House Joint Resolution 121: Amending Florida's Constitution to Restore the Balance of Power

By Representative Julio Gonzalez

Today, I introduced House Joint Resolution 121 calling for the submission of a proposed constitutional amendment to Florida's voters that would allow the Legislature, within a period of five years, to override a ruling of the Florida Supreme Court. I am also filing an accompanying communication to Congress that asks that a similar proposed amendment for the United States Constitution be passed. The necessity for such a provision, both at the state and national levels, is obvious.

Acknowledging the humanity and fallibility of judges

At its implementation, our system of government was truly exceptional on the world stage because, among other reasons, its power was vested on the will of the people. Key to the protection of this reliance was the separation of power into three separate and coequal branches of government restricted by a robust system of checks and balances.

Specifically not in the Constitution was an assignment to the judiciary of serving as the ultimate authority on the constitutionality of laws. And although the Legislature could always revamp a law the judiciary interpreted as meaning something different from what the legislature intended, there was no provision that would allow the Legislature to override a ruling where the court voids a law as unconstitutional.

With what most of us are taught about our government and our nation's history, it is difficult to conceive that the Supreme Court would not have such plenary authority in determining what is constitutional and what is not. After all, the members of the highest court are learned individuals inhabiting positions designed to insulate them from the world of politics and partisanship.

However, the fact is that these men and women, learned in the nuances of law as they may be, are neither insulated from the world of politics nor free of partisanship. One need only recall the consistent apportionment of Republican and Democrat justices on issues of gun control, redistricting, abortion, school choice, religious liberties, the scope of federal power, states rights, and religious education to realize that these predictable divisions amongst the various factions of the courts represent more than mere differences in legal opinion. In fact, Thomas Jefferson foresaw this harsh reality back in 1820 when he wrote,

Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is "boni judicis est ampliare jurisdictionem," and their power the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control.

(Thomas Jefferson to William Charles Jarvis, Sept. 28, 1820)

Indeed, we have seen these encroachments play out on countless occasions. Supreme Court rulings have mandated that religious symbols be taken down from public places or be replaced with others. They have placed prohibitions on prayer in public schools, commencement ceremonies, and athletic events. Negations of laws prohibiting the desecration of the American flag have made the unconscionable legally acceptable, and judicial prohibitions on federal term limits have overturned the will of the people of a state, even if that will is enshrined in the affected state's constitution. And recurrently, the distributions of votes in these opinions largely mirror the party affiliations of its members.

And let us recall that these members are generally appointed to their positions without oversight by the electorate and generally remain there for the rest of their lives.

The finality of a Supreme Court's opinion on matters of constitutionality

But an even greater threat than the inherent shortcomings of any court or its members is the finality of a supreme court's decision on constitutional matters.

When a supreme court writes an opinion on the issue of constitutionality, its decision has the same effect as if its author had written a note upon the face of the document, permanently changing its meaning, and in certain instances, its intent. Upon doing this, there is nothing the legislature, chief executive, or the electorate can do to reverse course other than to undertake the daunting task of amending the affected constitution. Needless to say, this is a Herculean endeavor, which is overwhelming in scope for most court-enacted constitutional changes. Consequently, the effects of court rulings on matters of constitutionality stand unchallenged, permanently changing the supreme law of the land, and by extension, the society which it governs.

In light of these considerations, shouldn't a court's opinion be subject to affirmative checks and balances just like the actions of any other branch of government?

The answer, of course, is yes. And the Framers would have agreed!

First, consider that the Framers never expressly gave the Supreme Court final authority on determining a law's constitutionality. Article III of the United Sates Constitution gave the courts "Judicial Power" over all cases and controversies arising out of the Laws of the United States and the Constitution. However, it does not say that the Supreme Court is the ultimate authority on the Constitution.

The federal Supreme Court's plenary authority in deciding issues of constitutionality was actually imposed upon it by its own actions. In the 1803 case of *Marbury v. Madison,* one of America's sentinel cases, John Marshall singlehandedly declared, "It is emphatically the province and duty of the judicial department to say what the law is." Consequently, any act of the legislature the court determines is repugnant to the Constitution will become void.

And with that, the Supreme Court of the United States gained the absolute power to overrule the legislature in issues of constitutionality.

But who overrules the Supreme Court?

The people? No, not unless they can mount a massive amendment process that we have already seen is excessive to the task.

The executive? No, except by the ability to replace justices as their positions become vacant through death, retirement, or impeachment (and add term limits-or advanced age in the cases of some state supreme courts).

The legislature? Absolutely not. Like a game of rock-paper-scissors, John Marshall said the court beats the legislature. Period!

Then *what*?

Nothing.

But this answer is not only inconsistent with the system of checks and balances the Framers developed for our government, it appears that such a conclusion was not what the Framers envisioned. The most direct commentary on the matter comes from Thomas Jefferson himself when commenting to William Jarvis on a book of essays Jarvis had written and sent to Jefferson for his consideration. In it, Jarvis wrote of the importance of the American judiciary to nullify a law it found to be unconstitutional. Jefferson took umbrage with that observation, writing, "to consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy." Further, he warned, "The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots."

George Washington also warned of the dangers of relying on the courts to modify and craft the policies of government in no lesser instance than in his Farewell Address:

"If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed."

Clearly, allowing the judiciary to act without direct restrictions is not only contrary to the visions the Framers had for our fledgling nation, but carries with it a real danger of encroachment upon the authorities of the other branches of government and ultimately upon the power of the people to control their own destinies.

The only remaining question then, is what can be done to remedy this situation?

Correcting a deficiency

Many corrections can be designed to address the issue of judicial overreach, but perhaps the most direct and effective of these is one that should have been instituted at the very inception of our nation's Constitution and inscribed into that of each state: the existence of a legislative override of a Supreme Court opinion.

Indeed, Canada already instituted such a provision. Section 33 of the Canadian Charter of Rights and Freedom amended onto the Canadian Constitution in 1982 allows, among other authorities, for the legislature or Parliament to declare an act operational *notwithstanding the opinion of the court*. In other words, if a sufficient proportion of a Canadian legislative body should find the opinion of the court inconsistent with the views of the electorate, the legislature could override or nullify the court's ruling.

It is such a provision, modified and tailored to the state of Florida and to our national government, that I propose be presented to the people as amendments to their respective constitutions.

For Florida, such an amendment would read:

Any law, resolution, or other legislative act declared void by the supreme court, district court of appeal, circuit court, or county court of this state may be deemed active and operational, notwithstanding the court's ruling, if agreed to by the legislature pursuant to a joint resolution adopted by a two-thirds vote of each house within five years after the date that the ruling becomes final. Such a joint resolution is exempt from section 8 of this article and shall take effect immediately upon passage.

And for the United States Constitution, it would read:

Any law, resolution, or other legislative act declared void by the Supreme Court of the United States or any District Court of Appeal may be deemed active and operational, notwithstanding the court's ruling, if agreed to by the legislature pursuant to a joint resolution adopted by a sixty percent vote of each chamber within five years after the date that the ruling becomes final. Such a joint resolution shall take effect immediately upon passage.

It is my concerted view that such provisions, if enacted by the people would curtail the tendency of activist judges to manipulate the law to suit their political views and agendas. Equally as importantly, this would force the people to engage the legislature in enacting rectifications to current laws that they see as objectionable or flawed, restoring the natural relationship between the people and their legislative bodies. This would also force the electorate to more carefully look at their candidates and their actions during times of reelection.

Three counterpoints countered

The defense of an American Notwithstanding Clause would be deficient if it did not address some foreseeable objections, which include: 1) the effects this provision would have on America's historic civil rights rulings; 2) the effect of a notwithstanding clause upon the separation of powers; and 3) the ability of the public to use the judiciary to overturn laws they presume to encroach upon the rights of free Americans.

First, to the issue of civil rights. Without question, the greatest stain in our nation's fabric is the tragic tolerance of slavery in the United States Constitution. As we know, it took a calamitous Civil War pitting brethren against brethren to rectify this gross travesty of justice. Moreover, equally as unconscionable is the persistence of legal hurdles to the equal standing of the various members of our American society throughout the latter nineteenth century and into the twentieth century. Indisputably, Supreme Court cases like the *Brown* decisions were instrumental in reversing the persistence of the racial injustices that gripped our nation. Indeed, the Civil Rights Movement either would not have survived or would have been greatly hampered were it not for the necessary interventions of the courts.

To help ensure that such decisions are never touched by an aggressive legislature, the provision I propose carries with it a reach back limit of five years. In other words, the legislature may only invoke a notwithstanding declaration within five years of the court's ruling. In this way none of the sentinel cases of American jurisprudence already in existence can be touched by the various legislatures. Five years also gives the people the opportunity to change the electorate in the hopes of overriding a recent opinion.

The concern regarding an encroachment unto the separation of powers is equally as spurious, first because of the five-year reach back limitation that has already been discussed, and second because of the supermajority requirement imposed on the legislature in reversing a court's decision. The reversal of a ruling would require such a high consensus that it would rarely be

employed. Indeed, the Canadian experience has been one of rare impositions of the legislatures' wills upon the judiciaries, and I expect it would be the same for the United States and its jurisdictions.

Moreover, the argument that the Legislature's newly acquired authority would encroach upon the judiciary's powers actually turns reality upon its head as presently, it is the judiciary that is improperly encroaching upon the people and their legislatures, and it is that encroachment that this amendment is designed to correct. Enactment of the Notwithstanding Clause would not intrude upon the power of the judiciary, but rather, it would act to restore the natural balance between the two coequal branches of government as originally envisioned by the Framers.

Finally, regarding the court's abilities to protect our rights as Americans and free members of society, for the reasons previously outlined, I suspect the law will have no effect on cases where clear violations of rights have taken place. Where the Notwithstanding Clause will exert its effects is in those situations where parties misguidedly wish to invoke their will upon the people by bypassing the legislature through the manipulations of an activist court. Such actions are the usurpations of which President Washington spoke in his Farewell Address. It is my impression that once again, the Notwithstanding Clause will have a salutatory effect upon our nation and upon our countenance.

Our nation's exceptional nature is based on, among other pillars, our government's respect for the will of the people, our reliance on a robust system of checks and balances to preserve our separations of powers, and upon the reliance on generalized debate in deciding our nation's future direction.

It is clear that with regard to our judiciary, our system has strayed away from this original framework and must be corrected. It is with this intent that I introduce the Notwithstanding Clause, initially for the legislature's consideration, but ultimately for the people's. I am excited about the conversation this provision will elicit and am hopeful for its ratification and for the beneficial effects it will have upon our Republic.

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