The Scope of Judicial Review: An Ongoing Debate

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Introduction

This symposium is devoted to what Professor Philip Kurland described as "the most immediate constitutional crisis of our present time, the usurpation of general governmental powers on the pretext that its authority derives from the Fourteenth Amendment."[1] Whether there be agreement on the answer is not nearly so important as to dissect out the issue. If, as Professor Louis Lusky observes, fortuitous circumstances have enabled *Government by Judiciary: The Transformation of the Fourteenth Amendment*[2] to "[crystallize] for millions of non-lawyers the fear that the Court has jumped the bounds of legitimate judicial review and is pursuing a course that bears dismaying resemblance to the excesses of the pre-1937 Court,"[3] I am well content. For as I wrote in the concluding pages, the first step is to isolate the problem and to make the people aware of its dimensions.[4] Cure must begin with diagnosis.

It is not surprising that the panelists—though of divided counsels—are united in their opposition to my views, for as Professor Stanley Kutler has noted, after 1937 "most of the judiciary's longtime critics

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1. Letter from Professor Philip Kurland to Harvard University Press (August 15, 1977) (in the possession of the editors of Harvard University Press).

2. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (hereinafter cited as GOVERNMENT BY JUDICIARY).

3. Lusky Essay at 404. The several essays by the panelists will be cited in this manner. It is worth noting that I have received approving editorials, reviews and letters from all quarters of the country, which are in marked contrast to the tone of academe, and which differ from the considerable volume of hate mail that came in the wake of my earlier books on impeachment and executive privilege. No such mail has come to me in consequence of GOVERNMENT BY JUDICIARY.

4. GOVERNMENT BY JUDICIARY at 417-18. Professor Henry Abraham states that it is because Berger brings "us face to face with the eternal dilemma of the limits of judicial power, that his work is so significant." Abraham Essay at 472.

suddenly found a *new faith*," a "new libertarianism promoting 'preferred freedoms' . . . with an activist judiciary to protect those values."[5] And if the panelists are not to be charged with what Kutler characterizes as the "sense of smug self-satisfaction [that] prevailed in such circles,"[6] the fact remains that they are united in defense of the "new faith" because it fulfills *their* social aspirations, never mind the constitutional cost.[7]

While conflicting views must make their way in the marketplace of ideas, the issue is not to be settled by a count of noses but rather, as W.S. McKechnie, the historian of Magna Carta, said, by an appeal to historical data and to principles.[8] The "True Believers" tend to turn for comfort to the decisions of the Court, as if the self-serving declarations of one who pretends to power are entitled to weight on that issue.[9] My attempts to direct their attention to the constitutional sources meet with scant success, though given a document that grants and limits delegated power, it is, as McKechnie observed, that history and those principles that must be decisive.

Academe is wont to brush off criticism of opposing views as "polemical,"[10] and some historians seem to regard their task as done when they merely record *their* opinion of the facts, leaving the reader in darkness as to opposing views of the same scene. One tempered by law practice is accustomed to have a judge turn to him for comment on the argument of opposing counsel in order to dispel confusion engendered by clashing views. Hence I was moved to write, "A commentator should spread before the reader the evidence on which his opinion is based and comment both on discrepant evidence and on opposing inferences. Consequently, a polemical tone is inescapable. . . ."[11] To avoid criticism of views that seem erroneous, I wrote, "is to court the charge of ignoring an influential body of contrary opinion, of selecting

5. Kutler Essay at 513 (emphasis added).

6. *Id.* at 514.

7. In his Farewell Address Washington warned, "[L]et 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." 35 THE WRITINGS OF GEORGE WASHINGTON 229 (J. Fitzpatrick ed. 1940), *quoted in* GOVERNMENT BY JUDICIARY at 299.

8. Faced by contrary opinion of respectable predecessors, McKechnie wrote, "[T]he truth of historical questions does not depend on the counting of votes or the weight of authority," but rather "on the historical record." W. MCKECHNIE, MAGNA CARTA 135 (1905).

9. "No man," said Madison, "is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." THE FEDERALIST No. 10 (J. Madison) at 56 (Mod. Lib. ed. 1938).

10. Kutler Essay at 514.

11. GOVERNMENT BY JUDICIARY at 9.

only the evidence that advances one's own argument, and, even worse, to cast the reader adrift on a sea of conflicting opinions."[12] Since penning those words I came across a similar statement by the distinguished historian, Charles McIlwain, explaining that during the course of his study of the High Court of Parliament,

> I came to the conclusion that the weight of contemporary evidence was against some views held by men whom I have always looked up to . . . . As these divergences . . . concerned things which are the very marrow of the subject under discussion, this has unavoidably given to certain parts of the book a polemical cast, and might lead one to think that it was written from the beginning merely to bolster up a preconceived theory. Such is not the case.[13]

I too can honestly say that "I entered upon this study without preconceptions."[14] My studies of the 1787 period had engaged me for years, and so when I turned to the Fourteenth Amendment, the terrain was for me terra incognita. What social preconceptions I entertained before long encountered historical evidence that, in Huxley's words, jarred against my "inclinations."[15] But long since I learned not to make my predilections the test of constitutionality;[16] in 1942 I wrote that I liked it no better when the Supreme Court read my predilections into the Constitution than when the Four Horsemen read in theirs.[17] Let the reader determine whether as much can be said for my critics.[18]

Their failure to come to grips with my central thesis has been and remains a constant source of wonderment. In my opening pages I stated,

> the proof is all but incontrovertible that the framers meant to leave control of suffrage with the States, which had always exercised such control, and to exclude federal intrusion. On traditional canons of interpretation, the intention of the framers being unmistakably expressed, that intention is as good as written into

12. *Id.*

13. C. MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY ix (1910).

14. *Id.*

15. T. HUXLEY, MAN'S PLACE IN NATURE 151 (1896), *quoted in* GOVERNMENT BY JUDICIARY at 1.

16. Chief Justice Marshall cautioned that "[t]he peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 190-91 (G. Gunther ed. 1969). Professor Felix Frankfurter observed that "wisdom and justice are not the tests of constitutionality." *Can the Supreme Court Guarantee Toleration?*, 43 NEW REPUBLIC 85, 86 (1925).

17. Berger, *Constructive Contempt: A Post Mortem*, 9 U. CHI. L. REV. 602, 604-05, 642 (1942).

18. *See* Cover, Book Review, 178 NEW REPUBLIC 26, 26-28 (1978); Brest, *Berger v. Brown et al.*, N.Y. Times, Dec. 11, 1977, § 7 (Book Review), at 10.

> the text. It is, therefore, as if the Amendment expressly stated that "control of suffrage shall be left with the States." If that intention is demonstrable, the "one man, one vote" cases represent an awesome exercise of power, an 180-degree revision, taking from the States a power that unmistakably was left to them. That poses the stark issue whether such revisory power was conferred on the Court.[19]

To round out the picture, I examined the *meaning* the terms of the Amendment *had for the framers*, and in course thereof, examined the history of the antecedent Civil Right Act enacted by the same Congress at the very same session. Most of the critical discussion has bogged down in the details of that analysis, and has ignored the larger central issue: given a *clearly discernible* intention, may the Court construe the Amendment in undeniable contradiction of that intention?

On that score Professor Richard Kay has contributed a valuable insight: suppose that Congress substituted a four year term for the express constitutional two year term of a Congressman. Who would defend that substitution, even though we would be "just as much ruled by the framers from their graves" as when effect is given to the clearly discernible intention of the framers.[20] When, therefore, Professor Arthur Miller urges that "the Founding Fathers cannot rule us from their graves,"[21] his logic leads to a total rejection of the Constitution. In one form or another, disguised in soothing rhetoric, that is the thesis of academe. But it has yet to be candidly explained to the people and accepted by them in the form of an amendment, the *only* instrument of change the Constitution provides.

Even those who applaud the Court's new activist role are anxious that it be subject to "limits," acknowledging that unrestrained power is alien to the Constitution.[22] And their differences regarding the form

19. GOVERNMENT BY JUDICIARY at 7-8. *See* Berger on Kutler, *infra*, at 595, nn. 42-43. My responses to the several essays by the panelists will be cited in this manner. The eminent British political scientist, Professor Max Beloff, viewing the scene with the detachment of an observer 3000 miles removed, declared the evidence to be "incontrovertible." Beloff, *Arbiters of America's Destiny*, THE TIMES (LONDON) HIGHER EDUCATION SUPPLEMENT, April 7, 1978, at II. A proponent of activism, Dean Alfange, wrote that "the cumulative impact of [Berger's] quotations is impressive. It must be conceded that many of Berger's conclusions on specific historical points are not easily challengeable. . . . [H]is historical argument *is* very powerful. Those who wish to challenge it will confront a formidable task in light of the volume and persuasiveness of the evidence he has amassed in support of his position." Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603, 606-07 (1978).

20. Kay, Book Review, 10 U. CONN. L. REV. 801, 804 (1978).

21. Berger on Miller, *infra*, at 586, n.81.

22. Professor John Hart Ely wrote, "If a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly

such limits should take underlines the difficulties, if not the hopelessness, of the task. Against this, I plead only that if the intention is clearly discernible (in which case there can be no difficulty of ascertainment), the Court is bound to give it effect. It is not empowered to reject the choices of the framers in favor of its own.

One point, I had thought, was beyond dispute: the fact that suffrage and segregation were excluded from the scope of the Amendment.[23] It is dispiriting, therefore, that an historian like Professor Kutler should challenge that view.[24] And it is inexplicable that after acknowledging that "Berger's scholarship of the past decade has substantially influenced and enriched our understanding of American constitutionalism,"[25] he should go on to impeach my credentials as an historian. What happened in the interval to vitiate my "scholarship," for in my prior studies of impeachment and executive privilege I invoked the selfsame intention of the framers to determine the meaning of the terms they employed? The answer, I suggest, is that liberals were ready enough to embrace that approach to topple Richard Nixon, but condemn it bitterly when it is used to test the Warren Court's espousal of causes dear to their hearts. Such a double standard is a reproach to scholarship.[26]

I would remind the reader that "[g]overnment by a self-designated elite—like that of benevolent despotism or of Plato's philosopher kings—may be a good form of government for some peoples, but it is not the American way."[27] When the rejection of judicial "Platonic Guardians" bears the imprimatur of Learned Hand,[28] it is not to be rejected out of hand after the fashion of Professors Miller and Kutler.

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inconsistent with our nation's commitment to representative democracy, responsible commentators would have to conclude, whatever the framers may have been assuming, that the courts should stay away from them." Ely, Constitutional Interpretivism: Its Allure and Impossibility, 53 IND. L.J. 399, 448 (1978).

23. *See* note 19 *supra*, and Berger on Miller, *infra*, pp. 580-81.

24. *See* Berger on Kutler, *infra*, at 594-595, nn. 35-42.

25. Kutler Essay at 511.

26. Professor Charles Black, who had been counsel for the NAACP in the desegregation case, writing during the impeachment investigation of President Nixon about the meaning of "high crimes and misdemeanors," noted some remarks by the Framers and said, "the men present were representative of their time, and their understanding, at the moment when the crucial language was under closest examination, tells us a great deal about its meaning." C. BLACK, IMPEACHMENT: A HANDBOOK 28-29 (1974). No thought of other times, other manners.

27. McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: II*, 54 YALE L.J. 534, 578 (1945). Ely has recently quoted Robert Dahl to the same effect: "[R]ule by aristocracy, even in modern dress, is not what Americans have ever wanted." Ely, *supra* note 22, at 411.

28. L. HAND, THE BILL OF RIGHTS 73 (1958).

No one who is devoted to the law should persist in leading it down the wrong path through pride of opinion. We are all fallible and to confess error is to acknowledge the fact. But I am not persuaded by my critics that I am in error; instead their conflicting efforts to rationalize the "new faith" have strengthened my convictions. I have undertaken to point out their errors in order to dispel confusion, and because, as Chief Justice Thomas McKean said in the Pennsylvania Ratification Convention, "refutation . . . begets a proof."[29] And I have dwelt on the splenetic nature of the Miller-Kutler-Alfange criticisms because they reveal that I have touched a raw nerve, and because unfair and distorted criticism reveals doubt about the strength of their own case and incapacity to bring dispassionate judgment to evaluation of my study. Finally, my commitment, unlike that of my critics, is not to a particular cause—be it desegregation, abortion, and the like—but to the Constitution, the bulwark of our liberties.[30] My credo is that of Charles McIlwain: "The two fundamental correlative elements of constitutionalism for which all lovers of liberty must yet fight are the legal limits to arbitrary power and a complete responsibility of government to the governed."[31] No dispensation has exempted the judiciary from these requirements.

29. 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 541 (1836).

30. Justice Story sought to impress "upon Americans a reverential attachment to the Constitution, as in the highest sense the paladium of American liberty!" He considered it "the only solid basis, on which to rest the private rights, the public liberties, and the substantial prosperity of the people." J. STORY, COMMENTARIES ON THE CONSTITUTION vii, 2 (1833).

31. C. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 146 (rev. ed. 1947), *quoted in* GOVERNMENT BY JUDICIARY at 298-99. McIlwain has been reformulated as R.H. Tawney's Law: "It is a condition of freedom that men should not be ruled by an authority which they cannot control." Beichman, *Probing Mysteries of Great Leadership*, Boston Globe, Oct. 15, 1978, at 9, col. 1.

I. Comment on Professor Louis Lusky's Essay

On many points Professor Lusky and myself are in accord; but we differ on a fundamental issue: he defends "the Court's new and grander conception of its own place in the governmental scheme,"[1] which rests, he notes, on "two basic shifts in its approach to constitutional adjudication": "assertion of the power to *revise* the Constitution, bypassing the cumbersome amendment procedure prescribed by article V," and "repudiation of the limits on judicial review that are implicit in the orthodox doctrine of *Marbury v. Madison*,"[2] and it may be added are explicit in the constitutional history. The Court itself has never openly avowed such grandiose claims; they are but a product of the recent past, articulated by academe on its behalf in order to justify its revolutionary decisions.[3]

My view is that the Court is not empowered to create a "new and grander" version of its power; "an agent," said Hamilton, "cannot new-model his commission."[4] Some would regard our difference as a choice between competing philosophies of judicial review, but I cannot regard a rejection of constitutional limitations as a matter of philosophical choice—that is a political choice reserved to the sovereign people. Of course, Professor Lusky has his own rationale for a judicial power of constitutional revision; and I would not maintain that my "prescription for legitimacy is . . . the only one possible,"[5] for I lay no claim to papal infallibility. But to confine myself to his essay, I would urge that it is vastly to be preferred to his solution.

My resort to the "original intention" of the Framers as the test of power, by no means novel, rests on a long tradition that Thomas Grey has written, "is one of great power and compelling simplicity . . . deeply rooted in our history and in our shared principles of political legitimacy. It has equally deep roots in our formal constitutional law.

1. Lusky Essay at 408.

2. *Id.* at 406. (emphasis added).

3. Berger on Kutler, *infra*, at 593. *See id.* at nn. 42, 122. As Professor Bork observed, "The Supreme Court regularly insists that its results . . . do not spring from the mere will of the Justices in the majority but are supported, indeed compelled, by a proper understanding of the Constitution. . . . Value choices are attributed to the Founding Fathers, not to the Court." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3-4 (1971), *cited in* GOVERNMENT BY JUDICIARY at 319.

4. 6 A. HAMILTON, WORKS 166, Letters of Camillus (H. Lodge ed. 1904). "In all free states, the constitution is fixed; it is from thence, that the legislative derives its authority; therefore it cannot change the constitution without destroying its own foundations." Letter of the Massachusetts House to the Earl of Shelburne, H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 65 (8th ed. 1968).

5. Lusky Essay at 408.

. . ."[6] The contrary view, John Hart Ely recently observed, conduces to "untethered" discretion and is "undemocratic as well";[7] and although he recognizes that "an untrammelled majority is indeed a dangerous thing . . . it will require a heroic inference" to deduce that "judicial enforcement of an 'unwritten constitution' is an appropriate response in a democratic republic."[8] He draws that "heroic inference" from the alleged "invitation" expressed in the "general" terms of the Fourteenth Amendment and elsewhere in the Constitution. For Grey, the answer lies in the alleged fact that the Founders embodied "natural rights" in the Constitution[9] (what Dean Pound labelled as "purely personal and arbitrary" discretion),[10] a view that Professor Lusky dismisses out of hand.[11] For him the answer lies in an *assumption*, expressed in his *By What Right?* that "the Founding Fathers *intended* . . . to empower the Court to serve as the Founders' surrogate for the indefinite future—interpreting the Constitution . . . as is thought right *by men who accept the Founders' political philosophy*. . . ."[12] In his essay he restates this as the Court's self-imposed task in the last forty years of "conforming the Constitution to what its makers would . . . have prescribed . . . had they been living and acting in the middle of the 20th century."[13] Senator Sam Ervin, in homelier diction, said that

6. Grey, *Do We Have An Unwritten Constitution*, 27 STAN. L. REV. 703, 705 (1975). Grey quotes Robert Bork: "The judge must stick close to the text and the history, and their fair implications, and not construct new rights." *Id.* at 704. The capitalized "Framers" refers to the draftsmen of the Constitution; the lower case "framers" to those who drafted the Fourteenth Amendment.

7. Ely, *Constitutional Interpretation: Its Allure and Impossibility*, 53 IND. L.J. 399, 403, 404 (1978).

8. *Id.* at 411.

9. Grey, *supra* note 6, at 716; *see also* Abraham Essay at 482.

10. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 393 (1908).

11. Grey "seems to offer a rationalization for whatever the Court elects to do rather than a criterion of legitimacy." Lusky Essay at 414. Yet Lusky remarks of my observation *re* the "alternative approaches" proposed by Grey and himself that Berger counters them "to his own apparent satisfaction, in a scant ten pages," *id.* at 410, though he joins me in rejecting Grey in two lines out of 50 pages, unwittingly employing a double standard.

12. L. LUSKY, BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 21 (emphasis in original) [hereinafter cited as BY WHAT RIGHT?] *quoted in* GOVERNMENT BY JUDICIARY at 393.

13. Lusky Essay at 413. Certainly the framers of the Fourteenth Amendment had no intention of making the Court their "surrogate." In the 1866 debates, Charles Sumner stated, "[I]f words are used which seem to have no fixed signification, we cannot err if we turn to the framers. . . ." CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866), *quoted in* GOVERNMENT BY JUDICIARY at 372. That is confirmed by a unanimous Senate Judiciary Committee Report (Jan. 25, 1872) "signed by Senators who had voted for the Thirteenth, Fourteenth, and Fifteenth Amendments in Congress [declaring that] '[i]n construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended to be accomplished by those who framed it and the people who adopted it.' "

men of this persuasion would "interpret the Constitution to mean what it would have said if they, instead of the Founding Fathers, had written it."[14]

The claim that the Founding Fathers gave the Court a power of attorney to "adapt" the Constitution to changing exigencies was repeatedly dismissed by Justice Black; away, said he, with "rhapsodical strains, about the duty of . . . [the] Court to keep the Constitution in tune with the times. . . . The Constitution makers knew the need for change and provided for it" by the amendment process of article V,[15] to the mechanics of which, the Court has insisted the legislative bodies must rigorously conform.[16] Black could avouch the doughtiest apologist for judicial review, Hamilton, who stated in his No. 78 of *The Federalist*: "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves . . . and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act."[17]

Since Professor Lusky jumps off from what "the Founding Fathers intended," let us review what they had in mind. Having learned from history how a procession of dictators had betrayed democracies which entrusted them with power, the Founders stood in dread of power and meant to curb it by resort to a written, "fixed constitution."[18] As Philip Kurland explains:

A. AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES, preface at 2, 571 (1967). At about the same time, Thomas Cooley wrote, "The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time." T. COOLEY, CONSTITUTIONAL LIMITATIONS 68-69 (6th ed. 1890). One of the foremost advocates of broad libertarian rights in the 39th Congress, John Farnsworth of Illinois, stated on March 31, 1871, with respect to the Fourteenth Amendment, "Let us see what was understood to be its meaning at the time of its adoption." A. AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES 506 (1967). For similar utterances by: Senator Richard Yates of Illinois, *see id.* at 374; James Garfield of Ohio, *see id.* at 526, 528; Charles Willard of Vermont, *see id.* at 540; Senator Oliver Morton of Indiana, *see id.* at 622; William Lawrence of Ohio, *see id.* at 662.

14. Wall St. J., Aug. 28, 1978, at 10.

15. Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting), *quoted in* GOVERNMENT BY JUDICIARY at 101 n.9.

16. "It is not the function of courts or legislative bodies . . . to alter the method [for change] which the Constitution has fixed." Hawke v. Smith, 253 U.S. 221, 227 (1920). In the First Congress Elbridge Gerry, one of the Framers, stated, "The people" have directed a "particular mode of making amendments, which we are not at liberty to depart from. . . . Such a power [to alter] would render the most important clause in the Constitution nugatory." I ANNALS OF CONGRESS 503 (1789), *quoted in* GOVERNMENT BY JUDICIARY at 318.

17. THE FEDERALIST No. 78 (A. Hamilton) 509 (Mod. Lib. ed. 1941), *quoted in* GOVERNMENT BY JUDICIARY at 316.

18. R. BERGER, CONGRESS V. THE SUPREME COURT 8-16 (1969).

> The concept of the written constitution is that it defines the authority of government and its limits, that government is the creature of the constitution and cannot do what it does not authorize and must not do what it forbids. *A priori*, such a constitution could have only a fixed and unchanging meaning, if it were to fulfill its function. For changed conditions, the instrument itself made provision for amendment which, in accordance with the concept of a written constitution, was expected to be the only form of change. . . .[19]

The Founders' attachment to a "fixed constitution" is well attested;[20] first and last the Constitution was meant to *limit* delegated power, in Jefferson's words, "from mischief by the chains of the Constitution."[21] Apparently Professor Lusky rejects Madison's insistence that if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers."[22]

As conceived by the Framers the judicial role was poles removed from the "Court's new and grander conception of its own place in the governmental scheme."[23] Judicial review itself was an innovation, resting on the debatable dictum in *Dr. Bonham's Case*[24] and a few pre-1787 state cases, some of which excited stormy disapproval leading to removal proceedings.[25] Even in our own times, Learned Hand, Archibald Cox and Leonard Levy consider that the evidence that judicial review was contemplated by the Framers is inconclusive.[26] Under-

19. P. KURLAND, WATERGATE AND THE CONSTITUTION 7 (1978).

20. Madison stated in the Federal Convention that "it would be a novel & dangerous doctrine that a Legislature could change the constitution under which it held its existence." 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION of 1787, at 92-93 (1911). For similar remarks by Samuel Adams, *see* 2 WRITINGS OF SAMUEL ADAMS, 325 (H. Cushing ed. 1906); *see also* note 4 *supra*; G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 277 (1969).

21. 4 I. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 543 (2d ed. 1901), *quoted in* GOVERNMENT BY JUDICIARY at 252.

22. Lusky Essay at 404. This was likewise Jefferson's view. *See* GOVERNMENT BY JUDICIARY at 366-67.

23. *See* text accompanying notes 1-2 *supra*.

24. Thorne, *Dr. Bonham's Case*, 54 LAW Q. REV. 543 (1938); *see also* Hurtado v. California, 110 U.S. 516, 531 (1884).

25. The cases are discussed in R. BERGER, CONGRESS V. THE SUPREME COURT 36-44 (1969).

26. L. HAND, THE BILL OF RIGHTS 15 (1958); Alexander Bickel remarked that Hand was "unwilling to rest on the historical evidence." A. BICKEL, THE LEAST DANGEROUS BRANCH 15 (1962) Cox and Levy's views are discussed in GOVERNMENT BY JUDICIARY at 355 & n.16.

standably, Hamilton assured the Ratifiers that of the three branches "the judiciary is next to nothing."[27] James Bradley Thayer and Learned Hand justly observed that the judicial function was to *police* constitutional boundaries, to prevent the other departments from "overleaping" their bounds, not to interfere with the legislative or executive discretion *within* those bounds.[28] Judicial participation in legislative policy-making, let alone constitution remaking, was categorically rejected. It had been proposed to make the Justices members of a Council of Revision that would assist the President in exercising the veto power, on the ground that "laws . . . may be dangerous . . . and yet not be so unconstitutional as to justify the Judges in refusing to give them effect.[29] But Elbridge Gerry objected, "It was quite foreign from the nature of ye office to make them judges of the policy of public measures."[30] Nathaniel Gorham likewise considered that judges "are not to be presumed to possess any peculiar knowledge of the mere policy of public measures";[31] and Rufus King added that judges "ought not to be legislators";[32] John Dickinson cautioned that judges had "become by degrees the law giver[s]."[33] Then there is the fact, noted by Morton Horwitz, that "fear of judicial discretion had long been part of colonial political rhetoric,"[34] pungently expressed by Chief Justice Hutchinson of Massachusetts: "*the Judge* should never be the *Legislator*: Because, then the Will of the Judge would be the Law: and this tends to a State of Slavery."[35] To conclude, therefore, that the Framers

27. THE FEDERALIST No. 78 (A. Hamilton) at 504 (Mod. Lib. ed. 1937).

28. GOVERNMENT BY JUDICIARY at 305 (emphasis added). For additional historical material, *see* Berger on Kutler, *infra*, at n.102. The courts, said Oliver Ellsworth, were a "check" if Congress should "overleap their limits." 2 Elliot, *supra* note 22, at 445, *quoted in* GOVERNMENT BY JUDICIARY at 304.

29. James Wilson, *quoted in* 2 M. FARRAND, *supra* note 20 at 73, *quoted in* GOVERNMENT BY JUDICIARY at 301.

30. 1 Farrand, *supra* note 20, at 97-98; 2 Farrand at 75, *quoted in* GOVERNMENT BY JUDICIARY at 301.

31. 2 Farrand, *supra* note 20 at 73, *quoted in* GOVERNMENT BY JUDICIARY at 301.

32. 1 Farrand, *supra* note 20, at 108; *cf. id.* at 98, *quoted in* GOVERNMENT BY JUDICIARY at 302.

33. 2 Farrand, *supra* note 20 at 299, *quoted in* GOVERNMENT BY JUDICIARY at 302.

34. Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in 5 PERSPECTIVES IN AMERICAN HISTORY 287, 303 (1971), *quoted in* GOVERNMENT BY JUDICIARY at 306.

35. Horwitz, *supra* note 34, at 392, *quoted in* GOVERNMENT BY JUDICIARY at 307. For similar utterances, *see* Wood, *supra* note 20 at 304, 298. Hutchinson echoed Montesquieu, the oracle of the Founders: "[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be subject to arbitrary control, for the judge would then be the legislator." XXI MONTESQUIEU, THE SPIRIT OF THE LAWS, ch. 6 (1748).

made the Judges their "surrogate" for revision of the Constitution (after exluding them from policy making and carefully supplying the article V machinery for amendment) represents, with due deference, the veriest wishful thinking.

Being of a more philosophical bent than myself, Professor Lusky ascribes to me an intention to encompass far more than was my purpose.[36] My book addresses several aspects of the Fourteenth Amendment, no more. Whether the principles applicable thereto can be applied elsewhere is another matter. Given, as he notes, "Justice Harlan's irrefutable and unrefuted demonstration in dissent that the Fourteenth Amendment was not intended to protect the right to vote, much less to guarantee that all votes have equal weight,"[37] on what theory may the Court displace the framers' choices by its own "one person—one vote" doctrine? Mark that this posits *a clearly discernible legislative intention squarely reversed by the Court*, an arrogation of power to set aside unmistakable constitutional limits and to rule in place of the sovereign people. Lusky inveighs time and again against my "tunnel vision" reliance on the "original understanding" as a "useless and even destructive endeavor;"[38] but does he mean to apply such strictures to the Harlan demonstration, which led Harlan to declare: "[W]hen the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect."[39] Even an ardent apologist for the Warren Court, Judge J. Skelly Wright, averred that "the most important value choices have already been made by the framers of the Constitution," and that judicial " 'value choices' are to be made only within the parameters" of those choices.[40]

History, Lusky maintains, "is at best one factor," and he places more emphasis on "the practical effects that would ensue if [Berger's] prescription were followed."[41] Consider the Harlan suffrage example: though I have no love for weighting the rural redneck vote 10 to 1

36. "It is clear," states Lusky, that Berger "would undo" the judicial revisory power and repudiation of its limits, "with respect to the whole Constitution as amended, and not the Fourteenth Amendment alone." Lusky Essay at 408.

37. *Id.* at 406.

38. *Id.* at 410.

39. Oregon v. Mitchell, 400 U.S. 112, 202-03 (1970), *cited in* GOVERNMENT BY JUDICIARY at 330.

40. Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 777, 784, 785 (1971), *quoted in* GOVERNMENT BY JUDICIARY at 322.

41. Lusky Essay at 410.

against the urbanite, I like even less an arrogation of power to cure an undeniable evil. The end does *not* justify the means. In "a decent, democratic society," wrote Emile Zola, "good ends cannot be used to excuse bad means, if only because it is those who employ the means who decide which ends are good."[42] On the opposite view the Inquisition extirpated the Albigensians in the interest of a higher morality. With Washington, I hold, "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."[43] Consequently I cannot accept Professor Lusky's proposition that the legitimacy of judicial power "must turn on the single question whether it is less hazardous to societal welfare than any visible alternative."[44] That determination, as Zola noted,[45] cannot safely be left to those who would exercise additional power; it cannot be left to them to hold their own acts legitimate, for as Lord Chief Justice Denman held, "The practice of a ruling power in the State is but a feeble proof of its legality."[46]

In truth Lusky is torn between conflicting aspirations. He aligns himself with Professor Herbert Wechsler[47] and myself in rejecting the "notion that the Supreme Court can legitimately function as a continuing constitutional convention *enjoying the total freedom that such a convention, if regularly established, would possess*."[48] He is critical of "scholars who approve whatever innovations may from time to time seem desirable to a majority of the Justices, for 'modernization' of the Constitution . . . and then construct a constitutional rule adequate to serve as a major premise for the desired result,"[49] because this would make the Court "simply another legislative house,"[50] oblivious to the fact that this applies to his own constructs.[51] He observes that "[s]ome if not all of [the Justices] seem to recognize the constraint of nothing outside themselves, to follow no star except each one's conception of

42. Whitman, *Book Review*, N.Y. Times, Nov. 2, 1977, at 29.

43. 35 G. WASHINGTON, WRITINGS 228-29 (J. Fitzpatrick ed. 1940), *quoted in* GOVERNMENT BY JUDICIARY at 299.

44. Lusky Essay at 408, quoting BY WHAT RIGHT?, *supra* note 12, at 24.

45. *See* text accompanying note 42 *supra*.

46. Stockdale v. Hansard, 112 Eng. Rep. 1112, 1171 (Q.B. 1839), *cited in* GOVERNMENT BY JUDICIARY at 375.

47. Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

48. Lusky Essay at 411 (emphasis in original).

49. *Id.* at 430.

50. *Id.*

51. *See* notes 57, 67 and accompanying text *infra*.

the public welfare . . . ."[52] His objective is to formulate a principle that can "serve to defend the Court from the accusation that it has cast off all restraint [an accusation he himself makes][53] and set itself above the law,"[54] a theory "that will preserve the legitimacy of constitutional innovation by the Court, and hence preserve judicial review itself."[55] Although he agrees that the Court may not serve as a "constitutional convention,"[56]

> it does not follow that judicial constitution-making is intrinsically illegitimate. Rather, judicial overconfidence calls simply for insistent reminders that constitution-making by judges is not acceptable as standard practice, but is instead a last resort—usable only when the elected branches are not merely unwilling but for some reason unable to realize a basic national objective. . . .[57]

This paraphrases the "vacuum" theory: when the legislature fails to exercise the legislative power it descends on the Court. But such failure does not transfer the legislative power to the Court. John Adams' 1780 Massachusetts Constitution made the separation of power explicit, forbade each branch to exercise the power of another, and particularized that the "[judiciary shall] never exercise the legislative . . . powers . . . [so that this] may be a government of laws, and not of men."[58] The "vacuum" theory improbably posits that the Framers who denied the Justices a share of policy-making power in the veto process authorized a complete take-over if Congress failed to legislate! And where is the constitutional warrant for "constitution-making by judges"!

What are Lusky's own test of "legitimacy?" He fleetingly refers to "the single question whether [judicial review] is less hazardous to societal welfare than any visible alternative,"[59] and again to "rules based on societal necessity."[60] Certainly *Brown v. Board of Education*[61] represented no such consensus for the Court rebuffed Justice Jackson's plea to tell the people that it was "declaring new law for a new day,"[62] rightly fearing it would be suicidal. Not long since Chester Finn wrote that the issue of racial discrimination "has been fanned into the most

52. Lusky Essay at 433.
53. *See* text accompanying notes 1-2 *supra*.
54. Lusky Essay at 409, quoting BY WHAT RIGHT?, *supra* note 12.
55. Lusky Essay at 418.
56. *Id.* at 411.
57. *Id.* at 416-17.
58. MASS. CONST. of 1780, art. XXX, *cited in* 1 B. POORE 960, *cited in* GOVERNMENT BY JUDICIARY at 290. For additional materials, see Berger on Kutler, *infra*, at nn. 149-50.
59. Lusky Essay at 408, quoting BY WHAT RIGHT?, *supra* note 12, at 24.
60. Lusky Essay at 414.
61. 347 U.S. 483 (1954).
62. For the absence of such consensus, *see* Berger on Kutler n. 130, *infra*.

protracted, rancorous, and divisive blaze of the post-war era";[63] in the words of Philip Kurland, "The Court has moved faster than society is prepared to go."[64] The "consensus" exists only in the eyes of the Court and its zealous partisans. Were it demonstrable, it would collide with Hamilton's pronouncement that "even knowledge of [the people's] sentiments" can not warrant a departure from the Constitution prior to amendment.[65] And who is to decide whether judicial review "is less hazardous to societal welfare" but the Court, thus enabling it to confer power on itself, a boot-strap lifting test.

Professor Lusky has still other basic criteria for judicial power: First, "a national objective . . . inferable from . . . the known purposes of the Constitution."[66] Since the "known purpose" of the Fourteenth Amendment admittedly was to exclude suffrage from its ambit, the "one person-one vote" decision falls by his own test. Lusky's second test is "a comprehensible reason why the Court is better fitted than other organs of government to effectuate that objective."[67] Again a self-conferred power, for presumably Lusky means the Court rather than Congress to make that determination. But section 5 of the Amendment provides that "Congress shall have power to enforce by appropriate legislation the provisions of this article." In 1879 the Court held, "it is not said that the *judicial power* . . . shall extend to enforcing" the Amendment; "It is the power of Congress which has been enlarged,"[68] a consequence of the deep-seated distrust of the Court that followed the fugitive slave and *Dred Scott*[69] decisions.[70] "If either of these [aforesaid] elements is lacking," Professor Lusky states, "the Court's rule is an exercise of raw power."[71] By these tests the reapportionment and desegregation cases cannot stand.

Professor Lusky would plunge the Court into a boiling cauldron of racial tension on the theory that "the basic value of judicial review [is] the bridging of dangerous social schisms such as those resulting from race . . . that are too broad to be healed through majoritarian legisla-

63. GOVERNMENT BY JUDICIARY at 328, n.55; *see also* Berger on Miller at n. 57.
64. GOVERNMENT BY JUDICIARY at 328, n.55.
65. *Supra* note 22.
66. Lusky Essay at 414, quoting BY WHAT RIGHT?, *supra* note 12.
67. *Id.*
68. Ex parte Virginia, 100 U.S. 339, 345 (1879), *cited in* GOVERNMENT BY JUDICIARY at 221.
69. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
70. *See* GOVERNMENT BY JUDICIARY at 222; *see also* Berger on Kutler *infra*, at nn. 121-23.
71. Lusky Essay at 414, quoting BY WHAT RIGHT?, *supra* note 12, at 107.

tion . . . ."[72] He criticizes the "unwarranted failure" of the Court in the *Bakke* case "to resolve the conflict presented by 'reverse discrimination' " because it "can be expected to exacerbate rather than ease existing social tensions."[73] The fact, as he notes, that there were six opinions, that ultimately the decision was that of one "lone 'swing man,' "[74] suggests, however, that this is a political hot potato not fit for settlement by the litigation process. The Court may well draw back from deepening involvement in such a divisive political struggle in which assertion of black rights means displacement of rights, for example, gained by whites in the labor field by years of service, thereby fanning racial discord. It was precisely such ill-considered intervention by the Court in the slavery conflict that proved disastrous in *Dred Scott*.[75]

To this Lusky replies that on my analysis "both Court and Congress would be left powerless to satisfy . . . the national obligation to do what can be done to retrieve the century lost"[76] by the blacks by virtue of the Court's frustration of the guarantees of the privileges or immunities clause in the *Slaughter-House Cases*.[77] In the first place, there are widespread differences as to the scope of the "national obligation," even on the Court itself, as the badly split *Bakke* case attests. He himself condemns the post-1968 school desegregation doctrine because it has "led to grotesquely destructive results," and "wantonly . . . wreck[ed] a number of local public school systems and outrage[d] the communities they serve."[78] How can he call on the Court "to resolve deeply divisive conflicts"[79] when he is estranged by its solutions? To be sure, when the result conforms to his predilections, he has praised "the tremendously valuable work [the Court] . . . has done in the past third of a century;"[80] however, when it runs counter thereto, as in the post-1968 decisions, it constitutes "a bold revision of history,"[81] though not nearly of the same order of revisory magnitude as the 1954 desegrega-

72. Lusky Essay at 420.

73. *Id.* at 435.

74. *Id.* at 434.

75. Professor Wallace Mendelson says of Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), "Let that disaster stand for all time as a warning to judges who—unmindful of their proper role—attempt to impose extra-constitutional policies upon the community under the guise of interpretation." Mendelson Essay at 453.

76. Lusky Essay at 430-31.

77. 83 U.S. (16 Wall.) 36 (1873).

78. Lusky Essay at 424.

79. *Id.* at 433.

80. BY WHAT RIGHT?, *supra* note 12, at 6, *quoted in* GOVERNMENT BY JUDICIARY at 392.

81. Lusky Essay at 424.

tion decision.[82] If history is to be disregarded in the latter case, neither can it serve Professor Lusky's demands. Secondly, if the power was not granted, it cannot be summoned from the void. "Had the power of making treaties," Madison declared, "been omitted, however necessary it might have been, the defect could only be lamented, or supplied by an amendment of the Constitution."[83] Especially when the omission concerns matters the Tenth Amendment reserves to the States,[84] it cannot be judicially corrected on the plea that there is a "national obligation" to do so. "The constitution," Chief Justice Marshall held, "was not intended to furnish the corrective for every abuse of power which may be committed by the state governments."[85]

Account must be taken of several criticisms Lusky levels at my views. It is a mistake, he considers, to approach the construction of a constitutional provision "in precisely the same way as if it were interpreting a statute, [to ask] what were the written words intended to mean by those who employed them?"[86] Yet that was the criterion applied by the 1866 framers,[87] who are my central concern. That Madison insisted upon giving effect to such intention in order to safeguard our democracy, apparently carries no weight with Lusky,[88] though he acknowledges that Chief Justice Marshall would have agreed "that the Constitution should be applied in accordance with the intent of those who made it."[89] In fact Chief Justice Marshall so held.[90] Professor Lusky thinks to discredit the statutory analogy by remarking that "Berger cites three statutory interpretation cases, decided . . . in 1845, 1861, and 1903, and the seventh edition of Bacon's *Abridgment*, published in 1832."[91] The latter dates back to the mid-1700s and was familiar to the Founders. Professor John Hart Ely, a critic in Lusky's camp, recently wrote that "In interpreting a statute . . . a Court will obviously limit

82. *Cf.* Berger on Kutler, *infra*, at nn. 40, 60-62.

83. 2 ANNALS OF CONGRESS 1900-1901 (February 2, 1791), *quoted in* GOVERNMENT BY JUDICIARY at 381 n.32.

84. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

85. Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 563 (1830).

86. Lusky Essay at 404.

87. *See* note 13 *supra*.

88. Lusky Essay at 404-05.

89. *Id.* at 405.

90. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824). For a general discussion of these cases, see GOVERNMENT BY JUDICIARY at 378-79.

91. Lusky Essay at 404.

itself to a determination of the purposes and prohibitions expressed by or implicit in its language," and he concluded that "the Constitution is [not] different in this respect," in reliance on Marshall's assumption in *Marbury v. Madison* that "constitutional review involves merely the traditional judicial function of comparing one legally prescribed mandate with another to see if they conflict. . . ."[92] The matter need not rest on inference because the Founders, as Julius Goebel wrote, were accustomed to "resort to the accepted rules of statutory construction to settle the meaning of constitutional provisions."[93] References to such rules are found in the First Congress, which contained many Framers and Ratifiers.[94] Such rules, Justice Story averred, provide a "fixed standard" for interpretation of the Constitution,[95] without which a "fixed constitution" would be forever unfixed. Plainly the Founders viewed the task of constitutional construction as subject to the same limits as that of statutory interpretation. And surely it would be unreasonable to maintain that while courts must give effect to the intention of the legislature they are free to disregard the clearly discernible intention of the sovereign people, as the Court unmistakably has done with respect to suffrage and segregation.[96]

Professor Lusky reserves his greatest emphasis for the argument that the judicial decisions of the last 25 years are "irreversible,"[97] that "we cannot turn back the clock,"[98] that the "most lawless government or governmental measures will finally be accepted as legitimate,"[99] presumably after the fashion of ducal dynasties established by Renaissance condottieri—in the absence of a Constitution. He overlooks the Court's repudiation per Holmes and Brandeis of *Swift v. Tyson*,[100] in-

92. Ely, *Constitutional Interpretation: Its Allure and Impossibility*, 53 IND. L.J. 399, 402 n.11 (1978).

93. 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 120 (1971). Earlier Edward Corwin wrote that the Founders borrowed from the English the "numerous rules for the construction of written instruments . . . [for] the business of constitutional construction." Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 370-71 (1929).

94. 1 ANNALS OF CONGRESS 507, 517 (1834) (print bearing running title "History of Congress"). *See also* Berger on Miller *infra*, at nn. 23-26.

95. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 399 at 283 (1833). In THE FEDERALIST No. 78, Hamilton stated that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." THE FEDERALIST No. 78 (A. Hamilton) at 504 (Mod. Lib. ed. 1937).

96. *See* GOVERNMENT BY JUDICIARY, chs. 4-7.

97. Lusky Essay at 403.

98. *Id.* at 418.

99. *Id.* at 415.

100. 41 U.S. (16 Pet.) 1 (1842).

volving a much more debatable constitutional issue than "reapportionment," after the lapse of a century, branding it "an unconstitutional assumption of power by courts . . . which no lapse of time or respectable array of opinion should make us hesitate to correct."[101] Professor Lusky himself urges the "Justices to confess that the Court itself, because of its misinterpretation of the Fourteenth Amendment in the 1873 *Slaughter-House Cases* . . . bears primary responsibility for the nation's slowness in making good the national commitment to extirpation of the remnants of slavery. . . ."[102] What is it that exalts the alleged "acceptance" by the people of the recent twenty-five-year course of the Court above the hundred-year "acceptance" of the *Slaughter-House Cases* but the fact that he is convinced that the latter cases were wrong and the former "right."

The argument of "acceptance" is in fact unseaworthy. To argue that "the people at large have accepted the legitimacy of the basic decisions claiming enlarged judicial power"[103] flies in the face of the fact that the Court declined to tell the people that it was "declaring new law for a new day."[104] They were never told that the Court was "claiming enlarged judicial power." Instead, as Professor Felix Frankfurter wrote President Franklin Roosevelt, "People have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is *they* who speak and *not* the Constitution."[105] Acceptance, or in legal terminology, ratification, of assumed power, requires disclosure;[106] none was ever made.[107] Professor Lusky would substitute, for the exclusive article V

101. Erie Ry. Co. v. Tompkins, 304 U.S. 64, 79 (1938), *cited in* GOVERNMENT BY JUDICIARY at 297 n.56. Lusky states that the "most convincing example" of the acceptance and legitimation of "the most lawless" measure, is that the Constitution "defied the unanimity requirement imposed on the 1787 Convention by the Articles of Confederation and by the specific resolutions endowing most of the state delegations with their authority. . . . Berger's logic would have it that the whole United States government was illegitimate down to May 29, 1790, when the thirteenth ratification (by Rhode Island) came in . . . ." Lusky Essay at 415-16.

The Articles of Confederation could not bind the sovereign people, when they decided to accept a new constitution, notwithstanding that the draftsmen had exceeded their instructions. Ratification operates to legitimate the agent's action in excess of authority. Would that a segregation amendment had been sanctioned by a similar majority.

102. Lusky Essay at 427.

103. *Id.* at 413.

104. R. KLUGER, SIMPLE JUSTICE 681, 689 (1976), *cited in* GOVERNMENT BY JUDICIARY at 130.

105. ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 383 (M. Freedman, ed. 1967), *quoted in* GOVERNMENT BY JUDICIARY at 281 n.143.

106. GOVERNMENT BY JUDICIARY at 155 & n.93.

107. Grey comments on the Court's "resort to bad legislative history and strained read-

amendment machinery for change, judicial revision fortified by tacit acquiescence.[108] Usurpation would be legitimated by inertia, contrary to Hamilton's assurance that the representatives of the people were unauthorized to depart from the Constitution prior to an amendment.[109]

For generations jurisprudes, striving for scientific methodology, have searched for legal principles; Professor Lusky adheres to his own version of "neutral principles."[110] But for me, as for Ely, if a "[neutral principle] lacks connection with any value the Constitution marks as special it is not a constitutional principle and the Court has no business imposing it."[111] Most of the rationalizations of the Court's "new and grander" revisory role proceed from the tacit assumption that academe can start afresh and lodge the amendment power in the Court,[112] ignoring the fact that ours is a government by consent of the governed. As one of the most acute Founders, James Iredell, declared, "The people have chosen to be governed under such and such principles. They have not chosen to be governed or promised to submit upon any other."[113] Assertion of the power to revise the Constitution—never explicitly avowed by the Court—is but a product of the recent past, asserted by academe in order to justify the Court's revolutionary decisions.

After noting the "two seismic changes that have taken place in the last twenty years"[114] in shaping the Court's "new and grander"[115] conception of its role, namely, the Court's assertion of a power to "revise the Constitution,"[116] and to repudiate "the limits on judicial review,"[117] Professor Lusky observes that Berger "assumes that they are fully reversible and may indeed be wiped away if shown to be contrary to the original intention" of the Framers."[118] Why not? Is the Court any

ing of constitutional language to support results that would be better justified by explication of contemporary moral and political ideals not drawn from the constitutional text." Grey, *supra* note 7, at 706.

108. *See* GOVERNMENT BY JUDICIARY at 353 (discussing a similar view adopted by Charles Black).

109. *See* text accompanying note 17 *supra*.

110. Lusky Essay at 411-14.

111. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 949 (1973), *quoted in* GOVERNMENT BY JUDICIARY at 285.

112. Berger on Kutler, *infra* at n. 156.

113. 2 G. J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 146 (1857-1858), *quoted in* GOVERNMENT BY JUDICIARY at 295-96.

114. Lusky Essay at 407.

115. *Id.* at 408.

116. *Id.* at 406.

117. *Id.* To my surprise, Professor Lusky asserts that my book "ignores these two seismic changes," *id.* at 407, when my thesis is that these changes are without constitutional warrant.

118. *Id.* at 407-08.

more entitled to enlarge its own power than was President Nixon? Where was it empowered to "revise the Constitution"?

Turning now to Professor Lusky's practical argument: "Were we to follow the Berger recommendation with respect to desegregation, it is entirely likely that the huge and increasingly well-organized nonwhite minority would write finis to the open society."[119] Such a prophecy of doom cannot alter constitutional facts; judges are not authorized to revise the Constitution to forestall "civil disorder."[120] Nor should an overwhelming majority be threatened with *in terrorem* consequences if it demands judicial compliance with the Constitution. In fact, however, I did not, on *practical* grounds, insist on overruling the desegregation decision. To the contrary, I stated that it would

> be utterly unrealistic and probably impossible to undo the past in the face of the expectations that the segregation decisions, for example, have aroused in our black citizenry—expectations confirmed by every decent instinct. . . . But to accept thus far accomplished ends is not to condone the continued employment of the unlawful means.[121]

The fact that eggs cannot be unscrambled does not warrant continuing breakage. Lusky himself condemns the post-1968 decisions as "grotesquely destructive,"[122] but where he unwittingly makes his predilections the test of constitutionality, I sought for surer footing in the clearly discernible intention of the framers to leave control of suffrage and segregation to the states. We need to remember Marshall's caution: "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional."[123] Because the result is laudable, it does not follow that it is constitutional.

119. *Id.* at 413.

120. *Id.*

121. GOVERNMENT BY JUDICIARY at 412-13.

122. Lusky Essay at 424.

123. JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 190-91 (G. Gunther ed. 1969), *quoted in* GOVERNMENT BY JUDICIARY at 271; *see also*, text accompanying note 29 *supra*.

II. Comment on Professor Wallace Mendelson's Essay

Some important areas of agreement emerge from Professor Mendelson's essay:[1] The due process and equal protection provisions "have been savagely abused by judicial 'interpretation' ";[2] due process "long ago became a term of art,"[3] it meant in the Fourteenth Amendment what it meant in the Fifth; "to incorporate the words is to incorporate their traditional meaning, and no more," namely "a fair hearing";[4] natural law is concerned with "amorphous moral postulates," not "man-made legal rules";[5] the *Dred Scott* dictum was a "disaster" that should "stand for all time as warning to judges" against an "attempt to impose extra-constitutional policies upon the community under the guise of interpretation."[6]

More important for immediate purposes is that like Professor Lusky, who adverted to "Justice Harlan's irrefutable and unrefuted demonstration in dissent that the Fourteenth Amendment was not intended to protect the right to vote,"[7] Professor Mendelson holds that the Amendment "does not forbid suffrage discrimination,"[8] that the framers "made clear that their purpose was to exclude voter problems from the equal protection and related clauses of Section 1,"[9] and that "the Fifteenth Amendment made good the omission of suffrage rights in section 1."[10] But he does not pause to inquire how to reconcile the "activist" construction of the terms of the Amendment, the "one person— one vote" doctrine,[11] with such exclusion.

In *Government by Judiciary* I did *not* purport to write a treatise on how to ascertain, weigh and effectuate the legislative intention in *all* circumstances.[12] My focus was very narrow: if the control of suffrage was clearly left to the states the "one person, one vote" cases represent "an awesome exercise of power, an 180 degree revision. . . . That poses the stark issue whether such revisory power was conferred on the Court."[13] In other words, given a *clearly discernible* purpose, where

1. Mendelson Essay, *supra.*
2. Mendelson Essay at 446.
3. *Id.* at 453.
4. *Id. See* GOVERNMENT BY JUDICIARY at 193-214.
5. Mendelson Essay at 450.
6. *Id.* at 453.
7. Lusky Essay at 406.
8. Mendelson Essay at 452 (referring to § 2 of the Fourteenth Amendment).
9. *Id.* at 453.
10. *Id.*
11. Reynolds v. Sims, 377 U.S. 533 (1964).
12. *See* GOVERNMENT BY JUDICIARY at 284-86.
13. *Id.* at 8.

was the Court authorized to displace the framers' choices by its own? To this question Mendelson makes no clear answer but engages instead in a general discussion of section 1, though he acknowledges that the framers "made clear that their purpose was to exclude voter problems" from section 1.[14] Whatever the meaning of the terms of section 1, they cannot comprehend what the framers so plainly rejected.[15] If "[j]udicial edicts derived from standards not discernible in statute or Constitution is government by judges,"[16] even more clearly is that the case when such edicts proceed in the teeth of the framers' unmistakable intention. And if we give credit to Mendelson's concurrence that suffrage was excluded (my central thesis), on this score at least the Amendment does not "ree[k] of compromise,"[17] nor is it an "enigmatic basic law."[18]

Since the purpose of an ongoing debate is to clarify and narrow the issues, I shall now address some particulars relating to the terms of section 1. In several chapters I inquired what did the terms mean to the framers who employed them.[19] Due process, Mendelson agrees, was employed in a procedural, not substantive sense,[20] as is confirmed by the records of the 39th Congress which framed the Amendment.[21] As does Professor John Hart Ely,[22] Mendelson rejects the substantive content whereby the Court, by its own confession, perverted due process into an instrument of misrule.[23]

But he questions my view that the "privileges or immunities" clause " 'had [a] clearly defined and narrow compass' revealed in the 'rights . . . enumerated' in the Civil Rights Act of 1866."[24] He finds

14. Mendelson Essay at 453.

15. Former Solicitor General Robert Bork wrote: "If the legislative history revealed a consensus about segregation in schooling . . . I do not see how the Court could escape the choices revealed and substitute its own, even though the words are general and conditions have changed." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 13 (1971), *cited in* GOVERNMENT BY JUDICIARY at 214.

16. Mendelson Essay at 445.

17. *Id.* at 437.

18. *Id.* at 443.

19. *See* GOVERNMENT BY JUDICIARY, chs. 2, 3, 10, 11 & 12.

20. Mendelson Essay at 453.

21. *See* GOVERNMENT BY JUDICIARY at 201-14, citing the relevant portions of the CONG. GLOBE, 39th Cong., 1st Sess. (1865-1866) [hereinafter cited as GLOBE].

22. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 415-16 (1978).

23. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963), wherein the Court acknowledged its "abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise. . . ." *Id.* at 731. *See also* GOVERNMENT BY JUDICIARY at 258 n.39, 265-66.

24. Mendelson Essay at 446 (quoting GOVERNMENT BY JUDICIARY at 18, 36).

only "confusion . . . in the proceedings of the thirty-ninth Congress."[25] It is difficult to reconcile this with his statement that "Congress proposed the Fourteenth Amendment to achieve what in principle the 1866 Act sought to do," namely, to insure to blacks that "they were to have, in the words of the Act, 'full and equal benefit of all laws and proceedings *for the security of person and property*, as is enjoyed by white citizens,' "[26] which is what I demonstrated, adding that rights other than those enumerated were excluded. In place of my "narrow" meaning, Mendelson in effect substitutes no meaning at all, for he concludes that the clause "is non-justiciable, because it provides no judicially discoverable or manageable standards for adjudication,"[27] surely a paradoxical repetition of the century-old *Slaughter-House* feat of reducing the clause to a dead letter.

Since the " 'identity' between Act and Amendment" is pivotal, I begin with the proof. "Over and over in this debate" on the Amendment, Charles Fairman said, "[t]he provisions of the one are treated as though they were essentially *identical* with those of the other."[28] An ardent advocate of an "activist" reading, Howard Jay Graham, wrote that "virtually every speaker in the debate on the Fourteenth Amendment—Republican and Democrat alike—said or agreed that the Amendment was designed to embody or incorporate the Civil Rights Act."[29] Another devotee of a broad construction, Harry Flack, observed that "nearly all said it was but an incorporation of the Civil Rights Bill . . . there was no controversy as to its purpose and meaning."[30] For example, George Latham stated that "the 'civil rights bill' which is now a law . . . covers *exactly* the same ground as this amendment."[31] There were other confirmatory remarks, and so far as I could find, not one remark to the contrary. Consequently the Act is of cardinal importance for the meaning of the terms employed in the Amendment.

What did the Civil Rights Act seek to secure, and what did the Amendment "incorporate"? Originally, the bill provided

25. Mendelson Essay at 447.

26. *Id.* at 451 (emphasis added)(quoting Act of April 9, 1866, ch. 21, 14 Stat. 27).

27. Mendelson Essay at 451.

28. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN L. REV. 5, 44 (1949)(emphasis added), *quoted in* GOVERNMENT BY JUDICIARY at 22-23.

29. H. GRAHAM, EVERYMAN'S CONSTITUTION 291 n.73, *quoted in* GOVERNMENT BY JUDICIARY at 23 n.13.

30. H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 81 (1908), *quoted in* GOVERNMENT BY JUDICIARY at 23 n.13.

31. GLOBE, *supra* note 21 at 2883 (emphasis added), *quoted in* GOVERNMENT BY JUDICIARY at 23.

> [t]hat there shall be no discrimination in civil rights or immunities . . . on account of race . . . but the inhabitants of every race . . . shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase . . . real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishments . . . and no other.[32]

Thayer and others assured the Framers that "when those civil rights which are first referred to in general terms are subsequently enumerated, that enumeration precludes any possibility that general words which have been used can be extended beyond the particulars which have been enumerated."[33] The chairman of the House Judiciary Committee and manager of the bill, James Wilson, explained that the "civil rights and immunities" clause was very narrow in scope, saying that the words do not

> mean that in all things, civil, social, political, all citizens, without distinction of race or color shall be equal. . . . Nor do they mean that all citizens shall sit on juries, or that their children shall attend the same schools. These are not civil rights and immunities. . . . I understand civil rights to be simply the absolute rights of individuals, such as 'The right of personal security, the right of personal liberty, and the rights to acquire and enjoy property.'[34]

Notwithstanding, John Bingham, draftsman of the Amendment, protested that the "civil rights" phrase was "oppressive," that it would "embrace every right that pertains to a citizen as such" and strike down "every state constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen."[35] In short, he was opposed to striking down *all* racial discriminations, and at his insistence the "no discrimination in civil rights" clause was deleted, to obviate a "latitudinarian" construction going "beyond the specific rights named in the section."[36] How can we attribute to Bingham, who rejected "civil *rights* and immunities" because it was too "oppressive," an intention to incorporate in the Amendment's "*privileges* or immunities" the even broader construction urged by activists?

In support of his conclusion that the privileges or immunities clause is non-justiciable because it provides no discoverable standards,[37] Mendelson states that he is not "aware of any common law, or

32. Act of April 9, 1866, ch. 21, 14 Stat. 27. *See also* GLOBE, *supra* note 21, at 474.
33. *Id.* at 1151, *quoted in* GOVERNMENT BY JUDICIARY at 28.
34. GLOBE, *supra* note 21, at 1117, *quoted in* GOVERNMENT BY JUDICIARY at 27.
35. GLOBE, *supra* note 21, at 1291-93, *quoted in* GOVERNMENT BY JUDICIARY at 120.
36. GLOBE, *supra* note 21, at 1291-93, *quoted in* GOVERNMENT BY JUDICIARY at 122.
37. Mendelson Essay at 451.

other tradition or usage . . . that elucidates this inherently obscure and enigmatic terminology. It is in a word unintelligible."[38] He finds "no help—indeed only more confusion—in the proceedings of the 39th Congress."[39] No wonder. Three of the witnesses he summons were Democrats, two of whom, Rogers and Hendricks, were bent on discrediting every measure to ameliorate southern mistreatment of blacks.[40] Before examining his three Republican witnesses, let me attempt to supply the elucidation Mendelson failed to find.

The "privileges or immunities" clause, as the debates show, was taken from article IV, section 2 of the original Constitution,[41] and that in turn was derived from article IV of the Articles of Confederation.[42] The object of the latter was to secure "mutual friendship and intercourse among the people of the different states,"[43] and to that end the

> free inhabitants . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the *privileges of trade and commerce*, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State. . . .[44]

For the Founders a general provision such as "entitled to all privileges and immunities" was limited by the subsequent enumeration, as Madison made crystal-clear,[45] and as was reiterated in the 1866 de-

38. *Id.* at 446.

39. *Id.* at 447.

40. *See, e.g.*, GLOBE, *supra* note 21, at 1122, 2538. Senator Reverdy Johnson, a Democrat from Maryland, a border state, was more practiced and conciliatory, but it is safe to say that he dragged his heels. In any event, his statement that he did not understand the "effect" of the privileges or immunities clause, *Id.* at 3041, *quoted in* Mendelson Essay at 449, merely betrays ignorance of the explanations made to the Senate by Senator Trumbull. *See* notes 55-58 *infra*.

41. John Bingham, draftsman of the Amendment, stated that he had drawn the "privileges or immunities" clause from article IV, section 2 of the Constitution, which reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." GLOBE, *supra* note 21, at 1034, *cited in* GOVERNMENT BY JUDICIARY at 22; *see also* Senator Trumbull's views, *infra* note 56.

Article IV employed "privileges *and* immunities," whereas the Fourteenth Amendment used "privileges *or* immunities"; why the shift was made was not explained.

42. 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 12 (1911).

43. H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 111 (7th ed. 1963).

44. *Id.*, emphasis added.

45. "For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural or common than first to use a general phrase, and then to explain . . . it by a recital of particulars." THE FEDERALIST No. 41 (J. Madison) at 269 (Mod. Lib. ed. 1937). Earlier,

bates.[46] Consequently the antecedent provision secured equality only for the "privileges of trade and commerce" and the like. The "privileges and immunities" phraseology was borrowed by article IV of the Constitution; the Civil Rights Bill, as Senator Trumbull explained, sought to make the privileges theretofore available to out-of-state persons equally available to resident blacks.[47]

The article IV clause had been judicially construed in three cases, which were repeatedly cited in the 1866 debates. In *Campbell v. Morris*,[48] Judge Samuel Chase, before long appointed to the Supreme Court, stated on behalf of the Maryland court that the "privileges and immunities" of article IV had a "particular and limited meaning," that is "the peculiar advantage of acquiring and holding real as well as personal property, . . . that such property shall be protected and secured by the laws of the State, in the same manner as the property of the citizens . . . is protected. . . . It secures and protects personal rights."[49] On behalf of the Massachusetts court, Chief Justice Parker held in *Abbott v. Bayley*[50] that the article IV phrase confers a "right to sue and be sued," that citizens who go to a second state "cannot enjoy the right of suffrage," but "may take and hold real estate."[51]

The third case, *Corfield v. Coryell*,[52] decided by Justice Bushrod Washington on circuit, also clung to the commercial-property rights enumeration. Washington, however, expansively referred to all rights and privileges, after the style of the Articles of Confederation, even including the "right . . . to pursue and obtain happiness."[53] But he *decided* that an out-of-state citizen could not dredge for oysters in a sister state—surely an innocent pursuit of happiness. Nevertheless, Washington said, the transient could vote in the sister state, though, as the Supreme Court later held, and as *Abbott* earlier indicated, one could not retain citizenship in one state and vote in another.[54] Wash-

the same view had been stated in M. BACON, A NEW ABRIDGMENT OF THE LAWS OF ENGLAND, "Statutes" I(2)(7th ed. 1832).

46. For the statement of Martin Thayer, see text accompanying note 33 *supra*; see also the views of various congressmen in GLOBE, *supra* note 21, at 632, 662, 1124, 1159, 1293, 1836, *cited in* GOVERNMENT BY JUDICIARY at 31 n.40.

47. *See* GLOBE, *supra* note 21, at 475, 595-96, 600, 1757, *cited in* GOVERNMENT BY JUDICIARY at 41-42.

48. 3 H. & McH. 535 (Md. 1797).

49. *Id.* at 554, *cited in* GOVERNMENT BY JUDICIARY at 33-34.

50. 6 Pick. 89 (Mass. 1827).

51. *Id.* at 91, *cited in* GOVERNMENT BY JUDICIARY at 34.

52. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

53. *Id.* at 551-52, *cited in* GOVERNMENT BY JUDICIARY at 31-32.

54. Abbott v. Bayley, 6 Pick. 89, 91 (Mass. 1827), *cited in* GOVERNMENT BY JUDICIARY

ington's confusion of values—oysters no, voting rights yes—illustrates why dicta are entitled to little credit. Senator Lyman Trumbull, chairman of the Judiciary Committee and sponsor of the Civil Rights Bill, said of Washington's dictum, that "[t]his judge goes further than the bill" in including the "elective franchise."[55] And he said of *Corfield* and the other cases that they held that under the "privileges and immunities" of article IV, section 2 a citizen had "certain *fundamental* rights, such as the right to life, to liberty . . . ."[56] He identified the rights "*defined*" in section 1 of the bill as "*fundamental rights* belonging to every man as a free man," thus drawing those rights from article IV as read by the cases.[57] Bickel observed that "Radicals and Moderates alike—who spoke in favor of the bill were content to rest on the points Trumbull made. The rights to be secured by the bill were those specifically enumerated in section 1."[58]

In the House, Thayer, as we have seen,[59] assured the framers that the "enumeration precludes any possibility that general words which have been used can be extended beyond the particulars which have been enumerated."[60] Shellabarger spoke to the same effect.[61] The specific enumeration responded to the desire, made explicit by Senator John Sherman, to secure such rights to the freedmen, "defining precisely what they should be."[62] Later he stated that the bill "says that these men must be protected in certain rights, and so careful is its language that it goes on to define these rights, the rights to sue and be sued [etc.] . . ."[63]

Thus Mendelson's failure to find any "common law"[64] overlooks Trumbull's explanation that he sought to incorporate the meat of the cases and article IV, section 2 in the Civil Rights Bill, and William Lawrence's recognition that "the courts have by construction limited

at 34. This principle was later reiterated in Minor v. Happersett, 88 U.S. (21 Wall.) 162, 174 (1874), cited in GOVERNMENT BY JUDICIARY at 32 n.43.

55. GLOBE, *supra* note 21, at 475, *cited in* GOVERNMENT BY JUDICIARY at 33.

56. GLOBE, *supra* note 21, at 474-75 (emphasis added), *cited in* GOVERNMENT BY JUDICIARY at 29.

57. GLOBE, *supra* note 21, at 476 (emphasis added), *cited in* GOVERNMENT BY JUDICIARY at 29 n.31. It is what Trumbull thought the cases meant, not how we read them today, that is important. *See* Berger on Kutler, *infra* at 592, n.19.

58. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 13 (1955), *quoted in* GOVERNMENT BY JUDICIARY at 29 n.31.

59. *See* text accompanying note 33 *supra*.

60. GLOBE, *supra* note 21, at 1151, *quoted in* GOVERNMENT BY JUDICIARY at 28.

61. GLOBE, *supra* note 21, at 1293, *cited in* GOVERNMENT BY JUDICIARY at 170, 176-77.

62. GLOBE, *supra* note 21, at 42, *quoted in* GOVERNMENT BY JUDICIARY at 24.

63. GLOBE, *supra* note 21, at 744, *quoted in* GOVERNMENT BY JUDICIARY at 30.

64. Mendelson Essay at 446.

the words 'all privileges' [of article IV] to mean only 'some privileges.' "[65] So, too, the foregoing history quite plainly delineates the limited scope of the Act. Although Mendelson recognizes that "Congress proposed the Fourteenth Amendment to achieve in principle what the 1866 Act sought to do,"[66] he rejects in the "privileges or immunities" context the view that the "intended function [of the Amendment] was simply to incorporate the substance of the 1866 statute into the Constitution,"[67] notwithstanding it was undisputed that the two were meant to be *identical*. This he does in reliance on six witnesses, two of whom, Democratic *opponents* of both Act and Amendment, are not, under established principles, acceptable witnesses as to the legislative intention.[68] Mendelson also remarks that he failed to find "in the leading news journals of the day even a hint of evidence which suggests that the ratifying public thought the '*privileges*' clause was a shorthand reference to the civil '*rights*' legislation of 1866."[69] If no specific identi-

65. GLOBE, *supra* note 21, at 1835.

66. Mendelson Essay at 451.

67. *Id.* at 450.

68. *See* GOVERNMENT BY JUDICIARY at 157-65 ("Opposition Statements Examined").

69. Mendelson Essay at 450 (emphasis in original). Professor Mendelson's revised *Slaughter-House Cases* opinion incorporates as an appendix a survey of contemporary newspaper opinion, broken down into three categories: the radical Republicans, the Democrats, and the conservative-moderate Republicans. The Democrats "were trying to make the proposed amendment as obnoxious to the States as possible." Appendix at 460. It is a rule of construction that the views of opponents of a measure are entitled to no weight. GOVERNMENT BY JUDICIARY at 157 n.2, 160. For the radicals, the proposed amendment did not go far enough; it was " 'a feeble thing.' " Appendix at 456. It failed to "provide southern blacks with effective political power," *id.* at 458; civil rights and political rights were inseparable. *Id.* at 461. The omission of "political rights," later provided by the Fifteenth Amendment, *see* notes 7-10 *supra*, was explained in the Report of the Joint Committee on Reconstruction: "the States would not surrender a power they had exercised and to which they were attached," and therefore it was thought best to "leave the whole question with the people of each State." GOVERNMENT BY JUDICIARY at 84. It is true that the radical view of "civil rights" was "expansive," including both "political power" and "education." Appendix at 462. But that battle was lost. Chairman James Wilson assured the House that "civil rights" included neither political rights nor mixed schools. *See* text accompanying note 34 *supra*. The Civil Rights Act of 1866 was drawn in severely limited, "enumerated" terms. *See* notes 26-30 and accompanying text *supra*. Moreover, attempts to remove *all* distinctions were repeatedly rejected by the framers. *See* notes 88-90 and accompanying text *infra*. The disappointment of radical editors cannot cancel out the crystal-clear intention of the framers to give "civil rights" a limited meaning.

The radical press recognized that the Amendment was a "reenactment of the Civil Rights Act." Appendix at 457, 463, and the debates show that they were in fact deemed to be "identical." *See* note 28 and accompanying text *supra*. The Appendix suggests that "if 'civil rights' meant something more than the recently enacted Civil Rights Act it is difficult, if not impossible, to define precisely what this crucial term was thought to mean." Appendix at 461. In that case, the rule favors a construction which gives, rather than deprives, a term of meaning. *See* United States v. Classic, 313 U.S. 299, 316 (1941). Finally, reliance on

fication with the "privileges" clause may be found, the want was supplied by Flack's canvass of "speeches concerning the popular discussion of the Fourteenth Amendment," which led him to conclude that "the general opinion held in the North . . . was that the Amendment [including the privileges or immunities clause] embodied the Civil Rights Act,"[70] which was limited to enumerated rights.

It is time to turn to Mendelson's three Republican witnesses. Bingham, the principal drafter, stated that the "proposed amendment will supply" a want, "to do that by Congressional enactment which hitherto they have not had the power to do," namely, "to protect . . . the privileges and immunities of all the citizens of the Republic."[71] By this Bingham presumably had in mind the decision in *Kentucky v. Dennison*[72] which denied to the federal government "implied power to exercise any control over a state's officers and agencies."[73] George Miller of Pennsylvania observed, that section 5 of the Amendment "is requisite to enforce the foregoing sections . . . is not contested."[74] In this resides no "confusion"[75] as to the *scope* or meaning of "privileges or immunities." As Mendelson himself states, "in Congressman Bingham's view, the privileges or immunities and related clauses entailed no *new* constitutional prohibitions whatsoever; they merely authorized *congressional enforcement* of prohibitions already contained in the Constitution;"[76] more accurately, as Trumbull made plain, they made available to in-state black residents what article IV, section 2 theretofore conferred only on out-of-state white residents of a sister state.[77]

Next Mendelson cites Stevens: "[F]or him the theme of section 1 . . . was racial *equality*."[78] But it was the limited equality of the Act.

radical editorials ignores the fact, cited by Senator John Sherman while the Amendment was up for ratification, that "we defeated every radical proposition in it." GOVERNMENT BY JUDICIARY at 105. As Professor M. L. Benedict stated, "[T]he nonradicals had enacted their program with the sullen acquiescence of some radicals and over the opposition of many." *Id.* at 239. No editorials can diminish such facts.

70. M. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 153 (1908) *quoted in* GOVERNMENT BY JUDICIARY at 151-52.

71. GLOBE, *supra* note 21, at 2542, *quoted in* Mendelson Essay at 447.

72. 65 U.S. (24 How.) 66 (1860).

73. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1357 (1964), *cited in* GOVERNMENT BY JUDICIARY at 226. *See* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1860).

74. GLOBE, *supra* note 21, at 2511, *quoted in* GOVERNMENT BY JUDICIARY at 275; *see also* GLOBE, *supra* note 21, at 2765 (Senator Howard).

75. Mendelson Essay at 447.

76. *Id.* (emphasis in original).

77. GLOBE, *supra* note 21, at 600. *See* GOVERNMENT BY JUDICIARY at 41-42.

78. Mendelson Essay at 447 (emphasis in original).

After his introductory statement, "[t]his amendment . . . allows Congress to correct the unjust legislation of the States so far that the law which operates upon one man shall operate *equally* upon all." Stevens launched upon an enumeration which parallels that of the Act:

> Whatever law punishes a white man for a crime shall punish the black man precisely in the same way. . . . Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever laws allow the . . . white man to testify in court shall allow the man of color to do the same.[79]

Manifestly he was recapitulating its stated purpose to give "equal benefit of all laws and proceedings for security of *person and property*, as is enjoyed by white men."[80] That he had no intention of repudiating his confreres' emphasis on the *enumerated* rights of the Civil Rights Act is evidenced by his closing remark, "Your civil rights bill secures the same thing."[81] And it is confirmed by his summation of the Amendment, stating that he had hoped to free our institutions "from *every vestige of* . . . *inequality* of rights . . . [so] that *no distinction* would be tolerated. . . . [But] [t]his bright dream has vanished,"[82] proving, as Fessenden said in the Senate, impossible of realization.[83]

Finally, Senator Howard, who introduced the proposed amendment in the Senate, Mendelson asserts, "differed" from Bingham and Stevens "concerning the nature of the prohibitions Congress would have power to enforce against the states."[84] Howard correctly noted that the *Supreme Court* had never "undertaken to define either the nature or the extent of the privileges and immunities thus guaranteed [by article IV]. . . . But we may gather some intimation of what probably will be the opinion of the judiciary by referring" to *Corfield v. Coryell*.[85] After reading therefrom, Howard "added the personal rights guaranteed . . . by the first eight amendments of the Constitution,"[86] none of

79. GLOBE, *supra* note 21, at 2459 (emphasis in original), *quoted in* Mendelson Essay at 448.

80. Act of April 9, 1866, ch. 21, 14 Stat. 27 (emphasis added).

81. GLOBE, *supra* note 21, at 2459, *quoted in* GOVERNMENT BY JUDICIARY at 172.

82. GLOBE, *supra* note 21, at 3148 (emphasis added), *quoted in* GOVERNMENT BY JUDICIARY at 173. Stevens also stated: "This . . . is not all that the Committee [on Reconstruction] desired. It falls far short of my wishes, but . . . it is all that can be obtained in the present state of public opinion." GLOBE, *supra* note 21, at 2459.

83. *Id.* at 705, *quoted infra* at pp. 559-560.

84. Mendelson Essay at 448.

85. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). *See* text accompanying notes 52-55 *supra*.

86. GLOBE, *supra* note 21, at 2765, *quoted in* Mendelson Essay at 449.

which had been mentioned in any of the three cases,[87] and which were added by the First Congress and were of entirely different provenance from the privileges and immunities clause of article IV. As to my central concern, suffrage, there were no differences, for Howard said, "The right of suffrage is not, in law, one of the privileges or immunities thus secured" by "the proposed amendment."[88]

From the foregoing remarks Mendelson gathers that "the chief sponsors of the proposed amendment were at odds as to the meaning of the privileges or immunities clause. . . . The fact is that, apart from what we have just quoted, there was virtually no discussion of this provision in the Congress that proposed it."[89] Presumably Mendelson confines himself to the Amendment, because the term "civil rights and immunities" was amply discussed in the concurrent debates on the Civil Rights Act, and it was made plain that it did *not* include suffrage.[90] Having settled the meaning of "privileges and immunities" in those debates, during the very same session and on a parallel track, as it were, the framers justifiably could take for granted that the terms of the Amendment were not being used in a different and new sense.[91] After Howard spoke, Senator Poland explained that the clause "secures nothing beyond what was intended by the original provision in the Constitution,"[92] *i.e.*, article IV, a tie-in that others had made earlier. Senator Doolittle echoed these remarks.[93] When the Amendment was returned to the House, George Latham stated, "The civil rights bill . . . covers exactly the same ground as this amendment,"[94] and Henry Van Aernam of New York said the Amendment gives "constitutional sanctions and protection to the substantial guarantees of the civil-rights bill."[95]

87. Campbell v. Morris 3 H. & McH. 535 (Md. 1797); Abbott v. Bayley, 6 Pick. 89 (Mass. 1827); and Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). *See* text accompanying notes 48-57 *supra*.

88. GLOBE, *supra* note 21, at 2766.

89. Mendelson Essay at 450.

90. Senator Hendricks observed, "I have not heard any Senator accurately define, what are the rights and immunities of citizenship." GLOBE, *supra* note 21, at 3039-40, *quoted in* Mendelson Essay at 449. They had been defined in connection with the Civil Rights Act of 1866 by Senator Trumbull. *See* text accompanying notes 56-58 *supra*; *see also* text accompanying notes 33-36 *supra*.

91. For discussion of *in pari materia*, see note 113 *infra*. Where terms have been given a meaning in a prior act that is *pari materia*, that meaning will be given to the terms in a later act. Reiche v. Smythe, 80 U.S. (13 Wall.) 162, 165 (1871). This is equally important authority for what otherwise rests on argument; it is equally important for equal protection. *See* Berger on Alfange n.99.

92. GLOBE, *supra* note 21, at 2961, *quoted in* GOVERNMENT BY JUDICIARY at 148-49.

93. GLOBE, *supra* note 21, at 2896, *cited in* GOVERNMENT BY JUDICIARY AT 149.

94. GLOBE, *supra* note 21, at 2883, *quoted in* GOVERNMENT BY JUDICIARY at 150.

95. GLOBE, *supra* note 21, at 3069, *quoted in* GOVERNMENT BY JUDICIARY at 150.

Given Mendelson's view that "Congress proposed the Fourteenth Amendment to achieve what in principle the 1866 Act sought to do;" namely, to insure that blacks would "have, in the words of the Act, 'full and equal benefit of all laws and proceedings for security of person and property,' "[96] and the unanimity respecting the *identity* of Act and Amendment, more than Howard's casual remark is needed to cancel out the meaning the leadership had attached to privileges and immunities.

Mendelson considers that the phrase "privileges or immunities of citizens of the United States" would be a strange, irrational way of referring to the "rights" covered by that legislation [the Act]. The making of contracts, the acquisition and conveying of property, for example, are state-law matters that have nothing to do with national citizenship.[97] In this Mendelson follows the reasoning of the *Slaughter House Cases*.[98] But the evidence gathered from the debates in *Government by Judiciary* demonstrates beyond cavil that the term "citizenship of the United States" was added to the Fourteenth Amendment merely to insure that a black would be a citizen, and to insure that a citizen of a state could claim the guaranteed rights in that dual capacity, not to take away with one hand what had been so painstakingly given by the other.[99] And that conclusion is confirmed by the continued references to the fact that the Amendment conferred the *same* rights as did the Act.

We "cannot rightly prefer" a meaning, the Supreme Court declared, "which will defeat rather than effectuate the constitutional purpose,"[100] as Mendelson notes, "to constitutionalize" the Act.[101] The "standards," in my judgment, are readily discoverable in the "identical" Civil Rights Act, where Justice Field and his three concurring dissenters experienced no difficulty in discovering them 100 years ago.[102] But whatever the meaning of "privileges or immunities," be it broad or

96. Mendelson Essay at 451.

97. *Id.* at 450.

98. 83 U.S. (16 Wall.) 36 (1872).

99. To the evidence gathered in *Government by Judiciary* at 37-51 (chapter entitled "The 'Privileges or Immunities of a Citizen of the United States' ") add Senator Howard's statement that "citizens of the United States [are] . . . entitled, as citizens to all the privileges and immunities of citizens in the several States." GLOBE, *supra* note 21, at 2765.

100. United States v. Classic, 313 U.S. 299, 316 (1941).

101. Mendelson Essay at 450.

102. "What, then, are the privileges and immunities which are secured against abridgment by State legislators? In the first section of the Civil Rights Act Congress has given its interpretation of these terms. . . ." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 96 (1872) (Field, J. dissenting).

narrow, it could not include suffrage, because Mendelson agrees that the Fourteenth Amendment "does not forbid suffrage discrimination,"[103] and that is my central proposition.

What Mendelson fails to find in the privileges or immunities clause he locates in the equal protection clause. Not that he has shaken down his doubts. He begins, "[I]t may be that the equal protection clause . . . is too obscure for judicial enforcement" because "classification is indispensable to the legislative process. The equal protection clause, then, must have a *narrower meaning* than its bare words may suggest."[104] This narrower meaning he finds in the fact that to resolve doubts as to the "constitutionality" of the Civil Rights Act—"to constitutionalize it"—"Congress proposed the Fourteenth Amendment to achieve what the 1866 Act sought to do," namely, to give blacks "in the words of the Act, 'full and equal benefits of all laws and proceedings for security *of person and property*, as is enjoyed by white citizens.' "[105] Mendelson reads this, however, as "more than an intimation of equal treatment for all races," and distills "a declaration that the laws of a state shall be the same for each and every race; that all persons regardless of race shall stand equal before the law; and that no state shall classify or discriminate on grounds of race."[106] What begins as a "narrower meaning" has speedily burgeoned into a full-blown one. Yet he himself states that the "racial equality which [the Act] explicitly mandates in *contractual and conveyancing* matters is covered presumably by the equality clause of the amendment";[107] the "ideal of equality" is adumbrated "*only partly* in the Civil Rights Act of 1866."[108] Thus he would extract from a statute, "constitutionalized" by the Amendment, which carefully restricts "equality" to "contractual and conveyancing matters," an across-the-board grant of "equality" which, by Mendelson's own admission, the framers rejected in the field of suffrage.[109] All that the Act prohibited was discrimination with respect to the rights there *enumerated*; and it was these rights to which they afforded "equal protection."

Mendelson makes no reference to my demonstration that throughout the debates on the Civil Rights Bill, the framers referred interchangeably to "equality," "equality before the law" and "equal

103. Mendelson Essay at 452.
104. *Id.* at 451 (emphasis added).
105. *Id.*
106. *Id.* at 451-52.
107. *Id.* at 450 (emphasis added).
108. *Id.* at 448 (emphasis added).
109. *See* text accompanying notes 7-9 *supra*.

protection" but always in the circumscribed context of the rights enumerated in the bill. Shellabarger's remarks in the House are illustrative: "Whatever rights as to each of these enumerated civil (not political) matters the State may confer on one race . . . shall be held by all races in equality. . . . It secures . . . *equality of protection in those enumerated civil rights*. . . ."[110] Bickel, having searched the debates, concluded that the Moderate leadership, which prevailed,[111] had in mind a "limited and well-defined meaning . . . a right to equal protection in the literal sense of benefitting equally from the laws for the security of person and property."[112] Were there nothing but the doctrine of *in pari materia*,[113] it would be necessary to show that "equal protection" had taken on a new and uncircumscribed meaning when it was transplanted to the Amendment. There is in fact hard evidence that its meaning was to remain restricted. In an early version of the Amendment, provision was made for *both* "the same political rights and privileges *and* . . . equal protection in the enjoyment of life, liberty, and property,"[114] evidence that "equal protection" was not meant to comprehend "political rights," as Shellabarger had earlier made explicit.[115] When the "political rights" phrase was deleted, the deletion manifested an intention to exclude "political," and a fortiori, unmen-

110. GLOBE, *supra* note 21, at 1293 (emphasis added), *quoted in* GOVERNMENT BY JUDICIARY at 170.

111. This is the view of a Reconstruction study by M.L. BENEDICT, A COMPROMISE OF PRINCIPLE (1975), discussed in GOVERNMENT BY JUDICIARY at 237-38.

112. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56 (1955), *quoted in* GOVERNMENT BY JUDICIARY at 170 n.20. Though Senator Howard stated that the equal protection clause "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of person to a code not applicable to another," he went on to state the Civil Rights Act enumerations: "It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over a white man. Is it not time that we extend to the black man . . . the poor privilege of the equal protection of the law." GLOBE, *supra* note 21, at 2766. It should be noted that: (1) "fundamental rights" were the code words for those rights enumerated in the Civil Rights Act; (2) Howard explicitly excluded suffrage from his "all class legislation," and (3) he stamped equal protection as a "poor privilege," a label that is incompatible with full scale equality.

113. M. BACON, A NEW ABRIDGEMENT OF THE LAWS OF ENGLAND, "Statute," I(3) (3d ed. 1768), long ago stated, "If divers Statutes relate to the same thing, they ought to be all taken in consideration in construing any one of them"; "all acts in *pari materia*, are to be taken together, as if they were one law." Particularly should this be the case where both were enacted at the same session and dealt with the same subject matter, so that familiarity with the terms and meaning of the prior act may be presumed. *See also* United States v. Freeman, 44 U.S. (3 How.) 556, 564 (1845).

114. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 31 (1955) (emphasis added) *cited in* GOVERNMENT BY JUDICIARY at 171.

115. *See* text accompanying note 110 *supra*.

tioned rights from the scope of the Amendment. Then there is the evidence that repeated efforts to abolish *all* distinctions were rejected,[116] epitomized by Senator Fessenden, the chairman of the Joint Committee on Reconstruction: "We cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions,"[117] a failure also sadly acknowledged in Thaddeus Stevens' comment on the Amendment.[118]

The narrow compass of the Civil Rights Act is so clear that if, as Mendelson correctly holds, the Fourteenth Amendment was meant "to achieve what in principle the 1866 Act sought to do,"[119] there is no room for a reading of "equal protection of the laws" to mean across-the-board equality. Confirmation is furnished by Mendelson himself. The Amendment, he notes,

> was not enforced in the North. It was soon found too revolutionary, too subversive of accepted ways of life to be enforced in the South without troops. Yet extended military occupation was out of the question. When that ended by mutual consent, the Fourteenth Amendment became with respect to blacks little more than a tabled promise.[120]

It is more reasonable to conclude that a promise "too revolutionary, too subversive of accepted ways of life" was never made; for, as George Julian, a leading Radical, stated in the House, "The real trouble is we hate the Negro,"[121] a statement also made by others.[122] "On one basic issue," Mendelson observes, "North and South were largely in agreement: blacks were generally considered inherently inferior beings."[123] To conclude that the North nevertheless was ready to make a "prom-

116. GOVERNMENT BY JUDICIARY at 163-66.

117. GLOBE, *supra* note 21, at 705, *quoted in* GOVERNMENT BY JUDICIARY at 99.

118. *See* note 82 and accompanying text *supra*.

119. Mendelson Essay at 451.

120. *Id.* at 443. By "mutual consent," Mendelson refers to the malodorous Hayes-Tilden deal. "There seems no doubt," wrote Samuel Eliot Morison, "that a deal was made by the Republicans with Southern Democratic leaders, by virtue of which, in return for their acquiescence in Hayes' election, they promised on his behalf to withdraw the garrison and to wink at non-enforcement of Amendment XV [*sic*] guaranteeing civil rights to the freedmen. The bargain was kept on both sides." S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 333-34 (1965). In plain words, the North turned the blacks over to the tender mercies of the recalcitrant South.

121. GLOBE, *supra* note 21, at 257, *quoted in* GOVERNMENT BY JUDICIARY at 91.

122. *See, e.g.*, GLOBE, *supra* note 21, at 257, 739, 911, 2799, 2948; *see also* GOVERNMENT BY JUDICIARY at 13.

123. Mendelson Essay at 441. For similar remarks by other scholars, *see* W. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION 285-86 (1963); D. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN, 202, 252 (1970); *see also* other commentators cited in GOVERNMENT BY JUDICIARY at 12-13 n.39.

ise" of across-the-board equality reads back into the minds and hearts of the framers the somewhat more enlightened views of our times; and it is contrary to statements by some of the framers who voted for the Amendment that they were not prepared to go beyond the rights granted by the Civil Rights Act.[124]

The congressional discussion of the Fourteenth Amendment, Mendelson remarks, did not "address the problem of racial segregation."[125] The reason, as Bickel explained, was that "[i]t was preposterous to worry about unsegregated schools, for example, when hardly a beginning had been made at educating Negroes at all and when obviously special efforts, suitable only for Negroes would have to be made."[126] Even so, Chairman Wilson felt constrained to assure the House that the Civil Rights Bill did not mean that black "children shall attend the same schools. These are not civil rights and immunities."[127] And repeated efforts to ban segregated schools in the District of Columbia, where Congress did not have to yield to State prejudices, came to naught.[128]

Finally, there is Mendelson's reference to "that unique experiment in government by judges called Warren Court activism."[129] He lists a string of idiosyncratic decisions, explained in opinions that grew "more and more devious, sloganistic and directed to the human thirst for fairy tales . . . [the] purpose [being] to obscure (for lesser minds) a raw exercise of judicial fiat. Make-believe, it seems, is activism's concession to the Rule of Law."[130] Is it for this that we need government by judiciary?

124. *See also* text accompanying notes 60-63 *supra*. *See* GOVERNMENT BY JUDICIARY at 124-25, 170-71.

125. Mendelson Essay at 446, n.51.

126. R. KLUGER, SIMPLE JUSTICE 654 (1976), quoting from a cover letter accompanying the legislative history of the Fourteenth Amendment which Bickel had compiled in the course of his research while serving as Justice Frankfurter's law clerk, *cited in* GOVERNMENT BY JUDICIARY at 100.

127. *Quoted supra* at n.34; *see* Berger on Kutler, *infra* at pp. 597-98.

128. *See* R. KLUGER, SIMPLE JUSTICE, 635 (1976); Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1085 (1956); and GOVERNMENT BY JUDICIARY at 123-28. In a bitter critique of my book, Paul Brest agrees that "the nation was not ready to eliminate" school segregation in the 1860s." N.Y. Times, Dec. 11, 1977 (Book Rev. Section). *See* Berger, *Academe v. The Founding Fathers*, Nat'l Rev., Apr. 14, 1978, at 468, 470.

129. Mendelson Essay at 443.

130. *Id.* at 440-41.

III. Comment on Professor Henry J. Abraham's Essay

Professor Abraham's attempt to fashion some "limits" on the current grandiose conception of the judicial role[1] discloses the all but insuperable difficulty of the task. Although it is gratifying to find myself in agreement with him at many points, the ongoing debate will be advanced by dwelling on our disagreements.

His essay, to my mind, is strewn with internal contradictions, with attempts to reconcile the irreconcilable. Thus the framers of the Fourteenth Amendment "specifically rejected its application to segregated schools and the franchise" and left suffrage " 'with the States' ";[2] nevertheless "the basis and spirit for its enactment rendered constitutionally permissible" the desegregation decision, *Brown v. Board of Education*.[3] How is a specific exclusion of segregated schools from the Amendment to be reconciled with the view that the "basis and spirit" of the Amendment authorized the decision that it outlawed segregation? So too, if article III implicitly authorizes the judiciary "periodically [to revise], even [revolutionize], the Constitution,"[4] it cannot be that judges are merely "appointed to 'defend the Constitution,' not to revise it."[5] If the judiciary was not "empowered to act as a superlegislature,"[6] even more clearly it is not empowered to act as a "continuing constitutional convention."[7] For the process of amendment was reserved by article V exclusively to the people themselves,[8] and then only by the procedures

1. Abraham Essay, *supra*.

2. *Id.* at 467-68. *See* text accompanying note 57 *infra*.

3. Abraham Essay at 480 (citing Brown v. Board of Educ., 347 U.S. 483 (1954)). Repeatedly Abraham stresses "invocation of the spirit as well as the letter of a constitutional provision." *Id.* at 478. *See id.* at 481. If, as he agrees, segregation and suffrage were excluded by the framers, *that* position represents "the spirit" of the Amendment. Beyond that, Hamilton rejected the argument that the courts were empowered to "construe the laws according to the *spirit* of the Constitution." THE FEDERALIST No. 81, at 524 (A. Hamilton) (Mod. Lib. ed. 1937) (emphasis in original), *quoted in* R. BERGER, GOVERNMENT BY JUDICIARY at 294 (1977).

4. Abraham Essay at 482.

5. *Id.* at 485.

6. *Id.* at 482 (referring to proposals such as that advanced by Professor Forrester in Forrester, *Are We Ready for Truth in Judging?* 63 A.B.A.J. 1212 (1977)).

7. J. BECK, THE CONSTITUTION OF THE UNITED STATES (1922), *quoted in* GOVERNMENT BY JUDICIARY at 2. Compare Professor Levy's statement that the "Court is and must be for all practical purposes a 'continuing constitutional convention' in the sense that it must keep updating the original charter by reinterpretation." L. LEVY, AGAINST THE LAW 29-30 (1974), *quoted in* GOVERNMENT BY JUDICIARY 2 n.5.

8. Berger on Lusky at 535, n.17. Elbridge Gerry, one of the most important framers, stated: "The people [have directed] a particular mode of making amendments, which we are not at liberty to depart from . . . . Such a power [to alter] would render the most important

there mandated.[9] Ours is still a government by consent of the governed; change requires consent. One of the most penetrating advocates of judicial review, James Iredell, later a Justice of the Supreme Court, averred: "The people . . . have chosen to be governed under such and such principles. They have not chosen to be governed or promised to submit upon any other."[10]

Again, Abraham perceives that "our constitutional democracy, based upon majoritarian rule with due regard for minority rights [as spelled out in the Constitution], does not shroud the judicial branch with the mantle of Platonic guardians,"[11] that the "primary salient fact of American constitutionalism" is "that lawmaking is emphatically the province of the legislative branch, . . . laws are designed to be made by the people's duly elected representatives" who "are replaceable via the electoral process."[12] He therefore agrees that "the judicial branch has indeed been guilty of engaging in vital aspects of governmental policy formation that are constitutionally delegated to . . . the legislature."[13] The judges, he says, "must resolutely shun prescriptive policymaking";[14] they must have "a resolute commitment to an abjuring both of decision making based upon personal philosophical commitments and value judgments," of "reach[ing] out [to] settle issues that may well require determination but which have not been resolved by the people's elected representatives."[15] With all this I heartily concur. How do these principles fare in application?

He defends what he himself terms a "double standard," differentiating between the Court's approach to "economic-proprietarian" legislation and "legislative . . . action affecting fundamental civil rights and liberties."[16] It would be "libertarian suicide," he considers, to transfer "the judicial guardianship of our basic civil rights and liberties to either the legislative or the executive or both,"[17] overlooking that judicial so-

clause of the Constitution nugatory." 1 ANNALS OF CONG. 503 (Gales & Seaton eds. 1834) (Running title: *History of Congress*).

9. It is not the function of courts or legislative bodies, national or state, to alter the method [for change] which the Constitution has fixed." Hawke v. Smith, 253 U.S. 221, 227 (1920). *See* GOVERNMENT BY JUDICIARY at 316-19.

10. 2 G. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 146 (1857-1858), *quoted in* GOVERNMENT BY JUDICIARY at 295-96.

11. Abraham Essay at 481. For a discussion of minority rights, see Berger on Kutler, *infra*, at 605, n.n.112-18.

12. Abraham Essay at 472-73.

13. *Id.* at 472.

14. *Id.* at 481.

15. *Id.* at 479.

16. *Id.* at 475.

17. *Id.* at 481.

licitude for civil liberties bloomed very late indeed.[18] He thus assumes that such "guardianship" was vested in the judiciary without explicitly identifying the source of that grant.[19] The historical records show, however, that the Framers conceived the role of the judiciary in very limited terms, certainly not as the maker of the policy,[20] as Abraham recognizes. In my comment on Professor Lusky's essay I briefly summarized the facts showing that judicial review was an anxiously regarded innovation so that Hamilton was constrained to assure the Ratifiers that of the three branches "the judiciary is next to nothing."[21] The judiciary, as Abraham recognizes, were merely to police the constitutional boundaries, to assure that the other branches did not "overleap" their bounds, not to exercise the legislative discretion *within* those boundaries.[22] Hamilton flatly stated that judges could be impeached for "usurpations on the authority of the legislature."[23] Non-exercise of its power by the legislature was not made an excuse for a judicial takeover. The judiciary, the Massachusetts Constitution of 1780 drafted by John Adams made explicit, was never to exercise legislative power.[24]

The Court's belated and gingerly approach to civil liberties was derived from its disallowance of economic regulation under the "liberty of contract" slogan drawn from the due process clause.[25] Economic due process is now admittedly discredited;[26] and it has not been demonstrated that "liberty" was placed on higher ground in the due process clause than "life" and "property." They all stand on a par. Judge Learned Hand remarked that the Framers would have regarded the current reading of the Fifth Amendment as "constituting severer restrictions as to Liberty than Property" as a "strange anomaly."[27]

18. Henry Steele Commager said of the pre-1937 Court that the record "discloses not a single case, in a century and half, where the Supreme Court has protected freedom of speech [and] press . . . against Congressional attack." Commager, *Judicial Review and Democracy*, 19 VA. Q. REV. 417, 428 (1943), *quoted in* GOVERNMENT BY JUDICIARY at 332. *See also* Kutler Essay at 512-13.

19. But Abraham hastens to add: "That does not mean, however, that the judiciary is or should be empowered to govern." Abraham Essay at 481. The correlative of a "guardianship," however, is that the ward is without power of self-government.

20. Berger on Lusky at 535-36. *See also* text accompanying note 83 *infra*.

21. THE FEDERALIST No. 81, at 504 (A. Hamilton) (Mod. Lib. ed. 1937).

22. GOVERNMENT BY JUDICIARY at 305; Berger on Lusky at n.28.

23. THE FEDERALIST No. 81, at 526-27 (A. Hamilton) (Mod. Lib. ed. 1937), *quoted in* GOVERNMENT BY JUDICIARY at 294.

24. MASS. CONST. of 1780, art. XXX, *quoted in* GOVERNMENT BY JUDICIARY at 250 n.5. *See also* T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA III (Peden ed. 1954).

25. GOVERNMENT BY JUDICIARY at 269-71.

26. *Id.* at 265-66.

27. *Id.* at 267, *quoting* L. HAND, THE BILL OF RIGHTS 50.

"There is no constitutional basis," he averred, "for asserting a larger measure of judicial supervision over" liberty than property.[28] Professor Stanley Morrison justly observed that the difference merely represents "the subjective preferences or convictions of the individual judge."[29] Interference with libertarian legislation (and *a fortiori*, constitutional alteration) cannot rest on due process, for Hamilton declared, reflecting centuries of English and colonial history, that "[t]he words 'due process' . . . can never be referred to an act of the legislature"—they apply "only" to proceedings in courts;[30] that is, due process is procedural, never substantive. Nor can judicial libertarianism be grounded on the Fourteenth Amendment, for the framers restricted its scope to protection of "person and property."[31]

Abraham would justify the "double standard" in cases involving civil liberties—what Professor Lusky describes as the Court's "new and grander . . . place in the governmental scheme"[32]—on four grounds which for the most part are drawn from judicial rationalization of this "new" role, not really rooted in constitutional grant, namely: "(1) the crucial nature of basic freedoms, (2) the explicit language of the Bill of Rights, (3) the expertise of the judiciary in matters involving the maintenance of fundamental liberties, and (4) the discrepancy in access to the political process between the 'haves' and the 'have nots.' "[33] Of these in turn, the fact that a freedom is "crucial" does not avail if the power was not conferred. "Had the power of making treaties," said Madison, "been omitted, however necessary it might have been, the defect would only have been lamented, or supplied by an amendment of the Constitution."[34] Free speech is certainly crucial to a democratic society, yet when Madison urged that the free speech guarantee of the Bill of Rights be extended to run against the states, the First Congress voted him down. Jefferson, that apostle of free speech, insisted that states have "the exclusive right" to control freedom of the press.[35]

28. *Id.* at 267, *quoting* L. HAND, THE BILL OF RIGHTS 51.

29. Morrison, *Does the Fourteenth Amendment Include the Bill of Rights?*, 2 STAN. L. REV. 140, 167 (1949), *quoted in* GOVERNMENT BY JUDICIARY at 267-68.

30. 4 THE PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett & J. Cooke eds. 1962), *quoted in* GOVERNMENT BY JUDICIARY 194. For the full quotation, see Berger on Kutler at 592, n.15.

31. Berger on Mendelson at 550-54, nn.28-63.

32. Lusky Essay at 408.

33. Abraham Essay at 476.

34. 2 ANNALS OF CONG. 1900-01 (1791), *quoted in* GOVERNMENT BY JUDICIARY at 381 n.32.

35. Letter to Abigail Adams dated Sept. 11, 1804, *quoted in* Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 226, *quoted in* GOVERNMENT BY JUDICI-

Doubtless Abraham would rest on the incorporation on one theory or another of the Bill of Rights in the Fourteenth Amendment; he disagrees with Charles Fairman's demonstration[36] that Justice Black's claim[37] to that effect is without historical foundation.[38] My minute study of the 1866 debates led me to set forth the evidence that confirms Fairman.[39] Here I shall only repeat Bickel's view that Fairman "conclusively disproved Black's contention, at least, such is the weight of opinion among disinterested observers."[40] This also covers Abraham's second point, reliance on "the explicit language of the Bill of Rights," for that applies only to the federal government, not the states. As to his third point, judicial "expertise" cannot confer power. Under a grant of limited powers—for so the federal government has always been regarded[41]—the threshold question always is: where was the power conferred?[42] Turning to his fourth point, the "discrepancy in access to the political process" was built into the Constitution for the protection of the propertied minority.[43] Disproportionate representation was a commonplace of American history until overthrown by the Court in the

ARY at 272. *See also* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971).

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

37. For Black's view on incorporation, see Adamson v. California, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting) and Duncan v. Louisiana, 391 U.S. 145, 162 (1968) (Black, J., concurring).

38. Abraham Essay at 468.

39. *See* GOVERNMENT BY JUDICIARY at 134-56.

40. A. BICKEL, THE LEAST DANGEROUS BRANCH 102 (1962), *quoted in* GOVERNMENT BY JUDICIARY at 137 n.17. If Fairman and Bickel are right, of which I have no doubt, I would vigorously dissent from Abraham's statement that the need for a decision articulating "the Sixth Amendment's guarantee of the right to counsel in all criminal cases [including State cases] . . . is beyond rational argument." Abraham Essay at 479. In these pages Professor Mendelson wrote, "We are not aware of anything in the background or legislative history of the Fourteenth Amendment which suggests it was calculated to give Congress or federal courts general supervisory control over state judicial proceedings." Mendelson Essay at 454. And Dean Alfange has written: "[I]t is all but certain that the Fourteenth Amendment was not intended to incorporate the Bill of Rights and thus to revolutionize the administration of criminal justice in the states." Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CON. L.Q. 603, 607 (1978).

41. *See* R. BERGER, CONGRESS V. THE SUPREME COURT 13-16 (1969); G. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 283-84 (1969).

42. Lee assured the Virginia Ratification Convention that "[w]hen a question arises with respect to the legality of any power" the question will be, "Is is enumerated in the Constitution?" GOVERNMENT BY JUDICIARY at 14.

43. G. WOOD, *supra* note 41 at 474-76, 484, 492, 507-14, 516, 554, 557. *See also* Berger on Kutler at 605, n.114.

1960s,[44] and it was perpetuated by the framers of the Fourteenth Amendment who left suffrage to the states.[45]

Unwittingly Abraham is swayed by his own predilections. Thus the "double standard" of which he approves has been judicially expanded in ways that would "have troubled both Holmes and Cardozo,"[46] and "has taken the form of what is unquestionably a 'double standard' within a 'double standard'—a patent manifestation of 'government by judiciary,' whatever one may think of its merits."[47] With the "double standard" as a theme, however, it was open to the Court to compose a set of variations. In company with other libertarians, Abraham is critical of the abortion cases: "[T]he Court should not view itself as a 'social reform agency' [as] when it wrote what, in effect, constitutes a Federal Abortion Code . . . ."[48] What was the desegregation decision but a revolutionary "social reform" measure?[49] The debates in the Thirty-ninth Congress show that segregation was *excluded* from the scope of the Amendment, as Abraham agrees, but not a word refers to abortion.[50] Does the Court have more power in the face of express exclusion than of silence? Once it is posited that the Court may interfere on behalf of "liberty" there is no bar to its judicial delineation. We learn that a right is "fundamental" only after the Court labels it as such. So too, Abraham can accept the desegregation decision as within "the basis and spirit" of the Fourteenth Amendment but rejects the decisions that followed in its train: "[T]he Court had no constitutional mandate to turn itself . . . into a combination of national school board, transportation expert, disciplinarian, employment manager and admissions director."[51] But given the judgment that ob-

44. Baker v. Carr, 369 U.S. 186, 307-17 (1962) (Frankfurter, J., dissenting). *See also* Berger on Miller at 580-81, nn.30-35.

45. *See* GOVERNMENT BY JUDICIARY at 72-74.

46. Abraham Essay at 476.

47. *Id.*

48. *Id.* at 479. *See also* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

49. Professor Archibald Cox wrote: "The school desegregation cases overturned not only the constitutional precedents built up over three quarters of a century but the social structure of an entire region." Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791, 802 (1976), *quoted in* GOVERNMENT BY JUDICIARY at 428 app. II.

50. With Justice Harlan we may view the state reapportionment cases "as a much more audacious and far-reaching judicial interference with the state legislative process . . . then [sic] the comparatively innocuous use of judicial power in the contraceptives case." The quotation is in the paraphrase of Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 256 (1965), *quoted in* GOVERNMENT BY JUDICIARY at 392.

51. Abraham Essay at 480 (footnotes omitted).

literation of segregation is constitutionally required, it follows that busing and affirmative action and the like are merely remedial actions to effectuate the constitutional mandate. The Latin maxim, "where there is a right, there is a remedy" was taken up in English and American law.[52] Once the basic decision is made that segregation is wrong, the means whereby to remedy the wrong traditionally have been left to the courts. In a prior work having no connection with segregation I wrote:

> When the path-breaking Statute of Westminster II (1285), for example, gave rise to the vast jurisdiction of Action on the Case, it merely authorized the issuance of writs in cases "of like nature" lest it happen that the court should fail "to minister justice unto the complainants." How justice was to be "ministered," what the ingredients of judgment were to be, traditionally was left to the judges . . . . Every novel grant of jurisdiction, I submit, therefore posited that judges, in deciding disputes, would exercise powers that were suitable to the jurisdiction conferred.[53]

Those who are unhappy with the judicial expansion of the desegregation decision might well reexamine whether a decision which led to such untoward results, such an unprecedented departure from traditional ways,[54] was itself sound.

Several of Abraham's reflections call for analysis. He "emphatically" does not reject Bickel's "conclusion" that the framers of the Fourteenth Amendment "chose language which would be capable of *growth*,"[55] though he makes no effort to meet my criticism of Bickel's "open-ended" theory.[56] Bickel advanced it as a *tentative hypothesis* which has since hardened into dogma and become a bastion of activism. Some factual highlights will show that it is without historical warrant. Bickel clerked for Justice Frankfurter when *Brown v. Board of Education* came to the Court, and Frankfurter set him to work on the legislative history. Bickel came up with an "impressive" memorandum in which he declared that "it is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting."[57] This is a far cry from a choice of language "capable of

52. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting Blackstone: "[W]here there is a legal right, there is also a legal remedy . . . ."). Madison stated in THE FEDERALIST No. 43, at 282 (A. Hamilton) (Mod. Lib. ed. 1937) that "a right implies a remedy."

53. R. BERGER, *supra* note 41, at 211-12 (footnotes omitted).

54. *See, e.g.*, note 49 *supra*.

55. Abraham Essay at 468 (emphasis in original).

56. *See* GOVERNMENT BY JUDICIARY at 99-116.

57. R. KLUGER, SIMPLE JUSTICE 654 (1976) (quoting Bickel Memorandum to Frankfurter (1953)), *quoted in* GOVERNMENT BY JUDICIARY at 118.

growth." In the period prior to the *Brown* decision, Frankfurter is said to have asked: "What justifies us in saying that what *was* equal in 1868 is not equal now?" and answered: "[T]he equality of laws enshrined in a constitution which was 'made for an undefined and expanding future . . .' is not a fixed formula defined with finality at a particular time," thereby scuttling the established attachment to a "fixed constitution."[58] Thus inspired, Bickel, now a research fellow at Harvard, engaged in revising his memorandum for publication, asked, "what if any thought was given to the long range effect of the Amendment under future circumstance, of provisions necessarily intended for permanence?"[59] And he ventured the hypothesis:

> [C]ould resort to "equal protection of the laws" have failed to leave the implication that the new phrase, while it did not necessarily, and certainly not expressly, carry greater coverage than the old, was nevertheless roomier, more receptive to the "latitudinarian" construction? No one made the point with regard to this particular clause.[60]

"It remains true," he wrote, "that an explicit provision going further than the Civil Rights Act would not have carried in the 39th Congress."[61] And he noted that the Republicans drew back from a "formulation dangerously vulnerable to attacks pandering to the prejudice of the people."[62] But, he speculated, "may it not be that the Moderates and Radicals reached a compromise permitting them to go to the country with language which they could, where necessary, defend against damaging alarms raised by the opposition but which at the same time was sufficiently elastic to permit reasonable future advances?"[63] The votes of 125 to 12 in the House and 34 to 4 in the Senate against suffrage proposals demonstrate that there was no need for such a compro-

58. R. KLUGER, SIMPLE JUSTICE 601, 685 (1976) (quoting Statements of Felix Frankfurter, Conference of Justices, Dec. 1952), *quoted in* GOVERNMENT BY JUDICIARY at 132. *See* Berger on Lusky at 536, n.19. "Limited government requires that at a particular point in history the limits are decided upon and that they remain relatively fixed." Kay, Book Review, 10 CONN. L. REV. 801, 805 (1978). Professor Philip Kurland explained: "The concept of the written constitution is that it defines the authority of government and its limits, that government is the creature of the constitution and cannot do what it does not authorize and must not do what it forbids. *A priori*, such a constitution could have only a fixed and unchanging meaning, if it were to fulfill its function." P. KURLAND, WATERGATE AND THE CONSTITUTION 7 (1978). *See also* 2 WRITINGS OF SAMUEL ADAMS 325 (H. Cushing ed. 1968); Berger on Lusky at 533, n.4.

59. GOVERNMENT BY JUDICIARY at 101.

60. *Id.* at 101-02.

61. *Id.* at 104.

62. *Id.*

63. *Id.*

mise.[64] Bickel's hypothesis is that the compromisers concealed the future objectives they dared not avow lest the whole enterprise be imperiled, a sorry basis for a sweeping judicial revision of the Constitution which invades rights reserved to the States.

Bingham, draftsman of the Amendment, had insisted on the deletion of the "Civil rights and Immunities" phrase in the Civil Rights Bill because it was "oppressive" and would strike down *all* discriminations.[65] The deletion was explained by Wilson, chairman of the House Judiciary Committee, as designed to obviate a "latitudinarian" construction going beyond the specific rights named in the section.[66] How can we attribute to Bingham an intention to incorporate in the Amendment's "privileges or immunities" clause the very power to terminate *all* discriminations that he had rejected?

In company with other academicians, Abraham is troubled by the untrammelled sweep of the power he ascribes to the Court, stating that there is "a crying need to find and establish lines and limits," but such limits "have been elusive in both definition and application."[67] In fact, he observes, the "quest for a viable line between judicial activism and judicial restraint" is "[i]nfinitely more difficult."[68] He enumerates seven different approaches, notes that there are yet others, and observes that they "are illustrative of the dilemma—and of the ubiquitous difficulties inherent in the search for definable limits to permissible constitutional adjudication."[69] Confessedly the permissible search for viable "limits" is "at once frustrating and controversial."[70] For judges, not academicians, draw the lines, and after the fashion of all wielders of power look indulgently upon their own unceasing expansion of their powers.[71] To exhort the Justices to practice "self-restraint"[72] is like urging a cat not to spring on a mouse, as Abraham acknowledges when he states that "even avowed champions of judicial self-restraint have

64. GOVERNMENT BY JUDICIARY at 105.

65. Berger on Mendelson at 551, n.35.

66. CONG. GLOBE, 39th Cong., 2d Sess. 1366 (1867), *cited in* GOVERNMENT BY JUDICIARY at 122.

67. Abraham Essay at 469-70.

68. *Id.* at 478.

69. *Id.* at 471-72.

70. 472.

71. Madison noted that "all power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." THE FEDERALIST No. 48, at 321 (A. Hamilton) (Mod. Lib. ed. 1937), *quoted in* GOVERNMENT BY JUDICIARY at 292. "Judicial power," wrote Justice Frankfurter, "is not immune against this human weakness." Trop v. Dulles, 356 U.S. 86, 119 (1958) (Frankfurter, J., dissenting), *quoted in* GOVERNMENT BY JUDICIARY at 292.

72. Abraham Essay at 481, 485.

been willing to embrace a judicial approach that unquestionably manifests a 'double standard' between judicial review of [economic and libertarian legislation]."[73] Self-restraint ceases at the door of the Justices' own predilections. Towards the close of his career, Justice Holmes expressed his "more than anxiety" because he could see "hardly any limit but the sky to the invalidating of [States'] rights if they happen to strike a majority of this Court as for any reason undesirable."[74] Forgotten is his caution: "I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or *moral beliefs* in its prohibitions."[75] Not long after, Chief Justice Stone, whose "preferred freedoms" *Carolene* footnote[76] proved "to be a veritable Pandora's box,"[77] stated: "The Court is now in as much danger of becoming a legislative and Constitution making body, enacting into law its own predilections, as it was [in the heyday of the Four Horsemen]."[78]

When Abraham translates my "solution [as amounting] to the entirely commendable exhortation that judges stay within the limits of their constitutionally assigned judicial function,"[79] he mistakes my meaning. I have learned to expect no self-restraint from the Justices. The paramount task, as I see it, is to educate the *people* to understand that the Court has arrogated ungranted power; once they grasp the fact of usurpation, they will remedy it. Would the people stomach "busing" or "affirmative action" if they understood that the framers "specifically rejected" the Amendment's "application to segregated schools,"[80] and that the Justices have displaced the choices of the framers by their own?[81]

As in the case of Professors Lusky, Mendelson and Ely, Abraham

73. *Id.* 475.

74. Baldwin v. Missouri, 281 U.S. 586, 595 (1930), *quoted in* GOVERNMENT BY JUDICIARY at 383.

75. *Id.* (emphasis added).

76. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). For the text of Justice Stone's footnote, see Abraham Essay at 475, n.38.

77. Abraham Essay at 476.

78. A. MASON, SECURITY THROUGH FREEDOM: AMERICAN POLITICAL THOUGHT AND PRACTICE 145-46 (1955) (quoting Chief Justice Stone), *quoted in* GOVERNMENT BY JUDICIARY at 278. Archibald Cox stated that "the Warren Court behaved even more like a Council of Wise Men and less like a Court than the *laissez faire* Justices." A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 50 (1976), *quoted in* GOVERNMENT BY JUDICIARY at 279.

79. Abraham Essay at 478.

80. *Id.* at 467.

81. See Professor Felix Frankfurter's Letter to President Franklin Roosevelt, Berger on Lusky at 545, n.105.

has his own prescription: identification of "institutional role commitments and meritorious court personnel."[82] The former, he states, requires increasing awareness by the judiciary that its role "is that of saying 'yes' or, more dramatically, 'no' to the other branches," *i.e.*, the policing of departmental boundaries.[83] The desegregation case was hardly an instance of saying "no"; it represented a takeover of national policy making on a grand scale. It is not lack of "awareness" that is in question; the Warren Court was well aware in light of Justice Harlan's "irrefutable and unrefuted" demonstration[84] that "one person-one vote" constituted "prescriptive policy making."[85] But it was moved by an irresistible compulsion to impose its will in place of that of the framers. As to "meritorious" appointments, Professor Stanley Kutler remarks that for years "liberals prayed and argued for 'good men' on the courts. One wonders if Franklin D. Roosevelt's judicial appointments from 1937 to 1943 empirically demonstrated the existence of God to the liberals."[86] Some of Richard Nixon's widely criticized nominations prove even less. With all the improved devices for choosing "good men" noted by Abraham, political considerations continue to reign.[87] Over the years the result has been an array of merely competent to mediocre appointees, a Holmes or Brandeis being the rare exception, often relegated to dissent.[88] As often as not we have had more gifted men off the bench than on, to mention only Jefferson, the two Adamses, Madison, Clay, Webster, Calhoun, Lincoln, Charles Francis Adams, when the Court boasted only of Marshall, Story and Taney. Learned Hand confessed that he would not know how to select Platonic Guardians, and would not want to be ruled by them if he did,[89] whereas the activists would entrust the destiny of the nation to such a group of unelected, unaccountable, life-tenured appointees. Were a better selection possible, I should yet be counselled by John Stuart Mill:

82. Abraham Essay at 481.

83. *Id.*

84. Lusky Essay at 406.

85. Abraham Essay at 481.

86. Kutler Essay at 513.

87. Abraham Essay at 483-85. Abraham is aware that this approach may "be regarded as unrealistic, perhaps naive." *Id.* at 483.

88. *See* GOVERNMENT BY JUDICIARY at 335-36. Justice Story wrote of the appointment of Justice McKinley: "[S]ome . . . who do know him, speak of him in very moderated terms of praise—so moderated as to leave me with the conclusion that he has not the requisite qualifications for the office." J. MCCLELLAN, JUSTICE STORY AND THE AMERICAN CONSTITUTION 292 n.79 (1971) (quoting Justice Story).

89. L. HAND, THE BILL OF RIGHTS 73 (1958).

> The disposition of mankind, whether as rulers or as fellow citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and some of the worst feelings incident to human nature, that it is hardly kept under restraint by anything but want of power.[90]

Not judicial self-restraint but an unrelenting campaign against usurpation seems to me the only cure.

In fine, Abraham's essay strengthens my preference for what he calls my "unbending keystone of the original intention of the drafters of the Constitution"[91] over his "elusive" and "[i]nfinitely more difficult" criteria for principles limiting "untethered" discretion.[92] My "unbending keystone" was applied only to a *clearly discernible* intention; that is not "[i]nfinitely more difficult" to ascertain; it represents a choice made by the framers and ratified by the people, and therefore calls for obedience by every principle of democratic government to which Abraham is attached.

The frankest alternative is that suggested by Professor William R. Forrester—to acknowledge that the Court "has become our Legiscourt," and as Abraham notes, to "candidly face that fact and let the justices decide issues on policy rather than strained [and disingenuous] constitutional grounds."[93] That, however, is not a decision for academe but for the sovereign people who at long last are entitled to be told that the Court has taken over national policy making, and to be asked to ratify the takeover.[94] That will be the moment of truth.

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90. J. MILL, ON LIBERTY 28 (1885), *quoted in* GOVERNMENT BY JUDICIARY 413 n.20.

91. Abraham Essay at 478.

92. *See* text accompanying notes 67-68 *supra*; *see also* Ely, *Constitutional Interpretation: Its Allure and Impossibility*, 53 IND. L.J. 399, 448 (1978), *quoted in* Introduction at 530, n.22.

93. Abraham Essay 472 (quoting Forrester, *Are We Ready for Truth in Judging?* 63 A.B.A.J. 1212, 1215 (1977). Professor Thomas Grey observed that courts "resort to bad legislative history and strained reading of constitutional language to support results that would be better justified by explication of contemporary moral and political ideals not drawn from the constitutional text." Grey, *Do We Have An Unwritten Constitution*, 27 STAN. L. REV. 703, 706 (1975). And he comments: [I]f judges resort to bad interpretation in preference to honest exposition of deeply held but unwritten ideals, it must be because they perceive the latter mode of decisionmaking to be of suspect legitimacy." *Id.* More crudely put, the Court is aware the people, if informed, would reject rule by a Council of Wise Men. *See also* Berger on Mendelson at 559, n.130; Berger on Miller, *infra* at 587, nn. 84-87.

94. During the desegregation case, Justice Jackson urged the Court to disclose that they were "declaring new law for a new day." R. KLUGER, *supra* note 57, at 681, 689 (1976), *quoted in* GOVERNMENT BY JUDICIARY at 130. Richard Kluger considers that this was "a scarcely reasonable request to make of the brethren," R. KLUGER, *supra* note 57, at 683 (1976), *quoted in* GOVERNMENT BY JUDICIARY at 130-31, presumably because it would have blown up a fire-storm.

IV. Comment on Professor Arthur Miller's Essay

When our beliefs are in conflict with the evidence, we become irritated, we pretend the conflict does not exist, or we paper it over with meaningless phrases.[1]

Professor Miller labels me as one who " 'first invents a false theory as to the nature of things, and then deduces that wicked actions are those which show that his theory is false.' "[2] What is this "false, puerile theory"? It is the theory that the Court is not empowered to alter the Constitution, to substitute its predilections for the choices of the Framers, a theory that has the sanction of Justices Holmes, Black and Harlan among others.[3] It is a view, wrote Professor Thomas Grey, who is a devout activist, that is "of great power and compelling simplicity . . . deeply rooted in our history . . . and in our formal constitutional law . . . the theory upon which judicial review was founded in *Marbury v. Madison*."[4] One of my critics, Professor John Hart Ely, agrees that it is a view which "stretches back" to Hamilton and Marshall and "seems to enjoy virtually universal contemporary acceptance."[5]

1. Jastrow, *Have Astronomers Found God?*, N.Y. Times, June 25, 1978, (Magazine), at 19, col. 1. The doctrines which *Government by Judiciary* challenges, Professor Richard Kay observes, "have now become almost second nature to a generation of lawyers and scholars. Thus it is hardly surprising that the casting of a fundamental doubt on some basic assumptions should produce shock, dismay, and sometimes anger." Kay, Book Review, 10 CONN. L. REV. 801, 801 (1978).

2. Miller Essay at 489. For my deduction of "wicked actions" he cites my "response to [his] rather mild criticism of [my] book," *id.* at n.15, a "mild criticism" that must be permitted to speak for itself: he charged me with "lawyer's history," with an "antiquarian viewpoint," with a "puerile theory of interpretation," with viewing the Constitution "through the eyes of a mechanic," and sneeringly referred to me as an "ex-Washington lawyer turned historian." Miller, Book Review, Washington Post, Nov. 13, 1977, § E, at 5. For a response, see Berger, *Academe v. The Founding Fathers*, NATIONAL REVIEW, April 14, 1978, at 468.

I ruefully confess that I am short on philosophy, the "in" thing just now in academic circles, and probably I have been corrupted during years of law practice by the judges' insistence that counsel meet opposing arguments. Miller on the other hand eschews "contentious debate," a "polemical tone," Miller Essay at 490, and therefore resorts to discussion that is "more conclusory than comprehensive." *Id.* at 498. More plainly, he speaks *ex cathedra*.

3. For Holmes' views, see notes 19, 65 & 66 and accompanying text *infra*; for Black's position, see note 52 and accompanying text *infra*. Justice Harlan declared: "When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect." Oregon v. Mitchell, 400 U.S. 112, 203 (1970), *quoted in* GOVERNMENT BY JUDICIARY at 330.

4. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975).

5. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L. J. 399, 412 (1978).

Miller is hardly a dispassionate critic; he has long been a perfervid adherent of the opposing school, the result-oriented school that applauds "judicial law making"[6] and a "goal-seeking and purposive" jurisprudence that proceeds "in terms of consequences [and] results."[7] That school is scarcely older than the desegregation decision in 1954;[8] the claims that it makes on behalf of the Court have never been nakedly avowed by the Court itself.[9] Instead, as Miller noted, there is a "lack of consensus on the Court as to the appropriate role of the judiciary . . . ."[10] Miller is entitled to his view, but he is not entitled to belittle and misrepresent those who do not share it. He would sweep under the rug a problem that Professor Kurland considers presents "the most immediate crisis of our time, the usurpation by the judiciary of general governmental powers on the pretext that its authority derives from the Fourteenth Amendment."[11] Scholars of no less stature than Miller are critical of the goal-oriented view he represents. Professor Henry Monaghan wrote:

> Berger's uncomfortable and unfashionable analysis is an important one. It will not do, as some have already done, to brush it aside in a peremptory manner. For I would insist that any theory of constitutional interpretation which renders unimportant or irrelevant questions as to original intent, *so far as that intent can be fairly discerned*, is not, given our tradition, politically or intellectually defensible.[12]

Miller scornfully dismisses the "intention of the Framers" as a "filiopietistic notion."[13] Invective is no substitute for analysis.

Typical is his charge that his opponents invoke the shades of the Framers because "[i]f we pretend that the Framers had a special sort of

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6. Miller Essay at 490, n.22.

7. *Id.* at 505.

8. Brown v. Board of Educ., 347 U.S. 483 (1954).

9. *See* Berger on Lusky at 533, n.3.

10. Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 678 (1960), *cited in* GOVERNMENT BY JUDICIARY at 331 n.65.

11. Letter to Harvard University Press (Aug. 15, 1977).

12. Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L.L. REV. 117, 124 (1978) (emphasis added) (citation omitted). *See* Kommers, *Role of the Supreme Court*, 1978 REV. OF POL. 409, 413: "The tendency of many reviewers of Berger's book is to dismiss his theory out of hand, in part because the modern liberal mind just cannot imagine turning the clock back to the days prior to *Brown v. Board of Education* and because of the fundamental fairness or simple justice for which *Brown* stands. But, as Berger suggests, if the Supreme Court's purpose is to establish justice without reference to the original intent of the framers, then what remains to circumscribe judicial power? Berger's critics have given singularly unsatisfactory answers to this question." *See also* note 1 *supra*. *See* Perry, *Book Review*, 78 COLUM. L. REV. 685 (1978).

13. Miller & Howell, *supra* note 10, at 683. For the opposite view, see GOVERNMENT BY JUDICIARY, at 288, 363-72; Berger on Lusky at 536, n.22.

wisdom, then perhaps we do not have to think too hard about how to solve pressing social problems,"[14] when the real issue is whether the solution of those "pressing social problems" was confided to the judiciary. When invective and distortion fail him, he resorts to a parade of irrelevancies, for example, devoting several pages to one of his "two basic points: (1) constitutional interpretation is not a judicial monopoly."[15] Of course not, but how does that justify the judicial take-over of legislative policy making, or the displacement of the Framers' choices?[16] Or he quotes Justice Byron White to the effect that the Court "make[s] new law and new public policy,"[17] and states, "I cannot see how one can disagree with the historical observations made by Justice White."[18] Certainly, as Justice Holmes earlier stated, "judges do and must legislate, but they can do so interstitially; they are *confined* from molar to molecular motions. A common law judge could not say 'I think the doctrine of consideration a bit of historical nonsense and shall not enforce it.' "[19] It is because the Court has acted in just that fashion, refusing to give effect to the intention of the Framers to exclude suffrage and segregation from the Fourteenth Amendment, that I essayed to demonstrate that the judiciary has arrogated a power withheld. This is translated by Miller as a striving for "an *elegantia juris* in Supreme Court decision-making"![20]

My quintessential flaw, in his eyes, is to make "the Constitution like any other written instrument—a contract, a will, a conveyance, a statute."[21] Thomas Rutherforth, in a work "well known to the colo-

14. Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of the Separation of Powers*, 27 ARK. L. REV. 583, 596 (1973). For the opposite view, see GOVERNMENT BY JUDICIARY at 364-65.

15. Miller Essay at 490.

16. Again, Miller learnedly discourses on the difference between " 'the law of the case' and 'the law of the land;' [a] difficult jurisprudential question, not mentioned by Berger"; *Marbury v. Madison* "only means that the Court decided the merits of the case for Mr. Marbury." *Id.* at 495. Yet in the same breath he states that there Marshall " 'established that the Supreme Court had the right of judicial review of acts of Congress,' " *id.* at 489, palpably not confined to "Mr. Marbury."

17. *Id.* at 490 (quoting Miranda v. Arizona, 384 U.S. 436, 531 (1966) (White, J., dissenting, joined by Stewart, J.)).

18. Miller Essay at 491.

19. Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (emphasis added), *quoted in* GOVERNMENT BY JUDICIARY at 321 n.32.

20. Miller Essay at 502.

21. *Id.* at 488. In his review in the *Washington Post*, he added that this "is to forget that it is the fundamental law." Miller, Book Review, Washington Post, Nov. 13, 1977 § E, at 5. A "fundamental law" that can be made to mean anything the justices choose to make it mean, even in direct contradiction of the plain intention of the framers, is no "law" at all; it is the fiat of a caliph.

nists," identified the interpretation of statutes with that of contracts and wills—a view applied to the Fourteenth Amendment by its contemporaries[22]—and explained that "[t]he end to which interpretation aims at, is to find out what was the intention of the writer, to clear up the meaning of his words."[23] The Founders in turn, as I have shown, assimilated the task of constitutional to that of statutory construction.[24] Are the courts, which consider themselves bound to effectuate the will of a testator, freer to substitute their own choices for the clearly discernible choices of the Framers? In an article which Miller praises as an "accurate and insightful perception of the realities of constitutional adjudication,"[25] Judge J. Skelly Wright stated: "Constitutional choices are in fact different from ordinary decisions. . . . [T]he most important value choices have already been made by the Framers of the Constitution."[26] Judicial "value choices," he continued, "are to be made only within the parameters" of those choices.[27] Notwithstanding, Miller maintains that cases need not "be decided 'in accordance with the specific intentions of the framers,' " for which he cites a recent law review article.[28]

22. Called on to determine whether a women's suffrage statute would come within the Fourteenth Amendment, a unanimous report issued by the Senate Judiciary Committee on January 25, 1872 and "signed by Senators who had voted for the 13th, 14th and 15th amendments in Congress," declared that "[t]he Constitution, *like a contract* between private parties, must be read in the light of circumstances which surrounded those who made it." REPORT ON RIGHT OF WOMEN TO VOTE, SENATE COMM. ON THE JUDICIARY, S. REP. NO. 21, 42d Cong., 2d Sess. (1872), *cited in* Avins, THE RECONSTRUCTION DEBATES 571 (1967) (emphasis added). That was repeated in the Senate on February 1, 1872 by Senator Matthew Carpenter. *Id.* at 601.

Carpenter rebuked the Senator from Massachusetts in March 1870, saying, "what is the meaning of all this wild talk about the Constitution being construed in the light of modern progress and new American ideas?" *Id.* at 433. Charles Sumner, for example, referred to "a new rule of interpretation of the Constitution, according to which . . . every word . . . is to be interpreted uniformly for human rights," a rule made at Appomatox, although he acknowledged that his appeal to the Declaration of Independence found little favor with his colleagues. *Id.* at 596-97. Of such theories, Carpenter said: "This loose method of construction, this utter contempt of the Constitution, bodes ill for our country, and nothing but evil." *Id.* at 433.

23. 2 RUTHERFORD, INSTITUTES OF NATURAL LAW 307-09 (1754-1756), *quoted in* GOVERNMENT BY JUDICIARY at 366.

24. Berger on Lusky at 543-44, nn.91-96.

25. Miller Essay at 508-09, n.133 (citing Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971)).

26. Wright, *supra* note 25, at 784.

27. *Id.* at 785.

28. Miller Essay at 498 (citing Munzen & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1054 (1977). The essay of Professor Abraham, *supra*, and the article written by Professor John Hart Ely, *supra*, note 5, both express anxiety about untethered judicial discretion and propose limits thereon. The constitutional limita-

It is time to descend from a cloud of generalizations to some brute facts. Justice Brennan observed that seventeen or nineteen Northern States had rejected black suffrage in 1865-1868.[29] Understandably, Roscoe Conkling, a member of the Joint Committee on Reconstruction of both Houses, which drafted the Fourteenth Amendment, stated:

> The northern States, most of them, do not permit negroes to vote. Some of them repeatedly and lately pronounced against it. . . . [W]ould it not be futile to ask three-quarters of the States to do for themselves and all others, by ratifying such an amendment, the very thing most of them have already refused to do in their own cases?[30]

Another member of the Committee, Senator Jacob Howard, who explained the Amendment to the Senate, said that "three-fourths of the States . . . could not be induced to grant the right of suffrage, even in any degree or under any restriction, to the colored race."[31] The chairman of the Joint Committee, Senator William Fessenden, said of a suffrage proposal that there is not "the slightest possibility that it will be adopted by the States."[32] The Report of the Joint Committee confirmed that "the States would not consent to surrender a power they had always exercised, and to which they were attached," and therefore thought it best to "leave the whole question with the people of each State."[33] Professor Nathaniel Nathanson who, like Miller, favors the Court's activist role, observed that the second Justice Harlan "quite convincingly demonstrated" that the Fourteenth Amendment "would not require . . . Negro suffrage," and that "Berger's independent research and analysis confirms and adds weight to those conclusions."[34] Professor Gerald Gunther wrote that "most constitutional lawyers agree" with Harlan's conclusion that Chief Justice Warren's "one per-

tion of power is central to our system of government. And as Professor Kay observes: "To implement real limits on government the judges must have reference to standards which are external to, and prior to, the matter to be decided. This is necessarily historical investigation. The content of those standards are set at their creation. Recourse to 'the intention of the framers' in judicial review, therefore, can be considered as indispensable to realizing the ideas of government limited by law." Kay, *supra* note 1, at 805-06. *See also* Berger on Abraham at 571, n.58.

29. Oregon v. Mitchell, 400 U.S. 112, 256 (1970) (opinion of Brennan, J.), *quoted in* GOVERNMENT BY JUDICIARY at 90.

30. CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866) [hereinafter cited as GLOBE] *quoted in* GOVERNMENT BY JUDICIARY at 58-59.

31. GLOBE, *supra* note 30, at 2766, *quoted in* GOVERNMENT BY JUDICIARY at 56.

32. GLOBE, *supra* note 30, at 704, *quoted in* GOVERNMENT BY JUDICIARY at 59.

33. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, S. REP. NO. 112, 39th Cong., 1st Sess. 8 (1866) *cited in* GOVERNMENT BY JUDICIARY at 84.

34. Nathanson, Book Review, 56 TEX. L. REV. 579, 581 (1978).

son—one vote" "lacked all historical justification."[35]

This incontrovertible history poses the central issue: where was the Court empowered to revise the choices of the Framers, to override the will of the Ratifiers? Instead of coming to grips with the issue, Miller ridicules the "bootless search for the intention of the Framers."[36] It was not "bootless" in the case of suffrage and segregation[37] which are the core of my book. This it is that Miller derides as "searching in a heaven of legal concepts for the one true principle."[38] And he warns, "[s]trict adherence to [the theory of original intention] can lead the Court and the nation into unwisely rigid postures, as the *Dred Scott* decision demonstrates."[39] True it is that that case "inflicted what probably is the most grievous wound the Court has ever suffered,"[40] but it was not obedience to the original intention that "inflicted" the wound but that, has historian George Bancroft wrote, "[t]he Chief Justice . . . without any necessity or occasion volunteered to come to the rescue of the theory of slavery,"[41] just as the nation was steeling itself to drown it in blood. Today the Court, urged on by enthusiasts like Miller, stands in danger of repeating that "grievous" mistake by interfering in social conflicts that divide the nation and excite bitter rancor.

"I concede, quite cheerfully," Miller writes, "that the Justices often invoke what they claim is the intention of the Founding Fathers . . . as a means of explaining or justifying their decisions . . . judges not being ready as, for example, Professor Ray Forrester is, for 'truth in judging.' "[42] A nation that insists on "truth in advertising" cannot afford less than "truth in judging." Where Miller "cheerfully" accepts untruthful and misleading statements, I would insist with Thomas Huxley

35. Gunther, Book Review, Wall St. J., Nov. 5, 1977, at 4. *See also* Berger on Kutler at 595, n.42 (remarks of Professor Bork).

36. Miller Essay at 500; *see also id.* at 490.

37. Respecting segregation, Miller considered it "rather doubtful that the historical record is so 'inconclusive' as Chief Justice Warren asserted in Brown v. Board of Education. . . , insofar as the framers of the fourteenth amendment had any intent regarding racially segregated schools." Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI L. REV. 661, 674 n.48 (1960), referring to the Chief Justice's remarks at 347 U.S. 483, 489 (1954). *See* GOVERNMENT BY JUDICIARY at 243-45.

38. Miller Essay at 498.

39. *Id.*

40. *Id.* at 498 n.74.

41. *See* GLOBE, *supra* note 30, at 801, *quoted in* GOVERNMENT BY JUDICIARY at 222 n.4. Professor Mendelson declared that *Dred Scott* was a "disaster" that should "stand for all time as warning to judges" against an "attempt to impose extra-constitutional policies upon the community under the guise of interpretation." Mendelson Essay at 453.

42. Miller Essay at 489-90 (quoting Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A. J. 1212 (1977)).

that "the foundation of morality is to have done, once and for all, with lying,"[43] especially when we are asked by Miller to regard the Court as the "national conscience."[44] Not the least remarkable aspect of Miller's article is his obliviousness to the moral problem. He dismisses Marshall's statement that "[j]udicial power is never exercised for the purpose of giving effect to the will of the Judge,"[45] with "[t]hat is a nice sentiment, were it true, but it is not. Judges make law, they always have and always will,"[46] unaware that to practice the very thing they are disclaiming (to reassure the people) is discreditable. To the question were the Justices empowered to revise the Constitution in spite of the Framers he answered with an ipse dixit: the Framers intended to leave it "to succeeding generations [meaning judges] . . . to rewrite the 'living' Constitution anew,"[47] in contradiction of the Article V reservation of that power to the people exclusively.[48]

To dispose of Article V he summons Senator Daniel Moynihan's observation that "this is not the only way change takes place, as John Marshall demonstrated when he established that the Supreme Court had the right of judicial review of acts of Congress."[49] Now Daniel Moynihan is an estimable Senator and respected sociologist, but he would hardly claim that he is a constitutional authority. Since he is avouched as such by Miller it is appropriate to point out his error. *Marbury v. Madison*, to which Moynihan refers, does not illustrate constitutional "change" but resistance to it; it held that Congress was *not* authorized to "change" the Constitution by adding to the Court's "original jurisdiction."[50] And Marshall flatly declared that the exercise of the judicial power "cannot be the assertion of a right to change" the Constitution.[51] It is sorry scholarship which leads Miller to adopt a

43. *Quoted in* H. MENCKEN, TREATISE OF RIGHT AND WRONG 194 (1934), *quoted in* GOVERNMENT BY JUDICIARY at 416-17.

44. Miller & Howell, *supra* note 37, at 689, *cited in* GOVERNMENT BY JUDICIARY at 331.

45. Osborn v. Bank of the United States, 22 U.S. 738, 866 (1824).

46. Miller Essay at 498.

47. Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of the Separation of Powers*, 27 ARK. L. REV. 584, 595 (1973), *quoted in* GOVERNMENT BY JUDICIARY at 363.

48. For a statement by a Framer, Elbridge Gerry, that the power is exclusive, see GOVERNMENT BY JUDICIARY at 318. In the same Congress, the maxim *expressio unius* was referred to; and the Supreme Court held that an express grant to A signified an intention to withhold the power from B. *See id.* at 223.

49. Moynihan, *Imperial Government* 65 COMMENTARY No. 6 at 25, 31, *quoted in* Miller Essay at 489.

50. R. MCCLOSKEY, THE AMERICAN SUPREME COURT 41-42 (1960). *See also* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN L. REV. 703, 707 (1975).

51. JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 209 (G. Gunther ed.

statement so contrary to the historical facts. Justice Black dismissed

> rhapsodical strains, about the duty of the Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. . . . The Constitution makers knew the need for change and provided for it [by the amendment process of Article V.][52]

Nevertheless, Miller insists that "[o]nly through growth without amendment" has the Constitution "endured as the fundamental law," by which he means judicial "adaptation," purportedly because it "must suit the aspirations of each generation of Americans."[53] Few would urge that the Court's denial over a fifty year period of legislative power to levy an income tax, to outlaw child labor, or to regulate wages and hours, "suit[ed] the aspirations of. . . Americans."[54]

Turning to the present, do the Court's abortion, obscenity, death penalty and busing decisions "suit the aspirations" of the present generation?[55] Scholarly uneasiness over the trend of the post-1968 decisions has been noted by Professors Abraham and Lusky in these pages.[56] About desegregation Miller himself tells us, "a quarter-century after *Brown* the struggle still continues over the civil rights of the black community. There is an eroding commitment to decent treat-

1969), *quoted in* GOVERNMENT BY JUDICIARY at 377. Professor Lusky observes that Marshall would have agreed "that the Constitution should be applied in accordance with the intent of those who made it." Lusky Essay at 405. *See also* GOVERNMENT BY JUDICIARY at 378-79.

52. Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting), *quoted in* GOVERNMENT BY JUDICIARY at 101 n.9. Black could have cited Hamilton, the outstanding apologist for judicial review. *See* Berger on Lusky, *supra*, at note 17. Where Miller sees no problems, Professor Lusky asked, "does establishment of new constitutional rules by the Court offend Article V . . . which prescribes for the amendment process? Does it outrage the principle of separation of powers? . . . In short, is the Court guilty of plain usurpation?" L. LUSKY, BY WHAT RIGHT? 79 (1975), *quoted in* GOVERNMENT BY JUDICIARY at 354 n.13. Washington so regarded it. 35 G. WASHINGTON, WRITINGS 228-29 (J. Fitzpatrick ed. 1940), *quoted in* GOVERNMENT BY JUDICIARY at 299.

53. Miller Essay at 508.

54. For Henry Steele Commager's scathing indictment of the pre-1937 Court, see *Judicial Review and Democracy*, 19 VA. Q. REV. 417, 428 (1943) *quoted in* GOVERNMENT BY JUDICIARY at 332; *see also* Kutler Essay at 512.

55. *See* GOVERNMENT BY JUDICIARY at 325-27. Appraising the scene in the Fall of 1975, Derrick Bell, a black professor, stated: "Today, opposition to desegregation is, if anything, greater than it was in 1954." Bell, *The Burden of Brown on Blacks: History Based on Observations on a Landmark Decision*, 7 N.C. CENT. L.J. 25, 26, 36 (1975), *quoted in* GOVERNMENT BY JUDICIARY at 327. Another black, Roy Wilkins, wrote in 1978 that "the attitude of whites towards blacks is basic in this country. And that attitude has changed for the worse." *Racial Outlook: Lack of Change Disturbs Blacks*, N.Y. Times, Mar. 3, 1978, § A, at 26, col. 1.

56. *See* Abraham Essay at 469-70, 475-77; Lusky Essay at 416.

ment under the Constitution for blacks, as well as for other disadvantaged elements of our society."[57] Those who like Miller and his patron saint, Sanford Levinson,[58] throw themselves into the struggle, hold the Constitution in contempt and call upon the Court to act in its despite.[59]

For a Professor who would put "an ex-Washington lawyer turned historian" in his place, Miller is remarkably free and easy in his citations, as his reliance on Senator Moynihan's constitutional authority has evidenced. Of the same order is his statement that Holmes "repudiated [my] view,"[60] citing *Missouri v. Holland*.[61] There the issue was whether the treaty-making power extended to an agreement with Great Britain for the protection of migratory birds which annually traversed parts of the United States and Canada. Addressing the argument that the treaty infringed powers reserved to the states by the Tenth Amendment, Justice Holmes stated that "[w]ild birds are not in the possession of anyone, and possession is the beginning of ownership," that the "States [therefore] are individually incompetent to act."[62] On that analysis a state could not claim a "reserved" power to do so.[63] Holmes' true sentiments were later clearly expressed in *Baldwin v. Missouri*:[64] "I cannot believe that the [Fourteenth] Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions."[65] And he wrote that it is not the function of judges "to renovate the law. That is not their province."[66] Chief Justice Hughes, it is true, took a different view in the mortgage moratorium case,[67] but his Court then went on to gut the New Deal under the banner of the now discredited economic due process doctrine, illustrating that power can be malign as well as benign. Repeatedly Miller relies on what the

57. Miller Essay at 494; *see* note 55 *supra*. In December, 1978, William Brashler wrote: "The schism between white and black America is still painfully present, and appears all but irreparable." Brashler, *The Black Middle Class: Making It*, N.Y. Times, Dec. 3, 1978, § 6 (Magazine), at 34, 36, col. 1.

58. *See* text accompanying note 92 *infra*.

59. *See* notes 93-7 and accompanying text *infra*; *see also* Berger on Kutler, *infra* at 611-12, n.156.

60. Miller Essay at 497.

61. 252 U.S. 416 (1920).

62. *Id.* at 433-34.

63. *See* GOVERNMENT BY JUDICIARY at 380-81.

64. 281 U.S. 586 (1930).

65. *Id.* at 595, *quoted in* GOVERNMENT BY JUDICIARY at 383.

66. O. HOLMES, JR., COLLECTED LEGAL PAPERS 239 (1920), *quoted in* GOVERNMENT BY JUDICIARY at 384.

67. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). *See* Miller Essay at 497, n.69. Hughes rested judgment on Marshall's "it is a *Constitution* we are expounding," not knowing that Marshall had explained he did not assert "a right to change [the Constitution]." 290 U.S. at 442-43. *See* GOVERNMENT BY JUDICIARY at 374, 377.

Justices have said about their exercise of power, e.g., Chief Justice Warren said that the Court "had the awesome responsibility of often speaking the last word 'in great governmental affairs.' "[68] It is a self-conferred responsibility, and needs to be measured by Lord Chief Justice Denman's observation that " '[t]he practice of a ruling power in the State is but a feeble proof of its legality.' "[69] To justify judicial usurpation by the Court's own words is the veriest boot-strap lifting. An emperor cannot anoint himself.

Next Miller advises us to "study carefully [the] profound words of a very wise judge,"[70] Learned Hand, who in summarizing the wide-ranging attainments required of a judge, said, "the words he must construe are empty vessels into which he can pour nearly anything he will."[71] Hand would have been the first to limit the effect of his dictum, uttered in the course of some extra-judicial remarks, were he called upon to apply it to the terms of the Fourteenth Amendment. The "due process" clause is not "empty" as Hamilton foreshadowed and as is generally agreed.[72] The words "privileges or immunities" have a limited historical content earlier delineated.[73] "Equal protection" was associated throughout the debates with the narrow enclave of rights enumerated in the Civil Rights Act.[74] Whatever the alleged "generality of the words," Hand would not have "pour[ed]" into them the suffrage and desegregation that the framers had so clearly excluded. Sitting as a judge, he held that if the purpose is "manifest," it "override[s] even the explicit words used."[75] Miller's penchant for empty generalization leads him to disregard Hand's confession, against the background of the desegregation case, of failure to understand the Court's function as a "third legislative chamber" except as a "*coup de main*,"[76] emphasiz-

68. Miller Essay at 499.

69. *Quoted in* GOVERNMENT BY JUDICIARY at 375; *see also* Introduction, *supra*, at 528, n.9.

70. Miller Essay at 501.

71. THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 81 (J. Dillard ed. 1953), *quoted in* Miller Essay at 499, 501.

72. Hamilton stated that due process applies "only" to proceedings in courts, "never" to legislation. THE PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett & J. Cooke eds. 1962), *cited in* GOVERNMENT BY JUDICIARY at 194. *See* Mendelson Essay at 451-53, and Ely, *supra* note 5, at 415-17.

73. Berger on Mendelson, at 549-59.

74. *Id.* at 560.

75. Cawley v. United States, 272 F.2d 443, 445 (2d Cir. 1959). In Johnson v. United States, 163 F. 30 (1st Cir. 1905), Justice Holmes held that when a legislature "has intimated its will . . . that will should be recognized and obeyed." *Id.* at 32.

76. L. HAND, THE BILL OF RIGHTS 55 (1962), *quoted in* GOVERNMENT BY JUDICIARY at 166, n.4.

ing at the same time that those who sought to escape the fact that economic due process was discredited by exalting "liberty" over "property" drew a distinction that is a "strange anomaly."[77] Again, when Miller tells us that Jefferson said the Constitution is " 'merely a thing of wax,' " which the Court " 'may twist and shape into any form they please,' "[78] he misrepresents the fact that Jefferson was protesting bitterly that the Court had *made* the Constitution "a thing of wax."[79] Jefferson's dread of the greedy expansiveness of power was made explicit: "It is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power. . . . In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."[80]

In truth, Miller could consign the Constitution to the dust heap, for he maintains that "the Founding Fathers cannot rule us from their graves."[81] To make the words of the Constitution "empty vessels" into which the Justices may pour any meaning they choose is to reduce it to

77. L. HAND, *supra* note 76, at 50-51, *quoted in* GOVERNMENT BY JUDICIARY at 267. Miller notices that "[t]he Court operated as an 'authoritative faculty of political economy' for the period of roughly 1886 to 1936. . . . The abrupt shift in the composition of the Court in 1937 and succeeding years meant that the Court had to find a new role. . . . [T]he Justices on the post-1937 Court set themselves up as an authoritative faculty of social ethics." Miller Essay at 504. Not a word about the constitutional authority. For him, as for Alexander Pope, "one thing is clear: Whatever is, is right."

78. 15 THE WRITINGS OF THOMAS JEFFERSON 278 (A. Libscomb & A. Burgh eds. 1904-07), *quoted in* Miller Essay at 499.

79. 12 WORKS OF THOMAS JEFFERSON 135, 137 (Fed. ed. 1905), *cited in* GOVERNMENT BY JUDICIARY at 341 n.13.

80. 4 ELLIOTT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 543 (2d ed. 1836) *quoted in* GOVERNMENT BY JUDICIARY at 252 [hereinafter cited as DEBATES]. Miller quotes Jefferson's "Some men look at the constitution with sanctimonious reverence . . . and suppose that what they did to be beyond *amendment*," *quoted in* W. DOUGLAS, STARE DECISIS 31 (1949), and reads it as a counsel against an "antiquarian view of constitutional interpretation." Miller Essay at 497 n.68. But Jefferson contemplated amendment by the people, not by a judicial oligarchy; he expressed confidence in the judiciary if "kept strictly to their own department." 5 THE WRITINGS OF THOMAS JEFFERSON 81 (P. Ford ed. 1892-1899), *cited in* GOVERNMENT BY JUDICIARY at 365 n.10. And he sought for the meaning of the Constitution "in the explanations of those who advocated it," the "meaning contemplated by the plain understanding of the people at the time of its adoption." DEBATES, *supra* note 80, at 446, *quoted in* GOVERNMENT BY JUDICIARY at 366-67.

81. Miller, Book Review, *supra* note 21, § E, at 8. Professor Kay comments that "the fashion has grown in our generation of scoffing at the 'filio-pietistic' notion that we must be restrained by the dead hand of the past," Kay, *supra* note 1, at 804, an argument equally applicable to the Constitution itself, text and all. But the Court, as Robert Bork noted, still purports to give effect to the value choices of the Founders. Berger on Lusky, *supra*, at 533, n.3.

a scrap of paper. It is because the Court is well aware that the people would not, if they knew, tolerate the displacement of the popular will expressed by the Framers and Ratifiers,[82] that it cannot afford "truth in judging",[83] as is confirmed by its rejection, in the midst of the desegregation case, of Justice Jackson's plea to tell the people that the Court "was declaring new law for a new day."[84] As Robert Bork observed: "The way an institution advertises tells you what it thinks its customers demand."[85] More baldly put, disclosure would have destroyed the myth that the Court speaks as the voice of the Constitution rather than as the voice of the Justices' own values.[86] For the people have a greater respect for the Constitution than for the Justices.[87]

Two other manifestations of Miller's indifference to the Constitution deserve notice. He twits me for not mentioning John Rawls, *A Theory of Justice*,[88] in which "a modernized theory of distributive justice [is] essayed," of "significance to analysis of constitutional adjudication."[89] Rawls' philosophical theory would require a new Constitution; I am concerned with honoring the old.[90] Were a convention—not a school of philosophers—to adopt a new Constitution it would little advance analysis of the existing one. And in light of the current revolt against increasingly oppressive taxation, it would appear that Rawls'

82. Professor Lusky justly stated that the people expect the Justices to view the Constitution as "expressing the will of those who made it" and "to ascertain their will." L. LUSKY, BY WHAT RIGHT? 32 (1975), *quoted in* GOVERNMENT BY JUDICIARY at 354; see Berger on Alfange, *infra*, n.21.

83. Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A. J. 1212 (1977).

84. *Quoted in* R. KLUGER, SIMPLE JUSTICE 681, 689 (1976), *cited in* GOVERNMENT BY JUDICIARY at 130. Miller casts doubt upon the decision. *See* note 37 *supra*.

85. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4 (1971), *quoted in* GOVERNMENT BY JUDICIARY at 319.

86. *See* Berger on Lusky at 545, n.105.

87. Professor Hans Linde remarked that the "whole enterprise of constitutional law rests, after all, on the premise that the nation cares about its Constitution, not about its courts." Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227, 256 (1972), *quoted in* GOVERNMENT BY JUDICIARY at 320 n.28.

88. J. RAWLS, A THEORY OF JUSTICE (1971).

89. Miller Essay at 507. Ely comments that Robert Nozick's *Anarchy, State and Utopia* (1974) "reach[es] very diffierent conclusions," that "virtually all the commentators on Rawls' work . . . have expressed serious reservations about Rawls' conclusions." Ely, FOREWORD: ON DISCOVERING FUNDAMENTAL VALUES, 92 HARV. L. REV. 5, 37 (1978). *See also* BARRY, A LIBERAL THEORY OF JUSTICE: A CRITICAL EXAMINATION OF THE PRINCIPAL DOCTRINES OF A THEORY OF JUSTICE BY JOHN RAWLS (1973); READING RAWLS: CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE (Daniels ed. 1975).

90. Yet Miller lectures, "one should distinguish between the 'is' and the 'ought.' The 'is' may be simply stated: The Justices have used a number of standards of judgment." Miller Essay at 496. The "standards" must correspond to the Constitution, for judges are bound by oath "to support this Constitution." *See* Berger on Lusky at 535, n.17.

proposal for even broader *distributive* justice does not represent the "aspirations of this generation of Americans."[91] More revealing is Miller's reliance on Sanford Levinson.[92] In his article, *The Specious Morality of the Law*,[93] Levinson brands various calls for maintenance of the rule of law under the Constitution as a "ritualistic incantation," and maintains that a law that is merely identified with the majority "will" is in terms of "moral integrity" not "worthy of respect," because the majority "notions of justice" may be "perceived as manifest tyranny by someone else."[94] Why, he asks, should those who feel tyrannized by the existing legal order recognize it as legitimate?[95] In short, Levinson invites disregard for law and the Constitution, at a time, as he acknowledges, "when except for reverence for law . . . there is no other basis for uniting a nation of so many disparate groups."[96] That Miller should cite such an article, which counsels us to resist "the call for new faith in an old gospel,"[97] as a text for "constitutionalism" betrays his contempt for the Constitution and democratarian government.

Finally, who are the demigods to whom Miller would entrust "the awesome responsibility of . . . the last word in 'great governmental affairs' "?[98] They are for the most part political accidents—as was Chief Justice Warren himself—ranging from mediocre to competent[99] who, Miller states, have not been prepared "for the task of constitutional interpretation."[100] "Few have," he states, the "broad-gauged approach and knowledge" essential "to search for and identify the values that should be sought in constitutional adjudication."[101] And the Justices labor under the grave disadvantage of employing what Miller terms the "faulty" "adversary system as a means of setting public policy," "faulty

91. *See* notes 55, 57 and accompanying text *supra.*

92. Miller Essay at 488, n.11.

93. Levinson, *The Specious Morality of the Law*, HARPER'S MAGAZINE, May 1977 at 35.

94. *Id.* at 38.

95. *Id.*

96. *Id.* at 41. For citations and a critique of the Levinson opus, see Berger, *The Constitution and the Rule of Law*, 1 W. NEW ENGLAND L. REV. 261 (1978).

97. Levinson, *supra* note 93, at 35.

98. *See* text accompanying note 68 *supra.*

99. *See* Justice Story, Berger on Abraham, *supra* at 578 n.88. So too, John Quincy Adams wrote of the Justices, many of whom he knew personally: "Not one of them, except Story, has been a man of great ability. Several of them have been men of strong prejudices, warms passions, and contracted minds." S. BEMIS, JOHN QUINCY ADAMS AND THE UNION 406 n.79 (1956), *quoted in* GOVERNMENT BY JUDICIARY at 335 n.85, paralleled in our own time by James McReynolds and Pierce Butler. For current comments, see GOVERNMENT BY JUDICIARY at 334-36. Professor Kutler remarks on the futility of praying "for *good* men in the seat of power." Kutler Essay at 513.

100. Miller Essay at 500.

101. *Id.* at 507.

on at least three scores—the competence of the personnel, an inability to know the consequences of alternative decisions and the flow of information to the judges."[102] The "system itself," he sums up, "is inadequate to the need."[103] And it is to defend this "inadequate" system that he attacks my call for a return to self-government and an end to government by judiciary!

102. *Id.* at 508.
103. *Id.*

V. Comment on Professor Stanley I. Kutler's Essay

Professor Kutler comes out swinging. His very title impugns my claim to historicity: Berger is "ahistorical," that is to say, nonhistorical.[1] From two eminent practitioners of the historical art, Professors Hugh Trevor-Roper and C.R. Elton, I learned that the essence of historical method is to ground "detail upon evidence and generalization upon detail."[2] The historian, therefore, must begin with scrupulous regard for factual accuracy. Kutler's carelessness with, indeed distortion of, the facts impeaches his own credentials, as can quickly be shown. He states, "Berger flatly rejects any notions of constitutional change and growth—of history, in short—through means other than constitutional amendment. John Marshall's famous dicta that 'it is a *constitution* we are expounding,' which was 'intended to endure for ages to come,' simply seem to have no standing with Berger."[3] It should also have no standing with Kutler, for Marshall himself repudiated the Kutlerian reading of his *McCulloch v. Maryland*[4] dictum. When the case came under attack Marshall rose to its defense, stating that this dictum "does not contain the most distant allusion to *any extension by construction of the powers* of congress. Its sole object is to remind us that a constitution cannot possibly enumerate the means by which the powers of government are to be carried into execution."[5] Again and again he repeated this repudiation and concluded by saying that the judicial power "*cannot be the assertion of a right to change that instrument*,"[6] *i.e.* the Constitution. Commenting thereon, Professor Gerald Gunther, who discovered Marshall's *Defense of McCulloch v. Maryland*, wrote, "If virtually unlimited congressional [or judicial] discretion is indeed required to meet twentieth century needs, candid argument to that effect, rather than ritual invoking of Marshall's

1. Kutler Essay at 511.

2. Trevor-Roper, *Book Review of Elton, The Practice of History*, London Times, Oct. 15, 1967, at 32.

3. Kutler Essay at 516 (footnote omitted).

4. 17 U.S. (4 Wheat.) 316 (1819).

5. JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 185 (G. Gunther ed. 1969) [hereinafter cited as JOHN MARSHALL'S DEFENSE], *quoted in* R. BERGER, GOVERNMENT BY JUDICIARY at 377.

6. JOHN MARSHALL'S DEFENSE, *supra* note 5, at 209 (emphasis added), *quoted in* GOVERNMENT BY JUDICIARY at 377. Professor Lusky agrees that "[t]he famous *McCulloch* dictum was uttered not to justify judicial disregard of the original intent, but to repel the suggestion that the Constitution ought to speak with the same *specificity* as a statute ordinarily does." Lusky Essay at 405.

authority, would seem to me more closely in accord with the Chief Justice's stance."[7] It is this stale canard that Kutler invokes to bypass the exclusive power of amendment and to discredit a fellow scholar. Not only is this a departure from the fastidious accuracy we are entitled to expect of an historian, but it represents a failure to take account, as Sir Herbert Butterfield enjoined, of "the evidence that is discrepant,"[8] a failure he exhibits throughout.

Kutler's treatment of "due process" displays similar deficiencies, let alone that it is a singular effort to resuscitate a discredited doctrine. Preliminarily he states,

> [the] ultimate perversion of the original intentions, *as Berger sees it*, has been the judicial use of the due process and equal protection clauses of the Fourteenth Amendment. For judicial activists in the late nineteenth century, the due process clause served as the cutting edge for the protection of economic privilege; in our time, the equal protection clause has served *judges who wish* to further civil rights and liberties.[9]

Now economic due process, by the Court's own confession, is discredited.[10] "The hostility to substantive due process," Professor Gunther explained, "was largely a hostility to the Supreme Court fishing out of thin air its own predilections with inadequate textual, structural and historical justification."[11] Professor Philip Kurland added, "The new equal protection, like the old equal protection, is the old substantive due process . . . . The difference between the new equal protection and the old substantive due process is essentially the difference in the hierarchy of values of the Court."[12] How due process changes color when applied for libertarian ideals is not explained by Kutler, though it presented a problem for Learned Hand and others.[13] So it is not only "as Berger sees it."

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7. JOHN MARSHALL'S DEFENSE, *supra* note 5, at 20-21, *quoted in* GOVERNMENT BY JUDICIARY at 378 n.19.

8. H. BUTTERFIELD, GEORGE III AND THE HISTORIANS 225 (rev. ed. 1959).

9. Kutler Essay at 519-20 (emphasis added). *But see* Berger on Mendelson at note 2, *supra*.

10. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970), *quoted in* GOVERNMENT BY JUDICIARY at 265. *See also* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

11. *Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645, 664 (1975).

12. *Id.* at 661. Herbert Packer pointed out that "the new 'substantive equal protection' has under a different label permitted today's justices to impose their prejudices in much the same manner as the Four Horsemen once did." Packer, *The Aim of the Criminal Law Revisited: A Plea for a New Look at 'Substantive Due Process'*, 44 S. CAL. L. REV. 490, 491-92 (1971), *quoted in* GOVERNMENT BY JUDICIARY at 191-92.

13. *See* Berger on Abraham at 566-67, nn.26-30; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 949 (1973).

More dispiriting is Kutler's free and easy way with the historical due process materials. He begins by dismissing out-of-hand Alexander Hamilton's statement in the New York Assembly on the eve of the Convention—that due process applied "only" to proceedings in courts, "never" to legislation,[14] that is, it is purely procedural, never substantive—as a "self-serving" disclaimer.[15] This is surely a cavalier, unexplained dismissal of an interpretation by a great contemporary, nowhere controverted in any of the Conventions, and which faithfully reflects 400 years of English and colonial history.[16] To the statement by John A. Bingham, draftsman of the Fourteenth Amendment, during the congressional debates, that the "courts have 'settled' [the meaning of due process] long ago,"[17] Kutler replies that the "decisions were hardly settled," and delivers himself of some generalities about the wrestling by state judiciaries "with a variety of implications for the centuries-old concept."[18] Not Kutler's present-day reading, but what Bingham, the draftsman, understood, is decisive.[19] In fact, however, only two cases have received scholarly attention, *Dred Scott v. Sanford*[20] and *Wynehamer v. New York*.[21] Kutler himself records that Bingham "heaped scorn on Chief Justice Roger B. Taney's bold [*i.e.* novel] substantive gloss on due process in the *Dred Scott* case."[22] That Bingham would then incorporate due process in the amendment "as a

14. 4 THE PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett & J. Cooke eds. 1962), *quoted in* GOVERNMENT BY JUDICIARY 194 n.4.

15. Kutler Essay at 522 n.70. Hamilton declared: "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to as an act of the legislature." *quoted in* GOVERNMENT BY JUDICIARY at 196 n.11.

16. *See* Berger, *Law of the Land Reconsidered*, 74 NW. L. REV. 1 (1979). To "quarrel with the records without abundant cause is to engage in a desperate contest." Richardson & Sayles, *Parliament and the Great Councils in Medieval England*, 77 L.Q. REV. 213, 235-36 (1961).

17. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) [hereinafter cited as GLOBE], *quoted in* GOVERNMENT BY JUDICIARY at 203.

18. Kutler Essay at 522.

19. As Charles Evans Hughes said of the colonists' reliance on the Magna Carta: "It matters not whether they were accurate in their understanding of the Great Charter, for the point is . . . what the Colonists thought it meant." C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 186 (1928), *quoted in* GOVERNMENT BY JUDICIARY at 361 n.46.

20. 60 U.S. (19 How.) 393 (1857).

21. 13 N.Y. 378 (1856). Corwin wrote that: "The *Wynehamer* decision found no place in the constitutional law that was generally recognized . . . in the year 1856 . . . nor was it subsequently accepted. . . ." Of Dred Scott, Corwin wrote, "[Taney carried] with him only two of his associates" and was convincingly refuted by Justice Curtis. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 474-76 (1911).

22. Kutler Essay at 522.

handmaiden for entrepenurial liberty"[23] borders on the grotesque. *Wynehamer* was shortly repudiated by the New York court,[24] and was roundly criticized on traditional grounds by the Rhode Island court.[25] Recently Professor John Hart Ely has written that these two cases "were aberrations, neither precedented nor destined to become precedents themselves," adding that "it should take more than two aberrational cases to convince us that those who ratified the fourteenth amendment had some eccentric definition in mind."[26] References to due process in the 1866 debates were solely in procedural terms,[27] a point ignored by Kutler, who is apparently unfamiliar with the judicial rule that *evidence* cannot be defeated by speculation or no evidence.[28] In these pages Professor Mendelson confirms that due process was procedural only.[29] Resort to substantive due process had to wait for the 1890s when the Supreme Court undertook to save the nation from socialism.[30] Of course, it is open to Kutler to hold that "judges, however lacking prescriptive warrants . . . would continue to search for new parameters of due process,"[31] but this merely illustrates the familiar greed for ever more power and does not meet my challenge to their right to do so.

It is with the legislative history that Kutler has himself a field day. First he taxes me with failure to "confront the reconstruction of the setting of the Fourteenth Amendment" as described by a number of listed scholars,[32] the sum total of which is "that the history surrounding the origins of the Amendment is complex and deeply immersed in a context of intra-party, personal and ideological conflicts—all of which led to confusion, deception, and even to a deliberate muting of differences," which Berger, relying on the " 'black letters' of the *Congressional Globe*" "ignores."[33] He warns that the Framers "engaged in their share of sham, deception, planned legislative colloquies and even

23. *Id.*

24. Metropolitan Bd. of Excise v. Barrie, 34 N.Y. 657, 668 (1866).

25. State v. Keeran, 5 R.I. 497 (1858), *cited in* GOVERNMENT BY JUDICIARY at 256.

26. Ely, *Constitutional Interpretation: Its Allure and Impossibility*, 53 IND. L.J. 399, 417, 420 (1978).

27. *See* discussion in GOVERNMENT BY JUDICIARY at 201-14.

28. *Id.* at 74.

29. *See* Mendelson Essay at 453-4. Professor Ely concluded that the view that the due process clause incorporates "a general mandate to review the substance of legislation . . . was probably wrong," and that it is now "universally acknowledged to have been constitutionally improper." Ely, *supra* note 26, at 415.

30. Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

31. Kutler Essay at 523.

32. *Id.* at 515 nn.27-31.

33. *Id.*

humor [that should caution us] against a literal reading of their words."[34] Confronted by unassailable "evidence" he takes refuge in a cloud of rhetoric. For the moment I defer showing that the historians he mentions confirm the *Globe*'s "black letters," and turn to the touchstone whereby to test his "complexities," namely, the exclusion of suffrage and segregation, which constitutes the core of my thesis.

There is no need once more to summarize the indisputable facts. Let it suffice to recall that Roscoe Conkling, John Bingham, Thaddeus Stevens, Senator Jacob Howard, members of the Joint Committee on Reconstruction which drafted the Amendment, and Senator William Fessenden, its chairman, all categorically stated that suffrage was excluded; and the Committee's Joint Report signed by all of them unmistakably confirmed the exclusion.[35] Such statements, courts hold, are the best criteria of legislative intention,[36] here buttressed by a unanimous chorus of statements to the same effect. Kutler summons no contradictory statements and, if memory serves me, there are none. Then there is the fact that radical opposition to readmission of Tennessee because its constitution excluded Negro suffrage was voted down in the House by 125 to 12, and Senator Sumner's suffrage proposal was rejected by 34 to 4.[37] Bingham, draftsman of the equal protection clause, who vigorously led the defense of Tennessee's exclusion of Negro suffrage, declared, "We are all for equal and exact justice . . . [but] justice for all is not to be secured in a day,"[38] an admission that equal protection did not comprehend suffrage. So too, proposals to abolish *all* discriminations were repeatedly voted down.[39]

Add to this that Berger does not stand alone. Professor Nathaniel Nathanson, an adherent of Kutler's activist camp, stated about my argument that the 39th Congress considered that the Fourteenth Amendment would not require school desegregation or Negro suffrage, "These are not surprising historical conclusions. The first was quite conclusively demonstrated by Alexander Bickel . . . the second was also convincingly demonstrated by the dissenting opinion of Mr. Justice Harlan . . . . Mr. Berger's independent research and analysis confirms and

34. *Id.* at 516-17 (footnote omitted).

35. *See* Berger on Miller at 580-81, nn.30-35. For Bingham's views, *see* text accompanying note 95 *infra*.

36. *See, e.g.*, United States v. Wrightwood Dairy Co., 315 U.S. 110, 125 (1942); Wright v. Vinton Branch, 300 U.S. 440, 463-64 n.8 (1936). *See also* GOVERNMENT BY JUDICIARY at 157 n.2.

37. GLOBE, *supra* note 17, at 3980, 4000, *cited in* GOVERNMENT BY JUDICIARY at 105.

38. GLOBE, *supra* note 17, at 3979, *quoted in* GOVERNMENT BY JUDICIARY at 111.

39. GLOBE, *supra* note 17, at 1287.

adds weight to those conclusions."[40] Professors Abraham, Lusky and Mendelson concur that suffrage was excluded from the Amendment;[41] and Professor Gunther wrote that "most constitutional lawyers agree" that the "one person-one vote" doctrine "lacks all historical justification."[42] Against this, Kutler's list of those "who did not see the Warren Court as judicial messiahs," namely, "Southern politicians . . . prosecutors promoting societal rights" and "the John Birch Society peddl[ing] its Impeach Earl Warren Kits,"[43] without mentioning the protests of Justices Black and Harlan against the Court's exercise of the amending power,[44] Judge Learned Hand's large doubts about the desegregation decision and the Court's role as a "third legislative chamber,"[45] hardly demonstrates the impartiality one expects of an historian. To refer against this background, moreover, to what *Berger* "interprets as the original intention underlying the Fourteenth Amendment," betrays an invincible addiction to preconceptions that facts cannot penetrate.[46]

Consider next the charge that Berger fails "to manifest, any feel for political context or nuance . . . . He repeatedly states that many white Americans harbored strong negrophobic sentiments. That, of course, is indisputable . . . ."[47] "Many" scarcely does justice to the pervasive feeling mirrored in George Julian's lament in the House: "The real trouble is that we hate the negro."[48] To quote one of the authorities whom I am charged with failing to "confront," Harold Hyman: "Negrophobia tended to hold even the sparse Reconstruction in-

40. Nathanson, Book Review, 56 TEX. L. REV. 579, 581 (1978).

41. *See* Abraham Essay at 002. Lusky refers to "Justice Harlan's irrefutable and unrefuted demonstration in dissent that the Fourteenth Amendment was not intended to protect the right to vote. . . ." Lusky Essay at 406; *See also* Mendelson Essay at 452.

42. Gunther, *Book Review*, Wall St. J., Nov. 5, 1977, at 4. Professor Robert Bork wrote that "The principle of one man, one vote . . . runs counter to the text of the Fourteenth Amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 18 (1971), *quoted in* GOVERNMENT BY JUDICIARY at 89-90 n.71. *See also* Introduction at 530 n.20.

43. Kutler Essay at 514.

44. For Justice Black's views, see Berger on Miller at 583 n.52. Justice Harlan stated, "When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed . . . ." Oregon v. Mitchell, 400 U.S. 112, 203 (1970), *quoted in* GOVERNMENT BY JUDICIARY at 330.

45. L. HAND, THE BILL OF RIGHTS 55 (1958), *cited in* GOVERNMENT BY JUDICIARY at 166 n.4.

46. Kutler Essay at 523.

47. *Id.* at 518-19.

48. GLOBE, *supra* note 17, at 257, *quoted in* GOVERNMENT BY JUDICIARY at 233.

stitutions that the nation created to low throttle, and played a part in Reconstruction's . . . incompleteness."[49] Its role in blocking black suffrage is copiously detailed in *Government by Judiciary*. This was a basic fact, not a mere "nuance," which screams from the "black letters" of the Globe, but does not really break through Kutler's preconceptions. He casually glides over another such fact, merely mentioning that the Republicans "[t]ime and again . . . invoked notions of state sovereignty and said that only the states could fix the qualifications for voting."[50] A Hyman disciple, Professor Phillip Paludan, repeatedly emphasizes that state control of local institutions was "the most potent institutional obstacle to the Negroes' hope for protected liberty."[51] Having found these two overtowering, super-"nuances,"—negrophobia and states' rights—I turned to the Reconstruction historians mentioned by Kutler (as well as others) and found that a "complex" setting notwithstanding, they confirmed my views.

Harold Hyman wrote, that "One reason the Reconstruction of the South loomed high to northerners was less that blacks were involved than that every one understood the pre-eminence of states . . . in affecting all their citizens' lives;" "virtually unhampered state powers were considered fundamental for liberty, federalism and democracy."[52] On the issue of states' rights, another Kutler authority, Howard Jay Graham wrote, "No one reading the debates carefully will question the framers' devotion to federalism . . . ."[53] Another Kutler authority, M.L. Benedict, disposed of Kutler's contemptuous dismissal of some "simplistic radical/moderate dichotomy."[54] Benedict classified the Republicans as Conservatives, Moderates (Centrists) and radicals (with a small r).[55] The radicals, he concluded, "did not dominate Congress during the Reconstruction era."[56] The "Centrists' work centered on two committees: Fessenden's Joint Committee on Reconstruction and Trumbull's Senate Judiciary Committee. Between them they fashioned

49. H. HYMAN, A MORE PERFECT UNION 447 (1973), *quoted in* GOVERNMENT BY JUDICIARY at 233 n.17.

50. Kutler Essay at 517.

51. P. PALUDAN, A COVENANT WITH DEATH 15 (1975), *quoted in* GOVERNMENT BY JUDICIARY at 155.

52. H. HYMAN, *supra* note 49, at 426 (1973), *quoted in* GOVERNMENT BY JUDICIARY at 63 n.50.

53. H. GRAHAM, EVERYMAN'S CONSTITUTION 312 (1968), *quoted in* GOVERNMENT BY JUDICIARY at 63 n.50.

54. Kutler Essay at 516.

55. *See* GOVERNMENT BY JUDICIARY at 237.

56. M. BENEDICT, A COMPROMISE OF PRINCIPLE 27 (1975), *quoted in* GOVERNMENT BY JUDICIARY at 237.

the conservative Reconstruction program of the 39th Congress."[57] In short, "the non-radicals had enacted their program with the sullen acquiescence of some radicals and over the opposition of many."[58] What Benedict supposedly drew from the "context" so warmly recommended by Kutler I deduced from the "black letter" rejection of suffrage proposals by votes of 125 to 12 and 34 to 4, and from repeated rejection of proposals to abolish *all* distinctions.[59]

Chairman Wilson, it will be recalled, assured the framers that the terms "civil rights and immunities" did not embrace mixed schools.[60] Richard Kluger tells us that Graham, one of counsel in the desegregation case, "was particularly troubled by Representative Wilson's insistence during the phase of the debates dealing with the 'no discrimination' clause that the Civil Rights Bill was not intended to outlaw separate schools. That negative reference, Graham reported, was 'unfortunate, particularly since he was House Manager of the . . . bill.' "[61] Graham himself recorded that "[t]here were many reasons why men's understanding of equal protection, as applied to educational matters, was imperfect in 1866 . . . . Negroes were barred from public schools of the North, and still widely regarded as 'racially inferior' and 'incapable of education.' Even comparatively enlightened leaders then accepted segregation in schools."[62] Here is a "context" that cries out for consideration in "the reconstruction of the setting of the Fourteenth Amendment" but all it receives from Kutler is that such learning "is hardly new."[63] Does that disentitle it to consideration in evaluating the Warren Court's "revolution?"

In the face of such testimony by his own witness, Kutler has the temerity to charge that "Berger *carefully culls out* every legislative statement [on school segregation]" . . . "[t]o demonstrate that modern Supreme Court decisions . . . *conflict with* a monolithic, irresistible *history*."[64] To "cull out" some statements is to reject others that presumably go the other way, a genteel style of charging me with suppression of

57. M. BENEDICT, *supra* note 56, at 146-47 (1975), *cited in* GOVERNMENT BY JUDICIARY at 238 n.41.

58. M. BENEDICT, *supra* note 56, at 210 (1975), *cited in* GOVERNMENT BY JUDICIARY at 239.

59. *See* notes 37-39 and accompanying text *supra*.

60. Berger on Mendelson at 551 n.34.

61. R. KLUGER, SIMPLE JUSTICE 634-35 (1976), *quoted in* GOVERNMENT BY JUDICIARY at 119 n.12.

62. H. GRAHAM, *supra* note 53 at 290 n.70 (1968), *quoted in* GOVERNMENT BY JUDICIARY at 127.

63. Kutler Essay at 515.

64. *Id.* at 519 (emphases added).

evidence. I challenge Kutler to produce the rejected statements.[65] Bickel's documented study of the 1866 debates let him to conclude,

> It was preposterous to worry about unsegregated schools, for example, when hardly a beginning had been made at educating Negroes at all and when obviously special efforts, suitable only for the Negroes, would have to be made . . . . It is impossible to conclude that the 39th Congress intended that segregation be abolished . . . .[66]

And in 1962 he again wrote: "The framers did not intend or expect then and there to outlaw segregation, which, of course, was a practice widely prevalent in the North,"[67] as Graham recognized.

Wishful thinker that he was, Graham[68] was yet far readier to face reality than Kutler: *Brown v. Board of Education*,[69] he wrote,

> [was] decided . . . with scant reference to the historical rebriefings or to framer intent or original understanding. Rather, political and judicial ethics, social psychology—what the equal protection of the laws means, and must mean, in our time, whatever it may have meant to whomever in 1866–1868—these were the grounds and the essence of Chief Justice Warren's opinion for a unanimous Court.[70]

In short Warren revised the Amendment, or in Kutler's blander version, "the equal protection clause has served judges who wish to further civil rights and liberties."[71]

Remains Alfred Kelly, who was one of the most arrant wishful thinkers in the field, as the reader may gather if he pursues the citations to Kelly in my index, where I painstakingly analyzed many of Kelly's utterances—what Kutler labels "polemical"[72]—and which, along with

65. He also refers to my "limited, selected evidence," *id.* at 523, when in fact I faced up to every discrepant fact, whereas Kutler cannot bring himself to do so. *Compare* Kutler's own undeniable "culling," *supra* at notes 43-45. *See also*, Perry, Book Review, 78 COLUM. L. REV. 685 (1978).

66. R. KLUGER, *supra* note 61, at 654 (1976), *quoted in* GOVERNMENT BY JUDICIARY at 100.

67. A BICKEL, THE LEAST DANGEROUS BRANCH 100 (1962), *quoted in* GOVERNMENT BY JUDICIARY at 101.

68. Confronted with the Framers' imperfect "understanding of equal protection, as applied to education matters," he asked, "Does it follow—dare it follow—[that] we *today* are bound by that imperfect understanding of *equal protection* of the laws?" H. GRAHAM, *supra* note 53, at 290 n.70, 291 (1968) (emphases in original), *quoted in* GOVERNMENT BY JUDICIARY at 282. Here is the apogee of self-delusion: the Framers had an "imperfect understanding" of the words *they* employed, words that expressed *their* intention, not those of Graham & Co.

69. 347 U.S. 483 (1954).

70. H. GRAHAM, *supra* note 53, at 269 (1968), *quoted in* GOVERNMENT BY JUDICIARY at 131 n.62.

71. Kutler Essay at 520.

72. *Id.* at 514.

other similar labors, led an eminent British political scientist, Professor Max Beloff, to say of that neo-abolitionist school: "The quite extraordinary contortions that have gone into proving the contrary [of my view] make sad reading for those impressed with the high quality of American legal-historical scholarship."[73] And it makes even sadder reading that Kutler should continue to rely on such authorities, as Kelly's recantation alone should demonstrate. Kelly had been of counsel in the desegregation case, and by his own admission "distorted" the history,[74] a lovely admission by an historian. In 1966, he adverted to

> the limitation imposed by the essentially federal character of the American constitutional system, which at last *made it impossible* to set up a comprehensive and unlimited program for the integration of the Negro into the southern social order. Such a program could have been effected only by a revolutionary destruction of the states and the substitution of a unitary constitutional system . . . . [T]he commitment to traditional state-federal relations meant that the radical Negro reform program *could be only a very limited one*.[75]

What he learned from an "extraordinary revolution in the historiography of the Civil War and Reconstruction"[76] I picked up from the "black letters" of the *Congressional Globe*. Kelly's recantation, which he could not bring himself expressly to avow, amounts to a confession that a generation of historians had misread the "setting and context"; Kutler's failure to weigh Kelly's recantation further impeaches his judgment.

Such are the "complexities and setting" which I allegedly "ignore[d]." And in my "unoriginal" way,[77] seeing 2 and 2 side by side, I

73. Beloff, *Arbiters of American Destiny*, The Times (London) Apr. 7, 1978 (Higher Educ. Supp.) at II. Nevertheless Kutler condemns my "unrelenting, ungracious treatment of other writers." Kutler Essay at 523. The progress of science, J.W.N. Sullivan wrote, is due to the fact that the scientific world has "one simple but devastating criterion, 'Is it true?' " J. SULLIVAN, THE LIMITATIONS OF SCIENCE 277-78 (1933). I took pains to demonstrate that the views of Kelly et al. were untenable, whereas Kutler is content to sprinkle his pages with prejoratives. When he does essay proof it is at the cost of the historical facts.

74. The NAACP "carefully doctor[ed] all the evidence to the contrary, either by suppressing it . . . or by distorting it when suppression was not possible." Kelly, *Clio and the Constitution: An Illicit Love Affair*, SUP. CT. REV. 119, 144 (1965).

75. Kelly, *Comment on Harold M. Hyman's Paper*, in NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION 55 (H. Hyman ed. 1966) (emphases added) *quoted in* GOVERNMENT BY JUDICIARY at 242.

76. Kelly, *supra* note 75 at 55, *quoted in* GOVERNMENT BY JUDICIARY at 242.

77. Kutler derides me for being "largely unoriginal," Kutler Essay at 515, the classic academican's dismissal, as if that dispenses with the need to reconsider the problem in light of the Warren Court's "revolution." *See* notes 140-44 and accompanying text *infra*. Problems do not go away because academicians like Kutler ignore them.

As one who has reached the age of 78, I may be permitted to deny the charge, rise to a

proceeded to deduce that they added up to 4, that is, given negrophobia and the deep-seated attachment to states' rights (plus a host of assurances that the Fourteenth Amendment excluded suffrage and segregation) I submitted to the evidence despite my predilections, as Huxley counselled,[78] and did not shrink from saying that the Court was not authorized by the Fourteenth Amendment to interfere therewith. If any of the Reconstruction historians cited by Kutler forthrightly said as much, it escaped my notice; indeed, I have seen a couple of them squirm when confronted by that inescapable deduction.

When Kutler seeks to wring from section 2 of the Amendment an impeachment of the foregoing materials, his passion for "context" markedly subsides. Because he insists that Berger fails "to manifest any feel for political context or nuance"[79] it needs to be demonstrated that this devotee of "context" glaringly disregards it when it suits his own purposes. Section 2 provides for reduced representation when states deny or abridge the right to vote. It did not derive from tenderness for the blacks but from the desire to preserve Republican ascendancy. Emancipation brought the startling realization that the Southern representation would no longer be limited in the House of Representatives to three-fifths of the blacks, as Article I, section 3 provided. Now each voteless freedman counted as a whole person; and as a result southern states would be entitled to increased representation, and in union with northern Democrats would have, as Stevens pointed out, "a majority," which must be forestalled to "secure perpetual ascendancy" to the Republicans.[80] Senator George Williams, a member of the Joint Committee, frankly avowed that it was more important to

question of "personal privilege" and point out a number of "firsts," which only an uninformed reader can fail to perceive. No prior commentator collected the historical materials that show what privileges or immunities, due process and equal protection meant to the Framers who used the terms, rebutted the *Slaughter House* emasculation of privileges or immunities, rebutted the neo-abolitionist attempt to read abolitionist theology into the Amendment, examined the meaning of the "Congress shall enforce" provision of the Fourteenth Amendment, examined the Marshall-Holmes-Frankfurter dicta that are the cornerstone of the activist case, examined the widely-held view that the Harlan dissents were refuted by William Van Alstyne, exposed the erroneous reliance on those who opposed the Amendment, and rebutted the "open-ended" theory. Against Kutler, I cite Professor C. Van Woodward: "Berger's *Government by Judiciary* raises scores of fascinating questions that no one in the field can afford to ignore." GOVERNMENT BY JUDICIARY (cover).

78. T. HUXLEY, MAN'S PLACE IN NATURE (1863), *quoted in* H. SMITH, MAN AND HIS GODS 372 (1953), *quoted in* GOVERNMENT BY JUDICIARY at 1: "My colleagues have learned to respect nothing but evidence, and to believe that their highest duty lies in submitting to it, however it may jar against their inclinations."

79. Kutler Essay at 518.

80. GLOBE, *supra* note 17, at 74, *quoted in* GOVERNMENT BY JUDICIARY at 16.

limit southern representation than to provide "that negroes anywhere should immediately vote."[81] In the House James Blaine said, "The effect contemplated . . . is perfectly well understood, and on all hands frankly avowed. It is to deprive the lately rebellious States of the unfair advantage of a large representation in this House, based on their colored population, so long as that people shall be denied political rights."[82] If the state *gave* them the vote, it was anticipated, of course, that they would vote for their benefactors and thereby perpetuate the Republicans in power.

Exactly the same concern later prompted the Fifteenth Amendment, for as Kutler states, "That measure was designed to guarantee black voting rights in the northern states in order to further Republican party fortunes."[83] This, he tells us, "underscores the contention that legislative history must be viewed as more than a frozen section of tissue; there also is, to repeat, a context of action, purpose, and pacing to be understood."[84] Indeed there is, but he does not grasp that it was perpetuation of Republican hegemony that section 2 and the Fifteenth Amendment sought, and that "context" in nowise alters the repeated assurances that section 1 did not confer suffrage.[85]

His analysis of section 2 throws "context" to the winds; now he relies on "words." The acknowledgment by Fessenden, Stevens and others, "that the Fourteenth Amendment *did not interfere with the states'* prerogatives," Kutler states, is "*negate[d]*" by "their own words."[86] By "their own words . . . Republicans acknowledged the reduced representation principle to be a remedial provision permitting national action against a state which Congress could not otherwise punish directly. In short, Berger's devotion to literalness led him to ignore the legislative convolutions, indeed sarcasm, conveyed by such language."[87] Now the attempt by, section 2 to *induce* states to *grant*

81. GLOBE, *supra* note 17, app. at 94, *quoted in* GOVERNMENT BY JUDICIARY at 52-53.

82. GLOBE, *supra* note 17, at 141, *quoted in* GOVERNMENT BY JUDICIARY at 66.

83. Kutler Essay at 519. Ward Elliott remarked, "The post-Civil War Radical Republicans . . . cared very little for the black vote until they came to believe that it would help to secure their position . . . against a Democratic resurgence." W. ELLIOTT, THE RISE OF A GUARDIAN DEMOCRACY 2 (1974), *quoted in* GOVERNMENT BY JUDICIARY at 53 n.4.

84. Kutler Essay at 519.

85. Professor Mendelson agrees that: "By treating suffrage separately and differently in section 2, those who gave us the Fourteenth Amendment made clear their purpose to exclude voter problems from the equal protection and related clauses of section 1. In short, the Fifteenth Amendment makes good the omission of suffrage rights in section 1 . . . ." Mendelson Essay at 453.

86. Kutler Essay at 518 (emphasis added).

87. *Id.*

black suffrage was not an "interfere[nce] with the state prerogatives"; control of suffrage was unmistakably left with the states. Why could Congress "not otherwise punish directly" denial of the vote that section 2 was "indirectly forcing the states" to give?[88] The answer was plainly given by the Report of the Joint Committee: "It was doubtful, in the opinion of your Committee, whether the States would consent to surrender a power they had always exercised, and to which they were attached."[89] Hence the Committee concluded that section 2 "would leave the whole question with the people of each State, holding out to all the advantage of increased political power *as an inducement* to allow all to participate in its exercise."[90] Since the point at issue is that suffrage was left to the states and therefore was unaffected by the Fourteenth Amendment, the fact that section 2 was "indirectly forcing the states to *let* [blacks] vote"[91] in nowise affects my demonstration that suffrage was left to the states. Kutler fails to perceive the difference between "an inducement" to a state to act and a provision authorizing federal action in the area.

Where is the "sarcasm"[92] in James Garfield's statement that he wanted suffrage guaranteed but said, "I am willing . . . to take what I can get"?[93] How is the point made by the Report, signed by Chairman Fessenden, affected by his statement that "if the states use *their* constitutional power to 'make an inequality of rights,' then they would 'suffer such and such consequences' "?[94] Both statements acknowledged that power was to remain in the states. What "legislative convolutions" or "sacrcasm" are hidden in Bingham's statement that "[t]he Amendment *does not give*, as the second section shows, the power to Congress of regulating suffrage in several States,"[95] or in Senator Howard's explanation that "[t]he second section *leaves the right* to regulate the elective franchise still with the States, and does not meddle with the right."[96] Kutler's argument, I submit, grasps at straws to bolster his preconcep-

88. *Id.*

89. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, S. REP. NO. 112, 39th Cong., 1st Sess. 8 (1866), *quoted in* GOVERNMENT BY JUDICIARY at 84.

90. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 89, at 8 (emphasis added).

91. Kutler Essay at 518 (emphasis added).

92. *Id.*

93. GLOBE, *supra* note 17, at 2462, *quoted in* Kutler Essay at 519.

94. Kutler Essay at 519 (emphasis added), quoting GLOBE, *supra* note 17, at 1279.

95. GLOBE, *supra* note 17, at 2542, *quoted in* GOVERNMENT BY JUDICIARY at 65 (emphasis added).

96. *Id.* at 2766, *quoted in* GOVERNMENT BY JUDICIARY at 65 (emphasis added).

tions, a course that does little honor to the historian's craft. Consider too Kutler's verbal gymnastics in his version of Stevens' views:

> The Pennsylvanian repeated the litany that "the States have the right . . . to fix the elective franchise," and that section 2 did nothing to alter that. But the wily Stevens was at his cleverest when he said that he preferred section 2 to a direct declaration for black suffrage because he would rather that blacks not vote until they had been educated in "their duties . . . as citizens." Stevens thus had the best of all worlds: he could make a gesture to northern bigotry by suggesting that blacks were not ready for suffrage, and he could erode southern white power in Congress either by reducing representation based on a denial of the franchise to blacks or by indirectly forcing the states to let them vote.[97]

This pretty exercise in psychoanalysis cannot wash out Stevens' recognition, whatever his motives, that the Amendment "falls far short of my wishes . . . [but] it is all that can be obtained in the present state of public opinion."[98] Such are the "words" which Kutler reads as "negating" my view that the "leading Republicans" acknowledged that "the Fourteenth Amendment did not interfere with the states' prerogatives."[99] To ape his style, "Some negation"!

His discussion of the judicial role has several facets.[100] First he rejects the view that it was confined to the "policing of [constitutional] boundaries and [excluded from] policymaking reserved to the legislature," a distinction he scornfully labels as "mechanistic jurisprudence,"[101] notwithstanding it was earlier drawn by Madison, Justice James Iredell, James Bradley Thayer and Learned Hand.[102] Neverthe-

97. Kutler Essay at 518 (footnotes omitted). In repeating the "litany," that is, the appointed form, Stevens showed he knew what his constituency demanded. *See* note 129 *infra*.

98. GLOBE, *supra* note 17, at 2459.

99. Kutler Essay at 518.

100. Where others—Abraham and Ely, for example— are deeply troubled by the problem of drawing "limits" for unrestrained discretion, Kutler blithely dismisses it. All that is needed, he asserts, is to "presume the constitutionality of legislative policy" and "apply severe scrutiny to legislation affecting processes of free political discourse, association, or balloting, which are the foundation for making substantive legislative and executive policy choices." Kutler Essay at 525. How do such "limits" account for judicial substitution of "one person—one vote" for the manifest exclusion of suffrage from the Fourteenth Amendment?

101. Kutler Essay at 522.

102. L. HAND, THE BILL OF RIGHTS 66, 31 (1958); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893). Although Hamilton stressed that the courts were to serve as "bulwarks of a limited Constitution against legislative encroachments," "within those limits," Madison said, there were "discretionary powers." 1 ANNALS OF CONG. 438 (Gales & Seaton eds. 1789), *quoted in* GOVERNMENT BY JUDICIARY at 304.

less Kutler maintains that "there is an abstract artificiality in distinguishing between 'policing boundaries' and 'policymaking.' "[103] All line-drawing, Justice Holmes reminded us, is a matter of degree; twilight imperceptibly merges into night, yet we do not hesitate to distinguish day from night, as did the Framers. They were exclusively concerned with preventing a department from "overleaping its bounds";[104] they had no intention of permitting a judicial takeover of legislative discretion *within* those bounds, as is evidenced by their rejection of judicial participation in policy-making on a Council of Revision, by their deep-seated distrust of judicial discretion,[105] by their attachment to the separation of powers, made explicit by John Adams' 1780 Massachusetts Constitution ("the judiciary shall never exercise the legislative" power),[106] and by Hamilton's assurance that judges could be impeached for "deliberate usurpations on the authority of the legislature."[107] What "abstract artificiality" is there in giving effect to the Framers' decision to exclude suffrage from the Fourteenth Amendment?[108] Instead of name-calling and derision Kutler would have been better occupied in accounting for such "discrepant evidence."

Second, Kutler attacks my comment on Archibald Cox's acknowl-

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The matter was put plainly in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796), by Justice James Iredell, who had made one of the most cogent arguments for judicial review prior to the Convention: "The power of the legislatures is limited" by the several constitutions. "*Beyond* those limitations, . . . their acts are void, because they are not warranted by the authority given. But *within* them, I think, they are in all cases obligatory . . . because . . . the legislatures only exercise a discretion expressly confided to them by the Constitution . . . . It is a discretion no more controllable (as I conceive) by a court of justice, than a judicial determination is by them. . . ." *Id.* at 265 (emphasis added). Similarly, executive discretion lies beyond judicial control. *See* Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169-70 (1803). *See also* Abraham Essay at 481.

103. Kutler Essay at 521.

104. R. BERGER, CONGRESS V. THE SUPREME COURT 13-16 (1969).

105. *See generally* GOVERNMENT BY JUDICIARY at 300-08. For the "profound fear of judicial . . . discretion," *see* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 298, 304 (1969).

106. 1 THE FEDERAL AND STATE CONSTITUTIONS 960 (B. Poore ed. 1878). For the same utterance by Madison, *see* 1 ANNALS OF CONG. 435-36, both *quoted in* GOVERNMENT BY JUDICIARY at 250 n.5.

107. THE FEDERALIST No. 81 (A. Hamilton) at 526-27, *quoted in* GOVERNMENT BY JUDICIARY at 294.

108. Kutler suggests: "[I]t can be argued that the Republican framers of the Fourteenth Amendment 'may have foreseen' the judicial activism of a later period stemming from 'the possibilities of their language.' " Kutler Essay at 520-21. For this he cites a 1950 statement by Professor Willard Hurst. *See* W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 227-28 (1950). I wonder whether Hurst would reject my detailed proof that the "open-ended" theory cannot stand up in the face of the historical evidence. *See* Berger on Abraham at 570-72, nn.56-66.

edgment that libertarian impulses "were felt more strongly in the world of the highly educated" and were "not shared so strongly and widely as to realize themselves through legislation,"[109] because I see this simply as a problem of "evil that the people were, and remain, unready to cure,"[110] exclaiming, "What an exquisite example of majoritarianism."[111] That our system is built on majoritarianism scarcely needs demonstration.[112] But Kutler has it that I am "oblivious" to the concern of the Founding Fathers "about legislative tyranny and majoritarianism," citing, ironically enough, No. 10 of *The Federalist* for its "recognition of minority rights."[113] There Madison was concerned with the protection of the propertied minority, with protection "of different and unequal faculties of acquiring property," with preserving the "unequal distribution of property" against a "rage for paper money, for an abolition of debts, for an equal division of property,"[114] which of course included Negro chattels. Discrimination against the black minority, for whom Kutler is concerned, was, however, built into the Constitution. In fact, as Gordon Wood observed, "[I]n the minds of most Whigs in 1776 individual rights, even the basic civil liberties that we consider so crucial, possessed little of their modern theoretical relevance when set against the will of the people."[115] Nowhere in the Constitution or its history is there an intimation that judges were given a power of attorney to fashion unenumerated "minority rights" in order to remedy "injustice, *as they perceive it*."[116] To the contrary, Marshall held that the Constitution did not protect against all abuses.[117] When the Civil Rights Act of 1866 came to the rescue of the blacks, it enumerated a narrow group of rights, picked up in the "privileges or immunities" clause, and the Framers made clear that they intended to exclude all others.[118] To speak of "minority rights" *en gros* is therefore to read into the Constitution limitations on "majoritarian" government for which there is no constitutional warrant.

109. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 35 (1976), *quoted in* GOVERNMENT BY JUDICIARY at 313.

110. A. COX, *supra* note 109, at 409.

111. Kutler Essay at 524.

112. It is freely acknowledged by Ely, a friend of an activist Court. Ely, *supra* note 26, at 411.

113. Kutler Essay at 524.

114. THE FEDERALIST No. 10 at 55-56, 62 (A. Hamilton) (Mod. Lib. ed. 1937).

115. G. WOOD, *supra* note 105, at 63. Anti-majoritarianism was the refuge of the propertied classes. *Id.* at 502-05.

116. Kutler Essay at 525 (emphasis added).

117. Berger on Lusky at 543, n.85, *see also* pp. 609-10, *infra*.

118. Berger on Mendelson at nn.33-36, 45-47, 56-63.

Lamenting that "our political system has often malfunctioned when entrenched interests confront rising demands for change,"[119] Kutler forgets that for generations the Court served as the handmaiden of such "entrenched interests," to mention only the overthrow of income tax legislation[120] and *Lochner v. New York*.[121] Henry Steele Commager excoriated the pre-1937 Court for blocking all efforts to ameliorate the lot of Negroes, labor and the like.[122] In the *Slaughter House Cases*[123] the Court aborted even the slender protection afforded to blacks by the "privileges or immunities" clause, so that for about 60 years they were exposed to violence and oppression.

Third, Kutler's version of the framers' distrust of the judiciary is again distorted and inaccurate. He begins: "Underlying [Berger's] analysis is a traditional assumption that the Republicans of the era instinctively distrusted the judiciary and, what is more, constantly *schemed to debilitate or destroy its functions*. Those expressing such views seemingly dominate the reports in the *Congressional Globe*—but only in verbiage."[124] His supporting citation contains not the slightest support for the italicized statement. Again in attributing to me the view "that the judges have engaged in self-conscious aggrandizement, motivated by contempt for the wishes of the sovereign people,"[125] he suggests that such proof is needed to make out a case. It suffices, however, that the Court has confirmed what John Stuart Mill referred to as "the disposition of mankind . . . to impose their own opinions and inclinations as a rule of conduct on others," and that, as Mill said, is enough reason to withhold judicial power to do so.[126] Be it never forgotten that Justice Holmes and Chief Justice Stone condemned the Justices' identification of their own predilections with constitutional mandates.[127] And if the Court has not exhibited "contempt for the

119. Kutler Essay at 524.

120. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 582 (1895).

121. 198 U.S. 45, 64 (1905).

122. *See* Commager, *Judicial Review and Democracy*, 19 VA. Q. REV. 417, 428 (1943). Leonard Levy wrote that "the Court crippled and voided most of the comprehensive program for protecting the civil rights of Negroes after the Civil War." JUDICIAL REVIEW AND THE SUPREME COURT 23 (L. Levy ed. 1967), *cited in* GOVERNMENT BY JUDICIARY at 332.

123. 83 U.S. (16 Wall.) 36 (1872).

124. Kutler Essay at 520 (emphasis added). Professor R. J. Harris wrote: "The Radicals did not trust the judiciary in general and the Supreme Court in particular." R. HARRIS, THE QUEST FOR EQUALITY 53-54 (1960). Professor Morton Keller stated: "Radical Republicans sought to deny the postwar court the power to review congressional Reconstruction." M. KELLER, AFFAIRS OF STATE 73 (1977). *See* GOVERNMENT BY JUDICIARY at 223 n.9.

125. Kutler Essay at 523.

126. J. MILL, ON LIBERTY 28 (1885), *quoted in* Berger on Abraham at 575 n.90.

127. Berger on Abraham at 573 nn.74,78.

wishes of the sovereign people" it certainly has exhibited disregard, as is disclosed by its rebuff of Justice Jackson's plea to tell the people that by the desegregation decision "we are declaring new law for a new day."[128] That rejection demonstrates that the Court was well aware that the people would not stomach its decision unless it was rested on the will of the framers, and therefore proceeded in disregard of the popular will.[129] And that is pointed up by its current disregard of popular discontent with its decisions on death penalties, obscenity, busing and the like.[130]

Nor is it true that the framers expressed their undeniable distrust "only in verbiage," in what Kutler, in a "triumph" of sarcasm refers to as Charles Sumner's success "in delaying an appropriation for commissioning a bust of Taney for the Supreme Court library."[131] It is true that "the Republicans of this era actively promoted new courts and, above all, new jurisdictional authority," and that "habeas corpus, admiralty, bankruptcy, and removal legislation" were expanded.[132] The Civil Rights Act itself marked a significant departure from the seventy-five year exclusion of the inferior courts from the "arising under" jurisdiction; but that was because the southern state courts were not trusted to enforce the unpopular measures for the protection of the blacks.[133]

128. R. KLUGER, SIMPLE JUSTICE 609 (1976), *quoted in* GOVERNMENT BY JUDICIARY at 130.

129. As Robert Bork stated, "The way an institution advertises tells you what it thinks its customers demand." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4 (1971), *quoted in* GOVERNMENT BY JUDICIARY at 319.

130. Kutler acknowledges that: "The actions of a federal judge in taking over [the Boston] school system probably run counter to a 'national consensus.' " Kutler Essay at 523-24. Of busing, the New York Amsterdam News, the leading weekly newspaper for the black community, stated, "(1) That polls have indicated that 51% of black Americans oppose busing, as do 85% whites. (2) That studies of best social scientists indicate that forced busing heightens racial identity and (3) . . . is a sociological disaster . . . ." *Quoted in* Wall St. J., Oct. 24, 1978, at 24, col.4. An equally jaundiced view is taken of "affirmative action" to correct past discrimination by a leading black educator, Professor Thomas Sowell. Sowell, *Are Quotas Good for Blacks?*, 42 COMMENTARY 39 (June 1978).

Justice Stewart acknowledged, "[I]t is now evident that a large proportion of American society continues to regard [capital punishment] as an appropriate and necessary criminal sanction," pointing to legislative enactments providing for the death penalty after the Court's adverse decision. Gregg v. Georgia, 428 U.S. 153, 179 (1976), *quoted in* GOVERNMENT BY JUDICIARY at 261 n.53. Professor Louis Jaffe stated that it is "overwhelmingly" the case that "the 'public conscience' does not support the claim of constitutional protection for 'obscenity.' " Jaffe, *The Court Debated—Another View*, N.Y. Times, June 5, 1960 (Magazine), *quoted in* THE SUPREME COURT UNDER EARL WARREN (L. Levy ed. 1972), *quoted in* GOVERNMENT BY JUDICIARY at 326 n.50.

131. Kutler Essay at 520.

132. *Id.*

133. GLOBE, *supra* note 17, at 653, *cited in* GOVERNMENT BY JUDICIARY at 225 n.16.

The "removal legislation" served a similar purpose—to secure to both loyal whites and blacks a less partial tribunal than the state courts. Bankruptcy was a traditional judicial staple, and Congress could not be expected—indeed it was not authorized—to take over the judicial function; so too with habeas corpus, all representing traditional litigation. But in his eagerness to tree his quarry, Kutler gallops past the fact that these were *nonpolitical* matters, unlike Taney's intervention in the *Dred Scott* slavery issue. When it came to the *political* decisions such as were involved in determining the extent to which rights conferred by the Amendment reached, Congress reserved paramountcy to itself by section 5, which provides that "[t]he Congress shall have power to enforce by appropriate legislation the provisions of this article." In 1879 the Court underscored this reservation of power: "It is not said that the *judicial power* . . . shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. . . . *Congress* is authorized to *enforce* the prohibitions by appropriate legislation."[134] This is not the place to recapitulate the source of and consequences that flow from that reservation. Suffice it to say that the jurisdiction of the inferior courts is only such as Congress chooses to give, that what it gives it can at any time withdraw,[135] and that given Congress' exclusive power to enforce, which it may in part *delegate* to the courts, it is reasonable to conclude that the ultimate judgment as to what enforcement requires was left to Congress, not to the Court. Even the Court's appellate jurisdiction needs to be reconsidered in light of this exclusive grant to Congress. That adds up to a little more than excluding Taney's bust from the judicial pantheon.

Not the least remarkable aspect of Kutler's distorted account of the era is his reference to "the *feeble congressional response* to *Ex Parte McCardle*."[136] Congress had withdrawn jurisdiction to consider a Re-

134. *Ex parte* Virginia, 100 U.S. 339, 345 (1879) (emphasis partially added), *quoted in* GOVERNMENT BY JUDICIARY at 221. This was but an application of the traditional rule that to give to A only is to withold from B. *See* T.I.M.E., Inc. v. United States, 359 U.S. 464, 471 (1959); United States v. Arredondo, 31 U.S. (6 Pet.) 691, 725 (1832), both *cited in* GOVERNMENT BY JUDICIARY at 223.

In April 1862, William Dunn of Indiana, stated: "I am not willing to trust the court in relation to this question of slavery, because very much of the trouble in which we are now involved may be attributed to the fact that we had a pro-slavery judiciary." CONG. GLOBE, 37th Cong., 2d Sess. 1792 (1862).

In the 42nd Congress, John Farnsworth of Illinois, stated on March 31, 1871: "We passed laws, Mr. Speaker, and the country knows it, which we did not like to let go to the Supreme Court for adjudication." CONG. GLOBE APP., 42d Cong., 1st Sess., 116 (1871).

135. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850), *cited in* GOVERNMENT BY JUDICIARY at 224.

136. Kutler Essay at 521 (emphasis added).

construction measure upon a petition for habeas corpus, then "in the bosom of the Court";[137] and it was the *Court* that meekly declared that its appellate jurisdiction was subject to regulation by Congress. It needs only to be added that congressional distrust of the judiciary for the protection of Negro rights—kindled by the fugitive slave cases and *Dred Scott*—was before long richly vindicated when the Court in the *Slaughter House Cases* aborted the protection afforded by the "privileges or immunities" clause, so that those rights remained without protection for several generations.[138] Doubtless Kutler would triumphantly inquire: so why didn't Congress do something about it? Perhaps the answer is that Republican zeal had evaporated, as the malodorous Hayes-Tilden turn-over of the blacks to the mercies of the South very soon indicated.[139] Confidence in Kutler's scholarly judgment, I submit, is seriously undermined by such distortions, particularly when they are at the service of his slavish devotion to the "new faith."

Heresy is usually predicated upon a departure from an old, established faith, *e.g.*, the extirpation of the Albigensians by the Holy Inquisition. But Kutler stands orthodoxy on its head; he would excommunicate me because I cling to the old pieties, the "new faith" notwithstanding. He himself has written that:

> From the early twentieth century throughout the late 1930s, academic and liberal commentators, as well as groups such as organized labor, criticized vigorously the abusive powers of the federal judiciary. They accused judges, particularly those on the Supreme Court, of consistently frustrating desirable social policies, *allegedly* sanctioned by popular sentiment,[140]

pointing out that "the judges had arrogated a policymaking function not conferred upon them by the Constitution," which "negated the basic principles of representative government." "After 1937," he writes,

137. Roberts, *Now is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A. J. 1, 3 (1949).

138. *See* Lusky Essay at 421. *See also* note 122 *supra*.

139. "[T]here seems no doubt," wrote Samuel Eliot Morison, "that a deal was made by the Republicans with Southern Democratic leaders, by virtue of which, in return for their acquiescence in Hayes's election, they promised on his behalf . . . to wink at non-enforcement of Amendment XV [*sic*] guaranteeing civil rights to the freedmen. The bargain was kept on both sides." S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 733-34 (1965). *See also* A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 489-94 (1970).

140. Kutler Essay at 512 (emphasis added). His "desirable social policies, allegedly sanctioned by popular sentiment" is of a piece with his constant distortion. Passage of the income tax amendment showed that *Pollock, supra* note 120, in fact was opposed to majority sentiment, as is also indicated by numerous state statutes seeking to govern maximum hours for bakers that had been frustrated by *Lochner, supra* note 121.

"most of the judiciary's longtime critics *suddenly found a new faith* and promoted it with all the zealousness of new converts,"[141] apparently unaware that he is possessed by the same zeal.[142] Now the courts "matched a new libertarianism promoting 'preferred freedoms' as enumerated in the Bill of Rights with an activist judiciary to protect those values";[143] or as Alfred Kelly put it, the Court was "determined to carry through a constitutional revolution . . . a degree of political activism rivalled only in the days of *Dred Scott*, *Pollock* and *Lochner*."[144]

For historians it seemingly suffices to record the events, because Kutler makes no effort to find constitutional warrant for the "new faith," or for a "constitutional revolution." Instead he derides those who do, as when he exults that judges have "prompted, even forced, legislatures and executives to deal with the problems they would rather ignore. That result admittedly violates *Berger's notions of constitutional purity* and somewhat confirms his concept of judicial policymaking, but how else should judges respond to injustice, as they perceive it?"[145] What could better illustrate Kutler's contempt for constitutional limitations on power than his "exquisite" phrase—"Berger's notions of constitutional purity?" For him it suffices that "judicial policymaking generally *fills a vacuum* created when politically-accountable legislators . . . abdicate their *proper* policy roles."[146] But legislative power does not descend on the shoulders of the judiciary when Congress neglects or refuses to exercise it,[147] even though there are "grievous injustices to which the political institutions could not or would not respond."[148] Judges are sworn to support the Constitution, not to revise it in the interest of "justice as they perceive it." Chief Justice Marshall held that "[T]he constitution . . . was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security . . . against

141. Kutler Essay at 513 (emphasis added).

142. *See* text accompanying note 145, *infra*.

143. Kutler Essay at 513.

144. Kelly, *supra* note 74, at 158. Kutler notices that the "result-oriented jurisprudence" of the Warren Court "witnessed the crumbling of sometimes century-old precedents and the charting of new politics and social goals . . . ." Kutler Essay at 514. It needs no argument that the Court was not designed as an instrument of "revolution."

145. Kutler Essay at 525 (emphasis added).

146. *Id.* at 523 (emphasis added). Given legislative discretion within constitutional boundaries, it is for the legislature to determine how properly to exercise it.

147. Berger on Lusky at 540, n.58.

148. Kutler Essay at 523.

. . . unwise legislation [and a fortiori, *no* legislation] generally."[149] The Framers, the records show, wanted no part of judicial "guardians," a position reaffirmed in our time by Judge Learned Hand.[150]

As to the Court's usurpation of the amendment power, sharply criticized by Justices as different as Black and Harlan,[151] that Kutler meets with stark simplicity: "[T]he path for amendment . . . is often blocked by inertia or irresponsibility,"[152] as if such difficulties endow the Court with power exclusively reserved to the people. Poor deluded women who continue their struggle to obtain the Equal Rights Amendment when there is the so-much-easier path of judicial amendment! The fact that problems of "change . . . have been effectively and responsibly handled by the judiciary on a case-by-case basis, rather than through the larger, more cumbersome, instrument of an amendment"[153] merely acknowledges the usurpation. Be it assumed that "injustice, as [judges] perceive it" coincides with the view of the people, even so, as said by Hamilton, "the peoples' representatives" cannot depart from "the established form" prior to an amendment by the people.[154] If to rely on such historical facts is "ahistorical," I commend a dose of it to Kutler as an antidote to wishful thinking.

In truth, Kutler belongs to a coterie of whom Professor Joseph Bishop wrote, "Those who favor abortion, busing . . . and oppose capital punishment . . . obviously have no faith whatever in the wisdom or will of the great majority of the people, who are opposed to them. They are doing everything possible to have these problems resolved by a small minority in the courts. . . ."[155] This was candidly avowed by Professor Robert Cover, who wrote that the Constitution is of no moment because "we" have decided to "entrust" judges with forming an

149. Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 563 (1830), *quoted in* GOVERNMENT BY JUDICIARY at 379.

150. Elbridge Gerry rejected setting judges up "as the guardians of the Rights of the people" and was sustained by the Framers' rejection of their participation in a Council of Revision. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97-98 (M. Farrand ed. 1937), *quoted in* GOVERNMENT BY JUDICIARY at 301. Nor did Learned Hand want any part of "Platonic Guardians." *See* R.H. Jackson, THE STRUGGLE FOR JUDICIAL SUPREMACY 37 (1941); L. HAND, THE BILL OF RIGHTS 71 (1962), *both cited in* GOVERNMENT BY JUDICIARY at 331.

151. For Justice Black, see Berger on Miller, at 583, n.52; for Justice Harlan, see Berger on Lusky, at 538, n.39.

152. Kutler Essay at 525.

153. *Id.*

154. THE FEDERALIST No. 78 (A. Hamilton) at 104, *quoted in* GOVERNMENT BY JUDICIARY at 316.

155. Bishop, *What is a Liberal—Who is a Conservative?*, 62 COMMENTARY 47 (Sept. 1976), *cited in* GOVERNMENT BY JUDICIARY at 314 n.6.

"ideology" whereby to measure "majoritarian politics," the reason being that majoritarianism is not to be trusted.[156] But the people have yet to be told that they have surrendered such powers to the Court.

It is for this reason that I urged "an end to pretence," and "submission of Court-wrought constitutional amendments to the people so as to legitimate 'government by judiciary,' " which Kutler states "hardly merits microscopic examination . . . ."[157] Yet the call for honest avowal was issued by Learned Hand—"If we do need a third [legislative] chamber it should appear for what it is, and not as an interpreter of inscrutable principles"—[158] and recently reiterated by Professor W.R. Forrester.[159] For as Alpheus Thomas Mason stated, "only that power which is recognized can be effectively limited."[160] That the power needs at the very least to be limited is the tenor of the Abraham and Ely articles. In deriding and obscuring these issues, in pretending that the people have surrendered the right of self-government to the Justices, Kutler and his like betray rather than serve our democracy.

156. Cover, Book Review NEW REP., Jan. 14, 1978, at 27. It "is for us, not the framers, to decide whether that end of liberty is best served by entrusting to judges a major role in defining our governing political ideas and in measuring the activity of the primary actors [Congress and the legislatures] in majoritarian politics against that ideology." *Id.*

157. Kutler Essay at 523. Kutler is merely expressing his satisfaction (for the moment) with judicial rule. For uneasiness with such rule, see Abraham Essay at 472-73, 481-82; Mendelson Essay at 444-45.

158. L. HAND, *supra* note 150, at 70 (1962), *quoted in* GOVERNMENT BY JUDICIARY at 416.

159. Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A. J. 1212 (1977).

160. Mason, *Myth and Reality in Supreme Court Decisions*, 48 VA. L. REV. 1385, 1405 (1962), *quoted in* GOVERNMENT BY JUDICIARY at 415-16.

VI. Comment on Professor Dean Alfange, Jr.'s Article

Professor Alfange[1] acknowledges that "Berger presents convincing evidence that the Thirty-Ninth Congress had a narrow purpose, and meant to protect neither political equality by guaranteeing the right to vote nor social equality by prohibiting the segregation of the races."[2] But he questions "the extent to which history, however clear, should control interpretation of the Constitution,"[3] in other words, the Court may substitute its own policy choices for those of the framers.[4] Nothing, according to him, stands in the way of that course.

Repeatedly he makes unfounded allegations. He insists, for example, that Berger "would forbid *all* judicial policymaking,"[5] whereas I consider that if the terms of a particular constitutional provision are ambiguous and no framers' choices are discernible, there is room for judicial policymaking. Allied with such arguments is a constant unwillingness to recognize that "Berger's" views have respectable authority. Thus he writes, "*as Berger sees it*, the power of judicial review . . .

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1. Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603 (1978) [hereinafter cited as Alfange Essay]. The editors have afforded me the privilege of responding to this critique, published in a prior issue.

Alfange opens on a pettish note, reproaching me for having "borrowed" my title from Louis Boudin's 1932 opus "without acknowledgment," *id.* at 603, though he notices that our goals are widely disparate. *Id.* at 603-604. The words "government by judiciary" are part of the common currency of legal discourse.

When William Cullen Bryant intimated that James Russell Lowell's "To the Past" had been suggested by a Bryant poem of the same title, Lowell asked, "Does he think that he *invented* the past and has a prescription title to it?" M. DUBERMAN, JAMES RUSSELL LOWELL at 413 (1960). In any event, since Alfange labels Boudin's work as "eccentric," Alfange Essay at 603, I had more to lose than to gain by the "borrowed" title.

Alfange notes that Boudin attacked the legitimacy (as distinguished from the scope) of judicial review, whereas I had published a book in its defense, finding "that the historical record was not 'vague and conflicting' as other scholars had found it," *id.* at 604. Presumably Alfange endorses those "other" scholars. *See id.* at n.6. If that be the case, he undermines the case for judicial review altogether; how can one defend the extreme extension of judicial review in opposition to the popular will if it is altogether without secure constitutional basis?

2. Alfange Essay, *supra* note 1, at 622; *see also id.* at 606-607. Yet Alfange states: "Berger disputes those historians who have viewed section one of the amendment as embodying the desire of the abolitionists to guarantee blacks full social and political equality." *Id.* at 605.

3. *Id.* at 608.

4. "The meaning of a constitutional provision is too vital to be decided by any formula that would exclude modern-day judgment—and, given judicial review, that judgment will most probably be exercised by the justices of the Supreme Court." *Id.* at 638.

5. *Id.* at 618; *see also id.* at 617, 626 (emphasis in original).

is nothing more than an authorization to *police* the boundaries of the Constitution . . . ."[6] Dispassionate scholarship demands recognition that this was the view of some of the greatest figures in our constitutional history—James Madison, James Iredell, Judge Learned Hand and James Bradley Thayer.[7]

Notwithstanding that he considers my "skill as a constitutional historian is extraordinary,"[8] he questions my judgment respecting canons of interpretation. His competence to challenge my reading of law is impeached by his astonishing version of Hamilton's No.78 of *The Federalist*: "Hamilton was there arguing for the power of judicial review as a means of allowing judges to *control* the power of the *legislature*, and *to enhance their own authority*."[9] Let Hamilton speak: (1) "The judiciary . . . can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment,"[10] that is, it cannot *initiate* policy, (2) There "is no liberty, if the power of judging be not separated from the legislative and executive powers."[11] (3) Quoting Montesquieu, "Of the three [departments] the judiciary is next to nothing."[12] (4) The courts may not "on the pretence of a repugnancy . . . substitute their own pleasure to the constitutional intentions of the legislature," that is, they may not intrude *within* the boundaries of the legislative power.[13] (5) "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents. . ."[14] And he assured the Ratifiers in No. 81 that the judges could be impeached for "deliberate usurpations on the authority of the legisature."[15] Their function was merely to insure that the other departments did not "overleap their bounds."

The struggle to "inter" the original intention represents an attempt to escape from the unmistakable intention of the framers to exclude suffrage and segregation from the Fourteenth Amendment, an intention that undermines a series of decisions so dear to the hearts of the "True Believers." Leonard Levy wrote of an earlier and similar attempt, that it is "of comparatively recent vintage, raising the suspicion

6. *Id.* at 604 (emphasis added); *see also id.* at 618.
7. *See* Berger on Kutler at 603, n.102.
8. Alfange Essay, *supra* note 1, at 637-38.
9. *Id.* at 630 n.124 (emphasis added).
10. THE FEDERALIST No. 78 (A. Hamilton) at 504 (Modern Lib. ed. 1937) [hereinafter cited as THE FEDERALIST].
11. *Id.* (quoting 1 SPIRIT OF LAWS 181).
12. *Id.*, (quoting 1 SPIRIT OF LAWS 186).
13. THE FEDERALIST, *supra* note 10, at 507.
14. *Id.* at 510.
15. THE FEDERALIST No. 81 (A. Hamilton) at 526-27 (Modern Lib. ed. 1937).

that the arguments have been concocted to rationalize a growing satisfaction with judical review among liberal intellectuals and scholars."[16] One of the neoabolitionist trio[17] that Alfange would rehabilitate, Jacobus tenBroek, stated that the Court "has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument . . . ."[18] To be sure, he went on to say that "the pretense of a disinterested search for the original intent is judicial hokum";[19] but the purpose of such "fairy tales," as Professor Mendelson justly observed, is to "obscure . . . a raw exercise of judicial fiat,"[20] because to tell the truth would be "suicidal."[21] Only because the people have been led to believe that busing, affirmative action and the like are demanded by the Constitution rather than by the Justices are such decisions reluctantly swallowed.[22] So that in interring the original intention doctrine Alfange is more royalist than the king.

True it is that in 1930 Max Radin attacked resort to legislative history for ascertainment of the intention of the legislature;[23] but he

16. JUDICIAL REVIEW AND THE SUPREME COURT 24 (L. Levy ed.), *cited in* GOVERNMENT BY JUDICIARY at 285 n.5.

17. The principal neoabolitionist spokesmen defended by Alfange are Howard Jay Graham, Jacobus tenBroek, and Alfred Kelly. See H. GRAHAM, EVERYMAN'S CONSTITUTION (1968); J. TENBROEK, EQUAL JUSTICE UNDER LAW (1965); A. Kelly, *The Fourteenth Amendment Reconsidered*, 54 MICH. L. REV. 1049 (1956).

18. TenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction*, 27 CAL. L. REV. 399, 399 (1939) [hereinafter cited as tenBroek], *quoted in* Alfange Essay, *supra* note 1, at 610 n.38.

19. TenBroek, *supra* note 18, at 410 *cited in* Alfange Essay, *supra* note 1, at 610 n.38.

20. Mendelson Essay at 441.

21. Martin Shapiro wrote, "Suicide is no more moral in political than in personal life. It would be fantastic indeed if the Supreme Court, in the name of sound scholarship, were to disavow publicly the myth upon which its power rests." M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 27 (1964). Power in the service of moral imperatives must not rest on a sham. It is not "scholarship" but obedience to constitutional limitations that calls for a halt.

Alfange explains that "judicial assertions of the necessity for fidelity to the original intent . . . [are] nothing more than an instinctive mechanism of self protection against those who may object to a particular line of constitutional interpretation." Alfange Essay, *supra* note 1, at 610.

22. *See* text accompanying Berger on Lusky at 545, n.105.

A devout activist, Thomas Grey, observed, "if judges resort to bad interpretation in preference to honest exposition of deeply held but unwritten ideals, it must be because they perceive the latter mode of decisionmaking to be of suspect legitimacy." Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975).

23. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 n.14 (1930) [hereinafter cited as Radin], cited in Alfange Essay, *supra* note 1, at 609. "A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might

noted that by that time "the number of American cases declaring the primacy of the rule that statutes should be interpreted in accordance with the intent of their framers 'run[s] into the hundreds.' "[24] And the Supreme Court likewise is committed to legislative history as an index of legislative intention.[25] Against the premature "interment" of the original intention by tenBroek and Charles Curtis,[26] there is the fact that the Court continues to invoke it — in one case Justices Black and Goldberg did so in support of opposing positions;[27] that Justice Holmes held that when a legislature "has intimated its will, however indirectly, that will should be recognized and obeyed. . . it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it."[28] Judge Learned Hand held in 1959 that if the purpose is "manifest" it "override[s] even the explicit words used."[29] Such rulings have their roots in a centuries-old tradition and in Supreme Court cases,[30] against which the criticism of tenBroek and Curtis break on the rocks.

Next Alfange echoes the argument that a rule of construction applicable to contracts and statutes is inappropriate to interpretation of a Constitution.[31] The Founders, however, turned to the rules of statutory construction for interpretation of the Constitution.[32] This reflected the Founders' fear of unbridled judicial discretion,[33] so that Hamilton felt constrained to assure the Ratifiers in *Federalist* No. 78 that to "avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by *strict rules* and precedents. . . ."[34] Such rules, Jus-

have had, and often demonstrably did have, different ideas and beliefs." Radin at 870. This is irrelevant to the all but unanimous exclusion of suffrage.

24. Alfange Essay, *supra* note 1, at 609, (quoting Radin, *supra* note 16a, at 870 n.13.

25. *See, e.g.,* Wirtz v. Bottle Blowers Assn. 389 U.S. 463, 468 (1968); Association v. Westinghouse Elec. Co., 348 U.S. 437, 444 (1955); Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943); Takao Ozawa v. United States, 260 U.S. 178, 194 (1922).

26. *See* C. CURTIS, LIONS UNDER THE THRONE (1947), *cited in* Alfange Essay, *supra* note 1, at 611 n.42.

27. Bell v. Maryland, 378 U.S. 226 (1964) (Black, J., dissenting, *id.* at 342; Goldberg, J., concurring, *id.* at 288-89), *cited in* GOVERNMENT BY JUDICIARY at 367-68.

28. Keifer & Keifer v. R.F.C., 306 U.S. 381, 391 n.4 (1939) *quoting* Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908), *cited in* GOVERNMENT BY JUDICIARY at 369.

29. Cawley v. United States, 272 F.2d 443, 445 (2d Cir. 1959).

30. *See* Alfange Essay, *supra* note 1, at 620 n.79, where Alfange notices my citation of Hawaii v. Mankichi, 190 U.S. 197, 212 (1903): "A thing may be within the letter of a statute and not within its meaning. . . The intention of the law maker is the law," *See* GOVERNMENT BY JUDICIARY at 7. Alfange, however, does not profit from the reference.

31. Alfange Essay, *supra* note 1, at 609-10, 626-27.

32. *See* text accompanying Berger on Lusky at 544, nn.92-95.

33. *Id.* at 537, nn.33-35.

34. THE FEDERALIST, *supra* note 10, at 510 (emphasis added).

tice Story later declared, provide a "fixed standard" for interpretation of the Constitution.[35] Alfange would sidestep the historical materials by arguing that "no such rule of interpretation is specified in the federal Constitution."[36] Neither is there specification for the separation of powers, nor, most consider, for judicial review itself. On Alfange's reasoning both would fall. Alfange also argues that the framers did not intend such a rule to apply because of "their deliberate use of general language."[37] Hamilton's statement that "strict rules" would prevent "arbitrary discretion" is incompatible with that reading, and it is reinforced by Marshall's view, as Professor Lusky notes, that "The Constitution should be applied in accordance with the intent of those who made it."[38]

Apart from the 1787 presupposition respecting resort to original intention, there is solid evidence that the *1866* framers regarded original intention as controlling. First there is the statement by the foremost libertarian, Charles Sumner, that resort to the original intention should be had precisely where the language had no fixed meaning, i.e. was "general."[39] Then there is the 1872 Report by a unanimous Senate Judiciary Committee, which included framers, stating that it was "compelled" to interpret the Fourteenth Amendment in terms of the intention of those who framed it,[40] and contemporary confirmation by the leading constitutional authority of the time, Judge Thomas Cooley.[41] These statements are contemporaneous constructions by those who had first-hand familiarity with the framers' intention, which are entitled to great weight,[42] greater weight than current efforts, unbacked by any evidence whatsoever, to rationalize the "new faith." To refer

35. Berger on Lusky at 544, n.95.

36. Alfange Essay, *supra* note 1, at 609.

37. *Id.*

38. Lusky Essay at 405; *see generally* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824); all *cited in* GOVERNMENT BY JUDICIARY at 378-79.

39. *See* Berger on Lusky at 534, n.13.

40. Report of Jan. 25, 1872, A. AVINS, THE RECONSTRUCTION AMENDMENTS DEBATES 571 (1967).

41. T. COOLEY, CONSTITUTIONAL LIMITATIONS 68-69 (6th ed. 1890).

42. Speaking of contemporaneous observers, Justice William Johnson stated, "they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them. . . ." Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 290 (1827). Respect for contemporaneous constructions is deeply rooted in the past. In 1454 Chief Justice Prisot stated, "the judges who gave these decisions in ancient times were nearer to the making of the statute then we now are, and had more acquaintance with it." Windham v. Felbridge, Y.B. 33 Hen. 4, f. 38, 41 pl. 7, *quoted in* C. K. ALLEN, LAWS IN THE MAKING 193 (6th ed. 1958).

against this background to a "*mindless* transfer to the area of constitutional interpretation of a rule that is justified in the context of statutory construction" is to exhibit a mind invulnerable to fact.[43]

Alfange relies on the "overriding fact that if the legislature finds its previous intent [as judicially determined] to be inadequate, it can alter it by the simple expedient of passing a new law."[44] Precisely that fact argues for giving "intent" overriding force in a constitutional context, because while judicial mistakes of statutory interpretation are thus curable, errors of constitutional construction are beyond cure except by the "cumbersome" process of amendment. If judges may dispense with the Article V amending process because it is cumbersome—the well-worn justification for judicial adaptation of the Constitution—[45] why is it not true that this very cumbersomeness calls for even more faithful adherence to constitutional than to statutory intent? What difference there is between statutes and the Constitution argues for more not less fidelity to the intent of the framers. As an ardent apologist for the Warren Court, Judge J. Skelly Wright, explained, "Constitutional changes are in fact different from ordinary decisions . . . the most important value choices have already been made by the framers" and judicial "value choices" are to "be made only within the parameters" of those choices.[46] It cannot be that the choices of legislators—mere delegates—are entitled to greater respect than the clearly discernible choices of the sovereign people.

Alfange argues, however, that although statutes may be amended by the legislature, a Constitution, in "Marshall's classic statement, [is] 'intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.' "[47] Like his fellow "True Believers" Alfange rings the changes on Marshall's "classic statement"; it is his Rock of Ages, his refuge from historical fact.[48] He cannot bring

43. Alfange Essay, *supra* note 1, at 626-27 (emphasis added).

44. *Id.* at 627.

45. Because "the process of amendment is politically difficult, other modes of change have emerged." McDougal & Lans, *Treaties and Congressional Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L. J. 181, 293 (1945).

46. Berger on Miller at 576 n.2; *see also* Berger on Mendelson at 549 n. 15.

47. Alfange Essay, *supra* note 1, at 609-10, *quoting* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis in original).

48. "Of course judges ought not to be free to manipulate [the Constitution's] words at will to arrive at whatever results their personal inclinations commend to them. Of course . . . George Washington . . . urged that modifications in the Constitution be brought about by 'amendment,' not by 'usurpation.' . . . Nevertheless, a constitution is intended to endure for ages to come." Alfange Essay, *supra* note 1, at 629-630 (*quoting* 356 THE WRITINGS OF GEORGE WASHINGTON 229 (J. Fitzpatrick ed. 1940)). Alfange relies on Marshall as if a

himself to admit that Marshall repudiated that very reading, categorically stating that the judicial power "cannot be the assertion of a right to change that instrument."[49] This he dismisses as Berger "*arguing* that the Chief Justice himself firmly repudiated any such implication,"[50] thus betraying either an incapacity or an unwillingness to distinguish incontrovertible fact from opinion. If I may trade counsels with him, the first essential for scholarship is to learn to live with the facts, however unpalatable. And, if "*McCulloch* is an abnegation of judicial authority to limit the powers of Congress," as he concluded,[51] it cannot amount to an assertion of a right "to change" the Constitution, the paramount voice of the people. Like his fellow "True Believers," Alfange insists that "although Chief Justice John Marshall *may* have abjured the existence of judicial authority to change the Constitution . . . and *may* have written in a judicial opinion that 'the intention of the instrument must prevail,' he nevertheless manifestly went beyond the intent of the framers. . . ."[52] A fervent advocate of "the best ideals and finest aspirations of the nation"[53] should begin by rejecting a contradiction between word and deed on the part of those whom he would entrust with the national destiny. Let there be an end to pretense; in the words of Judge Learned Hand, "If we do need a third [legislative] chamber it should appear for what it is, and not as an interpreter of inscrutable principles."[54]

Similar reluctance to face up to the facts is illustrated by Alfange's

judicial dictum affords warrant for rewriting the Constitution. *See also* Alfange Essay, *supra* note 1, at 624.

49. JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 185 (G. Gunther ed. 1969); *see also* Berger on Kutler at 590-91, nn.3-7.

50. Alfange Essay, *supra* note 1, at 624. So too, Alfange finds it impossible to reconcile my view that a rollback of the desegregation decision is "unrealistic and probably impossible" with my statement that I should have felt constrained in 1954 "to hold that the relief sought lay outside the confines of the judicial power," Alfange Essay, *supra* note 1, at 626 n.103, illustrating an inability to distinguish between recognition that water can not be made to flow back over the dam and the issue of constitutionality as a guide to future action. He also fails to notice that Justice Stevens wrote that "the legislative history discloses an intent not to outlaw segregated public schools," and that he would have given effect thereto "were we writing on a clean slate." Runyon v. McCrary, 427 U.S. 160, 189-90 (1976) (Stevens, J., concurring), *quoted in* GOVERNMENT BY JUDICIARY at 412 n.19.

51. Alfange Essay, *supra* note 1, at 625.

52. Alfange Essay, *supra* note 1, at 631 (citing JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 209 (G. Gunther ed. 1969) (emphasis added) and Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting)). Alfange's use of the word "may" is of a piece with his persistent attempt to cast doubt on indisputable fact.

53. Alfange Essay, *supra* note 1, at 629.

54. THE BILL OF RIGHTS 70 (1962), *cited in* GOVERNMENT BY JUDICIARY at 416.

reference to a chapter,[55] in which I analyzed the *McCulloch* dictum[56] and the Holmes dicta in *Missouri v. Holland*[57] as Berger "denies that either constitutes a valid argument for departing from the framers' original intent."[58] Of course I was not content with a mere "denial," as Alfange so often is, but mustered the facts upon which I grounded my opinion. Since those *dicta* are a cornerstone of the "new faith," Alfange should have rebutted my proof. It speaks volumes that Alfange continues to rely on such exploded *dicta*, whereas a more dispassionate observer, the British political scientist Professor Max Beloff, stated, "the familiar phrases about the nature of the Constitution and the canons of interpretation taken from Justice Marshall and Justice Holmes are when tracked back to their sources no authority for judicial review except in the narrowest sense."[59]

Alfange concedes that where "a desired change would be unmistakably contrary to an unambiguous provision of the Constitution, there is no doubt that the only legitimate mode of accomplishing it would be by formal amendment."[60] Why in the name of common sense is it not equally true where the legislative intention is also "unmistakable?"[61] For generations, in fact, the courts have held that when

55. *See* GOVERNMENT BY JUDICIARY at 373-86.

56. Chief Justice Marshall stated that, "we must never forget, that it is *a Constitution* we are expounding . . . a constitution intended to ensure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 407 (1819) (emphasis in original).

57. In discussing the relationship between the treaty-making power conferred by Article II, § 2 of the Constitution and the Tenth Amendment's reservation of powers to the states, Justice Holmes opined: "[w]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved." Missouri v. Holland, 252 U.S. 416, 433-34 (1920). For discussion of this dictum see Berger on Miller at 584.

58. Alfange Essay, *supra* note 1, at 614-15 n.56.

59. Beloff, *Arbiter of American Destiny*, The Times (London), Higher Education Supp. April 7, 1978 at II.

60. Alfange Essay, *supra* note 1, at 619.

61. *See* Kay, Book Review, 10 CONN. L. REV. 801, 804 (1978). The 1872 Senate Judiciary Committee Report, *see* Berger on Lusky, at 535, n.14, stated, "A construction which should give the phrase 'a republican form of government' a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the

the intention is clear, it is as good as written into the text;[62] and one suspects that Alfange is thus ready to acknowledge the paramountcy of the text only because the shoe is not presently pinching in a textual context.[63]

Consider next Alfange's views on the amendment process: "[A]*s Berger sees it*, the power of judicial review . . . is . . . not a grant of authority to alter the Constitution";[64] Article V "sets down *what Berger sees* as the only valid mechanism for effecting any change" in the Constitution.[65] "What Berger sees" had been perceived at the very outset by Washington,[66] Hamilton,[67] Elbridge Gerry,[68] and in our time, by Justices Black,[69] Harlan[70] and others. Scholarly fairness demands that the reader be told that Berger's views have the sanction of such authority,[71] not misleadingly to suggest that they constitute an "eccentric" departure from historical fact.[72] In similar fashion, Alfange quotes Berger, " 'Article V constitutes the *exclusive* medium of change, under the long standing maxim that to name a particular mode is to exclude all others.' It is more than a little suprising to find one of the ancient canons of statutory construction put forward as an authoritative guide to constitutional interpretation, since it would be difficult today to find any judge or commentator who would be prepared to treat them as binding."[73] To begin with, I did not rely on the "ancient canon" alone

Constitution in any particular." A. AVINS, THE RECONSTRUCTION AMENDMENT'S DEBATES 571 (1967).

62. *See* note 30, *supra*.

63. Thus he states, "*Blaisdell* demonstrates that there may be compelling reasons for a judicial reluctance to be bound by the intent of the framers even when a deviation from that intent requires a conscious distortion of the *actual words* of the Constitution." Alfange Essay, *supra* note 1, at 622 (emphasis added), citing Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934). *See also* Alfange Essay, *supra* note 1, at 613 n.54.

64. *Id.* at 604 (emphasis added).

65. *Id.* at 618 (emphasis added).

66. *See* 35 THE WRITINGS OF GEORGE WASHINGTON 228-29 (J. Fitzpatrick ed. 1940), *cited in* GOVERNMENT BY JUDICIARY at 299.

67. *See* THE FEDERALIST, *supra* note 10, at 509, *cited in* GOVERNMENT BY JUDICIARY at 316.

68. *See* 1 ANNALS OF CONGRESS 503 (1789), *cited in* GOVERNMENT BY JUDICIARY at 318.

69. *See* Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black J., dissenting), *cited in* GOVERNMENT BY JUDICIARY at 101 n.9.

70. *See* Reynolds v. Sims, 377 U.S. 533, 591 (1964) (Harlan, J., dissenting), *cited in* GOVERNMENT BY JUDICIARY at 1.

71. *See also* text accompanying notes 6-7 *supra*.

72. Alfange Essay *supra* note 1, at 603. "Eccentric" is defined as a departure from the usual custom. It is the "new faith," spawned "after 1937," Kutler Essay at 513, that constitutes a departure from the 150-year-old custom and is therefore "eccentric."

73. Alfange Essay, *supra* note 1, at 618-19, *quoting* GOVERNMENT BY JUDICIARY at 318

but showed that this was the interpretation of Washington, Hamilton and Gerry.[74] Nor is it true that no judge or commentator would invoke the canon. The Supreme Court has often held that "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode"; and the rule was applied by the Supreme Court in 1959.[75]

More important, such rules were among the presuppositions of the Founders. If their attachment to a "fixed constitution" was to be safeguarded, judges could not, as Chancellor Kent stated, "be left to a dangerous discretion to roam at large in the trackless field of their own imaginations."[76] For this reason Hamilton assured the Ratifiers that "strict rules" were "indispensable" to "avoid an arbitrary discretion in the courts."[77] The very *expressio unius* maxim referred to by Alfange was cited in the First Congress in which sat many Framers and Ratifiers.[78] To be sure, the rule is in bad odor with free-wheeling judges who denounce every restraint, and with commentators like Alfange who halloo them on to ever more heroic derring-do. But even libertarian commentators do not shrink from invoking the rule. In a handbook on impeachment, published at the height of the Nixon-Watergate investigation, Professor Charles Black glanced very briefly at the legislative history of "high crimes and misdemeanors" and concluded, "we have to have recourse to an old and quite sensible rule of legal construction . . . '*eiusdem generis*' " which says that "when a general word occurs after a number of specific words, the meaning of the general word ought often to be limited to the *kind* or *class* of things within which the specific words fall."[79] Thus casually did he solve a vexing problem by resort to an "ancient canon" of construction that carried greater weight with him than the actual intention of the framers.[80] The *expressio unius* rule, to borrow his words, is "quite sensible"; when a

(emphasis in original). The maxim referred to by Alfange is "expressio unius est exclusio alterius." *See generally* J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (4th ed. Sands 1972) §§ 47.23-47.25.

74. *See* notes 66-68 *supra*.

75. *See* T.I.M.E. Inc. v. United States, 359 U.S. 464, 471 (1959); Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929). It was recognized as the "general rule" in Springer v. The Phillippine Islands, 277 U.S. 189, 206 (1928).

76. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 373 (9th ed. 1858), *cited in* GOVERNMENT BY JUDICIARY at 308 n.34.

77. THE FEDERALIST, *supra* note 10, at 504, 510 *cited in* GOVERNMENT BY JUDICIARY at 308.

78. For citations in the First Congress, *see, e.g.*, 1 ANNALS OF CONGRESS 505, 517 (Comments by Benson and White), *cited in* GOVERNMENT BY JUDICIARY at 223 n.11.

79. C. BLACK, IMPEACHMENT: A HANDBOOK 36-37 (1974) (emphasis in original).

80. *See* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 53-102 (1973).

testator leaves his farm to his son he does not leave it to his daughter. What is sound sense for the impeachment of Richard Nixon does not become nonsense when applied for refutation of Chief Justice Warren.

Alfange's resort to the stale "general words" argument exhibits a striking inconsistency: he rejects the hard evidence of *explicit* intent—"convincing evidence that the Thirty-Ninth Congress had a narrow purpose" (excluding both suffrage and segregation)[81]—but builds on an *assumed* intent to override that explicit intent by the use of "general words," that is "privileges or immunities," "due process of law," and "equal protection of the laws." Men do not use words to defeat their purposes. Nor was "due process" "general"; it had a fixed historical content.[82] "Privileges or immunities" was traced by Senator Trumbull to Article IV and its judicial constructions, then incorporated in the Civil Rights Act, which the framers and the people were told was "identical" with the Fourteenth Amendment.[83] "Equal protection" constantly had been associated with a guarantee against discrimination respecting rights *enumerated* in the Act,[84] and only by doing violence to the framers' admitted intention can the suffrage and segregation they had unmistakably excluded be read into the terms.[85] Then why didn't they say so? asks Alfange.[86] When a similar query challenged judicial review itself, Henry Hart remarked, "Professor Crosskey is a devotee of that technique of interpretation which reaches its apogee of persuasiveness in the triumphant question, 'If that's what they meant, why didn't

81. Alfange Essay, *supra* note 1, at 622.

82. *See* Berger on Mendelson at 548, nn.2-4; *see generally* GOVERNMENT BY JUDICIARY at 193-214, 249-82. When Alfange invokes the word "commerce" as a "general" word which can be "applied to new developments that could not have been forseen by the framers," Alfange Essay, *supra* note 1, at 620, he fails to perceive the basic distinction between an amorphous term which had no fixed historical content and one which, as Charles Curtis said regarding "due process," when the Framers put it "into the Fifth Amendment, its meaning was as fixed and definite as the common law could make a phrase." Curtis, *Review and Majority Rule,* in SUPREME COURT AND SUPREME LAW 170, 177 (E. Cahn ed. 1954), *cited in* GOVERNMENT BY JUDICIARY at 200.

Presumably Justice Brandeis had such language as "commerce" in mind when he cited an earlier passage, "general language should not" be "confined to the form that evil had theretofore taken." Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting), quoting Weems v. United States, 217 U.S. 349, 373 (1910), *cited in* Alfange Essay, *supra* note 1, at 621 n.85. He concurred with Justice Holmes in rejecting the notion that the Fourteenth Amendment "was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions." Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting) (emphasis in original).

83. *See* Berger on Mendelson at 550-55, nn.30-67.

84. *Id.* at nn.78-83, 107-118.

85. *See id.* at note 15.

86. Alfange Essay, *supra* note 1, at 622.

they say so?' "[87]—a test summarily dismissed by Justice Holmes.[88]

Notwithstanding this anti-"general" demonstration, Alfange singles out what he labels as my "only" answer to the "vague" language of the amendment, avoidance of prolixity.[89] It was Marshall who said that a Constitution cannot be as prolix as a Code,[90] and Bickel who stated that "a specific and exclusive enumeration of rights" in the act presumably was considered "inappropriate in a constitutional provision."[91] Alfange disposes of Marshall by invoking his all-purpose poultice—"a constitution intended to endure for ages to come";[92] and Bickel is explained by his qualifying "open-ended" hypothesis, of which more anon.[93] For Alfange my thesis would result in a Constitution that is "exceedingly prolix";[94] he cites Bickel's remark that "[t]he familiarity of amendment will breed a species of contempt and incapacitate the document."[95] But is free-wheeling judicial "incapacitation" which thwarts the design of the framers the lesser evil? Then too, Alfange wanders outside the frame of my analysis—the Fourteenth Amendment. It would require only one amendment (and I do not suggest that there may be no statutory means of dealing with judicial usurpation) to limit the Court's jurisdiction thereunder.[96] In truth, once the people become aware that the Court is exercising powers that were withheld, allegedly for their own good, the Court will feel itself constrained to retreat.[97]

Since "it would have taken only a few additional lines" to embody the restrictions of the Civil Rights Act, Alfange concludes that the

87. Hart, Book Review, 67 HARV. L. REV. 1456, 1462 (1954).

88. *See* text accompanying note 28 *supra.*

89. Alfange Essay, *supra* note 1, at 622-23.

90. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). *See* note 56 *supra.*

91. A. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 61 (1955) [hereinafter cited as Bickel], *cited in* GOVERNMENT BY JUDICIARY at 39.

92. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819). *See* Alfange Essay, *supra* note 1, at 624.

93. *See* note 108 *infra.*

94. Alfange Essay, *supra* note 1, at 627.

95. A. BICKEL, THE LEAST DANGEROUS BRANCH 105 (1962), *cited in* Alfange Essay, *supra* note 1, at 627.

96. Alfange instances the *Dred Scott* decision, 60 U.S. (19 How.) 393 (1857), holding that the word "citizen" was not intended to encompass blacks, as showing "it would be difficult to know how to amend the document." Alfange Essay, *supra* note 1, at 626. The framers found no difficulty in defining citizenship in the Fourteenth Amendment so as to overcome that holding.

97. Justice Frankfurter stated, "scholarly exposure of the Court's abuse of its powers" would "bring about a shift in the Court's viewpoint." J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 59 (1974), *cited in* GOVERNMENT BY JUDICIARY at 415; *see also* note 131 *infra.*

framers' "deliberate failure to take this simple course . . . strongly suggests that they desired a constitutional provision that would be adaptable to future exigencies."[98] To the contrary, having throughout used "equal protection" in a restricted sense, the framers could safely assume that that meaning had not been changed when those words were incorporated in the Amendment,[99] and certainly not to include the very privileges they had repeatedly been assured were barred. Alfange turns a blind eye to John Bingham's (the draftsman of the Amendment) rejection of a broad, "oppressive" anti-discrimination clause in the Civil Rights Bill,[100] and without explanation now has him embrace in the Amendment exactly what he had rejected in the bill. Alfange also ignores that an early draft had distinguished between "equal protection of the laws" and "the same political rights and privileges,"[101] and that the deletion of the latter phrase set the seal on the restricted scope of "equal protection."[102] If, as Alfange urges, "surely the members of Congress must have seen that the language they were using in the amendment was an open invitation,"[103] why did they then turn to the cumbersome process of procuring the Fifteenth Amendment[104] when it would have been so much simpler and easier to confer suffrage by statute? Who would know better than the framers that they had left an escape hatch open? Instead, Charles Sumner told the Thirty-Ninth Congress that we are to turn to the framers for light as to words "which seem to have no fixed signification."[105] And when the Senate Judiciary Committee was asked to review a petition in 1871 to confer suffrage on women, it unanimously held that the framers of the Fourteenth Amendment had not intended to confer suffrage on women.[106]

98. Alfange Essay, *supra* note 1, at 624.

99. This is the effect of the pari materia rule, *see* Berger on Mendelson at 561, n.113. It is therefore no answer to quote Bickel that, "equal protection of the laws [is] a clause which is plainly capable of being applied to all subjects of state legislation." Bickel, *supra* note 91, at 60-61, *cited in* Alfange Essay, *supra* note 1, at 626. Bickel also stated that the Moderate leadership (which prevailed) had in mind a "limited and well-defined meaning . . . a right to equal protection in the literal sense of benefitting from the laws for security of person and property." Berger on Mendelson at 561, n.112. No explanation is proferred for a shift from this opinion.

100. Berger on Mendelson at 551, nn.35-36.

101. Bickel, supra note 91, at 31, *cited in* GOVERNMENT BY JUDICIARY at 171.

102. *Id.* at 163-65.

103. Alfange Essay, *supra* note 1, at 623 n.91.

104. U.S. CONST. Amend. XV provides, in pertinent part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any States on account of race, color, or previous condition of servitude."

105. *See* note 39, *supra*.

106. A. AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES 571-572 (1967).

Throughout, Alfange reveals that facts are uncongenial to him; speculation is easier and not so confining.

Alfange merely reiterates the "open-ended" theory which Bickel first proferred as an hypothesis in 1954.[107] To my lengthy exposition of the historical materials which rebut that theory,[108] Alfange merely retorts, "But surely the members of Congress must have seen that the language they were using . . . was an open invitation to such speculation. . . ."[109] Yet that "invitation" escaped the notice of the Court for three quarters of a century. Alfange would controvert *evidence* that the terms had a restricted meaning for the framers with mere *speculation*.[110] Nor is it enough to say that "Alfred Kelly found the framers' choice of broad language . . . to be particularly significant . . . . Berger examines and rejects Kelly's suggestion."[111] If the detailed recital of facts and reasoning on which my rejection was based is faulty, it was incumbent upon Alfange to expose the flaws. Then too, Alfange shuts his eyes to Kelly's recantation in 1966, induced by the "extraordinary revolution in the historiography of the Civil War and Reconstruction."[112] Such persistent oversights, all geared to his predilections, vitiate Alfange's credibility.

As a clincher Alfange parades some judicial lynchings and asks with respect to *Brown v. Mississippi*[113] (murder convictions of blacks based upon confessions extorted by torture) whether Berger "really [would] have contended that because the framers of the Fourteenth Amendment did not intend the due process clause to apply to state criminal procedures, the state *could*, as far as federal constitutional law was concerned, substitute the 'rack and torture chamber' for the witness stand."[114] Alfange is sadly confused. True it is, as he recognizes, that the due process clause of the "Fourteenth Amendment was not intended to incorporate the Bill of Rights and thus to revolutionize the

107. *See* note 108 *supra*.

108. *See* GOVERNMENT BY JUDICIARY at 99-116; *see also* Berger on Abraham at 570-72, nn.56-66.

109. Alfange Essay, *supra* note 1, at 623 n.91.

110. The courts require that evidence must be met by evidence, not speculation. *See, e.g.*, Eckenrode v. Pennsylvania R. Co., 164 F.2d 996, 999, n.8 (3d Cir. 1947); Meosson v. Liberty Fast Freight Co., 124 F.2d 448, 450 (2d Cir. 1941); Phillips v. Gookin, 231 Mass. 250, 251, 120 N.E. 691 (1918); *see also* Miller v. Herzfeld, 4 F.2d 355, 356 (3d Cir. 1925); Magg v. Miller, 296 F. 973, 979 (D.C. Cir. 1924), all *cited in* GOVERNMENT BY JUDICIARY at 74 n.15.

111. Alfange Essay, *supra* note 1, at 624 n.93, (citing Kelly, *The Fourteenth Amendment Reconsidered*, 54 MICH. L. REV. 1049, 1071-86 (1956)).

112. *See* Berger on Kutler at 599, nn.74-76.

113. 297 U.S. 278 (1936).

114. Alfange Essay, *supra* note 1, at 634 n.154.

administration of criminal justice in the states."[115] But it does not follow, and I did not suggest, that the due process clause in its historical *procedural* sense, was not intended "to apply to state criminal procedures." On the contrary, the Amendment expressly provides, "nor shall any State deprive any person of life, liberty, or property without due process of law." Fourteenth century statutes had guaranteed proper service in due course so that a defendant would have the opportunity to answer and defend—the primal meaning of due process,[116] a right that could not be emptied merely by going through the motions of a hearing. Thus a fair trial was implicit in the requirement of due process. John Bingham, who was to be the draftsman of the Fourteenth Amendment, stated in Congress in 1859, that a State could not deny "Free, native-born Negroes a fair hearing in maintenance of their rights in the courts of justice. . . ."[117]

In holding that a due process hearing demands a fair trial in a State court, the Court, therefore, was acting within the perimeters of procedural due process. And it was *giving effect* to the framers' intention to "secure protection" of the courts against "the enormities practiced upon" blacks, to afford them "security of person and property,"[118] a guarantee that would be eviscerated were State courts permitted to sanction a lynching merely by going through the forms of a judicial proceeding.[119] In short, Alfange fails to distinguish the *procedural due process that governs in judicial proceedings from the perverted substantive due process that would displace legislative* policy-making.[120] Moreover, the Mississippi court itself had outlawed convictions secured by torture,[121] so that the right to be protected therefrom might well have been

115. *Id.* at 607.

116. See GOVERNMENT BY JUDICIARY at 197-98.

117. CONG. GLOBE, 35th Cong., 2d Sess. 985 (February 11, 1859). Justice Holmes stated, "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial. . . . Mob law does not become due process of law by securing the consent of a terrorized jury." Frank v. Magnum, 237 U.S. 309, 347 (1915), dissenting opinion, Hughes, J., concurring. Such was the holding in Moore v. Dempsey, 261 U.S. 86, 91 (1923), per Holmes, J. In none of these cases was the applicability of procedural due process to such State proceedings questioned.

118. GOVERNMENT BY JUDICIARY at 201.

119. The Mississippi court held that the right to a "fair and impartial trial" "rises above mere rules of procedure." Fisher v. State, 145 Miss. 116, 134 (1926).

120. That distinction was drawn by Hamilton in 1787: "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature." GOVERNMENT BY JUDICIARY at 196 n.11.

121. *See* note 119 *supra. Accord*, Collier v. State, 115 Ga. 803, 810 (1902); Sanders v. State, 85 Ind. 318, 321, 323 (1882): State v. Weldon, 91 S.C. 29, 38 (1911).

regarded as one of the "privileges or immunities" that must be afforded without discrimination under the Fourteenth Amendment, had not the Court in *Slaughter House* aborted the clause.[122]

Throughout, Alfange confuses law with morals, although Justice Holmes, whom he is fond of quoting to me, wrote, "nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the constitution and the laws."[123] The point had been made by one of the leading architects of the Constitution, James Wilson: "Laws may be unjust, may be unwise, may be dangerous, be destructive, and yet not be so unconstitutional as to justify the Judge in refusing to give them effect."[124] At stake too was the attachment of the framers, both in 1787 and in 1866, to State sovereignty. Alfange's inarticulate premise, that somewhere there *must* exist power to deal with horrors and therefore the Court has it, is a non-sequitur, as Madison pointed out.[125]

"Of course," Alfange writes, "judges ought not to be free to manipulate [the Constitution's] words at will to arrive at whatever results their personal inclinations commend to them"—except apparently when those inclinations coincide with his own.[126] But he repeats, "Nevertheless, a constitution is intended to endure for ages to come,"[127] notwithstanding Marshall's disclaimer of a judicial power "to change that instrument."[128] To cling to that dictum is to confess that he has nothing better to offer. But then he quotes Archibald Cox: "Law ought to be binding upon even the highest court, but it must also meet the needs of men and match their [ethical] sensibilities."[129] That

122. The evidence that this was squarely in contradiction of the framers' clearly expressed intention is collected in GOVERNMENT BY JUDICIARY at 37-48.

123. O. HOLMES, JR., COLLECTED LEGAL PAPERS 171-72 (1920).

124. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 73 (1911) [hereinafter cited as FARRAND], *cited in* GOVERNMENT BY JUDICIARY at 301. *See also* Berger on Lusky at 537, nn.27-35. Professor Felix Frankfurter wrote, "wisdom and justice are not the tests of constitutionality." Abraham Essay at 474, n.35.

125. *See* text accompanying Berger on Lusky at 544, n. 96; *see also*, Chief Justice Marshall's statement in Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 563 (1830): "[T]he constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments." Even where power exists, it does not follow that it is vested in the courts, as Justice Frankfurter pointed out with respect to claimed presidential power. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 604 (1952) (concurring opinion).

126. Alfange Essay, *supra* note 1, at 629; *see* note 62, *supra*.

127. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819), *quoted in* Alfange Essay, *supra* note 1, at 630.

128. *See* notes 49 and 52 *supra*.

129. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 109-10 (1976) [hereinafter cited as COX], *quoted in* Alfange Essay, *supra* note 1, at 628.

does not answer the question: where was the Court empowered to contradict the intention of the framers in order to "meet the needs of men." Then too, Cox also wrote that

> in the new era those impulses were not shared so strongly and widely as to realize themselves through legislation. They came to be held after the early 1950s by a majority of the Supreme Court Justices, perhaps by the fate which puts one man upon the Court rather than another, perhaps because the impulses were more strongly felt in the world of the highly educated.[130]

So we do not have a "strongly and widely shared" "ethical" sense, but instead only views held by an elite of the "highly educated" which contrary to John Stuart Mill's caution, knows what is best for the people and maintains that the Court must be free to impose its will on the nation.[131] To maintain that the Court must be free to read the Constitution "in a way that comports with the demands of justice, *as broadly understood*"[132] is to ignore both that desegregation of the schools could not have commanded popular support in 1954, and the continuing resistance today to busing, reverse discrimination and the like.[133] And when Alfange insists that "it is one of the tasks of the federal courts to insure that the Constitution is not substantially at variance with broadly held conceptions of justice,"[134] he runs head on into Hamilton's statement in No. 78 of *The Federalist:* "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding . . . and no presumption, or even knowledge, of [the people's] sentiments, can warrant their representatives in a departure from it, prior to such an act."[135] Alfange argues in turn that

> if one more than one-quarter of the states were unwilling to ratify an amendment that was specifically intended to mean what the Fourteenth Amendment actually says, the vast majority of the nation would have to suffer under a fundamental law that embodied and perpetuated what they recognized as a fundamental injustice.[136]

130. COX, *supra* note 129, at 35, *cited in* GOVERNMENT BY JUDICIARY at 313.

131. *See* text accompanying Berger on Abraham at 575, n.90. Crane Brinton wrote of Robespierre, "If Frenchmen would not be free and virtuous voluntarily then he would force them to be free and cram virtue down their throats." 2 C. BRINTON, S. CHRISTOPHER & R. WOLFF, A HISTORY OF CIVILIZATION 115 (1955).

132. Alfange Essay, *supra* note 1, at 637.

133. *See* Berger on Miller at 583, n.55; Berger on Kutler at 607, n.130.

134. Alfange Essay, *supra* note 1, at 627.

135. THE FEDERALIST, *supra* note 10, at 509, *cited in* GOVERNMENT BY JUDICIARY at 316.

136. Alfange Essay, *supra* note 1, at 628. Suffrage undeniably was to be excluded, so that in this respect the amendment was *not* "specifically intended to mean what the Fourteenth Amendment actually says."

I daresay that Alfange could not in a referendum obtain the vote of a bare majority of the people for busing or affirmative action, let alone three-quarters of the States. So he speaks for "a vast majority" that is probably at odds with him, as Professor Cox frankly recognized in saying that the "impulses" that animate such as Alfange "were not so strongly and widely shared as to realize themselves through legislation."[137] And were they more widely shared they would still furnish no excuse for throwing a constitutional provision—article V—into the discard. Judges are sworn to support the Constitution, not to revise it. Why too should the judgment of 9—often only 5 Justices, or even, as in *Bakke*,[138] of a "lone 'swing man' "[139]—weigh more heavily than the will of one-quarter of the States?

It cannot be unduly emphasized that it was late in the day when the Court began to enter the field of civil liberties.[140] As late as 1922 it held that the Constitution "imposes upon the States no obligation to confer upon those within their jurisdiction . . . the right of free speech."[141] When Justice Holmes, in a 1925 dissenting opinion, maintained that "the Constitution prohibited the *states* from abridging freedom of speech,"[142] he explained that free speech "must be taken to be included in the Fourteenth Amendment *in view of the scope that has been given to* the word 'liberty' "[143] under the now discredited "liberty of contract" doctrine, whereunder the Court held that the right of bakery workers to work 10 hours a day 6 days a week was sacred.[144] Holmes took no account of the rejection by the First Congress of Madison's proposal to extend the free speech guarantee to the States,[145] nor, if memory serves me, did he ever turn to the history of the Fourteenth Amendment, which by Alfange's own account "[ineluctably

137. GOVERNMENT BY JUDICIARY, at 313; COX, *supra* note 129, at 35.

138. Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).

139. Lusky Essay at 434 n.153.

140. *See* Berger on Abraham at 566, n.18. Leonard Levy wrote, "millions of Negroes suffered lives of humiliation for five or more decades . . . because the Court betrayed the intent of the Reconstruction Amendments." JUDICIAL REVIEW AND THE SUPREME COURT 143 (L. Levy ed. 1967), *cited in* GOVERNMENT BY JUDICIARY, at 332 n.68.

141. Prudential Ins. Co. v. Cheek, 259 U.S. 530, 538 (1922), *cited in* GOVERNMENT BY JUDICIARY at 270.

142. Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting), *cited in* Alfange Essay, *supra* note 1, at 632.

143. GOVERNMENT BY JUDICIARY at 270-71 (emphasis added) (quoting Gitlow v. New York, 268 U.S. at 672).

144. *See* Lochner v. New York, 198 U.S. 45 (1905).

145. *See* C. Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 434-35 (1926) and 1 ANNALS OF CONGRESS 435, 755, both *cited in* GOVERNMENT BY JUDICIARY at 272.

proves] that incorporation [of the Bill of Rights] was not intended."[146] Our reverence for Holmes must not lead us to convert his oversights into gospel.

Alfange recognizes that "both the Warren and Burger Courts have often extended their authority to give meaning to the Constitution past the point that is compatible with a proper role for the judicial branch in a democratic society."[147] He states that:

> There can be no doubt that the lessons of the half-century from 1887 to 1937 teach that there may be great costs in a system of law in which judges feel free to disregard the intent of the framers of the Constitution and to rely instead of their own views of what the Constitution *ought* to say, and Berger has learned those lessons well. But, as decisions like *Dred Scott* demonstrate, there may also be great costs in a system of law in which judges mindlessly apply the putative intention of the architects of the Constitution. . . .[148]

Chief Justice Taney was far from "mindless"; the "costs" of that disastrous decision arose not so much from applying a "putative intention" as from an ill-fated hope of settling the slavery issue that was tearing the nation apart.[149] *That* is the lesson of *Dred Scott*—that judicial intrusion into divisive national issues wounds the Court—not that the

146. Alfange Essay, *supra* note 1, at 607.

147. *Id.* at 625.

148. *Id.* at 616. In *Dred Scott*, Chief Justice Taney had held that blacks "are not included, and were not intended to be included, under the word 'citizens' in the Constitution," 60 U.S. (19 How.) 393, 404 (1857), and Alfange asks, "why should the meaning of that word not be allowed to change with the passage of time." Alfange Essay, *supra* note 1, at 613. The gulf between his thinking and that of the framers is disclosed by the fact that despite the Thirteenth Amendment's alteration of black status, the framers placed no reliance on a "change" in the meaning of "citizen" but expressly defined it in the Fourteenth Amendment to include blacks. See GOVERNMENT BY JUDICIARY at 370-71.

149. *See* text accompanying Berger on Miller at 581, n.41. Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934), *cited in* Alfange Essay, *supra* note 1, at 613, 615, 620, 622, is a stronger case; it dealt with a genuine emergency—a moratorium on mortgage payments during the depression, leading Alfange to conclude that "there may be compelling reasons for a judicial reluctance to be bound by the intent of the framers. . . ." Alfange Essay, *supra* note 1, at 622. Chief Justice Hughes could summon no better authority than Alfange's favorite Marshall dictum, *see* note 56 *supra*, and his Court then went on to gut the New Deal. Put not your trust in saviors. And as Justice Holmes observed, "hard cases make bad law," resulting from "some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904) (dissenting opinion).

Moreover, the additional vice of such "emergencies," as Hamilton foresaw is that, "every breach of the fundamental laws, though dictated by necessity . . . forms a precedent for other breaches where the same plea of necessity does not exist at all." THE FEDERALIST No. 25 (A. Hamilton) at 158 (Modern lib. ed. 1937), *cited in* GOVERNMENT BY JUDICIARY at 329. Witness the abortion, death penalty and six-man jury decisions. Power grows by what it feeds on.

Court was betrayed by reliance on a rule of construction. In balancing the "costs" of judicial misrule against *Dred Scott* Alfange exposes the weakness of the argument on behalf of government by judiciary.

Again and again Alfange eschews fact for fancy: "the framers could not have been so naive as to believe that they could confer the power of judicial review without also necessarily conferring policy-making power."[150] Yet that unmistakably was the view taken by the foremost proponent of judicial review, Hamilton, as we saw at the outset.[151] Alfange resolutely shuts his eyes to the undeniable intention of the Framers to exclude the Justices from participation in policymaking in the Council of Revision, to their deep-seated distrust of judicial discretion.[152] In the Convention, Gerry, one of the most vigorous proponents of judicial review, declared, "It was quite foreign from the nature of ye office to make them judges of the policy of public measures. . . It was making Statesmen of the Judges; and setting them up as the guardians of the Rights of the people,"[153] exactly what Alfange now seeks to accomplish. Nathaniel Gorham observed that judges are "not to be presumed to possess any peculiar knowledge of the mere policy of public measures."[154] Throughout, Alfange mistakenly identifies his own predilections with constitutional power to effectuate them.[155] But like his fellows, he also sees the need "to find and describe limits to the proper scope of judicial policymaking"[156] a strange oversight on the part of Framers so fearful of illimitable power. He locates the limits in Justice Stone's *Carolene* footnote,[157] which Professor Abraham properly considers proved "to be a veritable Pandora's box,"[158] so that

150. Alfange Essay, *supra* note 1, at 637.

151. *See* text accompanying notes 10-15 *supra*. Professor Richard Kay has written: "[A]cceptance of government limited by law is premised on the faith that in the long run the evil which is prevented is greater than the good which is denied or deferred. . . . Indeed the history of constitutional adjudication presents striking examples of the dangers of governmental power unlimited by law." Kay, Book Review, CONN. L. REV. 801, 809 (1978). When we accept the substitution of judicial values on moral grounds, we ought to be clear that "it is in contradiction with and subversive of the design of constitutional government to which we purport to adhere." *Id.* at 810.

152. *See* Berger on Lusky at 537, nn.28-29, 32-35.

153. 1 FARRAND, *supra* note 124, at 97-98; 2 FARRAND, *supra* note 124, at 75.

154. *Id.* at 73, *quoted in* GOVERNMENT BY JUDICIARY at 301.

155. With respect to the slave trade, Chief Justice Marshall held, "this court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law." The Antelope, 23 U.S. (10 Wheat.) 66, 114 (1825).

156. Alfange Essay, *supra* note 1, at 625-26.

157. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938), *cited in* Alfange Essay, *supra* note 1, at 626 n.102.

158. Abraham Essay at 476. In a paper read before the American Enterprise Institution for Public Policy Research, Washington D.C., December 13, 1978, p.4. Professor Robert

before long Chief Justice Stone himself was disenchanted with its restraining influence.[159]

In sum, Alfange's attempt to meet my criticism of judicial activism exposes its historical and analytical inadequacies.

Bork stated with respect to the Carolene footnote: "I am thinking of putting errata sheets in every copy of volume 304 of the United States Reports stating that footnote four was a typographical error, thus wiping out an entire jurisprudential industry and bringing two dozen academic careers to an abrupt conclusion."

159. Chief Justice Stone wrote in 1945, "My more conservative brethren in the old days [read their preferences] into the Constitution . . . [h]istory is repeating itself. The Court is now in as much danger of becoming a legislative and Constitution making body enacting into law its own predilections, as it was then." GOVERNMENT BY JUDICIARY at 278.

Conclusion

But for Professor Lusky's assumption that the Founders made the Justices their "surrogate" for updating the Constitution[1]—regardless of the amendment provision for that purpose—my critics make no attempt to bridge the chasm that yawns between the limited role the Founders assigned to the judiciary and the "new and grander"[2] role the Court has carved out for itself. Their constitutional law is derived not from the Constitution and its history, but from what the Justices have said about the Constitution. So they rely on a few scattered dicta such as Marshall's "it is *a constitution*. . . ,"[3] overlooking that such dicta, at best, are pronouncements by judges who have a stake in the cause. Another alleged source of judicial power to proceed in direct contradiction of the Framers' clearly discernible intention is the so-called "general" words they employed, which the True Believers read as an invitation to rewrite the Constitution in order to attune it to modern exigencies.[4] Nevertheless they are profoundly uneasy with the creature of their imaginings; they search for limits on the unrestrained judicial power they have conjured,[5] limits which find no warrant in the "general" words or dicta they summon and the absence of which undermines their argument for a judicial revisory power. A people fearful of power in 1787 and distrustful of the judiciary in 1866 were hardly likely to grant unconfined judicial power on the supposition that academicians would limit it after the lapse of more than 100 years.

The most candid approach, that of Professor Miller, "The Founding Fathers cannot rule us from their graves,"[6] would equally authorize disregard of the text and constitute the Court as a continuing constitutional convention. The people have yet to be told by the Court that it has taken over that function and to give their assent.[7] That is the issue

1. L. LUSKY, BY WHAT RIGHT?, 21 (1975).
2. Lusky Essay at 408.
3. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).
4. Alfange Essay at 609, 620, 638.
5. *See* Abraham Essay at 469-71.
6. Berger on Miller at 586, n.81.
7. To my statement that the people would prefer to live under the constraints of the Constitution rather than the idiosyncratic rule of the Justices, Professor Alfange responds that if the people "were asked whether the Court should interpret the words of the Constitution according to current common understanding or according to the specific meaning intended by the framers, the vote would be much closer. . . ." Alfange Essay at 636. Instead let us frame the issue in a way the people can fully understand: whether they prefer the framers' exclusion of segregation from the Fourteenth Amendment to judicial insistence on

I sought to bring to public attention, and it deserves to be examined on its merits, not obfuscated by derision and casuistry. For myself I ask no more than to be judged by the criteria of historicity, factual accuracy and faithful examination of discrepant facts and opposing opinion.

busing and the like. Martin Shapiro stressed that the Court cannot "disavow publicly the myth on which it rests." Berger on Alfange, note 21. Alfange considers that my views posit a "large measure of naiveté on the part of the American public." Alfange Essay at 637. Yet Frankfurter wrote that the people have been led to believe that it is the Constitution rather than the Justices that speaks. Berger on Lusky at 545, n.105. Robert Bork observed that "[t]he way an institution advertises [*e.g.*, it is effectuating the framers' intent] tells you what it thinks its customers demand." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4 (1971), cited in GOVERNMENT BY JUDICIARY at 319.