Judicial Tyranny

Since at least the era of the Warren Court in the 1950s, the abuses of the American judicial system and the corruption of constitutional government by the courts have been major causes of concern for American conservatives. In the last few years, however, as federal courts have repeatedly struck down popularly and legally enacted laws intended to protect American liberties and have imposed their own rulings as laws on communities that never voted for them, more and more Americans are expressing alarm. To many, not only do the courts seem to be out of control and intent on establishing what legal scholars William J. Quirk and R. Randall Bridwell call "judicial dictatorship," but several court rulings seem to strike at the very heart of American republicanism, the concept of the consent of the governed.

Thus, in 1994 voters in California passed by a substantial margin the ballot measure known as Proposition 187, which denied most public benefits such as welfare to illegal aliens. Within a year, a federal judge ruled the law unconstitutional. Similarly, in 1996 the voters of California passed Proposition 209, a ballot measure that effectively abolished affirmative action programs and racial discrimination by the state government. Again, a federal judge ruled the new law unconstitutional — this time within three weeks.

In Colorado in 1992, voters passed an amendment to the state constitution that prohibited local jurisdictions from adopting laws that forbade discrimination on the basis of sexual orientation. The purpose of the measure, known as "Amendment 2," was to deny special legal protection and privileges to homosexuals and to protect the rights of those who refuse to do business with them — such as landlords. Federal courts, including the U.S. Supreme Court in its 1996 decision *Romer v. Evans*, ruled that Amendment 2 is unconstitutional.

The list, of course, could be extended endlessly: the 1973 Supreme Court ruling in *Roe v. Wade*, which legalized abortion in all 50 states; the 1989 ruling in *Texas v. Johnson*, which struck down laws in 48 states that made burning the U.S. flag a crime; rulings mandating forced busing, preventing prayer in school, prohibiting public display of religious symbols, ordering local prison systems to release convicted criminals, commanding traditionally all-male schools like the Virginia Military Institute and South Carolina's Citadel to admit women as cadets, and on and on. Although such "judicial activism" is by no means new, it has become particularly alarming in recent years as the courts seem to be intruding into areas where they have never gone before and at the very time when citizen activism has achieved major political victories through effective organizing within the political system. Several of the most controversial court rulings — on Propositions 187 and 209 and Amendment 2, for example — have targeted the direct results of such activism by citizens determined to resist the encroachments of liberalism on their freedom and safety. No sooner has such conservative activism proved to be successful in the political arena than the courts, impervious to public opinion and pressures, have leaped into the breach to block it.

Although some Americans, alarmed and frustrated by such judicial arrogance, have begun to talk about civil disobedience or even armed resistance to the courts, that kind of response is both unwise and unnecessary. What is necessary to end the "judicial dictatorship" is to restore in our courts, our elected officials, our legal profession, and among our citizens as a whole an understanding of and commitment to the principles of American federalism as the U.S. Constitution enshrines it and as the Framers of the Constitution intended it. Judges are not the only ones who have forgotten what the authentic federalism of the Framers means, and if many of our lawmakers — including many conservatives — had not also

forgotten its meaning, the problem of a court system out of control would never have arisen.

Authentic federalism proceeds from one of the fundamental principles of the U.S. Constitution — that the states themselves are the basic units of the federal union; that while the states under the Constitution surrender certain specified rights to the federal government, they retain all the other rights not explicitly surrendered, as guaranteed in the Ninth and Tenth Amendments to the Constitution; and that Washington — the federal government, whether in its executive, legislative, or judicial branches — has no rights or powers whatsoever except what the states under the Constitution have explicitly granted it.

Judicial revolution in the United States — the process by which the federal courts and especially the Supreme Court have appointed themselves the virtual dictators to determine which laws are valid and which laws are not, without reference to the wishes of voters or lawmakers or even to the text of the Constitution — consists precisely in overturning the authentic federalism of the Constitution and the states' rights it protects. In virtually every area where the courts have intruded, their rulings have sought to strip the states and local governments of their legitimate rights and powers and to grant illegitimate powers to the federal government. And, perhaps the saddest truth of all, the courts have been able to get away with this vast usurpation of power precisely because neither our elected lawmakers nor the citizens themselves have called them to account, and we have not called them to account because we have forgotten the true nature of our Constitution and the limits it places upon centralized power.

Since approximately the 1920s, the courts have made use of a variety of pseudo-constitutional doctrines and devices to override laws the judges disliked. One such device is the misinterpretation of the Constitution's Commerce Clause — clause 3 of Article I, Section 8 — which empowers Congress "to regulate Commerce with foreign nations, among the several states, and with the Indian tribes" — to justify federal regulation of virtually any activity that might remotely affect interstate commerce. While the original intent of the Framers in adopting this clause was mainly to prevent the erection of internal trade barriers between the states and at the same time reserve the right of the national legislature to restrict and regulate trade with foreign nations, the courts in the 20th century have used the same language for purposes that never occurred to anyone who supported the language at the time of its adoption.

Although the Supreme Court in the early 1930s adhered to a properly narrow interpretation of the Commerce Clause and thereby struck down several of the Roosevelt Administration's socialistic and centralizing laws (such as the fascistic National Industrial Recovery Act), Roosevelt himself proceeded to threaten to pack the Supreme Court if it did not show more deference to his demands. FDR's threat apparently had the intended effect, since the Court soon began to broaden its view of the Commerce Clause to uphold FDR's New Deal policies. In a classic statement affirming the new dogma, Supreme Court Justice Harlan Fiske Stone announced in a 1942 ruling, "The Commerce power extends to those intrastate activities which in a substantial way interfere with or obstruct the granted power." If the power to regulate trade among the states also includes the power to regulate not only trade but also "activities" within the states, then there is little Congress cannot do to manage the internal affairs of every state in the country. Under this doctrine, the High Court proceeded to uphold New Deal labor regulations and new federal regulatory powers that had long been held to be beyond the legitimate scope of federal authority.

In the 1960s, the same "commerce power" was invoked by the courts in upholding the 1964 Civil Rights

Act and its prohibition of racial discrimination by private enterprise in hotels, restaurants, and theaters. Again, the uses that the court made of the original constitutional language had nothing to do with the intent of the language or of those who originally drafted and adopted it.

The concept of "original intent" as the only legitimate means of interpreting the Constitution (or any law) is crucial to grasping the nature of the judicial revolution. Original intent means that in interpreting the meaning of the Constitution or of any law we should look to what those who drafted and enacted the law intended the law to mean. Indeed, the concept of original intent is essential to the very concept of the rule of law, because if we depart from or ignore the intent of the lawmakers, we have no reliable guide to what the laws they passed really do mean. Liberal judges and justices regularly ignore original intent because they want to use the language of the Constitution and other laws to drive their own agenda.

Last year, retired Supreme Court Justice William J. Brennan, one of the architects of this judicial revolution, published an op-ed piece in the April 28 *New York Times* acknowledging his own abandonment of the original-intent principle. "I approached my responsibility of interpreting it [the Constitution] as a 20th-century American," Brennan recalled, "for the genius of the Constitution rests not in any static meaning it may have had in a world dead and gone but in its evolving character."

But the whole point of a written constitution lies precisely in its "static meaning." That, indeed, is the purpose of writing it down at all. By fixing its meaning in writing, the framers of constitutions try to render it impossible for governments to twist the meaning of the laws to suit their own purposes. If we were to adopt Brennan's view of the Constitution as an "evolving" document, then the whole concept of the rule of law — the rule of publicly known, commonly understood standards permanently encoded in the text of the statute — would become meaningless. The courts could simply impose on the language whatever meaning they wished, without regard to the original meaning of the language. But if the whole purpose of writing a constitution down and preserving records of the debates over its adoption is to fix its meaning, the whole purpose of justices like Brennan in abandoning original intent is to contrive sophistries by which the fixed and clear meaning of the constitutional text can be ignored and their own preferences imposed in the place of the law.

Abandoning the concept of original intent and inventing clever but fallacious rationales for other means of constitutional interpretation have been essential to the judicial revolution and the immense damage it has inflicted on constitutional government. As we have seen, it was central to the re-interpretation of the Commerce Clause to turn that language into a charter for expanded governmental power. But the misuse of the Commerce Clause is only one of several such devices by which the courts have usurped power. Another, even more important but perhaps even less understood, usurpation consists in what is known as the "Incorporation Doctrine."

Under the Incorporation Doctrine, the courts have purported that the Bill of Rights in the Constitution applies to the states as well as to the federal government. Today, many Americans seem to take this view, and it is common to hear even well-informed citizens and politicians talking loosely about how certain state or local laws or practices "violate the First Amendment" or are "unconstitutional" because they violate one of the other Ten Amendments in the Bill of Rights. But the truth is that it was not until the 20th century that the idea of imposing the Bill of Rights on the states was even seriously discussed, and it was not until after World War II that the Supreme Court began systematically extending its powers to strike down state and local laws and dictate to states and local jurisdictions what they must and must not do.

The Constitution as originally drafted and submitted to the states for ratification in 1787 did not even contain a Bill of Rights, and one of its principal Framers, Alexander Hamilton, argued that it should not have one. A bill of rights, Hamilton argued in *The Federalist*, No. 84, "would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted." Nevertheless, many of the Anti-Federalists who feared the centralizing tendencies of political power insisted that the Constitution include a Bill of Rights that would restrict federal power. The Ninth and 10th Amendments were obviously included to alleviate the concern that Hamilton as well as the Anti-Federalists had raised.

But it was clearly understood at the time that the Bill of Rights did not apply to the states. James Madison, one of the main architects of the Constitution, believed that it should, for, he wrote, "the State governments are as liable to attack these invaluable privileges as the General Government is, and therefore ought to be cautiously guarded against." He proposed in the First Congress that the First Amendment be extended to apply to the states, but the Congress explicitly rejected his proposal and supported the view of Thomas Tucker of South Carolina, who argued that it would be "much better, I apprehend, to leave the State Governments to themselves." "As a result," writes historian Richard B. Morris, "the Bill of Rights, as adopted, contrary to Madison's intent, imposed restrictions only upon the federal government."

That was also the common understanding of the Bill of Rights throughout the 19th century, and indeed it was so established by Chief Justice John Marshall in his 1833 Supreme Court ruling in *Barron v. Baltimore*. In that case a Baltimore wharf owner had sued the city because, in the course of a public works project undertaken by the city, his privately owned harbor had been silted up. After he lost in the lower courts, he took his suit to the Supreme Court, claiming that the Fifth Amendment protected him against the taking of his property without just compensation. But Marshall and his colleagues ruled against him, with the Chief Justice holding, "Had Congress engaged in the extraordinary occupation of improving the Constitutions of the several States by affording the people additional protection for the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language."

Despite the efforts of some radicals (and indeed some conservatives who wanted federal protection of property rights) throughout the 19th century, Marshall's view prevailed as the majority view on the court and throughout the country. The Bill of Rights did not apply to the states, and laws the states enacted that seemed inconsistent with the Bill of Rights were perfectly valid as long as they were consistent with the constitutions of their own states. Of course, the court could strike down state laws that did violate the specific restrictions on the states in the Constitution. Under this authentic federalist system, the states retained the rights and powers they had not surrendered under the Constitution, the federal government remained extremely limited in its scope and powers, and the states were able to make their own arrangements in a wide variety of public issues such as education, criminal law and law enforcement, labor law, business regulation, suffrage, race relations, control of obscenity and subversion, and the relationship of church and state. The authority of the states to govern themselves in such areas is implicit in the language of the Ninth and 10th Amendments: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," and "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."

Problems began to arise in the early 20th century when justices schooled in "Progressivist" political

theory sought to use constitutional law to undermine federalism and centralize power in the federal government. One of the landmark cases that changed the meaning of the Constitution and initiated the subversion of federalism was a 1925 case known as *Gitlow v. New York*.

Benjamin Gitlow was a Communist Party member who was convicted of violating New York's Criminal Anarchy Law that made it a criminal offense to advocate the violent overthrow of the government. Appealing to the Supreme Court, Gitlow and his lawyer argued that the New York law violated the First Amendment's guarantee of freedom of expression and that this First Amendment guarantee was "incorporated" by the 14th Amendment's due process clause. The Court, while upholding Gitlow's conviction and the New York law, accepted this argument, ruling that "freedom of speech and of the press … are among the fundamental rights and 'liberties' protected by the due process clause of the Fourteenth Amendment."

It is from the Gitlow case that the Incorporation Doctrine descends, and through it the concept that the Bill of Rights constitutes a restraint not only on the federal government but also on the states themselves. The argument for the Incorporation Doctrine relies on the 14th Amendment, passed soon after the War Between the States, and it claims that the language of that amendment alters the meaning of the Bill of Rights as it had been understood previously by the Framers and John Marshall.

Section 1 of the 14th Amendment contains the language on which this doctrine is based: "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." The argument is that, as Justice Hugo Black expressed it in the 1947 case of *Adamson v. California*, "no state could deprive its citizens of the privileges and immunities of the Bill of Rights" and therefore that the 14th Amendment "incorporates" the Bill of Rights into the Constitution and applies it to the states. Black expressed this doctrine in a dissenting opinion, and although the Supreme Court as a whole has never endorsed Black's "total incorporation" doctrine, it has, in fact, as the *Oxford Companion to the Supreme Court of the United States* expresses it, "incorporated nearly all the individual components of the Bill of Rights under a doctrine called 'selective incorporation.'" (Of course, the rights selectively incorporated are those that correspond to liberal prejudices. For example, the court-created "right" to abortion is incorporated; the constitutionally protected right to keep and bear arms is not.)

The de facto adoption of the Incorporation Doctrine since the late 1940s has been the foundation stone of judicial liberalism ever since, underlying the constitutional revolution over which Earl Warren and his court presided in the 1950s as well as the judicial usurpations of more recent years. As legal scholar Douglas Bradford expressed it in the journal *This World* in 1993:

> This interpretative device, many writers argue, allows the Supreme Court to transform the Bill of Rights from its original status, namely as a limitation on federal authority, into a specification of the constitutionally guaranteed rights incident to national citizenship. Upon this rock rests the authority of the federal judiciary to oversee busing, quotas, school district boundaries, abortion, Miranda warnings, probable cause for arrest, prison and asylum standards, libel, pornography, subversive speech, and the separation of church and state. Incorporation has emerged as the linchpin of judicial activism in the twentieth century.

But how valid is the Incorporation Doctrine and the argument that the 14th Amendment transforms the meaning of the Bill of Rights from a restriction on federal power into one on the states? The answer is that that argument is without merit. The Framers of the 14th Amendment had no intention of initiating

a revolution in constitutional law or of bringing the states under the constraints of the Bill of Rights. The whole Incorporation Doctrine is simply an invention of judges and justices eager to impose their own ideology, political beliefs, and personal preferences on the nation as a whole, and they have had to rely on the courts to do so because the American people have never supported or been willing to enact the measures the courts have sought to impose through their revolution.

Liberal legal scholar Charles Murphy let this cat out of the bag when he wrote in his glowing history of the Warren Court that Warren "had utilized the judiciary as a constructive policy-making instrument in a wide range of areas. Intent more upon social ends than upon legal subtleties and refinements, and candidly prepared to say so, he had pushed the nation, through his Court's legal rulings, to take public actions that Congress was unprepared to recommend and the executive was incapable, unilaterally, of effectively securing."

In other words, Warren was indifferent to the real meaning of the Constitution but simply wanted to use the Constitution as a justification for his own "policy-making," and the policies he wanted to push were those that could not be enacted by Congress or the president because there was no popular support for them. Only by relying on the least democratic and least responsive branch of the federal government could Warren and his colleagues and heirs hope to impose their policy preferences on the country, and only by distorting the meaning of the Constitution and converting it into an instrument for political goals could they carry through their revolution.

Probably the definitive refutation of the argument for the Incorporation Doctrine is found in the work of legal scholar Raoul Berger of Berkeley and Harvard University, whose lifelong study of the enactment of the 14th Amendment shows that most of those who drafted and enacted the amendment had no intention of using it to incorporate the Bill of Rights against the states. The framers of the 14th Amendment certainly intended to protect the "privileges and immunities" of U.S. citizens from infringement by the states, but the question is whether the "privileges and immunities" language of the amendment includes, as Justice Black claimed it did, the rights that the Bill of Rights protect.

In fact, the 39th Congress was mainly concerned with establishing constitutional authority for its Civil Rights Act of 1866, which was meant to protect the rights of recently emancipated slaves in the South, and these rights, specified in the Act, consisted explicitly of the "right 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, and shall be subject to like punishment." These rights were held to be incident to the fundamental rights of life, liberty, and property without which the "fundamental rights of citizenship" could not be enjoyed. The emancipated slaves were now citizens, and like all citizens had to enjoy these fundamental rights that enabled them to function in society and sustain their freedom.

As Berger has shown, the "privileges and immunities" clause of the 14th Amendment refers not to the Bill of Rights but to the language of Article IV, section 2 of the Constitution, which declares, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The amendment merely confirmed such entitlement to citizens of the United States against the states. The language of Article IV could not refer to the protections of the Bill of Rights because: a) it was written well before the Bill of Rights was even drafted; b) the purpose of the language was to require, as Berger writes, "states to accord certain privileges to citizens of a sister state," a purpose "of entirely different provenance" from that of the Bill of Rights, which "was designed to protect certain rights against the federal government"; c) the debates over the Bill of Rights in the First Congress show no

disposition to relate the Bill of Rights to the "privileges and immunities" language of Article IV; and d) early court decisions such as *Corfield v. Coryell* (1823) explicitly specified the "privileges and immunities" to which the language of Article IV referred (largely the same rights later extended to the freedmen in the 1866 Civil Rights Act) and explicitly rejected the "all-inclusive" interpretation of Justice Black. As Berger writes in his authoritative *Government by Judiciary* of the debates over the adoption of the 14th Amendment by the 39th Congress:

> The constant reiteration that the purpose of the Amendment was to constitutionalize the Civil Rights Act, the frequent tributes to State sovereignty, and recognition of powers reserved to the States by the Tenth Amendment, in which [Rep. John] Bingham [of Ohio, author of Section 1 of the 14th Amendment] joined, unite to repel an inference that the framers intended to interfere with State conduct in its own affairs otherwise than is described in the Act.

Moreover, Berger quotes Hugo Black himself, some years before his formulation of the Incorporation Doctrine in *Adamson* in 1947. Despite Black's efforts in *Adamson* to argue that the framers of the 14th Amendment intended to incorporate the Bill of Rights, his earlier statements contradicted that argument. "The states," Black wrote in a 1938 Supreme Court ruling, "did not adopt the [14th] 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." In other words, the inventor of the Incorporation Doctrine himself acknowledged that the intent of the framers of the 14th Amendment did not include incorporation. Only by abandoning the concept of original intent could Justice Black expect to sustain his own case for incorporation.

Nevertheless, despite the absence of any authority for accepting the Incorporation Doctrine, the court proceeded to apply it as it wished, and having gotten away with applying it in selected and limited cases early in the century, it soon began to rely on it for its revolutionary purposes. The list of judicial invasions described by Douglas Bradford suggests the scope of the power that the Doctrine provided to the court, and to this day the court continues to rely on this totally unfounded myth to justify its intrusions into state and local affairs.

Aside from the concentration of federal power and the centralization of judicial power that reliance on the Incorporation Doctrine has allowed, one result of the 70-year crusade to bring the states under the authority of the Bill of Rights has been the involvement of the federal courts, including the Supreme Court, in micromanaging the affairs of the states and localities and thereby the increasing decline of local self-government, local responsibility, and the consent of the governed to the arrangements that govern them. Professors Quirk and Bridwell, in their recent book *Judicial Dictatorship*, discuss how communities are being arbitrarily subjected to really dangerous decisions by the courts. As of 1993, they write, the courts controlled "80 percent of all state prison systems and about 33 percent of the five hundred largest jails" in the nation, and the Supreme Court "routinely overrules the actions of the local police, boards of education, and the state laws under which they act. The beneficiaries of the Court's protection are criminals, atheists, homosexuals, flag burners, Indians, illegal entrants, including terrorists, convicts, the mentally ill and pornographers."

Moreover, in determining how local jurisdictions shall be governed, the courts have long since abandoned the practice of referring to the actual constitutional text. Indeed, in the case *Griswold v. Connecticut* (1965), which discovered a hitherto unknown "right to privacy" in the Constitution that later blossomed into the "right to an abortion" in *Roe v. Wade*, Justice William O. Brennan actually

invented what he called “penumbras” by which specific guarantees of the Bill of Rights imply other, unspecified rights that the courts may invoke to strike down state laws. In place of the constitutional text, justices have invented other tests by which to determine whether a community is abiding by the Constitution.

One such test is the so-called “Lemon Test,” under which the Court decides whether certain state laws violate the “separation of church and state” (a phrase not found in the Constitution but which has been erected into a fundamental constitutional principle). The Lemon Test, deriving from a 1971 case of *Lemon v. Kurzman*, consists of three standards a given law must meet if it is to be permitted: a) the law must have a secular legislative purpose; b) its principal or primary effect must be neither to advance nor inhibit religion; and c) it must not foster an “excessive entanglement” with religion. None of these standards is to be found in the Constitution either, nor is one of the corollaries of the Lemon Test, the “Reindeer Rule.” This rule regulates what kind of Christmas displays a local government may put up. The display must not have a religious purpose because the Constitution as re-invented by the justices does not permit government sponsoring of religion, and one means of determining whether a Christmas display is religious or not is whether it contains reindeer. Santa Claus, his reindeer, his elves, Frosty the Snowman, and similar secular images of Christmas are permitted by the U.S. Constitution. Madonna and Child, “Silent Night, Holy Night,” and (perish the thought) actual prayer are verboten, unless surrounded by secular Christmas paraphernalia.

The Lemon Test, the Reindeer Rule, and similar devices invented by the court have no foundation whatsoever in the Constitution. Having abandoned the concept of original intent, imported their own opinions into interpreting the words and language of the Constitution, and fabricated the myth of the Incorporation Doctrine, the courts have essentially liberated themselves from the Constitution as written and arrogated virtually unlimited power to themselves. There is today literally no telling as to how the courts may rule on any given subject, certainly not by examining the text of the Constitution, the records of its drafting and ratification, or the rulings handed down by earlier generations of jurists. Indeed, so irrational and unpredictable have the courts become in their decisions that conservative journalist and constitutional expert M. Stanton Evans concluded in his 1994 book, *The Theme Is Freedom*, “To all intents and purposes … this arrangement [the constitutional order established by the Framers] is now defunct. In reality, we no longer have a Constitution, or anything that can be accurately depicted as constitutional law.”

Must we accept this autopsy report on the Constitution, or is it possible to restore the Constitution to its vital function in our national life? In fact, Americans have allowed the Constitution to die by their own inattention to judicial (as well as congressional and presidential) usurpation. We can restore the Constitution and the federalism and states’ rights it protects by insisting that all branches of government abide by the real meaning of the Constitution and especially that the federal judges and Supreme Court justices appointed by the president and confirmed by the Congress be magistrates who understand and are committed to upholding its real meaning.

Yet, despite the Republican majority in both houses of Congress since 1994 and despite Republican control of the White House for 12 years under Ronald Reagan and George Bush, there has been little serious effort to restore the Constitution or bridle the outrageous usurpations of the judiciary. Today, all but two of the nine Supreme Court justices were appointed by Republican presidents, but the court continues to hand down decisions that are just as alien to the Constitution as anything Earl Warren or William J. Brennan (both of them appointed by Republican President Dwight Eisenhower) ever

attempted. Although Republican presidential nominee Robert Dole last year criticized President Clinton's judicial appointments, it turned out that Dole as Senate Majority Leader had himself voted for 185 of the 187 judicial nominees President Clinton had made in his first term. Neither Dole nor other leading Republicans raised much objection to either of Clinton's two liberal Supreme Court appointments, and some Republican senators actually endorsed the nominees before the Senate held confirmation hearings. By contrast, when the Democrats controlled Congress and Republicans nominated justices like Robert Bork and Clarence Thomas, the hearings and confirmation process were savage sessions of political opposition and character assassination. Certainly the Republicans should not engage in such tactics to stop liberal judicial appointments, but they could do far more than they have done to challenge the credentials and judicial philosophies of the judges and justices the Democrats have appointed.

Republicans and conservatives have generally been far too timid in criticizing liberal appointees, and they have often allowed liberal judicial philosophy to prevail simply because they either don't understand what is wrong with it or have come to believe that it is irreversible. Thus, even Judge Bork in his book *The Tempting of America*, written after his bitter confirmation battle in the Senate, concedes, "The controversy over the legitimacy of incorporation continues to this day, although as a matter of judicial practice the issue is settled." Of course it is "settled" as long as those who know the doctrine is a myth refuse to "unsettle" it. Only by challenging the Incorporation Doctrine and similar myths publicly and openly can conservatives hope to expose their fallacies and restore the real Constitution.

There is also a good deal of discussion about correcting the excesses of the courts through constitutional amendments like the school prayer amendment, the balanced budget amendment, term limits amendments, the human life amendment, and the flag amendment, which would reverse the Court's 1989 ruling striking down state laws against burning the American Flag. In some cases, amending the Constitution may be necessary, but in general it is not a good idea. It is impossible to amend the Constitution to correct every bad decision the Supreme Court hands down, and doing so would do nothing to strike at the real root of the problem, which lies in the courts and the judges. As Gary Benoit wrote last January in the pages of *The New American*, "Such 'solutions' are based on a premise that the U.S. Constitution is the problem when in fact the problem is a lack of adherence to the Constitution."

Even if we could amend the Constitution every time the courts make a bad decision, the text of the Constitution would become so cluttered that it would no longer be the simple and easily comprehensible document that has allowed it to endure as long as it has. It would soon come to resemble the long, complicated, and largely useless constitutions that many Latin American nations have and would be a document that only lawyers and experts could claim to comprehend. Indeed, the courts' twisted reading of the Constitution and their fabrication of false interpretations and standards have already moved us too far in that direction.

By far the single most effective remedy for judicial usurpation that the Congress could adopt would be to limit the appellate jurisdiction of the Supreme Court. Article II, section 2 of the Constitution states:

> 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 the other cases before mentioned [in the first part of the section], 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.

Under this provision, the Congress could simply enact a law or a series of laws that withdrew from Supreme Court jurisdiction any cases involving such issues as abortion, school prayer, law enforcement, pornography, subversion, civil rights, or any other area in which the Court has intruded. Conceivably, the Congress could also simply enact a law withdrawing from Supreme Court jurisdiction any case involving claims against the states based on the Bill of Rights, thereby abolishing the Incorporation Doctrine at a single stroke. The court itself has endorsed the legitimacy of limiting its appellate jurisdiction in the 1868 case *Ex Parte McCardle*.

Moreover, the Congress could also simply abolish (or, at the very least, limit the jurisdictions of) the lower federal courts, which the Congress, after all, created in the first place. Article III, section 1 of the Constitution states that "The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." By abolishing or limiting such courts Congress would remove the breeding grounds in which many false judicial doctrines are spawned, and even if Congress chose not to abolish them outright, it could still severely discipline them by curtailing the salaries of the judges, their clerical and office support, and other perquisites of office. Finally, the Congress could impeach judges and justices whose rulings showed that they have failed to understand the meaning of the Constitution or that they are really pushing their own political agendas despite the Constitution.

In short, the Congress, the Republican Party, and American citizens in general have not even begun to consider seriously the many ways in which they could halt the judicial revolution in its tracks and begin restoring the Constitution and its authentic federalism. If we are serious about the alarm we increasingly feel at the arrogance of judicial usurpations, the loss of liberties, and our commitment to constitutional government, it is time we started.

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