trial by reviewing questions of fact determined by a jury. As Luther Martin argued:

> "The proposed Constitution . . . by its appellate jurisdiction, absolutely takes away that inestimable privilege [trial by jury]; since it expressly declares that the Supreme Court shall have appellate jurisdiction both as to law and fact. . . The Supreme Court is to take up all questions of fact . . . to decide upon them as if they had never been tried by a jury." 3 Farrand 221.

In response, supporters of ratification pointed to the exceptions clause as providing Congress the authority to protect against this danger. Hamilton, in Federalist 81, noted that although appellate jurisdiction in the Supreme Court over questions of law had been generally accepted, there was a clamor against such jurisdiction over questions of fact. He answered:

> "It will not answer to make an express exception of cases which shall have been originally tried by a jury, because in the courts of some of the States all causes are tried in this mode; and such an exception would preclude the revision of matters of fact, as well where it might be proper as where it might be improper. To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security."

The argument is that the exceptions clause was designed simply to permit exception to Supreme Court appellate review of questions of fact, and that therefore Congress cannot invoke the authority of the clause in making exceptions to Supreme Court review of questions of law.

To the extent the argument focuses on opposition during the ratification debates to the specific language granting appellate jurisdiction "both as to law and fact," it encounters the serious difficulty that this language was added after the exceptions clause. As reported by the Committee of Detail, the clause in question simply provided "in all other cases before mentioned, it [Supreme Court jurisdiction] shall be appellate, with such exceptions, and under such regulations, as the legislature shall make." 5 Elliott 380 (1866). When this draft was being considered on the floor of the convention, Gouverneur Morris of Pennsylvania inquired whether the appellate jurisdiction was to extend to matters of fact as well as law. James Wilson, a member of the Committee of Detail, stated that the Committee intended that to be so. A motion by Dickinson of Delaware to insert the words "both as to law and fact" was made and adopted. See Merry, supra, at 58-59; Goebel, supra, at 243. In light of the chronology, therefore, it cannot be argued that the exceptions clause was designed to answer objections caused by the "both as to law and fact" language, since the exceptions clause antedated the objectionable language. As Professor Strong has concluded, "this sequence raises a presumption that the exception-regulations clause was originally included, and continued, for a purpose quite different from that of limiting the Supreme Court's appellate jurisdiction in fact as well as law." Strong, Prescription For A Nagging Constitutional Headache, 8 San Diego L.Rev. 246, 252 (1971).

It is of course true that it can still be maintained that the purpose of the clause was to permit Congress to restrict Supreme Court jurisdiction to review fact questions, since the appellate jurisdiction was intended to cover both law and fact questions even prior to the clarification amendment proposed by Dickinson. There is, however, no direct evidence that this was the purpose of the exceptions clause when it was drafted. The problem was not highlighted at that stage as it would be in the ratification debates, after the addition of the "both as to law and fact" language. Indeed, Judge Pendelton expressed his wish during the Virginia ratification debates that the words "both as to law and fact" "had been buried in oblivion. If they had, it would have silenced the greatest objections against the section." 3 Elliott 519. This suggests that the objection did not exist before the addition of the language, and that it therefore cannot explain the need for the exceptions clause. See also Goebel, supra, at 243 ("By one addition, a well-intentioned clarification of the scope of appellate authority, the convention unwittingly sowed seeds from which much trouble was soon to sprout"). (Emphasis supplied).

Proponents of ratification did point to the exceptions clause in response to criticisms that the Supreme Court possessed the power to violate the right to a jury trial by appellate review of questions of fact. It is a nonsequitur, however, to argue that the clause was therefore intended for this purpose alone. Even if the Framers were concerned about the vulnerability of jury determinations, the exceptions authority they provided went well beyond that particular problem. The fact that the clause provided a ready response to criticisms based on the right to a jury trial hardly supports the inference that it was intended to do nothing else. In this regard it is important to recognize that statements made by supporters of the Constitution concerning the exceptions clause, while perhaps directed to the problem of jury determinations of questions of fact, did not at all suggest a limited scope to Congress' power under the clause. As Professor Van Alstyne has put it, "the references . . . scarcely go so far as to suggest that that is all the clause would reach." Van Alstyne, supra, at 261 n. 99. See also Bator, Senate Hearings ("the evidence to support the proposition that the exceptions clause was to be reserved exclusively to issues of fact is weak"). For example, Hamilton noted that the clause would enable "the government to modify [appellate jurisdiction] in such a manner as will best answer the ends of public justice and security," and that appellate jurisdiction was "subject to any exceptions and regulations which may be thought advisable . . . . " Federalist 81. Marshall himself discussed the exceptions clause in the following terms:

> "What is the meaning of the term exception? Does it not mean an alteration or diminution? Congress is empowered to make exceptions to the appellate jurisdiction as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people." 3 Elliott 560.

As Governor Randolph of Virginia noted in connection with the exceptions clause, "it would be proper to refer here to anything that could be understood in the federal court. They [Congress] may except generally both as to law and fact, or they may except as to the law only, or fact only." 3 Elliott 572.

The most compelling argument against the Merry-Berger thesis is that the Judiciary Act of 1789, passed in the immediate wake of ratification and with the involvement of many of the Framers themselves, went far beyond fact questions in making exceptions to the appellate jurisdiction of the Supreme Court. Redish, Senate Hearings, 10. For example, the Supreme Court had no appellate jurisdiction over federal criminal cases, nor any jurisdiction over appeals from state courts in cases in which the state court struck down a state statute on federal constitutional grounds, or upheld the validity of a federal statute. As Chief Justice Marshall made clear in Durousseau v. United States, 10 U.S. (6 Cranch) 307 (1810), the failure explicitly to grant jurisdiction was an implicit exercise of the exceptions power. As noted, however, several of the implicit exceptions in the Judiciary Act of 1789 had nothing to do with excepting review of jury determinations of fact.

The Merry-Berger thesis is also difficult to reconcile with the existence of the Seventh Amendment. The Seventh Amendment provides, in part, that "no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." The Seventh Amendment does everything that Professors Merry and Berger argue the exceptions clause was designed to permit Congress to do. It is difficult to see what happened in the short period between ratification of the Constitution and enactment of the Seventh Amendment that created a need for the Seventh Amendment if there was no such need at the time of ratification of the Constitution. Further, if the purpose of the exceptions clause was to protect jury determinations of fact, it is difficult to understand why the Framers did not take a direct approach as was soon done in the Seventh Amendment. Professor Berger is singularly unpersuasive in suggesting that the purpose of the Seventh Amendment was simply to make "doubly sure" of the protections already available through the exceptions clause. Berger, supra, at 288.

Finally, the language of the exceptions clause does not support an interpretation limiting the power to make exceptions to questions of fact. As Professor Redish has put it, "to construe the language of the Constitution to reach the conclusion that the clause modifies only the word 'fact' requires a most tortured, and probably impermissible, grammatical construction." Senate Hearings, 10.

III.

Judicial pronouncements on the exceptions clause also support Congress' power to divest the Supreme Court of appellate jurisdiction over certain classes of cases. Any discussion of case law in this area must begin with Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). McCardle, an unreconstructed Mississippi newspaper editor, was being held in the custody of United States marshals on the order of the military governor. He applied to the federal circuit court for habeas corpus relief, under the Habeas Corpus Act of 1867. This relief was denied, and McCardle thereupon appealed to the Supreme Court pursuant to the appellate review provisions of the Act of 1867. While the case was pending in the Supreme Court Congress enacted, over President Johnson's veto, an act which repealed the provisions of the Act of 1867 permitting an appeal to be taken to the Supreme Court. The legislative history of the repealer provision left no doubt that Congress' purpose was to prevent the Court from deciding the McCardle case and perhaps undermining the entire military reconstruction scheme. See Van Alstyne, supra, at 240-241.

A unanimous Court upheld the power of Congress to divest the Supreme Court of jurisdiction. The Court clearly based its decision on Congress' power under the exceptions clause. Chief Justice Chase began the opinion by recognizing that the appellate jurisdiction of the Court "is conferred 'with such exceptions and under such regulations as Congress shall make.'" 74 U.S., at 513. He noted that Congress, in explicitly conferring certain appellate jurisdiction, was considered to have implicitly excepted all other jurisdiction. In the McCardle case, however, Congress had not merely exercised its power to make exceptions to appellate jurisdiction by negative implication. It had done so expressly:

> "The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the Act of 1867, affirming the appellate jurisdiction of this Court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception." Id., at 513-514.

Chief Justice Chase went on to note that the Court would not decline to recognize the effect of the repealer provision because of Congress' motive to avoid a possibly objectionable Supreme Court ruling on the merits. "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this Court is given by express words." Id, at 514 (emphasis supplied). The opinion then concluded that the Court was without jurisdiction, and that "the only function remaining to the Court is that of announcing the fact and dismissing the cause." Id.

It is true, as has been pointed out by several commentators, that Ex parte McCardle did not involve a situation in which the Supreme Court was totally divested of jurisdiction over an entire class of cases. Jurisdiction remained over habeas corpus appeals under the Judiciary Act of 1789, as the Court soon made clear in Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869). Indeed, if he had taken a different procedural route, McCardle himself could have had his case heard on the merits in the Supreme Court. This point was adverted to in the concluding paragraph of the McCardle opinion:

> "Counsel seem to have supposed, if effect be given to the Repealing Act in question, that the whole appellate power of the Court, in cases of habeas corpus, is denied. But this is an error. The Act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the Act of 1867. It does not affect jurisdiction which was previously exercised." 74 U.S., at 515.

None of this, however, detracts from the force of the analysis employed in the McCardle opinion. The Court considered the exceptions power to be plainly at issue, as did counsel in the case, see 74 U.S., at 511, and gave broad, indeed unlimited scope to that power. As Professor Bator has put it, "It has often been pointed out that McCardle is special and distinguishable; nevertheless, the language of the Court in McCardle plainly proceeded on the assumption that Congress' power is plenary and this is the only Supreme Court opinion squarely on point." Senate Hearings.

It is important to recognize that the concluding paragraph in the McCardle opinion had nothing to do with any reservation on the part of the Court concerning the scope of the exceptions power. The source of the concern, as was soon made clear in the Yerger opinion, was rather with the suspension clause, Article I, Section 9, which provides "the privilege of the writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." The Court went out of its way to

note that it was not totally divested of appellate jurisdiction in McCardle not because such action would have been improper under the exceptions clause, but rather because it would have been unusual insofar as habeas corpus jurisdiction was concerned. As the Court stressed in Yerger:

> "That this Court is one of the courts to which the power to issue writs of habeas corpus is expressly given by the [Judiciary Act of 1789] has never been questioned. It would have been, indeed, a remarkable anomaly if this Court, ordained by the Constitution for the exercise, in the United States, of the most important powers in civil cases of all the highest courts of England, had been denied, under a Constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint, which the Habeas Corpus Act of Charles II expressly declares those courts to possess." 75 U.S., at 96.

Indeed, far from diminishing the impact of McCardle, Yerger actually fortifies its conclusions concerning the plenary scope of the exceptions power. Yerger concluded that in passing the repealer provision in 1868 Congress affected only habeas corpus appeals under the 1867 Act, not those under the 1789 Act. At several points in the opinion, however, the Court noted that Congress had the power to do this if it desired. The Yerger court explicitly noted that "appellate jurisdiction is subject to such exceptions, and must be exercised under such regulations as Congress, in the exercise of its discretion, has made or may see fit to make." 75 U.S., at 98. The Court noted that it had appellate power to review habeas corpus cases under the Judiciary Act of 1789 and subsequent acts, "except in cases within some limitations of the jurisdiction by Congress." Id. The Court explicitly recognized the power of Congress to deprive it of jurisdiction in habeas corpus cases, not only those arising under the Act of 1867, but also those arising under the Act of 1789. "It is proper to add, that we are not aware of anything in any Act of Congress except the Act of 1868, which indicates any intention to withhold appellate jurisdiction in habeas corpus cases from this court, or to abridge the jurisdiction derived from the Constitution and defined by the Act of 1789. We agree that it is given subject to exception and regulation by Congress; but it is too plain for argument that the denial to this Court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ . . . These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction." Id., at 102-103 (emphasis supplied). Because of what it perceived to be the oddity of Congress depriving the Supreme Court of

habeas corpus jurisdiction, when the Constitution specifically provided that the writ should not be suspended except in exigent circumstances, the Court in Yerger adopted a rule of construction and on the basis of that rule declined to hold that Congress had totally divested it of appellate jurisdiction in habeas corpus cases. There was never any doubt in the opinion, however, concerning the power of Congress to do this if it so desired. That power had been clearly established in the McCardle opinion. The holding in McCardle, together with statements in Yerger concerning congressional power, clearly indicate that the Court accepted the proposition that Congress could, if it desired, totally divest the Supreme Court of appellate jurisdiction in habeas corpus cases.

United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), is often cited as undermining the apparent import of McCardle. Klein, however, is actually a red herring so far as the present question is concerned. The President had decreed that any former rebels who took an oath of loyalty could regain their property confiscated during the Civil War. Congress passed a statute providing that once the Court determined that such an oath was taken it was not to award the property but rather to dismiss the suit for want of jurisdiction. Once again, as in Yerger, the Court in its opinion recognized Congress' power under the exceptions clause:

> "If it [the Act] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient." Id., at 145.

The Court struck down the statute, however, because it did not simply make an exception to appellate jurisdiction, but rather permitted the Court to exercise jurisdiction only to achieve a certain result. The Act was unconstitutional because it granted the Court jurisdiction but then limited the Court's consideration of relevant law. As the Court noted, "the Court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction." Id., at 146. The result was that "the Court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary." Id., at 147. Nothing of the sort is involved in the question presently under consideration.

McCardle is simply the most prominent in a long and consistent line of judicial opinions reading the exceptions clause as meaning exactly what it says. As early as 1796 the Supreme Court recognized that its appellate jurisdiction was not automatically vested by the Constitution but rather depended upon congressional legislation. The opinions establishing this fundamental principle referred expressly to the exceptions power. The theory was that in explicitly granting jurisdiction short of the full scope of Article III, Congress was implicitly exercising its power to make exceptions to appellate jurisdiction as to those areas not expressly granted. In Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796), Chief Justice Ellsworth explained:

> "The appellate jurisdiction is . . . qualified; in as much as it is given 'with such exceptions, and under such regulations, as Congress shall make.' Here then, is the ground, and the only ground, on which we can sustain an appeal. If 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."

Chief Justice Marshall also drew the connection between an implicit exercise of the exceptions power and the theory that appellate jurisdiction is dependent on congressional action in United States v. More, 7 U.S. (3 Cranch) 159, 173 (1805): "as the jurisdiction of the Court has been described, it has been regulated by Congress, and an affirmative description of its powers must be understood as a regulation, under the Constitution, prohibiting the exercise of other powers than those described." The point was made even more explicit five years later, in Marshall's opinion for the Court in Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-314 (1810): "when the first legislature of the union proceeded to carry the third Article into effect, it must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court . . . ."

Under this established theory, Congress has exercised the exceptions power in a substantive fashion from the outset, since Congress has never granted the Supreme Court appellate jurisdiction over the full Article III judicial power. Four years before McCardle the Court recognized that "it is for Congress to determine how far, within the limits of the capacity of this Court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law," Daniels v. Railroad, 70 U.S. (3 Wall.) 250, 254 (1865), and in The Francis Wright, 105 U.S. 381, 386 (1881), Chief Justice Waite wrote for a unanimous Court that "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 Chief Justice specifically referred to "that the power to except from -- take out of -- the jurisdiction, both as to law and fact" and noted that "the general power to regulate implies power to regulate in all things." As the Court concluded in Colorado Central Consolidated Mining Co. v. Turck, 150 U.S. 138, 141 (1893), "it has been held in an uninterrupted series of decisions that this Court exercises appellate jurisdiction only in accordance with the acts of Congress upon the subject." Again, it bears emphasis that the basis for this theory is the implicit exercise by Congress of its exceptions power when it makes a limited grant of jurisdiction.

There have been several judicial expressions recognizing the plenary nature of Congress' authority under the exceptions clause in more recent opinions. Dissenting on other grounds in National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1948), Justice Frankfurter noted that "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is sub judice." Also dissenting on other grounds, Justice Rutledge noted in Yakus v. United States, 321 U.S. 414, 472-473 (1944), that "Congress has plenary power to confer or withhold appellate jurisdiction." In Lockerty v. Phillips, 319 U.S. 182, 187 (1943), the Court stated that Congress could have declined to create any inferior federal courts, leaving litigants to the state courts, "with such appellate review by this Court as Congress might prescribe." (emphasis supplied). Ex parte McCardle was cited with approval in Glidden Co. v. Zdanok, 370 U.S 530, 567 (1962), as were Hamilton's assurances in Federalist 80 to those who thought the federal judicial power too extensive that "the national legislature will have ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove [any] . . . inconveniences." Id. Justice Douglas objected to the citation of McCardle, id., at 605, but his objection apparently was based simply on the sub judice aspect of that case, since in Flast v. Cohen, 392 U.S. 83, 109 (1968) he wrote that "as respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of § 2, Art. III. See Ex parte McCardle . . . ." (concurring opinion).

IV.

Those opposed to recognizing the power of Congress under the exceptions clause argue that the Constitution requires that the Supreme Court be capable of insuring the uniformity and supremacy of federal law. If the Court were divested of its jurisdiction over certain classes of cases, it would be prevented from exercising these assertedly "essential functions" in those

areas. With no appellate review in the Supreme Court, state courts could refuse to uphold the supremacy of federal law, and reach different conclusions on identical questions of federal law. See Ratner, supra. The primary support for this argument is drawn from statements by the Framers and Supreme Court opinions in cases such as Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1806) and Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821).

In justifying the establishment of one Supreme Court, the Framers did indeed point to the virtues of uniformity and the need to secure the supremacy of federal law. Hamilton, for example, wrote that "if there are such things as political axioms, the propriety of the judicial power of the 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 having 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." Federalist No. 80. Rutledge noted that "the right of appeal to the supreme national tribunal" was sufficient "to secure the national rights and uniformity of judgments." 1 Farrand 124.

It is also true that the use of Supreme Court appellate jurisdiction as a means of securing the supremacy of federal law and uniformity in its interpretation figures as a prominent theme in significant Supreme Court cases. In Martin v. Hunter's Lessee, Justice Story upheld the power of the Supreme Court to review state court decisions, noting that "the Constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice." Story went on to note:

> "A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself: if there were no revising authority controlling these jarring and discordant judgments, and harmonizing them into uniformity, the laws, the treaties and the Constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states."

Chief Justice Marshall reiterated these themes in Cohens v. Virginia. Noting that many state judges were dependent for their office and salary on the will of the legislature, Marshall reasoned: "when we observe the importance which the Constitution attaches to the independence of judges, we are less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a state shall prosecute an individual who claims the protection of an act of Congress." He also stated that "the 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." 19 U.S., at 387, 416.

The argument which is based on the foregoing statements, however, confuses a permissive grant of constitutional authority with a constitutional requirement. The question presented in Martin v. Hunter's Lessee and Cohens v. Virginia was whether Congress acted constitutionally when it conferred appellate jurisdiction on the Supreme Court over decisions of state courts in the Judiciary Act of 1789. The question was whether Congress could constitutionally provide for such review, not whether such review was required by the Constitution. Story and Marshall stressed the policy arguments concerning supremacy and uniformity which persuaded the Framers to permit Congress to provide for Supreme Court appellate review, and which also persuaded Congress in the Judiciary Act of 1789 to authorize such review. None of this suggests that such review is constitutionally required. That this is the proper reading of Martin v. Hunter's Lessee and Cohens v. Virginia is made clear by examination of the opinions, discussed above, which establish the principle that the Supreme Court's exercise of appellate jurisdiction is entirely dependent upon an act of Congress.

Indeed, in Martin v. Hunter's Lessee, Justice Story noted that the appellate jurisdiction of the Supreme Court was "subject . . . to such exceptions and regulations as Congress may prescribe." In the very next sentence he noted that the appellate jursidiction was "therefore capable of embracing every case enumerated in the Constitution, which is not exclusively to be decided by way of original jurisdiction." The appellate jurisdiction was "capable" of embracing every case in the Constitution, and did not simply do so, because of Congress' power to make exceptions to the appellate jurisdiction. Cohens v. Virginia considered as a separate point whether jurisdiction was conferred by the Judiciary Act of 1789. This clearly indicated that the Court did not consider such jurisdiction to be required by the Constitution, even in the pursuit of the identified goals of federal supremacy and uniformity in the interpretation of federal law. Rather the matter was one for Congress to decide on policy grounds, in light of these considerations.

Hamilton's Federalist No. 80, with its statements concerning supremacy and uniformity, also contained full recognition of the exceptions power. Indeed, the essay concluded with these words:

> "From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences."

The removal of appellate jurisdiction from the Supreme Court does not, in any event, relieve courts from an obligation to respect the supremacy of federal law. Under Testa v. Katt, 330 U.S. 386 (1947), state courts cannot discriminate against the enforcement of federal rights. Under Article VI, state court judges are "bound by oath" to support the Constitution, including the supremacy clause. That Congress has available the stronger guarantee of supremacy and uniformity of vesting appellate jurisdiction in the Supreme Court does not mean that Congress is required to employ this device.

It is also significant to note that the Nation has in fact experienced and survived situations in which exceptions to Supreme Court appellate jurisdiction prevented that Court from guaranteeing uniformity in the interpretation of federal law. These exceptions were not limited to review of questions of fact, nor were they simply regulations of procedures. As Professor Gunther has put it, "They were not simply procedural matters as to when you file a case or how you prepare a case or how you raise the issues. I think they were of great substantive significance in the sense that a very large bulk of potential Supreme Court material did not get to the Supreme Court because of the congressional failure to vest the whole jurisdiction." Hearings, supra, at 17.

A leading illustration is the fact that, from the Judiciary Act of 1789 until the Act of December 23, 1914, 38 Stat. 790, the Supreme Court had no appellate jurisdiction of any kind over state court decisions interpreting the Federal Constitution and striking down state laws on the basis of the Federal Constitution. Thus, an interpretation of the Federal Constitution by a state Supreme Court, even if considered erroneous by

the United States Supreme Court, and even if in direct conflict with prior decisions of the highest courts of other states (or, for that matter, a prior decision of the United States Supreme Court), could not be reviewed. The United States Supreme Court could not guarantee uniformity in such cases.

This fact was clearly demonstrated in the early years of the 20th Century. In Ives v. South Buffalo Railroad Co., the highest court of the state of New York struck down the first American workmen's compensation law, finding it "a deprivation of liberty and property under the Federal and State Constitutions." 201 N.Y. 271, 294 (1911). Although the decision was roundly criticized as an outrage, and contrary to what the Supreme Court of the United States would have done, "under the existing appellate jursidiction there was no way of reviewing the Ives result by the Supreme Court." Frankfurter and Landis, The Business of the Supreme Court 195 (1928). Later in 1911 the Supreme Court of Washington upheld the constitutionality of a statute similar to that which was struck down in Ives, State v. Clausen, 65 Wash. 156 (1911), and soon thereafter the New Jersey Supreme Court also upheld a workmen's compensation statute, Sexton v. Newark District Telegraph Co., 84 N.J. 85 (1915). The confusion over the impact of the Federal Due Process Clause on workmen's compensation laws led to reform of Supreme Court appellate jurisdiction. As the House Judiciary Committee reported, "The Fourteenth Amendment meant one thing on the east bank of the Hudson and the opposite thing on the west bank." H.R. Rep. 1222, 63d Congress, 3d Sess., serial number 6766, 2. It was not suggested that this state of affairs was unconstitutional, simply bad policy. It was remedied by the Act of 1914. See Frankfurter and Landis, supra, 192-198.

Throughout the 19th Century, the Supreme Court also interpreted the Judiciary Act of of 1789 as withholding authority to review state court decisions upholding the validity of a federal statute. See, e.g., Baker v. Baldwin, 187 U.S. 61 (1902). This created a situation in which federal laws could be upheld in some jurisdictions, although struck down in others. Although the Court eventually abandoned this restrictive interpretation of the Judiciary Act, there was no suggestion that the prior interpretation was unconstitutional. Cf. Ratner, supra, at 185.

To take one more prominent illustration, until 1889 the Supreme Court could exercise no appellate jurisdiction over federal criminal cases. United States v. More, 7 U.S. (3 Cranch) 159 (1805). This made possible conflicts in the interpretation of federal criminal laws, conflicts which could not be resolved by resort to Supreme Court appellate review. Professor Ratner has argued that some review was

available, since there could be review upon a certificate of division of opinion filed by the circuit court, and in habeas corpus cases. See Ratner, supra, at 195-196. Habeas corpus review, however, hardly covered the whole range of questions which could arise under the federal criminal laws, see Van Alstyne, supra, at 262 n. 103, and review through certificate of division of opinion by the circuit court was a slender reed on which to rest the "essential functions" of the Supreme Court. Indeed, it became the practice for a single judge to hold circuit court, and, barring a rather severe case of judicial schizophrenia, this restricted the availability of review through certificate of division of opinion. See Carroll v. United States, 354 U.S. 394, 401 n. 9 (1957). As Frankfurter and Landis put it:

> "For a full hundred years there was no right of appeal to the Supreme Court in criminal cases. Until 1889 even issues of life or death could reach that Court only upon a certificate of division of opinion. As the practice became more prevelant for a single judge to hold circuit court (until in the '80's it became the rule rather than the exception), the finality of power of the single judge became particularly open to criticism in criminal cases." Frankfurter and Landis, supra, at 109.

Here again there was no suggestion that the lack of Supreme Court appellate review somehow unconstitutionally interfered with the essential functions of the Supreme Court. See Bator, Senate Hearings, at 36 ("For 100 years Federal criminal cases were not reviewable in the Supreme Court. That, of course, greatly prejudices the argument that the power to render uniform judgments is an essential fundamental of the constitutional plan").

At the Senate Hearings Professor Redish disposed of the "essential functions" argument in these terms:

> "The major difficulty with the 'essential functions' theory, however, is that it finds no basis in either the language or history of the Constitution. Certainly the explicit wording of the provision says nothing about it, and the history of the 'Exceptions' Clause is not of significant assistance to those urging the 'essential functions' thesis. Therefore as attractive as the theory may seem as a matter of policy, it does not appear to find support in the Constitution. To turn the words of Professor Hart, one of the thesis' leading advocates, against him, '[w]hose Constitution are you talking about--Utopia's or ours?'"

It has been argued that uniformity in the interpretation of federal law, imposed through Supreme Court appellate review, may no longer constitute sound policy. Until the scope of the due process clause of the Fourteenth Amendment was expanded far beyond the intent of the Framers, protections against state as opposed to federal action varied depending on local circumstances. At the A.E.I. Conference, Professor Scalia pointed out that Congress could make exceptions to Supreme Court appellate review in those areas where uniformity was not necessarily desired. Non-uniformity and diversity depending on local conditions can be viewed as desirable goals, and the exceptions clause provides a possible means to that end. Scalia recognized that non-uniformity in the interpretation of federal law could be criticized as "sloppy", but asked: compared to what? Given the choice between non-uniformity and the uniform imposition of the judicial excesses embodied in Roe v. Wade, Scalia was prepared to choose the former alternative.

A general argument is made that permitting Congress to make exceptions to the Supreme Court's appellate jurisdiction would put Congress above the judicial branch and undermine the entire structure of checks and balances established by the Constitution. As Professor Bator has noted, however, "Arguments which derive from 'structural' notions are . . . weak, primarily because they are so vague particularly in the face of a text which is not at all vague." Senate Hearings. The structural arguments also overlook the fact that the exceptions clause itself is part of the structure of the Constitution:

> "True, there is evidence that the Framers generally contemplated Supreme Court review of state court judgments. But they also contemplated Congressional regulation of this jurisdiction, and nothing in the 'structure of the document' serves in any powerful way to distinguish between regulations which are valid and those which are invalid." Id.

Professor Wechsler has criticized arguments that seek to limit the scope of the exceptions clause as themselves "antithetical to the plan of the Constitution for the courts -- which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power, or, stated differently, how far judicial jurisdiction should be left to the state courts. . . ." The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1005 (1965).

A short answer to the arguments that use of the exceptions power would undermine the system of checks and balances is that in divesting the Supreme Court of appellate jurisdiction, Congress is not attempting to dictate any particular result.

Other courts of competent jurisdiction, either lower federal courts or state courts, would still exist and have the capacity to declare acts of Congress unconstitutional. The state courts "are not free to refuse enforcement" of a federal right, Testa v. Katt, 330 U.S. 386, 394 (1947).

It is argued, however, that divesting the Supreme Court of jurisdiction over a particular class of cases would undermine the constitutional role of the Court as the ultimate arbiter of constitutional questions. The Consitution, however, does not accord such a role to the Court. The authority of the Court to interpret the Constitution derives from the necessity of its doing so in the course of discharging its judicial responsibility to decide those cases and controversies properly presented to it. As put in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803):

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constituion, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty. . . . In some cases, then, the Constitution must be looked into by the judges." (Emphasis supplied).

If the necessity of interpreting the Constitution is removed, as it would be if the Court were divested of jurisdiction, the basis for the Court's role as final arbiter of the Constitution is removed. As Professor Wechsler has recognized:

> "Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land. That is, at least, what Marbury v. Madison was all about." Wechsler, supra, at 1006.

See also Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 1.

Furthermore, the vision of a wholesale divesting of the Supreme Court's appellate jurisdiction is unfounded. Although many divestiture bills have been proposed, no bill which would have divested the Supreme Court of appellate jursidiction in response to a decision of the Supreme Court has ever been enacted. There are serious institutional restraints which inhibit Congress' exercise of the exceptions power. See Van Alstyne, supra, at 289; Wechsler, supra, at 1006-1007. The vociferous opposition which has been raised to the more recent proposals bears witness to these institutional restraints. If Congress were to divest the Supreme Court of appellate jurisdiction, as contemplated by the bills pending in Congress, it would not undermine the entire system of judicial review. Rather, Congress would simply be exercising its "ample authority to make such exceptions" as are necessary to remove the "partial inconveniences" which have developed in the system. Hamilton, Federalist No. 80.

Those who truly believe that the exercise of this exceptions power threatens the system of checks and balances should pursue the remedy suggested by Justice Roberts, namely amendment of the Constitution to remove Congress' exceptions power. Roberts, Now Is The Time: Fortifying The Supreme Court's Independence, 35 ABA J. 1 (1949). The American Bar Association supported such an amendment, see 34 A.B.A. J. 1072-1073 (1948), and the Senate actually passed one, S.J. Res. 44, 83d Cong., 1st Sess. (1953), but it was tabled by the House. In light of the foregoing it is perhaps not unfair to criticize those who argue against the power of Congress under the exceptions clause as the ones who are circumventing the amendment process.

It has even been suggested that the existence of the exceptions power aids the Court in the discharge of its functions by securing the legitimacy of judicial review.

> "Could it not be argued that, politically and pyschologically, the legitimacy of judicial review is enormously buttressed by the continuing existence of Congressional power to curtail jurisdiction? That the continuing existence of this power, rather than being a threat to judicial independence, is one of its important (though subtle) bulwarks?" Hart and Wechsler, The Federal Courts and The Federal System 364 (2 ed. 1973).

Professor Bator reiterated this theme in his recent Senate testimony, stating that "a powerful case can be made that such a plenary power [to make exceptions to the appellate

jurisdiction of the Supreme court] may be essential to making the institution of judicial review tolerable in a democratic society."

Along the same lines Professor Mishkin, participating at the A.E.I. Conference, recognized Congress' power under the exceptions clause and argued that the clause served the "important purpose" of providing a direct channel for expression of congressional discontent with the activity of the judicial branch, even if no legislation was ever actually enacted under the clause. He had made this same point thirteen years earlier during the hearings before Senator Ervin's subcommittee:

> "When the Butler constitutional amendment was proposed which would have taken constitutional cases out of the exceptions clause, I opposed it then on the ground that there ought to be the opportunity for Congress to direct itself to questions of jurisdiction, indeed as a response to Court decicions. . . . It would be a very, very unusual set of circumstances -- I am not sure there are any -- which would seem to me sufficient to actually abrogate the jurisdiction, but the possibility of it, and the existence of the power, seem to me to be healthy parts of the system." Senate Hearings, supra, at 202.

There would also be significant institutional restraints preventing the Court from declaring a law divesting it of jurisdiction unconstitutional. As three justices pointed out just last Term:

> "The exercise of jurisdiction over a case which Congress has provided shall terminate before reaching this Court . . . is a serious matter. The imperative that other branches of government obey our duly-issued decrees is weakened whenever we decline, for whatever reason other than the exercise of our own constitutional duties, to adhere to the decrees of Congress and the Executive." Jeffries v. Barksdale, 101 S. Ct. 3149, 3150 (1981)(Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from denial of certiorari).

V.

Once the power of Congress to make substantive exceptions to the appellate jurisdiction of the Supreme Court is recognized, particular proposals must be considered to determine if they comport with other constitutional protections. The exercise by Congress of its power under the exceptions clause is as subject to the due process clause, and the equal protection component

of the due process clause, as the exercise of any other constitutional grant of power. See Van Alstyne, supra, at 263-266. At the same time, however, the due process and equal protection constraints on the exercise of the exceptions power cannot be interpreted so stringently as to vitiate the clause and incorporate by the back door the more restricted constructions previously rejected. "If the exceptions clause meant to permit Congress to 'check' the court specifically in the exercise of substantive constitutional review, then the categorical exception of any group of cases made by Congress for that very reason cannot possibly be deemed offensive to the Fifth Amendment's equal protection concern: the exceptions clause itself would provide the source for the goverment's argument that that reason is both licit and compelling enough." Van Alstyne, supra, at 264 (emphasis in original).

The pending proposals to divest the Supreme Court of appellate jurisdiction do not seem to present a serious due process problem, since they all provide for at least some judicial forum, either the lower federal courts or state courts, to hear any claims. Due process does not require judicial review in a federal court or final review by the Supreme Court. See Hart, The Power of Congress To Limit The Jurisidiction of Federal Courts: An Exercise In Dialectic, 66 Harv. L. Rev. 1362, 1363-1364, 1401 (1953); Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("[Congress] could have declined to create any [inferior federal] courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe"); Yakus v. United States, 321 U.S. 414, 444 (1944) ("There is no constitutional requirement" that the "test of the validity of a regulation be made in one tribunal rather than another, so long as there is an opportunity for judicial review which satisfied the demands of due process"). As Professor Redish noted in his Senate testimony, "the Supreme Court has made clear that there is no due process right to any form of appellate review, and as long as some independent forum -- whether state or lower federal courts -- is available to review the constitutionality of federal legislation, the due process right is technically satisfied."

Equal protection challenges would seem to present the most serious hurdle for the pending bills to divest the Supreme Court of appellate jurisdiction. The argument would be that the bills in question classify in such a way as to affect fundamental rights, such as the right to an abortion, or classify on the basis of suspect criteria, such as race in the case of bills divesting the Supreme Court of appellate jurisdiction over school desegregation cases. Strict scrutiny would therefore be applied, demanding that the decision to "except" the specific classes of cases from Supreme Court appellate jurisdiction be closely related to the achievement of a compelling governmental purpose. It seems un-

likely that any of the bills could withstand this extremely heightened standard of review.

In response it should first be noted that not all of the pending bills affect fundamental rights or classify on the basis of suspect criteria. H.R. 2365 and H.R. 2791, for example, would divest all federal courts of jurisdiction to review claims of sex bias in the selective service system. There is no fundamental right to be drafted, nor is gender a suspect criterion calling for heightened judicial review. See Rostker v. Goldberg, 101 S. Ct. 2646 (1981). These bills would therefore be tested under more relaxed equal protection standards.

As to the other bills a strong argument against the application of strict scrutiny can be made by focusing on the nature of the classification the bills would make. For example, the bills to divest federal courts of jurisdiction in school desegregation cases do not classify on the basis of the suspect criteria of race. A bill that did would provide that the Supreme Court shall have no jurisdiction to hear cases brought by blacks. The pending school desegregation bills rather classify on the basis of the type of case involved, and although blacks are a "suspect class", school desegregation cases are not. The classification involved does not operate on the basis of race, and affects both black and white litigants. The point is clearest so far as exceptions to Supreme Court appellate jurisdiction are concerned. For example, if the highest court of a particular state were to rule in favor of a black group seeking school desegregation on the basis of the federal constitution, the school board or a white group could not, if one of the pending bills were enacted, obtain review in the Supreme Court. It is therefore difficult to see why that group whose cases are excepted from Supreme Court review -- a group which includes both black and white litigants, both those in favor of and opposed to any particular desegregation order -- are entitled to the extraordinary protection of strict scrutiny judicial review. The same is true of that aspect of the pending bills excluding such cases from the lower federal courts as well as from Supreme Court appellate review. Both whites and blacks and both those opposing and seeking relief alleged to promote desegregation sue in the federal courts, raising claims going both ways on the merits.

As to bills alleged to affect the exercise of a fundamental right, it can be argued that strict scrutiny should not be required simply because the bills classify on the basis of cases involving the exercise of such a right. Previous cases calling for strict equal protection scrutiny in the area of fundamental rights involved legislation directly burdening the exercise of the fundamental right. For example, in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966),

the requirement of payment of a poll tax before becoming eligible to vote was a direct restriction on the fundamental right to vote. In Shapiro v. Thompson, 394 U.S. 618 (1969), the one-year residency requirement before eligibility for welfare benefits directly penalized the fundamental right to travel. None of the pending bills concerning jurisdiction in abortion or school prayer cases directly burden the exercise of any fundamental rights. Once again the distinction between laws going to the merits and laws simply regulating jurisdiction to hear claims on the merits must be stressed.

Any proper application of fundamental rights equal protection analysis would have to be based on an asserted fundamental right of access to federal court, rather than any fundamental right to an abortion or the exercise of First Amendment freedoms. The pending bills would of course burden the "right" of access to federal court, although they do not burden the exercise of the right to an abortion or free speech. Access to federal court, however, has never been identified as a fundamental right. The fundamental right involved in this area is the right to due process, and that right can be satisfied by access to state courts.

VI.

Congress may derive additional authority in regulating Supreme Court appellate jurisdiction over Fourteenth Amendment cases by virtue of §5 of that Amendment. This provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." Congress could invoke the authority of this section in divesting the Supreme Court of appellate jurisdiction over specified Fourteenth Amendment claims and providing that such claims shall receive final enforcement in the state courts. As the Court noted in the Katzenbach v. Morgan, 384 U.S. 641 (1966), "section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." It is certainly within the broad scope of §5 for Congress to determine that in certain cases, such as abortion and school desegregation cases, the guarantees of due process and equal protection are more appropriately enforced by state courts.

The history of the Fourteenth Amendment strongly supports the authority of Congress to advance its view of the appropriate means of enforcing the guarantees of due process and equal protection under §5. The Fourteenth Amendment was drafted and passed in an atmosphere of great hostility to the Supreme Court.

Those who were triumphant in the Reconstruction Congress and drafted and passed the Civil War Amendments had suffered great defeats at the hands of the High Court in the Dred Scott and Fugitive Slave decisions. A court which would render such decisions was certainly not to be entrusted with securing the protections of the Thirteenth through Fifteenth Amendments. In the view of the Framers of the Civil War Amendments, therefore, Congress was to have primary responsibility for providing for the enforcement of the guarantees of due process and equal protection. See generally Berger, Government by Judiciary 222-223 (1977); Berger, Congressional Contraction of Federal Jurisdiction, 1980 Wis. L. Rev. 801.

It is of course true that the Supreme Court has long since assumed a dominant role in enforcing the Fourteenth Amendment. This does not, however, detract from the authority of Congress to enter the field under section 5 as originally contemplated. In Katzenbach v. Morgan, the Court upheld a congressional enactment striking down New York's English literacy requirement for voting because the Court could "perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause." This was so even though the Court itself had ruled in Lassiter v. North Hampton Election Board, 360 U.S. 45 (1959), that English literacy requirements did not violate the Equal Protection Clause. The activity of Congress in divesting the Supreme Court of appellate jurisdiction over certain Fourteenth Amendment claims is far less intrusive, since the legislation does not purport to "correct" previous Supreme Court decisions but simply provides a different final forum for resolution of the issues.

In Katzenach v. Morgan, Justice Brennan, in response to Justice Harlan's criticism that the majority was giving Congress the power to define the substantive scope of the Fourteenth Amendment, declared that §5 gave Congress no authority to restrict, abrogate, or dilute the guarantees of the Fourteenth Amendment. This so-called ratchet theory, permitting Congress under §5 to expand but not contract the protections of the Fourteenth Amendment, has been roundly criticized by commentators. One commentator, for example, has argued that the ratchet theory "does not satisfactorily explain why Congress may move the due process and equal protection handle in only one direction." There is also "difficulty in determining the direction in which the handle is turning." Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan .L. Rev. 603 (1975). See generally Buchanan, Katzenbach v. Morgan and Congressional Enforcement Power Under the Fourteenth Amendment: A Study In Conceptual Confusion, 17 Houston L. Rev. 69 (1979). Although

substantive legislation purporting to define the parameters of the Fourteenth Amendment may encounter difficulty with the ratchet theory, legislation simply governing court jurisdiction over Fourteenth Amendment claims, which is neutral on its face, cannot be said to contract the guarantees of the Fourteenth Amendment.

It should be noted that §5 of the Fourteenth Amendment can be considered to give Congress the power to divest the Supreme Court of appellate jurisdiction over Fourteenth Amendment claims even if Congress is considered to lack this power under Article III. It is not enough to argue that Article III and the structure of judicial review established by that Article prevents Congress from exercising such power. The Fourteenth Amendment, including §5, limits Article III. Cf. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)("the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . is necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment"). In this regard it is important to remember that the Framers of the Fourteenth Amendment intended it to be enforced primarily by Congress, and not the federal courts. Whatever validity "structural" arguments concerning the role of the federal judiciary may have in other contexts, these arguments are considerably weakened in the area of Fourteenth Amendment claims.

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