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THE ROLE OF THE SUPREME COURT IN A DEMOCRATIC SOCIETY *

THERE IS WIDESPREAD DISSATISFACTION with the judicial takeover of functions confided by the Constitution to the states and the people.¹ Many resent increasing judicial intervention in matters such as housing² and the administration of schools.³ Others are concerned with intrusions in the name of affirmative action.⁴ Some are perturbed by judicial administration of prisons which in effect supplants legislative discretion in making budgetary allocations.⁵ Still others decry interference with local control of pornography,⁶ abortions,⁷ and the administration of criminal justice.⁸ The people reluctantly obey such decrees because they are told so the Constitution requires. But what if the requirements are imposed by Justices rather than the Constitution? In his recently published autobiography, the late Justice William O. Douglas recounts Chief Justice Hughes' advice that "ninety percent of any [constitutional] decision is emotional. The rational part of us supplies the reasons for supporting our *predilections*."⁹ Then and there Justice Douglas admitted that "the 'gut' reaction of a judge at the level of constitutional adjudication, dealing with the vagaries of due process, freedom of speech, and the like, was the main ingredient of his decision."¹⁰ Why should many millions of Americans prefer the gut reactions of the Justices against death penalties,¹¹ for example, to their own attachment to death penalties?¹² Under democratic principles, that gut reaction is no substitute for the will of the people. "The most immediate constitutional crisis of our present time," Professor Philip Kurland has written, is "the usurpation by the judiciary of general governmental powers on the pretext that its authority derives from the Fourteenth

* The substance of the text of this article was presented as an address by Professor Berger at the Villanova University School of Law on October 29, 1980. Professor Berger is the author of an array of books and articles focusing on the historical role and functions of the Supreme Court and its interrelation with the other branches of government. The following is a partial list of his most recent publications: *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); *CONGRESS V. THE SUPREME COURT* (1969); "*Government by Judiciary*": *Judge Gibbons' Argument Ad Hominem*, 59 B.U. L. REV. 783 (1979); *The Fourteenth Amendment: Light From the Fifteenth*, 74 N.W. U. L. REV. 311 (1979); *The Fourteenth Amendment: The Framers' Design*, 30 S.C. L. REV. 495 (1979); *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355 (1978).

The reference notes which follow the text were prepared by the staff of the *Villanova Law Review* and are set apart to distinguish them from Professor Berger's work.

Amendment.”¹³ That is not understood by the people, nor indeed by most lawyers. Before any steps can profitably be taken to restore government to the people, they must be instructed in the historical facts.

At the height of Franklin D. Roosevelt's 1937 Court-packing campaign,¹⁴ then Professor Felix Frankfurter wrote to the President:

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.¹⁵

Robert Bork, former Solicitor General, observed that “[t]he Supreme Court regularly insists that its results . . . do not spring from the mere will of the Justices in the majority but are supported, indeed compelled, by a proper understanding of the Constitution. . . . Value choices are attributed to the Founding Fathers, not to the Court.”¹⁶ Were the people to understand that it is the Justices, *not* the Constitution, who require busing and affirmative action, govern abortion, and impose limitations on state administration of criminal justice, they would remedy the usurpation.

Judicial usurpation can readily be demonstrated by the reapportionment¹⁷ and desegregation¹⁸ decisions, for the framers unmistakably intended to exclude segregation and suffrage from the scope of the fourteenth amendment.¹⁹ Justice Harlan justly affirmed that the Warren Court's “one person-one vote” interpretation was made “in the face of irrefutable and still unanswered history to the contrary.”²⁰ Harlan's demonstration that suffrage was excluded, wrote Professor Louis Lusky, an apologist for an activist Court, is “irrefutable and unrefuted.”²¹ A fellow activist, Professor Nathaniel Nathanson, agrees²² and adds that Alexander Bickel “quite conclusively” demonstrated that segregation was likewise excluded,²³ and that “Berger's independent research and analysis confirms and adds weight” to those conclusions.²⁴ It is a mistake to read our views as to segregation back into the minds of the framers of the fourteenth amendment. For them, as Bickel observed, “It was preposterous to worry about unsegregated schools, for example, when hardly a beginning had been made at educating Negroes at all and when obviously special efforts, suitable only for the Negroes, would have to be made.”²⁵ The Indiana Constitution actually forbade the immigration of Negroes into the State.²⁶ Writing in

August, 1866, after submission of the fourteenth amendment to the ratifiers, Thomas Shearman stated in *The Nation* that “[t]he members from Indiana and Southern Illinois well knew that their constituents had barely overcome their prejudices sufficiently to tolerate even the residence of negroes among them, and that any greater liberality would be highly repulsive to them.”²⁷

Let me recount a few confirmatory facts as to suffrage. Justice Brennan noted that only five New England states and New York allowed Negroes to vote as of 1866, and that voters had rejected the extension of suffrage in seventeen of nineteen popular referenda held on the subject between 1865 and 1868. Hence, Roscoe Conkling, a member of the Joint Committee on Reconstruction which drafted the fourteenth amendment, stated that it would be “futile to ask three quarters of the States to do . . . the very thing which most of them have already refused to do in their own cases.”²⁸ Another member of the committee, Senator Jacob Howard, explained to the Senate that “three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race.”²⁹ The Report of the Joint Committee explained that suffrage was omitted because “it was doubtful . . . whether the States would consent to surrender a power they had always exercised,” and therefore concluded “to leave the whole question with the people of each State,”³⁰ as section two of the fourteenth amendment clearly shows.

Summing up in 1974, Professor 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 up to the day the Court invented the new formula.”³¹ No one would contend, for example, that Congress or the Court can change the constitutional provisions for a two-year term in the House to a four-year term. Is there a better reason to reject the framers’ unmistakable intention to exclude suffrage from the fourteenth amendment?

Much of the Court’s expansion of its powers rests on the selective incorporation of the Bill of Rights into the fourteenth amendment. It needs to be recalled that Madison’s proposal to make the free speech provision applicable to the states³² was voted down.³³ As late as 1922, the Supreme Court held that the states were not obliged to confer free speech.³⁴ Much earlier, Chief Justice Marshall concluded in *Barron v. Baltimore*³⁵ that, “[h]ad Congress engaged in the extraordinary occupation of improving the

constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone they would have declared this purpose in plain and intelligible language,"³⁶ for the founders placed their trust in the states, not in the suspect newcomer—the remote federal government.³⁷ Much the same thing was said by Justice Miller in 1872 with reference to the privileges or immunities clause of the fourteenth amendment: it did not contemplate the "transfer [of] the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?"³⁸ Justice Miller declined to embrace a construction that would so subject the States "to the control of Congress" and so radically change "the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people . . . in the absence of language which expresses such a purpose too clearly to admit of doubt."³⁹ Common sense urges that an electorate which refused to surrender state control of suffrage⁴⁰ would not authorize, *sub silentio*, federal control of its local affairs—affairs such as the administration of schools and of criminal justice, the regulation of obscenity, and the like.

Justice Black sought to lodge the incorporation of the Bill of Rights into the fourteenth amendment by lodging it in the privileges or immunities clause.⁴¹ That clause was lifted from article IV of the original Constitution, and self-evidently it did not embrace the Bill of Rights, which was added to the Constitution later.⁴² The progenitor clause, article IV of the Articles of Confederation, recited that it was designed to promote "trade and commerce;"⁴³ and the successor clause in article IV of the Constitution was thus narrowly construed in early decisions by the state courts, including Massachusetts.⁴⁴ In 1872, when Justice Miller compared the clauses of article IV and the fourteenth amendment,⁴⁵ he declared: "There can be but little question that . . . the privileges and immunities intended are the same in each. In the articles of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase."⁴⁶

The immediate predecessor of the fourteenth amendment privileges or immunities clause was the civil rights or immunities clause of the Civil Rights Act of 1866,⁴⁷ which proceeded in the Thirty-ninth Congress on a parallel track with the fourteenth amendment.⁴⁸ Russell Thayer of Pennsylvania explained to the framers of the Act that the terms civil rights and immunities were

limited by the subsequent enumeration of the right to contract, the right to own property, and the right of access to the courts, saying "that enumeration precludes any possibility that the general words which have been used can be extended beyond the particulars which have been enumerated,"⁴⁹ a statement echoed by others.⁵⁰ Even so, John Bingham, draftsman of the fourteenth amendment, protested that the terms civil rights and immunities were "oppressive" and would "embrace every right that pertains to the citizen as such."⁵¹ In short, he would not prohibit all discriminations.⁵² To meet Bingham's objections, the phrase was deleted,⁵³ as James Wilson explained, to obviate "the difficulty growing out of any other construction beyond the specific rights named in the section,"⁵⁴ and to avoid "a latitudinarian construction not intended."⁵⁵ No one has explained why Bingham would then give to privileges or immunities the unlimited scope he had so vehemently rejected.

As you are aware, the privileges or immunities clause was gutted by the *Slaughter-House Cases*⁵⁶ and has lain dormant for more than 100 years. In his recent book, *Democracy and Distrust*, Professor John Hart Ely seeks to resurrect it, though he finds its terms inscrutable.⁵⁷ The powers reserved to the states by the tenth amendment are not to be curtailed by inscrutable words, as both Chief Justice Marshall⁵⁸ and Justice Miller held.⁵⁹ I have dwelt on the privileges or immunities clause because it was the key clause in the framers' scheme, but the other clauses are little more helpful to the activist cause.

Due process had a clearly procedural meaning both in 1787 and in 1866. Summing up 400 years of history, Hamilton said in 1787 that due process applied only to judicial proceedings, never to an act of legislature.⁶⁰ Debates on the fourteenth amendment in the Thirty-ninth Congress reinforce this view.⁶¹ The phrase has now fallen into disrepute, however, because the Court misused it, applying it to thwart socio-economic reform. If we are to give due process the meaning it had for the framers, it is without substantive content, and must be confined to judicial procedure.

Resort to the equal protection clause⁶² is a more recent phenomenon, rising into prominence because economic due process had been discredited. As Professor Herbert Packer observed, "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 [of the pre-1937 Court] once did."⁶³ But to the framers of the fourteenth amendment, the clause meant only equal protection of the rights embodied in the privileges or immuni-

ties clause by way of the Civil Rights Act, which, it needs to be underscored, the framers said again and again were "identical."⁶⁴ Throughout the debates on the Act, references to equal protection were in the circumscribed context of the rights enumerated in the bill.⁶⁵ To quote Samuel Shellabarger of Ohio,⁶⁶ "[w]hatever rights as to each of these *enumerated* civil (not political) matters the States may confer upon one race or color of the citizens shall be held by all races in equality It secures . . . equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races."⁶⁷ Under the *pari materia* rule,⁶⁸ this meaning is to be given the words in the "identical" amendment. So it was held by Justice Bradley.⁶⁹ Moreover, proposals to eliminate *all* racial distinctions were repeatedly and decisively rejected.⁷⁰ The Co-chairman of the Joint Committee on Reconstruction, Senator William Fessenden, explained: "[W]e cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions" ⁷¹ Thaddeus Stevens,⁷² the scourge of the South, sadly confessed that he had not realized his dream that "no distinction would be tolerated This bright dream has vanished like the baseless fabric of a vision."⁷³

Whatever the meanings of the language of the privileges or immunities and equal protection clauses, they cannot, under long-established canons, embrace the suffrage and segregation the framers so unmistakably excluded. Men do not use words to defeat their purposes. As Justice Holmes declared, judges may not say "[w]e see what you are driving at, but you have not said it."⁷⁴ For the age-old rule is: the intention of the lawmaker is the law.⁷⁵

Whence did the Court derive the power to displace those value choices of the framers. As late as 1940, we are told by activist Professor Stanley Kutler, academicians criticized the federal judiciary for "frustrating desirable social policies,"⁷⁶ for arrogating "a policymaking function not conferred upon it by the Constitution."⁷⁷ Afterwards, he continued, "most of the judiciary's longtime critics suddenly found a new faith";⁷⁸ now "a new libertarianism promoting 'preferred freedoms'" was matched with "an activist judiciary to protect those values,"⁷⁹ an activism which today continues to hold sway among the intellectual elite. Although I share activist dislike of malapportionment and segregation, I like it no better, I wrote in 1942,⁸⁰ when Justice Black embodies my predilections in the Constitution⁸¹ than when Justice McReynolds & Co. incorporated theirs.⁸² Because a given result seems laudable, it does not

follow that it is constitutional, as the framers⁸³ and Chief Justice Marshall⁸⁴ long ago pointed out. The test of constitutionality cannot be whose ox is gored.

A glance at the roots of judicial review will be instructive. Judicial review was an innovation; it had been asserted in a few pre-1787 state cases, proceeding for violations of express constitutional provisions, such as trial by jury.⁸⁵ None of them represent a takeover of legislative, let alone constitutional, policy-making. Even so, a few cases excited stormy disapproval, leading to removal proceedings,⁸⁶ because the founders were attached to legislative paramountcy. As Justice Wilson, a leading architect of the Constitution, explained in his 1791 Philadelphia Lectures,⁸⁷ the founders trusted their assemblies because they elected them, whereas they were saddled with the judiciary by the Crown.⁸⁸ "Need we be surprised," he asked, that they were objects of aversion and distrust?", that "every occasion was seized for lessening their influence." Understandably, Alexander Hamilton assured the ratifiers that, of the three branches, 'the judiciary is next to nothing.'⁸⁹

No specific provision for judicial review is made in the Constitution. Learned Hand,⁹⁰ Archibald Cox⁹¹ and Leonard Levy⁹² consider the evidence that the framers contemplated judicial review inconclusive. The argument for judicial review has largely been rested on the framers' intention as revealed by the legislative history.⁹³ If that be relied on to *establish* the power, it cannot be discarded as to the powers' *scope*. The current activist dismissal of the framers' intention as the guide to meaning of the text would undermine the very legitimacy of judicial review.

Judicial review was conceived in narrow terms. Participation in legislative policymaking was categorically rejected by the framers. It had been proposed to make justices members of a Council of Revision that would assist the President in exercising the veto power, on the ground that "[l]aws may be unjust, may be dangerous . . . and yet not be so unconstitutional as to justify the judges in refusing to give them effect."⁹⁴ But Elbridge Gerry objected: "It was quite foreign from the nature of ye office to make them judges of the policy of public measures."⁹⁵ Nathan Gorham chimed in that judges "are not to be presumed to possess any peculiar knowledge of the mere policy of public measures."⁹⁶ Rufus King added that judges "ought not to be legislators."⁹⁷ So judicial participation in policymaking was rejected. Then too, the Colonists had a profound fear of judicial discretion,⁹⁸ pungently expressed by Chief Justice Hutchinson of Massachusetts: "[T]he

Judge should never be the *Legislator*: Because then the Will of the Judge would be the Law; and this tends to a State of Slavery.”⁹⁹ Montesquieu, the oracle cited constantly in the several conventions, wrote that if the judge were to be the legislator, the “life and liberty of the subject would be subject to arbitrary control.”¹⁰⁰ Such were the suppositions the founders brought to fashioning the novel judicial review.

A cluster of remarks by Alexander Hamilton, the great apologist for judicial review, has been too little noticed. Echoing Montesquieu, he stated that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”¹⁰¹ Having divorced adjudication from legislation, he hardly contemplated that legislation would 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.”¹⁰² That is, they may not intrude *within* the boundaries of legislative power, for as James Bradley Thayer,¹⁰³ Learned Hand,¹⁰⁴ and Justice James Iredell¹⁰⁵ before them emphasized, courts are confined to *policing* boundaries to insure that the departments do not overleap their bounds. And Hamilton emphasized: “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents.”¹⁰⁶ Is it conceivable that he would have held judges were less bound by the unmistakable will of the framers than by judicial precedents? Hamilton also assured the ratifiers that judges could be impeached for “deliberate usurpations on the authority of the legislature.”¹⁰⁷ All this testifies that the founders were worried about the innovative judicial review, and explains why it was conceived in narrow terms from which a takeover of policymaking was plainly excluded. Distrust of the courts, arising from *Dred Scott*¹⁰⁸ and the fugitive slave¹⁰⁹ decisions, was repeatedly expressed in the 1866 debates,¹¹⁰ and is evidenced by section five of the fourteenth amendment, which confided enforcement of the amendment to Congress, not the courts.¹¹¹

It is tempting to comment on 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,”¹¹² its “assertion of the power to revise the Constitution, bypassing the cumbersome amendment procedure prescribed by Article V,”¹¹³ what Alfred Kelly complacently termed a “constitutional equalitarian revolution.”¹¹⁴ But I must be content to note Professor Mark Tushnet’s indication that activist theorizing about the ex-

panded role of the Court is bankrupt, as is confessed by Professor Paul Brest's bold pronouncement that "judges and other public officials [are not] bound by the text or original understanding of the Constitution," or by the "consent" of those who "are dead and gone."¹¹⁵ On such reasoning, we are even less bound by the dead hand of Earl Warren.

What is to be done to limit judicial intervention? The amendment process is too onerous, requiring agreement among two-thirds of the Congress and three-quarters of the states. Legislation is vastly to be preferred, for it may be enacted by a majority of the legislature, and if vetoed by the President, it can be overridden by a two-thirds vote.¹¹⁶ That Congress has the power to limit the jurisdiction of the inferior federal courts is beyond doubt. Very early in our history the Court held, in *Cary v. Curtis*,¹¹⁷ that

the judicial power of the United States, although it has its origin in the Constitution, is . . . dependent for its distribution . . . entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them¹¹⁸

Federal question jurisdiction was first conferred on the federal courts by the Civil Rights Act of 1866.¹¹⁹ What Congress delegates, according to *Sheldon v. Sill*,¹²⁰ it can withdraw it.¹²¹ A withdrawal of jurisdiction over, for example, busing or affirmative action cases from the federal courts would dry up one source of appeals to the Supreme Court.¹²² As to the state courts, Congress from the beginning, wrote Charles Alan Wright, "has provided that in certain instances the jurisdiction of the federal courts shall be exclusive of the courts of the several States" ¹²³ One such instance is the provision of section three of the Civil Rights Act of 1866 that "the district courts of the United States shall have, *exclusively* of the courts of the several States, cognizance of all the crimes and offenses committed against the provisions of this act."¹²⁴ Section five of the fourteenth amendment reinforces the lesson of long precedent, by stating that "Congress shall have power to enforce" the provisions of the amendment.¹²⁵ If the state courts can proceed in spite of an exclusivity provision, they would take over the power of enforcement that was confided to Congress. And if neither

federal nor state courts may, by virtue of congressional enactment, determine certain categories of cases, there is no basis for appeals to the Supreme Court.¹²⁶

Let us consider the appellate jurisdiction of the Supreme Court in light of the article III provision that the appellate jurisdiction shall be subject to "such Exceptions and under such regulations as the Congress shall make."¹²⁷ Over the years the Supreme Court, in dicta, has recognized the control of Congress over its jurisdiction, notably in *Ex parte McCordle*.¹²⁸ In 1965, Professor Herbert Wechsler declared that "Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitation of the jurisdiction of the lower courts and of the Supreme Court's appellate jurisdiction."¹²⁹

Whatever the scope of the appellate jurisdiction clause,¹³⁰ there is the import of section five of the fourteenth amendment to consider. Section five provides that "Congress shall have power to enforce [the amendment]." In 1879 the Court itself emphasized in *Ex parte Virginia*,¹³¹ that this power was given to Congress, not the courts.¹³² Were the Supreme Court to insist upon enforcing the provisions of the fourteenth amendment against Congress' manifest intention not to do so — it would convert "Congress shall have power to enforce" into "The Court shall enforce." That would usurp power that was withheld. For discretion to enforce was left to Congress; section five does not mandate enforcement; it does not provide that Congress *shall* enforce, but that "Congress shall have power to enforce." This was not mere happenstance. Encroachment on state sovereignty was highly unpopular in the North and the "have power" formulation, I suggest, was a compromise designed to leave the matter in the hands of Congress. My study of the fifteenth amendment,¹³³ section two of which is the analog of section five of the fourteenth, disclosed, in the words of Senator Oliver Morton, that "the remedy for violation of the fourteenth and fifteenth amendments was expressly not left to the courts . . .," but was to "be enforced by legislation on the part of Congress."¹³⁴ Senator John Sherman stated that "before it shall be enforced in the courts some legislation should be passed by Congress."¹³⁵ Senator Matthew Carpenter argued: "We must legislate, and *then commit* the enforcement of our laws to the Federal tribunals, not to the States."¹³⁶ Nowhere was it intimated that the Supreme Court was exempted from the grant to Congress. In fact, section five sprang from the enduring sense of outrage *Dred Scott*¹³⁷ had inspired.¹³⁸

Does the due process clause require that a remedy must be provided on the theory that no one may be deprived of a right without trial? Passing the question whether a "right" can be claimed in spite of the framer's intention, for example, to exclude segregation from the scope of the fourteenth amendment, the issue is whether the framers meant the due process clause of section one to take precedence over the enforcement provision of section five. To require a judicial trial against the will of Congress is to lodge the enforcement power in the courts in spite of the specific grant to Congress. That deprives section five of its intended effect. The due process clause, to my mind, must be regarded as subordinate to section five, for the framers left to Congress the judgment whether any trial would be available. To it was left the power of enforcement.

REFERENCE NOTES

The following notes were prepared by the staff of the *Villanova Law Review* to supplement Professor Berger's lecture and are intended to serve as a research aid for our readers, not as a representation of the views of Professor Berger which are extensively documented in his works.

The Editors wish to express their appreciation to Douglas J. Smillie, Anne P. Stark, and Michael D. Venuti for their research assistance.

1. See P. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* 95 (1970).

2. See, e.g., *Hills v. Gautreaux*, 425 U.S. 284 (1976) (requiring HUD to make up for past discriminatory housing practices in Chicago by providing housing alternatives outside the city limits); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that state judicial enforcement of racially discriminatory restrictive covenants on property is prohibited by the equal protection clause of the Constitution).

3. See, e.g., *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971) (upholding a federal court's plan to remedy past racial discrimination in the school system which included pairing and grouping of schools, and busing of children); *Green v. County School Bd.*, 391 U.S. 430 (1968) (rejecting a school board's freedom-of-choice plan to remedy segregation as an ineffective way to achieve a unitary system); *Brown v. Bd. of Educ.* [Brown II], 349 U.S. 294 (1955) (implementing the *Brown I* desegregation decision by allowing for broad remedial powers in the federal courts to dismantle the dual system); *Brown v. Bd. of Educ.* [Brown I], 347 U.S. 438 (1954) (rejecting the doctrine of "separate but equal" and mandating desegregation of public schools). See also *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189 (1973). For school prayer decisions, see *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

4. For cases reviewing the benign use of sex classifications in affirmative action programs, see *Wengler v. Druggists Mutual Ins. Co.*, 100 S. Ct. 1540

(1980); *Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Webster*, 430 U.S. 313 (1977). For decisions involving the benign use of racial classifications in affirmative action programs, see *Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

5. See *Bounds v. Smith*, 430 U.S. 817 (1977) (requiring prisons to provide law libraries for inmates); *Estelle v. Gamble*, 429 U.S. 97 (1976) (concerning the medical needs of prisoners); *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977), *remanded*, 599 F.2d 17 (1st Cir. 1979) (finding several aspects of prison management defective and mandating specific changes); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976) *aff'd in part and remanded in part sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977) (establishing minimum constitutional standards applicable to Alabama prisons).

6. See *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Smith v. California*, 361 U.S. 147 (1959); *Roth v. United States*, 354 U.S. 476 (1957).

7. See *Bellotti v. Baird*, 443 U.S. 622 (1979) (holding parental consent requirement of Massachusetts abortion law unconstitutional); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (invalidating provisions of a post-*Roe* abortion statute); *Doe v. Bolton*, 410 U.S. 179 (1973) (striking down substantial portions of Georgia state abortion law); *Roe v. Wade*, 410 U.S. 113 (1973) (holding Texas abortion laws unconstitutional). See generally Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

8. See *Benton v. Maryland*, 395 U.S. 784 (1969) (applying the fifth amendment guarantee against double jeopardy to state criminal trials); *Boykin v. Alabama*, 395 U.S. 238 (1969) (imposing an obligation on state courts to meet certain requirements in their acceptance of a guilty plea); *Miranda v. Arizona*, 384 U.S. 436 (1969) (outlining procedural safeguards to be followed in custodial interrogation); *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying exclusionary rule to the states). For decisions dealing with sixth amendment right to counsel, see *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 355 (1963). One commentator has stated that "[t]he Court's 'coddling' of criminals became a major issue in the 1968 elections; new appointees to the Court after Warren's retirement were selected in part on their hostility to 'criminal forces.'" G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 364-65 (1976).

9. W. DOUGLAS, *THE COURT YEARS 1939-1975* 8 (1980) (emphasis added).

10. *Id.*

11. See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (invalidating North Carolina's mandatory death sentence for a specific category of homicide offenses); *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that the death sentence could not be imposed under sentencing procedures involving a substantial risk of arbitrary or capricious application).

12. See *Gregg v. Georgia*, 428 U.S. 153 (1976). Justice Stewart, writing for the majority in *Gregg*, acknowledged that a large segment of American society still regards the death penalty as "an appropriate and necessary criminal sanction." *Id.* at 179. Chief Justice Warren commented that the death penalty has been employed throughout our history, is widely accepted, and cannot be said to violate the constitutional concept of cruelty. *Trop v. Dulles*, 356 U.S. 86, 99 (1958).

13. Letter from Philip Kurland to Harvard University Press (Aug. 15, 1977).

14. In 1937, after several New Deal laws were held unconstitutional by the Supreme Court, Franklin Roosevelt submitted a court reorganization plan in the form of a bill which authorized the President to nominate new judges for each federal judge who did not retire or resign within six months of his seventieth birthday. The bill also called for a limit of fifteen members on the Supreme Court. At the time, there were six Supreme Court Justices over 70. The Senate Judiciary Committee concluded that the bill was a dangerous abandonment of constitutional principle and emphatically rejected it. See

generally J. ALSOP & T. CATLEDGE, *THE 168 DAYS* (1938); L. BAKER, *BACK TO BACK—THE DUEL BETWEEN FDR AND THE SUPREME COURT* (1967).

15. ROOSEVELT AND FRANKFURTER: *THEIR CORRESPONDENCE 1928-1945* 383 (M. Freedman ed. 1967) (emphasis in original).

16. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 3-4 (1971).

17. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). One commentator stated: "No cases in modern times have more sharply provoked such disagreement [regarding the propriety of judicial review] than the congressional districting and state legislative reapportionment cases." Auerbach, *The Reapportionment Cases: One Person, One Vote — One Vote, One Value*, 1964 *SUP. CT. REV.* 1, 2.

18. See note 3 *supra*.

19. Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 *Nw. U. L. REV.* 311 (1979).

20. *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment; see also *Reynolds v. Sims*, 377 U.S. 533, 615 (1964) (Harlan, J., dissenting). Justice Harlan's dissent included a thorough examination of the historical materials bearing on the fourteenth amendment. *Id.* at 589-632 (Harlan, J., dissenting).

21. Lusky, *Government by Judiciary: What Price Legitimacy?*, 6 *HASTINGS CONST. L.Q.* 403, 406 (1979).

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

23. *Id.* at 581, citing Bickel, *The Original Understanding and the Segregation Decision*, 69 *HARV. L. REV.* 1 (1955). Bickel's conclusions were first advanced in a memorandum that he prepared as Justice Frankfurter's law clerk when *Brown v. Board of Education* was pending before the Court. Nathanson, *supra* note 22, at 581.

24. Nathanson, *supra* note 22, at 581.

25. Letter from Alexander Bickel to Justice Frankfurter (Aug. 1953), quoted in R. KLUGER, *SIMPLE JUSTICE* 654 (1976). Bickel further stated that "[i]n any event, it is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting." KLUGER, *supra*, at 654.

26. *IND. CONST.* art. XIII, § 1 (1851). Along with the prohibition against immigration, the Indiana Constitution denied suffrage to Negroes and mulattoes. *IND. CONST.* art. II §§ 2, 5 (1851). According to Senator Hendricks, an Indiana Democrat during the 39th Congress, "[i]n the State of Indiana we do not recognize the civil equality of the races." *CONG. GLOBE*, 39th Cong., 1st Sess. 602 (1866) [hereinafter cited as 39th *CONG. GLOBE*].

27. 6 C. Fairman, *History of the Supreme Court* 1283 n.246 (1971).

28. 39th *CONG. GLOBE*, *supra* note 26, at 358.

29. *Id.* at 2766.

30. R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 84 (1977) [hereinafter cited as *GOVERNMENT BY JUDICIARY*], quoting Report of the Joint Committee on Reconstruction, S. REP. NO. 112, 39th Cong., 1st Sess. 8 (1866).

31. Bork, *supra* note 16, at 18, citing *Lucas v. Forty-Fourth Gen. Ass'y.*, 377 U.S. 713, 744 (1964) (Stewart, J., dissenting); *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting); *Baker v. Carr*, 369 U.S. 187, 266 (1962) (Frankfurter, J., dissenting).

32. See Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 *HARV. L. REV.* 431, 433-35 (1926). Madison included in the proposed draft of the Bill of Rights, the following: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." *Id.* at 434. In the House debates which followed proposal of this amendment, opponents expressed the concern that state governments should be left to them-

selves and that any more interference with the states would be ill-conceived. *Id.*

33. *Id.* at 435. Madison's proposed amendment, in a slightly altered form, was passed by the House but struck down by the Senate. Warren points out that the "House later concurred with the Senate's action." *Id.*

34. See *Prudential Ins. Co. v. Check*, 259 U.S. 530, 538 (1922).

35. 32 U.S. (7 Pet.) 243 (1833). The Court in *Barron* rejected the petitioner's claim based on eminent domain, holding that the fifth amendment operated as a restraint on the federal government and was not applicable to the states.

36. *Id.* at 250.

37. *Id.* Chief Justice Marshall noted that "the great revolution which established the Constitution of the United States, was not effected without immense opposition." *Id.* at 249. The people feared that the powers deemed essential to union "might be exercised in a manner dangerous to liberty." *Id.* Thus, "[t]hese amendments demanded security against the apprehended encroachments of the general government — not against those of the local governments." *Id.*

38. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77-78 (1872). In rejecting the petitioner's argument in that case, the Court implicitly answered Justice Miller's rhetorical question in the negative. *Id.* at 73-75.

39. *Id.* at 78.

40. See notes 27-30 and accompanying text *supra*.

41. See *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting). In *Adamson*, Justice Reed, writing for the majority, refused to extend the fifth amendment prohibition against compelled testimony to protect against state action through the fourteenth amendment. *Id.* at 51. Justice Black's dissent, including an appendix tracing the history of the fourteenth amendment, outlined his theory that the language of the amendment was thought, by both those who sponsored it and those who opposed its submission and passage, to guarantee that the Bill of Rights would be applicable to the states. *Id.* at 68-123. Alexander Bickel recounts that Black's dissent "aroused much interest and provoked new scholarship. Within two years, Professor Charles Fairman had conclusively disproved Justice Black's contention; at least such in the weight of opinion among disinterested observers." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 102 (1962), citing Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

42. See U.S. CONST. art. IV, § 2. The first ten amendments, forming the Bill of Rights, were ratified December 15, 1791.

43. ARTICLES OF CONFEDERATION art. IV. For the text of article IV, see DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 28 (1927) (prepared by the Library of Congress pursuant to a joint resolution by the 69th Congress providing for the compilation and printing of pertinent historical documents in commemoration of the 150th anniversary of the Declaration of Independence). Article IV also proclaimed the intent to "secure and perpetuate mutual friendship and intercourse among the people of the different states" and provided that "the people of each state shall have free ingress and regress to and from any other state." *Id.*

44. *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89, 90-93 (1827).

45. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1872).

46. *Id.*

47. Act of April 9, 1866, ch. 31, 14 Stat. 27. Section one of the Civil Rights Act of 1866 guaranteed to all persons born in the United States, except untaxed Indians, the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." Section two constituted the criminal enforcement provision of the Act. For the modern

counterparts of the Civil Rights Act of 1866, *see* 42 U.S.C. § 1982 (1976); 18 U.S.C. § 242 (1976).

48. The Joint Committee on Reconstruction began its formulation of the fourteenth amendment while the Senate was passing the Civil Rights Act, but before the House had considered it. *See* Bickel, *supra* note 23, at 29.

49. 39th CONG. GLOBE, *supra* note 26, at 1151.

50. The proposed draft of § 1 of the Civil Rights Act began with the words "that there shall be no discrimination in civil rights or immunities." During the opening debate on the Act, Senator Trumbull was asked what was meant by "civil rights?" He responded by reading the enumeration of the rights in § 1. *See id.* at 476; note 47 *supra*. According to Alexander Bickel, those "who spoke in favor of the bill were content to rest on the points Trumbull had made[.]" and the "rights to be secured by the bill were those specifically enumerated in § 1." Bickel, *supra* note 23, at 13.

51. 39th CONG. GLOBE, *supra* note 26, at 1291.

52. *Id.* at 1291-93. Bingham observed that virtually all states in the Union made some discrimination on the basis of race or color respecting civil rights and questioned the power of Congress to cure such discrimination. He contended that the proposal as drafted with the language concerning civil rights and immunities would make it a "penal offense for the judges of the States to obey the constitution and laws of their States" *Id.* at 1293.

53. *See* Bickel, *supra* note 23, at 28. Thus, the Act as passed began with the words: "that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States" and thereafter listed the enumerated rights. *See* note 47 *supra*. *Cf.* note 50 *supra* (deleted language).

54. 39th CONG. GLOBE, *supra* note 26, at 1367.

55. *Id.* at 1366.

56. *See* 83 U.S. (16 Wall.) 36 (1872). Dissenting Justice Field lamented that the majority's construction of the privileges and immunities clause rendered it a "vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." *Id.* at 96 (Field, J., dissenting).

57. *See* J. ELY, DEMOCRACY AND DISTRUST 22-30 (1980). Ely suggests incorporation of a broad and flexible range of protections, calling the privileges or immunities clause the one from which the Framers of the 14th amendment expected the most. *Id.*

58. *See* JOHN MARSHALL'S DEFENSE OF McCULLOUGH V. MARYLAND (G. Gunther ed. 1969). In pseudonymous letters to the Philadelphia Union and the Alexandria Gazette, Marshall defended his decision in *McCullough* by repudiating any notion that the opinion contained "the most distant allusion to any *extension by construction* of the powers of congress." *Id.* at 185 (emphasis added). Marshall further stated that although the Constitution granted the judiciary the power to decide all questions arising under the Constitution, "the exercise of it cannot be the assertion of a right to change that instrument." *Id.* at 209.

59. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) at 78; text at note 39 *supra*.

60. GOVERNMENT BY JUDICIARY, *supra* note 30, at 194, 196. Commenting on the New York Constitution in 1787, Hamilton found that the words "due process" had a "precise technical import" and were "only applicable to the process and proceedings of the courts of justice." THE PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett & J. Cooke eds. 1962).

61. Debates on the fourteenth amendment began in 1866 in the 39th Congress and ratification followed in 1868. Representative Bingham of Ohio, one of the framers of the fourteenth amendment, attached to due process the meaning that had been recognized by the courts, which was all but universally procedural. J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 86

(1965). See also B. TWISS, *LAWYERS AND THE CONSTITUTION* 26 (1942). Twiss maintained that before 1866, due process had been generally regarded as a procedural guarantee. *Id.* Another commentator noted that the term due process, as found in virtually all of the state constitutions employing those words in 1866, was to be found in a section of the constitution dealing with the conduct of criminal trials and the rights of the accused. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions which Protect "Life, Liberty and Property,"* 4 HARV. L. REV. 365, 369 (1891).

62. U.S. CONST. art. I, § 1.

63. 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).

64. Representative Latham of West Virginia stated that the civil rights bill covered exactly the same ground as the fourteenth amendment. 39th CONG. GLOBE, *supra* note 26, at 2883. Professor Fairman more recently commented on the relationship between § 1 of the fourteenth amendment and the Civil Rights Act, stating that, throughout the debates on the amendment, "the provisions of one are treated as though they were essentially identified with those of the other." Fairman, *supra* note 41, at 44.

65. The Civil Rights Act guaranteed to blacks the enumerated rights and the "equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens." Act of April 9, 1866, ch. 31, 41 Stat. 27. See note 47 *supra*. For the remarks of several members of the 39th Congress concerning the scope of rights under the Act, see GOVERNMENT BY JUDICIARY, *supra*, note 30, at 170-71. The language proposed by Bingham in an early version of the fourteenth amendment provided for equal protection "in the rights of life, liberty and property." See Bickel, *supra* note 23, at 57. Concerning this language, Bickel concluded that it was intended to protect those rights specifically enumerated in the Civil Rights Act in light of the "evils represented by the Black Codes, which were foremost in the minds of all men." *Id.* The final draft of § 1 of the fourteenth amendment, which adopted the Bingham formula, was not a subject of great debate in the House and "became the subject of stock generalization: it was dismissed as embodying and . . . 'constitutionalizing' the Civil Rights Act." *Id.* at 58.

66. Representative Shellabarger was a leading Radical of the 13th Congress. GOVERNMENT BY JUDICIARY, *supra* note 30, at 170.

67. 39th CONG. GLOBE, *supra* note 26, at 1293.

68. *Pari materia* has been defined as: "Of the same matter; on the same subject," that is, "laws *pari materia* must be construed with reference to each other." BLACK'S LAW DICTIONARY 1004 (5th ed. 1979).

69. See *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock & Slaughterhouse Co.*, 15 F. Cas. 649, 655 (C.C.D. La. 1870). Shortly after the amendment's ratification, Justice Bradley noted:

[C]onsidering that the civil rights bill was enacted at the same session, and but shortly before the presentation of the fourteenth amendment; was reported by the same committee; was in *pari materia*; and was probably intended to reach the same object, we are disposed to modify our opinion in this respect, and to hold, . . . that the first section of the bill covers the same ground as the fourteenth amendment, at least so far as the matters involved in this case are concerned.

Id.

70. GOVERNMENT BY JUDICIARY, *supra* note 30, at 163-65.

71. 39th CONG. GLOBE, *supra* note 26, at 705.

72. Representative Stevens of Pennsylvania was the chairman of the House section of nine members of the Joint Committee on Reconstruction. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 45.

73. 39th CONG. GLOBE, *supra* note 26, at 3148.

74. *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908) (Holmes, J., sitting as Circuit Justice).

75. *Id.* Justice Holmes stated that "[t]he Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." *Id.* See *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903).

76. Kutler, *Raoul Berger's Fourteenth Amendment: A History or Ahistorical?*, 6 HASTINGS CONST. L.Q. 511, 512 (1979).

77. *Id.*

78. *Id.* at 513.

79. *Id.*

80. See Berger, *Constructive Contempt: A Post-Mortem*, 9 U. CHI. L. REV. 602 (1942).

81. *Id.* at 602-05. The article criticized Justice Black's opinion in *Bridges v. California*, 314 U.S. 252 (1941), which found that the well-entrenched summary power of courts over publications in contempt of court was curtailed by the first amendment, and later by the fourteenth amendment. *Id.* at 602.

82. See *Meyer v. Nebraska*, 262 U.S. 390 (1923). Justice McReynolds read the concept of liberty in the fourteenth amendment broadly as including a number of implicit property rights, and limited the government's ability to legislate in a way which would affect these rights. *Id.* at 399.

83. See notes 94-107 and accompanying text *infra*.

84. See JOHN MARSHALL'S DEFENSE OF McCULLOUGH V. MARYLAND, *supra* note 58, at 190-91. Marshall cautioned that "[t]he peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." *Id.*

85. See II W. CROSSKEY, POLITICS AND THE CONSTITUTION 969 (1953). Crosskey noted that two or more unreported New Hampshire cases arose under the Ten Pound Act, which provided for the trial of actions on debts before a justice of the peace without a jury. *Id.* According to newspaper reports of the cases, the New Hampshire courts viewed the Ten Pound Act as unconstitutional and not binding upon them. *Id.* Crosskey also referred to a Rhode Island case, *Trevett v. Weeden* (noted only in a pamphlet at the time), wherein the defendant appealed a criminal conviction, which had been tried without a jury and in which the court refused to take jurisdiction of the case due to the unconstitutional statute involved. *Id.* at 967-68.

86. See *Bayard v. Singleton*, 1 N.C. (Mart.) 42 (1787) (holding a state act which directed the courts to dismiss any action that might be brought to recover lands under a confiscation act unconstitutional). For a discussion of the ensuing legislative action against the *Bayard* court judges, see II W. CROSSKEY, *supra* note 85, at 973-74. For other instances of disapproval of judicial actions leading to the impeachment of failure to reappoint judges, see *id.* at 964, 968 & 970.

87. Professor Robert McCloskey noted that James Wilson was one of six men whose signature appeared on both the Declaration of Independence and the Constitution, and that he made a significant contribution to the Federal Convention. I THE WORKS OF JAMES WILSON 2 (R. McCloskey ed. 1967). The Philadelphia "Lectures on Law" were given while Wilson was serving both as a Justice of the Supreme Court and a professor at the College of Philadelphia. *Id.* at 28-29.

88. See R. BERGER, CONGRESS V. THE SUPREME COURT 30 (1969), citing I J. WILSON, THE WORKS OF JAMES WILSON 398 (1804).

89. THE FEDERALIST NO. 78 (A. Hamilton), at 576 (Lippincott & Co. ed. 1873), quoting I C. MONTESQUIEU, SPIRIT OF LAWS 186 (5th ed. 1773). Hamil-

ton, in comparing the judiciary with the executive branch noted that the judiciary "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatsoever." *THE FEDERALIST, supra*, at 575.

90. *See* L. HAND, *THE BILL OF RIGHTS* (1958). Judge Hand expressed doubts that the Constitutional Convention would have voted as it did had there been any awareness that the courts would have power to invalidate acts of Congress. *Id.* at 7.

91. *See* A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1976). Cox could find no conclusive proof to support the notion that the judiciary was given supremacy over constitutional questions in the original charter. *Id.* at 15-16.

92. *See* L. LEVY, *ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* (1972). According to Levy, "decisive evidence" concerning whether judicial review was originally intended "cannot be marshalled to prove what the framers had in mind." *Id.* at 24-25.

93. *See* R. BERGER, *supra* note 88, at 198-284.

94. 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787 73* (1911).

95. 1 M. FARRAND, *supra* note 94, at 97-98.

96. *Id.*, vol. 2, at 73.

97. *Id.*, vol. 1, at 108.

98. *GOVERNMENT BY JUDICIARY, supra* note 30, at 307.

99. *Id.*, quoting Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in 5 *PERSPECTIVES IN AMERICAN LEGAL HISTORY* 292 (1971) (emphasis by Professor Berger).

100. 1 C. MONTESQUIEU, *THE SPIRIT OF LAWS* 152 (Rev. ed. 1899).

101. *THE FEDERALIST* No. 78, *supra* note 89, at 576. *See* 1 C. MONTESQUIEU, *supra* note 100, at 152.

102. *THE FEDERALIST* No. 78, *supra* note 89, at 579.

103. *See* Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *HARV. L. REV.* 129, 135 (1893).

104. *See* L. HAND, *supra* note 90, at 31, 66. Hand acknowledged the Court's role as final arbiter in determining whether a department had overstepped the bounds of its authority, but emphasized that each department and the states, *within* their prescribed borders, should "be free from interference." *Id.* at 31. Hand further stated that judicial review of an order or statute that fell outside a grant of power should not involve review of how the power is exercised. *Id.* at 66.

105. *See* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring).

106. *THE FEDERALIST* No. 78, *supra* note 89, at 581-82.

107. *THE FEDERALIST* No. 81, *supra* note 89, at 599.

108. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (holding the Missouri Compromise unconstitutional on the ground that Congress could not bar slavery from the territories).

109. *See* *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858) (reversing an order by the Supreme Court of Wisconsin to set aside the federal commitment of a fugitive slave); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (holding Pennsylvania law which prohibited the act of seizing and removing a fugitive slave by his master unconstitutional).

110. *GOVERNMENT BY JUDICIARY, supra* note 30, at 222, quoting H. GRAHAM, *EVERYMAN'S CONSTITUTION* 447-48 (1968). Representative Stevens discussed "the infamous sentiment that damned the late Chief Justice to everlasting fame; and, I fear, to everlasting fire." 39th *CONG. GLOBE, supra* note 26, at 75.

111. U.S. CONST. amend. XIV, § 5. This section states: "The Congress shall have power to enforce this article by appropriate legislation."
112. Lusky, *supra* note 21 at 408.
113. *Id.* at 406.
114. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 158. Kelly stated that "[t]his involves the justices in a degree of political activism rivaled only in the days of *Dred Scott*, *Pollock*, and *Lochner*. *Id.*
115. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 224-25 (1980).
116. U.S. CONST. art. I, § 7, para. 2.
117. 44 U.S. (3 How.) 236 (1845).
118. *Id.* at 245 (citation omitted).
119. See Act of April 9, 1866, ch. 31, 14 Stat. 27; note 124 and accompanying text *infra*.
120. 49 U.S. (8 How.) 440 (1850).
121. *Id.* at 448-49.
122. For a discussion of several congressional attempts to remove jurisdiction from the Supreme Court and lower federal courts, see G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 55-56 (10th ed. 1980). One such proposal was the Helms amendment, which, had it been successful, would have removed jurisdiction over suits challenging voluntary school prayers from the federal courts. *Id.* at 56.
123. C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 26 (3d ed. 1976).
124. Act of April 9, 1866, ch. 31, 14 stat. 27 (emphasis added). Section three of the Act also provided that the United States district courts would have concurrent jurisdiction with the circuit courts of the United States of all civil and criminal actions affecting persons who are unable to enforce those rights secured by section one in the state courts. *Id.* The rationale supporting the extension of exclusive jurisdiction to federal courts is reflected in a comment by McKee of Kentucky, asking "[w]here is your court of justice in any southern state where the black man can secure protection?" 39th CONG. GLOBE, *supra* note 26, at 653.
125. U.S. CONST. amend. XIV, § 5.
126. U.S. CONST. art. III, § 2. Under this section, the original jurisdiction of the Supreme Court is limited to "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party. . . ."
127. U.S. CONST. art. III, § 2.
128. 74 U.S. (7 Wall.) 506 (1869) (dismissing appeal on the basis of repeal of jurisdiction by Congress). See also *Glidden Co. v. Zdanok*, 370 U.S. 530, 567-68 (1962).
129. Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965).
130. See U.S. CONST. art. III, § 2.
131. 100 U.S. 339 (1879).
132. *Id.* at 345. Justice Strong, writing for the Court, emphasized that it was the power of Congress which was enlarged by virtue of § 5 of the fourteenth amendment.
133. See Berger, *supra* note 19, at 350-53.
134. CONG. GLOBE, 42d Cong., 2d Sess. 525 (1872).
135. CONG. GLOBE, 41st Cong., 2d Sess. 3568 (1870).
136. CONG. GLOBE, 42d Cong., 2d Sess. 897 (1872) (emphasis added).
137. 60 U.S. (19 How.) 393 (1856); see note 108 *supra*.
138. See Berger, *supra* note 19, at 350-51.