On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation

By DEAN ALFANGE, JR.*

GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT. By Raoul Berger. Cambridge and London: Harvard University Press (1977). xii + 483 pp. $15.00.

For his most recent book,[1] Raoul Berger has borrowed his title, without acknowledgment, from the vigorous attack on judicial activism by Louis Boudin published in two volumes forty-five years ago.[2] Boudin's study relied on an extensive canvass of historical materials to support the author's conclusions that the framers of the Constitution had not authorized judicial review, and that judges decided cases on the basis of their own policy preferences rather than adherence to the text and intended meaning of the Constitution. Despite the cogency and power of much of its argument, Boudin's work has been described as an "eccentric" study,[3] and it seems probable that the same adjective will in time be widely applied to Berger's book.

As the title of his book clearly suggests, Berger shares Boudin's view that the Supreme Court has been using its power to interpret the Constitution for the purpose of creating a body of law that corresponds with the justices' conception of wise policy rather than actual constitutional commands. However, in contrast to Boudin's hostile reaction to the actual rulings of the Supreme Court, Berger does not quarrel with the substantive rules laid down by the Warren Court in its interpreta-

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

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

3. L. LEVY, *Judicial Review, History, and Democracy: An Introduction*, in JUDICIAL REVIEW AND THE SUPREME COURT 4 (1967) [hereinafter cited as LEVY].

tion of the Fourteenth Amendment—except that those rules were established by the illegitimate process of judicial amendment of the Constitution. As Berger pointedly notes, he had written as early as 1942 that he "liked it no better when the Court read [his] predilections into the Constitution than when the Four Horsemen read in theirs,"[4] and he remains faithful to that view. Moreover, unlike Boudin, Berger does not argue that judicial review itself is in any way improper. In an earlier work,[5] he reviewed the history of the drafting and ratification of the Constitution and concluded both that the historical record was not "vague and conflicting," as other scholars had found it,[6] and that it demonstrated convincingly that "judicial review *was* contemplated and provided for by the Framers."[7]

Nevertheless, as Berger sees it, the power of judicial review granted to the courts is nothing more than an authorization to police the boundaries of the Constitution in order to insure that Congress, the President, and the states act within the limits of their prescribed powers. It is emphatically not a grant of authority to alter the Constitution one iota from the precise meaning its framers intended it to have. Therefore, Berger insists, "judicial amendment of the Constitution" is the only proper phrase with which to describe the transformation of the Fourteenth Amendment brought about by Warren Court rulings in this area, particularly those relating to desegregation,[8] suffrage,[9] reapportionment,[10] the protection of individual liberties against state encroachment,[11] and federal review of state criminal procedure.[12]

Government by Judiciary once again demonstrates that Raoul Berger's forte is the examination and elucidation of the drafting and ratification of constitutional provisions for the purpose of ascertaining the

4. BERGER, *supra* note 1, at 4 (citing Berger, *Constructive Contempt: A Post-Mortem*, 9 U. CHI. L. REV. 602, 604-05, 642 (1942)).

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

6. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH 1-16 (1962) [hereinafter cited as BICKEL]; LEVY, *supra* note 3, at 1-12; Westin, *Introduction* to C. BEARD, THE SUPREME COURT AND THE CONSTITUTION 34 (1962 ed.) [hereinafter cited as Westin]. *See also* Edward S. Corwin's testimony before the Senate Judiciary Committee that considered Franklin Roosevelt's court-packing plan, *printed in Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary*, 75th Cong., 1st Sess., pt. 2, 167-224 (1937). *But see* E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW (1914).

7. BERGER, *supra* note 1, at 355 (emphasis in original).

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

9. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

10. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

11. *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

12. *E.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968).

original intention of the framers.[13] The first of the book's two parts consists principally of an analytical review of the discussions in the Thirty-Ninth Congress preceding the submission of the Fourteenth Amendment to the states for ratification. From this review, Berger disputes those historians who have viewed section one of the amendment as embodying the desire of the abolitionists to guarantee blacks full social and political equality.[14]

Instead of seeking to constitutionalize the principle of racial equality, Berger argues, the "radical Republicans" who were responsible for drafting the Fourteenth Amendment desired only to provide an adequate constitutional underpinning for the Civil Rights Act of 1866,[15] which provided that citizens of the United States

> of every race and color, without regard to any previous condition of slavery . . . , shall have the same 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, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[16]

The purpose of this act, in Berger's view, was to nullify the Black Codes that had been enacted by former secessionist states in order to place the newly emancipated blacks in a practical, if not legal, status of servitude by denying them the "fundamental rights" enumerated.[17] Under this view, the three main clauses of section one of the Fourteenth Amendment—dealing, respectively, with privileges or immunities, due process, and equal protection[18]—were intended to do no more than provide constitutional protection for the precise rights set forth in

13. For earlier examples of his efforts in this respect, *see* R. BERGER, CONGRESS V. THE SUPREME COURT (1969); R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974); R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973).

14. Those whose historical analyses are the principal targets of Berger's criticism are Howard Jay Graham, Jacobus tenBroek, and Alfred Kelly. *See* H. GRAHAM, EVERYMAN'S CONSTITUTION (1968); J. TENBROEK, EQUAL UNDER LAW (1965); Kelly, *The Fourteenth Amendment Reconsidered*, 54 MICH. L. REV. 1049 (1956) [hereinafter cited as Kelly].

15. Act of April 9, 1866, ch. 31, 14 Stat. 27.

16. *Id.*

17. For Berger's discussion of the purpose of the Civil Rights Act of 1866, *see* BERGER, *supra* note 1, at 22-36.

18. U.S. CONST. amend. XIV, § 1, states in pertinent part:

> 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.

the Civil Rights Act, and for no others. Far from being motivated by abolitionist sentiment, Berger asserts, the radical Republicans were stringently limited by the political reality that the people of the northern states, whom they represented, were opposed to any proposal to grant blacks equal social or political status. These men, he writes, "were swayed by the racism that gripped their constituents rather than by abolitionist ideology,"[19] and, as a result, they intended that the guarantees of the Fourteenth Amendment should be very narrow in scope.

Berger does not rest his historical argument on undocumented assertions. He quotes extensively and repeatedly from the statements of individual senators and representatives in the course of the debates preceding the passage of the Fourteenth Amendment and the various pieces of civil rights legislation that were considered in 1866; these quotations comprise a major portion of Part I of the book, almost 250 pages.[20] The repetitiveness of the quotations is tiresome, but it is Berger's purpose to show how many statements by different legislators expressed the understanding that the actions of the Thirty-Ninth Congress in providing constitutional and legal protection for blacks were to be very restricted in scope, and the cumulative impact of these quotations is impressive.

It must be conceded that many of Berger's conclusions on specific historical points are not easily challengeable. His argument that section one of the Fourteenth Amendment was not intended to guarantee voting rights to blacks in states that chose not to enfranchise them, for example, is supported not only by numerous quotations from members of Congress expressing that view,[21] but also by the refusal of the Thirty-Ninth Congress to require Tennessee to provide equal suffrage for blacks as a condition of readmission to the Union,[22] by the provisions of section two of the amendment, which calls for a reduction in the congressional representation of any state in proportion to the percentage of the male citizens of the state to whom the right to vote is denied[23] (a provision implying that the inherent power to deny that

19. BERGER, *supra* note 1, at 10.

20. *Id.* at 1-245.

21. *See id.* at 58-60.

22. *See id.* at 59-60.

23. U.S. CONST. amend. XIV, § 2, states in pertinent part:

> But when the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

right was conceded), and by the perceived need subsequently to adopt the Fifteenth Amendment in order to guarantee black suffrage.[24] Similarly, despite the contrary evidence in the statements by Representative Bingham of Ohio and Senator Howard of Michigan that were utilized by Justice Black as the basis for his dissent in *Adamson v. California*,[25] it is all but certain that the Fourteenth Amendment was not intended to incorporate the Bill of Rights and thus to revolutionize the administration of criminal justice in the states. If that had been the framers' intent, surely some member of Congress would have objected to such a sweeping change going so far beyond the measures necessary to protect the civil rights of blacks, some opposition would have been manifested in the state legislatures when the ratification of the Fourteenth Amendment was debated, and some call would have been made that the states begin complying with the mandates of the Bill of Rights as soon as the Fourteenth Amendment was adopted. The fact that none of these events occurred seems to provide ineluctable proof that incorporation was not intended.[26]

Nevertheless, debates over legislative history and the originally intended meaning of ambiguous texts never cease. Although most of the scholars whose interpretations of the Fourteenth Amendment Berger most vigorously attacks are now deceased and thus unable to offer rebuttals, there is so much available historical material pertaining to the adoption of the amendment and to the history of the Reconstruction era, and so many alternative ways in which that material may be interpreted, that it is certain that Berger will not be allowed to have the last word. Yet the fact remains that his historical argument *is* very powerful. Those who wish to challenge it will confront a formidable task in light of the volume and persuasiveness of the evidence he has amassed in support of his position.

But, at the same time, *Government by Judiciary* is far more than an exercise in historical analysis. It is an impassioned argument on behalf of a specific rule of constitutional interpretation as well. That argument

24. Berger's argument on the exclusion of the right to vote from the scope of the Fourteenth Amendment follows closely the argument to the same effect in Justice Harlan's dissenting opinion in Reynolds v. Sims, 377 U.S. 533, 593-608 (1964) (Harlan, J., dissenting). *But see* Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.

25. 332 U.S. 46, 92-123 (1947) (Black, J., dissenting). The standard refutation of Justice Black's contention is Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949) [hereinafter cited as Fairman].

26. Berger devotes a chapter to refuting the theory that incorporation of the Bill of Rights was intended by the framers of the Fourteenth Amendment. BERGER, *supra* note 1, at 134-56. *See also* Fairman, *supra* note 25, at 43-134.

is the central focus of Part II of the book, and it is here that Berger's contentions are most arresting—and most vulnerable. Thus, for the present, let us accept provisionally Berger's claim that the history of the Fourteenth Amendment supports conclusively a restrictive interpretation of the scope of its provisions. Let us also bypass the argument most commonly employed by academicians to discredit efforts to resort to the original intention of the framers: that because historical records are "incomplete" or "inconclusive," legislative history can never be definitive.[27] The more important question is the extent to which history, however clear, should control interpretation of the Constitution.

Berger's argument on constitutional interpretation is tightly syllogistic. If one accepts the premises, the conclusion is foreordained. It may be summarized as follows:

First Premise: Wherever possible, provisions of the Constitution are to be interpreted in accordance with the ascertainable intent of the framers and the understanding of the ratifiers. The framers' intent is to be respected and must be given preference over the language of the text even if that language suggests a different meaning.[28]

Second Premise: If a court interprets a constitutional provision in a manner contrary to the intent of the framers, it is engaging in the process of amendment, and the authority granted to the judiciary to interpret the Constitution does not include the power to amend that document; "the judiciary was excluded from policymaking."[29] When a court attempts to change the Constitution it is subverting the terms of Article V, which specifies the only legitimate means of amendment.[30]

Conclusion: Since the intent of the framers of the Fourteenth Amendment is ascertainable, courts are obliged to honor it. Because the Supreme Court has failed to do so, its rulings affording protection under the amendment in cases involving racial segregation, voting rights, and civil liberties should neither be "countenance[d]" nor

27. *See* tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: Debates and Proceedings of the Constitutional and Ratifying Conventions*, 26 CALIF. L. REV. 437, 451-54 (1938); Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 503-11 (1964).

28. *See* BERGER, *supra* note 1, at 363-72.

29. *See id.* at 300-11.

30. *See id.* at 316-18. *See* U.S. CONST. art. V:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .

"tolerate[d]."[31]

The first question that necessarily arises in examining this syllogism is the extent to which the rule that written instruments must be interpreted in light of the intent of the framers should apply to constitutions as well as to contracts, wills, and statutes. Certainly no such rule of interpretation is specified in the federal Constitution, and it is far from clear that the framers of that document intended it to be construed in so rigid a manner, especially in light of their deliberate use of general language easily adaptable to changing circumstances in future eras. Thus, if interpretation on the basis of original intention is to be adopted as a fixed rule, a justification must be found for it. Berger notes that "rules governing 'intention' reach far back in legal history," and that "English case-law emphasis on effectuation of the 'original intention' was summarized in Bacon's *Abridgment* . . . ."[32] However, the early common-law references relate principally to the interpretation of documents drafted by private parties, such as contracts and wills. In such instances, there is little question that, except in rare cases where overriding considerations of public policy are implicated, the intention of the private parties is what the legal machinery of the state should enforce. The "original intent" rule is, however, also commonly utilized as a doctrine of statutory interpretation, where its function is to underscore the responsibility of judges to interpret a law in order to effectuate, not frustrate, the aims of the enacting legislature. The classic early statement of this doctrine appears in *Heydon's Case*,[33] decided in 1584, in which the English Court of Exchequer stated that statutes are to be read "to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."[34] By 1930, Max Radin was able to say that the number of American cases declaring the primacy of the rule that statutes should be interpreted in accordance with the intent of their framers "run[s] into the hundreds."[35] But statutes are, by their very nature, ephemeral; the legislature may amend them whenever it decides to alter the policy they embody or to extend or restrict their reach. A constitution, on the other hand, is, in Chief

31. BERGER, *supra* note 1, at 417.

32. *Id.* at 366. The reference is to M. BACON, A NEW ABRIDGMENT OF THE LAWS OF ENGLAND (3d ed. 1768).

33. 3 Coke 7 (Exch. Ch. 1584).

34. *Id.* at 7b.

35. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 n.14 (1930) [hereinafter cited as Radin]. Radin, however, goes on to state that "courts in England and America have generally qualified the 'golden rule' that intent governs the meaning of a statute, by saying that it must be the intent 'as expressed in the statute.'" *Id.* at 872.

Justice Marshall's classic statement, "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[36] In view of that critical characteristic, it would not seem that the original intent of the framers of a constitution should be accorded the same controlling effect given to the intentions of those who enact a statute. As generations pass, the precise end that the framers of a constitution sought to achieve may no longer be relevant, and it may be far more desirable and sensible for courts to ignore outmoded intentions and instead concern themselves with accommodating the spirit and general goals of the provision under consideration. As Leonard Levy has put it: "The principles themselves, not their framers' understanding and application of them, are meant to endure."[37]

Berger, however, insists that the "original intent" rule should apply both to statutory and constitutional interpretation. As he demonstrates, there is no dearth of dicta by the Supreme Court that appear to support that position, although there also exist dicta advocating a contrary view.[38] The fact that judicial assertions of the necessity for fidelity to the original intent of the framers of the Constitution frequently appear reflects, perhaps, nothing more than an instinctive mechanism of self-protection against those who may object to a particular line of constitutional interpretation. It does not demonstrate the existence of a constitutional rule inexorably requiring adherence to the original intent of the framers, and such dicta seem no more entitled to deference than do other judicial protestations of adherence to the procedures of mechanical jurisprudence. But Berger relies on these assertions, and

36. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis in original). Elsewhere, the Court has declared that constitutions "are not ephemeral enactments." Weems v. United States, 217 U.S. 349, 373 (1910). *See* note 85 *infra.*

37. L. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 17 (1972).

38. Jacobus tenBroek, in his study of the Supreme Court's use of historical materials in constitutional adjudication, concluded that: "Whenever the United States Supreme Court has felt itself called upon to announce a theory for its conduct in the matter of constitutional interpretation, it has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument or of the people who adopted it." TenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction*, 27 CALIF. L. REV. 399, 399 (1939) [hereinafter cited as tenBroek]. TenBroek, however, hastened to add that this theory "is an utterly false portrayal of what the Supreme Court actually does," that "the pretense of a disinterested search for the original intent is judicial hokum," and, moreover, that the "theory is also a misrepresentation of what the Court ought to do," since "exclusive concentration on the condition of things at the time of the framing would tend to cast modern constructions in the mold of a factual world that has been superseded." *Id.* at 410. The best known of the contrary dicta are probably those in Missouri v. Holland, 252 U.S. 416, 433 (1920), and in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934); *see* note 56 and accompanying text *infra. See also* Weems v. United States, 217 U.S. 349, 373 (1910); *see* note 85 *infra.*

since on this point a dictum by Chief Justice John Marshall is apparently worth two by anyone else, he principally stresses the well-known passage in Chief Justice Marshall's dissent in *Ogden v. Saunders*,[39] in which he stated that the words of the Constitution should not be "extended to objects not . . . contemplated by its framers."[40] To hold otherwise, Berger asserts, "is to convert the 'chains of the Constitution' to ropes of sand."[41]

This "original intent" theory of constitutional interpretation was long ago subjected to devastatingly effective criticism by Jacobus tenBroek and Charles P. Curtis, among others,[42] and one would have thought that their critiques had caused it to be interred once and for all. However, because it has now been advocated again by a scholar of the stature of Raoul Berger, an exhumation and reexamination seem in order. And, "[i]n considering this question," Chief Justice Marshall continues to remind us, "we must never forget, that it is *a constitution* we are expounding."[43]

To illuminate the problem, it would be helpful to look at what are probably the two best known cases in which the question of the binding effect of the original intent of the framers of the Constitution has been squarely addressed—two cases which point in opposite directions. The first of these decisions is *Dred Scott v. Sandford*.[44] The jurisdictional issue in that case was whether free blacks were "citizens" within the meaning of Article III of the Constitution, so that they could bring suit

39. 25 U.S. (12 Wheat.) 213 (1827).

40. *Id.* at 332 (Marshall, C.J., dissenting). The full quotation of Chief Justice Marshall's words is:

> Much, too, has been said concerning the principles of construction which ought to be applied to the constitution of the United States.
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> On this subject, also, the Court has taken such frequent occasion to declare its opinion, as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;—is to repeat what has been already said more at large, and is all that can be necessary.

Id.

41. BERGER, *supra* note 1, at 371 (quoting a statement by Thomas Jefferson appearing in the Kentucky Resolution of 1798, *reprinted in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 543 (J. Elliot ed. 1836)).

42. C. CURTIS, LIONS UNDER THE THRONE 1-8 (1947); tenBroek, *supra* note 38.

43. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original).

44. 60 U.S. (19 How.) 393 (1857). It is interesting that, despite Berger's exhaustive quotation from judicial and scholarly writings on the essentiality of respect for the original intent of the framers, he never cites Chief Justice Taney's opinion in *Dred Scott*, although there is no judicial utterance that more directly or forcefully states the case for his position.

in federal court under the diversity clause.[45] Chief Justice Taney, speaking for the majority, declared that blacks

> are not included, and were not intended to be included, under the word "citizens" in the Constitution . . . . On the contrary, they were at that time [of the adoption of the Constitution] considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[46]

Although the Chief Justice acknowledged that public opinion may have changed, that free blacks may have come to be regarded as citizens, and that they may have been granted the rights and privileges of citizenship in many states, he asserted that the Court was powerless to recognize this attitudinal change because the word "citizens" could not, in 1857, be read to include those persons who were not contemplated as being citizens by the framers in 1787:[47]

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and

45. U.S. CONST. art. III, § 2: "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . ."

46. 60 U.S. (19 How.) at 404-05.

47. In his dissenting opinion, Justice Curtis challenged the Chief Justice's view that free blacks were not considered citizens by the states at the time of the adoption of the Constitution, and demonstrated by examination of judicial decisions of the period and state constitutional provisions that free blacks were then accorded the status of citizens in North Carolina, Massachusetts, New Hampshire, New York, and New Jersey. *Id.* at 571-75 (Curtis, J., dissenting). His evidence seems to show that Chief Justice Taney's postion was not soundly based, but, in light of Berger's thesis, the relevant question is not whether the Chief Justice's historical assertions were correct, but whether, on the assumption that they were correct, the Court was obliged to declare in 1857 that free blacks were not citizens within the meaning of the Constitution.

> make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.[48]

It is difficult to imagine a more unsuitable rule for the interpretation of the Constitution. Even assuming the validity of Chief Justice Taney's view of the intent of the framers with regard to the word "citizens," why should the meaning of that word not be allowed to change with the passage of time so that all persons who, in a different generation, are looked upon as citizens can be considered as being included within the scope of the word? Since the Constitution in 1787 contained no definition of citizenship, how would such an interpretation convert its "chains" to "ropes of sand"?[49] How would such an intrepretation undermine the "security for a consistent and stable [government]"?[50]

The second illustrative case is *Home Building & Loan Association v. Blaisdell*,[51] decided in 1934. In the midst of the Depression, Minnesota adopted legislation providing that courts could, if they deemed it "just and equitable," extend the period of redemption with respect to mortgage foreclosures, so long as the duration of such an extension did not continue beyond May 1, 1935.[52] As the historical evidence collected in Justice Sutherland's dissenting opinion made abundantly clear, the central purpose of the contract clause of article one, section ten of the Constitution[53] was to forbid debtor relief legislation, specifically including stay laws and mortgage moratoria.[54] However, the majority,

48. *Id.* at 426 (majority opinion).

49. *See* note 41 and accompanying text *supra.*

50. BERGER, *supra* note 1, at 3, 364 (quoting Letter from James Madison to Henry Lee (June 25, 1824), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 191 (G. Hunt ed. 1910)). The principal part of the quotation used by Berger is:

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable [government?], more than for a faithful exercise of its powers.

51. 290 U.S. 398 (1934). An excellent discussion of this decision may be found in C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 39-51 (1969) [hereinafter cited as MILLER].

52. 1933 Minn. Sess. Laws ch. 339, pt. 1, § 4.

53. U.S. CONST. art. I, § 10, cl. 1: "No State shall . . . pass any . . . Law impairing the Obligation of contracts . . . ."

54. 290 U.S. at 453-65 (Sutherland, J., dissenting, joined by Butler, McReynolds & Van Devanter, JJ.). *Cf.* C. WARREN, THE MAKING OF THE CONSTITUTION 5-6 (1928) (noting that among the principal reasons leading to the Constitutional Convention of 1787 was dissatisfaction with such prevalent state actions as those "staying process of the Courts, making property a tender in payment of debts, issuing paper money, interfering with foreclosure of mortgages.") Charles Miller states that: "The history surrounding the inclusion of the contract clause in the Constitution is clear, particularly with respect to debtor legislation of the type at issue in *Blaisdell.* That history is unequivocally opposed to the decision of the Court." MILLER, *supra* note 51, at 43.

consisting of Chief Justice Hughes, and Justices Brandeis, Stone, Roberts, and Cardozo, declined to be bound by the evidence of the framers' intent. As Charles Miller has noted,

> [T]he opinion for the Court is unusual in that it does not invoke any of the common responses that have been developed in constitutional law to deal with obstinate historical facts. The first of these responses is to devise a different interpretation of history that would permit a different outcome for the case. A second is to dispute the clarity of the historical facts and to hold, on that basis, that history is of no real aid in settling the issue. A third response is to ignore history altogether. But Chief Justice Hughes admits that history is not on his side and proceeds to decide the case on other principles.[55]

Instead of invoking these common responses, the Chief Justice declared:

> It is manifest . . . that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.
>
> 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.[56]

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55. MILLER, *supra* note 51, at 43.

56. 290 U.S. at 442-43. The opinion goes on to cite, in support of its position, the statements regarding the nature of a constitution in Chief Justice Marshall's opinion in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819), *see* notes 36, 43 and accompanying text *supra*, and in Justice Holmes' opinion for the Court in Missouri v. Holland, 252 U.S. 416, 433 (1920):

> When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . 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.

Berger discusses both *McCulloch v. Maryland* and *Missouri v. Holland*, and denies that either

In other words, where a constitutional provision written in 1787 for an agrarian society that was largely individualistic in its economic structure must be applied nearly 150 years later in a society that has become urbanized, industrialized, and highly interdependent, it is unfeasible to insist that the intention of the framers be strictly observed, particularly when the impact of such an observance would be far different from that which they could have imagined, and might be catastrophic.

Needless to say, the dissent of Justice Sutherland in *Blaisdell* advanced Berger's argument for rigid adherence to the framers' original intent[57] in as vigorous a fashion as had Chief Justice Taney's opinion in *Dred Scott*. Assuming, arguendo, that the view of history presented by these two justices is accurate, does it follow that *Dred Scott* was rightly decided and *Blaisdell* wrongly? Most students of constitutional law would shrink from drawing such a conclusion. The practical effect of accepting such a view is that if, as Chief Justice Taney claimed, the Constitution was conceived in a spirit of racism, we must either amend it or continue to read and apply it as a racist document, even if its words, such as "citizens," be perfectly neutral. Similarly, it would mean that if, as Charles Beard has argued,[58] the Constitution was written by men who wished, above all, to protect the interests of the propertied class, we must either amend it or continue to read and apply it as disfavoring the poor and disadvantaged, even if the language of the document does not require such an interpretation. There seems something radically wrong with a theory of constitutional construction that would demand such results, and, as Justice Edward Douglass White once wrote: "the natural reluctance of the mind to follow an erroneous principle to its necessary conclusion, and thus to give effect to a grievous wrong arising from the erroneous principle, is an admonition that the

constitutes a valid argument for departing from the framers' original intent. *See* BERGER, *supra* note 1, at 373-84.

57. 290 U.S. at 448-53. Justice Sutherland speaks of the changelessness of the Constitution, quoting the passage from Chief Justice Taney in Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1857), *see* note 48 and accompanying text *supra*. Berger feels constrained to comment on the fact that he and Justice Sutherland are on the same side on this question:

> Small as is my esteem of Justice Sutherland, I consider nevertheless that his dissent has a firmer historical base. My friends inquire whether I am not troubled to find myself in such company. Edmund Wilson called this "the 'bedfellow' line of argument, which relies on producing the illusion of having put you irremediably in the wrong by associating you with some odious person who holds a similar opinion." E. Wilson, *Europe Without a Baedeker* 154 (1966). To which I would add, "I would rather be right with my enemy than wrong with my friend."

BERGER, *supra* note 1, at 374 n.6. He does not indicate his reaction to being opposed to those like Justice Brandeis. *See* notes 146-148 and accompanying text *infra*.

58. C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

principle itself is wrong."[59]

For Berger, however, the fact that his principle of constitutional interpretation might have harsh results is of little consequence. He rejects the notion that the "demands of justice . . . must rise above the law,"[60] and firmly maintains that courts "were not authorized to revise the Constitution in the interests of 'justice.' "[61] Courts are only empowered to apply the law, not to revise it, and "[r]espect for the limits on power are [*sic*] the essence of a democratic society; without it the entire democratic structure is undermined and the way is paved from Weimar to Hitler."[62] This type of hyperbole repeatedly mars Berger's argument. It is difficult to see the seeds of the transition "from Weimar to Hitler" in Chief Justice Hughes's opinion in the *Blaisdell* case, or in Chief Justice Warren's opinion in *Brown v. Board of Education*,[63] which is, for Berger, the crowning example of the Supreme Court's disrespect for the limits on judicial power.[64]

It is generally possible to distinguish between sincere efforts to achieve justice and disingenuous attempts to rationalize corruption; if such a distinction could not be made, there would be no effective way of evaluating law except by majority vote—a process that may, under certain circumstances, be precisely the means for paving the way from Weimar to Hitler. There can be no doubt that the lessons of the half-century from 1887 to 1937 teach that there may be great costs in a system of law in which judges feel free to disregard the intent of the framers of the Constitution and to rely instead on their own views of what the Constitution *ought* to say, and Berger has learned those lessons well. But, as decisions like *Dred Scott* demonstrate, there may also be great costs in a system of law in which judges mindlessly apply the putative intention of the architects of the Constitution without regard for the injustices they may thereby be perpetuating. Yet, in Berger's view, nothing less than the rule of law is at stake, and, like Justice Robert Jackson, he rests his case on the proposition that " 'the rule of law is in unsafe hands when courts cease to function as courts and become organs for control of policy.' "[65]

59. Northern Securities Co. v. United States, 193 U.S. 197, 372 (1904) (White, J., dissenting).

60. BERGER, *supra* note 1, at 288.

61. *Id.* at 288-89.

62. *Id.* at 410.

63. 347 U.S. 483 (1954).

64. BERGER, *supra* note 1, at 117-33.

65. BERGER, *supra* note 1, at 298 (quoting R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 322 (1941) [hereinafter cited as JACKSON]).

The overriding concern of Berger's book is to ensure the exclusion of the courts from the policymaking process. However, a major problem with the book is the lack of congruence between this concern and the "original intent" rule of constitutional construction. In the first place, the rule would do far more than limit *judicial* power; it would also deny the authority of Congress, as the legitimate policymaking branch, to make an ambiguous grant of power serve an imperative national need. Thus, if it was not the intent of the drafters of the Fourteenth Amendment to forbid racial segregation or racial discrimination except with respect to those areas enumerated in the Civil Rights Act of 1866, strict observance of the "original intent" rule would mean that an act of Congress, passed pursuant to section five of the amendment, that sought to enforce the equal protection clause by forbidding even state-mandated segregation, would be unconstitutional. Under Berger's conception of judicial review, the Supreme Court could not passively uphold that law by deferring to the judgment of Congress. On the contrary, it would be the responsibility of the Court to declare such a law invalid because of its inconsistency with the original intent of the framers of the Fourteenth Amendment. Moreover, since it is obviously possible for courts to find a spurious "original intent," Berger's rule of interpretation would allow judges to interpolate their own policies into the Constitution by first interpolating them into the intentions of the framers. Indeed, that is exactly how the Supreme Court has often used the "original intent" rule.[66] Ironically, therefore, Berger's rule has the potential to become a vehicle for the expansion, not the contraction, of judicial power.

Furthermore, Berger's reliance on adherence to the rule of law[67] as the basic premise of the argument against constitutional change through judicial reinterpretation begs a fundamental question. It does no violence to the rule of law to change existing laws. If the Supreme Court may legitimately construe the Fourteenth Amendment as prohibiting racial segregation, even if that prohibition was not within the original intent of the framers, then such a construction itself becomes the law and is entitled to respect under the rule of law. The rule is violated only if the procedure by which the change is made is illegitimate. But expansive construction of a constitutional provision by the courts can only be rejected as illegitimate if it is first determined that

66. *See generally* MILLER, *supra* note 51; tenBroek, *supra* note 38.

67. This rule endeavors "to make certain that men in power would be governed by *law*, not the arbitrary fiat of the man or men in power." *In re* Winship, 397 U.S. 358, 384 (1970) (Black, J., dissenting) (emphasis in original). *See* BERGER, *supra* note 1, at 288-89.

all judicial interpretation of the Constitution in a manner at variance with the ascertainable original intent of the framers is impermissible regardless of both the enormous societal changes that may have taken place since the framers spoke and the fact that the interpretation may be entirely consistent with the actual language that the framers utilized in drafting the constitutional provision in question. If such judicial interpretation is not inherently impermissible, then there is no illegitimacy in the procedure by which the law is changed, and thus no deviation from the rule of law. There is, therefore, a degree of circularity in Berger's argument. Judicial interpretation of the Constitution that is inconsistent with the precise intentions of the framers is intolerable because it violates the rule of law, and it violates the rule of law because it is inconsistent with the intent of the framers.

In the final analysis, Berger asks us to accept the harsh consequences of fidelity to the original intent for two reasons: (1) to insure total judicial exclusion from policymaking, and (2) to safeguard the integrity of Article V of the Constitution,[68] which sets down what Berger sees as the only valid mechanism for effecting any change in that document. As has been observed, the first of these reasons suffers from two defects: it is unduly absolutist, in that it would forbid *all* judicial policymaking without regard to any possible justification, and it is overbroad, in that it would forbid more than simply *judicial* policymaking. The second reason seems equally dubious.

With regard to Article V, Berger, like Justice Black,[69] holds that if the originally intended meanings of individual provisions of the Constitution are now considered obsolete and no longer adequate or appropriate for modern needs or conditions, the Constitution specifies the only remedy—the formal amendment process. By creating "a written Constitution, and expressly providing for change by amendment," Berger writes, the framers "evidenced that they had created a 'fixed' Constitution, subject to change by that process alone."[70] Similarly, he adds, "Article V constitutes the *exclusive* medium of change, under the long-standing maxim that to name a particular mode is to exclude all others."[71] It is more than a little surprising to find one of the ancient canons of statutory construction put forward as an authoritative guide to constitutional interpretation, since it would be difficult today to find

68. U.S. CONST. art. V. *See* note 30 *supra.*

69. *See, e.g.*, H. BLACK, A CONSTITUTIONAL FAITH 21 (1968); Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

70. BERGER, *supra* note 1, at 291.

71. *Id.* at 318 (emphasis in original).

any judge or commentator who would be prepared to treat them as binding.[72] But, aside from that, is it true that *every* manner of constitutional change is one that would call for invocation of the procedure set forth in Article V? Although Berger would give an affirmative answer to this question, the soundness of that answer is not readily apparent. "[N]othing but disaster," Alexander Bickel has written, "could result for government under a written constitution if it were generally accepted that the specific intent of the framers of a constitutional provision is ascertainable and is forever and specifically binding, subject only to the cumbersome process of amendment."[73]

If a desired change would be unmistakably contrary to an unambiguous provision of the Constitution, there is no doubt that the only legitimate mode of accomplishing it would be by formal amendment. Thus, if the populace desires to reduce the minimum age of eligibility to serve as President from thirty-five to thirty,[74] or to allow for reduction of the salaries of federal judges through means other than taxation or failure to grant increases to match the cost of living,[75] a constitutional amendment would clearly be necessary. On the other hand, it has been established, at least through acquiescence, that departures from the original conceptions of the framers may come about without any change in the constitutional text. The transmogrification of the electoral college from a body of impartial men to a group selected on behalf of a political party in each state and pledged to vote for the candidates for President and Vice President of that party is surely a constitutional change without amendment.

72. *See, e.g.*, K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521-35 (1960), where many of the most common canons of construction are listed alongside judicial statements antithetical to each. Justice Felix Frankfurter has written that these canons cannot "save us from the anguish of judgment. Such canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 544 (1947) [hereinafter cited as Frankfurter]. Of the particular canon Berger invokes, *expressio unius est exclusio alterius*, Max Radin has written that it "is in direct contradiction to the habits of speech of most persons," adding that: "So far from being logical, as some courts have called it, it illustrates one of the most fatuously simple of logical fallacies, the 'illicit major,' long the *pons asinorum* of schoolboys." Radin, *supra* note 35, at 873-74. In a critical note to Radin's article, James M. Landis, arguing for judicial attention to, and respect for, legislative intent in the interpretation of statutes, admits that this canon is "despised," but suggests that it is not without utility if used circumspectly. Speaking of such canons, he concludes: "Like most 'rules of law,' they solve only the obvious case, and give direction for profitable thinking about the difficult ones. And it is true of them, as of most 'rules of law,' that occasions will arise when they must be broken." Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 892-93 (1930).

73. BICKEL, *supra* note 6, at 106.

74. *See* U.S. CONST. art. II, § 1, para. 5.

75. *See* U.S. CONST. art. III, § 1, para. 1.

Change through extraconstitutional evolution is related to, but distinct from, a common form of constitutional growth that is not properly described as change at all, *viz.*, where general words in the Constitution are applied to new developments that could not have been foreseen by the framers but are within the categories that they established. Thus, the expansion of the word "commerce" to include modes of transportation and communication totally unknown to and probably never anticipated by the framers is not, in any real sense, a constitutional change. The framers did not intend to exclude future modes of transit from the coverage of the Constitution, and, when those modes developed, they fell within the category of "commerce," which, as defined by John Marshall, included "commercial intercourse . . . *in all its branches.*"[76] Any claim, therefore, that Berger's argument would necessitate a formal amendment to allow Congress to regulate automobile, rail, or air travel, or telephone, telegraph, radio, or television is wide of the mark. It would not. Justice Sutherland, who presaged Berger's argument forty years earlier in his dissent in *Home Building & Loan Association v. Blaisdell*,[77] was careful to draw this distinction. Citing the appropriateness of the expansion of the commerce clause to cover modern technological developments, he noted: "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."[78]

More problematical are changes that are not unmistakably contrary to a constitutional provision, but which require a strained reading of the words of that provision. If the strained reading is more consistent with the intent of the framers than the words they actually employed, Berger would applaud the interpretation, deny that any change was involved, and reject the need for formal amendment,[79] thereby giving actual application to Justice Frankfurter's quip "that only when legisla-

76. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-90 (1824) (emphasis added).

77. 290 U.S. 398 (1934). *See* notes 51-57 and accompanying text *supra.*

78. *Id.* at 451 (Sutherland, J., dissenting, joined by Butler, McReynolds & VanDevanter, JJ.) (emphasis in original). *But cf.* tenBroek, *supra* note 38, at 413-18, in which it is powerfully argued that the distinction between the meaning and the application of a constitutional provision is a fiction. "The meaning of terms cannot be changeless if their application is extensible because their meaning is not only determined by, but is the extent of their application." *Id.* at 416.

79. Berger states: "On traditional canons of interpretation, the intention of the framers being unmistakably expressed, that intention is as good as written into the text." BERGER, *supra* note 1, at 7 (citing Hawaii v. Mankichi, 190 U.S. 197, 212 (1903): "A thing may be within the letter of a statute and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law.").

tive history is doubtful do you go to the statute."[80] Under Berger's approach, therefore, whether the Court was justified in reading the Fourth Amendment[81] as a guarantee against the practice of indiscriminate warrantless wiretapping,[82] despite the fact that this practice involves no physical search or invasion of any "persons, houses, papers, [or] effects" and no seizure of any tangible items, would depend on whether the framers meant only to provide constitutional protection against the specific transgressions mentioned, as Justice Black argued,[83] or instead meant to provide a broad safeguard against improper police surveillance by whatever techniques technology might make available. But to focus on this question is to ignore that, in 1791, the framers could not have imagined how much more destructive of personal security wiretaps could be than general warrants or writs of assistance. Paying exclusive attention to their intent would omit from judicial consideration not only all modern knowledge of the efficacy of existing or potential systems of surveillance, but also all consideration of the values that we assign to individual privacy and dignity, on the one hand, and, on the other hand, the importance that electronic eavesdropping may have in the detection of reprehensible crimes that might otherwise remain unsolved. If these considerations must be deemed irrelevant, the Constitution would be a sterile document, indeed. Certainly Justice Brandeis was not prepared to disregard these considerations when the wiretapping issue first came to the Supreme Court, and, in his classic dissent in *Olmstead v. United States,*[84] he called for an interpretation of the Fourth Amendment in light of modern needs, not historical evidence.[85]

80. Frankfurter, *supra* note 72, at 543.

81. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

82. Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).

83. Katz v. United States, 389 U.S. 347, 365-67 (1967) (Black, J., dissenting); Berger v. New York, 388 U.S. 41, 71-77 (1967) (Black, J., dissenting).

84. Olmstead v. United States, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting).

85. In the course of his dissent, Justice Brandeis quoted the following passage from Justice McKenna's opinion for the Court in Weems v. United States, 217 U.S. 349 (1910):

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be

Also in the category of cases involving a strained reading of the text of a constitutional provision is *Home Building & Loan Association v. Blaisdell*.[86] The language of article one, section ten, forbidding any state from passing a "law impairing the obligation of Contracts"[87] is not so unambiguous that the Minnesota mortgage moratorium law could be said unmistakably to contravene it. Nevertheless, a strained reading of the contract clause is certainly required in order to sustain the state legislation. Moreover, this strained reading, whatever its appropriateness in the context of the Great Depression, cannot honestly be justified by the claim that it comports with the intent of the framers.

Blaisdell demonstrates that there may be compelling reasons for a judicial reluctance to be bound by the intent of the framers even when a deviation from that intent requires a conscious distortion of the actual words of the Constitution. If that is true, the reluctance must be all the more compelling where the deviation from the framers' intent requires *no modification whatever* of the constitutional text. Thus, in framing the Fourteenth Amendment, the members of the Thirty-Ninth Congress wrote that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[88] This is a broad guarantee of equality, but Berger insists that, despite its comprehensive language, it must be read to guarantee equality only with regard to the specific rights enumerated in the Civil Rights Act of 1866,[89] because these were the only rights the framers sought to protect.[90] Indeed, Berger presents convincing evidence that the Thirty-Ninth Congress had a narrow purpose, and meant to protect neither political equality by guaranteeing the right to vote nor social equality by prohibiting the segregation of the races. Yet even if one concedes that the members of Congress were concerned only with providing protection for a few narrowly defined rights, the question remains as to why they wrote into the Constitution the expansive language of the equal protection clause rather than specifically identifying the rights that they sought to guarantee. To this question, Berger has only one answer, which he offers twice. He first writes:

converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

Id. at 373, *quoted in* Olmstead v. United States, 277 U.S. 438, 472-73 (1928) (Brandeis, J., dissenting).

86. 290 U.S. 398 (1934). *See* notes 51-56 and accompanying text *supra*.

87. U.S. CONST. art. 1, § 10, cl. 1.

88. U.S. CONST. amend. XIV, § 1. *See* note 18 *supra*.

89. Act of April 9, 1866, ch. 31, 14 Stat. 27.

90. BERGER, *supra* note 1, at 99-116, 166-92.

> [There is] all but universal identification of § 1 [of the Fourteenth Amendment] with the Civil Rights Act. Why, then, were not the terms of the Act incorporated bodily in § 1? Constitutional drafting calls for the utmost compression, avoidance of the prolixity of a code; "the specific and exclusive enumeration of rights in the Act," as Bickel remarked, presumably was considered "inappropriate in a constitutional provision."[91]

Subsequently, he states: "A Constitution, Chief Justice Marshall stated, cannot have the 'prolixity of a code'; there the drive is for the most compressed utterance."[92]

But avoidance of prolixity is not an end in itself. If the framers of a constitutional provision wish it to be read narrowly by future courts, they are free to be as specific as necessary in order to insure that end.

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91. *Id.* at 39 (citing Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 61 (1955) [hereinafter cited as Bickel]). It is worth noting that, immediately following the language quoted by Berger, Bickel went on to write:

> These bits and pieces of additional evidence do not contradict and could not in any event override the direct proof showing the specific evils at which the great body of congressional opinion thought it was striking. But perhaps they provide sufficient basis for the formulation of an additional hypothesis. It remains true that an explicit provision going further than the Civil Rights Act could not have been carried in the 39th Congress; also that a plenary grant of legislative power such as the Bingham amendment would not have mustered the necessary majority. But may it not be that the Moderates and the 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? . . . It had both sweep and the appearance of a careful enumeration of rights, and it had a ring to echo in the national memory of libertarian beginnings. To put it another way, the Moderates . . . could go forth and honestly defend themselves against charges that on the day after ratification, Negroes were going to become white men's "social equals," marry their daughters, vote in their elections, sit on their juries, and attend schools with their children. . . . In the future, the Radicals could, in one way or another, put through such further civil rights provisions as they thought the country would take, without being subject to the sort of effective constitutional objections which haunted them when they were forced to operate under the thirteenth amendment.
>
> . . . [N]o specific purpose going beyond the coverage of the Civil Rights Act is suggested; rather an awareness on the part of these framers that it was *a constitution* they were writing, which led to the choice of language capable of growth.

Bickel, *supra*, at 61-63. Berger subjects Bickel's hypothesis to lengthy attack and rejects the "speculation that there was an unrevealed purpose to confer broader powers in the future." BERGER, *supra* note 1, at 110. But surely the members of Congress must have seen that the language they were using in the amendment was an open invitation to such speculation, and that, as long as there was room for speculation, the possibility existed that a broader interpretation would be given to the words of the amendment in the future.

92. BERGER, *supra* note 1, at 110. The full quotation from Chief Justice Marshall's opinion in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819), is:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.

The framers of the Fourteenth Amendment obviously understood this, for the provisions of sections two, three, and four of the amendment are quite specific and detailed, and do partake of the "prolixity of a legal code." If these men wanted to make sure that section one was applied by future generations only to protect the rights enumerated in the Civil Rights Act, it would have taken only a few additional lines to do so, and their intent would have been made plain.[93] Thus, the significance of their deliberate failure to take this simple course cannot be overlooked; the omission strongly suggests that they desired a constitutional provision that would be adaptable to future exigencies. To recall the words of Max Radin, "the legislature can not both have its cake and eat it. It can not indulge itself in using large, round, sonorous words and then complain that courts do not treat them as precise, definite, and unreverberant."[94]

Avoidance of prolixity serves not to insure that the Constitution is short, as Berger seems to believe, but rather to insure that it is flexible. Chief Justice Marshall in *McCulloch v. Maryland*[95] speaks of "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs,"[96] and adds that for the framers to have inserted detailed provisions "would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."[97] No other explanation of the use of "large, round, sonorous words" makes sense. Berger attempts to discredit Chief Justice Marshall's argument in *McCulloch* by describing it as "a self-serving claim of power to amend the Constitution,"[98] and arguing that the Chief Justice himself firmly repudiated any such implication in his pseudonymous defense of the *McCulloch* decision recently discovered by Professor Gerald Gunther.[99] However, Berger's use of the term "self-serving" to describe the *McCulloch* opinion, rather than Chief Justice Marshall's defense of it, is puzzling. Certainly, if one's writings are attacked by powerful political foes who denounce them as an as-

93. Alfred Kelly found the framers' choice of broad language for § 1 of the Fourteenth Amendment to be particularly significant. *See* Kelly, *supra* note 14, at 1071-86. Berger examines and rejects Kelly's suggestion, concluding that "there is no evidence of a concealed purpose" to include more comprehensive protection in the Fourteenth Amendment than in the Civil Rights Act. BERGER, *supra* note 1, at 112.

94. Radin, *supra* note 35, at 884.

95. 17 U.S. (4 Wheat.) 316 (1819).

96. *Id.* at 415 (emphasis in original).

97. *Id.*

98. BERGER, *supra* note 1, at 375.

99. JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (G. Gunther ed. 1969).

sault upon the emotion-laden principle of states' rights, to defend them by denying that they constitute such a threat is clearly self-serving. And, because Berger means to suggest by the use of that adjective that *McCulloch* was an assertion of *judicial* "power to amend the Constitution," it is necessary to emphasize that the significance of Chief Justice Marshall's dicta is not that they permit expansion of federal judicial power, but that they provide the groundwork for the enormously broad development of *congressional* power that has since occurred. If anything, *McCulloch* is an abnegation of judicial authority to limit the powers of Congress, and its critics recognized it as such.[100]

To permit courts to construe constitutional provisions in a manner not specifically intended by the framers themselves concededly accords the judiciary some degree of policymaking power. Admittedly, power, once conceded, is open to abuse, and such abuses must be guarded against. Indeed, a very cogent argument can be made that both the Warren and Burger Courts have often extended their authority to give meaning to the Constitution past the point that is compatible with a proper role for the judicial branch in a democratic society.[101] Therefore, efforts to find and describe limits to the proper scope of judicial

100. *See, e.g.*, C. WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 193-94 (1935):

> Present-day opponents of the Court center their dissatisfaction on those decisions of the Court which have held Acts of Congress *invalid*. It must be remembered, however, that for the first seventy-five years of the Court's existence, the attacks made upon it by its opponents were due to its decisions holding Acts of Congress *valid*; and it was because the Court upheld Congress in passing statutes, deemed by numbers of the people to violate the rights of individuals and of the States, that the Court was subjected for so many years to savage antagonism by considerable classes and sections of the country. For seventy-five years, it was the encroachments by Congress, supported by the Court, that were feared—and not at all encroachments by the Court in derogation of Congressional power.

(Emphasis in original.)

101. For cases that may exemplify judicial adoption of such an incompatible role, *see, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (Court assumed the authority to decide whether the national interest in avoiding corruption in presidential elections will allow limitations to be placed on expenditures in election campaigns on behalf of the candidates of the major political parties even though the political process is available to correct legislative excesses significantly burdening the ability of either party to advocate the candidacy of its nominees); Roe v. Wade, 410 U.S. 113 (1973) (Court evinced a willingness to draw lines establishing the precise times during the period of a woman's pregnancy when the state's interest in her health and in the potential life of the fetus override the constitutional right to terminate that pregnancy that was found by the justices to be protected by the due process clause of the Fourteenth Amendment); Kirkpatrick v. Preisler, 394 U.S. 526 (1969) (Court insisted that U.S. CONST. art. 1, § 2, as interpreted by prior decisions, requires a state to seek to achieve precise mathematical equality in congressional districting plans); Malloy v. Hogan, 387 U.S. 1 (1964) (Court indicated that the Bill of Rights applies to the states exactly as it does to the federal government, regardless of whether all aspects of the incorporated provisions are essential to fundamental fairness).

policymaking would be entirely appropriate.[102] But that is not the purpose of Berger's book. He does not attack alleged abuses of judicial policymaking; rather, he objects to *all* such policymaking, and thus puts himself in opposition to decisions that are plainly among the greatest in American constitutional history, and which few persons would wish to see reversed.[103]

But why is it not sufficient, as Berger asserts, to rely on the amending process to remedy all perceived constitutional defects? In the first place, if all that needs to be amended is the original intention of the framers, it would be difficult to know how to amend the document. If Chief Justice Taney was correct in *Dred Scott v. Sandford*[104] that the word "citizens" in Article III was intended to encompass only whites, the flaw is not in the word itself, but in the artificially restrictive meaning that the framers gave it. If the term "equal protection of the laws" does not apply to state laws imposing social inequalities or discrimination with regard to voting, new words are not what is needed to correct the deficiency. As Alexander Bickel has correctly noted, "equal protection of the laws [is] a clause which is plainly capable of being applied to all subjects of state legislation."[105] Should Congress be obliged to propose to the states for ratification a constitutional amendment identical in language to an existing provision merely to provide the judiciary with evidence of a different intent?

In the second place, as has already been noted,[106] the "original intent" rule was developed initially as a rule of interpretation of documents far different from constitutions. If, as the Supreme Court has soundly observed, constitutions are not "ephemeral enactments, designed to meet passing occasions,"[107] there would seem to be every reason to avoid mindless transfer to the area of constitutional interpre-

102. The best effort to do so is still Justice Stone's footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). *See* A. MASON, HARLAN FISKE STONE, PILLAR OF THE LAW 511-16 (1956).

103. Even Berger would now be unwilling to go back to what he sees as the original intention of the framers of the Fourteenth Amendment and rule that racial segregation is not forbidden by the Constitution. He writes: "It would, however, 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. That is more than the courts should undertake and more, I believe, than the American people would desire." BERGER, *supra* note 1, at 412-13. Yet he admits that had he been on the Court when these cases first arrived, he "should have felt constrained to hold that the relief sought lay outside the confines of the judicial power." *Id.* at 412.

104. 60 U.S. (19 How.) 393 (1857). *See* notes 44-48 and accompanying text *supra.*

105. Bickel, *supra* note 91, at 60-61.

106. *See* notes 32-35 and accompanying text *supra.*

107. Weems v. United States, 217 U.S. 349, 373 (1910). *See* note 85 *supra.*

tation of a rule that is justified in the context of statutory construction by the overriding fact that if the legislature finds its previous intent to be inadequate, it can alter it by the simple expedient of passing a new law. No one expects a statute to endure for ages to come.

Third, while Berger recognizes that a constitution "cannot have 'the prolixity of a [legal] code,' "[108] his rule would result, at best, in a Constitution that is exceedingly prolix. If every desired deviation from the original intention of the framers were to necessitate a constitutional amendment, the number of amendments that would have become necessary in the past 190 years (sometimes to change meanings without changing words) would be extraordinarily large or else the Constitution would have come to be looked upon as an intolerable barrier to sound government. As Edward Levi has so clearly observed:

> It may be suggested that the doctrine should be otherwise; that as with legislation so with a constitution, the interpretation ought to remain fixed in order to permit the people through legislative machinery, such as the constitutional convention or the amending process, to make a change. But the answer lies not only in the difficulties of obtaining an amendment, nor the difficult position of a court which obdurately refuses to interpret common words in a way ordinary citizens believe to be proper. The more complete answer is that a written constitution must be enormously ambiguous in its general provisions. If there has been an incorrect interpretation of the words, an amendment would come close to repeating the same words. What is desired is a different emphasis, not different language. This is tantamount to saying that what is required is a different interpretation rather than an amendment.[109]

Although Berger scorns those who believe that it is one of the tasks of the federal courts to insure that the Constitution is not substantially at variance with broadly held conceptions of justice,[110] the maintenance of a constitutional system requires, at a minimum, that the people perceive that the document is fundamentally just, and that some institution be responsible for preserving that perception. It is too facile to say that the amending process can suffice for this purpose. To begin with, there are times when the amending process can only be invoked too late. For example, the national attention focused on the first case

108. BERGER, *supra* note 1, at 110. *See* note 92 *supra.*

109. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 42 (1949). Similarly, Alexander Bickel has argued: "If a constitution purports to settle, in detail and for all time, most of the issues that are likely to be the grist of the political mill, it invites either abandonment or frequent amendment. The familiarity of amendment will breed a species of contempt and incapacitate the document for symbolic service." BICKEL, *supra* note 6, at 105.

110. *See, e.g.*, BERGER, *supra* note 1, at 288-89.

involving the Scottsboro boys[111] was a reflection of the widespread belief that the defendants had been given a trial that was nothing more than a sham. Although Berger categorically rejects Justice Harlan's statement that " 'The Due Process Clause of the Fourteenth Amendment requires that those [State] procedures be fundamentally fair in all respects,' "[112] it would have been a stunning, and conceivably fatal, blow to the conception of the Constitution as fundamental law for the Supreme Court to have held that while the trial of the Scottsboro boys violated the most basic notions of fair procedure, it was not one of the specific intentions of the framers of the due process clause to require that the states observe fair procedures, and thus no relief was possible. Nor would the adverse impact of that blow have been mitigated by an assertion that if the general public now thought differently about what the Constitution should require, they were free to ask their representatives to initiate an amendment after the executions had taken place.

In addition, Berger is far too willing to resign himself to the prospect that if the extraordinary majority necessary to amend the Constitution cannot be mustered, the original intention of the framers must be retained and enforced, even if it grew out of sentiments of the grossest racism or some other equally discredited attitude. He rejects the wise and sound defense of *Brown v. Board of Education*[113] offered by Archibald Cox: "To have adhered to the doctrine of 'separate but equal' would have ignored not only the revolution sweeping the world but the moral sense of civilization. Law must be binding even upon the highest court, but it must also meet the needs of men and match their [ethical] sensibilities."[114] Berger's response to this statement is: "I cannot bring myself to believe that the Court may assume a power not granted in order to correct an evil that the people were, and remain, unready to cure."[115] He also decries the view that "the cumbersomeness of the [amending] process authorizes the servants of the people informally to amend the Constitution without consulting them!"[116] Thus, if one more than one-quarter of the states were unwilling to ratify an amendment that was specifically intended to mean what the Fourteenth Amendment actually says, the vast majority of the nation would have to suffer

111. Powell v. Alabama, 287 U.S. 45 (1932).

112. BERGER, *supra* note 1, at 213-14 (quoting Duncan v. Louisiana, 391 U.S. 145, 172 (1968) (Harlan, J., dissenting)).

113. 347 U.S. 483 (1954).

114. *Id.* at 408 (quoting A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 109-10 (1976) [hereinafter cited as COX]).

115. *Id.* at 409.

116. *Id.* at 315-16.

under a fundamental law that embodied and perpetuated what they recognized as a fundamental injustice. That would hardly be compatible with the notion that the Constitution should reflect the best ideals and finest aspirations of the nation. Under that approach, it might just as easily reflect its basest prejudices—all in the name of limiting the power of judges.

It is difficult to know what to say to someone who rejects the thoughtful statement of Archibald Cox quoted above. Justice Black, who advanced the same position now taken by Berger in a dissenting opinion in 1965, observed in that opinion that "many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times."[117] It is pointless here to attempt to improve on those "rhapsodical strains," particularly since Berger, whose scholarship is quite comprehensive, has quoted the most persuasive of them,[118] and has dismissed them all because they permit some measure of judicial policymaking. He writes:

> It does not dispose of the uncomfortable historical facts to be told that "the dead hand of the past need not and should not be binding,"[119] that the Founders "should not rule us from their graves."[120] To thrust aside the dead hand of the Framers is to thrust aside the Constitution. The argument that new meanings may be given to words employed by the Framers aborts their design; it reduces the Constitution to an empty shell into which each shifting judicial majority pours its own preferences.[121]

Of course the provisions of the Constitution ought to be treated with respect and reverence. Of course judges ought not to be free to manipulate its words at will to arrive at whatever results their personal inclinations commend to them. Of course Madison,[122] Jefferson,[123]

117. Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

118. *E.g.*, LEVY, *supra* note 37, at 17; Curtis, *The Role of the Constitutional Text*, in SUPREME COURT AND SUPREME LAW 64-70 (E. Cahn ed. 1954); McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 212-16, 290-306 (1945) [hereinafter cited as McDougal & Lans]; Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583 (1973) [hereinafter cited as Miller].

119. JUDICIAL REVIEW AND THE SUPREME COURT 143 (L. Levy ed. 1967).

120. Miller, *supra* note 118, at 601.

121. BERGER, *supra* note 1, at 314-15.

122. *See* note 50 *supra*.

123. *See* note 41 and accompanying text *supra*.

Hamilton,[124] Marshall[125] and others involved in the drafting or ratification of the Constitution insisted that the document should be taken seriously, and George Washington, in his Farewell Address, urged that modifications in the Constitution be brought about by "amendment," not by "usurpation."[126] It was imperative to the preservation of the union that the Constitution not be disregarded whenever one of its provisions proved inconvenient to some political or sectional faction. And no less respect is due today to the words of the Constitution and the intent of its framers. They are not lightly to be given less than controlling weight when the document is interpreted. Nevertheless, a constitution is intended to endure for ages to come. The dilemma presented by these opposing considerations is nothing more than another instance of the age-old legal problem of reconciling the essential need for stability and security with the no less essential need for adaptability and growth. Thus, it is not enough to advert to the need for fidelity to the original intent of the framers or to insist upon devotion to the provisions of the Constitution. For one thing, it is often possible to find "the same justices and the same statesmen, on different occasions for different problems"[127] proclaiming, at one time, the case for stability and, at another time, the case for growth—as Berger demonstrates by showing that those who may have most effectively made the argument for a flexible and adaptable Constitution have, on other occasions, taken the opposite position.[128] The same justices and the same statesmen advocate both views because it is vital that *both* views be advocated. The fundamental failure of Berger's book is that, while it makes one case eloquently and fervently, it does not recognize the manifest essentiality of the other. It reduces what should be an agonizing dilemma to a straightforward issue of right and wrong.[129] Berger sees no middle ground between, for example, defining the word "citizens" as Chief

124. *See, e.g.*, THE FEDERALIST, No. 78, 507-09 (Modern Library ed. 1937) (A. Hamilton). Significantly, although Berger uses Hamilton's essay as an argument for the limitation of judicial power, BERGER, *supra* note 1, at 353-54, Hamilton was there arguing for the power of judicial review as a means of allowing judges to control the power of the legislature, and to enhance their own authority.

125. *See* note 40 *supra.*

126. 356 THE WRITINGS OF GEORGE WASHINGTON 229 (J. Fitzpatrick ed. 1940).

127. McDougal & Lans, *supra* note 118, at 214.

128. For this purpose, Berger focuses on Justices Marshall, Holmes and Frankfurter. *See* BERGER, *supra* note 1, at 373-86.

129. Archibald Cox has written:

> The dilemma [of reconciling the rule of law with the imperatives of justice] lies at the root of Anglo-American jurisprudence. There have always been occasions when the courts, to shape the law to these objectives [justice and morality], have had to pay the price of revealing that judges sometimes make law to suit the occasion. Nor should we forget that not to pay that price may even defeat the object of obtaining voluntary compliance, because law, to command consent, must deserve it.

COX, *supra* note 114, at 110.

Justice Taney did, to exclude blacks, and reducing the Constitution to an empty shell. For those who think there is, because there must be, a middle ground, he has nothing to say.

That the formal amending process is not, by itself, an adequate vehicle for all constitutional change is a conclusion that is supported by the evidence of history. Berger bravely states that had he been on the Court when it was called on to decide the issues of whether the right to vote or to serve on juries or to be free from a state-mandated system of racial segregation was protected by the Fourteenth Amendment, he "should have felt constrained to hold that the relief sought lay outside the confines of the judicial power,"[130] and his convictions appear sufficiently firm to have led him to do exactly that. But, happily, the men who have actually served on the Supreme Court have not had such strong resolve. Even those most committed to the philosophy of judicial self-restraint have seen fit to stretch the words of the Constitution or to depart from the original intent of the framers when the justification seemed to them great enough. Thus, although Chief Justice John Marshall may have abjured the existence of judicial authority to change the Constitution in his response to the critics of *McCulloch v. Maryland*,[131] and may have written in a judicial opinion that "the intention of the instrument must prevail,"[132] he nevertheless manifestly went beyond the intent of the framers in holding that a state-granted charter was a contract within the meaning of the contract clause of article one, section ten, as Berger specifically concedes.[133]

Other examples may be offered. Justice Oliver Wendell Holmes, who stands as a symbol of judicial self-restraint, not only wrote in *Missouri v. Holland*[134] one of the most powerful and moving statements concerning the need for an adaptable Constitution, but also was willing to invoke the concept of substantive due process when it proved necessary to defend freedom of speech against majority intolerance. The changes in his position on the First Amendment are instructive. In *Patterson v. Colorado*,[135] he had declared that "the main purpose" of the constitutional guarantee of freedom of speech was to prohibit previous restraints, and that it therefore did not "prevent the subsequent punish-

130. BERGER, *supra* note 1, at 412. *See* note 103 *supra.*

131. JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 209 (G. Gunther ed. 1969).

132. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting). *See* note 40 *supra.*

133. BERGER, *supra* note 1, at 386. The leading case for Chief Justice Marshall's interpretation of the contract clause is Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

134. 252 U.S. 416, 433 (1920). *See* note 56 *supra.*

135. 205 U.S. 454 (1907).

ment of such [speech] as may be deemed contrary to the public welfare."[136] However, during World War I, when federal and state sedition statutes were utilized with dismaying vigor to imprison socialists and pacifists who had the temerity to oppose the nation's participation in the hostilities,[137] Justice Holmes evidently began to question whether the scope of the guarantee intended by the framers—the prohibition of only previous restraints[138]—was adequate. In *Schenck v. United States*,[139] which set forth the "clear and present danger" test, he said: "It may well be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*."[140] While the free speech claims were rejected in *Schenck* and in two subsequent cases in which Holmes wrote the majority opinions,[141] by the end of 1919 he was prepared to invoke the "clear and present danger" test in his dissent to a decision upholding the convictions and heavy sentences meted out to individuals who had printed "poor and puny anonymities" in opposition to the use of Allied troops to thwart the Russian Revolution.[142] And, by 1925, Justice Holmes had come to the point where he could maintain that the Constitution prohibited the *states* from abridging freedom of speech—a clear instance of substantive due process.[143] It should also not be forgotten that Justice Holmes wrote the opinion of the Court in the first case in which it was held that the Fourteenth Amendment protected the right to vote,[144] a position that Berger firmly maintains is contrary to the intent of the framers.[145]

Justice Louis Brandeis, whose credentials as a self-restrained jurist are equally unimpeachable, joined Justice Holmes in his First Amend-

136. *Id.* at 462.

137. *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 3-195 (1941).

138. For compelling evidence of this disheartening proposition, *see generally* L. LEVY, LEGACY OF SUPPRESSION (1960).

139. 249 U.S. 47 (1919).

140. *Id.* at 51-52 (citation omitted).

141. Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919).

142. Abrams v. United States, 250 U.S. 616, 628-29 (1919) (Holmes, J., dissenting). In *Abrams*, Justice Holmes wrote that history contradicted the view "that the First Amendment left the common law as to seditious libel in force." *Id.* at 630. But the history to which Justice Holmes was referring was not the legislative history of the First Amendment, but that of the period following its adoption, for his evidence of that history was the nation's "repentance for the Sedition Act of 1798." *Id.*

143. Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting).

144. Nixon v. Herndon, 273 U.S. 536 (1927).

145. BERGER, *supra* note 1, at 166-67.

ment dissents, and, in fact, preceded the latter in his willingness to hold that the guarantee of free speech was applicable to the states through the due process clause of the Fourteenth Amendment.[146] When the question of the constitutionality of federal wiretapping came before the Supreme Court, Justice Brandeis, in dissent, saw neither the failure of the literal language of the Fourth Amendment to cover wiretaps nor the absence of evidence that the framers intended any broader meaning for the words as a barrier to holding the practice to be violative of the Constitution as an unreasonable search and seizure.[147] And it was Justice Brandeis who—as Alexander Bickel has informed us—wished to add the following sentences to one of his judicial opinions, and was restrained from doing so only because Chief Justice Taft, who joined the remainder of Justice Brandeis' opinion, said that he could not accede to them:

> Our Constitution is not a strait-jacket. It is a living organism. As such it is capable of growth—of expansion and of adaptation to new conditions. . . . Because our Constitution possesses the capacity of adaptation, it has endured as the fundamental law of an ever-developing people.[148]

The earliest cases holding state criminal procedures to be in violation of the due process clause of the Fourteenth Amendment were not written by justices bent on shaping the Constitution to fit their personal predilections, although Berger dismisses this position as "a judicial construct pure and simple; no such mandate can be drawn from the history of the Amendment."[149] Justice Holmes spoke for the Court in *Moore v. Dempsey*,[150] which held that the Fourteenth Amendment would be violated by a trial held in an atmosphere of mob violence such "that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion."[151] Chief Justice Hughes spoke for a unanimous Court in *Brown v. Mississippi*,[152] which reversed the murder convictions of three blacks based upon confessions obtained by whipping them until they "con-

146. Gilbert v. Minnesota, 254 U.S. 325, 343 (1920) (Brandeis, J., dissenting).

147. Olmstead v. United States, 277 U.S. 438, 471-79 (1928) (Brandeis, J., dissenting).

148. BICKEL, *supra* note 6, at 107. The opinion to which the sentences would have been added was in United States v. Moreland, 258 U.S. 433, 441-51 (1922) (Brandeis, J., dissenting, joined by Taft, C.J.). Although Justice Brandeis acceded to Chief Justice Taft's suggestion, he stated in a note to the Chief Justice that he "believe[d] strongly in the views expressed." BICKEL, *supra* note 6, at 108.

149. BERGER, *supra* note 1, at 214.

150. 261 U.S. 86 (1923).

151. *Id.* at 91.

152. 297 U.S. 278 (1936).

fessed in every matter of detail as demanded by those present."[153] The Court held that the use of torture to obtain a confession was a violation of the due process clause of the Fourteenth Amendment: "The rack and torture chamber may not be substituted for the witness stand."[154]

It was Justice Harlan Fiske Stone, the author of the brilliant statement in support of judicial self-restraint in his dissent in the case of *United States v. Butler*,[155] who, two years later, added a footnote to his opinion for the Court in the *Carolene Products* case[156] suggesting the propriety of judicial activism in cases involving restrictions on participation in the political process or laws aimed at discrete and insular minorities, and who alone dissented on Fourteenth Amendment grounds when the Court at first upheld a state law requiring school children to salute the flag.[157] When that decision was later reversed in *West Virginia State Board of Education v. Barnette*,[158] it was Justice Robert Jackson, whose attack on judicial policymaking is quoted with approval by Berger,[159] who wrote the majority opinion.

By any measure, Justice Felix Frankfurter was the most outspoken opponent of judicial policymaking of any justice who has sat on the Court in the last forty years.[160] Yet Berger points out that his judicial philosophy was not sufficient "to overcome his confidence in his own wisdom when he ascended to the bench."[161] Berger's disappointment is based on the evidence brought to light by Richard Kluger in his study of the events culminating in the Supreme Court's decision in *Brown v. Board of Education*[162] showing that Justice Frankfurter played an instrumental role in bringing about the final result.[163] "Frankfurter," Berger writes, "the sworn foe of subjective judgment, who disclaimed enforcement of his own 'private view rather than the consensus of society's opinion,' had made up his mind 'from the day the cases were

153. *Id.* at 282.

154. *Id.* at 285-86. One may wonder whether, had Berger been on the Court in 1936, he would really have contended that because the framers of the Fourteenth Amendment did not intend the due process clause to apply to state criminal procedures, the state *could*, as far as federal constitutional law was concerned, substitute the "rack and torture chamber" for the witness stand.

155. 297 U.S. 1, 78-88 (1936) (Stone, J., dissenting).

156. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

157. Minersville School Dist. v. Gobitis, 310 U.S. 586, 601-07 (1940) (Stone, J., dissenting).

158. 319 U.S. 624 (1943).

159. JACKSON, *supra* note 65, *quoted* in BERGER, *supra*, note 1, at 2, 281, 298.

160. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-71 (1943) (Frankfurter, J., dissenting).

161. BERGER, *supra* note 1, at 386.

162. 347 U.S. 483 (1954).

163. R. KLUGER, SIMPLE JUSTICE 596-602, 683-87 (1976) [hereinafter cited as KLUGER].

taken' that segregation must go!"[164] And he did so despite the fact that "judges are not required by Article VI, § 3, to take an oath to do justice but rather 'to support this Constitution' "[165]—that is, in Berger's view, to observe the original intent of the framers.

Berger finds it disheartening that judges who claim to eschew a policymaking role may sometimes act differently:

> To do what one disclaims as he acts is a reproach to any man, all the more when it is done by the oracles of the law whom we are urged to regard as the "national conscience." Of no one should more fastidious morality be required than of the Supreme Court.[166]

But none of the justices mentioned above is open to the charge of hypocrisy or immorality for the way he exercised judicial power in the cases discussed. The role of a Supreme Court justice demands a measure of schizophrenia. It requires recognition of the need for stability and adherence to the text of the Constitution, and, where possible, the ascertainable intent of its framers. But there are also times when it is appropriate, if not necessary, to ignore the intent of the framers and even to give a strained construction to the words of the text in the interests of justice or urgent necessity. Refusal to be bound by the original intent in such cases is all the more justifiable when the framers used general words capable of being expanded to cover more than the specific matters that they had directly in mind. When we look back on the last six decades of American constitutional history, it is hard to come to the conclusion that the dissents of Justices Holmes and Brandeis in the free speech cases, or Justice Brandeis' argument that the Fourth Amendment should be interpreted to include protection against wiretapping, or decisions such as *Nixon v. Herndon*,[167] *Home Building & Loan Association v. Blaisdell*,[168] *Brown v. Mississippi*,[169] *West Virginia State Board of Education v. Barnette*[170] or *Brown v. Board of Education*,[171] represent unworthy moments for the judiciary. On the contrary, most students of constitutional history would be likely to

164. BERGER, *supra* note 1, at 129. The first internal quotation, slightly modified to fit grammatically into Berger's sentence, is from Justice Frankfurter's concurring opinion in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring). The second is from KLUGER, *supra* note 163, at 601, quoting a statement of one of Justice Frankfurter's former law clerks.

165. BERGER, *supra* note 1, at 289.

166. *Id.* at 386.

167. 273 U.S. 536 (1927). *See* note 144 and accompanying text *supra.*

168. 290 U.S. 398 (1934). *See* notes 51-57 and accompanying text *supra.*

169. 297 U.S. 278 (1936). *See* note 152-54 and accompanying text *supra.*

170. 319 U.S. 624 (1943). *See* note 158 and accompanying text *supra.*

171. 347 U.S. 483 (1954).

agree that the Constitution and the polity are stronger because of them. If the choice is, as Berger frames it, between maintaining a system that tolerates some room for judicial policymaking and thus runs the risk of abuses, or one which eliminates such policymaking altogether and thus makes impossible decisions such as those listed above, most persons would probably choose the former.

Berger understands that his arguments will not be persuasive to students of constitutional law, but he assumes this is merely because of "their rapture over the Warren Court's adoption of *their* predilections."[172] On the other hand, he believes that the American public is not so enthusiastic about the Warren Court's accomplishments that it would be willing to abandon the fundamental principles of a democratic society in order to accommodate judicial discretion in the interpretation of the Constitution:

> Were the issue put squarely to the American people whether they would elect to have the Court strike the "shackles" of the past or to live under the constraints of the Constitution, I doubt not that they would resoundingly prefer the "idiosyncratic purposes of the Framers" to those of the Justices.[173]

However, how one asks the question makes all the difference. If the American people were to be asked whether the Supreme Court should decide on the basis of the Constitution or of the justices' personal preferences, an overwhelming majority undoubtedly would select the former. If, however, they were asked whether the Court should interpret the words of the Constitution according to current common understanding or according to the specific meaning intended by the framers, the vote would be much closer, and, if the latter alternative were altered so that the choice was whether the Court should read the words of the Constitution according to the specific meaning intended by the framers *190 years ago*, the vote would likely swing to the other side. And, if the question were asked whether the Court should interpret the Constitution according to the intent of the framers, even if changed circumstances might cause that interpretation to yield substantial injustice, or according to the meaning that would yield what the judges feel would be the most just result compatible with the language of the text, one could easily anticipate an overwhelming vote for the latter option.

In the final paragraph of his book, Berger states that the Court's policy making powers "are self-conferred and survive only because the

172. *Id.* at 332 (emphasis in original).

173. *Id.* at 319-20. The term "idiosyncratic purposes of the framers" is from McDougal & Lans, *supra* note 118, at 212.

American people are unaware that there is a yawning gulf between judicial professions and practice."[174] But this assertion is almost certainly wrong on the latter point, and if, as Berger claims, the power of judicial review was conferred, and not usurped,[175] it is wrong on the former point as well, for the framers could not have been so naive as to believe that they could confer the power of judicial review without also necessarily conferring policymaking power. Yet if Berger's conclusion presupposes a remarkable degree of naiveté on the part of the framers, it presumes an equally large measure of naiveté on the part of the American public. It is not likely that many literate laymen believe that there are objectively right answers to most of the questions of constitutional law that make their way to the Supreme Court, even if Berger seems to believe that there are. If that were true, there would be no reason for split decisions, except the individual obtuseness of particular justices. It is very unlikely that any substantial number of the American people understand that they are supposed to want the Court to adhere strictly to the original intent of the framers rather than provide a reasonable and just construction of the actual words of the Constitution. Laymen *are* aware that the Constitution is 190 years old, and that answers to modern problems are likely to be more satisfactory if they are given by the living who know something of the nature of these problems than by the framers, who could have no conception of them. Naturally, the public would not want the justices simply to read their own policy choices into the law as a matter of course, but it is very unlikely that it would feel deceived, and would want to strip the Court of its power, were it to learn what it probably already senses—that the Supreme Court may sometimes read the language of the Constitution in a way that comports with the demands of justice, as broadly understood, rather than with the intent of the framers, even when that can be clearly ascertained.

It is natural for one who has devoted oneself, as Raoul Berger has, to a long and painstaking examination of the legislative history of a constitutional provision to want that study to yield more than mere data to be accepted or rejected at the discretion of those who must interpret it. It is heady to think that if one can provide conclusive proof of what the framers intended with respect to a given constitutional provision, the meaning of that provision can be forever fixed in the terms established by one's research unless later changed by a formal constitutional amendment. It is therefore not surprising that Berger, whose skill

174. BERGER, *supra* note 1, at 417-18.

175. *See* notes 5-7 and accompanying text *supra*.

as a constitutional historian is extraordinary, and who has no diffidence about presenting his views as truth, would wish, in Alan Westin's phrase, "to carry off a coup from the library stacks and change the tides of judicial power."[176] But legislative history is no more likely to bring "the search for objectivity in constitutional law" to a successful conclusion than any of the other formulas that have up to now been proposed.[177] Even in the cases in which that history is relatively clear, it is unlikely that judges would deem themselves bound by it if doing so would result in an interpretation that would generally be considered unjust or inadequate to current conditions. Moreover, where the framers have chosen to use general words rather than to spell out their intent precisely, it is evidence that they, too, did not want future generations to be permanently bound by the history of their deliberations.

The meaning of a constitutional provision is too vital to be decided by any formula that would exclude modern-day judgment—and, given judicial review, that judgment will most probably be exercised by the justices of the Supreme Court. Of course their judgment may be mistaken, and we may suffer for it, but we are likely in the long run to suffer less than if judgment is excluded from the process of interpretation. It is because Berger would disallow all such judgment, would make history decisive, and would force reliance on the amending process for all constitutional change that it may confidently be predicted that *Government by Judiciary* will not prove to be an influential book. "It would be easy," Edward Corwin once wrote, "to imagine interpreters with a rigidity of mind that would soon have infected the Constitution with . . . premature senility."[178] Although vigor, eloquence, and indefatigable scholarship shine throughout this book, a rigidity of mind is clearly present, and premature senility is certainly the fate that would befall the Constitution if Berger's prescriptions were followed in practice. That this truly prodigious effort to rehabilitate the "original intent" theory of constitutional interpretation ultimately fails is overwhelming proof that the theory is basically untenable. It is regrettable that Berger chose to commit himself so completely to this theory that he blinded himself to its limitations and ignored completely the fatal difficulties in the concept of changeless constitutional provisions. His scholarship deserves to be channeled in more profitable directions.

176. Westin, *supra* note 6, at 33.

177. *See* Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571 (1948).

178. E. CORWIN, COURT OVER CONSTITUTION 86 (1938).