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## Congressional Retraction of Federal Court Jurisdiction to Protect the Reserved Powers of the States: The Helms Prayer Bill and a Return to First Principles

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CONGRESSIONAL RETRACTION OF FEDERAL COURT  
JURISDICTION TO PROTECT THE RESERVED POWERS  
OF THE STATES: THE HELMS PRAYER BILL AND A  
RETURN TO FIRST PRINCIPLES

JAMES McCLELLAN †

SINCE THE EARLIEST DAYS OF THE WARREN COURT, countless bills have been introduced in Congress which would deny the federal courts jurisdiction over a great variety of subjects ranging from busing to abortion.<sup>1</sup> The exceptions clause of article III of the Constitution provides Congress with the authority to enact such bills.<sup>2</sup> While none of these proposed bills has been enacted into law, it is noteworthy that two have passed at least one house of Congress, and that both of these have sought to deny all federal courts, including the Supreme Court, jurisdiction over certain cases arising under the fourteenth amendment. The first of these two bills, introduced by Representative William Tuck of Virginia in the 88th Congress in 1964, would have eliminated federal court jurisdiction over state legislative apportionments. It passed the House of Representatives but was defeated in the Senate.<sup>3</sup> The second measure, the Helms Prayer Bill,<sup>4</sup> passed the Senate two years ago but failed to get out of the House Judiciary Committee. The Helms Bill sought to deny all federal courts jurisdiction over cases involving voluntary prayer in the public schools.<sup>5</sup>

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1. See Baucus & Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 992-94 (1982).

2. U.S. CONST. art. III, § 2, cl. 2. The exceptions clause states: "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." *Id.*

3. See H.R. 11926, 88th Cong., 2d Sess. (1964).

4. S. 210, 96th Cong., 1st Sess. (1979). See also note 5 and accompanying text *infra*.

5. The Helms Prayer Bill originally was an amendment to a bill which created the Department of Education. S. 210, 96th Cong., 1st Sess. (1979). The amendment proposed by Senator Helms would have added two new sections to 28 U.S.C.:

§ 1259. Notwithstanding the provisions of section 1253, 1254, and 1257 of this chapter the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute [which] relates to voluntary prayers in public schools and public buildings.

(1019)

Its chief sponsor was Senator Jesse Helms of North Carolina, who has been introducing similar legislation since 1974. He has again introduced it in the 97th Congress, and its chances of passage seem excellent, not only because it passed before under a Democrat-controlled Senate, but also because it was endorsed by the Republican Party platform of 1980 and apparently also by President Reagan.<sup>6</sup>

These bills limiting jurisdiction all have one subject in common: they all deal with civil rights issues. This is true of every bill introduced since 1957 which has challenged the jurisdiction of the federal courts.<sup>7</sup> Moreover, these bills all involve the fourteenth amendment. While a few deal with rights under the equal protection clause, the overwhelming majority—of which the Helms Bill is representative—affect rights guaranteed by the Bill of Rights as applied to the states through the due process clause of the fourteenth amendment. Individually considered, they represent a rejection of specific Supreme Court holdings. Taken together, however, they reveal a distinct pattern of widespread dissatisfaction with the Court's nationalization of the Bill of Rights, or what is

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§ 1364. Notwithstanding any other provision of law, the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under Section 1259. . . .

S. 210, 96th Cong., 1st Sess. (1979). The Helms amendment was subsequently attached to a bill dealing with the jurisdiction of the Supreme Court. See S. 450, 96th Cong., 1st Sess. (1979). The House Judiciary Committee, however, refused to take action on the measure. See G. GUNTHER, CONSTITUTIONAL LAW 57 (10th ed. 1980); G. GUNTHER, CONSTITUTIONAL LAW 1 (1981 Supp.).

Proposed amendments to the Constitution which would reverse the Supreme Court's decision on prayers in public schools have been introduced in most sessions of Congress since 1962. Such an amendment sponsored by Senator Everett Dirksen during the 88th Congress achieved the widest support. On September 21, 1966, Dirksen carried a majority of the Senate with him, but the vote of 49-37 fell short of the two-thirds necessary to propose a constitutional amendment. Dirksen's proposed amendment (S.J. Res. 148) was one of the 150 measures introduced in the 88th Congress to reverse the Court's holding in the prayer decision. See 2 CONGRESS AND THE NATION 410-11 (1969).

6. The Republican Party platform states: "We support Republican initiatives in the Congress to restore the right of individuals to participate in voluntary, non-denominational prayer in schools and other public facilities. We applaud the action of the Senate in passing such legislation." CONG. Q. 2035 (July 19, 1980). President Reagan specifically supported congressional efforts to restore voluntary prayer in the schools in an interview with reporters from the Washington Star. The text of the interview is printed in the Washington Star, August 5, 1981, at A-4.

7. During the Warren Court years, Congress was provoked by several of the Court's decisions. In response, the Jenner-Butler Bill was introduced to curtail Supreme Court jurisdiction over cases involving subversive activity and state bar admissions. S. 2646, 85th Cong., 1st Sess. (1957). The Jenner-Butler Bill thus represents the first of a continuing series of bills which seek to withdraw the jurisdiction of the Supreme Court and/or the lower federal courts in cases relating to certain specified civil rights.

commonly referred to as the doctrine of incorporation.<sup>8</sup> Although no member of Congress has articulated the conflict in quite these terms, it is clear that what we are witnessing is something more than random dissatisfaction with judicial legislation. More fundamentally, these legislative efforts to reverse the Court are part of a growing, and increasingly popular, movement in Congress to return power over civil rights to the states. The controversy, then, is not simply about the substantive meaning of these rights, but about federalism. It is not simply about *what* our rights are, but about *who* is to say what they are.

Indeed, none of the bills limiting federal court jurisdiction introduced over the past twenty years has sought to impose upon the American people or the states a single-minded, monolithic definition of a particular liberty guaranteed by the Bill of Rights or by the fourteenth amendment. Instead, these bills invariably seek to lodge final review in the state supreme courts and to allow the states to decide for themselves the content of individual freedom.<sup>9</sup> Thus, the thrust of this legislation is not uniformity, but diversity. As I shall presently argue, this is not only entirely in keeping with the original purpose of the Bill of Rights, but also is a modest attempt at restoring the original design of our constitutional system. Our federal system, as originally conceived, left the individual states free to define the civil rights of their citizens because the Bill of Rights was applicable only to the federal government.<sup>10</sup> Nevertheless, this system has been radically altered—without an explicit constitutional amendment and without public debate over the merits of the alteration—by the Supreme Court's incorporation of

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8. For a discussion of the doctrine of incorporation, see notes 29-44 and accompanying text *infra*.

9. There are opposing views regarding the effect of withdrawal of Supreme Court jurisdiction. One writer, proceeding upon the assumption of judicial supremacy, argues that once the Court's jurisdiction is removed, its prior decisions on the issue will be "frozen." Thus, the state courts by virtue of their obligation under the supremacy clause, will be forced to uphold the presumably unpopular Supreme Court decisions on the issue. See Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 925 (1982).

Most scholars agree, however, that once the Supreme Court's appellate jurisdiction is removed, the state courts would be free to interpret the Constitution as they saw fit and could disregard prior Supreme Court decisions. See Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 936-38 (1982).

10. For a discussion of how the Framers viewed the Bill of Rights, see text accompanying notes 12-17 *infra*.

the Bill of Rights into the word "liberty" in the due process clause of the fourteenth amendment.<sup>11</sup>

Turning back to the period during which the Bill of Rights was considered and adopted, we recall that it was George Mason of Virginia who proposed at the Constitutional Convention of 1787 that a declaration of rights be included in the Constitution.<sup>12</sup> Yet, Elbridge Gerry's motion that a committee be appointed to prepare such a statement was voted down unanimously. The members of the Convention generally agreed that a bill of rights was unnecessary since the expressly enumerated powers of the federal government did not include power over "the liberties of the people."<sup>13</sup> Without much of a struggle, however, the Federalist supporters of the Constitution agreed to the adoption of a bill of rights during the ratification effort in the state conventions.<sup>14</sup> One reason they so readily acceded to Antifederalist demands for a bill of rights was that they felt such a declaration changed nothing regarding the constitutional structure, and neither reduced federal power nor increased state power.<sup>15</sup> The Bill of Rights, in other words, simply declared what was already understood by the Framers of the Constitution—that the national government had no authority in the general area of civil liberties. Thus, Federalists and Antifederalists were in general agreement that the states, not the federal government, would determine under their own bills of rights the meaning and substance of civil liberty within their respective jurisdictions. As James Madison explained in the *Federalist*, "the powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State."<sup>16</sup> Consequently, the debate in 1787 was not over the substantive meaning of the civil liberties, but rather over

11. For a discussion of the doctrine of incorporation, see text accompanying notes 29-44 *infra*.

12. See 5 J. ELLIOT, THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 538 (1888). See also J. MADISON, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787 630 (A. Koch ed. 1966); B. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW 124-26 (1931).

13. See 5 J. ELLIOT, *supra* note 12, at 538; J. MADISON, *supra* note 12, at 630. See generally B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 437-38 (1971).

14. See B. SCHWARTZ, *supra* note 12, at 762-66, 852, 932-33.

15. See *id.* See also J. McCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 145 (1971).

16. THE FEDERALIST NO. 44 (J. Madison) (J. Cooke ed. 1961) (emphasis added).

the issue of whether the Constitution should be explicit regarding their enforcement.<sup>17</sup>

It is important to bear in mind, therefore, that the Bill of Rights actually had a dual purpose: to protect each *individual* against the abridgment of his civil liberties by the federal government, and to assure each *state* that the federal government would not encroach upon the jurisdiction of the states over such matters. In the latter regard, the Bill of Rights is essentially a states' rights document. Each amendment was a guarantee to the individual *and* to the states. Indeed, the protection of states' rights by the Bill of Rights was widely regarded in 1791 as far more important than the protection it afforded to the individual. Six of the states which ratified the Constitution urged the adoption of numerous amendments before it went into effect.<sup>18</sup> With respect to those proposed amendments, Benjamin F. Wright has noted:

It has frequently been stated that the motive behind these amendments was a desire to secure greater protection for the natural rights of the people. This is true only in part. An examination of the proposals of the first three States to make them, Massachusetts, South Carolina, and New Hampshire, will afford sufficient evidence of the fact that the members of these conventions were much more disturbed about the rights and powers of the States than about the rights of the people.<sup>19</sup>

Massachusetts proposed nine amendments, but only the sixth, which referred to indictment by grand jury, dealt with individual liberty as such. The short list proposed by South Carolina made mention of "the freedom of the people," but otherwise dealt with the issue of the "sovereignty of the states," while of the twelve proposed amendments offered by New Hampshire, only the last three had a direct bearing on individual liberty. Only Virginia and North Carolina, it seems, proposed a true bill of rights for the people.<sup>20</sup>

Of further significance is the fact that the First Congress, which proposed the Bill of Rights, rejected an attempt to apply portions

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17. See text accompanying notes 12-15 *supra*.

18. See B. WRIGHT, *supra* note 12, at 146. See also B. SCHWARTZ, *supra* note 13, at 762-66, 852, 932-33.

19. See B. WRIGHT, *supra* note 12, at 146.

20. See *id.* at 146-47. For an analysis of the origin and development of the Bill of Rights, as well as the effect of the doctrine of incorporation on the Framers' view of the Bill of Rights, see J. McCLELLAN, *supra* note 15, at 142-59.

of it to the states. The fifth resolution of James Madison's proposed series of amendments for a bill of rights provided that "[n]o State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."<sup>21</sup> But, Madison's suggestion was defeated in the Senate. As Tucker of South Carolina observed:

This [proposal] is offered as an amendment to the Constitution of the United States, but it goes only to the alteration of the constitutions of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much.<sup>22</sup>

Charles Pinckney, a Framers of the Constitution, later explained the purpose and effect of the Bill of Rights in these striking words:

When those amendments became a part of the Constitution, it is astonishing how much it reconciled the States to that measure; they considered themselves as secure in those points on which they were the most jealous; they supposed they had placed the hand of their own authority on the rights of religion and the press, and . . . that they could with safety say to themselves: 'On these subjects we are in future secure; we know what they mean and are at present; and such as they now are, such are they to remain, until altered by the authority of the people themselves—no inferior power can touch them.'<sup>23</sup>

For nearly a century and a half, the Supreme Court respected these views, thereby securing one of the major objectives of the Bill of Rights. Speaking for a unanimous Court, Chief Justice Marshall declared in *Barron v. Baltimore*<sup>24</sup> that the first eight amendments "contain no expression indicating an intention to apply them to the state governments."<sup>25</sup> This position was consistently maintained in subsequent decisions involving the first, fourth, fifth, sixth, seventh, and eighth amendments between 1833

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21. 1 ANNALS OF CONG. 435 (J. Gates ed. 1789).

22. *Id.* at 755.

23. 10 ANNALS OF CONG. 128 (1800).

24. 32 U.S. (7 Pet.) 243 (1833).

25. *Id.* at 250.

and 1868.<sup>26</sup> In *Permoli v. New Orleans*,<sup>27</sup> for example, a unanimous Court upheld a municipal ordinance challenged by the Catholic Church as a denial of the free exercise of religion, asserting that “[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the State constitutions and laws.”<sup>28</sup> Even after the adoption of the fourteenth amendment, which prohibited the states from denying any person “life, liberty, or property, without due process of law,”<sup>29</sup> the Supreme Court continued to follow and apply *Barron*—a factor strongly supportive of the view that the fourteenth amendment was not intended, by those who witnessed its creation and sought to apply its provisions, to defeat the original purpose of the Bill of Rights. Throughout the late nineteenth and early twentieth centuries, state and federal courts uniformly upheld the principle that the Bill of Rights applied only to the federal government. “In at least twenty cases between 1877 and 1907,” Charles Warren observed, “the Court was required to rule upon this point and to reaffirm Marshall’s decision of 1833.”<sup>30</sup> As late as 1922, in *Prudential Insurance Co. v. Cheek*,<sup>31</sup> the Court declared that “neither the fourteenth amendment nor any provision of the Constitution imposes restrictions upon the state about freedom of speech.”<sup>32</sup>

The Court suddenly reversed itself in 1925 when it offhandedly remarked in *Gitlow v. New York*<sup>33</sup> that “[f]or present purposes

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26. See, e.g., *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321 (1868) (sixth amendment inapplicable to the states); *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475 (1867) (eighth amendment applies only to the national government); *Withers v. Buckley*, 61 U.S. (20 How.) 84 (1855) (fifth amendment inapplicable to the states); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855) (fourth amendment inapplicable to the states); *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847) (fifth amendment applies only to the federal government); *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845) (first amendment not applicable to the states); *Lessee of Livingston v. Moore*, 32 U.S. (7 Pet.) 469 (1833) (seventh amendment inapplicable to the states).

27. 44 U.S. (3 How.) 589 (1845).

28. *Id.* at 609.

29. U.S. CONST. amend. XIV. This amendment states in pertinent part: 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.

*Id.*, § 1, cl. 2.

30. Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 436 (1926).

31. 259 U.S. 530 (1922).

32. *Id.* at 543.

33. 268 U.S. 652 (1925).



we may and do assume that freedom of speech and press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the states.”<sup>34</sup> Thus began the piecemeal incorporation of first amendment freedoms into the word “liberty” of the due process clause of the fourteenth amendment, reversing *sub silentio* the *Barron* decision and thereby undermining one of the great objects of the Bill of Rights, i.e., exclusive state jurisdiction and control over the freedoms protected by the first eight amendments. In 1931, in *Near v. Minnesota*,<sup>35</sup> the Court embarked upon the revolutionary course outlined in *Gitlow* by incorporating the freedoms of speech and press into the fourteenth amendment. In subsequent cases, the Court arbitrarily transferred the freedom of assembly<sup>36</sup> and the freedom of religion<sup>37</sup> into the fourteenth amendment, finally completing the incorporation of the first amendment with the inclusion of the establishment clause in *Everson v. Board of Education*<sup>38</sup> in 1947. Since 1961 the doctrine of incorporation has been extended to the fourth,<sup>39</sup> fifth,<sup>40</sup> sixth,<sup>41</sup> eighth,<sup>42</sup> and ninth amendments.<sup>43</sup> As Charles Fairman has noted, however, “the record of history is overwhelmingly against” the idea that section 1 of the fourteenth amendment “was intended and understood to impose Amendments I to VIII upon the states.”<sup>44</sup>

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34. *Id.* at 666.

35. 283 U.S. 697 (1931).

36. *See, e.g.*, *De Jonge v. Oregon*, 299 U.S. 353 (1937).

37. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

38. 330 U.S. 1 (1947).

39. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourth amendment right to exclude from criminal trials illegally seized evidence); *Wolf v. Colorado*, 338 U.S. 25 (1949) (fourth amendment right to be free from unreasonable searches and seizures).

40. *See, e.g.*, *Benton v. Maryland*, 395 U.S. 784 (1969) (fifth amendment right against double jeopardy); *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment right against self-incrimination).

41. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to a jury trial); *Washington v. Davis*, 388 U.S. 14 (1967) (compulsory process for obtaining witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to a speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right of confrontation); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).

42. *See, e.g.*, *Robinson v. California*, 370 U.S. 660 (1962) (eighth amendment prohibition against cruel and unusual punishment).

43. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

44. *See* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *STAN. L. REV.* 5, 139 (1949).

Viewed in historical perspective, the *Everson* case was significant in two respects. For the first time, the Supreme Court interpreted the establishment clause as a restriction on the states.<sup>45</sup> By this bold and fundamental innovation the Court overturned more than a century of constitutional law that had regularly permitted the states to determine church-state relationships in accordance with their own laws and constitutions. Second, and equally novel, was the Court's absolutist theory of religious establishment which held that the first amendment erected a "wall of separation" between church and state which prohibited a state from giving any aid of any kind—not merely to specific religious sects but to religion generally.<sup>46</sup> Based upon its pronouncements in *Everson*, the Court subsequently ruled in *Engel v. Vitale*<sup>47</sup> that the voluntary recitation of a state-composed school prayer, though nondenominational, constituted an establishment of religion.

The Framers of the Bill of Rights were generally inclined toward the view that government had a duty to promote religion and morality in society, and at the time the Bill of Rights was adopted, most states actually provided varying degrees of aid to established religions within their jurisdictions.<sup>48</sup> The "wall of separation" rhetoric, which appears in a private letter written by Thomas Jefferson,<sup>49</sup> was not widely accepted even in the nineteenth and early twentieth centuries. The State of Massachusetts, for example, actually required bible-reading in the public schools in 1826, and between 1913 and 1930, eleven more states enacted similar statutes.<sup>50</sup> Little wonder that Mark de Wolfe Howe has described

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45. 330 U.S. at 8.

46. *Id.* at 18.

47. 370 U.S. 421 (1962).

48. See S. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* (1902); I. CORNELISON, *THE RELATION OF RELIGION TO CIVIL GOVERNMENT IN THE UNITED STATES OF AMERICA* (1895); W. SWEET, *THE STORY OF RELIGION IN AMERICA* (1950). McClellan, *The Making and Unmaking of the Establishment Clause*, in *A BLUEPRINT FOR JUDICIAL REFORM* (1981).

49. The phrase is taken from a letter of Jefferson to the Baptist Association of Danbury, Connecticut, 1802, which reads in part: "I contemplate with sovereign reverence that act of the whole American people, which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state." Letter from Thomas Jefferson to the Baptist Association of Danbury, Connecticut (1802), reprinted in C. RICE, *THE SUPREME COURT AND PUBLIC PRAYER* 63 (1964).

50. A. JOHNSON & F. YOST, *SEPARATION OF CHURCH AND STATE IN THE UNITED STATES* 33 (1934). The following states enacted similar statutes: Pennsylvania in 1913, Delaware and Tennessee in 1915, New Jersey in 1916, Alabama in 1919, Georgia in 1921, Maine in 1923, Kentucky in 1924, Florida and Idaho in 1925, and Arkansas in 1930. *Id.*

the Court's incorporation of the establishment clause and its imposition of the "wall of separation" doctrine as a complete "distortion of the intellectual background of the First Amendment."<sup>51</sup>

In response to these developments, the Helms Prayer Bill seeks to restore the establishment clause to its original purpose, for its effect would be to lodge in the highest courts of each state final authority over questions involving this one aspect of state aid to religion.<sup>52</sup> Regardless of the success or failure of the bill, Senate consideration of its merits will serve to focus public attention on the origin and purpose of both the establishment clause and the Bill of Rights generally, while possibly generating debate over the doctrine of incorporation itself—a public debate that is long overdue and goes to the very heart of the fundamental question of whether it is wise or proper for nine unelected judicial officials, serving for life, to possess the awesome power of deciding what our freedoms shall be.

When our Constitution was adopted, the American people overwhelmingly agreed that liberty is safest when protected at the state and local level. The doctrine of incorporation, which has become the great wellspring of judicial activism in our time, thus runs counter to the basic proposition upon which our nation was founded.<sup>53</sup> Putting aside the issue of whether Congress has the authority under article III to limit the appellate jurisdiction of the Supreme Court and return jurisdiction seized by the Court back to the states<sup>54</sup>—a question which both the Constitution and the Court itself have, in this writer's judgment, answered in the affirmative—the great strength of the Helms Prayer Bill lies in the fact that it promises to stimulate public discussion and debate about the very essence of the American political system.

In another sense, of course, the debate over court regulation under the exceptions clause of article III is one of separation of powers and democratic theory. We live in a democratic republic,

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51. M. HOWE, *THE GARDEN AND THE WILDERNESS* 31 (1965). For further discussion of the historical background of the first amendment, see E. CORWIN, *A CONSTITUTION OF POWERS IN A SECULAR STATE* (1951); F. O'BRIEN, *JUSTICE REED AND THE FIRST AMENDMENT* (1958).

52. For the text and a discussion of the Helms Prayer Bill, see notes 4-6 and accompanying text *supra*.

53. For a discussion of the doctrine of incorporation, see notes 29-44 and accompanying text *supra*.

54. Other commentators have determined that Congress has plenary power under the exceptions clause to control Supreme Court jurisdiction. See Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 *VILL. L. REV.* 1030, 1038-41 (1982); Redish, *supra* note 9, at 902-03; Rice, *Congress and Supreme Court Jurisdiction*, 27 *VILL. L. REV.* 959, 975 (1982).

based on separation of powers and checks and balances. Without the power to regulate the Court's jurisdiction, particularly when the Court exceeds its authority by creating its own jurisdiction, Congress is helpless to limit the judicial power and the Court is exempted from the checks and balances system—sitting, like a continuous constitutional convention, rewriting the fundamental law. This is not only inconsistent with the basic principle of limited government, but makes judicial review intolerable in a democratic society. Certainly no society can justly call itself democratic where as few as five appointed justices, who are beyond the control of the people and their elected representatives, can determine the meaning and substance of nearly all the freedoms that the people possess. And certainly, no constitution can be said to be based upon a separation of powers or federalism when one of the branches of the national government is free to usurp the functions of the legislature and the powers of the states.

Jurisdiction-limiting bills, like the Helms Prayer Bill, are clearly consistent with the basic principles of separation of powers and federalism. Moreover, these bills represent a return to an allocation of power consistent with the original intent of the Framers, and are essential to protect the rights of the people. At the very least, the American people, speaking through their representatives in Congress, have the right to decide which government and which courts shall protect their liberties. The exceptions clause of article III of the Constitution gives them that right.