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THE ROLE OF THE SUPREME COURT\*

*Raoul Berger\*\**

At the height of Franklin Roosevelt's 1937 Court-Packing campaign, Professor Felix Frankfurter wrote to him:

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. And I verily believe that is what the country needs most to understand.<sup>1</sup>

Forty years have passed and that lesson has yet to be learned. Professor Philip Kurland has written that the "most immediate constitutional problem of our present time is the usurpation by the judiciary of general governmental powers on the pretext that its authority derives from the Fourteenth Amendment."<sup>2</sup> Under that guise the Court requires busing, governs abortion, renders State control of pornography all but impossible, curbs death penalties and supervises State administration of criminal law. My documentation of this situation in "Government by Judiciary: The Transformation of the Fourteenth Amendment" has provoked some splenetic criticism.<sup>3</sup> The outrage of academe is not surprising because the Warren Court's reapportionment and desegregation decisions, as Professor

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1. ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945 383 (M. Freedman ed. 1967).

2. Letter from Philip Kurland to Harvard University Press (August 15, 1977).

3. *E.g.*, Brest, Book Review, N.Y. Times, Dec. 11, 1977 (Book Rev. Section) 10; Miller, Book Review, Washington Post, Nov. 13, 1977, p.E-5; Murphy, Book Review, 87 YALE L.J. 1752 (1978). For my replies, see Berger, *Academy v. The Founding Fathers*, NATIONAL REVIEW, April 14, 1978 at 468; Berger, *The Scope of Judicial Review and Walter Murphy*, 1979 WIS. L. REV. 341.

Richard Kay wrote, "have now become second nature to a generation of lawyers and scholars," so that "the casting of a fundamental doubt on such basic assumptions . . . produces shock, dismay, and sometimes anger."<sup>4</sup> But it needs to be remembered, as one activist critic observed, that these doctrines really represent a "New Faith."<sup>5</sup>

Professor Stanley Kutler notes that as late as 1940 academicians criticized the "abusive power of the federal judiciary" for "frustrating desirable social policies," for arrogating "a policymaking function unwarranted by the Constitution," thereby "negating the basic principles of representative government."<sup>6</sup> Afterwards, he continues, "most of the judiciary's longtime critics suddenly found a new faith"; now an "activist judiciary" promoted "preferred freedoms" that matched the "new libertarianism."<sup>7</sup> But, as Professor Archibald Cox wrote,

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.<sup>8</sup>

More bluntly, an intellectual elite, because it knows what is best for the people, maintains that the Court must be free to impose its will on the nation. The values of this elite are mine; I have no love for segregation; nor would I defend apportionment that heavily weights the vote of a rural voter against a city dweller. But as long ago as 1942 I refused to make my predilections the test of constitutionality.<sup>9</sup> Because I consider a given result desirable does not make it constitutional, as both the Framers and Chief Justice Marshall long since emphasized. The test of constitutionality is not whose ox is gored.

We are dealing with a question of power: who is to govern in our democracy, who is to make policy choices for the nation—a

4. Kay, Book Review, 10 CONN. L. REV. 801 (1978); and see Kommers, Book Review, THE REVIEW OF POLITICS 409 (1978).

5. Kutler, *Raoul Berger's Fourteenth Amendment: A History or A Historical*, 6 HASTINGS CONST. L.Q. 511, 513 (1979).

6. *Id.*

7. *Id.*

8. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 35 (1976).

9. Berger, *Constructive Contempt: A Post-Mortem*, 9 U. CHI. L. REV. 602 (1962).

group of unelected and virtually unaccountable Justices or the elected representatives of the people, indeed, the people themselves? The Founders adopted a written Constitution because they dreaded usurpations by power-hungry Caesars and sought to limit and diffuse the power they delegated.<sup>10</sup> They believed in a "fixed Constitution" with bounds that no delegate would overleap, and they provided for change in the future by the process of amendment submitted to the people.<sup>11</sup> Little did they dream that the Court would short-circuit the amendment process on the plea, advanced by academe, that it is too cumbersome. Poor deluded women who are still struggling to procure ratification of the Equal Rights Amendment when the Court could so readily redress a felt inequality!

The issue I pose is narrow: if the framers of the fourteenth amendment clearly intended to exclude suffrage from its scope—as the later provision by the fifteenth amendment for non-discriminatory suffrage confirms—whence does the Supreme Court derive power to hold that the fourteenth amendment demands "One person—one vote,"<sup>12</sup> thus manifestly contradicting the framers' exclusion of suffrage from the scope of the amendment? An activist critic of my views, Professor Louis Lusky, stated that Justice Harlan's demonstration, in dissent, to that effect was "irrefutable and unrefuted."<sup>13</sup> Another activist, Professor Nathaniel Nathanson, agrees and adds that Alexander Bickel "conclusively" demonstrated that segregation was likewise excluded, and that "Berger's independent research and analysis confirms and adds weight to those conclusions."<sup>14</sup> Eight or nine other reviewers, including activists, concur. But I would not rest on a count of noses, and take leave to spread a few confirmatory facts before you.

Justice Brennan, himself a perfervid activist, observed that seventeen Northern States had rejected black suffrage in 1865-1868.<sup>15</sup> Understandably, Roscoe Conkling, a member of the Joint

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10. R. BERGER, *CONGRESS v. THE SUPREME COURT* 12-16 (1969).

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

12. R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 4 (1977).

13. Lusky, "Government by Judiciary: What Price Legitimacy?" 6 *HASTINGS CONST. L.Q.* 402, 406 (1979).

14. Nathanson, *Book Review*, 56 *TEX. L. REV.* 579, 580-81 (1978).

15. *Oregon v. Mitchell*, 400 U.S. 112, 255-56 (1970) (dissenting in part).

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 . . . would it not be futile to ask three-quarters of the States to do for themselves and others, by ratifying such an amendment, the very thing most of them have already refused to do in their own cases.<sup>16</sup>

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."<sup>17</sup> The Report of the Joint Committee—such reports are held to be the best evidence of legislative intention—said that "the States would not surrender a power they had exercised, and to which they were attached," and therefore concluded to "leave the whole question with the people of each State."<sup>18</sup> Summing up in 1974, former Solicitor General Robert Bork stated, "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 to the day the Court invented the new formulas."<sup>19</sup>

Consider next the sources of judicial review. It was an innovation,<sup>20</sup> asserted in a few pre-1787 State cases, proceeding for violations of express constitutional provisions, such as trial by jury.<sup>21</sup> None of them represented a take-over of legislative policy, let alone constitutional revision. Even so, a few cases elicited stormy disapproval, leading to removal proceedings,<sup>22</sup> because the Founders were attached to legislative paramountcy. "In Republican Government," Madison stated in *The Federalist*, "the legislative authority necessarily predominates."<sup>23</sup> Understandably Hamilton assured the Rati-

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16. CONG. GLOBE, 39th Cong., 1st. Sess. 358 (1865-1866).

17. *Id.* at 2766.

18. Quoted in R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 84 (1977).

19. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 18 (1971).

20. 1 W. Blackstone, *Commentaries* \*91; *Hurtado v. California*, 110 U.S. 516, 531 (1884).

21. Berger, "Law of the Land" Reconsidered, 74 NW. U.L. REV. 1, 13-17 (1979).

22. R. BERGER, *CONGRESS v. THE SUPREME COURT* 40-42 (1969).

23. THE FEDERALIST No. 51 at 338 (Mod. Lib. ed. 1937).

fiers that of the three branches "the judiciary is next to nothing."<sup>24</sup> No specific provision for judicial review is made in the Constitution. Learned Hand, Archibald Cox and Leonard Levy consider the evidence that the Framers contemplated judicial review is inconclusive.<sup>25</sup> The argument for judicial review has largely been rested on the Framers' intention as disclosed in the legislative history. If that be relied on to establish the power, it cannot be disregarded as to its scope. The current dismissal of resort to the original intention for the meaning the terms employed by the Framers had for them<sup>26</sup> would undermine the legitimacy of judicial review itself. No one would contend, for example, that Congress or the Court can change the constitutional provision for a 2-year term in the House to a 4-year term. Is there better reason to reject the framers' unmistakable intention to exclude suffrage from the fourteenth amendment? Justice Holmes held that judges may not say "we see what you are driving at, but you have not said it."<sup>27</sup>

Judicial participation in legislative policy-making was categorically rejected by the Framers. 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, unwise . . . and yet not so unconstitutional as to justify judges in refusing to give them effect."<sup>28</sup> But Elbridge Gerry objected, "it was quite foreign from the nature of ye office to make them judges of the policy of public measures."<sup>29</sup> Nathaniel Gorham chimed in that judges "are not presumed to possess a peculiar knowledge of the mere policy of public measures";<sup>30</sup> and Rufus King added that judges "ought not to be legislators."<sup>31</sup> So judicial participation in policymaking was rejected. Then too, as Gordon Wood found, the colonists had "a profound fear of judicial . . . discretion,"<sup>32</sup> pungently expressed in 1767 by Chief Justice Hutchinson of Massachusetts: "The Judges should never be legislators. Because then the Will of the Judge would be the law; and this tends

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24. *Id.*, No. 78 at 504n.

25. For citations see BERGER, *supra* note 18, at 355; L. HAND, *THE BILL OF RIGHTS* 15 (1958).

26. See, e.g., Miller, *supra* note 3.

27. *Johnson v. United States*, 162 F. 30, 32 (1st Cir. 1908).

28. 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 73 (1911).

29. 1 *id.* 97, 98.

30. 2 *id.* 73.

31. 1 *id.* 108.

32. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1787-1789* 298 (1969).

to a state of slavery."<sup>33</sup> Montesquieu, the constantly cited oracle in the several constitutional conventions, had written that if the Judge were to be the Legislator, the "life and liberty of the subject would be subject to arbitrary control."<sup>34</sup> Such were the suppositions the Founders brought to fashioning judicial review.

A cluster of remarks by Hamilton, the great apologist for judicial review, that narrow its scope, has been too little noticed. Echoing Montesquieu, he stated, "there is no liberty, if the power of judging be not separated from the legislative and executive powers."<sup>35</sup> Having divorced judging from legislation, he hardly contemplated that legislation could be taken over by the judiciary. Instead he wrote that courts may not "on the pretense of a repugnancy . . . substitute their own pleasure to the constitutional intentions of the legislature."<sup>36</sup> That is, they may not intrude *within* the boundaries of legislative power. For as James Bradley Thayer, Learned Hand, and Justice James Iredell long before them, emphasized, courts are confined to *policing* constitutional boundaries to insure that the departments do not "overleap" their bounds.<sup>37</sup> And Hamilton said that "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."<sup>38</sup> Is it conceivable that he would have held judges are less bound by the unmistakable will of the Framers than by their own precedents? Hamilton also assured the Ratifiers that judges would be impeached for "deliberate usurpations on the authority of the legislature."<sup>39</sup> All this testifies that the Founders were worried about the innovative judicial review; and it explains why it was conceived in narrow terms from which a take-over of legislative and constitutional policymaking was plainly excluded. In the 1866 debates, distrust of the courts, arising from the *Dred Scott* and Fugitive Slave decisions, was repeatedly expressed,<sup>40</sup> and it led to section five, which the Court held in 1879 conferred enforcement of the amend-

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33. Quoted in M. Horowitz, *The Emergence of an Instrumental Conception of American Law 1780-1820*, in *FIVE PERSPECTIVES IN AMERICAN HISTORY* 292 (1971).

34. C. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, bk. 11, ch. 6 at 181 (Philadelphia 1802).

35. *THE FEDERALIST* No. 78 at 504 (Mod. Lib. ed. 1937).

36. *Id.*, No. 78 at 507.

37. For citations to Hand and Thayer, see BERGER, *supra* note 18, at 305 n.26; for Iredell, see *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 266 (1736).

38. *THE FEDERALIST* No. 78 at 510 (Mod. Lib. ed. 1937).

39. *Id.*, No. 81 at 526-27.

40. See BERGER, *supra* note 18, at 222-23.

ment on Congress, not the courts.<sup>41</sup>

Let us now consider a few activist rationalizations of what Professor Lusky describes as "the Court's new and grander conception of its own place in the governmental scheme, its assertion of power to revise the Constitution, bypassing the cumbersome amendment procedure,"<sup>42</sup> what Professor Alfred Kelly complacently termed a "constitutional revolution."<sup>43</sup> Hamilton declared, however, that "an agent cannot new model his own commission."<sup>44</sup> Conventional apologetics for the Court's "new and grander" role largely rests on the so-called "general" words of the fourteenth amendment: "due process of law," "equal protection of the laws," and "privileges or immunities." These allegedly "open-ended" terms are regarded as an "invitation" to the courts to adapt the amendment to present day needs.<sup>45</sup> "Due process," to begin with, is not a "general" term, but one of fixed historical meaning. Summing up 400 years of English and colonial practice, Hamilton said on the eve of the Convention, "The words 'due process' have a precise technical import, and are applicable only to the process and proceedings of the courts . . . they can never be referred to an act of the legislature."<sup>46</sup> When I combed the 1866 debates I found that all references to due process were in procedural terms.<sup>47</sup> The Court has confessed that "substantive economic due process"—a judicial construct of the 1890s to halt the spread of "socialism"—is now discredited.<sup>48</sup> But resort to due process for protection of "liberty" also collides with Hamilton's statement that due process never applies to legislation. Moreover, liberty and property stand on a par in the due process clause, and as Judge Learned Hand observed, "There is no constitutional basis for asserting a larger measure of judicial supervision [over "liberty" than property]."<sup>49</sup>

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41. *Ex Parte Virginia*, 100 U.S. 339, 345 (1879); see also BERGER, *supra* note 18, at 221-229.

42. Lusky, *supra* note 13, at 408.

43. Kelly, CLIO AND THE COURT: AN ILLICIT LOVE AFFAIR, 1965 S. CT. REV. 119, 158 (1965).

44. 6 A. HAMILTON, *Letters of Camillus*, in WORKS OF HAMILTON 166 (Lodge ed. 1904).

45. See Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); and reply *Government by Judiciary*, John Hart Ely's "Invitation," 54 IND. L.J. 277 (1979).

46. 4 THE PAPERS OF ALEXANDER HAMILTON, 35 (H. Syrett and J. Cooke eds. 1962).

47. BERGER, *supra* note 18, at 201-06.

48. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

49. L. HAND, *THE BILL OF RIGHTS* 50-51 (1962).

Until the very recent past "equal protection" was dormant. "The new equal protection," said Professor Kurland, "is the old substantive due process."<sup>50</sup> As Professor Herbert Packer put it, "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,"<sup>51</sup> and with no more constitutional warrant.

How can "equal protection" comprehend the suffrage that was so clearly excluded? Men do not use words to defeat their purposes. That is why Justice Holmes and Judge Learned Hand reiterated the centuries-old doctrine that the "manifest purpose overrides the text."<sup>52</sup> Activists would read into the text an *implied* intent to overrule the framers' *express* intention to exclude suffrage, and this in the teeth of the tenth amendment's reservation to the States of all powers not granted. That reservation, expressing an attachment to States rights, often voiced in the 39th Congress which drafted the amendment,<sup>53</sup> is not to be curtailed by implication. Such an implication, moreover, is rebutted by several facts: (1) The debates show that the amendment and the Civil Rights Act of 1866, enacted at the same session, were deemed to be "identical."<sup>54</sup> The amendment was designed to "constitutionalize" the Act and to prevent its repeal.<sup>55</sup> The Act banned discrimination solely with respect to ownership of property, the right to contract, and access to the courts—rights, the framers repeatedly stressed, that were carefully *enumerated*. Initially that enumeration had been preceded by a phrase prohibiting "discrimination in civil rights and immunities."<sup>56</sup> But John Bingham, draftsman of the several clauses of the amendment, protested that the phrase was "oppressive," that it struck down *all* discriminations and invaded the province of the States.<sup>57</sup> Hence the phrase was deleted to obviate a "latitudinarian" construction going "beyond the specific rights named in the sec-

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50. *Forum: Equal Protection and The Burger Court*, 2 HASTINGS CONST. L.Q. 645, 661 (1975).

51. 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).

52. For Holmes, see *supra* note 27; for Hand, see *Cawley v. United States*, 272 F.2d 443, 445 (2d Cir. 1959).

53. See BERGER, *supra* note 18, at 60-64.

54. *Id.* at 22-23.

55. BERGER, *supra* note 18, at 23.

56. *Id.* at 24.

57. *Id.* at 119-21.

tion.”<sup>58</sup> No activist has explained why Bingham now meant to give “equal protection” the very broad scope he had condemned in the Act. (2) Throughout the debates on the Act the framers interchangeably referred to “equality before the law,” and “equal protection” but always in the circumscribed context of the enumerated rights. So, Samuel Shellabarger told the House that the Bill secures “equality of protection in the enumerated rights.”<sup>59</sup> Again and again the framers were assured that suffrage was left untouched both by the Act and by the amendment. This responded to deep seated, openly avowed Negrophobia and attachment to States rights.<sup>60</sup> How did “equal protection” take on a new, unlimited meaning when it was transplanted to the amendment? The Supreme Court has held that the meaning given to a term in an earlier act will be presumed to be the same in a later act that is *in pari materia*.<sup>61</sup> (3) The framers’ repeated rejection of attempts to prohibit all discriminations shows that “equal protection” was not designed to be all-inclusive.<sup>62</sup> Activists have yet to explain these facts away.

Time will not permit detailed discussion of the “privileges or immunities” clause, reduced to a dead letter by the *Slaughter House Cases*.<sup>63</sup> “Privileges or immunities” were words of art, as an activist, Professor Walter Murphy, concedes I have “amply” demonstrated.<sup>64</sup> The phrase, the debates show, was drawn from Article IV; it had been construed by several courts to be limited to the protection of person and property, as was explained during the debates on the Civil Rights Act.<sup>65</sup> These rights were carefully enumerated in the Act. Justice Field, joined in dissent in the *Slaughter House Cases* by Justice Bradley and two other Justices, said, “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. . . .”<sup>66</sup> In light of this history, it is a perversion to label the terms of the amendment as “general” words of indeterminate meaning, and even more perverse to read them to embrace the suffrage

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58. *Id.* at 122.

59. *Id.* at 169-70.

60. *Id.* at 13, 60-63.

61. *Reiche v. Smythe*, 80 U.S. (13 Wall.) 162, 165 (1871).

62. BERGER, *supra* note 18, at 163-64.

63. 83 U.S. (16 Wall.) 36 (1872).

64. Murphy, Book Review, 87 YALE L.J. 1752, 1758 (1978).

65. BERGER, *supra* note 18, at 20-36.

66. 83 U.S. (16 Wall.) 36, 96 (1872).

that was so plainly excluded. As said by Professor Bork, even if the words are general,

surely that would not permit us to escape the framers' intent if it were clear. If the legislative history revealed a consensus about segregation in the schools and other relations of life, I do not see how the Court could escape the choices revealed and substitute its own.<sup>67</sup>

A tentative justification was attempted by Alexander Bickel's "open-ended" theory, which has become the activists' mainstay. "What," he asked, "if any thought was given to the long range effect of the amendment in the future?" Could resort to "equal protection of the laws," he inquired, "have failed to leave the implication that the new phrase . . . was more receptive to a 'latitudinarian' construction?" "It remains true," he acknowledged, "that an explicit provision going further than the Civil Rights Act could not have carried in the 39th Congress," that the Republicans drew back from a "formulation dangerously vulnerable to attacks pandering to the prejudice of the people." 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."<sup>68</sup> Bickel's hypothesis, to speak plainly, is that the alleged compromisers concealed the future objectives they dared not avow lest the whole enterprise be imperiled. There is not a shred of evidence for such a conspiracy, and there is evidence that there was no need for compromise because suffrage proposals were defeated by votes of 125 to 12 and 34 to 4.<sup>69</sup> Moreover, ratification requires disclosure and non-disclosure of the concealed objectives prevented effective ratification.<sup>70</sup>

Another activist refuge is Marshall's famous dictum in *McCulloch v. Maryland*: "[W]e must never forget that it is a constitution we are expounding . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the

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67. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 13 (1971).

68. Quoted in BERGER, *supra* note 18, at 101-02, 104-05.

69. *Id.* at 59-60, 95.

70. See, *id.* at 155 n.93.

various *crises* of human affairs."<sup>71</sup> For activists this dictum is the rock of ages. But as Justice Black repeatedly observed, the Framers supplied an instrument for adaptation, Article V, which provides for amendment by the people—the only provision for change.<sup>72</sup> In Hamilton's great defense of judicial review, No. 78 of *The Federalist*, he declared, "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 their sentiments, can warrant their representatives in a departure from it prior to such an act."<sup>73</sup> Mark that Hamilton left no room for judicial divination of "social ideals" as an excuse for judicial revision of the Constitution. To recur to Marshall, he spoke for a less confining construction of the *means* that *Congress* might employ to carry out its granted powers. When the decision came under attack, Marshall unequivocally disclaimed any intimation that the *powers* of Congress could be expanded by construction. And he specifically repudiated the notion that the Court enjoyed a "right to change" the Constitution.<sup>74</sup> As Professor Gerald Gunther commented, it is time to discard "ritual invoking of Marshall's authority" for "unlimited . . . discretion."<sup>75</sup>

In conclusion, the fundamental issue is the right of the people to govern themselves through the medium of representative assemblies; not to be governed by a non-elected, life-tenured judicial oligarchy that is all but unaccountable. Activists proudly affirm that the Court has worked a social revolution:<sup>76</sup> but it was not designed to serve as an instrument of revolution. It has taken over policy-making, that is, governance of the nation. With Learned Hand, I do not want to be governed by 9—often only 5—Platonic Guardians.<sup>77</sup> Although the democracy often goes down paths that make me unhappy, I will not make my predilections the test of constitutionality. John Stuart Mill cautioned that "The disposition of mankind . . . to impose their own opinions and inclinations as a rule of conduct for others . . . is hardly kept under restraint by anything but want of power."<sup>78</sup>

71. 17 U.S. (4 Wheat.) 316, 407-08 (1819).

72. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

73. *THE FEDERALIST* No. 78 at 509 (Mod. Lib. ed. 1937).

74. BERGER, *supra* note 18, at 376-77.

75. *Quoted in id.* at 378 n.19.

76. *E.g.*, Kelly, *supra* note 43, at 158.

77. HAND, *supra* note 49, at 73.

78. *Quoted in* BERGER, *supra* note 18, at 413 n.20.

My commitment is to the Constitution, not to a given result, and I cannot condone a judicial decision, however desirable, that exercises a power that plainly was withheld. Our democracy rests on respect by our agents for constitutional limitations. When we countenance extra-constitutional measures because we deem the result desirable we undermine the democratic structure. Disrespect, we learned from Watergate, breeds a Nixon. Whether it be a Richard Nixon or a Chief Justice Warren, we must insist on observance of constitutional limits. Lest you dismiss me as a Cassandra, let me remind you of Washington's warning to those impatient with the amendment process:

[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.<sup>79</sup>

Finally, a number of activists have expressed anxiety about a judicial power that is without "limits,"<sup>80</sup> but they are at odds as to what those limits should be. An easily ascertainable "limit," I suggest, is the clearly expressed intention of the framers to exclude suffrage and segregation from the scope of the fourteenth amendment and hence from judicial review. That represents a choice ratified by the people, requiring obedience on every principle of our democratic system. Ours is a government founded on consent of the governed. James Iredell, one of the ablest proponents of judicial review, stated, "The people have chosen to be governed by such and such principles. They have not consented to be governed or promised to submit upon any other."<sup>81</sup> A written Constitution is subverted by a theory that leaves the Justices free to jettison the meaning attached by the framers to their words. With Learned Hand, I would maintain that "If we do need a third chamber it should appear for what it is, not as the interpreter of inscrutable principles."<sup>82</sup> That will be the moment of truth.

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79. Quoted in *id.* at 299.

80. Ely, *supra* note 45, at 448; he finds the prospect "frightening". *Id.* at 477 n.28; Abraham, "Equal Justice Under Law" or "Justice at Any Cost?" *The Judicial Role Revisited: Raoul Berger's Central Message in his Government by Judiciary: The Transformation of the Fourteenth Amendment*, 6 HASTINGS CONST. L.Q. 467, 469-70 (1979).

81. Quoted in BERGER, *supra* note 18, at 295-96. For the colonists, Professor Oscar Handlin observes, consent "became a continuous process by which the people passed upon the validity of the acts of their rulers." O. HANDLIN, TRUTH IN HISTORY 310 (1979).

82. HAND, *supra* note 49, at 70.