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Congress versus Court: The Legislative Arsenal

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V.

CONCLUSION

From the foregoing, it appears that the Court has recognized its position as one of benevolent neutrality.⁵⁸ Rather than a "heads in the sand" attitude that some would infer from the separation doctrine, recognition must be given to the obligation to promote freedom, even if that promotion involves a form of affirmative action. However, such affirmative action is limited by two considerations. First, the action may not bestow beneficial treatment on any or all religions but rather must be limited to the *removal of barriers*, governmentally implaced, which obstruct freedom of exercise.⁵⁹ This is not granting the religion, or the person, a special status but merely returning him to the status he rightfully possessed before his rights were abridged by government intervention. Secondly, the barrier may not be removed if the state can show a compelling interest which will, *in fact*, be thwarted by the removal. The road to freedom becomes more clearly defined when the "blindness" of platitude are removed and obligations are realistically assumed.

Richard H. Zamboldi

CONGRESS VERSUS COURT: THE LEGISLATIVE ARSENAL

It has long been a favorite pastime among lawyers and citizens generally, to verbally attack the decisions and to criticize the powers of the United States Supreme Court. Indeed, some of the Court's harshest critics have come from its own membership. Thus, upon his retirement in 1875 Justice Miller is reputed to have remarked, "I can't make a silk purse out of a sow's ear. I can't make (Justice) Clifford and (Justice) Swaine, who are too old, resign, nor keep the Chief Justice from giving them cases to write opinions in which their garrulity is often mixed with mischief."¹

However, in view of the Court's enormous power in our present constitutional system, all criticism of the nation's highest tribunal will remain purely verbal unless one of its sister branches of government acts. Historically, action by Congress or the President which nakedly challenges the

58. Cf. Kauper, *Schempp And Sherbert: Studies In Neutrality And Accommodation in RELIGION AND THE PUBLIC ORDER* 3 (1963).

59. The idea was expressed by Mr. Justice Douglas in his concurring opinion in *Sherbert v. Verner*, 374 U.S. 398, 412 (1963):

This case is resolvable not in terms of what an individual can demand of government, but solely in terms of what government may not do to an individual in violation of his religious scruples.

1. Anderson, *We Will Hear More On The Supreme Court*, 15 TENN. L. REV. 112 at 114 (1938).

Court has come only when one or both of these politically oriented departments of government felt that its vital interests or inherent powers were threatened.

Since 1937 the Supreme Court has struck down several Congressional enactments² and, more recently, in *Gray v. Sanders*³ and *Wesberry v. Sanders*,⁴ the Court has struck a series of hammer blows at Congressional power and the very foundation upon which that power rests, namely, the power to control the manner in which its districts of representation are apportioned.

Predictably, opposition in Congress has steadily mounted and has resulted in two resolutions pointedly warning the Court that further poaching in what Congress considers its private preserve could bring about a power struggle, the like of which has not often been seen in American history.⁵ In view of the present membership of the Court and its philosophy as expressed in recent opinions, any retreat by the judicial branch seems extremely unlikely. Congress, therefore, will in all probability have to opt between an ignominious admission of the Supreme Court's right to supervise what was previously regarded as legislative internal affairs or an extremely dangerous attempt to impose its will on judicial determinations.

Should Congress choose the latter course a number of constitutional weapons would be available to it. We shall, therefore, attempt to examine some of these weapons, determine their effectiveness and their degree of insulation from Court interference and review.

Basically in a frontal attack upon the Court, Congress has two alternatives. It can attempt to change the decisions which it finds offensive or it can attempt to supplant the men who have made those decisions. The tactics may vary with the goal sought, and state experiences often provide us with a view of the likelihood of success.

IMPEACHMENT AND REMOVAL

Few remedies for curbing the Supreme Court's power have so often been suggested or so seldom used as impeachment, conviction and removal of Court members whom Congress finds offensive. The reasons for the impotency of this seemingly powerful weapon are apparent from a glance at the constitution. First, two-thirds of the Senate must concur in the removal of any federal judge⁶ and still more difficult only "high Crimes and Misdemeanors" are the basis for removal.⁷

2. See, *e.g.*, *Trop v. Dulles*, 356 U.S. 86 (1958); *Reid v. Covert*; *Kinsella v. Krueger*, 354 U.S. 1 (1957); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *United States v. Lovett*, 328 U.S. 303 (1946).

3. 372 U.S. 371 (1963).

4. 376 U.S. 1 (1964).

5. H.J. Res. 1132, S.J. Res. 185, 88th Cong., 2nd Sess. (1964).

6. U.S. CONST. art. I, § 3.

7. U.S. CONST. art. II, § 4.

The first serious suggestion of impeachment as a means of Congressional counter-attack in a battle with the Court came in the great political upheaval of 1800. In that year the Jeffersonian Republicans gained ascendancy in the Congress and Presidency. Almost immediately Congress began an attempt to dominate the judiciary in general and the Supreme Court in particular.

This movement took on various facets, the most interesting of which was a concerted effort to remove any federal judge who failed to follow the Republican political line. For their first target the Congress chose the extremely vulnerable District Judge John Pickering, a hopeless lunatic prone to drunkenness and profanity on the bench. In the subsequent impeachment and trial the House and Senate deliberately disregarded all attempts to make the proceedings before them legal, rather than political, in nature.⁸ Pickering was simply accused of misbehavior in office (without any attempt to reconcile this charge with the constitutional requirement of high crimes and misdemeanors) and convicted by the Republican controlled Senate by a straight party vote of 19 to 7.⁹

With the benefit of hindsight, the historian Henry Adams was to remark, "so confused, contradictory and irregular were these proceedings that Pickering's trial was never considered a sound precedent."¹⁰ However, to the unfortunate Judge's contemporaries in the Congress the precedent seemed sound enough to proceed with their plans to strike at the Justices of the Supreme Court.¹¹

Even while Pickering's trial was underway, the House impeached Justice Samuel Chase and prepared to strike at Chief Justice John Marshall as soon as the Senate disposed of Chase. Fortunately for the Court, moderate Republicans in the Senate refused to convict Chase on the vague charges framed by the House, and plans to remove Marshall were abandoned.¹²

Throughout the Pickering and Chase trials were woven the themes which have ever since clouded the effectiveness of impeachment and removal as a Congressional weapon against the Supreme Court.

Jeffersonian Republicans argued during these trials that if the federal courts chose to directly confront the power of Congress the people could speak only by removing from office those judges who disagreed with the majority view on the effect of constitutional provisions.¹³ Thus Senator Giles of Virginia always insisted that impeachment was nothing more than a declaration by the people's representatives that a judge held dangerous

8. Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485 (1949).

9. *Id.* at 505.

10. 2 Adams, HISTORY OF THE UNITED STATES 156 (1890-1891).

11. 2 Haynes, THE SENATE OF THE UNITED STATES 851 (1938).

12. *Id.* at 852.

13. At least one state (California) appears to have adopted this point of view by its removal of Judge James Hardy in 1862 for using profanity while off the bench and suspected Southern sympathies. Yankwick, *Impeachment of Civil Officers Under The Federal Constitution*, 26 GEO. L.J. 849 (1938).

opinions and must therefore give way to someone who could fill the office better.¹⁴ Despite the failure of Congress to affect the Supreme Court's membership by its impeachment efforts in 1803, Senator Giles' views have been shared by responsible spokesmen throughout American history. Indeed, in 1917, Senator Owen went so far as to propose a summary conviction and removal from office of any federal judge on any level who declared a federal statute unconstitutional.¹⁵

The Federalist position on impeachment quite simply called for a literal interpretation of the constitutional provisions on the subject. Thus before a federal judge could be removed he would have to commit an indictable common law crime.¹⁶ Under this view, impeachment would, of course, be virtually useless as a political weapon of the legislative branch.

Actually, history has chosen a middle ground between these two extreme views on the subject. Seven federal judges have been impeached since Pickering and Chase and three besides the former have been convicted and removed. Of those convicted, the broadest charges were against District Judge Ritter in 1936 (bringing his court into disrepute); and the most specific, against Judge Archbald (treason and accepting an office in the Confederacy).¹⁷ No Supreme Court Justice has been impeached since Chase; thus, the exact point of how far Congress can go in using impeachment as a political weapon is still unsettled. The most recent authority on the subject is found in the unsuccessful attempt to remove Judge English. The House committee on the matter reported the ingredients necessary as including:

. . . acts which are not defined as criminal and made subject to indictments and also . . . those which affect the public welfare . . . No judge may be impeached for a wrong decision.¹⁸

Whether a Supreme Court judgment affecting the vital interests of Congress is against "public welfare" or merely a "wrong decision" which must be righted by less severe measures than impeachment is still an open question. However, the latter view would seem to be more in accord with the historic outlook on the problem.¹⁹

Finally we come to the problem of whether the courts are empowered to check Congress should it adopt the old Jeffersonian Republican view of impeachment. Only once has a displaced judge challenged the validity of his removal in the courts. In *Ritter v. U. S.*,²⁰ the Court of Claims held that sole jurisdiction in impeachment matters rests in Congress. The case is important not only because it precludes jurisdiction but also because it

14. 3 JOHN QUINCY ADAMS' MEMOIRS 112 (Ford ed. 1874).

15. S.J. Res. 195, 64th Cong., 2nd Sess. (1917).

16. Several Republicans absented themselves rather than vote for conviction, Kelly and Harbison, *THE AMERICAN CONSTITUTION* 232 (1955).

17. Haynes, *supra* note 11, at 860.

18. 3 Willoughby, *THE CONSTITUTION OF THE UNITED STATES* 1450 (1929).

19. Simpson, *Federal Impeachments*, 64 U. PA. L. REV. 651 (1916).

20. 84 Ct. Cl. 293 (1936).

appears to accept a rather extreme position on the political nature of impeachment. It holds in part:

While the Senate in one sense acts as a court on the trial of an impeachment, it is essentially a political body and in its actions is influenced by the view of its members on the public welfare.²¹

The *Ritter* case would seem to over-emphasize the role of the Senate as a political body in matters of conviction and removal. A better view would be to regard the Senate as a court, but not necessarily one which had to adhere strictly to the common law. This would allow the Senate some freedom to remove Justices who disgrace the bench but do not commit an actual crime. There is, of course, danger here that the Senate would interpret "disgraceful conduct" too loosely, but there is no danger-free course in this area.

Finally, regardless of which view the Senate adopts, the *Ritter* case's refusal to disturb the Congressional finding is sound policy. Once the Congress has spoken on such a matter, the courts have no constitutional grounds for interference.

ALTERATION IN MEMBERSHIP

There are a number of ways in which Congress may strike at the Court by affecting its membership. The most obvious of these lies in the Congressional power over court appointments. Congress could, if it chose, merely refuse to supply the two-thirds vote necessary in the Senate to confirm new appointments to the Court.²² Thus as vacancies occurred among members of the Court who were unfavorable to Congress, that body could affect the Justices' voting pattern by holding down the number of those participating.

Historically, the most successful example of such reverse court packing came in 1865 and 1867 when Congress refused to fill the vacancies created by the deaths of Justices Catron and Wayne who had been generally in disagreement with the Radical Republican views on the nature of the post Civil War Union.²³ The effect of this action was to stall court decisions on a number of serious questions²⁴ until a popular mandate swept U. S. Grant into the presidency in 1867, thus cementing an alliance between the executive and legislative branches which the Court proved unable to withstand. Reverse court packing can, therefore, prove extremely useful as a short run solution when the Congress finds itself confronted with a hostile

21. *Id.* at 299. For a similar holding, with slightly different reasoning, on the state level see *Ferguson v. Maddox*, 114 Tex. 85, 263 S.W. 888 (1924). However, the latter case involved the removal of an executive rather than judicial officer.

22. U.S. CONST. art. II, § 3.

23. Kelly and Harbison, *supra* note 16, at 478.

24. *E.g.*, *Miss. v. Johnson*, 4 Wallace 475 (U.S. 1867); *Georgia v. Stanton*, 6 Wallace 50 (U.S. 1867). In both cases the court avoided the problem of the constitutionality of the reconstruction by the rather lame excuse that the question was political.

Court and a neutral or unfriendly executive. Thus if the legislative arm of government is confident that it represents the majority view in the country it can stand firm against appointments to the Court and put its position to the test in the next presidential election.

This is precisely what happened in 1868. Furthermore, Congress, once it had a president in sympathy with its views, quickly increased the size of Court membership from eight to nine.²⁵

The idea of inflating the Court's membership has always been a favorite of the other two branches.²⁶ Of course, the most famous instance was the unsuccessful 1937 "court packing" of the 76th Congress which was dis- guished as an attempt to retire over-aged federal judges. This plan pro- posed, in effect, to increase the Court's size from nine to fifteen members.²⁷ Although President Roosevelt was obviously the prime instigator of the plan, many commentators also viewed it as an attempt to strike at the Court from the legislature. Thus the president of the Massachusetts Bar Association stated that the plan would threaten :

. . . the liberties of the American people by so disrupting our con- stitutional frame of government as to throw absolute power, un- checked by constitutional restraint, into the hands of Congress. . . .²⁸

INTERFERENCE WITH COURT ADMINISTRATION

In the middle of the last century the state legislature of Arkansas attempted to impose a penalty of forfeiture of salary on any judge who failed to administer his office in a proper manner. This action was im- mediately tested and denounced in ringing terms by the state supreme court in *Ex Parte Tully*²⁹ which held in part that :

. . . if the Courts could be disgraced, and rendered imbecile by the reduction of their salaries, or moulded to suit their wishes and designs, then the judiciary would have no higher office or duties to perform than simply to register the mandates and edicts of the Legislature. How, then, could the judges declare the will of the legislature, or rightly interpret the laws, so as to make their decrees and judgments living monuments of truth and justice to their own age and bequeath them, as a rich and invaluable legacy, to posterity, around which the friends of liberty could rally. . . .³⁰

The Arkansas action suggests another line of attack Congress could take to restrict judicial powers. Constitutionally Congress is prohibited from lowering the salaries of federal judges during their tenure of office.³¹ How-

25. 16 Stat. 44 (1869).

26. In 1868 the Radical Republicans went to great lengths to assure that the judges appointed by President Grant subscribed to the Congressional view of Reconstruction. Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 977 (1941).

27. Draft Bill, 22 MASS. L.Q. 16 (1937).

28. *Id.* at 9.

29. 4 Ark. 220 (1842).

30. *Id.* at 223-24.

31. U.S. CONSR. art. III, § 1.

ever, at the same time Congress is given authority over the appropriation of federal monies and it has long assumed control over routine court administration matters.³² By using the power of the purse over which it is the undisputed master, Congress could greatly limit the powers of action by the Supreme Court.

This method of attack was apparently tried on the state level in a struggle between the legislature and executive of Missouri. There the legislature refused to appropriate funds for an executive department with which it had a policy disagreement. This attempt was ruled unconstitutional in *State v. Tolerton*,³³ which held that such an act effectively deprived the executive officials of their salaries (which were guaranteed much like those of federal judges). Therefore, should Congress attempt to strike at the Court by cutting off its funds, an analogy to the Missouri case could be used. The reasoning would, of course, be that Congress was actually attempting to cut judicial salaries by denying appropriations to the Court.

However, it is well to remember two points regarding such an analogy. First, Missouri's court was adjudicating as a neutral observer of a struggle between two other branches of government. There is no guarantee that another court, whose own power was challenged, could find the strength to make a like decision. Second, were Congress to move in a circumspect manner and merely gradually reduce Court appropriations while still providing for the justices' salaries, interference by the Court would be unlikely, since no adequate remedy would be available to the Court. Furthermore, if the cut in appropriations was carefully drawn, no issue for the Court to strike at would be presented.

Besides the power over the purse, Congress also possesses a power over when and in what manner justice is administered. Ironically, state courts have often found it necessary to restrict legislative attempts to overburden the judicial branch with extra administrative duties.³⁴ If Congress attempted to move in the other direction, the Court could probably fall back on the separation of powers doctrine and declare the act an interference with inherent judicial powers.

We come now to the most simple, and yet at the same time most complicated, Congressional weapon for interference with judicial administration — limitation of federal jurisdiction. It would be incredibly simple to affect the Court's future decisions by denying jurisdiction in all matters which are in dispute. Indeed Congress tried to use this remedy with the Clayton Act³⁵ by denying the federal court's power of injunction in certain labor disputes. When this attempt was very narrowly construed in *Duplex Printing Press Company v. Deering*,³⁶ Congress struck back with the Norris-La Guardia Act.³⁷ The battle finally ended when the Supreme

32. U.S. CONST. art. I, § 8.

33. 236 Mo. 142, 139 S.W. 403 (1911).

34. *Richardson v. County Court of Kanawha County*, 78 S.E.2d 569 (W.Va. 1953).

35. 38 Stat. 730 (1914), 15 U.S.C. §§ 12, 44 (1958).

36. 254 U.S. 443 (1921).

37. 47 Stat. 70 (1932), 29 U.S.C. § 101 (1958).

Court upheld the Norris-La Guardia Act in *Lauf v. E. G. Skinner Company*.³⁸ Whether this exchange settled the question of Congressional power in the jurisdictional area is extremely doubtful.

Only once in our history has the Congress bluntly used the jurisdictional weapon to weaken the Court's power. This event took place in 1867, when the previously mentioned struggle over Reconstruction was taking place. At that time, confronted with the full power of Congress, the Court bowed in *Ex parte McCordle*³⁹ and agreed to have its appellate jurisdiction stripped away by an act of Congress. Notwithstanding the *McCordle* case and its earlier decision in *Turner v. Bank of North America*,⁴⁰ many commentators doubt that today's Court would tolerate an outright attack on its appellate or its lower court's original jurisdiction in important constitutional areas.⁴¹

It is well to keep in mind that in the jurisdictional area Congress is barred by the Constitution from limiting only a minimum of judicial power. In the first instance the Constitution grants original jurisdiction to the Supreme Court in a few areas such as those in which a state is a party.⁴² Although relatively minor in scope, these areas are clearly outside the reach of Congress. Secondly, because the Supreme Court is granted appellate jurisdiction generally, it is commonly recognized that Congress would have to leave the lower federal courts jurisdiction in at least one area, perhaps patent cases. However, even granting this action by Congress, the state courts would always be available to an aggrieved party with a possibility of review by the Supreme Court.⁴³ Thus it seems the Court is secure in its jurisdiction and any move to limit that jurisdiction might prove not only fruitless, but also might be of questionable constitutional soundness or political merit.

Perhaps a more interesting weapon Congress could use to strike at the Supreme Court would be to require more than a simple majority to declare an act unconstitutional. It has always struck proponents of the Congressional point of view as somewhat inequitable that most acts by one branch of government in overruling another branch take a two-thirds vote,⁴⁴ yet by a majority of only one judge the Court is able to strike down legislation concurred in by both the legislative and executive branches or enacted by a sovereign state. This seeming injustice was addressed by Senator Borah who proposed that Congress enact legislation requiring at least seven of the Court's nine members to concur before an act could be declared unconstitutional.⁴⁵

38. 303 U.S. 323 (1938).

39. 6 Wall. 318 (U.S. 1867).

40. 4 Dall. 8 (U.S. 1799).

41. Hart, *The Power of Congress To Limit The Jurisdiction Of Federal Courts: An Exercise In Dialectic*, 66 HARV. L. REV. 1362 (1953).

42. U.S. CONST. art. III, § 2.

43. Hart, *supra* note 41.

44. *E.g.*, U.S. CONST. art. I, § 7.

45. S. Res. 4483, 67th Cong., 4th Sess. (1923).

Although the Senator apparently did not agree, such a solution would seem to require a constitutional amendment in view of the separation of powers doctrine. At least the experience of Ohio would seem to so indicate.

In 1912 Ohio adopted a constitutional amendment making it mandatory that all but one of the Ohio Supreme Court Justices concur before a statute could be declared unconstitutional.⁴⁶ Generally the amendment has been unsuccessful in curbing the state court's power. In fact, in *Board of Education v. City of Columbus*,⁴⁷ the Ohio court candidly admitted that justices were deliberately voting against constitutionality despite their feelings in an individual case in order to avoid the state constitution.⁴⁸ Thus once a majority of the court believes a statute is unconstitutional, enough of the minority will vote with the majority to achieve their purpose. However the Ohio amendment has not been totally without effect. In the recent case of *Hudson Distributors Inc. v. Upjohn Co.*,⁴⁹ which involved the constitutionality of a state fair trade law, the voting amendment had a decisive influence. Thus even though a majority of the court felt that the statute was unconstitutional, the law was upheld because the requisite number of votes could not be obtained when three justices stood firm for constitutionality.

The Ohio experience would seem to indicate that any such attempt by Congress would be ill advised. Not only is it probable that a constitutional amendment would be necessary to effectuate such a change, but the remedy as an attempt at political control appears to be of doubtful value in view of the stand the Ohio Supreme Court has taken towards the attempt.

AMENDMENT

With the cooperation of the state legislatures, Congress undoubtedly could overrule any Supreme Court decision by passing an amendment to the constitution. At present a whole series of possible amendments are circulating among the states, including one which would remove the issue of legislative apportionment from the jurisdiction of the federal courts.⁵⁰ Two previously successful efforts have been made by Congress to initiate amendments overruling Court decisions.

The first occasion came after the Court's holding in *Chisholm v. Georgia*⁵¹ which allowed a state government to be sued by the assignees of British creditors. To remedy what was thought to be a serious situation, the 11th amendment was adopted in 1798.⁵² It is probably the least important of all constitutional amendments, because the federal courts have virtually ignored it.

46. OHIO CONST. OF 1912 art. IV, § 2.

47. 118 Ohio St. 295, 160 N.E. 902 (1928).

48. The federal constitutionality of the unequal application of the amendment by the Ohio Supreme Court was upheld in *State ex rel. Bryant v. Akron Metrop. Park Dist.*, 281 U.S. 74 (1930).

49. 174 Ohio St. 487, 190 N.E.2d 460 (1963), *aff'd*, 377 U.S. 386 (1964).

50. Freund, *The Supreme Court Under Attack*, 25 U. PITT. L. REV. 1 (1963).

51. 2 Dall. 419 (U.S. 1793).

52. U.S. CONST. amend. XI.

The second use of the amendment power was far more important. It was the famous Income Tax amendment⁵³ used to overrule the *Pollack v. The Farmer's Loan and Trust Company*⁵⁴ case which had outlawed federal taxes on personal income. This amendment passed the Senate by a vote of 77 to 0 and then swept through the state legislatures in a massive revolt against the *Pollack* case.⁵⁵

There are, however, a number of serious drawbacks to any resort to amendment as a weapon against the Court. In the first place, the process is exceedingly cumbersome. The 11th amendment, for example, took five years before it became law. In today's world such a wait might well prove intolerable both to the government and the general public.

There is also a further problem of court interference with the amending process. On the federal level the situation in this respect is extremely cloudy. *Coleman v. Miller*,⁵⁶ with a badly split court (3-2-4), is the latest case on the subject. It greatly reduced the number of issues which the Supreme Court could consider with regard to the ratification of an amendment. The Chief Justice and Justices Reed and Stone felt that although there was standing to test the ratification of an amendment by a state, on the part of members of the state's legislature, the question of whether the proposed amendment had become stale was completely within the discretion of Congress. Although they concurred in the result, Justices Black, Douglas, Roberts and Frankfurter felt that there was no standing to sue regardless of the issues in such a case. Justices Butler and McReynolds dissented on the ground that the Court should consider the issue of when an amendment becomes stale and further that the amendment in question was stale. The vital question of whether the Court could pass on the qualifications of members of the state legislatures to vote on the amendment was left undecided because the Court was split evenly on whether the issue was political in nature.⁵⁷

In the state courts the issue has been much more clearly decided in favor of judicial supervision of the amending process. *McConoughy v. Secretary of State*⁵⁸ held that the procedure by which an amendment was adopted could be inquired into by the courts in detail. Today one can only speculate whether legislatures, apportioned in violation of the equal protection clause could successfully ratify an amendment proposed by a Congress similarly based. However, it would seem that regardless of the *Coleman* case the present Supreme Court would look rather closely into the matter.⁵⁹

53. U.S. CONST. amend. XVI.

54. 158 U.S. 601 (1895).

55. Kelly and Harbison, *supra* note 16, at 613.

56. 307 U.S. 433 (1939).

57. See also *Dillon v. Gloss*, 256 U.S. 368 (1921).

58. 106 Minn. 392, 119 N.W. 408 (1909).

59. Clark, *The Supreme Court And The Amending Process*, 39 VA. L. REV. 621 (1953).