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THE WHITE HOUSE
WASHINGTON 12/17/84

TO: John Roberts

FROM: ***Richard A. Hauser*** RAH
Deputy Counsel to the President

FYI: X

COMMENT: _____

ACTION: _____

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November 27, 1984

Mrs. Faith R. Wittlesey
Assistant to the President
for Public Liaison
THE WHITE HOUSE
West Wing, second floor
Washington, D.C. 20500

Re: Civil Rights
under the U.S.Constitution

Dear Mrs.Wittlesey:

I hope you received my letter of October 24, 1984.

Meanwhile, those of us who had hoped for the re-election of President Reagan have seen our hopes fulfilled beyond expectations, although it is certainly regrettable that the voters did not also give the President a republican Congress.

I am sure that you are familiar with the newspaper articles which tried to explain, or explain away, President Regan's victory. I found one remark noticeable because it appeared in the Washington Post in a column written by R.Emmett Tyrell, Jr., entitled, "The Old Left Lost" (Nov.12, A-19). He pointed out:

> "It is not that the American people are against welfare and civil rights, for instance. It is that the American people feel they have gone as far as they can with government solutions to these problems. They oppose any more social engineering. They are against affirmative action."

I happen to know from personal experience that many people for a long time have been tired of preferential laws for so-called "minorities" sailing under the misnomer of "civil rights." But they have been afraid of speaking up for fear of being accused of "racism."

However, there are now so many "minorities" entitled to preferential rights by the grace of Congress and the federal courts that together they probably form the majority of the population. The only ones left out seem to be white males. May be the President ought to prevail upon Congress to include this last "disadvantaged" group and extend preferential rights to 100% of the population. We might then finally begin to remember the Constitution and return the legislation respecting civil rights to the States where it belongs.

To be sure, any such suggestion by President Reagan would cause an outcry from those who did n o t vote for him and, as they have in the past, they will accuse him of tampering with the Constitution. But if President Reagan has departed from the Con-

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stitution, he did so by supporting Congress and the federal courts in their anti-constitutional rulings, quite obviously in the belief that the powers which these bodies have been exercising in the name of "civil rights" were given to them by the Constitution.

The truth is that they were not. The powers to legislate with respect to civil rights which Congress has assumed are those contained in the first version of the Fourteenth Amendment which could not pass the House, was never debated in the Senate and has never been ratified by any State.

If President Reagan really would undertake to revive the Constitution, how could any one seriously find fault with him, since he has sworn that he will to the best of his ability "preserve, protect and defend the Constitution of the United States," as required by Art.II, Sec.1, clause 7 of this Constitution. But in order to be able to be faithful to his oath with respect to civil rights, he would have to know what these rights really are which the Fourteenth Amendment was adopted to protect.

I am in a very good position to tell you for the reason that, when serving in the Department of Justice, I was asked by the then Deputy Attorney General, Mr.Joseph T. Sneed (now U.S.Circuit Judge) to make a study of the Fourteenth Amendment, because there had never before been a legal study of that important Amendment. All books then in existence had been written by political scientists. My study later was published as a book entitled, "The History and Meaning of the Fourteenth Amendment. Judicial Erosion of the Constitution through the Misuse of the Fourteenth Amendment" (New York 1977). It contains an extensive discussion of the civil rights intended to be protected by the Fourteenth Amendment. A concise excerpt thereof is included in Part I of my discussions of the Constitutional Problems connected with the Status of the Judiciary and the Incorporation Doctrine, with the Exclusionary Rule and with the Writ of Habeas Corpus, published in the Appendix of "Federalism and the Federal Judiciary," a U.S.Senate Publication (S.Hrg.98-749) at pp. 588-608, 628-629.

Very briefly: The expression civil rights goes back to the Confederation where it was used in distinction from political rights. After the States had entered into a League of Friendship, they could no longer treat citizens from a sister state as aliens. Therefore they agreed that each State would grant to a citizen from a sister state coming temporarily into the state the same civil rights as that state granted to its own citizens. This appeared in

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Article IV of the Articles of Confederation under the name "privileges" (meaning usually the right to do business, to make contracts and have them enforced, own and dispose of property, sue in the courts of the State) and "immunities" (meaning the right to be free of taxes, penalties and other burdens which the citizens of the State were not subject to). Political rights could only be acquired with residence for a period prescribed by the laws of the adopted State, at which time a citizen from a sister state became a citizen of the adopted State without naturalization.

The provisions of Art.IV of the Articles of Confederation substantially became Art.IV, Sec.2, clause 1 of the U.S.Constitution.

Negroes did not benefit from these provisions because in no State, with the exception of Maine, did they enjoy the same civil and political rights as whites. Therefore the states did not have to recognize them as citizens from a sister state.

After the adoption of the Thirteenth Amendment, a majority in Congress took the position that the state laws imposing disadvantages on Negroes were badges of slavery, and that the Thirteenth Amendment had given Congress authority to enact a civil rights law which would assure to Negroes the same civil rights as whites had. This became the Civil Rights Bill of 1866. President Andrew Johnson found that it was unconstitutional because it invaded the retained rights of the States, and therefore he vetoed it. Congress passed it over the President's veto. However, the serious doubts in the constitutionality of the Civil Rights Law of 1866 never subsided. Therefore, Congress decided to adopt a constitutional amendment for the protection of the civil rights act. A first version debated in the House was designed to give Congress full power to legislate with respect to civil rights and practically any other laws which Congress cared to enact for the protection of persons in the States. This proposal could not pass the House, was never debated in the Senate, and was not ratified by any State. Rep. Hotchkiss of New York expressed what the majority of the House felt, when he said: "I am unwilling that Congress shall have that power." (Cong.Globe, 39th Cong., 1st Sess. 1095). The second version became the first section of the Fourteenth Amendment. It gave Congress no new legislative powers. Particularly, it did not take from the States the power to legislate respecting civil rights. As interpreted correctly by the Supreme Court in the Slaughter-House Cases, 83 U.S.(16 Wall.) 36, 76-78 (1873), the great mass of privileges and immunities embracing nearly every civil right belong to the citizens of the States as such and are

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left to the State government for security and protection. And as specified by the Supreme Court in a number of other cases decided at about the same time, the Fourteenth Amendment only prohibits the States from denying certain rights. And "until some State action ... has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any other proceeding under such legislation, can be called into activity." Civil Rights Cases, 109 U.S.3, 13 (1883). The sponsors of the Fourteenth Amendment originally intended to include voting rights, but had to refrain from it when it became clear that the Northern States would not have ratified it. When later the Warren court misused the Fourteenth Amendment to deprive the States of their indisputable right to legislate respecting voter qualifications and apportionment of their own legislatures, it could not even pretend to have acted in good faith, because Justice Harlan printed large portions of the legislative history in his various dissenting opinions from which it appeared without any possible doubt that voting rights could not be included because of the threat of the Northern States not to ratify it. The Fifteenth Amendment only removed disability to vote because of race but did not touch any other right of the States respecting voting rights.

I agree with the Washington Post columnist that those millions who voted for President Reagan are not against civil rights, but they do not believe that the Constitution has given any particular group preferential rights. And they are right. If anything is certain about the Fourteenth Amendment, it is that it did n o t intend to give any special group preferential rights. It merely intended to assure that every American citizen would have the same civil rights which at that time only white citizens enjoyed.

On November 11, 1984, the Washington Post reported (at p.A-6) that Mr.Benjamin L. Hooks, the executive director of the NAACP, obviously irked by a recent speech of Mr.Clarence M.Pendleton, Chairman of the U.S.Civil Rights Commission, had said that

> "Mr.Pendleton's recent statements further underscore the need for Mr.Reagan to meet with black leaders to discuss urgent civil rights concerns ...".

The black leaders whom Mr.Hook had in mind have developed a great virtuosity to "prove" racial discrimination by unrealistic statistics. They also would consider any presidential action in violation of the Constituion if it does not accept a Supreme Court decision as the supreme law of the land. These black leaders have urged their followers n o t to vote for President Reagan. In contrast, those who d i d vote for President Reagan have long ago began to wonder why life tenured judges whom they have not elected are permitted to make the laws for them.

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For all these reasons, I believe that it is important that President Reagan and his close advisers know the truth about the constitutional protection of the civil rights.

As said before, a concise statement of the constitutional meaning of the civil rights was printed in the appendix of the U.S.Senate publication on Federalism and the Federal Judiciary (S.Hrg 98-749). However, it is such a bad reproduction that I am attaching for your personal use a copy of Part I of my typewritten manuscript which has a table of contents and an index, both of which were omitted in the printed version. The civil rights in the typewritten manuscript appear at pp.27-56 and 84-85. I am also attaching my book on the Fourteenth Amendment which you sometimes might find useful as a convenient reference.

I shall be glad to answer any questions you may have.

Sincerely,

Hermine Herta Meyer

Hermine Herta Meyer

ADMITTED IN NEW YORK AND THE DISTRICT OF COLUMBIA

THE U.S.CONSTITUTION HAS RESERVED THE POWER TO MAKE LAWS RESPECTING RELIGION (INCLUDING SCHOOL PRAYERS) TO THE STATES

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THE U.S.CONSTITUTION HAS RESERVED THE POWER TO MAKE LAWS RESPECTING RELIGION (INCLUDING SCHOOL PRAYERS) TO THE STATES.

Introduction.

Weep not for the lost amendment, for it contained a trap.

All those who worked so hard to get the proposed constitutional school prayer amendment through the U.S.Senate should not feel frustrated that they did not succeed. Rather, they ought to thank the Lord, because its second sentence contained a trap. President Reagan who sponsored the amendment could not have known it, because he is no lawyer. But it is obvious that he received bad legal advice.

The entire amendment-proposal, as it reached the Senate floor for debate, said:

> "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States, or by any State, to participate in prayer. Neither the United States, nor any State shall compose the words of any prayer to be said in public schools."

The second sentence would have involved the federal courts in an unending stream of law suits on the question of voluntariness of school prayers.

The school prayers which, in 1962 with Engel v. Vitale 1/, the Supreme Court began to declare unconstitutional, were all voluntary prayers. No child was required to participate. But already in the second case, in Abington School District v. Schempp, 2/ decided in 1963, Justice Brennan, in his 74 pages long concurring opinion, argued that even if a procedure is available for parents to have their children excused from participation, such excusal procedure forces a child "to a profession of disbelief or at least of nonconformity" and therefore may well deter those children who do not want to participate from exercising their right to be excused.

In short, because one or more children might feel embarrassed by being separated from their class mates, their participation may not be called voluntary.

This, and similar arguments, have been made by judges and opponents in order to emphasize that participation of children in school prayers cannot be voluntary under any circumstances.

So far, such arguments have been of no consequence because the Supreme Court has always held that school prayers violate the establishment clause of the First Amendment. If that were true, then any school prayer would violate it, whether voluntary or compulsory.

But had the proposed constitutional amendment been adopted, it would have elevated the question of voluntariness into a federal constitutional requirement and, judging from past performances, it would have offered the federal courts a perfect tool for defeating the major purpose of the amendment.

Not only that. The proposed constitutional amendment was restricted to prayer in public schools and public institutions. However, the federal courts did not only rule that school prayers violate the establishment clause, but any activity connected with the Judeo-Christian foundation of American culture. Therefore the courts could have seen in the proposed amendment an implied confirmation of all those decisions which did not involve school prayers but were directed against activities connected with the Judeo-Christian foundation of American culture, such as the offering of religious instructions in school buildings by a private interreligious group consisting of representatives of the Catholic, Protestant and Jewish faiths to children whose parents requested it; the teaching of the creation theory; the posting of the Ten Commandments in the class rooms; the meeting of students for religious purposes in school buildings outside of school hours.

Under the U.S.Constitution now in effect, that is the Constitution as written and intended by the Framers and as legally amended, no State authority permitting such activities, and no State law providing for them, can possibly violate that Constitution, because the power to make laws respecting religion has been retained by the States. It has never been delegated to the U.S.Government by the U.S.Constitution. To take that power from the States, would have required a constitutional amendment. Several attempts were made to get such an amendment through Congress. None of them succeeded. It ought to be remembered that for 174 years children have prayed in America's public schools under the protection of that Constitution, free from any federal interference.

No federal court, including the Supreme Court, has been given any authority to change that Constitution. Its Article V has given that power only to persons elected by the people, namely to two-thirds of Congress and to the legislatures or conventions of three-fourths of the States.

The idea that the Supreme Court's interpretation of a constitutional provision in an individual case ought to be binding, not only on the parties to that case as to the object of that case, but on the entire Nation, is nowhere in the Constitution. Men like Madison, Jefferson, his Attorney General Levi Lincoln, Andrew Jackson and Abraham Lincoln rejected such an idea decisively whenever it was raised.

To mention just one example: In 1858, in the famous Lincoln-Douglas debate 3/, Abraham Lincoln had attacked the Supreme Court's decision in the Dred Scott case 4/, especially two of the Supreme Court's pronouncements, namely that under the U.S.Constitution no

Negro slave nor his descendants could ever be a citizen of the United States because they had not been included in the Declaration of Independence; and that the Constitution permitted neither Congress nor a territorial legislature to exclude slavery from any U.S.territory.

Douglas saw in Lincoln's criticism "a crusade against the Supreme Court of the United States." According to Douglas, every pronouncement relating to the Constitution made by the Supreme Court had to be accepted as authoritative interpretation of the Constitution and the laws, even when made in a case, as here, where the Court had declared that it had no jurisdiction. For Douglas, the Supreme Court was the ultimate arbiter of all constitutional questions.

Lincoln called this "an astonisher in legal history," "a new wonder of the world." For Lincoln, this was "a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchie."

Lincoln considered this matter of such importance that he mentioned it in his first inaugural address in 1861. 5/ He said, he did not deny that a Supreme Court decision is binding on the parties to a suit as to the object of that suit. But "if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

Unfortunately, Lincoln's warnings were not heeded. With the support of the legal profession and the news media, and a submissive Congress, the Supreme Court became increasingly bolder, so that in 1958, exactly 100 years after the Lincoln-Douglas debate, the judges of the Supreme Court had the audacity to declare in Cooper v. Aaron 6/ that their interpretation of a constitutional provision becomes the supreme law of the land, thereby saying, in effect, that their interpretation of a constitutional provision, no matter how erroneous, takes the place of the constitutional provision itself. Those who say that such a Supreme Court decision rules the Nation and can be changed only by the Supreme Court itself or by a constitutional amendment accept a theory which is irreconcilable with the U.S.Constitution, because that Constitution is based on the principles of sovereignty and self-government of the people, not on a rulership of unelected life-tenured judges.

During the last 20 years, federal judges have reached into all walks of life, and the people have experienced what Abraham Lincoln prophecied would happen: they have ceased to be their own rulers, even in the most intimate spheres of their daily life, such as religion, schools and family.

As said before, the U.S.Supreme Court could not change the Constitution, and that Constitution does not forbid any prayers anywhere. The question is, how can the people regain the free exercise of their rights under that Constitution?

To answer this question, it is first necessary that the people know what the Framers meant when they wrote the so-called establishment clause into the U.S.Constitution.

I. What the Framers meant.

The "establishment clause" appears in the First Amendment to the U.S.Constitution as part of the religion clause, as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The First Amendment is part of the Federal Bill of Rights, as amendments 1-8 are commonly called. Together with amendments 9 and 10 they were drafted and adopted by the First Congress. Therefore, anybody who wants to know what the Framers meant and for what purpose these amendments were adopted must look at the debates of the First Congress. 7/

From these debates we learn that the amendments were proposed by several State conventions as special restrictions on the new U.S. Government, and that these States would not have ratified the proposed U.S.Constitution, had they not been assured that Congress would agree to their demands. The purpose of these amendments was to provide the people of the several States with the certainty of a constitutional command that the Federal Government would not, in the words of Madison, "deprive them of the liberty for which they valiantly fought and honorably bled."

The importance of religion to the States is evidenced by the fact that the very first sentence of these restrictions is devoted to religion. In the debates, James Madison explained that some of the State conventions had expressed fear that the Federal Government might misuse one of the provisions of the Constitution "to make laws of such a nature as might infringe the right of conscience, and establish a national religion."

The version which the Committee of the Whole House received for consideration was, "no religion shall be established by law, nor shall the equal rights of conscience be infringed."

This was rejected because it was feared, "it might be thought to have a tendency to abolish religion altogether."

Madison then suggested to insert the word "national" before religion.

But there was opposition to the word "national". The reason is to be found in the Records of the Federal Convention of 1787 8/, where the Constitution had been drafted by the delegates of the legislatures of 12 States (Rhode Island had sent no delegates). The so-called Virginia Plan, on the basis of which the Convention began its work, had proposed to establish a "National Government", to make the laws of the States dependent on the approval of a National Legislature and a Council of Revision composed of the National Executive and judges of the National Supreme Court. In short, the Virginia Plan would have reduced what were "free and independent States" to little more than administrative provinces. This was rejected. The Constitution, as finally adopted, created a central government limited to the powers enumerated in that instrument. These powers originally belonged to the States which, by virtue of the Constitution, delegated them to the United States. The powers not so delegated remained in the States free from any federal control. In order to indicate that the new government was to be a "federal" and not a "national" government, the word "national" was removed from the final constitutional text and replaced with "United States" 9/ This hatred of the word "national" made its appearance in the First Congress and influenced the formulation of the religion clause, so that the version suggested by Madison, "no national religion shall be established by law", could not be used.

However, the version finally adopted as the religion clause left no doubt as to what the Framers meant. "Establishment of Religion" was the expression of the time for an official church. The first part of the clause prohibits C o n g r e s s from establishing an official Federal church; the second part was designed to prevent the Federal Government from interfering with the free exercise of religion;and, as Madison told the House, the States also demanded "that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States." This declaration appears in the Tenth Amendment.

In short, by the religion clause of the First Amendment, the Framers intended to assure the States that there would be no Federal interference with their retained power to make their own laws respecting religion, limited only by their own State constitutions.

This was cleary understood by the U,S.Supreme Court in 1845 in Permoli v. City of New Orleans, where the Court said:

> "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the states." 44 U.S. (3 How.) 589, 609 (1845).

II. How the Supreme Court tried to change the Religion Clause.

With Engel v. Vitale in 1962, 10/ and with Abington School District v. Schempp in 1963, 11/ the Supreme Court began to rule that prayers in State public schools violated the establishment clause of the First Amendment, and that this had been made applicable to the States by the due process clause of the Fourteenth Amendment.

To arrive at this result, the Supreme Court had to depart from the Constitution.

First: The Supreme Court said that with the First Amendment's religion clause the Framers intended a complete separation of State and church. But, as shown before (under I), the sole purpose of the religion clause was to prevent the Federal Government from interfering with the retained power of the States to make their own laws respecting religion. The words "separation of State and church" were not even mentioned by the First Congress when it debated the religion clause, nor do these words appear anywhere in the United States Constitution.

Second: The Supreme Court declared that the religion clause had been made applicable to the States by the due process clause of the Fourteenth Amendment. But there is no relationship between these two clauses.

The due process clause of the Fourteenth Amendment reads:

> "nor shall any State deprive any person of life, liberty, or property without due process of law."

It was copied from the Fifth Amendment. It is the only provision of the Federal Bill of Rights which the Constitution has made applicable to the States. It came from the English law. When it was made part of the Fourteenth Amendment, it was already more than 600 years old. It has always meant the same, namely that no person accused of a crime may be sentenced to death, to imprisonment, or to forfeiture of property without first having been given access to a proof procedure, today called trial, where he could defend himself against the accusation. The Supreme Court itself has so held for more than 100 years, long after the adoption of the Fourteenth Amendment.12/

But early in this century, the Supreme Court began to misuse the Fourteenth Amendment's due process clause as a conduit for reaching into the retained rights of the States by declaring that it had made the First Amendment applicable to the States. To make this appear plausible, the Supreme Court first tried to establish some textual connection between the First and Fourteenth Amendments, namely between the word "freedom" in the First Amendment and the word "liberty" in the due process clause of the Fourteenth Amendment. Thus, in 1925, in Gitlow v. New York, 13/ the Supreme Court said, "that freedom of speech and of the press - which are

protected by the First Amendment from abridgment by Congress - are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." But in the First Amendment the Federal Government is told not to interfere with the freedoms there mentioned, such as freedom of speech and of the press, and the free exercise of religion, while in the due process clause the authority of the States to take freedom is recognized, except they may not do so without due process of law, that is without a trial.

Moreover, the Supreme Court has said that school prayers violate the establishment clause, and that clause does not contain the word freedom or liberty. Probably, the Supreme Court avoided the free exercise clause, because the Court did exactly what that clause forbids the Federal Government from doing, namely prohibit the free exercise of religion in the public schools.

In 1937, in Palko v. Connecticut, 14/ the Supreme Court provided itself with a magic formula to declare any State law unconstitutional which, in the opinion of no more than five Supreme Court judges, offends a principle of liberty and justice that is so "fundamental" as to be "implicit in the concept of ordered liberty". Said the Court: "Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial". Therefore, anything which in the eyes of the Supreme Court is so "fundamental" as to be implicit in the concept of ordered liberty has been made applicable to the States by the due process clause of the Fourteenth Amendment.

According to that formula, "a wall of separation between church and State " is so "fundamental" as to be implicit in the concept of ordered liberty, wherefore it has been made applicable to the States by the due process clause of the Fourteenth Amendment, for which reason children guided by their teachers may not say a little prayer in a public school of a State.

When judges consider neither the language of a constitutional provision, nor the intent of the Framers, nor the purpose for which it was created, it cannot honestly be called constitutional interpretation. The truth is that in the school prayer cases the Supreme Court did not interpret the Constitution, but tried to change it, because the Supreme Court tried to extend Federal control over a power retained by the States.

However, the Constitution has given the Supreme Court no power to change it. Art.V reserves that power to persons elected by the people. Therefore, no matter how often the Supreme Court has declared that State laws respecting school prayers and other religious matters violate the U.S.Constitution, it could not change that Constitution, and that Constitution, that is the Constitution as written and intended by the Framers and as legally amended, does not prohibit any prayers anywhere.

Legally, therefore, State legislatures that enact school prayer laws or any other laws connected with religion are only exercising a power reserved to the States and protected by the Tenth Amendment to the Constitution of the United States.

But the question remains how a State authority that makes use of that power can be protected from the effects of an adverse judgment by a federal court, that is from the threat of fine and imprisonment for contempt of court.

The answer has been provided by the Constitution itself.

III. The U.S.Constitution provides protections from the usurpations of the federal courts.

(1) The power of Congress over the jurisdiction of the federal courts.

The most important check which the Constitution has provided for the control of the federal courts is the power of Congress over their jurisdiction. The Constitution has given Congress complete control over the entire jurisdiction of the lower federal courts, and over the appellate jurisdiction of the Supreme Court.

We have incontrovertible evidence that this was intended by the Framers, namely from Oliver Ellsworth who was in the best possible position to know. He was a member of the Federal Convention of 1787 and, as a member of its Committee on Detail, one of the drafters of the clause providing for the appellate jurisdiction of the Supreme Court, now appearing in Art.III, Sec.2, of the Constitution. Later he became Chief Justice. In two early cases he emphasized that the lower federal courts cannot take jurisdiction, and the Supreme Court cannot exercise appellate jurisdiction, without congressional legislation to regulate their procedure. 15/

Additional evidence came from Alexander Hamilton, also one of the Framers of the Constitution. When the ratification of the proposed Constitution was under consideration in the conventions of the several States, fears were expressed that "the errors and usurpations of the Supreme Court will be uncontrollable and remediless." Hamilton tried to assuage those fears by pointing out (in No.80 of the Federalist Papers) that the Supreme Court would have original jurisdiction only in classes of cases almost never to occur. In all other cases of federal cognizance Congress had ample authority to use its power over the Supreme Court's appellate jurisdiction to obviate or remove any "partial inconveniences" which might develop.

When, in the 97th Congress, in response to complaints from their constituents, some members of Congress tried to make use of that power to prevent the lower federal courts from taking jurisdiction, and the Supreme Court from taking appellate jurisdiction, in cases relating to school prayers, abortion, and racial busing, they encountered opposition from those members of Congress who called themselves "liberal".

It is possible that the opposition in the Congress to the use of the power of Congress over the jurisdiction of the federal courts was due to the fact that the issue was obscured, and that the opponents might have second thoughts if faced with the true issue. The issue is not whether Congress is for or against school prayers, or for or against abortion. The issue is who under the U.S.Constitution has the right to make the laws respecting religion, abortion and schools, the Supreme Court or the people of the several States within their respective jurisdictions? The Framers of the U.S.Constitution and the States which ratified it opted for the democratic way, namely for the elected representatives of the people, not for unelected life-tenured judges.

It is democracy itself which is at stake !

Consequently, such laws ought to provide that the lower federal courts shall not take jurisdiction, and the U.S.Supreme Court shall not take appellate jurisdiction, in State cases relating to matters respecting religion, or abortion, or schools.

(2) The use of the President's pardoning power.

It must be expected that the laws passed by a State or any of its subdivisions, or any public school activities having any connection with Judeo-Christian teachings will be attacked in federal courts. In such a case, the voters ought to prevail upon the State Attorneys General to stop trying to defend by tip-toeing around the anti-constitutional Supreme Court decisions, but have the courage to show the judges that the U.S.Constitution does not prohibit any prayers anywhere; that it has left the power to make laws respecting religion to the several States; and that every judge is solemnly committed by oath or affirmation to support this Constitution, that is the Constitution as written and intended by the Framers and as legally amended pursuant to Art.V of the Constitution. Such efforts have succeeded once, namely with U.S.District Judge Hand in Alabama. They may succeed again, if constantly repeated.

If the lower federal courts persist in following the Supreme Court instead of their conscience and the Constitution, and the Supreme Court refuses to return to the Constitution, Art.II, Sec.2 of the U.S.Constitution has given the President the power to relieve the defendants from such a judgment by virtue of his power to grant pardons. When the Supreme Court ruled that the Alien and Sedition Acts were constitutional and persons were convicted and sentenced under them, President Jefferson declared that nothing in the Constitution gives the judges the right to decide for the Executive. The judges, believing the law constitutional, had a right to pass sentence of fine and imprisonment, because the power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it, because that power has been confided to him by the Constitution. 16/

President Reagan himself has made use of his pardoning power to relieve former officials of the FBI from the execution of a judgment which had been imposed upon them for actions they had committed in good faith to protect the security of the United States.

Such presidential pardoning power, if only exercised once to re-establish constitutional conditions, might even cause the judges to remember their constitutional oath and return to the Constitution.

IV. Why did the Supreme Court depart from the U.S.Constitution?

When the judges of the highest tribunal of the land, who have been given life time security in order to permit them to exercise their judicial functions free from any political pressure, misuse their high office to make their own policy and force it on the people, we must believe that they are doing this because they are convinced that they know better what is good for the people than the people themselves. Their opinions in the school prayer and related cases reveal that they wanted to protect the communities from the divisive conflicts which differences over religious questions have had in the past. However, the judges were looking backward. These bitter religious conflicts were usually due to the fact that o n e religion was forced by the government on all the people, the very thing which the First Amendment prohibits Congress from doing. But from the very beginning, the States in their earliest constitutions have guaranteed freedom of religious worship, even those with official establishments of religion.

Moreover, the Supreme Court overlooked the unifying influence which religion can have when members of different religious groups who believe in one creator unite for a common purpose. Jefferson was aware of it. He was in favor of separation of State and church, but not for the exclusion of religious education from the public schools. He was instrumental in the adoption of the Regulations of October 4, 1824, of the University of Virginia, a State University which he founded, to extend invitations to the religious sects of the State to establish schools for religious instruction "within or adjacent to the precincts of the University." He commented in a letter to Dr.Thomas Cooper, of November 2, 1822:

> "And by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality." 17/

The same idea appeared in 1940 when the Board of Education of School District No.71, Champlain County, Illinois, permitted a voluntary association, formed by members of the Protestant, Catholic and Jewish faith, to use rooms in public school buildings to offer

religious instruction by religious teachers to children whose parents requested it, at no cost to the school authorities. But in 1948, the Supreme Court declared in McCollum v. Board of Education 18/ that this was forbidden by the First and Fourteenth Amendments to the Constitution. Another example was the Regents' prayer in New York which was composed in such a way that could be accepted by all denominations that believe in one creator. It said:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents our teachers and our country."

No child was required to participate. Yet, in 1962 the Supreme Court condemned it as unconstitutional. 19/ Thus, the Supreme Court stopped a very desirable development.

Not only that. Unwittingly, the Supreme Court has encouraged and aided those forces that for years have waged a concerted attack on the Judeo-Christian foundation of American civilization. But this foundation has been this Nation's strength. It is inseparably connected with its respect for the individual and the protection of his liberties. It is this that has made this Nation so attractive to millions of people from all over the world, especially to those coming from countries which permit neither religion nor liberty. Take the foundation away, especially from the public schools, and the entire edifice will crumble. The signs are already everywhere.

Conclusion.

The re-establishment of constitutional conditions would be to the advantage of almost everyone, even of the Supreme Court judges.

If they would refrain from usurping jurisdiction in cases where the Constitution has granted no federal judicial power, such as in suits by individuals against the States arising under the retained rights of the States, federal judges would be relieved of most of their heavy case load about which they have complained so much.

If constitutional conditions had not been so profoundly disturbed during the last two decades by the federal courts' illegal encroachments on the jurisdiction of the State courts in matters relating to the retained rights of the States -- such as religion, schools, abortion, criminal process, and many others -- , Congress might not have been persuaded to create 152 new federal judgeships in 1978, and 85 additional federal judgeships in 1984. These many federal judges are a terrible burden on the federal budget and thereby on the taxpayers. A re-establishment of constitutional conditions might convince Congress that the Nation does not need so many federal judges so that Congress might finally begin with phasing out, instead of adding, federal judgships to the great benefit of the budget and the taxpayers.

As far as the people of the several States are concerned, the large majority of them would welcome it if they were finally told the truth that under the U.S.Constitution it is their right to make their own laws respecting religion, including school prayers, and respecting schools and family, including abortion, as they were used to do before the federal courts and Congress took it from them in disregard of the Constitution. Neither Congress nor the President need to fear that the States will force an unwilling person to participate in prayer. It ought to be remembered that it was the States that first guaranteed freedom of religious worship, and that it was their fear that the Federal Government might interfere with it that made them ask for the religion clause in the First Amendment.

To sum up: The U.S.Constitution leaves the States free to make any law they want respecting religion, including school prayers. An act of Congress to prevent the lower federal courts from taking jurisdiction, and the Supreme Court from taking appellate jurisdiction, in matters relating to religion is very desirable, although not absolutely necessary. But what the people do need is the willingness of the President to use his pardoning power to remit the execution of a possible adverse judgment of a federal court against any of those who have resumed their constitutional right to revive prayers in the public schools.

Appendix: Recent actions taken by the Supreme Court and by Congress.

Lest people be misled into false hopes, it seems necessary to mention briefly some recent actions taken by the Supreme Court and the Congress because they received considerable publicity.

The Supreme Court action concerned two school prayer laws enacted by the legislature of Alabama: the first one provided that at the commencement of the first class of each day, the teacher "may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer"; the later law provided that teachers "may lead willing students in prayer" either as selected by them or as suggested by the legislature.

The constitutionality of both laws was attacked by a father of three children in the public school system of Mobile County.

The attorney who defended the action on behalf of the State was Mr.Fob James III, a son of the then Governor of Alabama, Fob James. Upon my suggestion, they based the defence entirely on the Constitution.

U.S.District Judge J.W.Hand responded. Following his conscience and his oath taken pursuant to Art.VI, clause 3 of the U.S.Constitution to support t h i s Constitution, that is the Constitution as written and intended by the Framers and as legally amended, he came to the conclusion that the First Amendment was never intended to apply to the States through the Fourteenth Amendment; that in order to make the First Amendment applicable to the States, the courts had amended the Constitution by judicial fiat; that the only legal way to amend the Constitution is by following its formal, mandated procedures; and that to amend the Constitution by judicial fiat is both unconstitutional and illegal. Therefore he dismissed the actions on January 14, 1983. 1/

On May 12, 1983, the U.S.Court of Appeals for the 11th Circuit reversed. 2/ It held that according to the "standards articulated by the Supreme Court" both the silent as well as the vocal prayer laws were unconstitutional, and that "Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court." Probably to indicate that the Court of Appeals was not blindly following the Supreme Court but that it also had the Constitution in mind, the Court of Appeals said, "our Constitution provides that the Supreme Court is the final arbiter of constitutional disputes." But this pronouncement is demonstrably false. There is no such provision in the Constitution, and it can be proven from its sources that the omission was intended. 3/

On April 2, 1984, the Supreme Court affirmed without opinion the decision of the 11th Circuit Court of Appeals declaring unconstitutional the vocal prayer law, but agreed to give a full review of the silent prayer law, because the Supreme Court had never passed on that question. 4/

The Supreme Court's action regarding the vocal prayer law is a clear sign that the Court is not willing to change its anti-constitutional course.

Regrettably, the recent actions of Congress offer no protection from the usurpation of the federal courts. Rather, they showed that many members of Congress were not willing to face the constitutional problems.

On July 25, 1984, the House passed the so-called Equal Access Act, previously passed by the Senate, and signed into law by President Reagan on August 11, 1984, as part of the amendments to the Education for Economic Security Act. 5/ It provides that it shall be unlawful for any public secundary school which receives federal financial assistance to deny the use of its buildings to students who wish to conduct a meeting "on the basis of the religious, political, philosophical, or other content of the speech at such meetings," while granting such access to other extracurricular student groups "during noninstructional time". But then Congress attached to it so many qualifications and conditions as to be a veritable invitation to law suits.

On July 26, 1984, the House passed Sec.420A. "Voluntary Silent Prayer",as an amendment to Part B of the General Education Act, 6/ as follows:

> "No State or local educational agency shall deny individuals in public schools the opportunity to participate in moments of silent prayer. Neither the United States nor any State or local educational agency shall require any person to participate in prayer or influence the form or content of any prayer in such public schools."

Originally, the bill, as it came from the Senate, had provided for vocal prayers, and both the prayer bill as well as the Equal Access Bill had contained sanctions in the form of withholding funds in case of non-compliance. Thereby Congress would have made its willingness of paying out federal tax money, over which Congress has control, dependent on the observation of its conditions. But these sanctions were eliminated, and with them any constitutional basis for such congressional legislation. The only jurisdictions in which the Constitution has given Congress the power to legislate respecting religion in schools are the District of Columbia and the Federal Enclaves (Const.Art.I, Sect.8, cl.17), but as far as the States are concerned, that power has been retained by them. However, the debates indicate that the majority of Congress did not intend to pass effective legislation.

While the people are powerless to influence the federal courts, they can make their wishes known to their representatives in Congress, if necessary by voting them out of office. But the people must understand that the only effective legislation to protect them from the interference of the federal courts is an act of Congress to prevent the federal courts from taking jurisdiction, and the Supreme Court from taking appellate jurisdiction, in matters relating to religion.

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2. Abington School District (Pa.) v. Schempp; Murray v. Curlett et al., constituting the Board of School Commissioners of Baltimore City, 374 U.S. 203 (1963)

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7. 1 Annals of Congress 434 et seq., 729 et seq.

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   Jaffree et al. v. James, Governor of Alabama, 554 F.S.1130 (S.D. Ala. 1983)

2. Jaffree v. Wallace, Governor of Alabama, Jaffree v. Board of School Commissioners, 705 F.2d 1526; 713 F.2d 614 (11th Cir.1983).

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FEDERALISM AND THE FEDERAL JUDICIARY I.

A Discussion of the Constitutional Problems

connected with

the Status of the Judiciary and the Incorporation Doctrine

raised by the Judicial Reform Act

in preparation by the

Subcommittee on Separation of Powers,
Senate Committee on the Judiciary

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FEDERALISM AND THE FEDERAL JUDICIARY I.

by HERMINE HERTA MEYER
Attorney at Law

INTRODUCTION.

1. The Need for Federal Judicial Reform.

On October 1, 1982, Senator East introduced S.3018 (97th Cong., 2d Session) as a preliminary to a Judicial Reform Act. Its intended purpose was the restoration of the constitutional role of the federal courts.

The need for such legislation has been caused by the departure of the U.S.Supreme Court from the Constitution of the United States. Under its leadership, the federal courts have usurped functions which, under the constitutional plan, rightfully belong to the States and to the legislative and executive departments of the federal government. Congress did nothing to correct this, but often aided it by fashioning legislation on the anti-constitutional rulings of the Supreme Court.

As a result, federal courts have interfered with the administration of the schools, the prisons, mental institutions and the criminal justice systems.

In hearings held by Senator East, as Chairman of the Subcommitty on Separation of Powers, Senate Committee on the Judiciary, between March 16 and June 10, 1983, witnesses from various States have described the serious disturbances caused by such federal interference and the tremendous increase in litigation encouraged by the federal courts at enormous costs not only to the States, but also to the U.S.Government. Most recently, even six Supreme Court judges have publicly complained that their Court is so swamped with cases that it can no longer handle them properly.

The surest and cheapest remedy would be, of course, the re-establishment of constitutional conditions. The contemplated court reform bill would be a very desirable first step in this direction.

This paper will discuss the constitutional aspects connected with some of the remedies suggested by this bill. This will show to what extent the Supreme Court has departed from the real, the only Constitution of the United States.

2. The Status of the Judiciary under the Constitution of the United States.

"No, Democracy is not a fragile flower.
Still, it needs cultivating."

These words were spoken by President Reagan in his address to the Parliament of Great Britain, on June 8, 1982. In that speech, President Reagan demonstrated that democracy has not vanished from this earth in spite of all adversities it has encountered by that "terrible political invention -- totalitarianism." And he expressed satisfaction that in spite of any disagreement between free Europe and the United States, "on one point all of us are united -- our abhorrence of dictatorship in all its forms."

Surely, the President must have noticed that a form of dictatorship has been developing right here in the United States, namely a dictatorship of the federal courts. Under the leadership of the U.S. Supreme Court, the federal courts have established themselves as the supreme law and policy makers of the Nation. Without a constitutional amendment, merely in the guise of "constitutional interpretation," the Supreme Court has fabricated forever more new "constitutional rights," in order to serve the federal courts as justification to destroy any law they did not like, and to dictate to the States as well as to the federal government what laws they may or may not have.

In 1958, the Supreme Court elevated itself formally into the supreme constitutional lawgiver of the Nation. In Cooper v. Aaron, 358 U.S. 1, 18 (1958), the Supreme Court declared:

> "Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of Marbury v. Madison, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land,and Art.VI of the Constitution makes it of binding effect on the States, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art.VI, cl.3, "to support this Constitution.""

The judges of the Supreme Court must have sensed the enormous presumptuousness expressed by that declaration, because the opinion of the Court in which that statement appears was not, as customarily, delivered by one member of the Court, but as follows:

> "Opinion of the Court by THE CHIEF JUSTICE, MR.JUSTICE BLACK, MR.JUSTICE FRANKFURTER, MR.JUSTICE DOUGLAS, MR. JUSTICE BURTON, MR.JUSTICE CLARK, MR.JUSTICE HARLAN, MR.JUSTICE BRENNAN and MR.JUSTICE WHITTAKER."

These judges conveniently ignored that they too are solemnly committed by an oath taken pursuant to Art.VI, clause 3, "to support this Constitution," because by declaring that a decision of the Supreme Court, interpreting or pretending to interpret a constitutional provision, is "the supreme law of the land," they did not support this Constitution, but attempted to change Art.VI, clause 2 of the Constitution in plain violation of Article V.

Const.Art.VI, cl.2, is the so-called supremacy clause. At the Federal Convention of 1787, where the U.S.Constitution was drafted, the supremacy clause was offered as a substitute for the provision in the Virginia Plan to make all state laws, before they could go into effect, subject to the approval of the National Legislature and a Council of Revision composed of the Executive

and Supreme Court judges, which the States rejected. Instead, the States agreed that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land," and that the judges in every State shall be bound to give effect to the U.S.Constitution, the laws of the United States made in pursuance of the Constitution, and the Treaties made under the authority of the United States in preference to inconsistent provisions in the constitutions and laws of their States.[1] But, as the constitutional language says, the judges of the States may refuse to give effect to an act of Congress which, in their opinion, is not pursuant to the Constitution. As Hamilton explained in No.33 of the Federalist Papers,[2] acts of the larger society which are not pursuant to its constitutional powers are invasions of the residual sovereignty of the smaller society, and therefore acts of usurpation. For the same reason, a federal court, including the Supreme Court, invades the residual sovereignty of the States if it does not construe a constitutional provision strictly in accordance with its language and the intent of its framers. There is no vacuum in the United States Constitution.

There is no provision in the U.S.Constitution which says that a Supreme Court decision shall be the supreme law of the land. Nowhere has the Supreme Court been given the power to make the laws of the United States. On the contrary, the first sentence of the Constitution says clearly and without any possibility of misunderstanding: "All legislative powers herein granted shall be vested in a Congress of the United States." The Supreme Court itself has admitted that outside of the U.S.Constitution, no federal power can legitimately exist. See Reid v. Covert, 354 U.S.1, 5-6 (1957).

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1) 1 Max Farrand, The Records of the Federal Convention of 1787, 21, 245; 2 id. 28-29, 183, 572.

2) The Federalist Papers 204-205. (New American Library ed. 1961).

It follows that to give a Supreme Court decision the character of the law of the land or even of the supreme law of the land, requires a constitutional amendment. See Ullmann v. United States, 350 U.S. 422, 428 (1956).

The only provision regulating the amendatory process of the Constitution, is Article V. It authorizes only persons elected by, and responsible to, the voters to change the Constitution, namely with the consent of two-thirds of Congress and the legislatures or conventions of three-fourths of the States. The Constitution has given the Supreme Court no authority to change it. Therefore, the Supreme Court's interpretation of a constitutional provision cannot change the Constitution. But the Supreme Court can, with the help of raw federal enforcement powers, prevent the people from exercising their constitutionally protected right of making their own laws in matters reserved to the States.

Moreover, in Cooper v. Aaron, supra (p.3) the Supreme Court placed its claim, that its interpretation of the Fourteenth Amendment is the supreme law of the land, on an assertion which is not true. The Court said that this followed from the basic principle declared by Ch.J.Marshall in Marbury v. Madison, 5 U.S.(1 Cranch) 137, 177 (1803), "that the federal judiciary is supreme in the exposition of the Constitution," and that that principle had ever since been respected by the country as a permanent and indispensable feature of our constitutional system.

Marbury v. Madison established no such principle. In that case, Ch.J.Marshall struggled through a long and wordy opinion with the question whether he could refuse to give effect to an act of Congress if, in his opinion, it was not in pursuance of the Constitution. The Constitution has given this authority expressly to the judges of the State courts (in Art.VI, cl.2). But there is no such provision for the federal judges. Ch.J.Marshall cited a number of reasons, most of them erroneous, which, so he argued, authorized him by implication to expound the Constitution and refuse to give effect to an act of Congress not in pursuance thereof. Among these reasons was the sentence invoked by the Warren Court in 1958 as basis for its exaggerated claim. Ch.J.Marshall said:

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case." 5 U.S.(1 Cranch), at 177.

Obviously, Marshall claimed no more than the authority to examine the Constitution and the act of Congress in order to be able to determine the applicable law in that particular case. However, the only provision in the Constitution which gave federal judges this authority was one which Marshall also mentioned among his many reasons, namely:

> "The judicial power of the United States is extended to all cases arising under the constitution.
>
> Could it be the intention of those who gave this power, to say that ... a case arising under the constitution should be decided without examining the instrument under which it arises?
>
> This is too extravagant to be maintained." 5 U.S. (1 Cranch), at 178-179.

But it is doubtful that Marshall was seriously interested in expounding the Constitution, because, as Corwin[3] showed, there was no genuine constitutional issue in that case. As Marshall had formulated it, the question was whether Congress, in §13 of the Judiciary Act of 1789, could add to the original jurisdiction of the Supreme Court granted by the Constitution the jurisdiction to issue a writ of mandamus to public officers. His answer was that this authority "appears not to be warranted by the Constitution." 5 U.S.(1 Cranch), at 175-176.

However, a reading of §13 of the Judiciary Act of 1789 reveals that it speaks of four different things:

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3) Edwin S. Corwin, The Doctrine of Judicial Review 1-10 (Princeton Univ.Press 1914, reprinted in 1963).

(1) when the Supreme Court shall have exclusive jurisdiction;

(2) when the Supreme Court shall have original but not exclusive jurisdiction;

(3) when the Supreme Court shall have appellate jurisdiction;

(4) that the Supreme Court "shall have power to issue writs of prohibitions to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." (Emphasis added).

Corwin pointed out that, like the writs of habeas corpus and injunction, the writ of mandamus was a remedy available from a court which had otherwise jurisdiction. Only a few years later, the Supreme Court itself had recognized and applied the rule that "the writ of mandamus is not to be regarded ordinarily as a means of obtaining jurisdiction, but only of exercising it" when there was otherwise jurisdiction.[4)]

Corwin further pointed out that the framers of the Judiciary Act of 1789 were largely the same men who framed the Constitution. They would hardly have written an unconstitutional provision into the Act.

Corwin concluded that "there was no valid occasion in Marbury v. Madison for an inquiry by the court into the prerogative in relation to acts of Congress." Why then, he asked, did the court make such an inquiry? Corwin's answer was: "The court was bent on reading the President a lecture on his legal and moral duty to recent Federalist appointees to judicial office, whose commissions the last Administration had not had time to deliver, but at the same time hesitating to invite a snub by actually asserting jurisdiction over the matter."[5)]

Thus, John Marshall's celebrated decision in Marbury v. Madison was in essence a misuse of the Supreme Court's power by Marshall who fabricated a constitutional issue for the purpose of expressing his displeasure with President Jefferson, while at the same time not daring to issue an order which the President might have refused to execute.

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4) Id. 7-8.

5) Id. 9-10.

Since Ch.J.Marshall had declared that the Court had no jurisdiction, there was no "decision" to be carried out by the Chief Executive, and there was no indication that Congress or President Jefferson felt themselves in any way bound by any of the pronouncements in the Court's overlong opinion. The decision would have fallen into the obscurity which it deserved, had it not been for the development of the theory in the United States, so destructive of the principles of democracy and self-government, that the Supreme Court is the ultimate expounder of the Constitution, and that its opinions, no matter how erroneous and even in open disregard of the Constitution, have the effect of a generally binding law.

For that reason, it must again be emphasized that Ch.J.Marshall made no claim that the federal judiciary was supreme in the exposition of the Constitution, or that the Supreme Court's interpretation of a constitutional provision is the supreme law of the land. And even if he had made such a claim, it could have no effect unless it is in the Constitution and that, most emphatically, it is not.

The debates in the Federal Convention of 1787 leave no doubt about the intended effect of a Supreme Court decision. When Dr.Johnson moved to insert into the Constitution that the jurisdiction of the Supreme Court should be extended to cases arising under this Constitution, Madison's notes indicate that he was first opposed to it. He said, he

> "doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department."

The notes continue:

> The motion of Docr.Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature - ". 6/

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6) 2 Farrand 430.

It is clear that what the framers of the Constitution intended to give to the federal judicial department, and what was ratified by the States, was the power to decide a constitutional issue only in a case brought properly before the court, and that such a decision was to be binding only on the parties to the suit as to the objects of that suit.[7)]

This was correctly so understood by the early Presidents and Jefferson's Attorney General.

Already in the First Congress, Madison objected strongly to an argument

> "that the Legislature itself has no right to expound the Constitution; that wherever its meaning is doubtful, you must leave it to take its course, until the Judiciary is called upon to declare its meaning. I acknowledge, in the ordinary course of Government, that the exposition of the laws and Constitution devolves upon the Judiciary. But I beg to know, upon what principle it can be contended, that any one department draws from the Constitution greater powers than another, in making out the limits of the powers of the several departments?" 8/

In 1801, Madison became President Jefferson's Secretary of State. In this capacity, he was advised by Levi Lincoln, Jefferson's Attorney General, in an opinion of June 25, 1802, 9/ as to the effect of the Supreme Court's decision in the case of United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), as follows:

> "The Supreme Court, who were competent to decide this principle, have determined it in her case. It must, therefore, be considered as binding in this particular instance. Although they have fixed the principle for themselves, and thereby bound others, in reference to the case on which they have adjudicated, it can, I conceive, extend no further. In all other cases in which the Executive or other courts are obliged to act, they must

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7) See 2 George Bancroft, History of the Formation of the Constitution 198 (New York 1882).

8) First Congress, 1st Sess., June 17, 1789. 1 Annals of Congress 500.

9) 1 Opinions of the Attorneys General 119, 122 (1802)

> decide for themselves; paying a great deference to the opinions of a court of so high an authority as the supreme one of the United States, but still greater to their own convictions of the meaning of the laws and constitution of the United States, and their oaths to support them."

Thomas Jefferson expressed the same view in his letter to Abigail Adams, dated September 11, 1804,[10] where he explained why he pardoned the defendants convicted under the Alien and Sedition Acts:

> "You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them the right to decide for the Executive, more than the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power has been confided to them by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch."

The opinion of Madison and Jefferson as to the effect of a Supreme Court decision under the Constitution was also shared by President Jackson. In his message to Congress of July 10, 1832, communicating to Congress his veto of the Charter of the United States Bank,[11] he said :

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10) cited by Walter F. Murphy, Congress and the Court 25. (Univ. of Chicago Press 1962).

11) 8(3) Congressional Debates, 22nd Cong., 1st Sess., App.73, 76 (1832).

"It is maintained by the advocates of the bank that its constitutionality, in all its features, ought to be considered as settled by precedent, and by the decision of the Supreme Court. To this conclusion I cannot assent. ...

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this Government. The Congress, the Executive, and the court, must each for itself be guided by its own opinion of the constitution. Each public officer who takes an oath to support the constitution, swears that he will support it as he understands it, and not as understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the supreme judges, when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges; and on that point, the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive, when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."

It seems inconceivable that with such a constitutional and historical foundation, any legislator or future legislator could ever adhere to an opinion that not only the actual decision of the Supreme Court, but every pronouncement, that is every dictum, touching upon a constitutional provision, is of binding effect on the entire Nation. Yet, that is what Stephen A. Douglas did in the famous Lincoln-Douglas debate during his campaign for the United States Senate.[12)]

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12) Created Equal? The Complete Lincoln-Douglas Debates, ed. and with an introduction by Paul M. Angle (Chicago 1958).

In 1856, the Supreme Court had decided Dred Scott v. Sanford, 60 U.S.(19 How.) 393. Dred Scott, a Negro, had sued in a federal court to establish his freedom. He claimed to be a citizen of Missouri on the ground that he had acquired his freedom through a temporary stay in Illinois, a free State, and in a territory where slavery had been outlawed by an act of Congress. He had been taken there by his master, an army surgeon by the name of Emerson, who later returned with Scott to Missouri, his home State. After Emerson's death, his widow transferred title to Scott to her brother, the defendant Sanford, a citizen of New York, for the purpose of enabling Scott to sue in a federal court.

The actual decision of the Supreme Court was that Scott's status was determined by the law of the State of Missouri; that according to that law, Scott was a slave and therefore not a citizen of Missouri; that for that reason he could not sue in a federal court; and that therefore a federal court had no jurisdiction.

Outside of this actual decision, the Supreme Court said many other things, among them,

(1) that no Negro slave, imported as such from Africa, and no descendant of such slave, can ever be a citizen of the United States, in the sense of that term as used in the Constitution of the United States, because they had not been included in the Declaration of Independence, 60 U.S. (19 How.), at 407, 410;

(2) that "subject to the Constitution of the United States," neither Congress nor a territorial legislature can exclude slavery from any U.S. territory. Id. at 450-452.

Lincoln, who campaigned against Douglas for the U.S.Senate, had attacked the Dred Scott decision, especially these two pronouncements.

Douglas saw therein "a crusade against the Supreme Court of the United States." According to him, every pronouncement (dictum) relating to the Constitution made by the Supreme Court, even in a case where the Court had declared that it had no jurisdiction,

had to be accepted as authoritative interpretation of the Constitution and the laws. For him, the Supreme Court was the ultimate arbiter of all constitutional questions.

Lincoln called this "an astonisher in legal history;" "a new wonder of the world." For Lincoln, this was "a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchy." He denied that he "resisted" the Supreme Court's Dred Scott decision. The Court had decided that Scott was still a slave, and he, Lincoln, had no intention of interfering with the property by attempting to take Scott from his master. He merely denied that the Court's decision would prevent Congress from prohibiting slavery in a new territory. He refused to recognize it as "a rule of political action for the people and all the departments of the government." In short, he made the time honored distinction between an actual decision of the Supreme Court that established with finality the rights between the parties to a law suit -- in the Dred Scott case that Scott was still his master's property -- and a dictum; and he also rejected the view that a Supreme Court's interpretation of a constitutional question in an individual legal controversy was binding on everyone outside of that controversy.[13)]

Lincoln considered this matter of such importance that he spoke about it at his first inaugural address. He said:

> "I do not forget the position, assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit ... And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

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13) Id. 36-37, 56, 78.

Regrettably, Lincoln's advice was not heeded, and his prophesy has come to pass: the people of the United States have ceased to be their own rulers because Congress and their Presidents have practically resigned their government into the hands of the Supreme Court. As a result, a phenomenon has occurred: by way of a law suit, a Constitution based on the democratic principles of sovereignty and self-government of the people has been replaced by a minority government of life tenured judges.

However, the judges alone would not have succeeded in forcing the result of anindividual decision on the entire Nation, had Congress and the Presidents not become slaves to the theory, unknown to the entire Western world and, above all, also unknown to the U.S.Constitution, that a decision of the Supreme Court as well as every pronouncement (dictum) expounding a constitutional provision takes the place of that constitutional provision itself and becomes the supreme law of the land.

The logical consequence of that theory is that the Nation can ~~only~~ free itself from the effects of a Supreme Court decision only through a constitutional amendment pursuant to Art.V. of the Constitution. And this, in fact, is being claimed by groups who find it advantageous to cling to the rulership of the judges.

This means that no more than five Supreme Court judges have it in their power to change the Constitution at will, while the people are relegated to the constitutional amendatory process if they want to rid themselves of a constitutional misinterpretation by the Supreme Court. This is so absurd that we can be sure that it was never contemplated by the framers of the Constitution.

True to its plan, the Constitution has not left the usurpations of the Supreme Court without a check. It is the power to regulate the jurisdiction of the federal courts. With the exception of the very few cases in which the Constitution itself has granted original jurisdiction to the Supreme Court, all power over the appellate jurisdiction of the Supreme Court and over the entire jurisdiction of the lower federal courts has been given to Congress.

Because Art.III, Sec.2 of the Constitution says "... the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make," there have been allegations at an early date that also the Supreme Court's appellate jurisdiction is derived directly from the Constitution and that there are certain "core functions" of the Supreme Court into which Congress may not intrude.

Such allegations have been convincingly refuted by Ch.J.Ellsworth who, as a member of the Federal Convention's Committee on Detail, was one of the drafters of the clause. In Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796), he said:

> "Here then, is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of an appellate jurisdiction, is simply, whether Congress has established any rule for regulating its exercise?"

In Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 9-10 (1799), Rawle, Counsel for the defendant in error, had argued, "that the judicial power is the grant of the constitution, and congress can no more limit, than enlarge, the constitutional grant." Ch.J.Ellsworth responded in a footnote, as follows(at p.10):

> "How far is it meant to carry this argument? Will it be affirmed, that in every case, to which the judicial power of the United States extends, the federal Courts may exercise a jurisdiction, without the intervention of the legislature, to distribute, and regulate, the power?"

J.Chase added (id.):

> "The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we possess it, not otherwise; and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would perhaps, be expedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant."

Ch.J. Ellsworth also had pointed out that a court of limited jurisdiction cannot act unless the contrary appears (id. at 11). All federal courts, including the Supreme Court, are courts of limited jurisdiction. Therefore the Supreme Court cannot act unless the contrary appears. The Constitution itself has granted to the Supreme Court original jurisdiction in a few cases enumerated in Art.III, Sec.2, cl.2, but has left to Congress the regulation of all its appellate jurisdiction. It follows that there has to be an act of Congress before the Supreme Court can take appellate jurisdiction.[14)]

In the Federalist Papers, Alexander Hamilton, also one of the framers of the Constitution, mentioned the power of Congress over the appellate jurisdiction of the Supreme Court three times as being adequate to remove any "partial inconveniences" which may be caused by usurpations of the Supreme Court, viz. in No.80 (p.481), and No.81 (at pp.488 and 491). However, when, in the 97th Congress, in response to complaints from their constituents, some members of Congress tried to make use of that power to prevent the Supreme Court from taking appellate jurisdiction, and the lower federal courts from taking jurisdiction, in cases relating to school prayers, abortion, and racial busing, they encountered opposition from those members of Congress who called themselves "liberals."

Noticeable was also the total absence of support from President Reagan, although he had declared himself against the rulings of the Supreme Court in these matters. It soon became obvious that he had received bad legal advice, because he sent to Congress a proposal for a constitutional amendment with respect to school prayers, which reads:

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14) See Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845); Ex parte McCardle, 73 U.S. (6 Wall.) 318 (1868), 74 U.S. (7 Wall.) 506, 513-514 (1869); Carroll v. United States, 354 U.S.394 (1857).

"Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or public institutions. No person shall be required by the United States or by any State to participate in prayer."

The U.S.Constitution does not prohibit prayers anywhere, and both the United States Constitution as well as the State constitutions guarantee freedom of religious worship. The prayers which the Supreme Court declared to be unconstitutional[15] were all voluntary prayers. The second sentence of the proposed amendment, if adopted, would for the first time provide the federal courts with a constitutional basis to involve themselves in a constant fight over the question of voluntariness.

A constitutional amendment to "permit" voluntary silent prayer or meditation, as has also been proposed, is even more undesirable, because it would for the first time provide the federal courts with a constitutional authority to suppress all other prayers.

As shown in my statement submitted to the Senate Judiciary Committee on September 16, 1982, at the Hearing on S.J.Res.199[16], the decisions in which the Supreme Court ruled that prayers in State public schools violate the U.S.Constitution, were not interpretations of the Constitution, but attempts to change it in the guise of constitutional interpretation. The Supreme Court rendered these decisions against the Constitution, because the Constitution has given the Supreme Court no authority to change it. The proposed constitutional amendments would be most undesirable already for the reason that they would, for the first time, place into the Constitution an indirect admission that the Supreme Court has the right to change the Constitution in the guise of "constitutional" interpretation, and therefore would be irreconcilable with Art.V of the Constitution which reserves the authority to change it to persons elected by the people.

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15) See Engel v. Vitale, 370 U.S.421 (1962) and Abington School District v. Schempp, 374 U.S.203 (1963). See infra 71-73.

16) Hearings before the Committee on the Judiciary, U.S.Senate, 97th Cong., 2nd Sess., on S.J.Res.199, Serial No.J-97-129, pp.351-362.

It is possible that the opposition in the Congress and of the President to the use of the power of Congress over the jurisdiction of the federal courts was due to the fact that the issue was obscured and that the opponents might have second thoughts if faced with the true issue. The issue is not whether Congress is for or against school prayers, or for or against abortion. The issue is who under the U.S.Constitution has the right to make the laws concerning religion, abortion and schools, the Supreme Court or the several States within their jurisdictions and Congress in the District of Columbia. The framers of the Constitution and the States which ratified it opted for the democratic way, namely for the elected representatives of the people in Congress and the legislatures of the States, not for unelected life tenured judges.

It is democracy itself which is at stake !

Obviously, democracy needs cultivating in the United States, and the President is in the best possible position to do this through the prestige of his Office. He ought to do this by giving his support to the efforts now underway in the Senate Judiciary Subcommittee on Separation of Powers to restore the constitutional role of the federal courts.

3. Under the Constitution of the United States, a Supreme Court Decision expounding the Constitution binds only the parties to the suit as to the objects of that suit.

The foregoing introduction was needed to unravel the confusion which prevails concerning the constitutional plan for the federal courts, in order to preclude objections that Congress cannot legislate where the Supreme Court has established a "constitutional" rule. As Hamilton pointed out in No.81 of The Federalist Papers (at p.484): "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."

The following can be proven from the constitutional language and its sources:

The "supreme Law of the Land", of which Art.VI, clause 2 speaks, consists of the U.S.Constitution, the laws of the United States, meaning acts of Congress if made in pursuance of the Constitution, and the treaties made under the authority of the United States.

Art.III, Sec. 2, clause 2 has given original jurisdiction to the Supreme Court only in very few cases, viz."in Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."

Clause 2, as modified by the Eleventh Amendment, refers to those cases in which the grant of power is made in clause 1.

The Constitution has granted no federal judicial power in cases arising under the retained rights of the States in suits by individuals against a State, and between citizens of the same State, and between a State and its citizens.

Art.III, Sec.2, clause 2 has given Congress unconditional power over the appellate jurisdiction of the Supreme Court and over the entire jurisdiction of the lower federal courts.

In all cases in which Congress has not made use of its power to give federal judicial jurisdiction to the federal courts, it has remained in the courts of the States.[17)]

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17) See Palmore v. United States, 411 U.S.389, 401-402 (1973):

> "'[T]he judicial power of the United States ... is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) ... and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degree and character which to Congress may seem proper for the public good.' Cary v. Curtis, 3 How. 236, 245 (1845). Congress plainly understood this, for until 1875 Congress refrained from providing the lower federal courts with general federal-question jurisdiction. Until that time, the state courts provided the only forum for vindicating many important federal claims. Even then, with exceptions, the state courts remained the sole forum for the trial of federal cases not involving the required jurisdictional amount, and for the most part retained concurrent jurisdiction of federal claims properly within the jurisdiction of the lower federal courts." (Citations omitted).

The U.S.Constitution contains no provision authorizing judicial review, as the power assumed by federal judges , to destroy a law which they believe to be unconstitutional, is called.

In the debates of the Federal Convention of 1787, the opponents to the participation of judges in the law-making process as members of the Council of Revision had remarked on several occasions that the constitutionality of the law would be considered by the judges when the question was properly before them in their capacity as judges.[18] But outside of such occasional remarks, there was no debate on that point, nor did the Convention ever vote on a motion to include into the Constitution the power for the federal courts to declare a law invalid because they believed it to violate the Constitution.

The omission was intended. Madison of Virginia and Wilson of Pennsylvania were the strongest advocates of the participation of Supreme Court judges as members of a Council of Revision to veto any law before it could go into effect. But there, the judges would have acted together with the Executive, and two-thirds of Congress could have overruled them. After this was rejected, Madison was in no mood to grant to the judges an uncontrolled power to destroy a law. Hence, his insistence that the federal judiciary should have the power to expound the Constitution only in "cases of a Judiciary nature," that is in a legal controversy properly before the Court, with binding effect only on the parties to the suit as to the objects of that suit. (supra 8-9).

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18) 1 Farrand 97, 98, 109; 2 Farrand 27, 73, 76, 78, 92, 93.

Re: JUDICIAL REFORM ACT -- TITLE I - COURT PROCEDURES.

Part A -- Incorporation Doctrine

1. The first 8 amendments to the U.S.Constitution were added upon request of the States as special restrictions on the U.S.Government only and were not intended to apply to the States. -- The Ninth Amendment was intended to protect from federal interference those State rights retained by the people of the several States which are not enumerated in Amendments 1-8. -- The Tenth Amendment makes clear that the powers not delegated to the U.S.Government by the U.S.Constitution, nor prohibited by it to the States have been retained by the States or their people.

Part A is designed to prevent the U.S.Supreme Court from taking appellate jurisdiction, and the lower federal courts from taking jurisdiction, over "any case wherein any party claims the abridgement by a State," or by any authority of a State, "of any right secured by the first eight amendments to the Constitution of the United States."

The first eight amendments to the Constitution are commonly called the Federal Bill of Rights. They were intended to be special restrictions on the new federal government. They were not intended to apply to the States.

This fact has never been drawn into question by the Supreme Court and is so generally accepted that it would not be necessary to prove it from the Constitution and its sources, had I not been advised that some Senators permitted themselves to be influenced by William Rawle's book, published shortly after the adoption of the Constitution,[19] which expressed the view that only the First Amendment was a restriction on the federal government alone, because its language clearly says, "Congress shall make no law", while the other amendments are in general terms and therefore also applied to the States.

The book was probably written by the same Rawle whose views on federal judicial power were refuted by Ch.J.Ellsworth (supra 15-16).Rawle's views on the applicability of amendments 1-8 can be just as easily refuted.

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19) William Rawle, A View of the Constitution of the United States of America, 2nd ed. Philadelphia 1829.

Rawle wanted to prove his views exclusively from the language (id.120-135). But he was inconsistent. Thus, he indicated that Congress could legislate to protect against abuses of liberty of speech and of the press, because "the punishment of dangerous or offensive publications which, on a fair and impartial trial, are found to have a pernicious tendency, is necessary for the peace and order of government and religion, which are the solid foundations of civil liberty." (Id. 123-124). But the First Amendment says categorically, "Congress shall make no law ... abridiging the freedom of speech, or of the press". Logically, therefore, Congress cannot make any law protecting individuals from excesses of the press. That power, namely the power to make laws respecting the press, together with the power to make laws to protect the people from excesses of the press, has been retained by the States.

Then Rawle said that the Sixth Amendment "has more immediate reference to the judicial proceedings of the United States, and may therefore be considered as restraints only on the legislation of the United States (id.128). But this Amendment is also in general terms. Evidently then, this alone cannot be taken as a criterion for its applicability to the States. Actually, exactly the contrary is true. We have it from one of the framers himself, namely Alexander Hamilton. He explained in No.83 of the Federalist Papers (at p.503):

> "The United States, in their united and collective capacity, are the OBJECTS to which all general provisions in the constitution must necessarily be construed to refer." (Emphasis original). 20/

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20) The framers of the Constitution used the plural form when speaking of the United States, and so does the Constitution (See Art.III, Sec.2, cl.1 and Thirteenth Amendment). This is grammatically correct and more fitting a federal system than "the United States is." Therefore I shall follow the Constitution.

Later, Ch.J.Marshall, certainly as much a contemporary as Rawle, gave the same explanation expressly with respect to the Federal Bill of Rights. In Barron v. Baltimore, 32 U.S.(7 Pet.) 242, 246-247 (1833), Ch.J.Marshall said, in substance, that the U.S.Constitution was created for the general government, not for the individual States. Each State established a constitution for itself. The powers conferred by the U.S.Constitution were intended to be exercised by the United States Government, "and the limitations on power, if expressed in general terms, are naturally and, we think, necessarily,applicable to the government created by the instrument." Therefore, "the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states."

As already mentioned, freedom of speech, or of the press refer to rights retained by the States, as do all the other rights enumerated in amendments 1-8 as restrictions on the federal government. The Constitution has not given the federal government any power to make laws which could endanger those rights. Therefore some people opposed a Federal Bill of Rights as unnecessary and even dangerous.

For instance, Rep.Jackson from Georgia objected:

> "There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government.
>
> The gentleman endeavors to secure the liberty of the press; pray how is this in danger? There is no power given to Congress to regulate this subject as they can commerce, or peace, or war." 21/

Madison had referred to these objections when introducing the amendments. He considered them to be "the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against."[22] For that purpose, he had proposed the following clause:

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21) First Congress, first Session, 1 Annals of Congress 442 (1789).
22) Id. 439.

> "The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution." 23/

This became the Ninth Amendment which reads:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

As an added precaution to protect the retained rights of the States, several State conventions had requested that it should be declared in the Constitution:

> "The 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."

In addition, the Senate prefixed the following preamble to the amendments:

> "The conventions of a number of the states, at the time of adopting the constitution, expressed a desire in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: ..." 24/

All this is clear evidence of the intent of the framers that the first eight amendments are restrictions on the federal government only, and that none of them was meant to apply to the States.

It also ought to be clear that the rights retained by the people mentioned in the Ninth Amendment, and the powers reserved to the people mentioned in the Tenth Amendment are, of course, the the rights and powers of the people of the several States, that is they concern State laws, not federal laws. There are only such federal rights as are in the Constitution. See Reid v. Covert, 354 U.S.1, 5-6 (1957). Therefore there can be no federal rights retained by the people.

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23) Id. 435.

24) Journal of the First Session of the Senate, Appendix 96 (1789).

Strangely enough, former Supreme Court Justice Goldberg discovered such federal rights retained by the people in the Ninth Amendment. In his concurring opinion in Griswold v. Connecticut, 381 U.S.479, 492 (1965), he said:

> "the Ninth Amendment shows a belief of the Constitution!s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. As any student of this Court's opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States. (Citations omitted). The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." (Emphasis supplied).

Thus, J.Goldberg "interpreted" the Ninth Amendment into the exact opposite of what the constitutional authors intended it to be. Of course, he had to change the constitutional text for that purpose, namely 'the rights retained by the people' into 'fundamental rights,' so that J.Goldberg could change the Ninth Amendment from a protection of State rights retained by the people of the several States, into a "protection" of fundamental rights against the rights reserved to the people of the several States. As a result, the Ninth Amendment was turned into an inexhaustible pit out of which the federal courts could fish forever more "fundamental rights protected by the Constitution" to destroy any law they did not like. To arrive at such a result, takes ignorance of the Constitution and its history, or a determination not to know them.

However, J.Goldberg's "interpretation" was taken up with zeal by a U.S.District Court in Texas. It found that a woman's "fundamental rights" of marital privacy to choose whether to have children was a right protected by the Ninth Amendment, which enabled the District Court to declare that the Texas Abortion laws were unconstitutional.[25)]

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25) Jane Roe v. Henry Wade, v. James Hubert Hallford, Intervenor; John Doe and Mary Doe v. Wade, 314 F.Supp.1217 (U.S.D.Ct., N.D.Texas, Dallas Div.1970).

The Supreme Court, in Roe v. Wade, 410 U.S.113, 153 (1973), gave its blessing to the District Court's "interpretation" that a fundamental right of privacy was founded "in the Ninth Amendment's reservation of rights to the people", which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy", although the Supreme Court preferred to find such a right "in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."

Thus, the Supreme Court secured its power over abortion in two ways:

> First, the Supreme Court plucked a "right of privacy" out of the First, Fourth and Fifth Amendments and out of the "penumbras of the Bill of Rights," and then declared it to be included in "the concept of liberty guaranteed by the first section of the Fourteenth Amendment." 410 U.S., at 152.
>
> Second, the Supreme Court declared that "the Ninth Amendment's reservation of rights to the people is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id., at 152-153.

The Constitution neither mentions a "right of privacy" nor "penumbras of the Bill of Rights," nor abortion. Obviously the Constitution has never delegated to the United States the power to legislate with respect to abortion. According to the Tenth Amendment, that power, therefore, is reserved to the States or to their people, and was intended to be specially protected by the Ninth Amendment's reservation of all State rights retained by the people which are not mentioned in Amendments 1-8.

It is not hard to imagine what will happen if Part A of the Court Reform Act should be enacted into law. If a party should claim the abridgement by a State or by any of its subdivisions of any right secured by the first eight amendments to the Constitution, federal judges will rule that such rights, as well as any other "constitutional rights" they may dream up, are secured against the States by the Ninth Amendment. Therefore, the word "eight" in the last sentence of Sec.111(a) should be replaced by "nine", so that the last part of the sentence will read: "... of any right secured by the first nine amendments to the Constitution of the United States."

2. The only provision of the Federal Bill of Rights which the Constitution has made applicable to the States by incorporating it into the Fourteenth Amendment is the due process clause of the Fifth Amendment.

The incorporation doctrine, as usually understood by American lawyers, is the doctrine according to which some or all provisions of the Federal Bill of Rights have been incorporated into the first section of the Fourteenth Amendment, whereby they became applicable to the States, so that, what was intended by the Constitution to be a restriction on the federal government only, became also a restriction on the States.

The doctrine is entirely judge-made and has no basis in the Fourteenth Amendment, neither in its language, nor in its history.

The first section of the Fourteenth Amendment reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

As can be seen, only one clause of the Federal Bill of Rights appears in this section, namely the due process clause of the Fifth Amendment. It is this clause which the Supreme Court has misused to "incorporate" almost all provisions of the Federal Bill of Rights and any other "constitutional right" which the Supreme Court cared to invent in order to declare them applicable to the States and destroy any state law which displeased the Court.

However, J.Black, and some of his colleagues, believed that the privileges or immunities clause incorporated the entire Bill

of Rights. J.Black based his opinion predominently on three speeches, two by Rep.Bingham of Ohio, one by Senator Howard of Michigan. The first speech by Bingham was made when he introduced the first version of the Fourteenth Amendment to the House, which was rejected. His second speech came five years later, in 1871, during the debates on the Ku Klux Klan Bill.[26] Only Senator Howard's speech was made during the debates on the adopted version of the Fourteenth Amendment. His was the only speech which mentioned Amendments 1-8.

As will be shown later, these speeches were unable to distinguish between the "privileges and immunities" of Art.IV, Sec.2, and the Federal Bill of Rights of Amendments 1-8. Moreover, Howard, as member of the Joint Committee on Reconstruction, where the Fourteenth Amendment was drafted, had voted against Bingham's motions to include another clause of the Fifth Amendment, namely the just compensation clause, into the proposed constitutional amendment.[27]

Because of this confusion, and also because Part D of Title I of the Judicial Reform Act is entitled "Federal Civil Rights Litigation," it seems desirable to explain that the many invasions of the powers reserved to the States which have occurred by the federal courts as well as by Congress in the name of "civil rights", were not authorized by the Fourteenth Amendment.

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26) See Hermine Herta Meyer, The History and Meaning of the Fourteenth Amendment 51-53, 80-84, 112-124 (New York 1977).

27) See infra 37-38.

3. By the privileges and immunities clause of Art IV, section 2, clause 1 of the Constitution each State promised to accord to a citizen from a Sister State coming temporarily into the State the same civil rights as it accorded to its own citizens. The privileges or immunities clause of the Fourteenth Amendment was originally believed to do the same. It was not intended to incorporate Amendments 1-8.

Almost immediately after the Declaration of Independence, the States formed a League of Friendship under the name of "The United States of America." Thereafter they could not continue to treat one another's citizens as aliens. Therefore, they agreed in Art.IV of the Articles of Confederation that

> "the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants respectively." 28/

This provision became Art.IV, sect.2, cl.1 of the Constitution, as follows:

> "The citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several States."

Like Art.IV of the Articles of Confederation, Art.IV of the U.S.Constitution was addressed to a citizen of a State who went temporarily to another State. Thus, a citizen of State A who went temporarily to State B was intended to have the same right to do business and to do related things, such as make contracts and have them enforced, own and dispose of property, sue in the courts of

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28) Articles of Confederation, agreed to on Nov.15, 1777, ratification completed on March 1, 1781. 19 Journals of the Continental Congress 214 (1781). Library of Congress ed.

the State (privileges), as the citizens of State B; and the citizens of State A had the right to be free of taxes, penalties, and other burdens (immunities) which the citizens of State B were not subject to. These were the civil rights, as opposed to political rights. But the laws to which a citizen of State A had a right in State B, were those of State B, and he could not demand that State B recognize any laws of the homestate of the citizen from State A.

The political or municipal rights could only be acquired with residence for a period prescribed by the laws of the adopted state, at which time a citizen from another State became a citizen of that State without naturalization.[29)]

It was in the nature of things that jury service and schools were not part of the civil rights. Jury service is not only a right, but also a duty, and a citizen from another State could not be forced to act as a juror when temporarily in the State; nor did he have a right to act as a juror. Neither could a citizen from another State be expected to have his children in the schools of a State to which he went only temporarily.

Negroes did not enjoy the benefits of Art.IV, sect.2, cl.1. The States were only obliged to accord them to citizens of a sister State. Those who were slaves, could not be citizens. But Northern and Eastern States had abolished slavery, and in five States all/native born inhabitants, including Negroes, were citizens by birth. However, after the abolition of slavery, those States passed laws imposing discriminatory burdens on the colored people.

free

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29) See H.H.Meyer, Fourteenth Amendment 18-26 (supra note 26).

As stated by Chancellor Kent, "in no part of the country, except in Maine, do the latter (colored persons), in point of fact, participate equally, with whites, in the exercise of civil and political rights." 30) For that reason, the States did not recognize them as full citizens entitled to the privileges and immunities under Art.IV, sec.2. After the abolition of Slavery by the Thirteenth Amendment, several of the former slave holding States followed the North in enacting laws which imposed on the colored race onerous disabilities and burdens.

To remedy this, Senator Trumbull of Illinois introduced on January 5, 1866, a Civil Rights Bill for the protection of the civil rights of persons of African descent. This Bill passed Congress on March 15, 1866.31) Its first section reads as follows:

> "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." 32/

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30) 2 James Kent, Commentaries on American Law, 258 note (a) (11th ed.1866). Discriminatory laws existed in New York, Ohio, Indiana, Michigan, Pennsylvania, Massachusetts, Connecticut, New Hampshire, and Rhode Island, all not slave holding States. See Kent, id. and at 252 n.1, 253 n(c), 254 n.(f); see also Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 413-419 (1856).

31) Cong.Globe, 39th Cong., First Sess., 1422; See H.H.Meyer, Fourteenth Amendment 40-47, 64-71 (supra n.26).

32) Cong. Globe, id. 1857.

Aside from the citizenship clause, the bill was practically a catalogue of the civil rights which traditionally had been the "privileges and immunities" under Article IV, section 2, clause 1, of the Constitution.[33] All these were matters which belonged to the retained rights of the States. The Thirteenth Amendment had merely outlawed slavery and involuntary servitude, but it had given Congress no power to legislate with respect to citizenship by birth and civil rights. Senator Trumbull simply declared that any statute which deprives any citizen of civil rights is, in fact, a badge of servitude and prohibited by the Constitution.[34]

However, Senator Saulsbury of Delaware questioned the constitutionality of the bill. He regarded it as a dangerous intrusion into the reserved rights of the States. The Thirteenth Amendment cannot be tortured into meaning that Congress "shall invade the States and attempt to regulate property and personal rights within the States any further than refers simply and solely to the condition and status of slavery."[35] His opinion was shared by many.

President Johnson vetoed the bill as violative of the Constitution. In his message of March 27, 1866, the President declared, in substance, that every subject embraced by the bill had hitherto been considered as exclusively belonging to the States. The bill invades the judicial power of the States and interferes with the municipal legislation of the States.[36]

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33) See H.H.Meyer, Fourteenth Amendment 20-26 (supra n.26).
34) Cong. Globe, 39th Cong. First Sess. 474 (1866).
35) Id. 476.
36) Id. 1681, 1859.

Congress passed the bill over the veto of the President, and it became law on April 9, 1866.[37]

It will be remembered that in 1856, in Dred Scott v. Sanford, supra 12, the Supreme Court had declared that Negroes of African descent could not be citizens of the United States under the Constitution. Yet, with complete unconcern, Congress declared in the Civil Rights Bill that all persons born in the United States and not subject to any foreign power are citizens of the United States. President Johnson and those who opposed the bill as unconstitutional saw its unconstitutionality only in its invasion of the reserved rights of the States. Obviously, no one believed that the pronouncements of the Supreme Court in the Dred Scott case were binding on Congress or the President.

Because of the serious doubts concerning the constitutionality of the Civil Rights Act of 1866, its supporters wanted it secured by a constitutional amendment. Its prime mover was John Bingham, Rep. from Ohio. He was a member of the Joint Committee on Reconstruction which drafted the Fourteenth Amendment.

The Committee produced a first version which was debated in the House on February 26, 27 and 28, 1866, and then postponed indefinitely.[38] It was never debated in the Senate. Although it came to nothing, it is insofar instructive as the history of its failure shows what Congress was not willing to accept because it knew that it could not be ratified by the Northern States.

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37) Id.1861. Act of April 9, 1866, ch.21, 14 Stat. 27.

38) Cong.Globe, 39th Cong. 1st Sess.1033-1095 (1866). H.H.Meyer, Fourteenth Amendment 47-64 (supra n.26).

Originally, Thaddeus Stevens, Rep. from Pennsylvania, had hoped that the Fourteenth Amendment could be drafted in such a way as to secure equal civil rights as well as equal political rights for blacks and whites. His first proposal was:

> "All laws, State or national, shall operate impartially and equally on all persons without regard to race or color." 39)

The version which the Committee decided to submit to the House was one suggested by Bingham. He introduced it to the House. It read as follows:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art.4, sec.2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th amendment). 40/

Already in his opening speech, it became clear that Bingham had very confused ideas about the Constitution. He assured the House that "Every word of the proposed amendment is today in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States." He cited the text of Article IV, section 2, and of the due process clause of the Fifth Amendment. He continued that, if the original Constitution had granted Congress power to enforce those provisions on the States, there would have been no rebellion. It is clear, he said, that "this immortal bill of rights embodied in the Constitution rested for its execution and enforcement hitherto upon the fidelity of the States." According to Bingham's opinion, everybody knew that

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39) Journal of the Joint Committee on Reconstruction, reprinted as Senate Document No.711, 63rd Cong., 3rd Sess.9 (1915).

40) Id.17.