1983

Congressional Attempts to Amend the Constitution by the Back Door

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The high regard in which I hold my former colleague, your current Dean, is not the only reason why I am very pleased to be here. As I examined the list of previous participants in the George Wythe Lecture Series, I found them to be very interesting and distinguished. An impressive group of legal scholars and judges from both the United States and abroad have presented ideas on a wide spectrum of important legal issues. It is a very laudable tradition befitting the reputation of the great George Wythe, one of this Law School's two namesakes. It is a tradition I am proud to join by my appearance before you this afternoon.

Having said why I am very pleased to be here this afternoon, let me give you a preview of my topic and why I believe it is worthy of our collective inquiry.

I realize that most of the lawyers and lawyers-to-be in this room are unlikely to have their law practice or scholarly pursuits centrally occupied by constitutional law questions. But this remoteness from one's daily legal work does not make a lawyer remote from the Constitution or from the Supreme Court which expounds it. After all, we lawyers depend upon a legal system in which the "rule of law" is guaranteed, with stability and finality, under established constitutional processes.
And, as United States citizens, all of us depend upon the Constitution for the very individual freedoms which make "life, liberty and the pursuit of happiness" possible.

In that light, I think we should all be very concerned that during the 97th Congress, which adjourned in late 1982, the role of the courts as the expounders and guarantors of the Constitution was placed under a growing and ingenious attack. As you may know from press reports or other sources, over thirty bills were introduced in the last Congress to alter the scope and role of the Supreme Court and, in some instances, the lower federal courts. The Senate passed one measure to limit federal court authority over the subject of busing to achieve integration. After extensive debate and several relatively close votes, the Senate voted to sidetrack Senator Jesse Helms' proposal to strip the courts of jurisdiction in school prayer cases.

Some see the much-publicized setback to Senator Helms and other supporters of his court-stripping bill as the beginning of the end for efforts to amend the Constitution through statute. As a vocal opponent of such legislation, I would like this to be the case. However, the court-stripping impulse that tempted so many members of the preceding Congress reflects both a strong opposition to the present trend of federal court decisions and a deep-felt (although, in my judgment, profoundly erroneous) view about what methods are proper for altering those decisions.

I have some doubt that we have seen the last serious congressional consideration of efforts to reverse court rulings by tinkering with court jurisdiction and authority.
Indeed, as I make this speech, some three months into a new Congress, five bills have already been introduced to eliminate court jurisdiction over the matters of abortion or school prayer.

Benchmark for Evaluation of Court-Stripping Proposals: The Constitutional Scheme and Tradition of a Strong, Independent Judiciary

My discussion of the proposals to change court decisions through simple statute will proceed along two lines. First, I will place these proposals in the context of how our Constitution came to provide for a strong federal judiciary and how that tradition has been followed -- although not without controversy -- in the almost 200 years since the Constitution was ratified. Second, I will discuss how the major court-stripping proposals are fundamentally at odds with our constitutional scheme and tradition. I will do so by breaking the proposals into three groups based on the different legal questions they would put off limits and the differing legal and policy questions they raise.

The Constitution as a Reaction to the Articles of Confederation

Frankly, if the court-stripping proposals I am discussing here today were not so potentially poisonous to our constitutional scheme, I would be glad they came before the Senate. I say that because the need to understand and articulate just how at odds these proposals are with our constitutional system and tradition led me to study the Constitution's historical antecedents.
Specifically, I devoted significant attention to a period that is the least evaluated and most ignored period of our nation's history: the Articles of Confederation period from 1781 to 1789. My study convinced me that this time frame is perhaps the most important period of our nation's history for understanding the origins of the Constitution.

Under the Articles of Confederation, our nation was a league of disunited States, whose representatives met from time to time to deal with a very limited range of common concerns in a system that relied almost entirely on voluntary cooperation. The government under the Articles of Confederation was a dismal failure. We are in the "last stage of national humiliation," wrote Hamilton in Federalist No. 15. Agreements broken, debts unpaid, credit dried up, commerce stagnated, territory violated, remonstrances scorned -- all of this was the disorder of the day. Our national governmental non-structure was, according to historian Herbert J. Storing, a "dark catalogue of public misfortunes."

Perhaps the weakest of the weak governmental links under the Articles of Confederation was the court system. When the courts functioned, they functioned in a piecemeal, haphazard way. Sometimes they didn't function at all, as during "Shays' Rebellion" in Massachusetts in 1786, when disciples of Shays time and again crowded around the courthouses and kept the courts from processing debt claims. Thomas Jefferson, away in France on ambassadorial assignment, was not particularly worried about "Shays' Rebellion" except insofar as the principal manifestations of discontent were "the attempts to interfere with the orderly process of the courts." The designers of the Constitution would not forget this experience with powerless courts.
The Founders' Clear Choice of a Strong National Government and Court

Washington, Adams, Jay, Hamilton, Madison and, later in the process, Jefferson concluded that a much stronger governmental structure was necessary to avoid the chaos, paralysis and disunion of the day. As the antidote to creeping anarchy, the Constitution was born with strong powers in a truly national government. An integral part of national sovereignty established by the Constitution was a national court. The national judicial power was "vested in one supreme court." James Madison and Alexander Hamilton, the guiding geniuses of Federalism, were clear on the link between a strong, independent Supreme Court and the preservation of the Constitution against future inroads.

The Founding Fathers clearly realized that they would put the basic survival of the Constitution in jeopardy if they did not provide a strong and independent judicial power. They understood that, to quote Hamilton (in Federalist No. 22), "Laws are a dead letter without courts to expound and define their true meaning and operation." And, fearing a legislature which, to quote Madison (in Federalist No. 48), was "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex," the Founders ensured an independent judiciary.

Not that the Founders created an "imperial judiciary." They provided for impeachment of judges for cause. They sanctioned a constitutional amendment process for changing the meaning of the Constitution. (Of the 26 amendments to the Constitution, four have overturned Supreme Court opinions.)
Yet, the Founders obviously intended that interferences with court processes and rulings would be rare and difficult to achieve. Only in this way could they guarantee that the federal courts could continue, as Justice Black later put it, to "stand against any winds that blow as havens of refuge for those who... are victims of prejudice and public excitement."

A History of Controversy About the Court

The historical record since ratification of the Constitution proves that the Founders were quite savvy, in addition to being brilliant. For, strong winds, to use Justice Black's metaphor, have frequently blown around the federal courts, as they sought to protect the individual rights and liberties embedded in the constitutional compact.

Throughout his remarkable 34-year tenure as Chief Justice, John Marshall was in a running battle with Presidents, Congress, and State Governors as he asserted the judicial supremacy of the Supreme Court. President Jefferson so violently opposed Marshall and his rampant Federalism that he even contemplated the impeachment of the Chief Justice.

In the pre-Civil War years, there was intense and, at times, vitriolic debate by Abolitionists in and out of Congress directed at the Taney Court.

Early in the 20th century, progressives in Congress and President Theodore Roosevelt castigated what they viewed to be a reactionary Supreme Court. Moves were initiated to restrict the Supreme Court and to establish a method of recall of federal judges.
Getting closer to the present, we can recall the billboards and bumper stickers in the '50s and '60s stating, "Impeach Earl Warren."

So, criticizing and disputing the Court and its decisions is as old as the Republic itself and, presumably, "as American as apple pie." Fortunately, however, we have never let our outrage at particular court actions lead us to place at risk the fundamental authority and independence of our courts.

The Dangerous Nature of the Present Attack on Court Authority

Undoubtedly, the recent rash of anti-court legislative proposals draws some inspiration from our custom of criticizing the federal judiciary. However, I want to begin my discussion of the specific court-stripping proposals by observing how their attack differs in important ways from the attack of their predecessors.

First, while previous attacks were primarily directed at individual judges and the philosophical composition of the Court, the present drive against the courts has been launched on the arcane, legally technical battlefield of court jurisdiction and congressional remedial power. This means that while previous attacks, for the most part, lacked any serious constitutional cover, today's court-stripping proposals seemingly come clothed in the very language of the Constitution. (As I will indicate, current proposals rest on Congress' power to regulate federal judicial power or to enforce several constitutional amendments through "appropriate legislation."
The present attacks on the Court also differ from previous ones in terms of the breadth of the damage they would do to our constitutional system.

It is true that previously considered attacks on particular judges or courts, if they had been successful, would have significantly harmed judicial independence and created a bad precedent. However, inherent in the present court-stripping proposals is the theory that Congress can amend what the Supreme Court has found to be the meaning of the Constitution merely by passing a statute of one form or another. Therefore, if sanctioned and carried to their ultimate logic, the current proposals would subject an unlimited universe of constitutional issues to quick, legislative nullification. Every judge and every court would face case-by-case reversal, whenever a transitory majority in the Congress could be mustered to pass a court-stripping statute.

Let me now discuss the three basic types of proposals by which some in Congress seek to amend the Constitution by the back door. As I mentioned, although the three types share a common theory, they are constitutionally dangerous for somewhat different reasons.

**Prayer in Schools**

Until President Reagan's announced support for a proposal to amend the Constitution with respect to school prayer, the front-running proposal to overturn Supreme Court decisions in this area was that of Senator Helms. The Helms bill, offered last Fall as an amendment to the federal debt ceiling resolution, would have taken away the jurisdiction of the Supreme Court
and other federal courts to hear cases relating to prayer in schools.

Senator Helms' proposal did not purport, nor could he have purported, to alter the jurisdiction of the state courts to hear cases involving school prayer and the First Amendment; state courts would be left as forums of last resort in school prayer cases. However, the proposal clearly banked on state courts being less than zealous in discharging their duty to "protect and defend the Constitution" by enforcing the spirit and letter of current Supreme Court decrees. As Senator Helms made clear in 1981, he and his supporters expected adjudication of school prayer cases in state, not federal court to "restore to the American people the fundamental right of voluntary prayer in the public schools," current law notwithstanding.

The constitutional infirmity of the Helms legislation seems straightforward. The proposal aims by mere statute to change the Constitution's guarantees against establishment of religion, as authoritatively interpreted by the courts, exercising a role which dates from Marbury v. Madison. This runs headlong into the Framers' intent that the Constitution be changeable only through the constitutional amendment process. Specifically, statutory amendment of the Constitution would run afoul of a caution sounded by Alexander Hamilton almost two centuries ago: that the Constitution should not be revised by "the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution..."
Despite all this, there is a swath of textual material which seems on first inspection to provide constitutional cover for proposals such as the Helms bill. Article III, Section 2 of the Constitution gives the Congress power to make "exceptions" and "regulations" to the appellate jurisdiction of the Supreme Court. Proponents of the Helms approach, including Senator Helms himself, have characterized removal of jurisdiction over certain constitutional cases as an "exception" or "regulation" permitted by Article III. Beyond the words of the Constitution, they point to jurisdiction-limiting statutes in non-constitutional settings and an 1869 case in which the Supreme Court approved a restriction on its jurisdiction in habeas corpus cases.

Whatever the surface appeal of these arguments, I believe, with many legal scholars, that reliance on the exceptions and regulations clause for bills such as the Helms' school prayer bill, is misplaced. The Exceptions Clause must be read in its broader constitutional context, and against the backdrop of the Constitutional Convention debates.

Viewed in that light, it is very doubtful that the Founders intended Congress' power over appellate jurisdiction to be a license to circumvent the constitutional independence of the Supreme Court and the sole means which the Constitution prescribes for its amendment. As respected legal scholar Henry Hart put it: "Why, what monstrous illogic! To build up a mere power to regulate jurisdiction into a power to affect rights having nothing to do with jurisdiction! And [to say this] in contradiction to all the other terms of the very document which confers the power to regulate jurisdiction!"
Or as the present Attorney General of the United States concluded in an extensively-documented letter to the Chairman of the Senate Judiciary Committee: "There is no doubt that Congress possesses some power to regulate the appellate jurisdiction of the Supreme Court. ... Congress may not, however, consistent with the Constitution, make "exceptions" to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers."

Abortion

The subject of abortion has prompted several jurisdiction-limiting bills along the lines of the Helms school prayer bill. In addition, however, the effort to reverse Supreme Court cases on the legality of abortion has led to a different proposal for amending the Constitution by the back door. I refer to Senator Helms' bill, which, in the version reported by a Subcommittee of the Senate Judiciary Committee, would have Congress by statute define the word "person" in the Fourteenth Amendment thus: "The Congress hereby recognizes that for the purpose of enforcing the obligation of the States under the Fourteenth Amendment not to deprive persons of life without due process of law, each human life exists from conception..."

Many people, myself included, have been highly critical of the Supreme Court's 1973 abortion decisions, and we seek to rectify those decisions by the traditional constitutional amendment route.
However, many abortion decision critics, again including me, regard the Helms human life-defining approach as of very dubious constitutionality.

Indeed, as with the school prayer bills, the Helms approach to overturning abortion decisions by statute seems on its face to subvert the fundamental attributes of the judicial power the Founders ordained. The power to define is the power to expound. Under our Constitution, that power is vested in the Supreme Court, not the Congress. To impute to Congress the power to reverse abortion cases by the simple expedient of writing a statutory definition of "person" would be to impute the right of Congress to reverse through redefinition other portions of the Fourteenth Amendment as well -- including the terms "due process," "equal protection," and some of the other bedrock rights, such as freedom of the press and speech, which have been applied to the States through the Fourteenth Amendment. To permit a transitory, political majority in Congress to rewrite the Constitution by statute is to begin the destruction of the Constitution itself.

Yet, the situation is not quite as simple as it might seem. The Helms abortion bill is similar to the school prayer bills in another respect: a constitutional provision and an expansively-written Supreme Court decision blur what would otherwise be, to my eyes, a clear picture of unconstitutionality.

Thus, proponents of the supposed power of Congress to redefine by statute the Fourteenth Amendment point to its Section 5. Section 5 of the Fourteenth Amendment states that, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this [Amendment]."
In *Katzenbach v. Morgan*, the Supreme Court construed Section 5 to permit Congress to prohibit certain state voting laws as discriminatory -- notwithstanding the Court's previous ruling that the laws did not violate the Equal Protection Clause.

Although Section 5 and *Morgan* give this argument a semblance of constitutional validity, on closer analysis, the semblance is more imaginary than real. The *Morgan* Court sought to avoid any general conclusion that Congress may displace the Court as expounder of Fourteenth Amendment rights. Subsequent cases buttress that caution. For example, *Oregon v. Mitchell* struck down a legislative conclusion that the 18-year-old vote was necessary to provide equal protection under the Fourteenth Amendment. A majority of the Court joined separate opinions assuming that the Court's, not Congress', interpretation of Equal Protection should govern.

There is little in current case law or logic to justify a congressional reversal of basic Supreme Court enumerations of the rights embedded in the Fourteenth Amendment.

**School Busing**

The congressional approach to school busing, as spearheaded by Senators Helms and Johnston, involves some of the questions already discussed, but also brings a new and very disturbing dimension to the current court-stripping efforts. The Helms-Johnston restrictions, as passed in the last Congress, would deny to the federal courts the right to impose a busing remedy requiring travel beyond fifteen minutes from a student's home.
To the extent that the bill would restrict the ability of
the Supreme Court to exercise its appellate jurisdiction over
school desegregation cases involving busing remedies -- and there
is some dispute among those who have studied the amendment
about whether it would do this -- it would have to be justified
as either a "regulation" of Supreme Court jurisdiction or an
exercise of Congress' remedial power to enforce constitutional
amendments. For the reasons discussed previously, either
justification should be judged severely wanting.

However, as they would apply to the lower federal courts,
the Helms-Johnston restrictions seek justification in another,
quite different source. Thus, because Congress has the discretion
under Article III to create the lower federal courts, some argue
that it therefore has the power to define or limit the remedies
that a lower federal court may impose.

It is true that efforts to restrict lower court actions stand
on a different footing from efforts to restrict the Supreme Court.
However, it is even more true that hobbling the judiciary by
denying it the remedy necessary to vindicate a constitutional
right may well be the same as nullifying the constitutional right
itself. In constitutional terms, denial of adequate remedial
power would be invalid as an impermissible congressional interference
with the essentials of the independent judicial function. Or, it
could well be a violation of constitutional provisions outside of the
Article III power (such as, due process), which constrain
legislative action.
In the very practical terms of the Helms-Johnston amendment as it passed the Senate, Congress, by statute, is saying to an aggrieved minority student that there is a 15-minute "shot clock" on your Equal Protection right. The lower federal courts can provide you a remedy for up to 15 minutes; beyond that, "Sorry, You're on your own."

**Conclusion**

Hear these moving words from a legislative report:

"Manifestly, if we may force the hand of the Court to secure our interpretation of the Constitution, then some succeeding Congress may repeat the process to secure another and a different interpretation and one which may not sound so pleasant in our ears as that for which we now contend.

"It is essential to the continuance of our constitutional democracy that the judiciary be completely independent of both the executive and legislative branches of the Government, and we assert that independent courts are the last safeguard of the citizen, where his rights come in conflict with the power of governmental agencies."

Thus spoke the Senate Judiciary Committee in 1937 when liberal Franklin Roosevelt sought to re-write conservative Supreme Court opinions by the ingenious strategem of "packing" the Court with appointees of his own choosing. Today, 46 years later, dissatisfied conservatives want to re-write liberal Supreme Court opinions by equally ingenious strategems of re-writing the Constitution by statute or by procedural artifice. In short, they want to amend the Constitution by the back door.
The 1937 words of the Senate Judiciary Committee are just as applicable today. What can be manipulated by today's political majority can be just as easily manipulated by tomorrow's -- and to other ends.

In a very real sense, the choice before the Congress and the country is whether we want a Constitution according to Hamilton, Madison, and Marshall, or a Constitution according to Jesse Helms. To me, the choice is abundantly clear.