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Withdrawing Jurisdiction from Federal Courts

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Courts today generally accept two assumptions in their interpretation of the Constitution. They first assume that the judiciary is the only branch of the government which has definitive power to decide what the Constitution is. The second assumption, related to the first, is that the language of Supreme Court opinions is somehow of the same stature as the language of the Constitution itself. Remember, it was not until 1958 in *Cooper v. Aaron*[1] that even the Supreme Court said that its decisions were the law of the land. But we see this operating. And I think we ought to be careful not to overstate the case. I am convinced that the exercise of power by Congress to remove the appellate jurisdiction in these areas is both constitutional and desirable.

Now, there are problems. I have no problem at all with someone who disagrees with me on prudential grounds and says, "I don't think it's a good idea." There are problems with it. For example, the limitation of Supreme Court appellate jurisdiction would not overturn the cases that Congress was objecting to. They would remain and presumably the courts would then be free to decide whether to follow them or not. They might follow them, they might not.

The proposals in the abortion area, for example, would act as damage control measures, since they would effectively withdraw the federal courts' jurisdiction to decide such cases. Our federal courts currently accept the notion that some human beings are nonpersons, simply because the Court said whether or not the unborn child is a human being, he's a nonperson. We have a regime under which every year we wipe out the equivalent of the combined populations of Kansas City, Miami and Minneapolis. Now, when somebody wants to take away the power of the Supreme Court to work further mischief, it's not a broad scale attack upon the Constitution. It is rather a surgical removal of jurisdiction.

We are dealing here with a form of boot strap jurisprudence on the part of the Supreme Court. As Berger,[2] Fairman[3] and others

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

2 R. BERGER, GOVERNMENT BY JUDICIARY (1977).

3 Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L.

have demonstrated, the fourteenth amendment was not intended to apply the Bill of Rights to the states. If you have any doubt about that, particularly with respect to the establishment clause, consult the history of the fourteenth amendment.

The Supreme Court has invented the incorporation doctrine. In the process it has applied against the states not only the provisions of the Bill of Rights, but rights that were never even envisioned by the Framers, such as the right of reproductive privacy, which the courts found lurking in the penumbras formed by the emanations from the Bill of Rights.

The Supreme Court has also invented the notion that it's unconstitutional for a public official to pray. This would be a surprise to the Framers of the Constitution who, between September 22 and 24, 1789, did two things. They first approved the first amendment and then they called on the President to pray.

I think it's quite important for us to look at this and say, "Look, a constitutional amendment is a very difficult and long, important process." There is something wrong with the notion that says that every time we disagree with the Supreme Court's decision, we must amend the Constitution, unless our assumption is that every Supreme Court decision is equivalent to the Constitution itself.

The question ultimately becomes whether the Supreme Court's interpretation of the Constitution can ever be wrong. The answer is "yes." We only have to consult the history of *Swift v. Tyson*[4] and the *Erie* decision[5] to see that. So unless we are going to accept the assumption that the Supreme Court is the exclusive arbiter of what the Constitution means, and that its opinions have the same status as the language of the Constitution, then we ought not to get paranoid about the consideration by Congress of the exercise of its powers under article III, section two. It is a legitimate power of Congress.

Believe me, I'm not claiming that it is something that is without problems. There are problems, both implementation problems and possible problems of precedent. These are all things that would come into the consideration of the decision, the prudential decision as to whether it's a good thing to do it. In future years as these proposals come up, I hope that the rhetoric will be toned down so

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REV. 5 (1949).

4 41 U.S. (16 Pet.) 1 (1842).

5 Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

that we will at least address ourselves to it as a question of prudence, rather than regarding it as a confrontation involving the very survival of the Constitution itself, because it is simply within Congress' power. Whether it should be exercised is of course a debatable question, but that's what the debate should be about.