THE BARKER'S CHILDREN

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There is an old and honored tradition in the Chit Chat Club that the title of the proposer's paper may be, and usually is, designed to conceal rather than to reveal the subject matter of that paper. I suspect that it has its roots in self protection of the proposer. If the members are unable to divine the subject matter, they cannot do any advance preparation for their own remarks, and thus the proposer is less likely to be embarrassed and torpedoed by displays of greater erudition than his own by the members present. Now for this paper!

In an article in the February 7 Sunday Examiner & Chronicle entitled "Barkers, Boon or Blemish to the Broadway Strip," on one page there is a picture of Enrico Banducci, owner of Enrico's Sidewalk Cafe, who is quoted as saying, "I don't care what goes on inside the clubs. I care about what happens on the sidewalk. Barkers affect the quality of the street. I hate them." On the facing page is a picture of Sandy Cherniss, the barker at the Roaring Twenties, and the only woman barker on the Strip. She is quoted as saying, "I'm not a hooker. I don't use drugs.

I earn a good honest living. My children all wear braces, and they're all in private schools."

I find the idea of braces, I assume on the teeth, as status symbols, surprising--or at least I did until I remembered that orthodontists are expensive. But what really grabbed me was the reference to private schools. My guess is that the school or schools that Sandy refers to are all white, or at least do not have black pupils, and that is one reason why Sandy puts her children there. She says that her salary pays for their being there. I also think it likely that her children get to their school (or schools) on a bus (or busses).

The school bus is an old institution in American society. It has long been used to bring rural children to school, and its use has accellerated the demise of the cross-roads one room school. Before the Supreme Court's historic decision in Brown v. Board of Education, the bus was widely used, in states that had segregated schools, to maintain segregation. Black children who lived near all-white schools were bussed past them, to and from all-black schools. After Brown v. Board of Education, the federal trial judges, who had the unenviable job of enforcing the decision, began to use the bus as a means of getting black children to formerly all-white schools. It says something, I think, about our society, that most of the bussing was of black children. When white children were bussed to predominately

black schools, there was an immediate outcry, which has continued ever since. Segregationists no longer needed to argue for segregation. They could curse the bus instead, as if there were something intrinsically evil in taking children to school in a bus, or in the bus itself.

I do not suggest that all opponents of bussing to achieve desegregation of schools are segregationists. My own children, for example, attended Madison School in San Francisco, five blocks from our home. It was convenient; they could walk to and from; they went to school with the children in the neighborhood where they grew up, many of whom were their good friends, and it was an excellent school. Moreover, it was not a segregated school. I would not have been happy if I had had to have my children go, by bus, to a school half way across town. But it remains a fact that the school bus gave the segregationists a target that they could attack while denying that they were segregationists.

The long campaign against bussing, or "forced" bussing, has recently culminated in a remarkable performance in the U.S. Senate. There, on March 2, after a long fight and a futile fillibuster led by Republican Senator Weicker, a bill, sponsored by Senators Helms of North Carolina and J. Bennett Johnston of Louisiana, was passed containing an amendment to the authorization bill for the Department of Justice, by a vote of 57 to 37.

Here is what the amendment does. It prohibits the use of Department of Justice funds to bring or maintain any sort of action to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home. It prohibits the federal courts from issuing any injunction requiring bussing of a student to a school other than the one nearest his home, with certain very limited exceptions that are minutely and tightly defined. Maximum bussing that can be required is 30 minutes round trip and 10 miles round trip, except to the school nearest to the student's home. The exception is a bow to rural schools in the great open spaces. The Attorney General is required, on complaint of a person (or his parent) who is required to be bussed longer or farther, to bring suit to prevent the bussing. And these provisions apply to ~~the~~ previously ordered bussing as well as to bussing that may be ordered hereafter. The Attorney General's suit can apparently be one attacking a judgment of a state court requiring bussing of students. The measure states that, in adopting it, "The Congress is hereby exercising its power under Article III, Section I, and under section 5 of the fourteenth amendment" of the Constitution.

Article III, Section I, provides: "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." When the Constitution was drafted, there was some question as to whether United States courts inferior to the Supreme Court would be necessary or desirable. It was believed that the state courts would apply the Constitution and Laws of the United States in cases coming before them. Indeed, the Constitution itself provides, in Article VI, Section 2:

> 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Nevertheless, the first Congress, in 1789, created the inferior Federal courts in the Judiciary Act of that year, and they have been functioning, mutatis mutandis, ever since. However, the jurisdiction of the Federal courts has been greatly increased since they were first created. For a very long time, they did not have jurisdiction of all cases presenting questions arising under the Federal constitution and laws. Until 1980, the Federal courts did not have jurisdiction in many

such cases unless the amount involved was at least $10,000.

The power to create the courts has always been considered to include the power to define their jurisdiction. This includes enlarging jurisdiction and taking it away. For example, Section 1341 of the Judicial Code prohibits Federal courts from enjoining, suspending, or restraining the assessment, levy or collection of any tax under State law if State law provides a plain, speedy and efficient remedy in state courts. Section 1342 contains similar restrictions on actions involving public utility rates fixed by State agencies.

In 1932, the Congress adopted the Norris-La Guardia Act, which drastically restricted the jurisdiction of the Federal courts to issue injunctions in labor disputes. This was upheld in a case called Lauf v. E.G. Shiner & Co., where the Supreme Court said: "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). In a more recent case, Palmore v. United States (411 U.S. 389) decided in 1973, the Supreme Court said:

> The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress. That body was not constitutionally required to create inferior Art III courts to hear and decide

cases within the judicial power of the United States, including those criminal cases arising under the laws of the United States. Nor, if inferior courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art III.

The Court then quoted extensively from the 1845 case of Cary v. Curtis ~~in~~ a decision which said:

> [T]he judicial power of the United states . . . is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.

The Palmore court added a footnote, and then concluded:

> Congress plainly understood this, for until 1875 Congress refrained from providing the lower federal courts with general federal

question jurisdiction. Until that time, the state courts provided the only forum for vindicating many important federal claims. Even then, with exceptions, the state courts remained the sole forum for the trial of federal cases not involving the required jurisdictional amount, and for the most part retained concurrent jurisdiction of federal claims properly within the jurisdiction of the lower federal courts.

Article III, as thus construed by the Court, is the principal reliance of those who advocate statutes like the one that has just passed the Senate. The theory is that the Federal courts have ordered bussing; we don't like bussing; let's take away the court's jurisdiction to order it; Article III authorizes us to do just that.

The Senate bill also relies on section 5 of the Fourteenth Amendment. That section reads: "The Congress shall have the power to enforce by appropriate legislation the provisions of this article." The Amendment guarantees to "any person" within a state the equal protection of the laws. (Sec. 1). The Courts have used bussing to terminate the inequality that was found inherent in the segregated schools. It seems odd to call the Senate Bill one that enforces the Fourteenth Amendment, but the bill recites findings that bussing does not promote equality

but rather, tends "to cause separation of students by race to a greater degree than would have otherwise occurred." This, presumably, lays a foundation for arguing that the Bill does indeed enforce the Fourteenth Amendment. It is this provision that would be looked to in support of a suit by the Attorney General of the United States seeking to enjoin enforcement of a state court judgment requiring bussing to end segregation in public schools.

I find it interesting, and surprising, that the Helms-Johnston Bill, which is entitled the "Neighborhood School Act of 1981" (1982?), does not contain any provision seeking to limit the jurisdiction of the Supreme Court of the United States. Article III, Section I of the Constitution creates the Supreme Court. Congress cannot abolish it. Section 2, Clause I, defines the extent of the Federal Judicial Power. The pertinent provision here is that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States. . . ." Section 2, Clause 2 reads as follows:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction. In all other Cases before mentioned, 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.

Thus, Congress can make exceptions to the Appellate jurisdiction of the Supreme Court. I am somewhat surprised that Senators Helms and Johnston have not tried to do so in the Neighborhood School Act. There are other bills, however, that do make the attempt. At present, there are more than 30 bills pending in Congress that attempt to nullify or circumvent constitutional rulings of the Federal courts by depriving the courts of jurisdiction to make them or to enforce them or both. Some deal with bussing school pupils. Some deal with abortion. Some deal with prayer in public schools. These three are, at the moment, the hottest issues for many members of the new right.

It is not my intention to debate here the merits of bussing to achieve integrated schools, or of the Supreme Court's holdings that a woman has a constitutional right to have an abortion during the first trimester or that the constitution forbids sponsoring "voluntary" prayer in public schools. What I am interested in is the methods used by opponents of these decisions.

In this respect, the use of bussing is different from the abortion and school prayer decisions. The latter are direct rulings on constitutional law, and the normal

way to overturn such rulings is by amending the Constitution. This was done in the Sixteenth Amendment, which overturned a decision of the Supreme Court that Congress lacked power to levy income taxes. Another way is to persuade the Court that one of its decisions is wrong, and for the Court then to overrule it. This has often happened, and no doubt it will happen again. Experience is a good teacher, and it often shows how different practice is from theory.

Bussing school children is different. It is a means to achieve a Constitutionally required end, integrated public education. The courts created the means; they can abandon it, and probably will if persuaded that it does not work, or that it has effects detrimental to achievement of the desired end.

However, opponents of court rulings in these three areas are unwilling to undertake the long and difficult task of amending the Constitution. They may well feel that they cannot succeed. They would need the votes of two thirds of both houses of Congress, or two thirds of the states, and the ratification of three fourths of the states. They also apparently do not think that they can persuade the Supreme Court to change its mind. So they resort to depriving the courts of jurisdiction.

The Supreme Court has construed Article III, Section 2, Clause 2 of the Constitution as meaning that the Court has only such appellate jurisdiction as Congress confers upon it, rather than conferring appellate jurisdiction,

to which Congress can then make exceptions. This was a view expressed by Chief Justice Marshall in 1805, in United States v. More (7 U.S. 159). He said much the same thing in 1810, in Durousseau v. U.S. (10 U.S. 307). An extreme case illustrating the power of Congress is Ex parte McCardle (74 U.S. 7) decided in 1868. McCardle, a Mississippi editor, was imprisoned by the reconstruction government of that state. He asked for a writ of habeas corpus in Federal court, which was denied. He then appealed to the Supreme Court, under a statute expressly authorizing such an appeal. After his case was argued in the Supreme Court, Congress repealed the statute granting it jurisdiction. Thereupon, the Court held that it had been validly deprived of jurisdiction, and dismissed the case. McCardle stayed in jail!

There is only one Supreme Court decision holding invalid a statute which withdraws jurisdiction. It is called U.S. v. Klein, decided in 1872 (80 U.S. 128). There, the statute did not deprive the court of jurisdiction of a case. What it purported to do was to deprive the court of power to decide the case in a particular way. This, the Court said, Congress cannot do. This is not much of a limitation, and can readily be avoided by careful draftsmanship.

In the famous case of the Nixon tapes (U.S. v. Nixon, 418 U.S. 683), Chief Justice Burger, for a unanimous court, repeated the statement of Chief Justice Marshall,

in 1803: "It is emphatically the province and duty of the judicial department to say what the law is." Burger also said: "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. . . . Notwithstanding the deference each branch must accord the others, the 'judicial Power of the United States' vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared by the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government."

These are strong words, but it appears they they probably can be nullified by the legislative branch (with or without the cooperation of the executive because a presidential veto can be overridden) by the simple expedient of depriving the Supreme Court and the inferior Federal courts of jurisdiction of the controversy.

But there remains a larger question. Should statutes depriving the Federal courts, including the Supreme Court, of jurisdiction in particular cases, be adopted because a majority in each house of Congress, and the President, are persuaded that a rule of Constitutional Law,

announced by the Supreme Court and applicable to such cases, is wrong? What will be the effect of such monkey business?

In a recent speech, the president of the American Bar Association said this about such bills:

> We have a right to disagree with (court) decisions respecting these problems, but we must not solve these or any other social problems by shutting off access by our citizens to the federal courts.
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> For if we shut off our access to the courts, we shut off our constitutional rights. And if Congress can shut off these particular rights, a future Congress can shut off other constitutional rights--in fact, can shut off all our constitutional rights, including those the proponents of the present bills hold most dear.
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> The potential consequences . . . are so destructive of the system of government painstakingly created by the Constitution that it is clear that the framers could not have intended any such result.

The Association itself, by an overwhelming vote of its governing body, has taken a similar position.

A former President of the Association, Robert W. Meserve, testifying before a congressional committee, pointed out that denying jurisdiction to the Federal

Courts would leave persons claiming constitutional rights to the state courts. He then said:

> State court judges are bound by their oaths to uphold federal law, but remedy- curtailing legislation puts unfair pressure on state judges.
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> . . .
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> The very legislation, if it leaves the remedy in state courts only, may well stand as an implied invitation to state judges to disregard established substantive law. The state judges will be subjected to pressure from the very groups who desire to evade federal law, without going through the challenges of the amendment process. As state judges are not protected by federal constitutional guarantees of tenure and compensation and many hold their positions through periodic elections, they will be subject to great temptation, peril, and the unenviable choice between oaths and careers. It is unfortunate and unfair to put them in this position.
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> When the object of denying federal courts jurisdiction and remitting federal claimants to state courts is hostility to the right being claimed, and when the purpose and hope are that state courts will somehow alter the interpretation or the method of enforcement given in federal

> courts, then that legislative endeavor is improper. It unfairly politicizes state judges; it puts them under pressure to disregard established law. It politicizes the judicial consideration of constitutional issues. And if state legislatures object to state courts following federal precedent, the denials of state court jurisdiction will place claimants in a "Catch 22" situation in which the only effective remedy for constitutional wrongs is denied everywhere.

We had an example of what Mr. Meserve is talking about not long ago in California. A Superior Court Judge in Los Angeles was voted out of office, following a vigorous and well financed campaign against him, solely because he had ordered bussing to integrate the Los Angeles School District.

Mr. Meserve continued:

> Once we start down this road, only an unusual sense of self-restraint may stand in the way of a wide negation of constitutional guarantees. Congress should not go this way. Judicial and legislative sanity argue for a restrained approach. Even if Congress feels that the Supreme Court or the federal court system has adopted the wrong approach, the remedy is not jurisdictional manipulation,

a constitutionally doubtful and politically dangerous policy.

The Supreme Court often modifies or revises its prior decisions. I concur with a man named Lincoln, who, in a speech in Springfield, Illinois, on June 26, 1857, set forth his understanding of the appropriate response of the public and of political leaders to unpopular Supreme Court decisions. "We think," Lincoln said, "its decisions on constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the Court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this."

Professor Archibald Cox of Harvard, the special Watergate prosecutor whom Nixon fired, says: "To deprive federal courts of jurisdiction granted by the Constitution would result in a hodgepodge of inconsistent state interpretations, not all of which would be expected to rise above the local passion or selfishness."

It is now established law in every state and in all federal courts that a decision of the Supreme Court of the United States interpreting a provision of the Constitution is binding on all courts, state and federal, indeed, on all governments, state and federal. The pending bills do not purport to change that rule.

Bearing the rule in mind, let us look at a single example, the decision holding that a woman has a Constitutional right, during the first trimester of her pregnancy, to have the fetus aborted.

Let us suppose that Congress passes, and the President signs, a bill which reads:

"No court of the United States, including the Supreme Court, shall have jurisdiction to hear or decide any case by trial, appeal, writ, or in any other manner, and whether the case is originally filed in a court of a State or of the United States, that arises from or relates to the abortion, or a claimed right to the abortion, of a human fetus at any time during the pregnancy of a woman. Pregnancy begins at the instant of conception."

Now let us suppose that in state A., say Arizona, the state Supreme Court decides to follow the prior decision of the United States Supreme Court, and holds invalid a state statute prohibiting abortions during the first trimester because it violates the U.S. Constitution. In state B., say California, the legislature adopts a statute that prohibits all abortions, and the California Supreme

Court, disagreeing with the U.S. Supreme Court, holds the statute invalid. Thereupon, many California women go to Arizona to have abortions. Arizona next adopts a statute providing that no woman who is not a bona fide resident of that state can have an abortion in Arizona. The Supreme Court of Arizona holds the statute valid. Can the U.S. Supreme Court review the decision, which interferes with the right of citizens to travel? If not, and a woman from California is prosecuted in Arizona for aborting her fetus, while women residents in Arizona cannot be prosecuted for a similar offense, what recourse has the California woman?

Suppose that in state C., say New York, women can have abortions during the first trimester, and, if they are poor, can do so at state expense. Women from other states flock to New York. Can New York prevent this? If it tries, can a case raising the question be taken to Federal court?

Suppose that in state D., say Illinois, the Supreme Court of the state holds that a poor woman has a right, under the United States Constitution, to have her legal abortion paid for by the state. The Supreme Court of the United States has held that there is no such Federal constitutional right. Can Illinois get a hearing of its case in the U.S. Supreme Court?

One of the most objectionable features of the pending bills is that, if they are valid, as they may well be, the law of the Federal Constitution can be different in different states. This sort of Balkanization in a nation as diverse as this one can, I suggest, be destructive, and could, if carried far enough, lead to serious internal conflicts.

Many people feel strongly about abortions, as others do about bussing children to achieve integration of schools, and as others do about "voluntary" prayer in public schools. There are others who feel equally strongly about many, many other things. Some people are outraged when zoning laws prevent them from using their land as they wish to. Some are outraged because the police cannot, except in certain narrowly limited situations, break into a man's home without a warrant to arrest him, or to search for evidence of crime; others are outraged when the police do just that. Some are outraged by pornography; some are outraged by governmental efforts to suppress it. Some are outraged that people from other states, whom they consider undesirable for one reason or another, have a constitutional right to come to California. Others would be outraged at any attempt to prevent them from coming. Some were outraged (including the President) when some of F.D.R.'s economic legislation was held invalid by the Supreme Court in the 1930's. Others were outraged

by F.D.R.'s attempt to pack the Court to get the decisions changed. Ultimately, the Court did change them--a performance that reminded Judge Learned Hand of a line in one of Fielding's novels: "He lept upon her, and would have deprived her of her virtue, had she not saved herself by gracefully yielding."

Attempts to get at decisions on questions of Constitutional law, and to get at the courts that make the decisions, through the Achilles' heel of jurisdiction, are not new. They have been made and defeated before. I hope that they will be defeated this time, now that they are being made again.