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Mark E. Herrmann

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LOOKING DOWN FROM THE HILL: FACTORS DETERMINING THE SUCCESS OF CONGRESSIONAL EFFORTS TO REVERSE SUPREME COURT INTERPRETATIONS OF THE CONSTITUTION

That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested. . . . A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases.¹

Throughout the 200-year history of the United States Constitution, frequent debate has arisen over the proper roles of the three branches of the federal government in interpreting the Constitution. The Supreme Court has, in recent years, expressed the view that the federal judiciary is supreme in the exposition of the law under the Constitution.² Under this view, once the Supreme Court has spoken regarding a constitutional issue, only the Court itself can alter that interpretation of the Constitution. Other observers, including Abraham Lincoln,³ have argued that although court decisions are binding on the parties in a specific case, they are not necessarily permanently binding on the other branches of government.⁴ Noting the oath taken by the Executive to "preserve, protect and defend the Constitution of the United

1. THE FEDERALIST No. 81, at 523, 526 (Alexander Hamilton) (Mod. Libr. 1937).

2. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

3. Lincoln/Douglas Sixth Joint Debate at Quincy, Ill. (Oct. 13, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (Roy Basler ed., 1953). Referring to his unwillingness to be bound by the Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), Lincoln stated he opposed viewing the holding "as a political rule . . . which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision." 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra*, at 255.

4. A more recent proponent of this viewpoint was Edwin Meese, United States Attorney General during the Reagan administration. See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985-86 (1987):

[C]onstitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.

The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions.

States"⁵ and the similar oath taken by members of Congress,⁶ proponents of this view argue that *all* branches of the government have both a right and a duty to interpret the Constitution.

The constitutional amendment process, of course, provides Congress with a direct mechanism by which, with the approval of three-fourths of the states, it can alter the Constitution itself in response to a Supreme Court decision.⁷ Indeed, Congress has employed this mechanism on a number of occasions. In 1971, for example, Congress passed the Twenty-sixth Amendment guaranteeing eighteen-year-olds the right to vote⁸ in response to the Supreme Court's decision in *Oregon v. Mitchell*.⁹ Similarly, in 1909, Congress passed the Sixteenth Amendment authorizing an income tax¹⁰ to reverse the effects of *Pollock v. Farmers' Loan & Trust Co.*¹¹ Although the amendment process is an available option, Congress has been hesitant to employ it for a variety of reasons.¹² This reluctance has not, however, meant that Congress has silently acquiesced when it has disagreed with the Court's reading of the Constitution.

The Legislature has instead, at times, sought a change not in the Constitution itself, but rather in the prevailing interpretation of its language. By enacting federal statutes that directly contradict the Court's constitutional interpretations, the Legislature has, in effect, directly challenged the Supreme Court's view of itself as "supreme in the exposition of the law of the Constitution."¹³ In some of these instances, the Court has shown deference to Congress and has allowed congressional actions to stand.¹⁴

5. U.S. CONST. art. II, § 1, cl. 7.

6. *Id.* art. VI, cl. 3 (prescribing language for the congressional oath "to support this Constitution").

7. *Id.* art. V.

8. *Id.* amend. XXVI, § 1.

9. 400 U.S. 112 (1970).

10. U.S. CONST. amend. XVI.

11. 157 U.S. 429, *aff'd on reh'g*, 158 U.S. 601 (1895), *overruled by* *South Carolina v. Baker*, 485 U.S. 505 (1988). Other amendments Congress approved in response to "unfavorable" Supreme Court decisions include the Eleventh Amendment, guaranteeing states sovereign immunity in response to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and the Fourteenth Amendment, guaranteeing equal protection of law in response to *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

12. Among these reasons are the cumbersome nature of the process of ratification by the states, *see infra* notes 108-11 and accompanying text, and a general congressional reluctance to tamper with the Constitution when alternative means are available, *see infra* notes 255-61 and accompanying text.

13. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

14. For examples of such deference on the part of the Court, *see infra* notes 125-41 and accompanying text (discussing *United States v. Darby*, 312 U.S. 100 (1941)) and *infra* notes 177-82 and accompanying text (discussing *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)).

More often, however, the Justices have refused to yield to congressional interpretations that disagree with those of the Court.¹⁵

This Note examines several specific occasions in which Congress has attempted to make a role for itself as an interpreter of the Constitution by intentionally enacting legislation contrary to existing Supreme Court precedents.¹⁶ Specifically, this Note discusses Congress' attempts to create a federal law prohibiting child labor between 1918 and 1940 in response to the Supreme Court's decision in *Hammer v. Dagenhart*,¹⁷ Congress' passage of the public accommodations provisions of the Civil Rights Act of 1964¹⁸ despite the Court's earlier rejection of similar provisions in the *Civil Rights Cases*,¹⁹ and congressional attempts to reverse the effects of Supreme Court decisions with regard to the rights of criminal defendants in *Miranda v. Arizona*²⁰ and *United States v. Wade*²¹ and with respect to desecration of the American flag in *Texas v. Johnson*.²² This Note analyzes the approaches taken by Congress in fashioning its responses to the Court and considers the factors that may have contributed to the Court's acceptance or rejection of those responses. Examination of these factors may permit greater certainty in predicting the outcome of future cases involving elected branch constitutional interpretations that challenge Court precedents. Additionally, a recitation of past congressional failures and successes in challenging the Supreme Court may help to avert the time-consuming process of trial and error Congress has experienced previously.

BACKGROUND

*Marbury v. Madison*²³ established the power of the Supreme Court to review acts of Congress and to strike down those laws

15. See *infra* notes 320-23 and accompanying text (discussing *United States v. Eichman*, 110 S. Ct. 2404 (1990), the Court's rejection of Congress' flag desecration statute).

16. This Note considers only substantive laws passed to counteract Supreme Court holdings on constitutional issues. For a discussion of "Court-stripping" proposals—congressional attempts to counteract Supreme Court decisions in such areas as school prayer, abortion, and busing by removing such issues from the appellate jurisdiction of the federal courts—see generally Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988 (1982); Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Laurence Sager's "Court-Stripping" Polemic*, 44 OHIO ST. L.J. 611 (1983).

17. 247 U.S. 251 (1918), *overruled by* *Darby*, 312 U.S. at 117.

18. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C. (1988)).

19. 109 U.S. 3 (1883).

20. 384 U.S. 436 (1966).

21. 388 U.S. 218 (1967).

22. 491 U.S. 397 (1989).

23. 5 U.S. (1 Cranch) 137 (1803).

found to be repugnant to the Constitution.²⁴ Chief Justice John Marshall, who wrote the opinion, declared that it "is emphatically the province and duty of the judicial department to say what the law is."²⁵ The Court further defined the meaning of those words with respect to Congress sixteen years later in *McCulloch v. Maryland*:²⁶

Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.²⁷

In the past thirty-five years, the Court has expanded still further its view of its authority relative to the other branches. In the 1958 case of *Cooper v. Aaron*,²⁸ the Court adopted a far-reaching interpretation of its decision in *Marbury*, reading that opinion to "declare[] the basic principle that the federal judiciary is *supreme* in the exposition of the law of the Constitution."²⁹ *Baker v. Carr*³⁰ reasserted this view in 1962, describing the Court as the "ultimate interpreter of the Constitution."³¹

Being the "ultimate interpreter of the Constitution," however, is not necessarily the same as being the only interpreter. The Court has conceded that it expects other branches of the federal government to interpret the Constitution in the course of their initial deliberations over a proposed action and has stated that "the interpretation of its powers by any branch is due great respect from the others,"³² including the Court.

24. That power actually may have first been claimed by the Court 11 years earlier in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), in which a majority of the Justices refused to comply with a statute because it assigned them the duty certifying of pension claimants—a duty not of the judicial nature specified by the Constitution. The Court gave no extensive justification for this refusal.

25. *Marbury*, 5 U.S. at 177.

26. 17 U.S. (4 Wheat.) 316 (1819).

27. *Id.* at 423. In *McCulloch*, however, the Court upheld Congress' action creating the Bank of the United States. *Id.* at 436.

28. 358 U.S. 1 (1958).

29. *Id.* at 18 (emphasis added).

30. 369 U.S. 186 (1962).

31. *Id.* at 211.

32. *United States v. Nixon*, 418 U.S. 683, 703 (1974); see Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 715 (1985).

In some cases, the Court has been willing to show a great deal of deference to congressional interpretations of the Constitution—such deference even has become the controlling factor behind some of the Court's decisions.³³ In *Rostker v. Goldberg*,³⁴ for example, a case involving the constitutionality of male-only registration for the military draft, the Court noted that "[t]he customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the act's constitutionality."³⁵

As the following case histories demonstrate, however, the Court's deference to the constitutional judgments of Congress is limited, particularly in cases in which Congress takes a position directly contrary to a past Court decision.

CONGRESS TAKES ON THE COURT: FOUR CASE HISTORIES

Child Labor

The Initial Decision

This century's first major dispute between Congress and the Supreme Court regarding constitutional interpretation arose over the passage of the Keating-Owen Child Labor Law (Child Labor Act)³⁶ in 1916.³⁷ The Act prohibited the interstate shipment of the products of mines and factories that had employed children within thirty days prior to the products' shipment.³⁸

The passage of the original Child Labor Act was itself a major new assertion of constitutional power by Congress. Previously,

33. Fisher, *supra* note 32, at 715-16.

34. 453 U.S. 57 (1981).

35. *Id.* at 64.

36. Act of Sept. 1, 1916, ch. 432, 39 Stat. 675 (1916).

37. Arguably, the true starting date of the dispute was 1906, when Senator Albert J. Beveridge introduced the first federal child labor bill. Beveridge's bill prohibited any interstate carrier from transporting the products of any mine or factory that employed children under 14 years of age. Robert E. Cushman, *The National Police Power Under the Commerce Clause of the Constitution* (pt. IV), 3 MINN. L. REV. 452, 452-54 (1919). Although Beveridge defended the constitutionality of his bill, the views of others in the Senate as to its constitutionality generally "ranged from skepticism to the clear conviction that it was unconstitutional." *Id.* at 454. In the House of Representatives, the Judiciary Committee issued a report setting forth its belief that the bill was clearly invalid. The Beveridge bill never became law. *Id.* at 453-54; see also H.R. REP. NO. 7304, 59th Cong., 2d Sess. 8 (1906) (concluding that the federal government "is too weak to undertake the exercise of the police power of the States" and that "Congress has no jurisdiction or authority over the subject of woman and child labor").

38. Act of Sept. 1, 1916, § 1.

Congress had exercised its Commerce Clause power in pursuit of two broad objectives: the protection of interstate commerce from injury and obstruction³⁹ and the prohibition of the use of interstate commerce to further the distribution of commodities that were themselves obnoxious in nature, such as lottery tickets or tainted foodstuffs, or to further the consummation of injurious schemes, such as prostitution.⁴⁰ The Child Labor Act, however, prohibited the transport of goods that were themselves entirely harmless both in character and in purpose.⁴¹ The products were harmful only in that they were produced under conditions that Congress viewed as injurious to the public welfare.⁴²

The ground-breaking nature of the Act brought criticism and questions concerning its constitutionality, not only from employers of child labor and advocates of states' rights, but also

from those who, while sympathising with the objects of the law, honestly doubted that there was any sound constitutional basis upon which a child labor law under the commerce clause could rest; who, in the apt phrase of one of their number, could not convince themselves "that 'accroachment of power' is expedient when benevolent, and that, though a child is entitled to protection, the constitution is not."⁴³

39. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (upholding Congress' ability to act contrary to state laws restricting navigation between two states).

40. Cushman, *supra* note 37, at 452; see also Andrew A. Bruce, *Interstate Commerce and Child-Labor*, 3 MINN. L. REV. 89, 94 (1919):

[I]n the Lottery Case [*Champion v. Ames*, 188 U.S. 321 (1903)], the Pure Food and Drug Act Case [*Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911)], and the White Slavery Cases [*Hoke v. United States*, 227 U.S. 308 (1913); *Caminetti v. United States*, 242 U.S. 470 (1917)], the decisions dealt with things or articles of commerce, or with commercial practices, which in themselves were nuisances and inherently harmful . . . or whose production was tainted with fraud which would everywhere be condemned and everywhere be deleterious. The things themselves in short were outlaws or were branded with the brand of Cain.

41. Act of Sept. 1, 1916.

42. Cushman, *supra* note 37, at 452 ("Like an illegitimate child, they were made to bear the taint of the evil which brought them into existence; the disability which attached to them was created . . . because [Congress] wished to make it unprofitable to employ children in the manufacture of any kind of goods.").

43. *Id.* at 453 (quoting Frederick Green, *The Child Labor Law and the Constitution*, 1 ILL. L. BULL. 6 (1917)). Another critic of plans to use the Commerce Clause to support a federal child labor law was former President (1909-1913) and future Chief Justice (1921-1930) William Howard Taft who, in his text on constitutional issues, wrote:

Bills have been urged upon Congress to forbid interstate commerce in goods made by child labor. Such proposed legislation has failed chiefly because it was thought beyond the Federal power. The distinction between the power

Opponents had already managed to delay passage of the bill for one year,⁴⁴ maneuvering in March 1915 to keep it from reaching the Senate floor before Congress adjourned.⁴⁵ In 1916, however, the bill gained the support of President Woodrow Wilson.⁴⁶ Wilson, who had earlier expressed his belief that such a bill would exceed Congress' authority under the Commerce Clause⁴⁷ and had maintained a cool neutrality toward the measure,⁴⁸ changed his views for political reasons. With the Progressive Party in disarray following Theodore Roosevelt's return to the Republicans, Wilson hoped to attract former Progressives to the Democratic Party by convincing them that the Democrats

exercised in enacting the pure food bill and that which would have been necessary in the case of the child labor bill is that Congress in the former is only preventing interstate commerce from being a vehicle for conveyance of something which would be injurious to people at its destination, and it might properly decline to permit the use of interstate commerce for that detrimental result. In the latter case, Congress would be using its regulative power of interstate commerce not to effect any result of interstate commerce. . . . The proposed law is to be enforced to discourage the making of articles by child labor in the State from which the articles were shipped. In other words, it seeks indirectly and by duress, to compel the States to pass a certain kind of legislation that is completely within their discretion to enact or not. . . . Such an attempt of Congress to use its power of regulating such Commerce to suppress the use of child labor in the State of shipment would be a clear usurpation of that State's rights.

WILLIAM H. TAFT, *POPULAR GOVERNMENT* 142-43 (1913).

44. WALTER I. TRATTNER, *CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA* 124-27 (1970).

45. *Id.* at 126-27. The session was nearing its end when the Senate Committee on Interstate and Foreign Commerce favorably reported the bill, H.R. 12,292, 63d Cong., 3d Sess. (1915), which had already passed the House by a 233-43 vote on February 15. S. REP. NO. 1050, 63d Cong., 3d Sess. 1-2 (1915); 52 CONG. REC. 3836, 4911 (1915). Because of the short time remaining in the session and the crowded Senate calendar, managers of the bill sought to bring it directly to the Senate floor. To do so, however, required unanimous consent, and Senator Lee Overman of North Carolina refused to consent. Three days later, on March 4, 1915, Congress adjourned. 52 CONG. REC. 5509; TRATTNER, *supra* note 44, at 126-27.

46. TRATTNER, *supra* note 44, at 129-30.

47. Wilson's position had not changed since 1908 when, as a political scientist, he had written of the Beveridge bill:

The proposed federal legislation . . . affords a striking example of a tendency to carry Congressional power over interstate commerce beyond the utmost boundaries of reasonable and honest inference. If the power to regulate commerce between the states can be stretched to include regulation of labor in mills and factories, it can be made to embrace every particular of the industrial organization and action of the country.

Id. at 121-22 (quoting WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 179 (1908)).

48. *Id.* at 125-27.

were now the leading party urging social reform.⁴⁹ Wilson called a meeting of Democratic congressional leaders, and soon thereafter, the Democratic Caucus placed the bill on its list of priority legislation.⁵⁰ The Senate passed the bill on August 8, 1916, by a 52-12 vote, with thirty-one senators abstaining,⁵¹ and on September 1, President Wilson signed the bill into law.⁵²

The victory for opponents of child labor was to prove short-lived, however. In mid-August of 1917, even before the new law was to take effect on September 1, a father, on behalf of himself and his two minor sons, filed a lawsuit in federal district court seeking an injunction against the Act's enforcement.⁵³ The district court held the Act unconstitutional,⁵⁴ and on June 3, 1918, the Supreme Court affirmed on appeal by a five-to-four vote in *Hammer v. Dagenhart*.⁵⁵

The language of the majority's opinion in *Hammer* echoed the sentiment of earlier critics of the bill. Distinguishing the Child Labor Act from earlier congressional actions under the Commerce Clause, the Court declared that Congress' regulatory authority extended only to those instances in which the act of interstate transportation of an article was necessary to the accomplishment of a harmful result.⁵⁶ In the case of child labor, the production process, not the transportation process, caused the harmful result. Therefore, the Court ruled, the child labor issue remained for the states, rather than the federal government, to regulate.⁵⁷

Congress' First Attempt: The War Power

The public and press reactions to the Court's decision in *Hammer v. Dagenhart*⁵⁸ were overwhelmingly negative.⁵⁹ The

49. *Id.* at 129-30.

50. *Id.* at 130.

51. 53 CONG. REC. 12,313 (1916).

52. TRATTNER, *supra* note 44, at 131. The House passed the bill on January 15, 1916, by a 343-46 vote. *Id.* at 128.

53. TRATTNER, *supra* note 44, at 134-35; Cushman, *supra* note 37, at 455.

54. Judge James E. Boyd decided the case from the bench; no opinion was written at the district court level. TRATTNER, *supra* note 44, at 135.

55. 247 U.S. 251, 281 (1918).

56. *Id.* at 271.

57. *Id.* at 272. Moreover, responding to the Solicitor General's argument that the unfair competition between states that employed child labor and those that did not was sufficient to justify a congressional response under the Commerce Clause, the Court declared that the Framers did not intend the clause to give Congress authority to equalize conditions that may give one state an economic advantage over others. *Id.* at 273.

58. 247 U.S. 251.

59. Bruce, *supra* note 40, at 89 (noting "the caustic if not contemptuous references in

response in Congress was no less severe, as legislators immediately began looking for a way to reverse the effects of the Court's decision.⁶⁰ After all, the Court had not held that child labor could not be regulated, or even that it could not be regulated through Federal legislation. It merely said that Congress could not regulate child labor via the Commerce Clause.⁶¹ The problem facing Congress, therefore, was one of constitutional interpretation, that is, how to employ federal power to attack child labor without running afoul of the limitations placed on federal power by the Court's reading of the Constitution.

One commentator, Andrew A. Bruce of the University of Minnesota, recommended that Congress try a direct approach to the problem: rather than attempting to discourage the use of child labor through indirect measures such as taxation or restrictions on interstate commerce, Congress should directly prohibit the employment of child labor by claiming a *parens patriae* interest in the well-being of the nation's children and the power to protect that interest under the Fourteenth Amendment:

Surely the framers of the constitution never intended that an indirect power of regulation could accomplish that which a direct action could not constitutionally accomplish, and that local self-government could be overthrown by indirection but not by direction.

Congress then, it would seem, if it should act at all in the matter, should act directly. It should take the broad position that the protection of the health and of the lives and of the morals of its citizens is as much a matter of national concern as the protection of the currency and of the flag; that the protection of the health and lives of its citizens while at home is as much within its province as their protection while abroad.⁶²

Bruce's argument, in effect, was that if an indirect approach would be constitutional, a direct approach must be as well. The

the magazines and public press to the majority that concurred" in the decision); see also TRATTNER, *supra* note 44, at 137 (noting that "[l]eaders in and out of Congress, students of the Constitution, American journalists, and most newspapers criticized the ruling" but that "[i]n the Southern textile districts the decision brought cheers and rejoicing").

60. Edward F. Waite, *The Child Labor Amendment*, 9 MINN. L. REV. 179, 182 (1925); see also 56 CONG. REC. 7692 (1918) (statement of Rep. Meyer London (Soc.-N.Y.) (declaring that "if this decision remains the law of the land it will be impossible for the National Legislature, for Congress, to cure by legislation any of the social or industrial evils which legislation in all civilized countries of the world tries to meet").

61. TRATTNER, *supra* note 44, at 136-37.

62. Bruce, *supra* note 40, at 100.

constitutionality of even an indirect approach, however, remained unproven. Moreover, although any of several indirect approaches might arguably have a basis in the text of the Constitution and Court precedents, a law directly outlawing child labor would, as Bruce admitted, require a broad new construction of the Fourteenth Amendment.⁶³ Congress never even considered seriously such a direct challenge to the Court's decision.

Several other approaches received a more favorable hearing in Congress, including proposals for a constitutional amendment and for use of the federal taxing power to curtail child labor.⁶⁴ Time was needed, however, to study the various alternatives, and in the interim, child laborers would be left without federal protection.⁶⁵

With the help of the American Federation of Labor and the approval of President Wilson, the National Child Labor Committee drafted a bill that it hoped would cover this interim period. The bill contained the same standards as the Child Labor Act previously struck down by the Court, but instead of the Commerce Clause, its authority derived from the emergency wartime powers given to the federal government during World War I.⁶⁶ The idea seemed a good one, given the constitutional vagueness concerning the extent of the war powers.⁶⁷ As one child labor foe wrote later, reflecting on the wartime child labor bill,

63. *Id.* at 99.

64. TRATTNER, *supra* note 44, at 138.

65. *Id.*

66. H.R. 12,767, 65th Cong., 2d Sess. (1918). The government also took a more limited step to reduce child labor. On July 19, 1918, the War Labor Policies Board adopted a resolution making the Secretary of Labor responsible for the enforcement of a clause, to be placed in all government contracts, which provided that government contractors would not directly or indirectly employ any child under the age of 14 years or permit any child between the ages of 14 and 16 to work more than eight hours in any one day, more than six days in any one week, or before 6 a.m. or after 7 p.m. By simply exercising its right to enter into contracts, the federal government was thus able to prohibit child labor at least with respect to government contractors—a sizable category particularly during the war—without invoking any constitutional questions. William C. Jones, *The Child Labor Decision*, 6 CAL. L. REV. 395, 416-17 (1918); see also TRATTNER, *supra* note 44, at 138 (noting that future Supreme Court Justice Felix Frankfurter was then serving as the head of the War Labor Policies Board).

67. Under Article I, § 8, Congress has the power to declare war, to raise and support armies, to maintain a navy, to make rules for the regulation of the land and naval forces, and to provide for organizing, arming, disciplining, and calling forth the militia. U.S. CONST. art. I, § 8. Commentators have interpreted this constitutional provision to give Congress wide powers during war in order to wage war effectively. James M. Hirschorn, *The Separate Community: Military Uniqueness and Serviceman's Constitutional Rights*, 62 N.C. L. REV. 177, 213 (1984).

Whatever the people at large conceive to be necessary to the national interest can be done at their instance or with their approval under the war power—though it often must be done by stretching pretty far the doctrine of implied powers, or even in defiance of the constitution itself.⁶⁸

In its wartime guise, the bill's purpose was stated as "conserving the manpower of the Nation and thereby more effectively providing for the national security and defense."⁶⁹ If passed, it would be effective until six months after the war's end.⁷⁰

The bill was doomed, however, not by constitutional infirmities but rather by poor timing.⁷¹ Before Congress could consider the measure, the war ended on November 11, 1918, and with it ended the possibility of citing the military crisis to justify federal regulation of child labor.⁷²

Although the question of whether such an approach would have succeeded remains open, the courts traditionally have shown great deference toward actions justified by arguments of military necessity, even if no such necessity actually existed.⁷³ That a wartime child labor act could have survived a court test is possible, and perhaps likely.

Congress' Second Attempt: The Taxation Power

The war's end sent congressional opponents of child labor back to the drawing board. With federal action under the commerce power declared unconstitutional and action under the war power no longer an available option, Congress turned to another of its most powerful weapons: the power to lay and collect taxes.⁷⁴

68. RAYMOND G. FULLER, *CHILD LABOR AND THE CONSTITUTION* 279 (Arno Press 1974) (1923).

69. TRATTNER, *supra* note 44, at 138-39 (quoting H.R. 12,767, 65th Cong., 2d Sess. (1918)).

70. *Id.* at 139.

71. *Id.*

72. *Id.*

73. One may find a more recent, and infamous, example of this deference in the case of *Korematsu v. United States*, 323 U.S. 214 (1944), in which the Supreme Court upheld laws requiring the internment of Americans of Japanese ancestry during World War II, citing the exigencies of war. See also *Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding Air Force regulation prohibiting the wearing of religious headgear while on duty indoors).

74. The Constitution provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8.

On November 15, 1918, only four days after the armistice, Senator Atlee Pomerene (D-Ohio) introduced an amendment to the 1918 Revenue bill to place a ten percent excise tax on the net profits of all mills, canneries, work shops, factories, manufacturing establishments, mines, or quarries employing child labor contrary to the specific standards laid down in the proposal.⁷⁵ The proposal included an exception, however, for cases in which an employer hired a child without being aware of the child's age.⁷⁶ The measure was a frank attempt to eliminate through taxation a perceived injustice that, under the Supreme Court's ruling, Congress could not abolish more directly via the commerce power.⁷⁷

The language of the tax proposal itself, and the circumstances of its passage, made clear that its purpose was to prohibit child labor, not to raise revenue.⁷⁸ From a constitutional standpoint, the issue was whether this was an allowable use of the taxing power.

The bill faced little opposition within Congress itself as opponents of federal child labor legislation, seeing the bill's political popularity, decided it would be a waste of time and money to fight its passage. Instead, they decided to bide their time and challenge the tax in the courts.⁷⁹ Some critics outside Congress, however, were quick to note the bill's constitutional shortcomings. Andrew Bruce, for example, argued that by passing such a bill, Congress would be asserting a claim that the taxing power of the federal government, via the "provide for the common Defence and general Welfare" language in Article I, Section 8 of the Constitution,⁸⁰ gave Congress the power to tax out of existence any practice of which it disapproved, and thus by indirect means to dictate the internal policies of the states. This interpretation of the clause, he argued, was flawed.⁸¹

At the time of the adoption of the Constitution, Bruce noted, the original states were jealous of one another and fearful of the

75. 56 CONG. REC. 11,560 (1918) (Sen. Pomerene proposing amendment to H.R. 12,863, 65th Cong., 2d Sess. (1918)).

76. *Id.*; see also Thomas Reed Powell, *Child Labor, Congress, and the Constitution*, 1 N.C. L. REV. 61, 69 (1922).

77. TRATTNER, *supra* note 44, at 140.

78. William A. Sutherland, *The Child Labor Cases and the Constitution*, 8 CORNELL L.Q. 338, 351 (1923).

79. TRATTNER, *supra* note 44, at 140.

80. U.S. CONST. art. I, § 8.

81. Bruce, *supra* note 40, at 101-02.

power of the new government they were creating for themselves. The distrust was such that the states insisted upon the addition of a Bill of Rights with an express statement that powers not granted to the federal government should be reserved to the states. Additionally, they requested the inclusion of a statement within the Constitution itself prohibiting Congress from levying any tax upon exports, which would interfere with the marketing of states' domestic products. Given the states' concerns, Bruce argued, they could not have intended that courts construe the language giving Congress the power to tax so as to give a temporary majority in Congress an avenue to bypass those safeguards of the states' liberties.⁸²

Instead, he suggested, the federal taxing power was intended merely as a means of raising money for the public defense and the promotion of the public welfare, not as a weapon to force the federal will upon the states.⁸³ Congress, however, claimed that its power to tax did indeed include the power to destroy.⁸⁴ This notion was not novel; Alexander Hamilton had stated a similar view in *The Federalist No. 12* when he discussed the favorable implications of taxing liquor imports.⁸⁵

Supporters of the child labor tax could also point to three recent cases that appeared to lend constitutional legitimacy to the tax plan. In *Veazie Bank v. Fenno*,⁸⁶ the Supreme Court held that the courts could not inquire into the motives of Congress in matters of taxation, nor seek to discover whether the true purpose of a tax was to destroy rather than to raise revenue.⁸⁷

82. *Id.* at 102.

83. *Id.*

84. TRATTNER, *supra* note 44, at 139; cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (Marshall, C.J.) (stating that "the power to tax involves the power to destroy").

85. THE FEDERALIST No. 12, at 75 (Alexander Hamilton) (Mod. Libr. 1937):

The single article of ardent spirits, under federal regulation, might be made to furnish a considerable revenue. Upon a ratio to the importation into this State, the whole quantity imported into the United States may be estimated at four millions of gallons; which, at a shilling per gallon, would produce two hundred thousand pounds. That article would well bear this rate of duty; and if it should tend to diminish the consumption of it, such an effect would be equally favorable to the agriculture, to the economy, to the morals, and to the health of the society. There is, perhaps, nothing so much a subject of national extravagance as these spirits.

86. 75 U.S. (8 Wall.) 533 (1869) (upholding a tax of 10% on state bank notes).

87. *Id.* at 548. Although this may be true, Bruce argued, "honorable men should hardly legislate upon this theory." Bruce, *supra* note 40, at 103.

Similarly, in *McCray v. United States*,⁸⁸ the Supreme Court held that courts could not control or limit the discretion of Congress in the exercise of its constitutional power to levy excise taxes solely because the former might deem the incidence of the tax oppressive or even destructive.⁸⁹ Finally, in *United States v. Doremus*,⁹⁰ the Court held that a tax was not invalid merely because another motive other than taxation, which was not shown on the face of the act, might have contributed to its passage.⁹¹

Although the constitutionality of the Child Labor Tax bill may have been debatable, Congress clearly had some foundation in the case law upon which to base the assertion that it could use the taxation power in such a way. In debating the measure, Congress had carefully studied Court precedents in attempting to create a bill acceptable to the Court.⁹² The measure passed as Title XII of the Revenue Act of 1918 and was signed into law on February 24, 1919.⁹³

Child labor proponents, after deciding not to participate in the congressional debates, were quick to challenge the new measure in the courts.⁹⁴ This time congressional proponents of the law were confident of a victory in the Supreme Court. After all, they had discharged their duties with care, seriously deliberating in search of a means of eliminating child labor without running afoul of the Constitution, and painstakingly drafting a bill which they felt would do just that. Senator William Kenyon, one of the drafters of the tax law, remarked:

"I have absolute faith that the Supreme Court will sustain the law. We studied every phase of the case when we drafted the

88. 195 U.S. 27 (1904) (upholding a tax on oleomargarine that hampered manufacturers' ability to compete with butter producers).

89. *Id.* at 63-64; see also *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1866). In these cases, the Court found:

[T]he power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.

Id.

90. 249 U.S. 86 (1919) (upholding the Harrison Narcotic Drug Act of 1914, 38 Stat. 785, which imposed a special tax on the importation, manufacture and sale or gift of opium or coca leaves or their compounds or derivatives).

91. *Id.* at 93-94.

92. See generally 57 CONG. REC. 609-21 (1918) (final Senate consideration of amendment to Revenue bill); *Id.* at 3029-33 (House debate on amendment to Revenue bill).

93. Revenue Act of 1918, Pub. L. No. 65-254, § 1200, ch. 18, 40 Stat. 1057, 1138-40 (1919).

94. See *Drexel Furniture Co. v. Bailey*, 276 F. 452 (W.D.N.C. 1921); *George v. Bailey*, 274 F. 639 (W.D.N.C. 1921), *aff'd*, 259 U.S. 20 (1922).

section, including the point raised by Judge Boyd [the district judge who struck down the tax], that it was an invasion of the rights of the state. I do not believe that the Supreme Court will rule against it. If it does, it will have to go back on every one of its own decisions regarding the taxing power of the United States.”⁹⁵

The Supreme Court, however, disagreed with the Senator’s analysis when it reviewed the case of *Bailey v. Drexel Furniture Co.*,⁹⁶ commonly referred to as the *Child Labor Tax Case*.⁹⁷ Writing the Court’s opinion was Chief Justice Taft, who had earlier expressed his disapproval of indirect federal actions that would intrude on states’ rights.⁹⁸

Taft first conceded that the Court must construe the law and interpret the intent of Congress from the language of the Act alone, not from other sources.⁹⁹ Even that method of construction could not find the tax law constitutional, however, because the measure was clearly intended as a penalty rather than as a means of generating revenue.¹⁰⁰

The Court noted three major features of the Act leading to that conclusion:

(1) The amount of the tax was not based on the extent to which an employer used child labor. The percentage tax paid by a business that employed one child for one day would be the same as that paid by a business employing 500 children for the entire year;

(2) An employer who was not aware that a worker was within the specified age limit did not pay; only those who knowingly employed child labor owed the tax. “Scienter,” Taft noted, “is associated with penalties not with taxes;”¹⁰¹ and

(3) The employers’ factories were subject to inspection not only by the regular taxing officials of the Treasury Department, but also by officials of the Labor Department, whose ordinary function was protecting the welfare of workers.¹⁰²

95. TRATTNER, *supra* note 44, at 141 (quoting Press Release, National Child Labor Comm. Papers, Manuscript Division, Library of Congress, Washington, D.C. (May 8, 1919)).

96. *Child Labor Tax Case*, 259 U.S. 20, 20 n.1 (1922).

97. *Id.* at 20.

98. *See supra* note 43.

99. *Child Labor Tax Case*, 259 U.S. at 36.

100. *Id.* at 36-37.

101. *Id.*

102. *Id.* at 37.

"In the light of these features of the act," Taft wrote, "a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable."¹⁰³ Although it struck down the child labor tax, the Supreme Court at the same time acknowledged its willingness, in at least some cases, to show deference to congressional interpretations of the Constitution:

Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.¹⁰⁴

What, then, had Congress done wrong in drafting its bill? Apparently, its error was not in the method it chose to attack the Court's *Hammer* ruling, but was rather in not being suffi-

103. *Id.*

104. *Id.* at 37-38. Chief Justice Taft preceded that statement, however, with a strong statement concerning the Court's duty to act as a check on congressional action:

It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the States. We can not avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. In the maintenance of local self government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

Id. at 37.

ciently subtle in pursuing its motives. The Court's opinion seemed to suggest that the Justices were willing to forego close examination of the legislative history underlying a tax statute,¹⁰⁵ but when "Congress in the name of a tax which *on the face of the act* is a penalty seeks to do the same thing [that it could not accomplish through a direct penalty], . . . the effort must be equally futile."¹⁰⁶ Here, the inclusion in the Act of the provisions criticized in Chief Justice Taft's opinion made it clear to the Court, even without an examination of legislative history, that Congress did not intend the Act as an ordinary revenue-producing tax.

Arguably, Congress could have passed a new child labor tax following the Court's decision in the *Child Labor Tax Case* that would have addressed the Court's concerns.¹⁰⁷ Such a tax, for example, might have required an employer to pay a fixed amount for each hour of child labor employed, provided no exception for unknowing employment of child labor, and left enforcement solely in the hands of the Treasury. Such a law, however, would not have fully accomplished Congress' purpose. Although such a measure might have discouraged businesses from using child labor on a large scale, employers using child labor for only a small number of hours—small businesses or seasonal employers, such as canneries—might have continued to find it profitable to hire children. In some parts of the country, the difference in labor costs between child and adult workers might have been so great as to exceed the amount of the excise tax. In any case, Congress declined to pursue such an option, choosing instead to follow a course that appeared certain to bring favorable and complete results: a constitutional amendment.

Congress' Third Attempt: A Constitutional Amendment

Congressmen had already proposed amendments several times during their previous consideration of child labor measures, but the defeat of the child labor tax law gave the prospect of an amendment new life. Congress now appeared to have no better

105. *Id.* at 36 ("We must construe the law and interpret the intent and meaning of Congress from the language of the act.").

106. *Id.* at 39 (emphasis added).

107. *Cf.* Herman T. Reiling, *Child Labor and Federal Taxation*, 13 TAX MAG. 584 (1935) (arguing that any constitutional attempt to regulate child labor would rest on "exceedingly narrow" grounds).

option.¹⁰⁸ The difficulty with a constitutional amendment was that Congress could not act alone. To become part of the Constitution, an amendment required not only a two-thirds vote of both houses of Congress, but also ratification by three-quarters of the states.¹⁰⁹

At least one member of Congress argued that a simple amendment empowering Congress to outlaw child labor would not be sufficient. What was needed, rather, was an overhaul of the entire system of enacting constitutional amendments to give Congress greater power to respond via amendment to situations it perceived as requiring federal action.¹¹⁰ Others, however, argued that Congress was often unwilling to act as an interpreter of the Constitution, preferring to pass legislation without serious consideration of its constitutionality and leave constitutional anal-

108. See, e.g., 64 CONG. REC. 5345 (1923). Senator Joseph McCormick (R-Ind.) stated, We have no recourse but to amend the Constitution for the sake of the children who otherwise will be driven into the mills of the country to their own injury and so to the hurt of their more fortunate and happier fellows. . . . When we have done our work it will not be possible anywhere in the United States, for a pittance, to buy or sell the birthright of any child in this land.

Id.

109. U.S. CONST. art. V. At the time Congress adopted the amendment, it needed 36 states to ratify.

110. Representative London proposed a constitutional amendment process similar to that of the New York State Constitution, which required an amendment to be approved by two consecutive legislatures, then submitted for a referendum:

It is impossible to reconcile democratic institutions with an institution which permits a bare majority of one or two of a court consisting of nine members to override the will of the elected representatives of the people.

. . . I share the opinion of those who believe that it was never intended that the Supreme Court should have the power to declare acts of Congress unconstitutional. Whatever the situation may be in that regard, the important thing before us today is to make the fundamental law of the land more flexible, more adapted to present conditions. . . .

[Even if a specific child labor amendment were to be adopted, t]he court will continue to nullify [other social legislation enacted] by Congress and will prevent it from giving legislative expression to the wishes of the people. The stupendous economic and social changes of modern times emphasize the necessity of harmonizing the legal structure of society with its industrial needs.

The remedy lies in the direction of making the amendment provision of the Constitution more elastic, so that the Constitution should be a living organism, growing and expanding with the people.

. . . .

The present cumbersome method of changing the Constitution should be replaced with a simple and direct appeal to the people through a referendum, either upon the initiative of Congress or upon the initiative of a part of the people.

62 CONG. REC. 8773 (1922).

ysis to the courts.¹¹¹ As such, Congress should not be trusted with greater power to tamper with the Constitution itself.

Most, however, were willing to leave for future consideration a broad amendment to meet the needs of the modern age, and to settle instead for an amendment devoted solely to the child labor problem.¹¹² The amendment read:

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.
Section 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.¹¹³

The proposal passed the House by a 297-69 vote on April 26, 1924, but not before a lively debate over whether federal control of child labor was preferable to state control.¹¹⁴ Senate debate

111. See, for example, the following discussion between Representatives Andrew J. Montague (D-Va.), George Huddleston (D-Ala.), and Meyer London:

Mr. MONTAGUE. Is it not the tendency of the times for members in legislative bodies, State and National, to pay less and less regard to the Constitution, and to pass all questions of constitutionality to the courts, the members of these legislative bodies thereby relieving themselves of their obligation, and impairing the highest and most solemn political morality? The Congress thus coerces the courts to pass upon such questions.

Mr. LONDON. But that is a most cowardly thing.

Mr. MONTAGUE. Of course it is. Congress is more blameworthy than the courts.

Mr. LONDON. The legislator who deliberately votes for a law knowing that the Supreme Court will declare it unconstitutional is false to himself and false to his oath.

Mr. HUDDLESTON. But is it not true that under our present system there is a great tendency to encourage the legislatures to ignore their obligations to the Constitution and to put the whole question up to the courts?

Mr. LONDON. Oh, when you permit the existence of an institution that is out of tune with the demands of the times the institution becomes a dead letter or an obstruction, and despite the prohibition of contempt it invites contempt. If it should be easier to amend the Constitution, it will become impossible for the legislator to evade responsibility and to throw the blame for defeating the will of the people upon the courts.

Id.

112. See TRATTNER, *supra* note 44, at 166.

113. H.J. Res. 184, 68th Cong., 1st Sess., 43 Stat. 670 (1924). Before this language was finally adopted, Congress rejected 23 other suggestions for the amendment's wording. In all, senators and representatives from 14 different states offered 40 amendment proposals in the three years after the *Child Labor Tax Case* decision. Charles C. Burlingham, *The Need for a Federal Child Labor Amendment*, 21 A.B.A. J. 214, 215 (1935).

114. 65 CONG. REC. 7295 (1924).

was no less active, filling nearly 100 pages of the *Congressional Record* with speeches, evidence, and debate over the bill.¹¹⁵ On June 2, the Senate passed the resolution by a 61-23 vote—just five favorable votes more than the necessary two-thirds.¹¹⁶

Supporters of the amendment drafted it with care to cover every foreseeable contingency. They used the term "persons under eighteen years of age" rather than "children" because previous court cases had defined "child" in differing ways and use of the word may have caused uncertainty in interpreting the amendment.¹¹⁷ Eighteen was chosen as the age limit rather than sixteen, not because Congress wished to prohibit all employment up to that age, but rather to enable Congress to regulate the employment of older children in particularly hazardous occupations.¹¹⁸ Finally, the amendment used the word "labor" rather than "employment" because "to state it thus avoids all possibility of the shufflings and evasions which might follow the adoption of the latter word."¹¹⁹

Although the final wording may have been popular with Congress, which stood to gain increased power from the amendment, it did not sit well with the state legislatures that would correspondingly sacrifice some of their autonomy to Congress if they voted in favor of ratification. In particular, critics attacked the choice of the word "labor," interpreting it to give Congress the power to prohibit chores performed by children at home rather than merely industrial employment.¹²⁰ Although supporters of the

115. *Id.* at 9597-98, 9600-03, 9858-64, 9866-68, 9991-10,009, 10,073-126, 10,128-29, 10,139-42.

116. *Id.* at 10,142. Fourteen of the 23 negative votes came from southern senators.

117. S. REP. NO. 406, 68th Cong., 1st Sess. 16 (1924).

118. *Id.*

119. *Id.* at 15; see also Burlingham, *supra* note 113, at 216 ("In industrial home work, in the beet fields, frequently in canneries children who work are not employed in the technical sense of the term . . . but they labor from sun-up to sun-down.").

120. See statement of Rep. Christian W. Ramsmeier (R-Iowa), who voted for the amendment:

Under the proposed amendment Congress will have the power to regulate the labor of a boy under the direction of his father as well as the employment of the same boy when he works for a neighbor or stranger. . . . Congress will have the power to "limit," "regulate" and "prohibit" the labor of girls under 18 years of age in the homes and of boys under 18 years of age on the farms.

65 CONG. REC. 7290 (1924).

It should be noted that Congress, prior to adopting the amendment, had been given an opportunity to address such concerns. Two additions had been proposed to the amendment:

(1) "But no law enacted under this article shall affect in any way the labor of any child

amendment claimed that Congress had no such intent, opponents responded that regardless of present intent, Congress might eventually exercise the full authority granted by the amendment.¹²¹ Some went so far as to allege that the amendment was a Socialist- or Communist-inspired plot to strip states and parents of their authority.¹²²

Due to concerns such as those mentioned above, the amendment proposal quickly bogged down once it reached the state legislatures. Loath to sacrifice a portion of their authority to the federal government, thirteen states—enough to defeat ratification—had affirmatively rejected the amendment by March 5, 1925.¹²³ Once again, by its refusal to settle for a measure that would accomplish less than its entire goal, Congress had crafted a measure that could not win acceptance—this time by the states, rather than by the Court as had been the case with the tax law. By 1937, only twenty-eight of the requisite thirty-six states had ratified the amendment. Debate began over whether the 1924 amendment could still be ratified if some states reversed their positions, because the amendment had been submitted to the states more than thirteen years earlier.¹²⁴

or children on the farm of the parent or parents." *Id.* at 7293.

(2) "That no law shall control the labor of any child in the house, or business, or on the premises connected therewith, of the parent or parents." *Id.* at 7292.

Both additions, however, were rejected. *Id.* at 7292-93.

121. A.C. Campbell, *The Child Labor Amendment*, 60 AM. L. REV. 254, 260-61 (1926) ("It would be utter rashness for the country to institute a revolutionary change in government on the plea that we should have confidence in the wisdom and prudence of federal legislators. . . . We do not issue blank signed checks to others.") (quoting the Chairman of the National Comm. for the Rejection of the Twentieth Amendment, *quoted in* 9 CONST. REV. 44, 51 (1925)).

122. Representative Victor Berger, a Socialist congressman who supported the amendment, may have fostered this idea by telling Congress, "It is a socialist amendment and that is why I am for it." 65 CONG. REC. 7311 (1924) (statement of Rep. John J. McSwain (D-S.C.)) (quoting Berger (Soc.-Wis.)); *see also id.* at 10,007 (1924) (statement of Sen. William H. King (D-Utah)):

In conversation with one of the leading Bolsheviks in the city of Moscow, . . . I was remonstrating with him about the scheme of the Bolsheviks to have the state take charge of the children. "Why", he said, "you are coming to that" Then he said, "A number of socialists in the United States . . . are back of the movement to amend your Constitution . . . and you will transfer to the Federal Government the power which the Bolshevik Government is asserting now over the young people of the state."

Id.

123. Comment, *Child Labor Legislation—Its Past, Present and Future*, 7 FORDHAM L. REV. 219, 221-22 (1938). The Supreme Court declined to answer the time limit question in the 1939 case of *Coleman v. Miller*, 307 U.S. 433, 452 (1939).

124. Emerson S. Sturdevant et al., Note, *What is the Status of the Child Labor*

The Fourth Time is a Charm: A Familiar Approach

By 1937, however, perhaps the more pertinent question was whether the amendment was still necessary. The composition and attitude of the Supreme Court had undergone a major reformation since the *Hammer* decision in 1918, and many observers believed the time was ripe for a new child labor law grounded in the Commerce Clause.¹²⁵

Despite the failure of his infamous "Court-packing" plan,¹²⁶ President Franklin D. Roosevelt succeeded, beginning in 1937, in

Amendment?, 26 GEO. L.J. 107, 112-18 (1937). During the interim, the federal government had implemented some restrictions on child labor through the actions of the National Recovery Administration (NRA), established under the National Industrial Recovery Act of 1933, Pub. L. No. 67, 48 Stat. 195 (1933). Because of the relationship among adult unemployment, low wages during the Depression, and child labor, the NRA issued codes with a 16-year minimum working age in many industries and an 18-year minimum in particularly hazardous occupations such as mining, logging, and sawmill operations. By the fall of 1934, most American industries were operating under such restrictions. All such restrictions were removed in May 1935, however, when the Supreme Court declared the NRA unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

125. See, e.g., Fred L. Kuhlmann, Note, *Child Labor Amendment or Alternative Legislation?*, 22 WASH. U. L.Q. 401, 401-06 (1937); Joseph B. Shapero, Note, *The Proposed Child Labor Amendment*, 13 NOTRE DAME L. REV. 59, 62-63 (1937); James Barclay Smith, Note, *A Child Labor Amendment is Unnecessary*, 27 CAL. L. REV. 15, 17-28 (1938); Comment, *supra* note 123, at 233-35.

126. Angered by Supreme Court rulings striking down key New Deal legislation, see, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down Bituminous Coal Conservation Act of 1935); *United States v. Butler*, 297 U.S. 1 (1936) (striking down Agricultural Adjustment Act of 1933); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking-down NRA); and *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (striking down Railroad Retirement Act of 1934), Roosevelt proposed a bill to permit the President, with Senate approval, to appoint an additional judge or justice to any federal court when one of the court's members reached the age of 70 and did not resign or retire. Roosevelt claimed the proposal was intended to help the Supreme Court handle its workload, but this explanation was somewhat disingenuous—six Supreme Court Justices were then over 70. By adding six Justices, even if the older Justices declined to resign, Roosevelt could have turned his string of five-to-four defeats into ten-to-five victories. H.R. DOC. NO. 142, 75th Cong., 1st Sess. 9-11 (1937), reprinted in 81 CONG. REC. 877, 893 (1937) (citing Roosevelt's message to Congress concerning reorganization of the judiciary); see also C. HINMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES* 8-9 (1948) (describing Roosevelt's explanation of his plan as "indirect and maladroit" and discussing the controversy it engendered).

The Senate Judiciary Committee sternly rejected Roosevelt's proposal, denouncing the bill as "a needless, futile, and utterly dangerous abandonment of constitutional principle[sic]." SENATE COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 711, 75th Cong., 1st Sess. 23 (1937). Although Roosevelt did not achieve his complete goal legislatively, his actions were not without effect. Arguably, the President's threat of political retaliation against the Court helped induce Justice Owen J. Roberts to change his view of the Commerce Clause and to look more favorably upon New Deal

rebuilding the Court with Justices more likely to favor a wide-reaching commerce power.¹²⁷ The new Justices' outlook began to make itself apparent immediately in decisions expanding the federal government's power. One case in particular, *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co.*,¹²⁸ in which the Court upheld a federal statute barring the shipment of goods made with convict labor into states that had laws against the sale of such goods,¹²⁹ suggested that the Court might be ready to reconsider a use of the commerce power to restrict child labor.¹³⁰

The *Kentucky Whip* case, however, left opponents of child labor with a problem. The statute upheld in that case had barred shipments of convict-made goods only into states with laws prohibiting their sale. Thus, a comparable child labor bill would require cooperation of the states in outlawing the sale of goods made with child labor.¹³¹ The bill that eventually passed, however, ignored this problem—constitutionally, it was a twin of the Act the Court had struck down in *Hammer*.¹³² Congress again was swinging for the fences.

That bill, the Fair Labor Standards bill,¹³³ was actually a hybrid. In proposing the measure, President Roosevelt combined

legislation (the so-called "switch in time that saved nine," a reference first made in a letter from Edwin Corwin to Attorney General Homer Cummings (May 19, 1937) (available in Corwin Manuscripts, Princeton University), *quoted in* GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 533 (10th ed. 1980)). It is equally possible, however, that Roberts' "switch" was motivated simply by the popularity of the New Deal. Whatever its motivation, it cleared the way for far greater federal power relative to the states.

127. For Roosevelt, time accomplished what legislation could not—within four years, resignations and retirements gave him the opportunity to appoint Justices Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, James Byrnes, and Robert Jackson. Roosevelt also elevated Harlan Stone from Associate to Chief Justice. Leaving the Court were Charles E. Hughes, James C. McReynolds, Louis D. Brandeis, Pierce Butler, George Sutherland, Benjamin N. Cardozo, and Willis Van Devanter.

128. 299 U.S. 334 (1937).

129. Ashhurst-Summers Act, ch. 412, Pub. L. No. 74-215, 49 Stat. 494 (1935) (current version at 18 U.S.C. §§ 1761-1762 (1988)).

130. In seeking to harmonize *Kentucky Whip* with *Hammer*, however, the Court restated its opinion that the evil to be corrected by Commerce Clause legislation must be accomplished by the completion of interstate shipment. *Kentucky Whip*, 299 U.S. at 350.

131. Such a bill, the Wheeler-Johnson bill, was in fact introduced in March, 1937. S. 2226, 75th Cong., 1st Sess. (1937), in *To Regulate the Products of Child Labor: Hearings Before the Senate Comm. on Interstate Commerce*, 75th Cong., 1st Sess. 4-5 (1937).

132. Compare Fair Labor Standards bill, ch. 676, Pub. L. No. 75-718, 52 Stat 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-219, 557 (1988)) with Act of Sept. 1, 1916, ch. 432, 39 Stat. 675 (1916).

133. Also referred to as the Black-Connery Wages and Hours bill, S. 2475, 75th Cong., 1st Sess. (1937); H.R. 7200, 75th Cong., 1st Sess. (1937).

child labor regulations with his proposals for minimum wage and maximum hours legislation, possibly believing that such a combined measure would get through Congress more easily. As one legislator noted, the child labor provisions were added as a sweetener "because it was desired to say to Senators, 'When you vote against this bill you are also voting against the prohibition of child labor.'"¹³⁴

As passed, the Fair Labor Standards Act's child labor provisions prohibited the shipment in interstate commerce of goods made at a location employing child labor within thirty days prior to shipment. As such, the provisions echoed the original Keating-Owen Child Labor Law,¹³⁵ making the Act a direct challenge to *Hammer*.

The Court considered the constitutionality of the Act in *United States v. Darby*.¹³⁶ In upholding the Act, the Supreme Court did not attempt to reconcile its decision with *Hammer* as it had in *Kentucky Whip*. Instead, the unanimous Court overruled *Hammer*, saying, "The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution."¹³⁷ The Court added:

The conclusion is inescapable that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.¹³⁸

The Court paid no heed to the Tenth Amendment warning that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹³⁹ The Amendment, the Court said, is nothing more than "a truism that all is retained

134. TRATNER, *supra* note 44, at 203 (quoting Jeremy P. Felt, *The Child Labor Provisions of the Fair Labor Standards Act* 9 (Apr. 20, 1968) (paper delivered at the Annual Meeting of the Organization of American Historians)).

135. See *supra* notes 36-38 and accompanying text.

136. 312 U.S. 100 (1941).

137. *Id.* at 116.

138. *Id.* at 116-17.

139. U.S. CONST. amend. X.

which has not been surrendered.”¹⁴⁰ The Court held that the Amendment has little value in defining the relationship between the federal government and the states, that it was added only to allay the states’ fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.¹⁴¹

Analysis of Congress’ Efforts

After more than twenty years, Congress finally crafted a “constitutional” federal regulation of child labor that was, in all important respects, identical to its initial “unconstitutional” effort. The changes in the interim that made the final statute more acceptable than the first were not congressional changes in constitutional interpretation, wording, or behavior, but rather jurisprudential changes in the Court itself. Congress’ triumph was not due to its mastery of constitutional thought or its ability to nimbly sidestep the Court’s objections, but rather to its persistence, like that of a punch-drunk fighter who keeps coming back for more until his more powerful opponent dies of old age and is carried from the ring.

Nonetheless, Congress in the end had successfully challenged and reversed a Supreme Court decision of which it disapproved and, in doing so, had won a new interpretation of the Commerce Clause that greatly enhanced the power of the federal government relative to the states. Congress also learned some lessons regarding approaches to challenging the Court that do *not* work.

Clearly, Congress could not openly express its intent, as shown by the failure of the child labor tax. The Court showed it was willing to wink at Congress’ possible behind-the-scenes motives, but a bill that showed on its face an intent to overturn a recent Court ruling was unlikely to meet with success. Such a statute, showing disrespect for the Court, which had made the prior decision,¹⁴² perhaps treaded too close to the Court’s later-enun-

140. *Darby*, 312 U.S. at 124.

141. *Id.* at 123-24. The Court chose to ignore the possibility that if the amendment succeeded in allaying the states’ fears, the states in ratifying it may have intended it to have some practical protective value.

142. See, for example, the language of the defendant’s argument in the Child Labor Tax Case, 259 U.S. 20, 28-29 (1922), which apparently fell upon fertile ground:

Notwithstanding this solemn decision by this court [in *Hammer*], Congress in its enactment of the Federal Revenue Act of 1913, the consideration of which began soon after the decision in *Hammer v. Dagenhart*, prescribed

ciated view of its role as the supreme interpreter of the Constitution. Although Congress used great care in attempting to find a different constitutional basis for its actions than the one the Court had rejected in *Hammer*, the final product of that interpretation was doomed to failure.

Similarly, in the case of the Child Labor Amendment to the Constitution, Congress again showed too much of its hand on the face of the measure. Distrusting the state legislatures to act in a manner it deemed proper, Congress wanted to fashion for itself the broadest possible powers so that it could deal with any "evasion" by state legislatures or individuals. In sowing distrust, however, Congress reaped distrust in return. A sufficient number of states remained unsure of Congress' intentions, or its willingness to stay within the limitations promised in Congress' statements but not in its amendment proposal. Congress asked the states for a "blank check"; the states refused to sign it.

Civil Rights Act of 1964

The Initial Decision

Congress' enactment of the Civil Rights Act of 1964,¹⁴³ like its earlier attempts to reverse *Hammer v. Dagenhart*,¹⁴⁴ was an action that appeared to conflict with prevailing Supreme Court constitutional interpretation. One major difference existed, however, between the two situations. Whereas Congress had begun almost

precisely the same minimum ages and the same working hours which it had prescribed in the statute of 1916, and provided that the employer operating a mine, quarry, mill, cannery or factory, who saw fit to disregard the will of Congress in his employment of children, should, instead of having his goods shut out of interstate commerce, as the statute of 1916 had provided, be subjected to a so-called tax of ten per cent on all the profits of his business additional to all other taxes.

It needs no reference to the debates to ascertain the purpose of Congress in this enactment, and the direct effect of such enactment—if it is to have validity and effect at all. If recourse to the debates were necessary or desirable, it shows the frankest and clearest expression of the congressional will and purpose.

It does not consist with the dignity that should characterize arguments in this court to discuss, as if it were an uncertain thing, the purpose and effect of this statute. Of course, it is not a revenue statute, and of course it is an attempt to impose upon all the citizens in all the States the congressional will

143. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C. (1988)).

144. 247 U.S. 251 (1918).

immediately to look for responses to the Court's child labor decision, the Civil Rights Act followed the Court decision it "overruled" by more than three-quarters of a century.

Congress passed its first attempt at a civil rights measure soon after the end of the War Between the States: the Civil Rights or Enforcement Act of April 9, 1866.¹⁴⁵ That Act was followed by the Slave Kidnaping Act,¹⁴⁶ the Peonage Abolition Act of March 2, 1867,¹⁴⁷ the Act of May 31, 1870,¹⁴⁸ and the Anti-Lynching Act of April 20, 1871.¹⁴⁹ Although all these acts dealt with civil rights and related issues, none dealt with the problem of eliminating discrimination in public accommodations.¹⁵⁰ The Civil Rights Act of March 1, 1875,¹⁵¹ first addressed that issue, making it unlawful to deny a person the enjoyment of accommodations at inns, on public transportation, in theaters, or at similar facilities on the basis of race.¹⁵² The Act was based on

145. Ch. 31, 14 Stat. 27 (1866) (current version at 42 U.S.C. §§ 1982, 1987-1992 (1988)) (guaranteeing all people equal property rights).

146. Ch. 86, 14 Stat. 50 (1866) (prohibiting kidnapping or enticing persons to be sold into slavery).

147. Ch. 187, 14 Stat. 546 (1867) (codified as amended at 42 U.S.C. § 1994 (1988)):

[T]he holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful, and the same is hereby declared to be unlawful, and the same is hereby abolished and forever prohibited . . . in any . . . Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages . . . of any . . . Territory or State . . ., which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, be, and the same are hereby, declared null and void. . . .

148. Ch. 114, §§ 1-22, 16 Stat. 140, 141, 144 (1870) (current version at 42 U.S.C. §§ 1971, 1987-1991 (1988)) (providing criminal sanctions for violations of federal rights).

149. Also referred to as the "Ku Klux Klan Act," Ch. 22, 17 Stat. 13 (1871) (current version at 42 U.S.C. §§ 1983, 1985-1986 (1988)) (providing a federal remedy for persons injured due to attacks or other civil rights violations by the Klan and similar groups).

150. For a general discussion of post-Civil War civil rights legislation, see Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323-36 (1952).

151. Ch. 114, 18 Stat. 335 (1875) (§§ 1-2 declared unconstitutional in the Civil Rights Cases, 109 U.S. 3 (1883); §§ 3-4 repealed, Ch. 645, § 21, 62 Stat. 862 (1948); § 5 eliminated, see 42 U.S.C. § 1984 (1988)).

152. The Act stated, in pertinent part:

That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

That any person who shall violate the foregoing section by denying to any

the Fourteenth Amendment, one of the newly-minted "Civil War Amendments" to the Constitution, which provides in part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" ¹⁵³

Although the 1875 Act was certainly morally correct, and perhaps legally correct as well, it was ahead of its time insofar as its likelihood of surviving a constitutional challenge. In the *Civil Rights Cases*,¹⁵⁴ the Court struck down the Act, holding that the Fourteenth Amendment prohibits only state action, not private action.¹⁵⁵ The Amendment therefore did not give the federal government the power to pass such a law; only the states could do so.¹⁵⁶

Congress Responds: A Constitutional Circumvention

Following the passage of the ill-fated Civil Rights Act of 1875, eighty-two years passed before Congress again enacted major legislation in the civil rights field.¹⁵⁷ Moreover, not until 1963 did a call come for a new law to prevent discrimination in public accommodations.¹⁵⁸ In its final form, the Civil Rights Act of 1964

citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated

Id. §§ 1-2, 18 Stat. at 336.

153. U.S. CONST. amend. XIV, § 1.

154. 109 U.S. 3 (1883).

155. *Id.* at 11. The Court also held that "slavery," as outlawed in the Thirteenth Amendment, did not encompass discrimination in general. *Id.* at 24.

156. "It should be noted that [the Supreme Court's decision in the *Civil Rights Cases*] was handed down 10 years before the adoption of State laws, statutes, or ordinances requiring segregation. . . . [I]n 1885 a Negro could use railroad, dining, and saloon facilities without discrimination in the Carolinas, Virginia, and Georgia." S. REP. NO. 872, 88th Cong., 2d Sess. 10 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2364-65. Louisiana and Alabama did not repeal statutes prohibiting discrimination in certain public accommodations until 1954 and 1959, respectively. *Id.*

157. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.), followed three years later by the Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 18 U.S.C., 20 U.S.C. and 42 U.S.C.).

158. The call came from President John F. Kennedy who, on June 19, 1963, sent the Congress a proposed bill

to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in . . . public accommodations through the exercise by Congress of the powers conferred upon it . . . [.] to enforce the

contained provisions similar to those struck down in the *Civil Rights Cases*. The provisions began in section 201(a) of the Act, which provided: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."¹⁵⁹ The definition encompassed inns, hotels, motels, restaurants, motion picture houses, and any establishment the operations of which affected commerce¹⁶⁰ or the segregation of which was supported by state action.¹⁶¹

Both the House and Senate committees conducted extensive hearings on President John F. Kennedy's proposal. In the Senate, the Commerce Committee held twenty-three separate sessions to consider the public accommodations provisions of Senate bill 1732,¹⁶² reviewing statements from forty witnesses, including government officials,¹⁶³ religious leaders,¹⁶⁴ and oth-

provisions of the fourteenth and fifteenth amendments, to regulate commerce among the several States, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution.

H.R. Doc. No. 124, 88th Cong., 1st Sess. 14 (1963) (containing President Kennedy's message to Congress regarding the bill).

Kennedy's proposals were introduced in the House as H.R. 7152, 88th Cong., 1st Sess. (1963), and in the Senate as two separate bills, S. 1731, 88th Cong., 1st Sess. (1963), containing the entire administration proposal, and S. 1732, 88th Cong., 1st Sess. (1963), dealing solely with public accommodations. The Senate Judiciary Committee conducted hearings on S. 1731, while the Senate Committee on Commerce conducted hearings on S. 1732. The House Judiciary Committee conducted hearings on the House measure.

159. Pub. L. No. 88-352, § 201(a), 78 Stat. 241, 243 (1964) (codified as amended at 42 U.S.C. § 2000a(a) (1988)).

160. The Act defined the following establishments as "affecting commerce": (1) inns, hotels, motels, etc., providing lodging to transient guests, other than small guest houses; (2) restaurants, cafeterias, etc., serving interstate travellers, or offering, as a substantial portion of the food they serve or the products they sell, items that have "moved in commerce"; and (3) theaters, concert halls, sports arenas, etc., customarily presenting films, performances, athletic teams, or other entertainment which "move in commerce."

Id. § 201(c), 78 Stat. at 243 (codified as amended at 42 U.S.C. § 2000a(c)).

161. *Id.* §§ 201-207, 78 Stat. at 243-46 (codified as amended at 42 U.S.C. § 2000a).

162. *Civil Rights - Public Accommodations: Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong., 1st Sess. (1963).

163. Among them were United States Attorney General Robert Kennedy, Secretary of State Dean Rusk, Secretary of Labor Willard Wirtz, Assistant Attorney General for Civil Rights Burke Marshall, and the governors of South Carolina, Georgia, Florida, Alabama, and Mississippi. See S. REP. NO. 872, *supra* note 156, at 11-12, reprinted in 1964 U.S.C.C.A.N. at 2366.

164. Religious leaders included Dr. Eugene Carson Blake of the National Council of Churches, Rabbi Irwin Blank of the Synagogue Council of America, and Father John F. Cronin of the National Catholic Welfare Conference. *Id.*

ers.¹⁶⁵ The House Judiciary Committee was equally thorough, with one subcommittee spending twenty-two days in hearings and an additional seventeen days in executive session.¹⁶⁶

Constitutionally, the principal debate concerned whether the bill would be based on the Fourteenth Amendment, placing it squarely in opposition to the *Civil Rights Cases*, or on some other ground, such as the increasingly expansive commerce power.¹⁶⁷ That concern was particularly apparent in the hearings before the Senate Commerce Committee on Senate bill 1732, during which several senators expressed their concern that by basing its action on the Commerce Clause, Congress would be "stretching the Constitution" to allow federal control over noneconomic areas more properly left in state hands.¹⁶⁸ Others favored the Fourteenth Amendment not because of concern for states' rights, but rather because they believed the Fourteenth Amendment's lofty language, speaking of equal protection of the law, was more suitable to Congress' purpose.¹⁶⁹ As one Senator noted,

165. For example, NAACP Executive Secretary Roy Wilkins, NFL Commissioner Peter Rozelle, and Baseball Commissioner Ford Frick. *Id.*

166. H.R. REP. NO. 914, 88th Cong., 1st Sess. 17 (1964), *reprinted in* 1964 U.S.C.A.N. 2391, 2392.

167. As proposed by President Kennedy, the bill contained references to both grounds, but a commerce power focus predominated:

[F]or example, the proposed title was "Interstate Public Accommodations Act"; the introductory series of findings dealt almost entirely with commerce; the commerce emphases, and the afterthought nature of the Fourteenth Amendment reliance, were highlighted by the final "finding" that the "burdens on and obstructions to commerce which are described above can best be removed by invoking the powers of Congress under the Fourteenth Amendment and the commerce clause of the Constitution"; and the coverage provisions were entirely in commerce terms.

GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 159 n.4 (11th ed. 1985).

168. *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the Senate Comm. on Commerce*, *supra* note 162, part 1, at 66-67 (statement of Sen. A.S. Mike Monroney (D-Okla.)); *id.* at 91 (statement of Sen. Strom Thurmond (D-S.C.)).

169. Compare, for example, the statements in the Senate Commerce Committee hearings of United States Attorney General Robert F. Kennedy, supporting the President's proposal, and Sen. John S. Cooper (R-Ky.), who introduced (with Sen. Thomas Dodd (D-Conn.)) a public accommodations bill based solely on the Fourteenth Amendment:

MR. KENNEDY. . . . The Constitutional authority of Congress to enact this law is derived from the commerce clause and the 14th amendment, but our primary reliance is on the commerce clause.

The list of public accommodations covered . . . demonstrates that each has a direct and intimate relation to the movement of persons and goods across State lines, and in the words of the late Justice [Robert] Jackson: ["If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."] (*United States v. Women's*

I believe in this bill, because I believe in the dignity of man, not because it impedes our commerce I like to feel that what we are talking about is . . . an issue that involves the morality of this great country of ours. And that morality, it seems to me, comes under the 14th amendment, where we speak about immunities and where we speak about equal protection of the law.¹⁷⁰

Sportswear Ass'n, 336 U.S. 460, 464 (1949)

In addition to the commerce clause, we rely on Congress' power under the 14th amendment, to prohibit the denial of equal protection of the laws to any person. . . . We recognize that in 1883 the Supreme Court held in the *Civil Rights Cases* [that] Congress did not have power under the 14th amendment to prohibit discrimination in privately owned places of public accommodation

But in 80 years, much of the force of that decision has disappeared. State regulation of private business has increased. State relationships with business have become more varied and complex, and views of what action may be attributed to the State have changed. . . .

However, the 1883 decision has not been overruled and remains the law of the land. It is for this reason that we rely primarily on the commerce clause. . . . [W]e feel it is absolutely clear that Congress has the power to end discrimination in places of public accommodation under the provisions of the commerce clause.

SENATOR COOPER. . . . I do not suppose that anyone would seriously contend that the administration is proposing legislation, or the Congress is considering legislation, because it has been suddenly determined, after all these years, that segregation is a burden on interstate commerce. We are considering legislation because we believe . . . that all citizens have an equal right to have access to goods, services, and facilities which are held out to be available for public use and patronage.

If there is a right to the equal use of accommodations held out to the public, it is a right of citizenship and a constitutional right under the 14th amendment. It has nothing to do with whether a business is in interstate commerce or whether discrimination against individuals places a burden on commerce. It does not depend upon the commerce clause and cannot be limited by that clause, in my opinion, as the administration bill would do. . . .

[T]he interstate commerce approach would grant only partial relief; it would declare legislatively that the equal right of all citizens to use public accommodations is only applicable to businesses affecting interstate commerce, and would thus admit discrimination in other businesses. . . .

So, for these reasons, I hold that [S. 1591] is superior to the administration bill. It would cover all businesses which are licensed by the State . . . and which are held out for public use. . . .

If we are going to deal with this question of the use of public accommodations, I think it imperative that Congress should enact legislation which would meet it fully and squarely as a right under the 14th amendment, and not indirectly and partially as the administration's approach would do.

Rights under the Constitution apply to all citizens, and the integrity and dignity of the individual should not be placed on lesser grounds such as the commerce clause.

Id. at 23, 190-93.

170. *Id.* at 252 (statement of Sen. John O. Pastore (D-R.I.)).

Some in Congress thus had a moral desire to challenge the Court to redefine the Fourteenth Amendment and to give Congress the power to control the actions of individual business owners as well as state governments.¹⁷¹ The Senate committee chose to follow what appeared to be the constitutionally safer course and relied instead solely on the Commerce Clause. In doing so, the committee noted the language of Justice Stone in *United States v. Darby*:¹⁷² "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."¹⁷³ The committee cited a number of cases in which Congress had successfully discouraged "evil, dangerous or unwise practices" through application of the Commerce Clause.¹⁷⁴ Many of them, perhaps not surprisingly, were the same cases Congress relied on in passing the ill-fated first Child Labor Act in 1916.¹⁷⁵ The House committee reached similar conclusions with regard to the proper form of the bill.¹⁷⁶ On July 2, 1964, President Johnson signed the Civil Rights Act of 1964 into law.

Almost immediately, however, challenges to the Act's constitutionality began in the courts. Before year's end, two cases had reached the Supreme Court: *Heart of Atlanta Motel v. United States*,¹⁷⁷ challenging the provisions with regard to hotels and motels, and *Katzenbach v. McClung*,¹⁷⁸ challenging the provisions relating to restaurants and cafeterias. In both cases, the Supreme Court upheld Congress' action.

Unlike the first failed congressional attempt to reverse the Court's child labor decision by purporting to have a different constitutional basis for its new action, in the case of the Civil Rights Act, Congress successfully evaded the precedent set in

171. See also S. REP. NO. 872, *supra* note 156, at 12, reprinted in 1964 U.S.C.C.A.N. at 2366 ("There is a large body of legal thought that believes the Court would either reverse the earlier decision if the question were again presented or that changed circumstances in the intervening 80 years would make it possible for the earlier decision to be distinguished.").

172. 312 U.S. 100 (1941).

173. S. REP. NO. 872, *supra* note 156, at 13, reprinted in 1964 U.S.C.C.A.N. at 2367 (quoting *Darby*, 312 U.S. at 115).

174. *Id.* (citing *Darby*, 312 U.S. 100); *Clark Distilling Co. v. Western Md. Ry.*, 242 U.S. 311 (1917); *Hoke v. United States*, 227 U.S. 308 (1913); *Hippolite Egg Co. v. United States*, 220 U.S. 45 (1911); *Champion v. Ames*, 188 U.S. 321 (1903).

175. Compare with the discussion *supra* notes 39-41 and accompanying text.

176. See H.R. REP. NO. 914, *supra* note 166.

177. 379 U.S. 241 (1964).

178. 379 U.S. 294 (1964).

the *Civil Rights Cases* decision by basing its 1964 law on the Commerce Clause rather than the Fourteenth Amendment. The Court used that fact as its means of distinguishing the 1964 Act from the earlier 1875 Act:

Unlike Title II of the present legislation, the 1875 Act broadly proscribed discrimination in "inns, public conveyances on land or water, theaters, and other places of public amusement," without limiting the categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved.¹⁷⁹

The 1875 Act, the Court implied, might have passed constitutional muster had Congress based it on the commerce power.¹⁸⁰ This claim may be somewhat spurious, however, given the much more limited reading of the Commerce Clause prior to the 1930's.

A more interesting question, perhaps, is whether the Court would have found the Act constitutional if, as Senator Pastore and Senator Cooper advocated, it had been grounded entirely in the Fourteenth Amendment. Given the societal changes in the eighty years following the *Civil Rights Cases*, and particularly the impact of the civil rights movement of the 1950's and early 1960's, the Warren Court—already known for its liberal social ideals—might well have overturned the *Civil Rights Cases* outright if Congress had pressed the issue.¹⁸¹ If so, as in the child labor example, Congress would have "succeeded" in reversing the Court simply because the Court, due to a change in the philosophy of its members, had itself changed.

179. *Heart of Atlanta Motel*, 379 U.S. at 250-51.

180. Finally, there is language in the *Civil Rights Cases* which indicates that the Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power. . . . [T]he Court went on specifically to note that the Act was not "conceived" in terms of the commerce power and expressly pointed out: . . .

"these remarks [as to lack of congressional power] do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject . . . as in the regulation of commerce"

Id. at 251 (quoting *The Civil Rights Cases*, 109 U.S. 3, 18 (1883)).

181. The *Civil Rights Cases* still have not been expressly overruled, although the Court questioned the decision's continuing vitality in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968) (noting that *Katzenbach* and *Heart of Atlanta* had rendered the question of the decision's continuing vitality largely academic).

Relative to the Court's relationship with Congress, one must note that the Court showed great deference to the congressional findings of fact underlying the Act. In *Katzenbach*, for example, although the bill contained no congressional findings about the impact of restaurant discrimination on commerce, the Court relied on Congress' conclusion that discrimination somehow affected commerce in finding a rational basis for the provisions.¹⁸²

Omnibus Crime Control and Safe Streets Act of 1968

The Initial Decision

Between 1953 and 1969, the Supreme Court, under the leadership of Chief Justice Earl Warren, took a revolutionary approach to criminal law by greatly expanding the recognized rights of criminal defendants¹⁸³ and restricting the admissibility of improperly obtained evidence.¹⁸⁴

Although innovations such as the *Miranda* warning are viewed today as routine by any viewer of television police dramas, many received the Warren Court's decisions with great skepticism.¹⁸⁵ Three Supreme Court decisions were subject to particular denigration:¹⁸⁶ *Mallory v. United States*,¹⁸⁷ which held that in the federal system, arraignment must be made without unnecessary delay;¹⁸⁸ *Miranda v. Arizona*,¹⁸⁹ which held that an accused must be advised, prior to interrogation, of his rights to silence and to the assistance of counsel to protect his Fifth Amendment privilege against self-incrimination;¹⁹⁰ and *United States v. Wade*,¹⁹¹

182. *Katzenbach*, 379 U.S. at 299 ("[W]hile no formal findings were made, . . . it is well that we make mention of the testimony at [the congressional] hearings . . . of the burdens placed on interstate commerce by racial discrimination in restaurants.").

183. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring recitation of certain rights to a suspect).

184. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (excluding evidence seized in violation of the Fourth Amendment).

185. See, e.g., 113 CONG. REC. 21,087 (1967) (statement of Rep. F. Edward Hébert (D-La.)) ("It is a wonder . . . that the police can arrest anyone—under the rulings of the present Supreme Court."); *id.* at 21,197 (statement of Rep. Watkins M. Abbitt (D-Va.)) ("Apparently the majority of the members of the Supreme Court of America are more interested in protecting the lawless than they are in preserving law and order . . .").

186. ADAM C. BRECKENRIDGE, CONGRESS AGAINST THE COURT 4-5 (1970).

187. 354 U.S. 449 (1957).

188. *Id.* at 455.

189. 384 U.S. 436 (1966).

190. *Id.* at 467-69.

191. 388 U.S. 218 (1967).

which held that an accused had the right to counsel at police lineups.¹⁹²

The Stealth Response

Congressional skepticism over the Court's decisions turned into action when Congress began consideration of the bill¹⁹³ that would eventually become the Omnibus Crime Control and Safe Streets Act of 1968.¹⁹⁴ Although most of the Act dealt with other matters, Title II of the Act¹⁹⁵ sought directly to overturn those three Supreme Court decisions. Senator John L. McClellan (D-Ark.), Chairman of the Senate Subcommittee on Criminal Laws and Procedures, set the tone for debate on the measure by remarking that he was "unequivocally convinced . . . that something must be done to alleviate the baleful effects of the Supreme Court's 5-to-4 *Miranda* decision."¹⁹⁶

Senator Sam J. Ervin (D-N.C.), in his opening remarks, more specifically defined those "baleful effects," stating:

[T]here is no question that these decisions have resulted in the freeing of multitudes of criminals of undoubted guilt and have unduly hampered legitimate law enforcement activities. The

192. *Id.* at 236-37.

193. S. 917, 90th Cong., 1st Sess. (1967), in *Controlling Crime Through More Effective Law Enforcement: Hearings before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 96-101 (1967) [hereinafter *Senate Crime Hearings*]; H.R. 5037, 90th Cong., 1st Sess. (1967), in *Anti-Crime Program: Hearings before Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 1-6 (1967) [hereinafter *House Crime Hearings*]. S. 917 and H.R. 5037, as originally proposed, did not contain language aimed at reversing any Supreme Court decision. Instead, the original bills contained President Lyndon B. Johnson's proposals to provide planning and program grants to state and local governments and other organizations for crime control and to establish a new Office of Law Enforcement and Criminal Justice Assistance in the Justice Department. See also BRECKENRIDGE, *supra* note 186, at 2-3.

The language aimed at reversing the Supreme Court decisions, added to S. 917 in committee, was taken from Senator John L. McClellan's (D-Ark.) proposed S. 674, 90th Cong., 1st Sess. (1967), in *Senate Crime Hearings*, *supra*, at 74. The version which finally passed and was signed into law was nominally the House version, H.R. 5037, but the text of the amended Senate bill had been substituted for the original language of the House bill. (The House's decision to adopt the Senate version, made on June 5, 1968, may have been influenced by the assassination of Robert F. Kennedy and resulting anti-crime sentiment.) The measure, which had earlier passed the Senate by a 72-4 vote, passed in the House as well by a vote of 369-17. 114 CONG. REC. 14,798, 16,300 (1968).

194. Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified at 18 U.S.C. §§ 3501-3502 (1988)).

195. *Id.* at 210-11.

196. *Senate Crime Hearings*, *supra* note 193, at 4.

situation must be rectified and the duty to do so devolves rightly upon the Congress.¹⁹⁷

From a constitutional standpoint, Congress' desire to, in effect, overturn *Mallory* did not appear to pose a great problem. The Supreme Court had not decided *Mallory* on constitutional grounds, rather its decision relied upon an interpretation of the Federal Rules of Criminal Procedure.¹⁹⁸ As such, it was within the power of Congress to correct the Court's interpretation of the Rule, as it could with any federal statute.¹⁹⁹

Miranda and *Wade*, however, appeared more difficult for Congress to reverse. In both, the Supreme Court reached its decisions by interpreting the Constitution rather than a statute—in *Miranda* the Fifth Amendment privilege against self-incrimination,²⁰⁰ and in *Wade* the Sixth Amendment right to counsel.²⁰¹ As House Judiciary Committee Chairman Emanuel Celler (D-N.Y.) warned, legislation appearing to overturn a Court decision but destined to be itself declared unconstitutional would be "a cruel hoax on citizens for whom crime and the fear of crime are the facts of life. . . . It is built on false premises. Its promises are illusory."²⁰²

Others in Congress, however, expressed the belief that Congress could attack the Court's constitutional interpretation head-on and win: "I refuse to concede . . . that the elected represen-

197. *Id.*

198. *Mallory v. United States*, 354 U.S. 449, 451-53 (1957). The Court addressed application of FED. R. CRIM. P. 5(a) which stated:

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

Id. (prior to 1972 amendment).

199. See, e.g., S. REP. NO. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S.C.A.N. 2112, 2126 (quoting subcommittee testimony of the Honorable Alexander Holtzoff, United States District Judge for the District of Columbia) ("This doctrine was predicated not on any constitutional principal, but merely is a procedural matter as a sanction or a means of enforcing rule 5 of the Federal Rules of Criminal Procedure Since this rule is not based on any constitutional principle, it can be changed by legislation."); *id.* (quoting subcommittee testimony of California Attorney General Thomas C. Lynch) ("Since the . . . rule was formulated in the exercise of the Supreme Court's supervisory powers over lower Federal courts, and has never been considered a constitutional requisite, no constitutional obstacle is imposed in the way of its legislative repeal.").

200. U.S. CONST. amend. V; see *Miranda v. Arizona*, 384 U.S. 436, 467-79 (1966).

201. U.S. CONST. amend. VI; see *United States v. Wade*, 388 U.S. 218, 236-37 (1967).

202. 114 CONG. REC. 16,066 (1968).

tatives of the American people cannot be the winner in a confrontation with the U.S. Supreme Court," declared House Minority Leader Gerald R. Ford (R-Mich.).²⁰³ "To admit that is to admit that the American people cannot control the U.S. Supreme Court."²⁰⁴

In the case of § 3501,²⁰⁵ directed at *Miranda*, Congress seemed to rely primarily on hope that, by building a careful record of its decision to pass the section, it could persuade the Court to see the error of its ways. As the Judiciary Committee's report on the bill noted, the legislative process of hearings and debate makes it possible for Congress to examine the various facets of an issue with greater precision than a court limited to the facts of a particular case.²⁰⁶

203. *Id.* at 16,073.

204. *Id.*

205. Section 3501 provided, in pertinent part, that:

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

18 U.S.C. § 3501(a), (b) (1988) (emphasis added). The italicized language placed the Act in direct conflict with the *Miranda* decision, which absolutely required that the accused be warned of his right to remain silent; of the fact that anything said could be used against him; of his right to have an attorney present during questioning; and of his right to have an attorney appointed to represent him if he could not afford one. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

206. See S. REP. No. 1097, *supra* note 199, at 47, reprinted in 1968 U.S.C.C.A.N. at 2133; see also *id.* at 46-47, 1968 U.S.C.C.A.N. at 2132-33 (quoting subcommittee testimony of Chief Judge J. Edward Lumbard of the United States Court of Appeals for the Second

Passage of this bill with all of its legislative history—the record of the subcommittee hearings and all of the underlying social policies bearing on this issue and taken into account by Congress—will furnish an excellent record that will hopefully make an impression on some of the Supreme Court Justices.²⁰⁷

After all, the Court had recognized its willingness to defer to such congressional efforts just three years earlier in *Katzbach v. McClung*.²⁰⁸

The Senate report also noted that the *Miranda* opinion contained something of an open invitation for Congress or the States to legislate alternatives to the specific procedural framework the opinion created.²⁰⁹ As Chief Justice Earl Warren wrote for the majority:

[T]he Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination

Circuit). Judge Lumbard stated:

In my opinion, it is most important that the Congress should take some action in the important areas I have discussed. The legislative process permits a wide variety of views to be screened and testimony can be taken from those who know the facts and those who bear the responsibility for law enforcement.

The legislative process is far better calculated to set standards and rules by statute than is the process of announcing principles through court decision in particular cases where the facts are limited. The legislative process is better adapted to seeing the situation in all its aspects and establishing a system and rules which can govern a multitude of different cases.

Judges seldom have before them all those who are the best informed regarding practical problems and the difficulties in living with any proposed change in the law. Judges usually are advised only by the parties in the case; the parties want to win the case and do not always care about general principles of wider application.

. . . [I]t is because the Congress and the legislatures of the States have taken so little action in the field of criminal justice that the courts have more and more chosen to lay down rules which have the force of law until changed, and which all too frequently come to us in the form of new constitutional principles which then can be modified only by constitutional amendment.

Id.

207. *Id.*; see also *id.* (quoting California Att'y Gen. Lynch). Mr. Lynch stated: The bill under consideration sets out factors bearing on the voluntariness of confessions. If findings of fact are made by Congress that demonstrate the relevance and importance of these factors, and their superiority over the rules laid down in *Miranda*, it would seem that the Court would have little choice but to defer to the expert judgment of Congress. Accordingly, I consider the bill constitutional . . .

Id.

208. 379 U.S. 294 (1964).

209. S. REP. NO. 1097, *supra* note 199, at 50-51, reprinted in 1968 U.S.C.C.A.N. at 2137 (quoting *Miranda*, 384 U.S. at 467).

during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described . . . in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.²¹⁰

The Court did not intend, however, by that invitation to give Congress carte blanche to reverse its decision. The Court's language—"so long as they are fully as effective as those described"²¹¹—seemed to indicate that the procedures it set down were intended to exemplify the *minimum* required to protect the Fifth Amendment rights of the accused.²¹² Anything less would be unconstitutional.²¹³ As the opinion remarked: "[T]he issues presented [in *Miranda*] are of constitutional dimensions and must be determined by the courts. . . . Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."²¹⁴

Part of Congress' hopes for the survival of Title II in the face of *Miranda*'s requirements rested on the fact that *Miranda* had been a five-to-four decision. Senator McClellan, author of the portion of Title II directed at *Miranda*, expressed optimism that at least one Justice, faced with a clear statement from Congress, might change "on the side of law and order instead of continuing

210. *Miranda*, 384 U.S. at 490; see also *id.* at 467:

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional strait-jacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.

211. *Id.* at 490.

212. BRECKENRIDGE, *supra* note 186, at 59-60.

213. This concern may have moved the Senate Judiciary Committee, with an eye toward making a favorable record for later review by the Court, to remark in its report on the measure:

The committee is of the view that the legislation proposed in . . . title II would be an effective way of protecting the rights of the individual and would promote efficient enforcement of our criminal laws. . . . [A] civilized society could not be more fair to persons accused of crime, as the constitutional rights of defendants in criminal cases would be fully protected and respected by the safeguards in this proposed legislation.

S. REP. NO. 1097, *supra* note 199, at 51, reprinted in 1968 U.S.C.C.A.N. at 2137.

214. *Miranda*, 384 U.S. at 490-91.

to insist on a position that obviously does work to the advantage of criminals."²¹⁵

McClellan did not, however, wish to pursue the one option by which Congress could be certain to make an impression on the Court: a constitutional amendment.²¹⁶ His primary concerns were the difficulty of achieving the ratification of an amendment and the delay involved in the ratification process; the evils of the Court's decisions, he argued, should be dealt with immediately, and therefore, by a statute.²¹⁷

The arguments for passage of § 3502,²¹⁸ which targeted *Wade*, were less carefully crafted than those for § 3501, despite the fact

215. BRECKENRIDGE, *supra* note 186, at 59 (quoting *Senate Crime Hearings*, *supra* note 193, at 180). McClellan, hoping that a change in the makeup of the Court might gain him that one vote, said: "The Supreme Court changes. You cannot depend on it being stable. I hope we get men on the Court in time who will decide that this Court was wrong. I hope it will become a reality and not only a probability." *Id.* at 66. His hope may not have been a vain one—by 1969, two members of the *Miranda* majority, Chief Justice Warren and Justice Fortas, had left the court, and Chief Justice Burger and Justice Blackmun replaced them. One *Miranda* dissenter, Justice Clark, also left the Court, only to be replaced by Justice Thurgood Marshall, who proved to be a staunch advocate of the rights of the accused.

216. The version of Title II approved by the Senate committee did, however, contain an alternate means of attacking *Miranda*. Section 3502 of the committee bill (in the committee bill, the *Wade* provisions were § 3503) attempted to withdraw federal court jurisdiction to review decisions of state courts regarding the admission of voluntarily made admissions or confessions. S. 917, 90th Cong., 2d Sess. § 3502 (1968) (Senate Judiciary Committee version), in S. REP. NO. 1097, *supra* note 199, at 10. This proposal was apparently based on Congress' constitutional powers to control the organization of inferior federal courts and to regulate the appellate jurisdiction of the Supreme Court. U.S. CONST. art. III, §§ 1, 2, cl. 2. Senator Sam J. Ervin, Jr. (D-N.C.), who originally proposed the measure, argued that it would place responsibility for such decisions where they belonged, with state trial courts and courts of appeals, rather than with a federal review court far removed from the first hand knowledge of the trial judge and jury. BRECKENRIDGE, *supra* note 186, at 59.

Senator Wayne Morse (D-Or.), a Title II opponent, said of this proposal:

[W]e find in the bill . . . sections that withdraw jurisdiction over several issues from the federal courts. . . . I find these the most repugnant sections of the whole bill. . . . [It] smacks of a court packing scheme: When you do not like the decision, change the judges. Or when you do not like the decision, withdraw the jurisdiction.

114 CONG. REC. 11,595-96 (1968); see also *id.* at 12,293 (statement of Sen. Hiram L. Fong (D-Haw.)) ("[T]he exceptions and regulations clause does not give the Congress the power to abolish Supreme Court review in every case involving a particular subject. . . . To interpret that clause otherwise would give the Congress the power to destroy the essential function of the Supreme Court in our Federal system."). The provision was eliminated by the full Senate in a 52-32 vote. *Id.* at 14,777.

217. BRECKENRIDGE, *supra* note 186, at 58.

218. The proposal, denominated as § 3503 in the Senate committee version of the bill, read as follows:

The testimony of a witness that he saw the accused commit or participate

that *Wade* lacked *Miranda*'s express invitation from the Court for Congress to experiment. Presumably, Congress intended the arguments made in favor of the *Miranda* section to apply to § 3502 as well.

Discussion of the section and the *Wade* decision it attacked, both in committee and in Congress, was limited. The Senate committee report noted only, without specific evidence, that the decision "struck a harmful blow" to efforts to control crime, and that the decision had nothing in the Constitution to justify it.²¹⁹

Although Congress may have believed that, in Title II, it had fashioned a constitutional means of reversing the Supreme Court's decisions in *Miranda* and *Wade*, history has not yet proven Congress correct. After twenty-two years, neither section has faced a challenge before the Supreme Court.²²⁰ The reason for this silence is that Congress' actions, once taken, were not implemented by those responsible for putting them into effect.

In a memorandum issued on June 11, 1969, the Nixon Justice Department instructed all United States Attorneys to, in effect, ignore Title II in most cases:

Aside from any constitutional issues . . . it is impossible to predict how much weight a particular court will give to the absence of one of the factors mentioned [in Title II]. For this reason, the only safe course for federal investigative agents, and for such United States Attorneys as may have occasion to talk with defendants, is to continue their present practice of giving the full *Miranda* warnings.²²¹

in the commission of the crime for which the accused is being tried shall be admissible into evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States; and neither the Supreme Court nor any inferior appellate court . . . shall have jurisdiction to review, reverse, vacate, modify, or disturb in any way a ruling of such a trial court . . . admitting in evidence . . . [such] testimony

S. 917, *supra* note 216, at § 3503 (Senate Judiciary Committee version), in S. REP. NO. 1097, *supra* note 199, at 10. This language conflicted with the holding in *Wade* that in some cases the testimony of an eyewitness who had previously identified the accused in a lineup when accused's counsel was not present might not be admissible. Following the defeat in the full Senate of the original § 3502, see discussion *supra* note 216, this provision became new § 3502. The full Senate later eliminated the language restricting federal appellate jurisdiction by a 50-31 vote. The resulting Act, therefore, applied only to federal and not to state criminal prosecutions. See 18 U.S.C. § 3502 (1988).

219. S. REP. NO. 1097, *supra* note 199, at 53, reprinted in 1968 U.S.C.C.A.N. at 2139.

220. See *infra* notes 225-26.

221. Memorandum No. 584, Supp. No. 3 from the Dep't of Justice to U.S. Attorneys (June 11, 1969), reprinted in 115 CONG. REC. 23,236 (1969).

This instruction to federal prosecutors was, in retrospect, somewhat surprising given then-candidate Richard M. Nixon's strong endorsement of the Title II proposal in a position paper released during the 1968 presidential campaign.²²² Viewed cynically, Nixon's campaign statement may have been intended primarily to draw a distinction between himself and the Democrats on the "law and order" issue,²²³ rather than as an endorsement of the constitutionality of the proposed legislation. Once in office, the Nixon administration may have belatedly realized that Title II, although clear in its symbolic intent, was vague in its application.²²⁴

In any case, although Congress may have sent a signal to the Court of its disapproval of *Miranda*, the practical effect of § 3501 remains negligible. Later administrations have not strayed from Nixon's lead in following *Miranda* rather than § 3501, and, as a result, the section has never faced a constitutional challenge before the Supreme Court.²²⁵

222. Richard M. Nixon, *Toward Freedom from Fear* (May 8, 1968) (position paper on crime), reprinted in 114 CONG. REC. 12,936-38 (1968).

The . . . decisions of the high court have had the effect of seriously hamstringing the peace forces in our society and strengthening the criminal forces. The balance must be shifted back toward the peace forces in our society and a requisite step is to redress the imbalance created by these specific court decisions. I would thus urge Congress to enact proposed legislation that—dealing with . . . *Miranda* . . .—would leave it to the judge and the jury to determine both the voluntariness and the validity of any confession. And I think they point up a genuine need—a need for future presidents to include in their appointments to the United States Supreme Court men who are thoroughly experienced and versed in the criminal laws of the land.

Id. at 12,937-38. See generally FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 305-32 (1970) (discussing the history of Title II's passage).

223. The day before the Nixon statement was released, President Lyndon B. Johnson sent a letter to Senator Mike Mansfield (D-Mont.), the majority floor leader, urging passage of the proposals in Title I of the Omnibus bill. The letter made clear Johnson's opposition to Title II, stating: "We can best do this by: . . . [n]ot encumbering the legislation with provisions raising grave constitutional questions" President's Letter to the Majority Leader of the Senate regarding the Crime Control and Safe Streets bill, 4 PUB. PAPERS 772, 773 (May 9, 1968), reprinted in 114 CONG. REC. 12,450 (1968).

224. Former President Johnson expressed similar reservations regarding the efficacy of the Act. Statement by the President upon Signing the Omnibus Crime Control and Safe Streets Act of 1968, 4 PUB. PAPERS 981, 983 (June 19, 1968) (referring to "the provisions of Title II, vague and ambiguous as they are").

225. The constitutionality of § 3501 has, however, received some support in the United States Courts of Appeals. See, e.g., *United States v. DiGiacomo*, 579 F.2d 1211, 1219 (10th Cir. 1978) (Barrett, C.J., dissenting):

The Supreme Court has not been called upon to rule on the constitutionality of 18 U.S.C. § 3501(b). To be sure, the Supreme Court is the final and

Section 3502, designed to "repeal" *Wade*, has proven similarly ineffective.²²⁶ As one commentator wrote:

As a practical matter, the Congressional [response to *Wade*] has proved to be meaningless. The inferior federal courts have considered themselves bound by the Supreme Court's reading of the Constitution rather than that of the Congress and have appeared to ignore the new statute. It exists on the books more as the expression of a legislative hope than as a binding rule of decision, and it will presumably continue in this posture until the Supreme Court, if it ever does, overrules or modifies its identification decisions.

. . . [Congress] appeared to overlook completely the threat to the conviction rate inherent in the impatience of juries with prosecution cases limited to incourt identification. It showed no awareness of the values that may reside, for the prosecution as well as for the defense, in tightening up pretrial identifi-

ultimate arbiter of any constitutional issue raised involving its applicability. That, however, is no reason for this court to "bury its head in the sand" in avoidance of the provisions of § 3501, *supra*.

The Congress, in obvious recognition of society's needs in the area of effective administration of the criminal justice system, enacted § 3501, . . . in order to vitalize the "totality of the circumstances" rule which, in my judgment, is both common sensed and fair. It *does not* abolish the *Miranda* guidelines, but instead it places them in proper focus based upon the totality of all of the facts and circumstances surrounding the confession or admission against one's Fifth Amendment interest. It avoids a mechanical, unrealistic application of *Miranda*.

[I]n cases where incriminating disclosures are voluntarily made without coercion, and hence not violative of the Fifth Amendment, but are obtained in violation of one of the *Miranda* prophylaxes, suppression is no longer automatic. Rather, we weigh the deterrent effect on unlawful police conduct, together with the normative Fifth Amendment justifications for suppression, against "the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce"

Id. (quoting *Brewer v. Williams*, 430 U.S. 387, 424 (1977) (Burger, C.J., dissenting) and *Michigan v. Tucker*, 417 U.S. 433, 450 (1974)).

226. Federal appellate courts faced with questions implicating § 3502 have either declined to address its constitutionality or have interpreted the statute contrary to the obvious intent of Congress, so that it did not conflict with *Wade*. *See, e.g.*, *United States v. Johnson*, 461 F.2d 1165 (5th Cir. 1972); *United States ex rel. Reed v. Anderson*, 461 F.2d 739 (3d Cir. 1972); *United States v. Serio*, 440 F.2d 827 (6th Cir.), *cert. denied*, 404 U.S. 838 (1971); *United States v. Valez*, 431 F.2d 622 (8th Cir. 1970); *United States v. Butler*, 426 F.2d 1275 (1st Cir. 1970), *cert. denied*, 401 U.S. 978 (1971); *United States v. Bennett*, 409 F.2d 888 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969); *United States v. Levi*, 405 F.2d 380 (4th Cir. 1968).

cation procedures so that impressively credible identification evidence can be adduced.²²⁷

The entire episode surrounding the passage and effects of the Omnibus Crime Control and Safe Streets Act of 1968, thus, shows in two ways the inherent weakness of Congress or, indeed, of any single branch acting alone as an interpreter of the Constitution. In nearly all cases, one branch's interpretation must have the support, or at least the acquiescence, of another branch in order to be effective. Here, Congress' attempt to vary from the Supreme Court's interpretation of the Fifth Amendment failed to win the acceptance of the executive branch, while the judicial branch has ignored its Sixth Amendment interpretation. As a result, Title II, although never struck down, has proven to be of no practical avail.

This result appears at first glance to present an insoluble dilemma for Congress: its past attempts to reverse the effects of Court decisions failed because they were too specific, yet the *Miranda* portion of the Omnibus Crime Control Act was ineffective because it was too vague. A closer analysis, however, reveals that such is not the case. From a constitutional standpoint, the Crime Control Act is anything but vague—it is a direct challenge to the Court's decisions. Its vagueness lies only in its practical application. By giving judges a group of factors to weigh as each individual judge saw fit, it prescribed a solution that would lead to vastly divergent results in similar cases. Preferring a certain standard for ease of application in individual cases, the executive branch decided that *Miranda*, as problematic as it might have been, at least had the virtue of certainty.

The Flag Protection Act of 1989

The Initial Decision

In Congress' most recent attempt to reverse a constitutionally based decision of the Supreme Court, many of the same issues arose again. The episode began in May of 1989 with the Supreme Court's decision in *Texas v. Johnson*,²²⁸ which struck down a Texas flag desecration law²²⁹ and, in so doing, also effectively invalidated

227. Carl McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 249-50 (1970).

228. 491 U.S. 397 (1989).

229. TEX. PENAL CODE ANN. § 42.09(a)(3) (West 1989).

a federal flag desecration statute and similar statutes in forty-seven other states.²³⁰

Gregory Lee Johnson, who burned an American flag as a part of a political demonstration during the 1984 Republican National Convention in Dallas, had been convicted of violating a Texas statute outlawing the desecration of state and national flags.²³¹ When the case reached the Supreme Court, a five-to-four majority held that punishing Johnson for conduct that constituted an act of symbolic speech would not be consistent with the First Amendment.²³²

In considering the case, the Supreme Court looked at three primary questions: whether Johnson's acts constituted expressive

230. See Flag Protection Act of 1989, 18 U.S.C. § 700(a) (1988), *amended by* 18 U.S.C. § 700(a) (Supp. I 1989); ALA. CODE § 13A-11-12 (1982); ARIZ. REV. STAT. ANN. § 13-3703 (1989); ARK. CODE ANN. § 5-51-207 (Michie 1987 & Supp. 1991); CAL. MIL. & VET. CODE § 614 (West 1988); COLO. REV. STAT. § 18-11-204 (1986); CONN. GEN. STAT. § 53-258a (1990); DEL. CODE ANN. tit. 11, § 1331 (1987); FLA. STAT. ch. 876.52 (1976); GA. CODE ANN. § 50-3-9 (Michie 1990); HAW. REV. STAT. § 711-1107 (1985); IDAHO CODE § 18-3401 (1987); ILL. REV. STAT. ch. 1, para. 3351 (1989); IND. CODE § 35-45-1-4 (1986); IOWA CODE § 32.1 (1989); KAN. STAT. ANN. § 21-4114 (1988); KY. REV. STAT. ANN. § 525-110 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 14:116 (West 1986); ME. REV. STAT. ANN. tit. 1, § 254 (West 1964); MD. ANN. CODE of 1957 art. 27 § 83 (1988 & Supp. 1990); MASS. GEN. LAWS ANN. ch. 264, § 5 (West 1990); MICH. COMP. LAWS ANN. § 750.246 (West 1991); MINN. STAT. § 609.40 (1990); MISS. CODE ANN. § 97-7-39 (1972); MO. REV. STAT. § 578.095 (1990); MONT. CODE ANN. § 45-8-215 (1989); NEB. REV. STAT. § 28-928 (1989); NEV. REV. STAT. ANN. § 201.290 (Michie 1986); N.H. REV. STAT. ANN. § 646-A (Supp. 1990); N.J. STAT. ANN. § 2C:33-9 (West 1982); N.M. STAT. ANN. § 30-21-4 (Michie 1984); N.Y. GEN. BUS. LAW § 136 (Consol. 1980); N.C. GEN. STAT. § 14-381 (1986); N.D. CENT. CODE § 12.1-07-02 (1985); OHIO REV. CODE ANN. § 2927.11 (Baldwin 1990); OKLA. STAT. tit. 21, § 372 (1990); OR. REV. STAT. § 166.075 (1990); 18 PA. CONS. STAT. ANN. § 2102 (1983); R.I. GEN. LAWS § 11-15-2 (1988); S.C. CODE ANN. § 16-17-220 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 22-9-1 (1988 & Supp. 1991); TENN. CODE ANN. §§ 39-5-843, -847 (1982); UTAH CODE ANN. § 76-9-601 (1990); VT. STAT. ANN. tit. 13, § 1903 (1974); VA. CODE ANN. § 18.2-488 (Michie 1988); WASH. REV. CODE § 9A.06.030 (1990); W. VA. CODE § 61-1-8 (1989); WIS. STAT. § 946.05 (1989). Most of these state statutes were patterned after the Uniform Flag Act of 1917 which provides, in § 3, that "[n]o person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield." UNIF. FLAG ACT § 3, 9B U.L.A. 52 (1917). The only two states without such statutes are Alaska and Wyoming.

231. Section 42.09 provided in full:

§ 42.09. Desecration of Venerated Object

(a) A person commits an offense if he intentionally or knowingly desecrates:

- (1) a public monument;
- (2) a place of worship or burial; or
- (3) a state or national flag.

(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense under this section is a Class A misdemeanor.

Following *Johnson*, the Acts of 1989, 71st leg., 1st c.s. Ch. 27, § 2, in TEX. PENAL CODE ANN. § 42.09 (West Supp. 1991), deleted § 42.09(a)(3).

232. *Johnson*, 491 U.S. at 397.

conduct, thus permitting him to invoke the First Amendment in challenging his conviction; whether the State's regulation was related to the suppression of free speech; and, whether the State's interest in regulating such conduct was sufficient to justify Johnson's conviction under the mid-tier standard of review established in *Spence v. Washington*.²³³

The Court noted that, given the circumstances surrounding Johnson's act, "the expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent."²³⁴ Johnson's First Amendment rights were therefore implicated. As to whether the Texas statute involved suppression of free expression, the Court noted that the only state interest affected by Johnson's action was its interest in preserving the flag as a symbol of national unity.²³⁵ Because a threat to the flag's symbolic value arises only when a person's treatment of the flag communicates some contrary message, the Court found that the State's interest in protecting the flag was related to "the suppression of free expression," and therefore implicated the more demanding standard of *Spence* rather than the test used in *United States v. O'Brien*.²³⁶

Applying the *Spence* test in a fairly strict form of mid-tier scrutiny, the Court looked closely at the ends pursued by the statute and the means employed in pursuit of those ends.²³⁷ "It

233. 418 U.S. 405, 414 n.8 (1974) (discussed *infra* note 237). Otherwise, the less demanding test of *United States v. O'Brien*, 391 U.S. 367 (1968), would have been applied. See *infra* note 236.

234. *Johnson*, 491 U.S. at 406.

235. In its arguments, the State also asserted an interest in preventing breaches of the peace. The Court decided, however, that that particular interest was not applicable to the *Johnson* case because nothing in the record indicated that Johnson's act might even possibly have led to a breach of the peace. *Id.* at 408.

236. 391 U.S. 367, 377 (1968). The *O'Brien* test for regulations of conduct containing both "speech" and "non-speech" elements stated that a regulation was acceptable if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. That test was recently employed by the Supreme Court in upholding an Indiana law banning nude dancing in *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2461-63 (1991).

237. Judging by the Court's language, it was not employing true "strict" review. For example, the Court accepted the State's ends by saying that the government has a "legitimate interest" in making efforts to preserve the symbolic role of the flag. *Johnson*, 491 U.S. at 418. The "compelling interest" language associated with true strict review was absent. This application of mid-tier review rather than strict scrutiny comports with the Court's statement elsewhere in its opinion that the "government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Id.* at 406.

is not the State's ends, but its means, to which we object, . . . to say that the government has an interest in encouraging proper treatment of the flag . . . is not to say that it may criminally punish a person for burning a flag as a means of political protest."²³⁸ Following that reasoning, the Court affirmed the Texas Court of Criminal Appeals' reversal of Johnson's conviction.²³⁹

Congress Responds

Although Johnson and his attorneys were pleased with the Court's decision, they were definitely in the minority. Polls taken soon after the decision showed that sixty-five percent of Americans disagreed with the outcome, and that over two-thirds of Americans supported a constitutional amendment to permit laws forbidding flag burning.²⁴⁰ Some in Congress, however, argued that polls alone should not be enough to motivate a constitutional change. "Do we vote for constitutional amendments whenever the latest public opinion polls indicate public dissatisfaction with a decision of the Supreme Court?" asked Senator Patrick J. Leahy (D-Vt.). "If public opinion surveys become the standard, by the end of the century we are going to need computer programs to decipher our Constitution."²⁴¹

Political pressures aside, however, many in Congress appeared to respond on a deeply emotional level to the Court's decision:

In the House of Representatives, Democrats and Republicans took turns at the microphone assailing the Court in ever more

²³⁸ *Id.* at 418.

²³⁹ *Id.* at 420.

²⁴⁰ See, e.g., *Americans Disagree With Supreme Court on Flag Burning Poll*, REUTERS, June 24, 1989, AM cycle (citing a *Newsweek* poll of 500 adults, with a margin of error of plus or minus five percentage points. Only 28% agreed with the Court's decision. Also, 71% of those polled favored a constitutional amendment to protect the flag.); Michelle Battle, *Poll: 69% Want Flag Protected*, USA TODAY, June 23, 1989, at 1A (polling 453 Americans, with five percentage point margin of error, 69% supported an amendment and 20% did not); Chris Black, *Bush Backed on Flag-Burning*, BOST. GLOBE, June 29, 1989, at 12 (polling 1,003 registered voters with three percentage point margin of error, 72% supported an amendment and 24% opposed it); Michael D'Antonio & Richard Firstman, *Rallying 'Round the Flag; Across LI and Nation, They're Telling the Court: O, Say Does That Star-Spangled Banner Yet Wave*, NEWSDAY, July 2, 1989, at 4 (Nassau & Suffolk ed.) (polling 410 Long Island, N.Y., adults with five percentage point margin of error, 80% favored amendment and 16% opposed it. The NEWSDAY poll also showed that 68% of those interviewed favored outlawing the desecration of a Bible or Torah, 64% favored outlawing the flying of the American flag upside down, and 58% favored outlawing the burning of a copy of the Constitution or the Declaration of Independence.).

²⁴¹ 135 CONG. REC. S8095 (daily ed. July 18, 1989) (statement of Sen. Leahy).

passionate terms. Representative Ron Marlenee, Republican of Montana, evoked the men portrayed in the Marine Corps War Memorial raising the flag over Iwo Jima and declared, "Yesterday [June 21, 1989, the date the Court's opinion was announced] those six brave soldiers were symbolically shot in the back."

Representative Doug Applegate, Democrat of Ohio, said the Court had "humiliated" the flag and demanded, "Are they going to allow fornication in Times Square at high noon?"

At his regular news conference this morning [June 22, 1989], House Speaker Thomas S. Foley said, "Americans look on the burning of the American flag with abhorrence, and it is deeply offensive to virtually all Americans, and it will be a difficult matter for them to understand how it can be justified under any circumstances."

Similar sentiments came from the Senate, where a resolution expressing "profound disappointment" in the Court ruling was passed 97 to 3.

. . . .

The resolution calls for an immediate study of the impact of the Court ruling "and to seek ways to restore sanctions against such reprehensible conduct." It also declares that "Congress has believed that the act of desecrating the flag is clearly not speech as protected by the First Amendment."²⁴²

The study called for in the resolution was hardly necessary—Congress faced no shortage of ideas for restoring sanctions against flag burning. By the time the House Subcommittee on Civil and Constitutional Rights convened to hold hearings on the issue on July 13, 1989, the House had referred no fewer than thirty-eight constitutional amendments and three statutory proposals.²⁴³ The

242. Robin Toner, *Bush and Many in Congress Denounce Flag Ruling*, N.Y. TIMES, June 23, 1989, at A8. The three senators voting against the resolution were Senator Edward M. Kennedy (D-Mass.), who said it was inappropriate for the Senate to "go on record criticizing the Supreme Court for discharging its solemn duty," Senator Gordon J. Humphrey (R-N.H.), who described the resolution as "an exercise in silliness," and Senator Howard M. Metzenbaum (D-Ohio). *Id.* The resolution referred to in the article was S. Res. 151, 101st Cong., 1st Sess., 135 CONG. REC. S7189 (daily ed. June 22, 1989).

243. *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 1 (1989) [hereinafter *House Flag Hearings*] (opening statement of Chairman Don Edwards). This number later swelled to 42 constitutional amendment proposals, 5 proposals for statutory provisions, and 4 resolutions concerning the *Texas v. Johnson* decision. H.R. REP. NO. 231, 101st Cong., 1st Sess. 2 (1989); see H.R.J. Res. 302-10, 314-15, 317-19, 321-26, 328-37, 339-40, 342-43, 348-51, 359-60, 365, 377, 101st Cong., 1st Sess. (1989); H.R. 2744, 2778, 2855, 2978, 2982, 101st Cong., 1st Sess. (1989); H.R. Con. Res. 159, 101st Cong., 1st Sess. (1989); H.R. Res. 184, 185, 186, 188, 101st Cong., 1st Sess. (1989); see also H.R. Res. 189, 101st Cong., 1st Sess. (1989) (declaring July 4, 1989 as "Take Pride in the Flag Day").

Senate Judiciary Committee, meanwhile, was considering three constitutional amendments and one statutory proposal.²⁴⁴

The reasons behind Congress' desire for action to reverse the Court's decision were twofold. The first, artfully articulated by Senator Joseph R. Biden, Jr. (D-Del.) and others, invoked the need to preserve the flag as a symbol of national unity.²⁴⁵ The second, seldom stated directly, but always present at the margins of debate, was pure politics.

Arguably, most congressmen were more interested in the political realities of the situation than in the nature of American unity. Coming as it did close on the heels of a presidential campaign in which support for the Pledge of Allegiance became a major issue and in which candidates visited flag factories for star-spangled photo opportunities,²⁴⁶ the Supreme Court's decision seemed to carry ominous political hazards for any congressman who opposed action to reverse it.²⁴⁷ Indeed, the period between the November 1988 election and the Court's decision in *Johnson* had already seen several flag-related resolutions come before Congress.²⁴⁸ What congressional Democrats wished most of all

244. *House Flag Hearings*, *supra* note 243, at 6 (testimony of Sen. Joseph R. Biden, Chairman of the Senate Judiciary Committee). This number later grew to include six proposals for constitutional amendments. See S.J. Res. 165, 167, 169, 171, 179, 180, 101st Cong., 1st Sess. (1989); S. 1338, 101st Cong., 1st Sess. (1989); see also S. Res. 151, 101st Cong., 1st Sess. (1989) (expressing disapproval of the Court's opinion).

245. *House Flag Hearings*, *supra* note 243, at 9-10 (testimony of Sen. Biden).

246. See, e.g., Ellis Henican, *Their Patriotism Never Flags*, *NEWSDAY*, Sept. 20, 1988, at 16.

247. See, e.g., Joseph Mianowany, *Flag Hearings to Start Next Week*, *UPI*, July 7, 1989, available in *LEXIS*, Nexis Library, UPI File ("[M]any Democrats, realizing the unpopular nature of the court decision, fear that if they oppose the president they may be hurt politically by appearing to not want to defend the flag."); Joseph Mianowany, *Flag Amendment Puts Dems on Defensive*, *UPI*, June 27, 1989, available in *LEXIS*, Nexis Library, UPI File [hereinafter *Flag Amendment*].

Hanging over the entire debate for Democrats is the bitter memory of last year's presidential campaign when Bush, by using subjects such as the Pledge of Allegiance, raised questions about the patriotism of Democrat Michael Dukakis.

After the Massachusetts governor failed to adequately respond to Bush's rhetorical broadsides, many Democrats vowed never to be placed again in the position of seeming less than patriotic.

248. See, e.g., H.R. Con. Res. 35, 101st Cong., 1st Sess. (1989) (relating to flag desecration, introduced on January 27, 1989); H.R. Con. Res. 72, 101st Cong., 1st Sess. (1989) (criticizing art schools for encouraging the improper display of the flag, introduced on March 14, 1989); H.R.J. Res. 253, 101st Cong., 1st Sess. (1989) (proposing a "National Pledge of Allegiance Day," introduced on May 2, 1989); S. 1177, 101st Cong., 1st Sess. (1989) (proposing amendments to 36 U.S.C. §§ 174-177 (1988) relating to the proper manner of display of the flag, respect for the flag, and the conduct prescribed for raising, lowering, and passing of the flag, introduced June 14, 1989).

was to avoid letting the Republicans become the party of the flag.²⁴⁹

As the hearings began, it quickly became apparent that the multitude of proposals would be lumped into two groups for consideration: those proposals seeking to amend the United States Constitution and those seeking a statutory solution.

Most prominent among the constitutional amendment proposals was the amendment language backed by President George Bush, which called for a constitutional amendment declaring, "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States."²⁵⁰ Among the statutory proposals, the one that initially drew the greatest amount of interest was Senator Biden's, which sought a change in the already existing federal flag desecration statute contained in § 700 of Title 18 of the United States Code.²⁵¹ Biden's bill²⁵² called for what appeared to be a small, but significant, alteration. The old Title 18 language ordering punishment for "[w]hoever knowingly casts contempt upon any flag of the United States *by publicly* mutilating, defacing, defiling, burning or trampling upon it"²⁵³ would be replaced by language ordering punishment of "[w]hoever knowingly mutilates, defaces, burns, maintains on the floor or ground, or tramples upon any flag of the United States."²⁵⁴

249. Steve Daley, *Bush Not Ready to Unwrap Himself from Old Glory*, CHI. TRIB., July 9, 1989, at C1. Republicans, meanwhile, appeared anxious to exploit the flag desecration issue politically. See, e.g., Robin Toner, *Political Memo; Flag Fight: From Rhetoric to Reality*, N.Y. TIMES, July 24, 1989, at A13 (quoting John Buckley of the National Republican Congressional Committee: "It's going to be a very long campaign season for those who get on the wrong side of this. On just these kinds of issues, [the Democrats have] lost five out of the last six presidential campaigns.").

250. S.J. Res. 180, 101st Cong., 1st Sess. (1989); H.R.J. Res. 350, 101st Cong., 1st Sess. (1989).

251. Flag Protection Act of 1967, 18 U.S.C. § 700 (1988), *amended by* 18 U.S.C. § 700 (Supp. 1990). But see S. 1177, 101st Cong., 1st Sess. (1989), introduced by Sen. Strom Thurmond (R-S.C.) on June 14, 1989 (prior to the *Johnson* decision), which called for changes in the flag display provisions contained in 36 U.S.C. §§ 174-177 (1988).

252. S. 1338, 101st Cong., 1st Sess. (1989).

253. 18 U.S.C. § 700(a) (1988), *amended by* 18 U.S.C. § 700(a) (Supp. 1990) (emphasis added).

254. *House Flag Hearings*, *supra* note 243, at 18 (text of proposed Senate bill, included as part of prepared statement of Sen. Biden). Representative Thomas E. Petri (R-Wis.) proposed a similar bill in the House. Petri's bill differed from Biden's only in requiring that the desecration be performed "publicly" as well as "knowingly." H.R. Res. 2778, 101st Cong., 1st Sess. (1989). The language of H.R. Res. 2778 was actually identical to that of an earlier statutory proposal introduced in the Senate by Senator Biden as an amendment to a child care bill. Biden later withdrew that initial proposal for two reasons. First, some constitutional experts with whom Biden consulted suggested that the inclusion

As the House subcommittee and the Senate Judiciary Committee began their hearings, they had four basic options available to them: a statutory modification of some sort, a constitutional amendment, both, or neither. The two committee chairmen, at least, openly preferred a statutory response to *Texas v. Johnson*²⁵⁵ over a constitutional one. Representative Don Edwards (D-Cal.), chairman of the House subcommittee, made his position clear in his opening remarks: although the flag was strong enough to survive this test of fire unscathed, the Constitution might not be. The American flag is sturdy, he said, "flying proudly through every fierce battle of every war and through times of social upheaval."²⁵⁶ The Constitution, to the contrary, "is fragile and can be amended by the votes of legislators caught up in the emotional whirlwinds of the moment."²⁵⁷

Edwards was, no doubt, overstating his case a bit by understating the difficulty of adopting a constitutional amendment. As the flag burning debate revealed, merely achieving a two-thirds vote of the two houses of Congress, much less the approval of thirty-eight of the fifty states' legislatures, can be difficult. In the 200-year history of the United States Constitution, only twenty-six amendments have been adopted, and only sixteen have been added since the ratification of the Bill of Rights in 1791. Even Edwards himself noted that since 1971, when he became chairman of the subcommittee, "scores—even hundreds" of constitutional amendments have been referred for consideration.²⁵⁸ Of these, only two—the Equal Rights Amendment and voting representation for Washington, D.C.—received congressional approval,²⁵⁹ and neither was subsequently ratified by the states.

of the word "publicly" might increase the likelihood that courts would find the statute unconstitutional, because a requirement of public desecration might suggest that the statute was attempting to curb the communicative effect of the act rather than the act itself. Secondly, it appeared that the child care bill might be tied up in Congress for some time, making a free-standing bill more expeditious. *House Flag Hearings*, *supra* note 243, at 19.

255. 491 U.S. 397 (1989).

256. *House Flag Hearings*, *supra* note 243, at 2 (opening statement of Chairman Edwards).

257. *Id.*

258. *Id.* at 1; see also Richard Wolf, *Topic: The Flag Amendment; Don't Let Hysteria Hurt Flag's Meaning*, USA TODAY, July 12, 1989, at 9A (interview with Chairman Edwards).

259. H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972) (Equal Rights Amendment); H.R.J. Res. 554, 95th Cong., 2d Sess., 92 Stat. 3795 (1978) (voting representation for Washington, D.C.).

Edwards offered a powerful argument that the guarantees of the First Amendment had never been altered. Quoting constitutional scholar Alan Barth, Edwards reminded the subcommittee: "It is easier to lose liberty than to win it. The loss comes about, like so many losses, from forgetfulness, from carelessness."²⁶⁰ President Bush's proposed amendment, he implied, would be such a careless act, setting a precedent by "amend[ing] and limit[ing] this free speech provision of the Bill of Rights . . . [which] has never before been amended."²⁶¹

Although he opposed an amendment, whether Edwards truly favored a statutory action over no action at all was never clear. Edwards was one of only sixteen congressmen who voted against the passage of the original federal flag desecration statute in 1967, and in 1990 his attitude toward the statutory proposals was tepid at best. He expressed a hope that the issue would indeed "go away" over time.²⁶² Speaking to reporters after the close of the first day of hearings, he suggested that a statute might be a tool toward that end. "Hopefully," he remarked, "if something has to be done, it would be a statute, and hopefully, that will cool the fires."²⁶³

In the Senate, hearings on the flag desecration issue were held before Senator Biden's Judiciary Committee. As author of the only statutory proposal before the committee, Biden plainly preferred that route and, in fact, testified before the House subcommittee in support of his proposal.²⁶⁴

Unlike Edwards, however, Biden was not completely opposed to the possibility of an amendment. Although he believed that a statute could be written to meet the constitutional test, he acknowledged that he had no objection to a constitutional amendment and did not believe that a properly drafted amendment would necessarily be "amending the Bill of Rights or the first

260. *House Flag Hearings*, *supra* note 243, at 2.

261. *Id.*; see also *Flag Amendment*, *supra* note 247:

"This would be the first amendment to the Bill of Rights in 200 years," Edwards said. "It could open the door to other amendments. I wonder what Thomas Jefferson and James Madison would think, that a loony kid in Dallas, Texas, could do a despicable act and have the Congress jump to amend the Bill of Rights. I find it appalling."

262. Wolf, *supra* note 258, at 9A ("It always has happened that way, that these kinds of emotional issues have a way of clearing up.").

263. Robin Toner, *House Subcommittee Takes Up Touchy Issue of Protecting Flag*, N.Y. TIMES, July 14, 1989, at B6.

264. *House Flag Hearings*, *supra* note 243, at 6-20.

amendment or in any way doing damage to the Bill of Rights.”²⁶⁵ Biden’s argument in favor of a statutory approach relied not upon the evils of an amendment, as Edwards’ had, but rather upon the relative speed with which a statutory proposal could be put into effect.²⁶⁶

Biden also raised the possibility that both a statute and an amendment might be passed. The amendment alone, he noted, would not make burning the flag illegal; it would merely empower the Congress or the states to pass laws to make such acts illegal. A revised statute would serve as the enabling legislation needed to give effect to the amendment.²⁶⁷

This argument, however, was somewhat disingenuous. A federal flag desecration law already existed. Although *Johnson* may have clouded that statute’s constitutionality, an amendment would quickly serve to remove those clouds and restore the existing statute’s vigor. A new statute would give effect to the amendment no better than the old, except possibly during the period until ratification of the amendment was achieved.

The proamendment faction, conversely, maintained that any statutory response to *Johnson* would be inadequate. Any statute worded broadly enough to survive a constitutional challenge, amendment supporters contended, would encounter severe problems of both overinclusivity and underinclusivity, because it would necessarily be unable to distinguish between differing adverse treatments of a flag. Such a statute would outlaw “good” flag burnings, such as the Boy Scouts’ dignified burning of soiled or worn flags.²⁶⁸ Meanwhile, it would fail to prohibit “bad” acts not specifically covered in the language of the statute, such as displaying the flag in an offensive or contemptuous manner without actually physically damaging it.²⁶⁹

Proponents of a constitutional amendment also questioned whether, absent an amendment, *any* flag desecration statute, no matter what words it used, could possibly pass constitutional muster. Even a facially neutral statute, they argued, would be struck down if applied to a person who desecrates the flag as an act of political expression, because *Johnson* made clear that the government’s interest in preserving the flag as a symbol of

265. *Id.* at 6 (testimony of Sen. Biden).

266. *Id.* at 7 (testimony of Sen. Biden).

267. *Id.* at 20 (testimony of Sen. Biden).

268. *Id.* at 142.

269. *Id.* at 143 (testimony of former Assistant Attorney General Charles Cooper).

national unity is insufficient to overcome an individual's First Amendment right to free expression.²⁷⁰ Neutral language in a statute could not mask the fact that Congress' clear purpose in passing the statute would be to prohibit a particular form of political expression, rather than to protect the material, thread, and dye of the flag.²⁷¹

Although Edwards' remarks hinted that his heart may have been with the "do nothing" camp, the best spokesman for that viewpoint was not Edwards, but rather Senator Howard M. Metzenbaum (D-Ohio). In his minority statement in the Senate Judiciary Committee's report recommending a statute, Metzenbaum argued that the Court's decision in *Johnson* did not warrant any legislative response at all.²⁷² "The Court's decision in *Johnson* was a courageous and unpopular one," he wrote, "[i]t illustrates the wisdom of allowing the Supreme Court to be the final arbiter of the Constitution, thereby preventing the sweep of its protection from varying according to the political passions of the day."²⁷³

Attempting to craft a flag desecration statute that could pass constitutional muster, the Senate Judiciary Committee and the House Subcommittee on Civil and Constitutional Rights summoned the assistance of America's best, or at least best-known, constitutional thinkers. Both committees heard testimony on the question from such distinguished witnesses as Harvard Law School Professor Laurence H. Tribe, former law professor and judge Robert M. Bork of the American Enterprise Institute, Duke University Law School Professor Walter E. Dellinger III, Assistant Attorney General William P. Barr of the Justice Department's Office of Legal Counsel, and former Assistant Attorney General Charles J. Cooper.²⁷⁴ Representatives of veterans' groups and individual members of the House and Senate also gave testimony.²⁷⁵ The advice the committee received, however, was mixed.

Some witnesses, notably Bork and Barr, argued the impossibility of drafting a statute aimed at protecting the flag that

270. *Johnson v. Texas*, 491 U.S. 397, 411-12 (1989).

271. S. REP. NO. 152, 101st Cong., 1st Sess. 24 (1989), reprinted in 1989 U.S.C.C.A.N. 610, 631 (minority views of Sen. Orrin G. Hatch (R-Utah) and Sen. Charles E. Grassley (R-Iowa)).

272. *Id.* at 19-20, reprinted in 1989 U.S.C.C.A.N. at 626-28.

273. *Id.* at 19, reprinted in 1989 U.S.C.C.A.N. at 627.

274. *House Flag Hearings*, *supra* note 243, at iii.

275. *Id.*; S. REP. NO. 152, *supra* note 271, at 6, reprinted in 1989 U.S.C.C.A.N. at 615.

would survive a constitutional challenge.²⁷⁶ Others, however, such as Dellinger, Tribe, and Biden, argued that such a statute was indeed possible. Analyzing *Johnson* and other Supreme Court cases, they attempted to determine the reasons underlying the Court's decision, and by doing so to determine the statutory elements necessary to satisfy the Constitution.²⁷⁷

Tribe first suggested two possible statutes premised on the idea that the government has an interest in preventing disturbances of the peace.²⁷⁸ His first proposal was for a general statute, prohibiting *all* breaches of the peace, including those incited by symbolic protests such as flag burning. *Johnson*, he argued, made it clear that if a particular act of flag desecration could be shown to threaten the peace in any way, for example, by provoking a group of veterans to physically retaliate, then that act of flag desecration could be constitutionally punished by the state.²⁷⁹

Tribe's reading of *Johnson* on this point, however, may be flawed. Justice Brennan's opinion seems, to the contrary, to indicate that a state *cannot* ban the expression of certain ideas "on the unsupported presumption that their very disagreeableness will provoke violence" by the audience.²⁸⁰ Instead, the Court

276. See, e.g., S. REP. NO. 152, *supra* note 271, at 24, reprinted in 1989 U.S.C.C.A.N. at 631 (minority views of Sens. Hatch and Grassley) (quoting Barr's statement that "it cannot be seriously maintained that a statute aimed at protecting the flag would be constitutional"); H.R. REP. NO. 231, 101st Cong., 1st Sess. 18 (1989) (additional views of Reps. F. James Sensenbrenner, Jr. (R-Wis.), Carlos J. Moorhead (R-Cal.), Bill McCollum (R-Fla.), George W. Gekas (R-Pa.), William E. Dannemeyer (R-Cal.), Howard Coble (R-N.C.), D. French Slaughter, Jr. (R-Va.), Lamar S. Smith (R-Tex.), Larkin I. Smith (R-Miss.), and Craig T. James (R-Fla.) [hereinafter *Additional Views*]) (quoting Bork):

"No statute can be drawn that can cure the problem created by *Texas v. Johnson*. Indeed, if that were possible, it seems to me . . . a far more dangerous course than amending the Constitution because it would mean that Congress can overturn Supreme Court constitutional decisions by a straight majority vote and I don't think that is what our system of government imagines and it is certainly not what *Marbury v. Madison* [5 U.S. (1 Cranch) 137 (1803)], decided by Chief Justice John Marshall, meant."

277. See, e.g., S. REP. NO. 152, *supra* note 271, at 12, reprinted in 1989 U.S.C.C.A.N. at 621 (quoting Dellinger's statement that "[t]he proposed Federal statute . . . eliminates the particular constitutional flaw that was the basis for the Court's decision in *Texas v. Johnson*"); *id.* at 13, reprinted in 1989 U.S.C.C.A.N. at 622 (quoting Tribe's statement that under the Court's current view it appeared that "insofar as someone is prosecuted only for damaging the physical integrity of the American flag [and not for the message he communicates], that prosecution is not barred by the first amendment"); *House Flag Hearings*, *supra* note 243, at 20 (Sen. Biden stating: "The key . . . is political expression If there is no communicative impact to the law that the law is attempting to deal with, then in fact there is not political expression.").

278. *House Flag Hearings*, *supra* note 243, at 99.

279. *Id.* at 101.

280. *Texas v. Johnson*, 491 U.S. 397, 409 (1989).

requires careful consideration of the actual circumstances surrounding each such expression. The government entity wishing to restrict such an expression must ask whether it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."²⁸¹ Merely a potential for a breach of the peace is not sufficient.²⁸²

Tribe's second suggested statute seemed to correct this problem—a statute directed only at those public assaults upon an American flag that are calculated to cause an immediate and serious physical disturbance.²⁸³ Such a narrowly drawn statute would, indeed, likely be constitutional, but it was not the type of statute Congress was seeking to enact. After all, under such a statute, Gregory Johnson's act of flag burning would have been perfectly legal because no threat of a physical disturbance was likely. If the goal of Congress was to undo the *Johnson* decision and turn back the clock to the day before the Court announced that decision, such a statute would plainly fall far short of that goal.

Most members of Congress wanted a way to stop flag burning in cases in which not even the most remote possibility of breaching the peace existed. Tribe, Biden, and the other statute proponents had a final proposal that they believed could achieve that goal.

They began with the assumption that the Texas flag desecration statute in *Johnson* failed not because the government's interest in protecting the flag is *always* outweighed by an individual's First Amendment rights, but rather because the specific wording of the statute made it a crime to treat the flag "in a way that communicates a message giving offense to others."²⁸⁴ Similarly, the then-existing federal flag desecration statute was probably as unconstitutional because it made it a crime to "cast[] contempt"²⁸⁵ on the flag by one's acts, rather than to commit the acts themselves. A respectful flag burning would be perfectly legal under the old statute, but a flag burning with a contemptuous message would not.²⁸⁶

Thus, to survive a constitutional test, a flag desecration statute would have to depend upon a government interest that is not

281. *Id.* at 409 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

282. *Id.*

283. *House Flag Hearings*, *supra* note 243, at 101-02.

284. *Id.* at 50 (testimony of Prof. Dellinger).

285. 18 U.S.C. § 700(a) (1988).

286. *House Flag Hearings*, *supra* note 243, at 50 (testimony of Prof. Dellinger)

directed at the idea being communicated by the act.²⁸⁷ It would have to operate without any regard to whose flag was burned, where it was burned, how the audience, if any, might react, or why the individual chose to burn the flag in the first place.²⁸⁸

This line of reasoning may be criticized, however, and in fact was questioned at the House subcommittee hearings by Representative Sensenbrenner. Quoting from Justice Brennan's opinion in *Johnson*, Sensenbrenner asked whether such a claim could be reconciled with the statement that "the State's interest in preserving the flag as a symbol of nationhood and national unity [does not] justify his criminal conviction for engaging in political expression."²⁸⁹ While the language of Biden's proposed statute might be "content neutral," its purpose, as Biden himself stated, was still related to the flag's role as a symbol of national unity.

Perhaps even more damning was another passage in Brennan's opinion:

The State . . . asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag. . . . We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression". . . .²⁹⁰

Because the motivating governmental interest behind the statutory proposals was, as with the Texas statute, to protect the flag's symbolic value,²⁹¹ and that interest will always relate to

287. *Id.* at 50-51.

288. *Id.* at 102 (testimony of Prof. Tribe).

289. *Id.* at 20 (statement of Rep. Sensenbrenner) (quoting *Texas v. Johnson*, 491 U.S. 397, 420 (1989)).

290. *Johnson*, 491 U.S. at 410 (quoting *Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974)).

291. Political expediency, although perhaps the prime motivating interest, would be an untenable argument before the Court.

the expressiveness of the conduct, the constitutionality of any statute designed to further such a purpose appears dubious. Although Congress might try to disguise that purpose in the language of the statute itself, the legislative history of the statute would point directly toward that purpose. As Judge Bork remarked in his testimony before the House subcommittee, "[T]his conversation itself dooms any possibility of the constitutionality of such a statute."²⁹² Although the government might claim that the statute's design was to further a different legitimate interest, any such claim "would plainly be pretext and would be recognized as such by any court."²⁹³

Professor Tribe's response to that problem was a pragmatic one.²⁹⁴ he counted heads. Tribe noted that one member of the five-Justice *Johnson* majority, Justice Harry A. Blackmun, had previously written a dissent in *Smith v. Goguen*²⁹⁵ in which Blackmun indicated a statute protecting the physical integrity of the flag in *all* circumstances would be acceptable.²⁹⁶ A statute written in that manner, Tribe said, would therefore win a majority composed of the four *Johnson* dissenters (Justices Rehnquist, White, O'Connor, and Stevens) plus Justice Blackmun.²⁹⁷

Following, as Professor Tribe did, a pragmatic analysis of the question, rather than a principled one, a possibility exists that a statute broadly drawn to outlaw any intentional physical damaging of a flag may, indeed, have won the support of a majority of the Court. Equally likely, however, is the possibility that Justice Blackmun's jurisprudence has shifted farther than Professor Tribe believes in the years since the *Smith* decision in 1974. The answer may never be known, because the statute Congress finally adopted was clearly different from that envisioned by Tribe, Dellinger, and Biden.

292. *Additional Views*, *supra* note 276, at 17 (quoting Judge Bork).

293. *Id.* at 17-18.

294. Representative Sensenbrenner, in fact, quoted one of Tribe's own writings ("Factually Neutral Abridgements Motivated by Content Censorship") back to Tribe in asking for his evaluation of the problem. What Tribe had written was, "If the first amendment requires an extraordinary justification of Government action which aimed at ideas of information that Government doesn't like, the constitutional guarantee should not be avoidable by Government action which seeks to attain that unconstitutional objective under some other guise." *House Flag Hearings*, *supra* note 243, at 127.

295. 415 U.S. 566, 590-91 (1974) (Blackmun, J., dissenting).

296. *Id.*; see *House Flag Hearings*, *supra* note 243, at 128. In his statement, Professor Tribe theorized that Justice Brennan had to make specific reference to Blackmun's earlier *Smith* opinion in footnote six of the *Johnson* opinion in order to get Blackmun to join the *Johnson* majority. *Id.* at 102.

297. *House Flag Hearings*, *supra* note 243, at 128.

Testimony at both the House and Senate hearings clarified that for a statute to have any hope of surviving a constitutional challenge, it would have to be "content neutral"—banning all flag burnings, regardless of the message, or lack thereof, intended by the flag burner or perceived by onlookers. Even then, as several experts testified, the constitutionality of the statute may remain questionable.

Proponents of a constitutional amendment identified several problems with a statute, the greatest of which was overinclusivity. Congress did not want to put itself in the position of making criminal the actions of veterans' groups and Boy Scouts in, for example, holding dignified burnings of worn or soiled flags on Memorial Day.²⁹⁸

Senator Biden attempted to hurdle this problem by taking a definitional approach, that is, that the flags burned in such ceremonies were not truly "flags" at all. Flags that were tattered and worn to the extent that they were no longer fitting emblems for display were, in fact, "flags that have already been destroyed."²⁹⁹ He also noted that the *Johnson* decision mentioned in passing that federal law designates burning as the preferred method for disposing of a worn or soiled flag, and that if Johnson had burned the flag for that purpose, he would not have been convicted under the federal statute.³⁰⁰ Biden may have erred, however, in interpreting that reference as an endorsement of an exception for the burning of worn flags rather than as an additional reason that a statute with such an exception would be unconstitutional.

The second problem with Biden's proposed statute was a definitional one: what, under the statute, was a flag? In their testimony before the House subcommittee, Tribe and Cooper both mentioned the example of a cake served at a party celebrating the reversal of Lyn Nofziger's conviction for illegal lobbying³⁰¹—a cake decorated to look like the American flag. By cutting up and eating that cake, party-goers might arguably have faced criminal charges under a statute such as the one proposed.³⁰²

298. See, e.g., *id.* at 21 (questioning of Sen. Biden by Rep. Sensenbrenner).

299. *Id.*

300. *Id.* at 21-22.

301. See Martin Tolchin, *Nofziger Wins Court Reversal of Conviction*, N.Y. TIMES, June 28, 1989, at A1.

302. *House Flag Hearings*, *supra* note 243, at 102, 143.

The final problem was that mere passage of a statute would not be the last word on the subject of flag desecration. Instead, the first arrest under the statute would merely signal the beginning of extensive litigation concerning the constitutionality of the statute. District courts applying the *Johnson* decision would likely declare the new statute unconstitutional. Unless the Supreme Court agreed to grant a writ of certiorari to decide the issue, Congress might find itself, years later, right back where it began.³⁰³

The shortcomings apparent in the statutory approach created a difficult dilemma for opponents of a constitutional amendment. Although a statute appeared to be their only hope of derailing the amendment proposals, an unacceptable statute clearly would not succeed in doing so. Fortunately, however, the individual most anxious to avoid an amendment was in one of the best positions to do something about the problem. Representative Don Edwards was not only chairman of the House subcommittee considering the problem, but he also had the subcommittee stacked with like-minded congressmen.³⁰⁴

Edwards' solution was to draft a new statutory proposal that met all of the practical objections facing the Biden proposal. Working together with House Judiciary Committee Chairman Jack Brooks (D-Tex.), he introduced H.R. Res. 2978 on July 24, 1989, four days after the subcommittee completed its hearings.

In its original form, the Edwards/Brooks proposal attempted to deal with each of the problems facing a content-neutral statute. To reduce the statute's overinclusivity, the proposal included a specific exception: "This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled."³⁰⁵ They addressed the problem of determining the nature

303. *Additional Views*, *supra* note 276, at 10-11.

304. *See* Wolf, *supra* note 258, at 9A:

USA TODAY: You've been able to stall a lot of high-profile amendments—school prayer, balanced budget and others.

EDWARDS: Yes. With the help of a subcommittee that generally a majority saw eye to eye with me.

USA TODAY: Which was one of your requirements, wasn't it?

EDWARDS: Almost, yeah. But I have had a majority who sees things the conservative way. This is a conservative view that I have . . . that you don't fool with your liberties lightly.

See also id. (Rep. Edwards concurring in description of the subcommittee as "a mortuary because many proposed amendments die there"); *House Flag Hearings*, *supra* note 243, at 3 (statement of Rep. Sensenbrenner) ("[T]his subcommittee is commonly known as the graveyard for legislation which the Democrats don't want to get to the House floor.").

305. H.R. Res. 2978, 101st Cong., 1st Sess. (1989).

of a flag under the statute through the addition of a new definitional section: "[T]he term 'flag of the United States' . . . shall include any flag, standard, colors, or ensign, or any part or parts of either, made of any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America."³⁰⁶ Finally, the proposal addressed the prospect of protracted litigation by providing for expedited review of any constitutional challenge by the Supreme Court.

At the time, Edwards defended the new bill as being carefully drawn and constitutionally sound,³⁰⁷ but he also acknowledged the political realities that prompted the drafting of the bill, admitting that the statute "gives members cover. They can tell the American Legion and the Veterans of Foreign Wars, 'Look, we protected the flag.'"³⁰⁸ The purpose of the statute, he said, was to avoid a constitutional change, which he and other Democrats would "go to the wall" to stop.³⁰⁹

Seeking to halt the amendment push, Brooks and Edwards moved quickly. They introduced the bill on July 24, and the Brooks-led House Judiciary Committee the next day scheduled a vote on the measure for July 26.³¹⁰ The full House Judiciary Committee actually met for two days, on July 26 and 27, to consider the resolution and approved one amendment—a change in the "flag" definition to read: "any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed."³¹¹ The "commonly displayed" language, the committee believed, would further reduce the possibility of prosecutions for the destruction of flags on cakes, napkins, magazine covers, and the like.³¹² On July 27, the committee voted 28-6 to report the amended bill favorably to the House, four days before the Senate Judiciary Committee even began its hearings on the Biden statutory proposal. On September 12, the full House passed it by a 308-38 vote, with many pro-amendment congressmen joining to support the bill after House

306. *Id.*

307. *Quotelines*, USA TODAY, Sept. 13, 1989, at 10A; Robert Shepard, *House Passes Flag Protection Bill*, UPI, Sept. 12, 1989, available in LEXIS, Nexis Library, UPI File.

308. Richard Wolf, *Smoking, Flag Fire Up Congress*, USA TODAY, Sept. 12, 1989, at 1A.

309. Joseph Mianowany, *House Panel Ignores Bush, Passes Flag Bill*, UPI, July 27, 1989, available in LEXIS, Nexis Library, UPI File.

310. Joseph Mianowany, *House Democrats Move Flag Bill*, UPI, July 25, 1989, available in LEXIS, Nexis Library, UPI File.

311. *Additional Views*, *supra* note 276, at 2 (Explanation of Amendment).

312. *Id.*

Speaker Tom Foley (D-Wash.) promised to schedule a vote on an amendment proposal before the end of the year.³¹³ On September 13, it went to the Senate.

The Senate made two major changes to the bill. The first amendment added two additional acts to the list of those prohibited under the proposal: "physically defil[ing]" the flag³¹⁴ and "maintain[ing] the flag] on the floor or ground,"³¹⁵ the latter in direct response to a controversial art exhibit in Chicago in which viewers were required to walk across the flag to reach one portion of the exhibit.³¹⁶ A second amendment modified the expedited review section.³¹⁷

On October 12, the House agreed to the Senate's amendments, and on October 28, the bill became law without the President's signature. In declining to sign the bill, President Bush stated that

[w]hile I commend the intentions of those who voted for this bill, I have serious doubts that it can withstand Supreme Court review. The Supreme Court has held that the Government's interest in preserving the flag as a symbol can never be compelling enough to justify prohibiting flag desecration that is intended to express a message.³¹⁸

Although even the original content-neutral statute proposed by Senator Biden was not certain to survive a constitutional challenge, plainly, the later additions to that bill's basic structure made the final statute's survival even less likely.

In redefining the list of prohibited acts to include "physically defil[ing]" the flag, Congress took a step away from language arguably not directed toward communication of a message—"burn" for example—and toward language indicative of a showing of contempt.³¹⁹ "Defile" is a word carrying with it a great deal of emotional meaning—arguably even more so than words such

313. Myron S. Waldman, *House Passes Flag-Burning Bill; Move Aimed at Heading Off Constitutional Amendment*, *NEWSDAY*, Sept. 13, 1989, at 15.

314. 135 CONG. REC. S12,616 (daily ed. Oct. 4, 1989) (Amendment 951).

315. *Id.* at S12,607 (Amendment 950).

316. See, e.g., Laurie Goering, *Veterans Offended by Artwork of Flag; Art Institute School Shuts Exhibit*, *CHI. TRIB.*, Feb. 26, 1989, at C1.

317. 135 CONG. REC. S12,601 (daily ed. Oct. 4, 1989) (Amendment 949).

318. Statement on the Flag Protection Act of 1989, 25 WEEKLY COMP. PRES. DOC. 1619 (Oct. 26, 1989).

319. Arguably, however, some of the language already present in the bill (for example "trample" or "mutilate") was similarly content laden. See 135 CONG. REC. S12,618-19 (daily ed. Oct. 4, 1989) (statement of Sen. Pete Wilson).

as "trample" and "mutilate" which were themselves cited by the Supreme Court in *United States v. Eichman*.³²⁰ *Eichman*, which eventually struck down the statute, stated, "Each of the specified terms—with the possible exception of 'burns'—unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag's symbolic value."³²¹

In adding a specific exception for the destruction of soiled or worn flags, Congress made even more obvious that its intent was not to prevent *all* destructions of flags, but merely those it found to be objectionable. The Court cited that addition as proof of Congress' intent to restrict the communicative impact of flag burnings, rather than simply to protect the fabric of all flags.³²² Finally, the expedited review provision, though not mentioned in *Eichman*, indicated that Congress itself had great doubts concerning the constitutionality of the law, and wished to find out quickly whether it would have to go "back to the drawing board" to fashion an amendment.

The statute may have failed as an attempt to protect the flag; however, it may be considered a great success by those whose goal was merely to avoid a constitutional amendment. The heat of public passion over the flag issue, which appeared as a raging inferno in the summer of 1989, proved to be little more than a brief flash of emotion. Although half-hearted attempts to revive the constitutional amendment followed the Court's *Eichman* decision,³²³ most members of Congress have been more than willing to let the issue "go away," as Representative Edwards had originally wanted. The second time around, congressmen were more willing to acknowledge that the issue was principally a political one.³²⁴

What remains, however, is a rather unflattering picture of Congress' abilities to interpret the Constitution. Given clear

320. 110 S. Ct. 2404, 2409 (1990).

321. *Id.*; see also *id.* at 2409 n.7 ("For example, 'defile' is defined as 'to make filthy; to corrupt the purity or perfection of; to rob of chastity; to make ceremonially unclean; tarnish; dishonor.'") (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 597 (1976)).

322. *Id.* at 2409 (The exception "protects certain acts traditionally associated with patriotic respect for the flag.").

323. On June 21, 1990, an amendment proposal failed to gain the requisite two-thirds vote in the House. 136 CONG. REC. H4087-88 (daily ed. June 22, 1990) (House voting 254-177 on H.J. Res. 350, 101st Cong., 2d Sess. (1990)); see also, Eliot Brenner, *Amendment Fails House Test*, UPI, June 21, 1990, available in LEXIS, Nexis Library, UPI File.

324. See, e.g., Eliot Brenner, *Flag Protection Amendment Begins Journey Through Congress*, UPI, June 13, 1990, available in LEXIS, Nexis Library, UPI File (quoting Rep. John Conyers (D-Mich.)) (The amendment issue "is about politics, the politics of re-election, the politics of hypocrisy, of manipulating the system for political advantage.").

instructions as to what it had to do to make a constitutional flag desecration statute, Congress instead did something else. Given an opportunity to show itself as a principled body, Congress played politics. Rather than taking a courageous stand either behind or against the Supreme Court's *Johnson* decision, Congress instead engaged in a massive charade by pretending to act while public passions seemed to demand it, but actually—and to some extent intentionally—accomplishing nothing. Although this result was arguably the best one possible for the country, the route taken to achieve it was unnecessarily circuitous.

The difficulty lies, perhaps, in the very nature of legislative decisionmaking. A large legislative body will, almost inevitably, encounter division over practically any issue—much less by an issue of constitutional magnitude. Forces in a legislature seeking to push through an emotional measure will almost always face equal forces seeking to sidetrack the measure. The result, of course, is compromise.

The Flag Protection Act of 1989, in its final form, is a prime example of compromise at the expense of constitutionality. Seeking a statute that could command the support of amendment proponents, Representatives Edwards and Brooks sought to draft a bill that would be all things to all people: a bill that would, in fact, overturn *Texas v. Johnson*³²⁵ without making criminal those flag burnings of which Congress approved. In doing so, however, they proceeded in a manner that greatly reduced the chances that their bill would survive.

ANALYSIS OF FACTORS RELATING TO THE COURT'S DEFERENCE TO CONGRESS

In reviewing these four episodes in which Congress has challenged a Supreme Court interpretation of the Constitution, one may identify a number of factors that have determined the success or failure of Congress' efforts. These factors include the extent to which Congress is able to disguise its motives; the gap in time, and resulting changes in the character of the Court, between the Court's action and the congressional response; Congress' ability to respond to concerns expressed in the Court's decision by basing its response on different constitutional grounds; the tone of congressional debate; the extent to which Congress

325. 491 U.S. 397 (1989).

has the cooperation of the states and/or the executive branch; and the nature of the constitutional issue involved.

Clarity of Congressional Motives

Cases such as the *Child Labor Tax Case*³²⁶ reveal that the Court can see through a sham purpose for legislation if the obvious intent is to circumvent one of the Court's constitutional holdings. This is particularly true when the intent of Congress is apparent not only in its debates and the legislative history of an act, but on the face of the act itself, as in the Child Labor Tax Act of 1918 and the Flag Protection Act of 1989. The modern Court, however, is willing to look even "behind the scenes" to determine the true intent behind a piece of legislation. As Judge Bork noted in the committee hearings on the Flag Desecration Act, the Court may use the very fact that Congress discussed reversing a Court decision in committee as a reason to strike down the resulting Act.

Passage of Time

The eventual success of its child labor efforts reveals that Congress, if patient, may eventually be able to wait out the Court. Particularly in situations in which the current president has views sharply divergent from the Court, Congress can wait and hope that new appointments to the Court will transform the Court's ideology, as happened under Roosevelt in the late 1930's and under Reagan in the 1980's.

A longer gap in time, such as the eighty-five years that passed between the *Civil Rights Cases*³²⁷ and the passage of the Civil Rights Act of 1964, may result in an even more fundamental change. Justices of the Supreme Court are to some extent, like all people, products of their times. If changes in society as a whole make a particular Court decision seem unwise, or even repugnant, a more modern Court raised with more progressive beliefs is likely to share those views, and be more willing to reverse such a decision. Of course, if Congress can give the Court a tailor-made means of distinguishing the new case from the old,

326. 259 U.S. 20 (1922).

327. 109 U.S. 3 (1883).

as it did with the Civil Rights Act, the current Justices will find it even easier to accomplish a change in direction not necessarily supported by precedent.

Change in Constitutional Approach

Congress can help the Court evade the effects of troublesome precedent by giving the Court an alternative means of addressing a particular social problem. For this approach to work, however, the Court must want to evade the precedent. Thus, either Congress must wait for a change in the Court's attitudes toward an issue or seek to convince the Court that its previous decision was erroneous or harmful by findings of fact concerning the results of the Court's decision.³²⁸

Tone of Congressional Debate

In situations in which the Congress shows great concern for acting in a constitutional manner and in finding a sound constitutional basis for its actions, the Court may be more likely to show deference to a congressional interpretation even if it is contrary to a prior precedent, as it did in *Heart of Atlanta Motel v. United States*.³²⁹ Developing a solid record showing the need for a particular action may also persuade the Court.

When Congress appears motivated by short-term political motives, however, and does not appear to give due consideration to constitutional issues in determining its course of action, the Court may show less deference, as in the case of the Flag Protection Act.

Cooperation With Other Branches

Congress is not able to make constitutional law in a vacuum. After it adopts a particular interpretation of the Constitution, it must rely on the assistance of the other branches to give that interpretation effect. Thus, as in the case of the Omnibus Crime Control Bill, if Congress attempts to act without the support of either of the two coordinate branches, its interpretation is likely to end up as a forgotten footnote rather than as an effective piece of legislation.

328. In particular, the tax power is now virtually foreclosed to the Congress as a means toward any end other than raising revenue, as a result of the *Child Labor Tax Case* and other similar cases. See *supra* notes 97-107 and accompanying text.

329. 379 U.S. 294 (1964).

Nature of the Constitutional Issue Involved

The Court may show greater deference to a congressional action rooted in a constitutional area in which the language of the Constitution itself is vague and the case law is either unclear or permissive. Thus, actions based on the Commerce Clause or the war power, in which Congress has been given nearly carte blanche to act as it sees fit, are more likely to meet with Court approval than actions based on strictly limited congressional powers, such as taxation.

The same is true when a separate constitutional issue, such as speech, is involved. A congressional action viewed as a restriction of a right specifically enumerated in the Constitution (for example, speech) or in past Court holdings (for example, privacy) will generally be viewed less favorably by the Court than restrictions on nonfundamental rights, such as the "right" to employ child labor.

CONCLUSIONS

Clearly the elected branches may act as interpreters of the Constitution, even in the face of Supreme Court decisions that appear to contravene their actions. The manner in which the elected branches act, however, can be as important as the action itself in determining whether the Supreme Court will allow their acts to stand.

To maximize the likelihood that a given action will succeed in reversing the effects of a prior Supreme Court decision, Congress first must cautiously draft the language of the act itself. Exceptions added to a measure to address particularized concerns tend to reveal an act's nature as a "dodge" to avoid a Court ruling, rather than a principled piece of legislation.³³⁰

Evidence of careful consideration by Congress of constitutional and practical concerns is also helpful in demonstrating to the Court that it should defer to Congress in a particular case. Toward this end, the addition of findings of fact to an act, as well as developing a thorough record in hearings and debate upon which to base those findings, is particularly important. The

330. Note, for example, the scienter exception in the child labor tax law and the exception for the destruction of worn flags in the Flag Protection Act the Court seized upon as clear evidence of Congress' unconstitutional intentions. See *supra* notes 101, 305 and accompanying text.

Supreme Court's increasing willingness to look behind the language of the act itself to seek any underlying motives of a legislative action necessitates such a thorough Congressional record.

As discussed previously, certain sections of the Constitution, as currently delineated, give almost limitless power to Congress. In determining the constitutional basis for a particular action, Congress should, if possible, employ one of the permissive clauses, for example, the war power or the commerce power, rather than clauses that have been read more restrictively, such as the tax power.

Finally, although it has been reluctant to do so in past, Congress should be willing to consider seriously the possibility of constitutional amendment—the sole certain way to reverse a Supreme Court decision. In its considerations, however, Congress must be mindful of the concerns of the states, because their cooperation is necessary to the ratification of any amendment.

Mark E. Herrmann