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CONGRESS AND THE SUPREME COURT:

COURT JURISDICTION AND SCHOOL PRAYER

INTRODUCTION

On April 9, 1979, the Senate, on a 61-30 vote, passed S. 450 a bill eliminating much of the obligatory jurisdiction of the Supreme Court. The measure was successfully amended on the floor of the Senate to include a provision removing the jurisdiction of the Supreme Court and the federal district courts over state laws dealing with voluntary prayer in public schools. Senator Jesse Helms (R-N.C.) had originally won passage, by a 47-37 vote, of the school prayer provision as an amendment to the Department of Education bill. But the Senate subsequently voted, 53-40, to strip the amendment from that bill and, by a 51-40 vote, to add it to S. 450.

The bill was sent to the House, where it has languished in the House Judiciary Committee ever since. In October 1979, Congressman Philip Crane (R-Ill.) began seeking House signatures on a petition that would discharge the Judiciary Committee from consideration of the bill and send it directly to the floor of the House for a vote. A major effort to collect the 218 signatures required for the discharge petition was begun in February of this year and, as of the date of this Backgrounder, 155 members of the House had signed.

Support for the discharge petition has come from House members more interested in the school prayer amendment than in the other subject matter of S. 450. That amendment marks the renewal of an intermittent eighteen-year old battle between segments of the Congress and the Supreme Court over the meaning of the First Amendment's Establishment of Religion clause. The Supreme Court initiated the battle by ruling in Engle v. Vitale (1962) and Abington v. Schempp (1963) that the Establishment Clause forbade the voluntary recitation of prayers and reading of the Bible in public schools.

THE JURISDICTION OF THE SUPREME COURT

The jurisdiction of a court refers to its authority to hear and decide a case. In Ex parte McCardle (1868), Chief Justice Salmon P. Chase said, "Without jurisdiction the Court cannot proceed at all in any case. Jurisdiction is power to declare the law...." Article III of the Constitution grants Congress complete discretionary authority over not only the jurisdiction, but also the very existence of the federal district courts and circuit courts of appeals. The same article provides that the Supreme Court shall have two jurisdictions: an "original" jurisdiction over cases "affecting ambassadors, other public ministers and consuls, and those in which a state shall be party." Thus the original jurisdiction of the Supreme Court comes directly from the Constitution and cannot be expanded or contracted by any acts of Congress. In cases under its original jurisdiction, the Court has the right (but it is not required) to hear all the initial arguments directly. Today, the Court decides very few cases brought under its original jurisdiction. Additionally, from the date of the Judiciary Act of 1789, Congress has given itself the authority - and the Supreme Court has acquiesced - to decide whether the Court's original jurisdiction in certain kinds of cases is exclusive (belonging to the highest court alone) or concurrent (shared with other state or federal courts).

Article III also grants the Supreme Court an "appellate" jurisdiction, that is, the authority to review - and affirm or overturn - the decisions of state or lower federal courts that had heard the initial arguments. This appellate jurisdiction extends "both as to law and fact...to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made...to all cases of admiralty and maritime jurisdictions; to controversies to which the United States shall be a party...to controversies...between citizens of different states, between citizens of the same state claiming lands." But the entire group of cases is subject to "such exceptions, and under such regulations as the Congress shall make." Thus, the appellate jurisdiction of the Supreme Court comes from the Constitution by way of congressional legislation.

S. 450 AND THE SCHOOL PRAYER AMENDMENT

Since 1789, Congress has often exercised its power to change and regulate the appellate jurisdiction of the Supreme Court. S. 450, which is favored by all the justices currently sitting on the Supreme Court, is the latest exercise of the congressional authority.

Under its appellate jurisdiction, cases are brought to the Supreme Court in two ways: by writ of certiorari (a means of seeking appellate review that the Court has complete discretion to accept or deny) and by regular appeal (which has come to be obligatory on the Court).

The problem is that litigants petitioning the Court for review under its obligatory (appeals) appellate jurisdiction are certain to have these cases heard, whereas petitioners seeking review under the Court's certiorari appellate jurisdiction are at the mercy of the Court's discretion to hear the case. The Senate Judiciary Committee describes the problem thus:

> In the 1976 term, the Supreme Court disposed of 3,959 cases. Of these there were 311 on the Court's obligatory docket. One hundred of the obligatory cases were dismissed on procedural and technical grounds. That means that 211 of the cases or two-thirds, were decided on the merits. Of the 3,652 cases on the Court's discretionary docket, only 234 were decided on merits - less than 7 percent.
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> Significantly, obligatory cases are forming an increasingly larger percentage of all cases decided on the merits. In 1942, they comprised 28 percent of all cases decided on merits. Today, that figure has climbed to 47 percent.
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> One conclusion to be drawn from those figures is that a litigant whose case fortuitously appears on the obligatory appellate docket has nine times the chance of gaining access to the Court that a petitioner for certiorari has. A significant number of petitioners for certiorari whose cases involve issues of considerable importance are being denied access to the Court simply because the Court has no time to hear them due to the crush of obligatory appeals. (Senate Report No. 96-35, March 14, 1979, pages 6-7)

S. 450 intends to correct this imbalance by doing away with almost all of the Court's obligatory jurisdiction.

The distinction between the obligatory and certiorari types of the Supreme Court's appellate jurisdiction is a result of history and past congressional action.

From the date of the Judiciary Act of 1789 to the date of the Circuit Court of Appeals Act of 1891, the Supreme Court's appellate jurisdiction was entirely obligatory. Under the types of cases placed by Congress in the appellate jurisdiction of the Court, it was understood that aggrieved parties had an absolute right to have their cases appealed, and the Supreme Court regarded itself as completely obligated to hear the appeals.

The crush of litigation became uncontrollable, so Congress responded in 1891 by creating the concept of discretionary review by way of certiorari. The amount of certiorari jurisdiction granted to the Court by the 1891 Act was small, but Congress continued to increase it over the years until, under the Judiciary Act of 1925, it expanded the Court's certiorari power significantly. Nevertheless, many statutes remained in the U.S. Code that required mandatory review of certain cases by the highest Court.

Today the Supreme Court is again burdened with an enormous caseload. Four times in the 1970s, Congress has acted to further cut away different areas of the Court's mandatory jurisdiction. S. 450 completes this task by eliminating nearly all of it.

By its various provisions, S. 450

- repeals the mandatory jurisdiction of the Supreme Court in cases in which a federal district judge has invalidated an act of Congress with the United States or its agencies or employees as a party to the case.

- repeals the mandatory jurisdiction of the Supreme Court in cases in which a federal circuit court of appeals judge has invalidated a state statute.

- repeals the mandatory jurisdiction of the Supreme Court in cases in which the highest court of a state invalidated a U.S. statute or treaty or when an argument has been advanced that a state statute is unconstitutional or in violation of a law or treaty of the United States but, nevertheless, has been held valid. (This repeal includes cases appealed from the Supreme Court of Puerto Rico.)

- repeals the mandatory jurisdiction of the Supreme Court in cases involving the Federal Election Campaign Act, involving California Indian lands, and involving construction of the Alaska pipeline.

- substitutes certiorari jurisdiction for all the repealed mandatory jurisdictions.

The school prayer amendment provides that neither the federal district courts nor the Supreme Court shall:

> ...have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation, or any part thereof, or arising out of an Act interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation, which relates to voluntary prayers in public schools and public buildings....

> (This amendment) shall not apply with respect to any case which, on such date of enactment, was pending in any court of the United States.

ORIGIN AND MEANING OF THE FIRST AMENDMENT

When the various states were considering the ratification of the Constitution as proposed to them by the Constitutional Convention of 1787, there was much discussion of the absence of a Bill of Rights. Several of the states, already having their own bills of rights, ratified the Constitution with strong recommendations to the first Congress that a Bill of Rights be added.

As in the framing of the Constitution itself, it was left to James Madison to take the lead in framing a Bill of Rights. By the time the first Congress convened in May 1789, Madison, a newly-elected member of the House, had drawn up a list of amendments to propose to the House. On June 8, he introduced the amendments to the House and said that the Constitution needed to be amended in order "to quiet the apprehensions felt by many that the Constitution does not adequately protect liberty." And even though he was the guiding light of the Constitutional Convention that had sent the Constitution to the states without a Bill of Rights, Madison assented to the undisputed popular desire for a list of rights, arguing its propriety so that "the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done."

With respect to religion, Madison proposed two amendments:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or in any pretext, infringed.
>
> No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.

"Equal rights of conscience" was considered by the men of the time to be almost coincident with, or at least an immediate corollary of, freedom of religion. The first amendment above was plain on its face with regard to religion. Its purpose was to prevent the establishment of a national religion as in England, where the Anglican Church was established, sanctioned by, and supported by the Crown. The meaning of the second amendment, directed against the states, became clear in debate, as will be seen. At the time of the meeting of the First Congress, only four of the thirteen states had no established religion or religions (six states having multiple established Protestant sects receiving state aid and recognition). And it must be remembered

that the popular call for a Bill of Rights was inspired by concern over the supposed dangers to individual rights from the new national government.

Madison wanted his amendments to be considered immediately by the entire House, but that body voted to have them referred to a special committee for consideration. When the House took up debate on the report of the committee, Madison's first amendment on religion had been changed by the committee to read:

> No religion shall be established by law, nor shall the equal rights of conscience be infringed.

Daniel Carroll of Maryland immediately took the floor to offer the opinion that he considered an amendment on freedom of religion to be the most important in any list of rights and that such an amendment would go the farthest "towards conciliating the minds of the people" to the new Constitution and the new national government. Madison rose to say that he interpreted the words to mean that the Congress could never establish a religion and enforce the legal observation of it by law. The state conventions called to ratify the Constitution, Madison noted, had expressed concern that the new Congress might have great leeway, under the clause empowering it "to make all laws necessary and proper," to infringe upon the rights of conscience and establish a national religion. He regarded the amendment under consideration as a clear declaration to the people that no national religion would ever be sanctioned by the national government.

Next ensuing was an exchange between Benjamin Huntington of Connecticut and Madison that can be considered definitive of what became the final wording and meaning of the establishment and free exercise clauses of the First Amendment.

Huntington rose to express his fear that the proposed amendment might eventually become harmful to religion. He accepted Madison's interpretation that the amendment meant that no national religion could ever be established by the national government, but he worried that others, namely the federal courts, might interpret it to mean that local ordinances providing for the support of churches and ministers would be unconstitutional as establishment of religion.

In answer, Madison proposed to insert the word "national" before the word "religion." If so amended, Madison maintained, "it would point the amendment directly to the object it was intended to prevent." Samuel Livermore of New Hampshire argued that the wording should be changed in order to spell out that it was intended to prevent "Congress" from establishing any religion.

Elbridge Gerry of Massachusetts objected to Madison's proposal to include the word "national." That word, Gerry maintained, brought to mind the continuing and widespread argument over

whether the new Constitution instituted a federal government of shared powers balanced between the state and federal governments or a national government of excessively centralized powers. Madison, probably realizing the continuing sensitivity of that argument, withdrew his proposal, and the House then passed Livermore's wording of the amendment explicitly preventing the Congress from establishing any religion, or infringing on the rights of conscience, a solution that incorporated the purpose of Madison's proposal anyway, for only the national legislature, the Congress, could establish any national religion. Upon reconsideration, the House passed a different wording of the amendment offered by Fisher Ames of Massachusetts (but, it has been said, actually written by Madison):

> Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.

Later the House took up Madison's other amendment which had been altered in committee to read

> No state shall infringe the equal rights of conscience, nor the free speech of the press, nor of the right of trial by jury in criminal cases.

As can be seen, this amendment (with the "rights of conscience" substituting for the "free exercise of religion") was a nearly identical version of the First Congress' final wording of the First Amendment - but directed against the states, not against the national government. This prompted Thomas Tucker of South Carolina to argue that it be deleted in its entirety because its effect would be to amend the constitutions of the state governments, not the national government. Tucker thought it improper for the national legislature, the Congress, to consider measures that were the province of the state legislatures. Madison, whose previous and subsequent public career demonstrated that he, along with Jefferson, was the strongest advocate of a sharp separation of church and state, and whose home state of Virginia had already passed laws disestablishing all religions, rose to defend the amendment saying that it was the "most valuable amendment in the whole list" because "if there was any reason to restrain the government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the state governments." Madison carried the debate, and the amendment (with a rearranging of its clauses) was adopted by the House and sent, along with fifteen other amendments, to the Senate. Although six of the sixteen amendments guaranteed rights to a "person" or to "people," only the amendment discussed immediately above contained an express limitation on the powers of a "state."

The Senate met behind closed doors, and, thus, no record of its debates survived. However, the notes taken were recorded in

the first Senate Journal. On the whole, the Senate was less enthusiastic about amending the Constitution. It reduced and consolidated the sixteen amendments to the twelve that eventually were sent to the states for ratification.

The Senate struck out Madison's "most valuable amendment" restricting the states in the areas of conscience, speech and the press (and moving the right to trial by jury in criminal cases to what became the Sixth Amendment). Concerning the amendment banning Congress from establishing religion, preventing the free exercise thereof, or infringing the rights of conscience, the Senate eliminated the last ban completely (perhaps considering it redundant to the "free exercise").

The House had formulated an amendment declaring that the freedoms of speech, and the press, along with the right to assemble and petition the government, "shall not be infringed," a formulation not mentioning what institution of the government was prohibited from doing the infringing. By collecting the freedoms of speech, the press, and assembly and petition together with the guarantees concerning establishment of religion and free exercise of religion, and putting them all into one sentence beginning "Congress shall make no law...," the Senate made clear that this, what became the First, amendment was directed against actions of Congress.

A conference committee consisting of members of both houses was formed in order to work out a final agreement in the wording of several of the amendments. In conference, the House tried to reinsert into the Bill of Rights its amendment prohibiting state actions in the areas of conscience et al., but the Senate would not concur. The House was successful, however, in gaining Senate agreement to alterations in the language of the establishment and free exercise clauses.

After "Congress shall make no law...," the final language was changed from "...establishing religion, or to prevent the free exercise thereof..." to "...respecting an establishment of religion, or prohibiting the free exercise thereof...." As can be seen, this change, almost certainly the work of Madison, made the language stricter and more specific, prohibiting Congress not only from completely establishing religion, but also from legislating in any manner concerning ("respecting") an establishment of religion.

The First Amendment, as passed by the First Congress and ratified by the requisite three-fourths of the states, still reads:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble,

and to petition the Government for a redress of grievances.

In summation, the following can be said concerning the origin of the religion clauses of the First Amendment: When the First Congress convened, six of the thirteen states still had established religion(s). The widespread concern was that the new national legislature instituted by the new Constitution might pass laws concerning religion that would be binding on all the states and, thus, on all the people. An amendment to prohibit such legislation easily passed both Houses after significant debate clarifying its meaning. All members of both houses of Congress, including Madison, understood it to be a restriction on actions of Congress, not on actions of the states. (It can be inferred that the state legislatures that ratified the First Amendment were equally clear about its meaning.) Another amendment, advocated by Madison, to extend this prohibition to actions of the states passed the House, but was defeated in the Senate. Perhaps it can be said that the Senate, in rejecting a curb on state actions in the areas covered by the First Amendment, acted precisely in the manner anticipated by the Constitution itself, for the Constitution provides that senators represent states and thus can be expected to defend the rights of the states. Members of the House, of course, each represent a certain number of people.*

THE SUPREME COURT, SCHOOL PRAYER, AND THE ESTABLISHMENT CLAUSE

That the Bill of Rights is a restriction on the power of the national government, not the state governments, was re-emphasized by the Supreme Court in the 1833 case of Barron v. Baltimore (7 Pet. 243). A wharf owner tried to invoke the "just compenstation" clause of the Fifth Amendment in order to force the city of Baltimore to compensate him in damages for his wharf, which he claimed had been rendered useless by city action.

Chief Justice Marshall, speaking for the unanimous Court, ruled that the Court had no jurisdiction over the case because the Bill of Rights placed no restrictions on the actions of the city or state governments. Marshall pointed out that Article I of the Constitution applied to the legislative powers of Congress only, except in Section 10 where the Constitutional Convention limited the powers of the state expressly by beginning all three sentences of Section 10 with "No state shall...."

Likewise, concerning the Bill of Rights, and the two subsequent amendments, Marshall said:

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*Journal of the Senate and House of Representatives of the First Congress, June-August, 1789. Published in the Bernard Schwartz, Bill of Rights: A Documentary History, Chelsea House Publishers (1971), pp. 1007-1165, passim.

> Had the framers of the amendments intended them to be limitations, on the powers of the state governments, they would have imitated the framers of the original constitution and have expressed that intention. (at 249)

Marshall, who had been a delegate to the Virginia state convention that ratified the Constitution, knew well both the source and meaning of the ten amendments to the Bill of Rights:

> In almost every convention by which the constitution was ratified, amendments to guard against the abuse of power were recommended. These amendments divided security against the apprehended encroachments of the general government - not against those of the local governments....Those amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them. (at 249)

For over 150 years after the ratification by the states of the First Amendment, the Supreme Court upheld the intent and meaning of that Amendment and followed the doctrine of Barron with respect to the entire Bill of Rights. Regarding religion, the Court decided only one significant case, Reynolds v. U.S., 98 U.S. 145 (1878), over that time. And Reynolds was a case of the free exercise of religion, not the establishment of religion. With religious liberty as a matter of state, rather than federal, constitutional law, the several states dealt with matters of religion according to their own views.

But, in the 1920s and 1930s, the Supreme Court, at its own initiative and discretion, began to develop the most important judicial doctrine of the Twentieth Century: the "incorporation" of the Bill of Rights into the Fourteenth Amendment. That amendment, ratified in 1868, made federal citizenship pre-eminent over state citizenship and declared that "no state shall..." abridge the "privileges or immunities," the right to "due process of law," or the "equal protection of the laws" of any citizen.

By incorporating the Bill of Rights into these three clauses of the Fourteenth Amendment, the Supreme Court gave itself the power to overturn any state law dealing with any area covered by the ten amendments of the Bill of Rights. Thus, with regard to the First Amendment, the Court fashioned a judicial doctrine to circumvent the conclusions of the First Congress and the actions of the states that ratified the Bill of Rights.

The Court incorporated the First Amendment's freedom of speech clause into the Fourteenth Amendment in the 1925 case of Gitlow v. New York (268 U.S. 652). Significantly, the Court gave no explanation whatsoever of why the Bill of Rights suddenly

became applicable to the states by means of the Fourteenth Amendment, but merely declared it so, saying (at 666) that "for present purposes" the Court "assumed" that it was applicable. In 1931, in the case of Near v. Minnesota (283 U.S. 697), the Court, relying on Gitlow and three other cases based on Gitlow, incorporated the First Amendment's freedom of the press clause into the Fourteenth Amendment, thus granting itself authority over state laws dealing with the press. The Near Court declared that "it is no longer open to doubt" (at 707) that the First Amendment applied to the states by way of the Fourteenth Amendment.

In the 1937 case of DeJorge v. Oregon (299 U.S. 323), the Court, saying the case was "ruled by Gitlow" (at 355), the Court took over jurisdiction of state laws dealing with the First Amendment's assembly and petition clauses. The Court stated that "explicit mention" of certain guarantees in the First Amendment "does not argue exclusion elsewhere" (at 364). In Cantwell v. Connecticut (310 U.S. 296), a 1940 case, the Court, citing no previous cases at all, but merely stating that its decision was mandated by a "fundamental concept of liberty" (at 303), declared that the free exercise of religion clause was binding on the states as well as Congress.

Completing the process in 1947, in Everson v. Board of Education (330 U.S. 1), the Court, relying on Cantwell and cases based on both Near and DeJorge, ruled that the establishment clause was likewise binding on the states. Everson was the first case in which the Supreme Court ruled on state government aid to church schools. New Jersey had passed a statute allowing its local boards of education to reimburse parents for the costs of using public transportation to sent their children to church schools. After an elaborate dissertation on the absoluteness of the "wall of separation between church and state," the Court finally allowed the New Jersey statute to stand, construing it as public welfare legislation benefiting children rather than schools.

Since Everson, most of the Supreme Court's decisions on the establishment clause have concerned public financial aid to church schools and their students. However, in 1962 and 1963, the Court initiated a new area of constitutional litigation when it handed down Engle v. Vitale (370 U.S. 421) dealing with prayers in public schools and School District of Abington Township, Pennsylvania v. Schempp (374 U.S. 203) dealing with the reading of the Bible in public schools.

In Engle, the Court faced a constitutional challenge to the mandated daily recitation of the following prayer in the Union Free School District No. 9 of New Hyde Park, New York:

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

The prayer had been carefully crafted with the consultation of a wide range of both Jewish and Christian religious leaders and recommended to the Union Free Board of Education by the New York State Board of Regents, a governmental agency with broad supervisory authority over the state's public school systems.

In both the lower state courts and the New York Court of Appeals (the highest court of New York) the constitutional challenge had been rejected with the caveat that no student could be compelled to recite the prayer. The Supreme Court granted itself jurisdiction over the case because, it mentioned, the First and Fourteenth Amendments were affected. Joining the Board of Education in urging the affirmation of the decision of the New York Court of Appeals were the Board of Regents and the attorneys general of twenty-three states. Joining the parents of the ten students who had brought the case were the American Ethical Union, the American Jewish Committee (et al.), and the Synagogue Council of America (et al.).

It had been thirty-seven years since the Court began its process of taking over the First Amendment with the Fourteenth Amendment in the Gitlow case and fifteen years since the process had been completed with the Everson case. To the mind of the Engle Court, the issue was well settled and needed no explanation. The Establishment and Free Exercise clauses were "operative against the States by virtue of the Fourteenth Amendment" (at 430). Writing the opinion of the Court in this, the first Supreme Court case ever dealing with prayer in public schools, Justice Black, unable to refer to even one previous Supreme Court decision as a precedent, instead explained the decision by means of a historical essay on the separation of church and state.

Two themes predominated. The first was a desultory reflection on the idea of the establishment of religion in English and American history up to the time of the Revolutionary War and the framing of the Constitution and Bill of Rights. The second, using extensive quotations from the writings of Thomas Jefferson and James Madison, re-enforced the conclusions of the first theme: that governmental establishment of religion has always brought ill effects on both society and religion. Black mentioned that Jefferson and Madison both understood this and knew that a strict "wall of separation" between church and state was the solution.

In Everson, the Court had declared that Madison had been successful in getting his view of the separation of church and state written into the First Amendment. The Engle Court reemphasized the conclusion by calling Madison "the author of the First Amendment" (at 436). (It has been restated in other Supreme Court decisions also and can be considered official judicial doctrine.) Besides quoting letters and speeches of both Jefferson and Madison, the Court, as it had previously done in Everson, placed great stock on the passage by the Virginia state legislature in 1785 of the famous "Virginia Bill for Religious Liberty."

This bill, whose primary advocates were Jefferson and Madison, disestablished all religions from Virginia. In elaborating on the meaning of the separation of church and state, the Court quoted at length Madison's famous speech "Memorial and Remonstance against Religious Assessments" which he delivered in defense of the Virginia bill of 1785.

The history of the state of Virginia's legislative action on the establishment of religion was the only governmental action considered by the Court. Nowhere did the Court pay attention to the proceedings of the First Congress or Madison's success in drafting a prohibition of a national establishment of religion or his failure in accomplishing the passage of a prohibition of establishment of religion by any of the states. And as has already been stated, the Court felt no necessity to deal with the language itself of the First Amendment: "Congress shall make no law...." By maintaining that Jefferson's thoughts on religion were an equally valid interpretation of the meaning of the First Amendment, the Court made a constitutional doctrine of the ideas of a man who was neither a delegate to the Federal Constitutional Convention of 1787 nor the Virginia ratifying convention of 1788, and was neither a member of the First Congress of 1789 nor a member of the Virginia state legislature that ratified the Bill of Rights in 1791. During these years, Jefferson was ambassador to France and then Washington's Secretary of State. Much legislative history of all of these conventions and legislative sessions exists, but the Engle Court considered none of it.

In the end, the Court ruled that the required prayer was unconstitutional in that it violated the establishment clause by way of the Fourteenth Amendment. And while conceding that the New York practice was "relatively insignificant" and did "not amount to a total establishment of one particular religious sect to the exclusion of all others" (at 436), the Court declared (at 424) that it was unconstitutional to also "encourage" the recitation of prayers in the public school.

In his concurring opinion, Justice Douglas admitted that the Court's decision was novel: "I cannot say that to authorize this prayer is to establish religion in the strictly historic meaning of those words" (at 442). Yet, he thought that, regardless of the time spent in recitation of the prayer, the practice amounted to financial aid to religion since the teachers were paid by the state. Additionally, he thought that many other traditional relationships between governments and religion were unconstitutional and should be declared so. Among such practices, Douglas mentioned the chaplains of both houses of Congress, religious services in federal hospitals and prisons, the use of the Bible for administering oaths of office, the motto of "In God We Trust" on money, and the mention of the name of God in the pledge of allegiance.

The lone dissenter, Justice Stewart, said that he saw no reason, constitutional or otherwise, to deny school children the

opportunity to participate in the "spiritual heritage of our nation," that Justice Black's historical essay was irrelevant to the issue in the case, and that the Court's "uncritical invocations of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution" was irresponsible (at 445-446).

A year later, in the companion cases of School District of Abington Township v. Schempp and Murray v. Carlett (374 U.S. 203), the Court likewise struck down state laws requiring the reading of the Bible in public schools. In Abington, the plaintiffs challenged a Pennsylvania state law requiring the reading of ten verses from the Bible in the public schools at the beginning of each day. Upon written request, parents could excuse their children from the readings. In Murray, famous atheist Madalyn Murray and her son challenged a Baltimore city rule requiring the reading of a chapter of the Bible or the recitation of the Lord's Prayer each day in the city public schools. As in Pennsylvania, parents could excuse their children from the practice. Murray did get her son excused but nevertheless brought the suit claiming that the rule violated religious liberty "by placing a premium on belief as against non-belief" (at 212).

Abington was an appeal from a federal district court that had struck down the Pennsylvania statute, while Murray was an appeal from the Maryland Court of Appeals, which had sustained the Baltimore City rule. The Attorney General of Pennsylvania argued for upholding the statute in Abington while the Attorney General of Maryland, together with the attorneys general of eighteen other states, urged the upholding of the Baltimore City rule in Murray. In both cases, the same three organizations as in Engle argued that the Establishment clause forbade such practices.

On the first page of the decision, Justice Clark, writing for an 8-1 majority, announced that the rationale for the decision was the Court's own "incorporation" doctrine: "the laws requiring them are unconstitutional under the Establishment clause, as applied to the states through the Fourteenth Amendment" (at 205). Subsequent to that statement and throughout the wording of the opinion, the Court referred to several of its previous cases - all of which had been based on the incorporation doctrine. Specifically, the Court relied on its own previous statements in Engle, Cantwell and Everson. And, once again, it reiterated its notion that "the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our states" (at 214).

CONGRESS' AUTHORITY OVER THE SUPREME COURT

Section Two, Parargraph Two, of Article III of the Constitution reads:

> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all other cases before mentioned (i.e., cases in law and equity under the Constitution, the laws, and treaties of the U.S. along with cases of admiralty and maritime jurisdiction), 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.

Little evidence is available concerning the ideas and debates surrounding the origin of the "exceptions and regulations" clause of Article III. The Constitutional Convention of 1787 opened on May 17. Two plans for a new constitution were proposed, the New Jersey plan (drafted by William Patterson) and the Virginia plan (masterminded by James Madison). Concerning the role of the judiciary, both plans were inchoate. After the opening debates on the two plans, a Committee of Detail was formed to draft a proposed constitution incorporating parts of both plans and other ideas that had already been debated.

When the Committee on Detail reported back to the full convention on August 6, it had given shape to a complete document that eventually served as the substantial basis for the final Constitution. And this was true for its provisions on the judiciary also which, for the first time at the Convention, brought up the issue of the proposed Supreme Court. Concerning both the original and appellate jurisdiction of the Supreme Court, the Committee came up with almost the precise language that was to become part of Article III of the Constitution. The Court was to have original jurisdiction in "cases affecting ambassadors, other public ministers and consuls and those in which a state shall be a party" and appellate jurisdiction "in all other cases beforementioned (refer to first paragraph of this section) with such exceptions and under such regulations as the Legislature shall make."

Thus, this was the first appearance of this language for consideration by the Convention delegates. Another clause (later deleted and, therefore, not included in the Constitution) emphasized again the legislative control over the judiciary's jurisdiction by declaring that "The Legislature may assign any part of the jurisdiction abovementioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts...."

Debate on the "exceptions and regulations" clause was limited and non-controversial, and so it might be presumed that it was an issue about which no one disagreed. The authority of the legislature to "assign" the jurisdiction of the Court was eliminated by a unanimous vote. Although no debate on this vote has survived,

it might be safe to assume that it was considered a redundancy with the "exceptions and regulations" clause.

However, two short exchanges about the jurisdiction of the judiciary were revealing. Madison wanted the Constitution to state that the jurisdiction of the Supreme Court was limited to "cases of a Judiciary nature" rather than to "all cases arising under this constitution." He thought that the highest court should not have a general "right of expounding the Constitution."

All agreed with Madison's idea but thought that the wording "all cases arising under the constitution" already clearly limited the authority of the Court to cases "of a Judiciary nature." Another motion was offered that would have made the resolution of all cases under the appellate jurisdiction to be resolved "in such manner as the Legislature shall direct." This was likewise defeated unanimously.

Thus, overall, the writers of Article III of the Constitution accepted without controversy that the Congress should have the authority to except and regulate the appellate jurisdiction of the Supreme Court, concluded that the Supreme Court had no general right to expand the Constitution, but was limited to cases "of a Judiciary nature," and decided that the Congress could not direct the "manner" of the exercise of the appellate jurisdiction of the Court.*

And these conclusions seem re-enforced by Alexander Hamilton in Federalist 80:

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

And by Hamilton in Federalist 81:

> The amount of the observations hitherto made on the authority of the judicial depart-

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*Notes of Debates in the Federal Convention of 1787 Reported by James Madison Norton Library, 1969, pages 393, 510, 536-541.

> ment is this: that it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that in the partition of this authority a very small portion of original jurisdiction has been preserved to the Supreme Court, and the rest consigned to the subordinate tribunals; that the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all cases referred to them, both subject to any exceptions and regulations which may be thought advisable; that this appellate jurisdiction does, in no case, abolish the trial by jury; and that an ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source. (Emphasis in original.)

From the beginning of the new government, the Congress has exercised its authority over the jurisdiction of the Supreme Court and the lower federal courts. Probably the most important statute passed by the First Congress was the landmark Judiciary Act of 1789 which actually created the federal judicial system, left largely inchoate by the Constitution. As anticipated by Article III, which left the establishment of any lower federal courts to Congress, the Act provided for a system of district courts and circuit courts (consisting of two Supreme Court justices and one district court judge). Both of these kinds of courts were given limited and carefully circumscribed jurisdictions, and the Supreme Court's appellate jurisdiction was created and also equally limited. Acting under the "exceptions and regulations" clause, the Congress provided that the Supreme Court could accept appeals in civil cases from the circuit courts only if more than $2,000 was involved and also decreed that the highest court could not hear appeals in criminal cases - which Congress did not change until 1889. Additionally, the Congress decided to qualify even the constitutionally-mandated original jurisdiction of the Supreme Court by providing that, in certain cases, the Court would share its original jurisdiction with the newly-established lower federal courts. The overall intention of the Judiciary Act of 1789 was that most cases and controversies would be decided in the state courts.

Early decisions of the Supreme Court show a complete understanding of the constitutionally-granted authority of Congress over the appellate jurisdiction of the federal judiciary. In the 1796 case of Wiscart v. D'Auchy, Chief Justice Oliver Ellsworth, who had been a member of the Committee on Detail at the Constitutional Convention and later one of the authors of the Judiciary Act of 1789, wrote:

> The constitution, distributing the judicial power of the U.S., vests in the Supreme Court, an original as well as appellate jurisdiction.... 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 our appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of appellate jurisdiction, is simply, whether Congress has established any rules for regulating its exercise. (3 Dall. 321 at 326)

In the 1799 decision of Turner v. Bank of North America, Ellsworth said that a "circuit court...is of limited jurisdiction and has cognizance, not of cases generally, but only of a few specifically circumscribed..." (4 Dall. 8 at 10). In a footnote to the same decision, Justice Ellsworth added:

> 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...to enlarge the jurisdiction of the federal courts, to every subject, to every form, which the constitution might warrant. (at 11)

In the 1810 case of Durousseau v. U.S., Chief Justice Marshall emphasized the same point:

> The appellate powers of this Court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such acts as have been passed on the subject. When the first legislature of the Union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. (6 Cranch 307 at 313)

In 1845, in the case of Cary v. Curtis, the Supreme Court declared that the "judicial power of the United States [is]

dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress..." (3 How. 236 at 245). In the 1868 case of Nashville v. Cooper, the Court emphasized the point again by saying that "two things are necessary to create jurisdiction....The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it" (6 Wall. 247 at 252).

By way of comparison, the Court has ruled, in what was probably its most famous case, Marbury v. Madison, that its original jurisdiction has been given directly from the Constitution and is not dependent on any acts of Congress. In Marbury the Court ruled that a clause of the Judiciary Act of 1789 was unconstitutional because it acted to expand the original jurisdiction of the Supreme Court - something that could be accomplished only by constitutional amendment.

In the 1820s and 1830s, there was a major constitutional confrontation between the Supreme Court and the highest courts of the states. Under Section 25 of the Judiciary Act of 1789, Congress had authorized the Supreme Court to review decisions of the states' courts under the federal constitution. States began to appeal to Congress to remove this jurisdiction from the Supreme Court. A bill was introduced in the House to that effect but even though a significant percentage of the House supported it, the bill never made it to a floor vote, and eventually the confrontation passed.

In 1867, Congress, for the first and only time in the nation's history, acted to prevent a decision of the Supreme Court by repealing its jurisdiction over the subject matter of the case. William McCardle, a Mississippi editor who was violently opposed to the post-Civil War Reconstruction Acts, was arrested and held for military trial by Major General Edward Ord, the commander of the Northern Occupation forces in Mississippi and Arkansas. McCardle, having been denied a writ of habeas corpus in the federal circuit court, appealed to the Supreme Court which had only six months before been granted jurisdiction by Congress to review denials of writs of habeas corpus.

The Supreme Court accepted the petition and the Congress, dominated by the radical Republicans of the Reconstruction era who were unsympathetic to challenges to the military rule of the South, moved immediately to repeal the jurisdictional statute that it had only recently passed.

The Court had no choice but to dismiss the case for lack of jurisdiction. Writing for the Court, Chief Justice Salmon P. Chase said:

> We are not at liberty to inquire into the motive of the legislature. We can only examine into its power under the Constitution, and the power to make exceptions to the

> appellate jurisdiction of this Court is given by express words. What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause.... (Ex parte McCardle 7 Wall. 506 at 514-515)

Nevertheless, four years later in U.S. v. Klein, the Court declared unconstitutional another statute that Congress had passed under its power to make exceptions and regulations to the appellate jurisdiction of the Court. President Lincoln had offered full presidential pardons to all Confederates who swore allegience to the Constitution and the Union. Persons pardoned were then able to recover any of their property confiscated by the Union during the war. Klein, a pardonee, sued in the federal Court of Claims because his property had not only been confiscated, but sold to another. The Court of Claims ruled in his favor, but the case was appealed to the Supreme Court. Before the Court could act, the Reconstruction Congress passed a statute removing the Court's jurisdiction over appeals from the Court of Claims based on presidential pardons without some additional proof of loyalty.

In a 7-2 decision, with Chief Justice Chase again writing the opinion, the Court ruled that Congress, in this instance, had acted unconstitutionally under the exceptions and regulations clause. Nevertheless, the Court emphasized that Congress does have the power to remove jurisdiction "in a particular class of cases":

> Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient....But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court has adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We have already decided

> that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty.... It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power....To the Executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences. It may be granted on conditions. In these particular pardons that no doubt might exist as to their character, restoration of property was expressly pledged; and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath....Now, it is clear that the Legislature cannot change the effect of such a pardon any more than the Executive can change a law. (13 Wall. 128 at 142, 145, 146, 147, 148)

It can be seen that the Klein Court based its decision not only on the exceptions and regulations clause of Article III, but also on the pardoning power granted exclusively to the President by Article II, Section 2, Clause 1. Also, and in contrast to McCardle, the Klein Court found that it was unconstitutional for Congress to prescribe the decision in a case by eliminating some of the evidence, that is, a pardon - matters of evidence in a particular pending case being pre-eminently a judicial concern. In McCardle, the Congress had restricted the Court's authority over a judicial procedure, that is, a writ of habeas corpus, and, further, a certain statutory class (i.e., under the Reconstruction Acts only) of the writs - the Court's jurisdiction over other habeas corpus writs being left untouched. Since the Klein case of 1872, there have been no significant controversies in the Supreme Court about the exceptions and regulations clause. And no judge, save for Justice Douglas, has ever seriously questioned the authority of the Congress over the Supreme Court's appellate jurisdiction. In a footnote to his opinion in the 1962 case of Glidden v. Zdanok (370 U.S. 530), Douglas wondered (at 605) "whether the McCardle case could command a majority view today." But, six years later in Fleet v. Cohen (392 U.S. 83), Douglas, in a concurring opinion, cited McCardle when he said, "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of Section 2, Article III" (at 109).

In 1932, Congress culminated more than two decades of disputes between legislatures and the federal courts over labor issues by passing the Norris-LaGuardia Act, removing the authority of the lower federal courts to issue injunctions in such cases. In the 1938 case of Lauf v. E. G. Skinner & Co., the Supreme Court

upheld the constitutionality of the Norris-LaGuardia Act. Associate Justice Roberts, writing for the Court, said that there "can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." (303 U.S. 323 at 330)

Over the past 30 years, as the Supreme Court accrued more powers to itself, Congress has periodically considered legislation to repeal specific areas of jurisdiction of the highest court. At the beginning of this modern era, the American Bar Association joined by Justice Roberts sought to head off the whole controversy by recommending the adoption of a constitutional amendment giving the Court, instead of Congress, authority to determine its appellate jurisdiction. But the idea received little congressional support. Throughout the post-World War II era and up to the present time, Congress has considered legislation to limit the jurisdiction of the Supreme Court and the lower federal courts in a wide variety of areas: desegregation, certain criminal procedures, internal security, school prayer, apportionment, and abortion. In 1964, the House passed a bill eliminating the jurisdiction of the Supreme Court to hear cases dealing with the apportionment of any state legislature, but the bill failed in the Senate.

DISCHARGE PETITIONS

The discharge petition on S. 450 is the second such petition to receive serious consideration by the House in less than a year. In July of 1979, the necessary 218 signatures were gathered to force floor consideration of a constitutional amendment to overturn the rulings of the Supreme Court on school busing. However, the amendment was eventually defeated on a rollcall vote of 209 to 216.

Prior to last year, there had been only four effective discharge petitions since 1960. In that year, a petition drive was started to discharge the House Judiciary Committee from consideration of the 1960 Civil Rights Act. When the petition came within ten signatures of the required majority of the House, opponents of the Act capitulated and agreed to allow the bill to be brought to the floor, where it subsequently passed and became law. In 1965, a drive for a discharge petition succeeded in removing the District of Columbia Home Rule Bill from the House District Committee. However, after much parliamentary maneuvering, another home rule bill was substituted and eventually passed (subsequently failing in the Senate).

In 1970, a discharge petition easily succeeded in forcing floor consideration of the Equal Rights Amendment, which passed the House by an overwhelming 352-15 margin. The Senate failed to pass the amendment that year, and it was not until 1972 that the ERA was sent to the states for ratification. The next year, a constitutional amendment to overturn the Supreme Court school

prayer decisions was discharged onto the House floor, but failed, 240-163, to receive the necessary two-thirds majority required for the passage of a constitutional amendment.

CONGRESS VS. THE COURTS

Constitutional amendments have been passed to overturn Supreme Court decisions four times in the past. The Eleventh Amendment was ratified in order to prevent any person from suing a state in the federal courts. It was adopted after the Supreme Court took jurisdiction over a case, Chisholm v. Georgia (1793), filed by a citizen of South Carolina against the state of Georgia. The Fourteenth Amendment overcame the Southern doctrines of state sovereignty and succession. It made federal citizenship paramount, thus overriding the Supreme Court's construction of the Constitution in Dred Scott v. Sanford (1857), which made citizenship by birth dependent on state law.

The Sixteenth Amendment, establishing the federal income tax, overrode the Supreme Court's decision in Pollock v. Farmer's Loan and Trust Company (1895), which stated that a federal tax on incomes derived from properties was unconstitutional. The Twenty-Sixth Amendment extended the suffrage in both state and national elections to all citizens eighteen years of age and over. It was adopted after the Supreme Court, in Oregon v. Mitchell (1970), declared unconstitutional the provisions of the Voting Rights Act insofar as they related to state elections.

Additionally, in 1924, Congress culminated an eight-year battle with the Supreme Court over child labor and interstate commerce by submitting to the states a constitutional amendment designed to reverse the Court's rulings in Hammer v. Dagenhart (1918) and Bailey v. Drexel Furniture Co. (1922). The amendment was ratified by 28 states, but led to a new ruling, U.S. v. Darby Lumber Co. (1941) in which the Court capitulated and overruled its previous decision in Dagenhart. An unsuccessful campaign to overturn the Supreme Court's "one man-one vote" decisions, Baker v. Carr (1962), and Reynolds v. Sims (1964), occurred in the 1960s when a nation-wide drive in the state legislatures to call a constitutional convention fell one state shy of the necessary two-thirds number of states.

Alternatively, Congress has been able to use an easier means, the passage of statutes by simple majority vote, in order to reverse rulings of the Court which are not based on the Constitution. Normally, the Court has assented to such legislative reversals and, in some cases, even challenged the Congress to do so. Recent examples of this exercise of congressional power were 1978 statutes dealing with pregnancy disability and with the snail darter. Concerning the former, Congress decided to require employers to include pregnancy benefits in their health insurance plans, thereby reversing the Supreme Court in General Electric Co. v. Gilber (1976) where it had held that pregnancy need not be

included in health plans. Regarding the latter, Congress enacted a provision to overturn the ruling of the Court in the famous snail darter case, TVA v. Hill (1978), in which the Court had prevented the completion of the Tellico Dam because it endangered the existence of that tiny fish.

EFFECT OF REMOVAL OF JURISDICTION

In contrast to a constitutional or statutory reversal, removing the jurisdiction of the lower federal courts and the Supreme Court over school prayer would not by itself overturn the Engle and Abington decisions. The issue would be transferred to the state courts where each state supreme court would have the final say. It is likely that some of these courts would continue to uphold the rulings in Engle and Abington as controlling. Other state supreme courts might fashion variations, perhaps stricter, perhaps looser, than Engle and Abington. Still others would likely reject the two cases out of hand.

Thus, unlike a constitutional amendment or a statutory act, the result of the removal of jurisdiction cannot be known or presumed. As such, the school prayer amendment to S. 450, if passed, would be an act involving conclusions about broad constitutional policy, namely, the separation of national and state powers, rather than an answer to a specific issue. With respect to school prayer, S. 450 would return a measure of sovereignty to both state legislatures and state courts.

THE FIRST AND FOURTEENTH AMENDMENTS

The First Amendment, by its own words, is not binding on the states. Additionally, the rejection by the First Congress of Madison's amendment directed against the states is another demonstration of the meaning and intent of the that amendment. As has been recounted, the Supreme Court, beginning with the Gitlow case, has held the First Amendment binding on the states by way of "incorporating" it into the Fourteenth Amendment. As has also been recounted, the Court has never given a real explanation of how the Thirty-Ninth Congress (1866), which passed the Fourteenth Amendment, intended to incorporate the entire Bill of Rights into the language of that amendment. Nevertheless, that conclusion has long been considered a major premise by judges and lawyers and especially by the scholars who write in the leading law journals.

In 1977, Raoul Berger, one of the most prominent legal scholars of our times, published Government by Judiciary, The Transformation of the Fourteenth Amendment, in which he concluded that there is no evidence whatsoever to prove that the members of the Thirty-Ninth Congress intended to make the entire Bill of Rights a part of the Fourteenth Amendment. In Chapter 8 of the book, Berger takes the reader day by day through the debate on

the passage of the Fourteenth Amendment and, along the way, shows where many of the false assumptions about the Amendment have come from.

Ironically, even Justice Black, the author of the Engle decision, once conceded this point:

> The states did not adopt the Amendment with knowledge of its sweeping meaning under its present construction. No section of the Amendment gave notice to the people that, if adopted, it would subject every state law... affecting [judicial processes]...to censorship of the United States courts. No word in all [sic] this Amendment gave any hint that its adoption would deprive the states of their long recognized power to regulate [judicial processes]. (Connectict General Ins. Co. v. Johnson 303 U.S. 77 at 89, 1938)

It has been argued that allowing each state to make its own decisions concerning voluntary school prayer would put in abeyance the "supremacy clause" of Article VI of the Constitution which states that "The constitution...shall be the supreme law of the land; and the judges in every state shall be bound thereby...." Yet, the supremacy clause was not a factor in either the Engle or the Abington decision nor has it figured in the incorporation doctrine. Additionally, the principles of a separation of powers between the national government and the state governments; the power of Congress over the federal judiciary; and the explicit First Amendment prohibition of Congress only, and not the states, from legislating on religious matters, are all constitutional doctrines and, therefore, part of the "supreme law."

CONCLUSION

Over the past twenty-five years, the Supreme Court has been racing ahead of other governmental institutions in effecting changes in national social policy and in society itself. Indeed, the Court has been fashioning a national social policy for the first time, for through the succession of controversial Supreme Court decisions on desegregation, reapportionment, school prayer, capital punishment, criminal procedure, school busing, pornography, abortion, and reverse discrimination a common theme has been apparent: all these areas had been long-standing matters of individual state policy before the Court acted. By its decisions in the cases, the Court not only suddenly made them all matters of national policy, but it also defined what the new national policy would be in each case.

Such a role for "the judicial power" is not provided for in the Constitution nor was it ever contemplated by the Constitutional Convention of 1787. As mentioned above, the judiciary power was

not intended to extend to all cases arising under the Constitution but to cases of a "judiciary nature" only. Nevertheless, the opportunity for the Court to assume policy-making powers might be provided by the Constitution itself.

The delegates to the Constitutional Convention were much more concerned with the executive and legislative powers than with the judicial power. The amount of time and debate spent on Article III was minor by comparison. Consequently, it took a subsequent act by the First Congress, the Judiciary Act of 1789, to give a complete expression to the role, authority, and jurisdiction of the judicial power. The last substantial change in the federal judicial system was the creation of the circuit courts of appeals in 1891. Since, then, the judiciary has largely functioned according to its own discretion.

In Madison's view, the so-called "system of checks and balances" was the fundamental pillar holding up the entire constitutional structure. In Federalist No. 51, he explained this principle:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

It can be asked whether the system of checks and balances can function with respect to a Supreme Court that has assumed unplanned powers of fashioning and promulgating policy.

Compared to the executive and the legislative branches, the Supreme Court is able to act in a relatively easy manner. The justices are appointed for life and are answerable to no one after their initial confirmations by the Senate. Five justices in agreement constitute a summary authority to eliminate long-standing social customs (prayers in public schools, local prohibitions on the sale of pornography), establish new constitutional rights (the right of privacy, the rights to welfare and education), re-order the structure of government (re-apportionment), or assume executive and/or legislative powers (overseeing prisons, hospitals and schools).

The other departments of the "compound republic" are shackled by checks and restraints. The executive and the members of Congress must stand for re-election, thus making their actions reviewable periodically. The legislative is divided into two: the House holds an effective vote over the actions of the Senate and vice versa. With each house, it takes the agreement of a multitudinous majority in order to pass legislation. The presidential veto, seemingly a powerful weapon, must be separately sustained by one-third of each house.

Amending the Constitution, deliberately planned as a rare and arduous undertaking, must be accomplished by the agreement of two-thirds of each house and three-fourths of the states. The states, who substantially weakened themselves by ratifying the Sixteenth (national income tax) and Seventeenth (direct election of senators) Amendments can effect a major change in the structure of government only if two-thirds of them agree to call a constitutional convention, something that has never happened.

Against the judiciary, the executive has no power. The Constitution gives the "check" on the judiciary to the Congress. "In republican government, the legislative authority necessarily predominates." (Madison in Federalist No. 51) In recent years, the relative powers of the Congress and the Supreme Court have been skewed in favor of the latter: passage of a constitutional amendment being an enormously difficult task compared to the agreement of a majority of the Court. Removing the jurisdiction of the Court over a class of cases requires only a simple majority of each house. The Senate has decided to use this means regarding school prayer and awaits the decision of the House.

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