The Elusive Search for Values in Constitutional Interpretation

by ARTHUR S. MILLER*

Introduction

How and by whom should a written constitution be interpreted? For nearly two centuries these questions have stirred debate in the United States, a debate at times enlightening, at times polemical, and at time merely choleric. Raoul Berger, who a decade ago maintained that judicial review, although not mentioned in the Constitution, was nevertheless constitutionally permissible,[1] has now in *Government by Judiciary*[2] decided that the federal courts, and particularly the Supreme Court, have gone too far in interpreting the Fourteenth Amendment.

Berger concentrates on two Warren Court decisions, *Brown v. Board of Education*,[3] the 1954 landmark school desegregation decision, and *Reynolds v. Sims*,[4] the 1964 reapportionment decision mandating "one person/one vote" in apportionment of state legislatures, but he casts his net far wider. He asserts that much of the Supreme Court's exegesis of the first section of the Fourteenth Amendment[5] amounts to an unconstitutional exercise of raw power by the Justices because neither racial desegregation nor equal suffrage was contemplated by its framers. As the principal technique of constitutional interpretation,

* Professor of Law Emeritus, The George Washington University. The research assistance of Carl Gulliver is gratefully acknowledged.

1. R. BERGER, CONGRESS V. THE SUPREME COURT (1969).

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

3. 347 U.S. 483 (1954).

4. 377 U.S. 533 (1964).

5. U.S. CONST. amend. XIV, § 1. Section 1 of the Fourteenth Amendment provides that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Berger would have the Court search for and ascertain the intentions of those in the thirty-ninth Congress who drafted the Fourteenth Amendment; once found, those intentions are to be rigorously followed.[6] To facilitate this process, *Government by Judiciary* focuses on the debates in the thirty-ninth Congress as the best evidence of that intent.[7]

In essence, Berger's position treats the Constitution like any other written instrument—a contract, a will, a conveyance, a statute—and views the Supreme Court as an ordinary court of law. He repeatedly refers to commonly accepted canons of interpretation as if such a fixed, reliable body of decisional principles existed and could be applied to the Constitution.[8] In fact, the Constitution, as Woodrow Wilson phrased it, "is not a mere lawyers' document . . . . [I]t is . . . the vehicle of a nation's life."[9] By focusing solely on the Framers' intent, Berger merely isolates one of many factors to be considered when interpreting the Constitution.

I believe with Woodrow Wilson that the Constitution is Darwinian, not Newtonian, and that Americans "have married legislation with adjudication and look for statesmanship in our courts."[10] Whether or not "statesmanship" is always forthcoming from the Justices, the point remains that the 1787 Constitution, as Professor Sanford Levinson has said, "is related to today's Constitution only in metaphorical ways."[11] The Constitution is not a document frozen in time; it never has been, and indeed never can be. Amendment is not the only way the document can be changed.[12] As Senator Daniel Moynihan recently

6. GOVERNMENT BY JUDICIARY at 3.

7. *Id.* at 7.

8. *See, e.g., id.* at 7 n.22, 7-8 n.24, 9 n.26, 17 n.57, 124, 136-37.

9. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 157 (1908) (1961 ed.). Wilson wrote: "No lawyer can read into a document anything subsequent to its execution; but we have read into the Constitution of the United States the whole expansion and transformation of our national life that has followed its adoption . . . . The explicitly granted powers of the Constitution are what they always were; but the powers drawn from it by implication have grown and multiplied beyond all expectation, and each generation of statesmen looks to the Supreme Court to supply the interpretation which will serve the needs of the day." *Id.* at 157-58.

10. *Id.* at 168.

11. Levinson, *The Specious Morality of the Law*, HARPER'S MAGAZINE, May 1977, at 37, 42. Levinson's brief essay is a particularly fertile contribution to the study of American constitutionalism.

12. For Berger, the sole avenue for divergence from precedent lies in the amendment process. For example, in his discussion of the desegregation decision, Brown v. Board of Educ., 347 U.S. 483 (1954), Berger argues that the thirty-ninth Congress, when adopting the Fourteenth Amendment, did not intend to address the question of desegregation. He concludes that the *Brown* Court therefore had no constitutional power under the Fourteenth Amendment to mandate school desegregation. Berger's alternative is constitutional amend-

observed:

> Americans, understandably, tend to think of constitutional change in terms of the amendment process. But 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. In this sense the American Constitution can evolve rather in the way the British constitution is said to evolve, and indeed does.[13]

As a statement of what has happened, Moynihan's position surely cannot be gainsaid.[14]

Berger, however, is stating what *should* happen—quite a different thing. In that, I fear, he recalls to mind the philosopher about whom Bertrand Russell once wrote: "[He] 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."[15] Berger does not call for a retreat to the status quo ante: "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."[16] "But," he writes, "to accept thus far accomplished ends is not to condone the continued employment of the unlawful means. . . . [T]he difficulty of a rollback cannot excuse the *continuation* of such unconstitutional practices."[17]

I concede, quite cheerfully, that the Justices often invoke what they claim is the intention of the Founding Fathers, or of those who drafted the amendments, as a means of explaining or justifying their decisions. The Black–Frankfurter debate in the *Adamson*[18] case and Chief Justice Taney's opinion in *Dred Scott*[19] amply document this

---

ment. "The real issue," Berger writes, was "who was to make the change—the people or the Justices." GOVERNMENT BY JUDICIARY at 132. This view ignores the dynamics of judicial interpretation and would have the law bound and tied by *stare decisis*, whether or not well-suited to contemporary needs.

13. Moynihan, *Imperial Government*, 65 COMMENTARY No. 6, at 25, 31 (June 1978). Moynihan begins his essay with these words: "The question of size and effectiveness in American government is beginning to take on aspects of constitutional as against merely political debate." *Id.* at 25. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

14. In accord with Moynihan's view, I think that Berger's theory of constitutional interpretation is surely faulty and probably false, at least to the extent that it has never been consistently followed by the 101 men who have sat or are sitting on the Supreme Court.

15. B. RUSSELL, SCEPTICAL ESSAYS 91 (1928). For Berger's response to two rather mild criticisms of his book, see Berger, *Academe vs. the Founding Fathers*, NATIONAL REVIEW, April 14, 1978, at 468.

16. GOVERNMENT BY JUDICIARY at 412-13.

17. *Id.* at 413 (emphasis in original).

18. Adamson v. California, 332 U.S. 46 (1947).

19. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). *See* note 74 *infra*.

point. History is often a part of the opinions of the Justices. But that does not mean that the history invoked is clear, or, of more importance, that it should control. It is not unknown, furthermore, for the Justices to see an intention of the Framers where others do not.[20] But that, I suggest, is the result of deep-set institutional reasons, judges not being ready as, for example, Professor Ray Forrester is, for "truth in judging."[21]

The purpose of this commentary is not to engage in contentious debate—although that would be easy, for Berger himself admits that his book has a "polemical tone."[22] My purpose is instead to suggest and develop two basic points: (1) constitutional interpretation is not a judicial monopoly; and (2) the need is to search for and identify the values that should be furthered in interpreting the Constitution, rather than to make a bootless and usually fruitless quest for the intentions of those who drafted the document and its amendments. Each point will be taken up in order, but my main effort will be directed toward the second.

I. The Making of Constitutional Decisions

Who under the Constitution can make decisions of constitutional dimensions? Since *Marbury v. Madison*[23] was decided in 1803, lawyers

20. *E.g.*, Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); *see* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).

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

22. GOVERNMENT BY JUDICIARY at 9. I add at the outset that of course Berger is fully entitled to his opinion and to expressing it however he wishes. The First Amendment guarantees him that, although surely it is meet to note that the protections we all enjoy from encroachments by state governments on First Amendment freedoms came only through judicial "incorporation" of that Amendment into the due process clause of the Fourteenth Amendment. Although Justice Black believed otherwise, most commentators (and judges) do not rely on history to justify that bit of judicial lawmaking. For Black's views on this subject, see Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting). A useful essay is Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

The Supreme Court has not overruled Barron v. Baltimore, 32 U.S. 243 (1833), in so many words, but has so eroded its foundations that the case is now little more than a seldom noticed milestone in American constitutional history. *Barron* established the principle that the Bill of Rights applied only to actions of the federal government, not to those of the states.

23. 5 U.S. (1 Cranch) 137 (1803). It is important to note that *Marbury* did not declare a statute unconstitutional; the Court merely refused to exercise a jurisdiction not constitutionally granted to it. The *Dred Scott* case, 60 U.S. (19 How.) 393 (1856), *discussed at* note 74 *infra*, was the first time the Court held a federal statute unconstitutional. Felix Cohen maintains that Louis Boudin "presents at least a *prima facie* case for the view that the decision in *Marbury v. Madison* was neither intended nor, for many years, understood as an affirmance of the modern doctrine that final power to interpret the Constitution rests in the conscience of the judiciary." F. COHEN, THE LEGAL CONSCIENCE 439 (L. Cohen ed. 1960). Cohen's

have become accustomed to agreeing that it is the "judicial department" whose task it is "to say what the law is."[24] It is true that the Supreme Court has had the major role in interpreting the fundamental law. In those interpretations, the Court of course makes law, as Justice White asserted in *Miranda v. Arizona*:[25]

> That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.[26]

To Justice White, "it is wholly legitimate . . . to inquire into the advisability of [the Court's decision] in terms of the long-range interest of the country;"[27] or, as he said later in his dissenting opinion, the Court has a "duty to assess the consequences of its action."[28] However one views the actual merits of the *Miranda* decision, I cannot see how one can disagree with the historical observations made by Justice White.[29]

Anyone with the power of interpretation "is truly the lawgiver," as Bishop Hoadley said in 1717.[30] Despite Chief Justice Marshall's assertion in *Marbury*,[31] quoted by Chief Justice Burger in *United States v.*

views were expressed in a review of L. Boudin's *Government by Judiciary*. Cohen, Book Review, 32 COLUM. L. REV. 1262 (1932).

24. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

25. 384 U.S. 436 (1966).

26. *Id.* at 531 (White, J., dissenting, joined by Harlan & Stewart, JJ.) (footnote omitted).

27. *Id.*

28. *Id.* at 537.

29. What Justice White did not specify is how the Justices are to "assess the consequences" of their decisions, a critical need. Are they, as Justice Frankfurter once said, to make "blind guesses about those consequences"? F. FRANKFURTER, SOME OBSERVATIONS ON SUPREME COURT LITIGATION AND LEGAL EDUCATION 17 (1954).

30. Sermon by Bishop Hoadley, King's Court, Mar. 31, 1717, *quoted in* W. LOCKHART, Y. KAMISAR, & J. CHOPER, CONSTITUTIONAL LAW: CASES, COMMENTS & QUESTIONS 1 (4th ed. 1975).

31. *Quoted in* text accompanying note 24 *supra*.

Nixon,[32] it is (at times, at least, and not rarely) "the province and duty" of the political branches of government "to say what the law is."[33] Congressional enactments such as the Sherman Antitrust Act of 1890,[34] The Employment Act of 1946,[35] the War Powers Resolution of 1973[36] and the Budget and Impoundment Control Act of 1974[37] surely have constitutional dimensions.[38] Of particular significance in light of recent history is the power asserted by Congress in the War Powers Resolution of 1973[39] to establish guidelines for the use of military force other than in a state of declared war. President Nixon vetoed the bill on constitutional grounds,[40] but Congress overrode the veto and subsequently enacted guidelines to limit any future use of armed forces in foreign hostilities.[41] Similarly, Congress has, in the Impoundment Control Act of 1974,[42] imposed substantial restraints on presidential authority to impound funds appropriated by Congress. The President has the duty to administer the national budget, yet this Congressional enactment limits the exercise of that power.

Professor Gerald Gunther has called the War Powers Resolution and the Impoundment Control Act "quasi-constitutional,"[43] but there is no reason to soften the label with a "quasi." Congress has histori-

32. 418 U.S. 683 (1974) (the first time the writ of the Court ran against the President *qua* President).

33. *Id.* at 703 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). For examples of congressional and executive law-making, see L. BOUDIN, GOVERNMENT BY JUDICIARY (1932).

34. 15 U.S.C. §§ 1-11 (1976).

35. 15 U.S.C. §§ 1021-1025 (1976).

36. Pub. L. No. 93-148, 87 Stat. 555 (1973), adopted over Presidential veto Nov. 7, 1973.

37. 31 U.S.C. §§ 1301-1353 (1976).

38. The Sherman Act itself has all the attributes of a constitutional provision. The original statute and its exegesis by the Court provide a close analogy to "pure" constitutional cases. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911); Northern Sec. Co. v. United States, 193 U.S. 197 (1904); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); United States v. E. C. Knight Co., 156 U.S. 1 (1895).

39. Pub. L. No. 93-148, 87 Stat. 555 (1973).

40. *See* H. R. DOC. No. 93-171, 93d Cong., 1st Sess. (1973).

41. *See* note 36 *supra.* The controversy out of which the resolution arose involved the question of whether legal justification existed for the use of military force in the Vietnam conflict absent a formal declaration of war by Congress. The Supreme Court consistently denied certiorari in cases seeking a judicial determination as to the constitutionality of the Vietnam conflict. *See, e.g.*, dissents by Justices Stewart and Douglas to the denial of certiorari in Mora v. McNamara, 389 U.S. 934 (1967). *See also* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 427-29 (9th ed. 1975) [hereinafter cited as GUNTHER].

42. 31 U.S.C. §§ 1301-1353 (1976).

43. GUNTHER, *supra* note 41, at 429 n.3. Gunther writes of the Impoundment Control Act: "That Act—like the War Powers Resolution of 1973 . . . represents congressional action of an unusual and especially important nature. Instead of congressional directives regarding substantive governmental policies, it delineates structures and processes. It is

cally and continues in the present to formulate statutes of constitutional dimension, carrying out roles in the exercise of its express powers that were not contemplated by the Framers. So, too, with the President; possibly the outstanding example of this is the Chief Executive's exercise of his duty as Commander-in-Chief, and his assertion of "constitutional reason of state"—the power of the President to take action in emergency situations.[44] This power has been repeatedly asserted from Lincoln's time until the Mayaquez incident[45]—in sharp contrast to the explicit delegation to Congress of the power to "declare war."[46]

Other examples could be given, for both Congress and the Chief Executive, but they need not be needlessly multiplied. The point is clear: constitutional interpretation is not a monopoly of the judges. To say this, however, is not to answer the question of where in the constitutional scheme the *ultimate* power of interpretation is lodged. The Court has claimed this role for itself. "We are not final because we are infallible," observed Justice Jackson, "but we are infallible only because we are final."[47] Justice Jackson's observation is true enough, so far as it goes, but how far does it really go? Despite De Tocqueville's well-known aphorism that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question,"[48] effective control over many decisions of constitutional dimension lies elsewhere than in the Supreme Court—in Congress, in the President and even in the bureaucracy.[49] When the additional factor of

legislation that can be viewed as quasi-constitutional in nature, for it seeks to clarify and define basic relationships among the branches of government." *Id.* at 416.

44. U.S. CONST. art. II, § 2 provides that: "The President shall be Commander in Chief of the Army and Navy of the United States." *See generally* A. MILLER, PRESIDENTIAL POWER IN A NUTSHELL 162-228 (1977).

45. *See id.* at 211-13. Lincoln used the Commander-in-Chief clause to justify defensive blockades in the Civil War. *See* The Prize Cases, 67 U.S. (2 Black) 635, 668-70 (1863). Another example is the presidential removal of Japanese-Americans from the West Coast during World War II. *See* Hirabayashi v. United States, 320 U.S. 81 (1943), upholding Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942), *as ratified by* Congress, Pub. L. No. 503, 56 Stat. 173 (1942). On the war making power, *see generally* Berger, *War-Making By the President*, 121 U. PA. L. REV. 29 (1972); Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972); Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972). For specific discussions of the Mayaguez incident, see Kelley, *The Constitutional Implications of the Mayaguez Incident*, 3 HASTINGS CONST. L.Q. 301 (1976); Paust, *The Seizure and Recovery of the Mayaguez*, 85 YALE L.J. 774 (1976).

46. U.S. CONST. art. I, § 8.

47. Brown v. Allen, 344 U.S. 443, 540 (1953). *See also* notes 61 & 62 and accompanying text *infra*.

48. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (1956 ed.).

49. For a view of the increasing complexity of all aspects of government and its corre-

compliance with Court decisions by public officials and the people generally is considered, one finds that the purported finality of judicial decisions is quite often something very different from the theory presented to students of law and government.

We know very little about the impact of judicial decisions; impact is, generally speaking, *terra incognita* in constitutional scholarship.[50] Even an impressionistic glance, however, quickly reveals that the pattern of compliance is uneven. Consider for example, *Brown*[51] and *Reynolds*,[52] the cases about which Berger is most concerned: the latter has been followed to a large extent, but a quarter-century after *Brown* the struggle still continues over the civil rights of the black community.[53] There is an eroding commitment to decent treatment under the Constitution for blacks, as well as for other disadvantaged elements of our society.[54] The point need not be belabored: the Supreme Court is not the only constitutional interpreter and, when it does interpret, its view, although the last word, is not necessarily final. Furthermore, the

sponding impact on our governmental functions, see Wilson, *The Rise of the Bureaucratic State*, 41 PUB. INTEREST 77 (1975).

50. *See* T. BECKER, THE IMPACT OF SUPREME COURT DECISIONS: EMPIRICAL STUDIES (1969); L. BOUDIN, GOVERNMENT BY JUDICIARY (1932); WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT (1970); Miller, *On the Need for "Impact Analysis" of Supreme Court Decisions*, 53 GEO. L.J. 365 (1965), *reprinted in* A. MILLER, THE SUPREME COURT: MYTH AND REALITY at ch. 7 (1968) [hereinafter cited as MILLER, THE SUPREME COURT]; Miller & Scheflin, *The Power of the Supreme Court in the Age of the Positive State: A Preliminary Excursus*, 1967 DUKE L.J. 273, 522, *reprinted in* MILLER, THE SUPREME COURT, *supra* at ch. 6.

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

52. Reynolds v. Sims, 377 U.S. 533 (1964).

53. Compliance with *Brown* has been partial at best. In the 1964-65 school year, statistics revealed that only 2.14% of black students in the eleven "southern states" attended schools in which they were not the racial majority. In September 1968, the figure was reported at 20.3%. By the 1972-73 school year, it was 46.3%. STATISTICAL ABSTRACT OF THE UNITED STATES 124 (1974). The comparative figure for 1972-73 in the six "border states and the District of Columbia" was 31.8%; in the 32 "northern and western states" it was 28.3%. *Id.*

54. To illustrate, one need only mention the half-hearted implementation of *Brown's* desegregation mandate in areas outside education by some of the southern federal judiciary. *See* Vines, *Federal District Judges and Race Relations in the South*, 26 J. OF POL. 337-57 (May 1964), *reprinted in* T. BECKER, THE IMPACT OF SUPREME COURT DECISIONS 76-87 (1969). Vines analyzes all race relation cases decided in the federal district courts of the eleven southern states from May 1954 to October 1962. He finds a pattern of compliance with *Brown* that varies according to such factors as the political background of judges and the black population of the district. *See also* McKay, *"With all Deliberate Speed": A Study of School Desegregation*, 31 N.Y.U.L. REV. 991-1090 (1956); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 676-77 and cases cited at 677 nn. 64-66 (1960), *reprinted in* MILLER, THE SUPREME COURT, *supra* note 50, at ch. 3.

very legitimacy of the character of some of the Court's recent decision-making is far from settled.

In such decisions as *Cooper v. Aaron*,[55] *Roe v. Wade*,[56] *Miranda v. Arizona*,[57] and *Green v. County School Board*,[58] the Justices stated not a specific norm aimed only at the parties before the bench (or the class they represented), but a "general norm" purporting to bind all people. The difference is between "the law of the case" and "the law of the land;" this difficult jurisprudential question, not mentioned by Berger, is one of the unsolved problems of constitutional adjudication. If one agrees with Berger that *Marbury v. Madison*[59] was correctly decided, that only means that the Court decided the merits of the case for Mr. Marbury.[60] The Court in *Cooper*, however, maintained that *Marbury* established "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."[61] The Court thus asserted that it was *the* final arbiter of the meaning of the Constitution, and further, that its decisions in the *Brown* cases were "the law of the land"[62]—something quite different than the "law of the case." The *Roe*

55. 358 U.S. 1 (1958), wherein the Court reinstated the desegregation plan for Little Rock, Arkansas approved by the district court in Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1956). The Arkansas legislation had sought and won a stay in enforcement of the plan, 163 F. Supp. 13 (E.D. Ark. 1958), believing that *Brown* was unconstitutional. The Court in *Cooper* took the opportunity to emphasize "basic constitutional principles," reiterating *Marbury*'s declaration that " 'it is emphatically the province and duty of the judicial department to say what the law is.' " 358 U.S. at 18. Furthermore, the Court observed that the fiat of a state governor, not the Constitution, would be the supreme law of the land if state legislators and executives were free to ignore the interpretations of the Constitution rendered by federal courts. *Id.* at 17-20.

56. 410 U.S. 113 (1973), wherein the Court held that under the equal protection clause of the Fourteenth Amendment, state legislatures may not impose unduly burdensome restrictions on a woman's decision to obtain an abortion during the first trimester of her pregnancy, although abortion may be prohibited during the last trimester.

57. 384 U.S. 436 (1966). The Court in *Miranda* held that the Fifth Amendment privilege against self-incrimination dictates exclusion of any confession or statements obtained from a suspect in police custody if the suspect has not been informed of his right to remain silent and that he is entitled to counsel.

58. 391 U.S. 430 (1968). The Court held a school desegregation plan which utilized a "freedom of choice" option that resulted, after three years, in no white child choosing to go to the school attended by 85% of the black students inconsistent with Brown v. Board of Educ. (II), 349 U.S. 294 (1955), and directed the Board to formulate a new plan.

59. 5 U.S. (1 Cranch) 137 (1803).

60. R. BERGER, CONGRESS V. THE SUPREME COURT (1969).

61. 358 U.S. at 18. I have found no previous case in which the Justices made such a sweeping claim. "It follows," the Court continued, "that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' " *Id.*

62. *See id.* at 17-20. All state activity, the Court noted, "must be exercised consistently

and *Miranda* decisions also have all the appearances of legislation. At the very least, they are "backdoor advisory opinions"[63] designed to settle not only "the law of the case" but untold other cases from the entire nation. Save for a few exceptions, constitutional scholars have not tackled the problem of the legitimacy of the Court's articulating general norms.[64] Had Berger done so, his book would have been a more valuable addition to the literature.

II. Criteria for Constitutional Interpretation

Never resolved, either in the fundamental law or American history, is the conflict between popular sovereignty and a written constitution. They are twin ideals, and it is the tension between them that has led to the importance of judicial review.[65] Also left unanswered is the question of the guidelines that should be followed in Supreme Court lawmaking. Put another way, what values should the Justices seek to further? Here, 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 and have never felt bound to any one technique.[66]

The "ought" is something different—far more complex and far more difficult. Constitutional adjudication requires a teleology as well as adherence to proper procedure. Berger, however, hews steadily to the line that the original understanding or intentions of the framers are the sole proper criterion of judgment. This historical literalism fails to

with federal constitutional requirements as they apply to state action . . . . The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law. . . . The principles announced in that decision [*Brown*] and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us." *Id.* at 19-20.

63. My colleague Jerome Barron and I so characterized them in Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975), *reprinted in* MILLER, THE SUPREME COURT, *supra* note 50, at ch. 8.

64. For one example of a scholar's attempt to address this question, see P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970): "In Cooper v. Aaron, the Court seemed to assume the same scope for its decision as the statute could claim." *Id.* at 185.

65. *See* R. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960).

66. It is instructive to compare the technique of Chief Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), with that utilized in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). In the former, he treated the Constitution as any ordinary written legal instrument; sixteen years later in *McCulloch*, he maintained that the justices should never forget that they were expounding a Constitution. Marshall was typical, not unique, in varying his technique to suit the case at bar.

offer any positive framework for determining what overriding values there are or should be. But history is at best an uncertain muse, as Professors Kammen and Kelly have shown.[67] The words of Thomas Jefferson are instructive in this regard:

> Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew this age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead.[68]

Both Justice Holmes and Chief Justice Hughes repudiated Berger's view that the framers' intention is the sole proper criterion.[69] The ques-

67. M. KAMMEN, PEOPLE OF PARADOX (1972); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

68. Words of Thomas Jefferson, *quoted in* W. DOUGLAS, STARE DECISIS 31 (1949). That passage from Jefferson should be pondered well by those who take an antiquarian view of constitutional interpretation. Professor Kammen makes much the same point: "There is an awkward anomaly in American thought. Although the founders were themselves engaged in a continuous quest for modes of legitimacy appropriate to their times and needs, subsequent Americans have sought to validate their own aspirations by invoking the innovations and standards of our hallowed pantheon as unchanging verities. This nostalgic vision of the Golden Age actually conjures up an era when values were unclearly defined, when instability often seemed beyond control, when public rancor and private vituperation were rampant, and institutions frail and unformed." M. KAMMEN, PEOPLE OF PARADOX 56 (1973 paperback ed.).

69. *See* Justice Holmes' comments in Missouri v. Holland, 252 U.S. 416 (1920), and Chief Justice Hughes' remarks in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). *Holland* upheld the Migratory Bird Treaty Act as a valid exercise of federal power which was not unconstitutional as an interference with the rights reserved to the states under the Tenth Amendment. Justice Holmes stated: "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." 252 U.S. at 433.

Blaisdell upheld the Minnesota Mortgage Moratorium Law of 1933 against the claim that the law interfered with freedom of contract. Chief Justice Hughes held: "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation." 290 U.S. at 442-43.

Compare the views of Holmes and Hughes with Justice Sutherland's dissent in *Blaisdell*, which anticipated Berger's position on constitutional interpretation: "The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls within their meaning. But, their *meaning* is changeless; it is only their *application* which is extensible." 290 U.S. at 451 (Sutherland, J., dissenting) (emphasis in original). Justice Sutherland contin-

tion remains as to what standards should be used. What are the values to be furthered through constitutional adjudication? The following discussion is, of necessity, brief, more conclusory than comprehensive.

The pretense for many decades was that judges merely found, they did not make the law, a view derided by Morris R. Cohen as the "phonograph" theory of justice.[70] Perhaps the classic statement came from Chief Justice Marshall:

> Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.[71]

That is a nice sentiment, were it true, but it is not. Judges make law, they always have and always will; any case that reaches the stature of a ruling on the merits involves the "principle of doctrinal polarity."[72] In our adversary system where attorneys represent the opposing viewpoints of private parties to a controversy, at least two principles of equal, or approximately equal, persuasion can be and are produced by counsel; it is the choice between those principles that makes adjudication a creative act. That choice is not made, today or yesterday, by searching in a heaven of legal concepts for the one true principle. Nor is it usually made by determining the intention of the framers; fidelity to the Constitution does not require that cases be decided "in accordance with the specific intentions of the framers"[73]—even when those intentions are ascertainable, which usually they are not. Strict adherence to such a theory can lead the Court and the nation into unwisely rigid postures, as the *Dred Scott* decision demonstrates.[74]

---

ued: "The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent of its framers and the people who adopted it." *Id.* at 453.

70. M. COHEN, LAW AND THE SOCIAL ORDER 380-81 n.86 (1933) (collection of essays).

71. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824). For a brief comment on that statement, see B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 169-70 (1921).

72. For a brief discussion of this concept, see MILLER, THE SUPREME COURT, *supra* note 50, at 115-17.

73. Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1054 (1977).

74. 60 U.S. (19 How.) 393 (1857). By strictly following the intentions of the Framers in *Dred Scott*, Chief Justice Taney inflicted what probably is the most grievous wound the Court has ever suffered. It took a sanguinary war and the Fourteenth Amendment (as now interpreted) to overcome the Court's blunder.

Perceptive observers since at least the time of Thomas Jefferson have known that the Constitution, as Jefferson testily put it, is "merely a thing of wax," which the Court "may twist and shape into any form they please."[75] Judge Learned Hand called the words of the litigable parts of the Constitution "empty vessels into which [a judge] can pour nearly anything he will."[76] And Chief Justice Warren, in a candid valedictory, stated: "We, of course, venerate the past, but our focus is on the problems of the day and the future as far as we can foresee it."[77] The Court, he said, had the awesome responsibility of often speaking the last word "in great governmental affairs."[78] He went on: "It is a responsibility that is made more difficult in this Court because we have no constituency. We serve no majority. We serve no minority. We serve only the public interest as we see it, guided only by the Constitution and our own consciences . . . ."[79]

Jefferson, Hand and Warren were surely correct. But that does not tell us, and additionally does not tell judges, how they are to search their "own consciences" and pour content into the "empty vessels" of the Constitution. A beginning may be made in a greater understanding by restating what should be obvious but is not—that the Supreme Court is not to be equated with any ordinary court of law. The issues that come before it in constitutional cases depend upon the determination of many types of facts, their consequences and the values Americans place on those consequences. They are questions of economics and politics and of social policy. Legal training cannot solve them unless law includes all social knowledge. It is, at the very least, "a very special kind of court."[80] Justice Cardozo admitted that his long experience on the New York Court of Appeals did little to prepare him for his duties on the Supreme Court;[81] and Justice Frankfurter maintained that Car-

75. 15 THE WRITINGS OF THOMAS JEFFERSON 278 (A. Libscomb & A. Burgh eds. 1904-07), *quoted in* L. LEVY, AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE 31, 447 n.88 (1974) [hereinafter cited as LEVY].

76. Quotation from Learned Hand, *quoted in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 81 (I. Dilliard, ed. 1953) [hereinafter cited as SPIRIT OF LIBERTY].

77. Retirement Address by Chief Justice Warren, Supreme Court of the United States (June 23, 1969), *reprinted in* 395 U.S. X-XII.

78. *Id.* at XI.

79. *Id.* at XI.

80. Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 785 (1957).

81. "It [The New York Court of Appeals] is a great common law court; its problems are lawyers' problems. But the Supreme Court is occupied chiefly with statutory construction . . . and with politics." Statement by Justice Cardozo, *quoted in* R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 54 (1955).

dozo's classic study, *The Nature of the Judicial Process*, did not help him (Frankfurter) in making decisions.[82]

Constitutional decisions, furthermore, do not follow logically from the constitutional text. Only by a transparent fiction can, for example, answers to problems of separation of powers be deduced from the silences of articles I, II and III. This is also the case with problems of federalism; in the words of Morris R. Cohen: "In a changing society the relations between the states and the nation are essentially political, i.e., determined on the grounds of social policy, and . . .only by an intellectually indefensible fiction can they be deduced from a written document such as our Federal Constitution."[83] The proper discharge of the judicial function depends not on conceptualized formulae or a bootless search for the intentions of the Framers, but on the "correct appreciation of social conditions and a true appraisal of the actual effects of conduct."[84]

The Constitution is therefore an appeal to the decency and wisdom of those with whom the responsibility for its enforcement rests.[85] Constitutional law is, generally speaking, the statement of the nation's deepest feelings writ large and publicly. There should be small wonder, then, that at times the Justices stumble. The adversary system, a heritage from feudal days before public law became dominant, is simply not up to the task of providing judges with the data relevant to decision—with the social conditions, with the actual effects of conduct and with insight into what is decent and wise.[86] Nothing—or very little—in legal education or the practice of law prepares a judge for the task of constitutional interpretation. As he so often did, Learned Hand stated the needs of a constitutional judge better than anyone else:

> I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare, and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written upon the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he

82. Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 786 (1957).

83. M. COHEN, AMERICAN THOUGHT: A CRITICAL SKETCH 169 (1954).

84. R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 44 (1941).

85. *See* F. COHEN, THE LEGAL CONSCIENCE at 10 n.15 (L. Cohen ed. 1960); A. PEKELIS, LAW AND SOCIAL ACTION 1-41 (M. Konvitz ed. 1950).

86. *See* Miller & Barron, *supra* note 63.

> can pour nearly anything he will. Men do not gather figs of thistles, nor supple institutions from judges whose outlook is limited by parish or class. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.[87]

We should study carefully these profound words of a very wise judge. We should realize that reliance on a formula or a dogma is intellectual death. Our judges should be cautioned not to roam at will, acting like a Muslim kadi under a tree;[88] but of equal importance, they should not be rigidly confined in a strait jacket. Their discretion is in fact limited to that which the public will accept.[89] Judges know this; and they generally act accordingly. They do not always do so, to be sure, as *Dred Scott*[90] and the *Pollock*[91] cases reveal, but they usually follow this pattern. Even Judge Frank Johnson's extraordinary mental hospital[92] and prison cases[93] have not been overruled, either by appellate courts or in

87. SPIRIT OF LIBERTY, *supra* note 76, at 81.

88. Berger states that "intellectual honesty" demands that the "original understanding" be honored across the board—and that less would be "to reduce 'law' to the will of a kadi." GOVERNMENT BY JUDICIARY at 411.

89. *See* MILLER, THE SUPREME COURT, *supra* note 50, at ch. 1.

90. 60 U.S. (19 How.) 393 (1857), *discussed at* note 74 *supra*.

91. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), held invalid a national income tax applied to income from state bonds. The Sixteenth Amendment was added in 1913 to constitutionalize the income tax. Just as *Dred Scott* was reversed by means of the Civil War Amendments, so too was *Pollock* relegated to history by the Sixteenth Amendment.

92. Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972); *aff'd sub. nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). *Wyatt* held that an Alabama state facility designed to habilitate the mentally retarded was being operated in an unconstitutional fashion because plaintiff was denied treatment. 344 F. Supp. at 395. The court held that under the Constitution, minimum standards for care and training were mandated, the lack of operating funds for which constituted no justification for the failure to provide such services. *Id.* at 392. The opinion virtually ordered the Alabama state legislature to appropriate funds; in app. A, the court sets forth detailed "Minimum Constitutional Standards for Adequate Treatment of the Mentally Retarded." *Id.* at 395-407.

93. Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part, rev'd in part, and remanded sub. nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977). In *Pugh*, class actions filed by inmates of Alabama penal institutions sought declaratory and injunctive relief, alleging deprivation of their Eighth and Fourteenth Amendment rights. The court held that conditions of confinement in Alabama penal institutions constituted cruel and unusual punishment where they bore no reasonable relationship to legitimate penal goals. *Id.* at 328. An order was issued to enjoin the state of Alabama from maintaining a prison system that was not in compliance with constitutional requirements. The order was quite detailed, including minimum constitutional standards for inmates, and the appointment of a Human Rights Committee with supervisory powers. *Id.* at 331. Most aspects of the judgment were upheld by the 5th Circuit. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977).

the court of public opinion. He had his radar finely tuned to what the public would accept.

All judges, so we are told by Judge Braxton Craven of the Court of Appeals for the Fourth Circuit, are "result oriented."[94] So is the public: it cares for results and gives little, usually no, attention to the reasons that judges state in their opinions.[95] Only the professoriate, some of their students and a few members of the bar care to analyze the reasoning of the Justices in constitutional cases. We may not be pleased with the extent to which the rationale of the Court escapes close examination, but it is a fact. "The public cares about results," says Professor Leonard Levy, "and has little patience for reasons."[96] Levy and others do not like that,[97] but there is little or nothing that they can do about it. There is no more reason to strive for an *elegantia juris* in Supreme Court decision-making than there is to expect or strive for cool rationality in congressional decision-making. The governmental process simply does not work that way; quite possibly, no decision-making does. It remains a harsh truth that after nearly two centuries of constitutional adjudication, pathetically little is known about how the Justices reach their decisions.[98]

One reason for our ignorance is the secrecy that envelops the Court and its operations, a secrecy well-nigh impenetrable. We are told that absolute secrecy is necessary for the effective functioning of the Court. Whether that is so is, at the very least, open to question.[99] But it is not likely to change. We are not likely to learn more than the Justices choose to tell us in their opinions and, after their deaths, in their collected papers. Neither is enough. We are left with a tribunal which speaks with the authority as well as the opacity of the Delphic Oracle.

If we ask, however, as we should, what results should be furthered by the adjudicative process, we arrive at the core of the present inquiry. A preliminary observation is in order: few would wish the Supreme

94. Craven, *Paean to Pragmatism*, 50 N. C. L. REV. 977, 977 (1972). The history of American constitutional adjudication can and should be written around the theme of the Supreme court being result-oriented. *See* Miller, *Judicial Activism and American Constitutionalism: Some Notes and Reflections*, NOMOS XX: *Constitutionalism* 333 (J. Pennock & J. Chapman eds. 1979).

95. *See* Miller & Scheflin, *supra* note 50, at 524.

96. LEVY, *supra* note 75, at xiv.

97. *See id.* at xiii-xiv. *See also* Griswold, *Of Time and Attitudes: Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960).

98. *See* F. FRANKFURTER, OF LAW AND MEN 32 (P. Elman ed. 1956); Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 UTAH L. REV. 157 (1960).

99. *See* Miller & Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 BUFFALO L. REV. 799 (1973).

Court to reach "a just result merely because of its identification with underdog litigants like radicals, aliens, Negroes, the poor, and criminal defendants who have been victimized by suppression."[100] Similarly, most thoughtful people would eschew results reached because the Justices are obviously biased toward the interests of some more powerful groups in American society—for example, the corporations, the unions or the press. However, it should be remembered by those who would criticize the Warren Court for its "result orientation" (favoring the disadvantaged) that the Burger Court is also result oriented (toward the protection of property),[101] in some respects reflecting a posture not dissimilar to the Court of the 1886-1936 era. These critics should also remember that Justice Miller once remarked:

> It is vain to contend with judges who have been at the bar as advocates for forty years of railroad companies, and all the forms of associated capital, when they are called upon to decide cases where such interests are in contest. All their training, all their feelings are from the start in favor of those who need no such influence.[102]

We should also keep in mind that judges are human and subject accordingly to the shortcomings of human nature. Their decisions are reflections of their personal philosophies, as President Theodore Roosevelt once said.[103] Lawyers, of course, know this, for they often go "judge-shopping," as Justice Douglas observed in the *Chandler* case.[104] Finally, judges, are invariably taken from the Establishment, and they perceive their function as buttressing the stability of the system of government in which they operate and as protecting that system from all except minor and relatively insignificant efforts to change it.[105] The Justices are not a group of impervious legal technicians above and beyond the political struggle. They participate in that struggle, although the pretense is otherwise, and, indeed, as Richard Kluger demonstrated in his classic study of *Brown v. Board of Education*, at

100. LEVY, *supra* note 75, at xiii.

101. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). *Tornillo*, a First Amendment decision, also involved the right to control private property.

102. Statement of Justice Miller, *quoted in* C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 374 (1939).

103. *See* M. COHEN, AMERICAN THOUGHT: A CRITICAL SKETCH 163 (1954).

104. Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting).

105. *See* J. GRIFFITH, THE POLITICS OF THE JUDICIARY (1977); Miller, *The Politics of the American Judiciary*, 49 POL. Q. 200 (1978).

times are the object of pressure group tactics.[106]

Raoul Berger is not alone in expressing a critical view of the Supreme Court's decisionmaking; his contribution must now be put into perspective. Perhaps it was the dawning realization that judges indeed are human and that the Blackstone theory of the judicial process is not accurate, which contributed to efforts either to constrain the Supreme Court or to have the Justices achieve a higher intellectual standard in their opinions. Whatever the reasons, and no doubt they are multiple, the Court in recent decades has been attacked, subtly and not so subtly, by commentators of various persuasions.

No clear beginning can be found for such attacks, although they surely go back at least as far as Thomas Jefferson.[107] However, another book entitled *Government by Judiciary*, [108] a two-volume work written by Louis Boudin, is a useful starting point. That study was a frontal assault on the Court's economic policy decisions, such as *Lochner v. New York*[109] and other substantive due process decisions. The Court operated as an "authoritative faculty of political economy"[110] for the period of roughly 1886 to 1936—not always, to be sure, for there were some aberrations—but enough so that monetary policy, for example, could be resolved by a lawsuit between private parties that involved the sum of $15.60.[111] The abrupt shift in the composition of the Court in 1937 and succeeding years meant that the court had to find a new role, which it did in civil rights and civil liberties cases. Economic substantive due process gave way to innovative applications of the equal protection clause. The technique remained the same, although the appellation and the ends served altered drastically. No longer a faculty of political economy, the Justices on the post-1937 Court set themselves up as an authoritative faculty of social ethics.

Opposition to this trend soon emerged, beginning in the late 1940s and peaking in the 1950s with two Holmes Lectures at Harvard Uni-

106. R. KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

107. *See* note 75 and accompanying text *supra*.

108. L. BOUDIN, GOVERNMENT BY JUDICIARY (1932).

109. 198 U.S. 45 (1905). *Lochner* invalidated a New York statute forbidding employment in a bakery for more than 60 hours a week or 10 hours a day on basis that it impermissibly interfered with the right to contract between employer and employee and also denied liberty under the due process clause of the Fourteenth Amendment.

110. J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 7 (1924).

111. Norman v. B. & O. R.R., 294 U.S. 240 (1935). *See* R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941) for an account of how astonished some Europeans were that national monetary policy could be settled in a lawsuit between private litigants decided by lawyer-judges. Those days are gone forever.

versity: Learned Hand's *The Bill of Rights*[112] and Herbert Wechsler's *Toward Neutral Principles of Constitutional Law.*[113] Hand's main thrust was judicial abnegation; he preferred that the Court defer, save in exceptional and clear cases, to the political branches of government. Perhaps appalled by the idea that the Constitution, as Jefferson said, is "a thing of wax,"[114] Hand hewed stoutly to the notion that Holmes and Frankfurter espoused—judicial self-restraint.

Professor Wechsler's position, which in some respects was a reply to and refutation of Hand, is somewhat different. He sought constitutional values in well-written opinions, in what essentially is a procedural viewpoint. He, and others such as Professor Henry Hart[115] and Dean Erwin Griswold,[116] admonished the Justices to make decisions in accordance with "neutral" or "impersonal" principles or "the law as it has been received and understood."[117] To them, as to Aristotle, law is Reason unaffected by desire. The word "reason" is capitalized because to them it is the *ne plus ultra* of constitutional adjudication.[118] To the extent that the Wechsler position is a procedural concept, it offers little help to judges who must often choose between conflicting constitutional values. Put another way, the deliberation is about means and presupposes that the problem of ends has been settled. But that problem—of ends, of goals, of purposes—is precisely what is not settled in constitutional adjudication. Professor Wechsler's clarion call is not sufficient to meet that need.

What, then, is required? In highest level abstraction, the need is for a teleological jurisprudence, one goal-seeking and purposive in nature. Judicial thought should ultimately be in terms of consequences, of results and of alternative decisions. This is not a bald-faced plea for results in accordance with who the litigants are. The task of the Court is to further the democratic ideal. Emphatically, it is *not* to search for

112. L. HAND, THE BILL OF RIGHTS (1958).

113. 73 HARV. L. REV. 1 (1959).

114. *See* note 75 and accompanying text *supra*.

115. Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

116. Griswold, *Of Time and Attitudes: Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960).

117. Wechsler, *supra* note 113 at 15.

118. It is appropriate to note that none of these observers, nor any who adhere to their views, have ever analyzed the concept of Reason as used in adjudication. The fact is that choices among competing values are unavoidable; judicial non-neutrality is pervasive in Supreme Court opinions. Constitutional adjudication since 1789 has been purposive in nature, beginning with the groundwork laid by Chief Justice John Marshall. *See* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 671 (1960), *reprinted in* MILLER, THE SUPREME COURT, *supra* note 50, at ch. 3.

intentions, save only as those intentions are relevant to that mission; we cannot ignore the past, of course, but it need not imprison us. In this era of the most rapid social change in the history of mankind, moreover, neither the present nor the future are mere extensions of the past.[119] Public policy in general, and that enunciated by the Supreme Court in particular, must be forward looking.

Something more than the pragmatic temper regnant is the requirement. Judicial pragmatism is exemplified most obviously in the "balancing" approach so often employed in modern Supreme Court opinions.[120] It was, to be sure, a major breakthrough from the arid and sterile conceptualism previously used. But it is not enough: the trouble with pragmatism is that it fails its own test—it does not work. "Muddling through" may be observed throughout the governmental process.[121] This has sufficed in our system largely for reasons external to law or to the Constitution; pragmatism was satisfactory for a nation in the conditions of an empty continent, protected by two oceans and the British navy, and free from many of the problems that beset other nations. With the Great Depression, the Second World War and the Cold War, that situation has fundamentally changed. We must know what we want and then try to get it. That includes knowing what we want from the judges.

The "something more" that is needed has thus far received little attention from constitutional scholars. Legal writing tends, in constitutional and other matters, to be detailed analyses of judicial opinions, with the writer often asserting that the judge was right but for the wrong reasons, or vice versa.[122] That is a narrow focus on the *procedure* of adjudication. No attention is paid to the *substance*, although not entirely, to be sure; for example, Professor Wechsler approves the result in *Brown* but cannot locate the neutral principle.[123] Berger also approves the result in *Brown*, but faults the Court for ignoring the inten-

119. For a recent discussion of this point, see H. BROWN, THE HUMAN FUTURE REVISITED (1978).

120. Note for example the balancing concept in First Amendment and commerce clause cases. *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976) (discharge of non-civil service employee Republicans by newly elected Democrat sheriff violates First and Fourteenth Amendments); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (Arizona's interest in quality control insufficient to require California dealer to build special packing plant in Arizona for Arizona-grown cantaloupes).

121. *See* C. LINDBLOM, THE POLICY-MAKING PROCESS (1968).

122. See the articles in any issue of SUP. CT. REV., or almost any law journal article discussing a Supreme Court opinion.

123. Wechsler, *supra* note 113, at 31-35.

tions of the thirty-ninth Congress.[124]

A few writers have tried to go beyond analyses of the reasoning of opinions for internal consistencies or for adherence to such standards as Wechsler and Berger proffer. These commentators admit, tacitly or explicitly, the importance of reasoning, but maintain that the judicial eye should be on the consequences of the Court's action. Representative examples of this genre include: a modernized theory of distributive justice essayed by philosopher John Rawls;[125] Alexander Pekelis' call for a "jurisprudence of welfare;"[126] Myres McDougal's appeal for a "law of human dignity;"[127] and Felix Cohen's view that "the Good" should be furthered.[128] These contributions illustrate the existence of a very respectable body of scholarly thought of significance to analysis of constitutional adjudication. Any book-length discussion of *Government by Judiciary* is faulty to the extent these works and the issues they raise are ignored. Berger does not mention them.

The overwhelming requirement is to search for and identify the values that should be sought in constitutional adjudication, values that go beyond mere procedure, as important as that is, and involve analysis of the goals or purposes of the American constitutional order. That such a search has been eschewed by most writers is not surprising. It takes a different type of mind from that usually evident in the legal profession. It takes the broad-gauged approach and knowledge outlined by Judge Hand.[129] Few have it, but we all need it. And it is the task of legal educators, if not the bar as a whole, to move in that direction. It has been stated that:

> No one—not even the most brilliant scientist alive today—really knows where science is taking us. We are aboard a train which is gathering speed, racing down a track on which there are an unknown number of switches leading to unknown destinations. No single scientist is in the engine cab and there may be demons at the switch. Most of society is in the caboose looking backward.[130]

The time has come for lawyers to get out of the caboose and try to do some steering.

---

124. GOVERNMENT BY JUDICIARY, at 117-33 (ch. 7).

125. J. RAWLS, A THEORY OF JUSTICE (1971). Rawls' book, written by a philosopher, not a lawyer, is perhaps the best. Professor Ronald Dworkin in *Taking Rights Seriously* (1977) agrees with Rawls' standpoint. *Cf.* R. NOZICK, ANARCHY, STATE AND UTOPIA (1974).

126. *See* PEKELIS, LAW AND SOCIAL ACTION 1-41 (M. Konvitz ed. 1950).

127. McDougal, *Perspectives for an International Law of Human Dignity*, 1959 AM. SOC'Y INT'L L. PROC. 107 (1959).

128. F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS (1933).

129. *See* text accompanying note 87 *supra*.

130. R. LAPP, THE NEW PRIESTHOOD: THE SCIENTIFIC ELITE AND THE USES OF POWER (1965). *See also* D. PRICE, THE SCIENTIFIC ESTATE (1965).

If they do so, then one of the first tasks to be undertaken is a thorough analysis and evaluation of the adversary system as a means of setting public policy. It is faulty 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.[131] The principal problem is that the system itself is inadequate to the need.

Conclusion

The Constitution is a politico-legal palimpsest. That it will remain so is not to be doubted (barring, of course, catastrophe such as nuclear war; in which case arguments over constitutionalism would be totally irrelevant).[132] The gloss of nearly two centuries of constitutional development will not—and cannot—be erased. We cannot return to the status quo ante. Trying to read the minds of men long dead is not the way to interpret the Constitution, for it is a document always in a state of becoming. It must suit the aspirations of each generation of Americans. If it does not do so, it will be discarded. Only through growth without amendment has it—the original text—endured as the fundamental law.

That does not mean that each interpretation, by the judiciary or others, need be or will be accepted by the American people. The Justices know that; they are fully aware of the fact that they are a political institution which cannot proceed too far ahead of the main currents of American thought. The overall pattern of constitutional law reflects both what the nation needs and what it will abide by.

The needs of scholarship are manifest and in large part unfulfilled. The adversary system does require systematic and comprehensive reexamination and evaluation. Substantive goals that fit a rapidly changing society must be developed—and applied. To the extent that Raoul Berger forces lawyers and others to reexamine their premises and basic beliefs, his book serves a worthy purpose. The pity is that his "solution" is no solution at all. One does not have to be clairvoyant to predict that *Government by Judiciary* will convince only those already convinced, and that it will have little or no effect upon the course of constitutional interpretation.[133] His call for "hard-nosed legal interpretation" does

131. *See* text accompanying note 86 *supra*. For further discussion, see Miller & Barron, *supra* note 63.

132. "The possibility of all-out thermonuclear war is the most serious danger confronting industrial civilization today." H. BROWN, THE HUMAN FUTURE REVISITED 180 (1978).

133. It is likely that the late Professor Alexander Bickel will continue to have a demonstrable influence on those who write about the Constitution, at least to the extent that his writings are cited by commentators and judges. *See, e.g.*, A. BICKEL, THE MORALITY OF CONSENT (1975). Not that I always agree with him; I often do not. The point is that his

not fit the facts of constitutional development—neither in the past, nor in the present and surely not in the future.

criticism of the Warren Court in, for example, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970), is faulty as is the criticism of Professor Wechsler; it is, in the final analysis, a demand for "right" or "correct" procedure and adherence to the "passive virtues," at a time when it is substance as much as procedure that is required. *See* Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971), in which Judge Wright remarks that Bickel "aspires to a neutral, scientific viewpoint; he seeks to demonstrate that the clash between himself and the Warren Court is not one of conflicting value choices, but of fundamental method . . . . [The] fundamental dispute [is] over the good society as well as over judicial method." *Id.* at 803. It appears that Judge Wright is correct. His essay, along with others such as Levinson, *supra* note 11, is an accurate and insightful perception of the realities of constitutional adjudication.