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AGAINST AN ACTIVIST COURT*

*Raoul Berger***

"The real issue," Professor Willard Hurst stated in 1954, "is who [is to make] the policy choices in the twentieth century: judges or the combination of legislature and electorate that makes constitutional amendments."¹ The thesis of this paper is that the judiciary is not empowered to supplant the policy choices of the framers with its own. One example suffices to show that it has done so. With the "one person-one vote" doctrine,² the Supreme Court reversed the unmistakable intention of the fourteenth amendment's framers to exclude suffrage from its scope. Justice Harlan affirmed that this doctrine truly flew "in the face of irrefutable and still unanswered history to the contrary."³ An activist, Professor Louis Lusky of Columbia University, wrote that Harlan's demonstration is "irrefutable and unrefuted";⁴ half-a-dozen activist academicians agree.⁵

Let me summarize the veriest nutshell of the confirmatory facts. Justice Brennan, himself a perfervid activist, observed that "17 of 19" northern states had rejected black suffrage between 1865 and 1868.⁶ Consequently, Roscoe Conkling, a member of the Joint Committee on Reconstruction which drafted the fourteenth amendment, stated that it would be "futile to

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1. Discussion following Curtis, *The Role of the Constitutional Text*, in SUPREME COURT AND SUPREME LAW 75 (E. Cahn ed. 1954).

2. Reynolds v. Sims, 377 U.S. 533, 568 (1964); Wesberry v. Sanders, 376 U.S. 1, 7-9 (1964).

3. Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

4. Lusky, Book Review, 6 HASTINGS CONST. L.Q. 403, 406 (1979).

5. See, e.g., Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603, 622 (1978); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 234 n.115 (1980); Abraham, Book Review, 6 HASTINGS CONST. L.Q. 467, 468 (1979); Mendelson, Book Review, 6 HASTINGS CONST. L.Q. 437, 452-53 (1979); Nathanson, Book Review, 56 TEX. L. REV. 579, 581 (1978); Perry, Book Review, 78 COLUM. L. REV. 685, 687 (1978).

6. Oregon v. Mitchell, 400 U.S. 112, 256 (1970) (Brennan, J., dissenting).

ask three quarters of the States to do . . . the very thing most of them have already refused to do.”⁷ Another member of the committee, Senator Jacob Howard, made a similar statement.⁸ The chairman of the committee, Senator William Fessenden, said, of a suffrage proposal, that there is not “the slightest probability that it will be adopted by the States.”⁹ The unanimous report of the committee doubted that “the States would consent to surrender a power they had exercised, and to which they were attached,” and therefore thought it best to “leave the whole question with the people of each State.”¹⁰ That such was the vastly-preponderant opinion in the debates is confirmed by a remarkable fact. During the pendency of ratification, radical opposition to readmission of Tennessee, because its constitution excluded Negro suffrage, was voted down in the House by 125 to 12.¹¹ Senator Charles Sumner’s parallel proposal was rejected by a vote of 34 to 4.¹² Thus, the evidence indicates that even the radicals did not believe that suffrage was covered by the fourteenth amendment. Hence, the fifteenth amendment was adopted—as its framers expressly stated—to fill the gap left by the failure of the fourteenth to provide for Negro suffrage. Summing up, former Solicitor General Robert Bork stated that “[t]he principle of one man one vote . . . runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula.”¹³

Before showing that no such power to reverse the framers was given to the Court, let me recall some basic principles. Chief Justice Marshall declared, in *Marbury v. Madison*,¹⁴ that a written constitution was designed to define and limit power and asked: “To what purpose are powers limited . . . if these limits may, at any time, be passed by those intended to be restrained,”¹⁵ among whom he included the courts. In addition, there is the founders’ attachment to a “fixed” Constitution, expressed by Justice William Paterson, one of the foremost framers: “The Constitution is certain and fixed; it contains the permanent will of the people . . . and can be

7. CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866).

8. *Id.* at 2766.

9. *Id.* at 704.

10. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess. xiii (1866), quoted in R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 84 (1977).

11. CONG. GLOBE, 39th Cong., 1st Sess. 3980 (1866).

12. *Id.* at 4000.

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

14. 5 U.S. (1 Cranch) 137 (1803).

15. *Id.* at 176.

revoked or altered only by the authority that made it."¹⁶ Another influential framer, Elbridge Gerry, emphasized that the people provided for a particular mode of making amendments, which "we are not at liberty to depart from . . ."¹⁷ Until the people have changed the Constitution by amendment, Alexander Hamilton assured the ratifiers, "it is binding . . . and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it."¹⁸ Little wonder that Marshall explicitly disclaimed a judicial "right to change [the] instrument."¹⁹

What role did the framers assign to the judiciary? The Constitution makes no specific provision for judicial review. The Founders were fearful of the greedy expansiveness of power; they dreaded that their delegates might "overleap" their bounds.²⁰ Hence, as James Bradley Thayer and Judge Learned Hand noted, they empowered the courts to *police* those boundaries.²¹ The limited nature of that role was underscored by Justice James Iredell, who had anticipated Hamilton's defense of judicial review. Referring to constitutional limits on legislative power, Justice Iredell declared:

Beyond these limitations . . . their acts are void, because they are not warranted by the authority given. But *within* them . . . the Legislatures only exercise a discretion expressly confided to them by the constitution It is a discretion no more controllable [sic] . . . by a Court . . . than a judicial determination is by them.²²

Hamilton was constrained to assure the nervous ratifiers that, of the three branches, the judiciary was "next to nothing,"²³ that the courts may not "on the pretense of a repugnancy . . . substitute their own pleasure to [sic] the constitutional intentions of the legislature."²⁴ He stressed that judges would be impeached for "deliberate usurpations on the authority of the legislature."²⁵ He would have been aghast to learn that judges may substitute their own pleasure for the unmistakable intention of the framers.

16. *Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (1795).

17. 1 ANNALS OF CONGRESS 503 (1789).

18. THE FEDERALIST No. 78, at 525 (A. Hamilton) (Heritage Press ed. 1945).

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

20. 4 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 196, 445 (2d ed. 1836).

21. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893); L. HAND, THE BILL OF RIGHTS 31, 66 (1962).

22. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 266 (1796) (emphasis added).

23. THE FEDERALIST No. 78, at 523 n.* (A. Hamilton) (Heritage Press ed. 1945).

24. *Id.* at 524.

25. THE FEDERALIST No. 81, at 544 (A. Hamilton) (Heritage Press ed. 1945).

Judicial participation in legislative policymaking was categorically rejected. It had been proposed to make the Justices members of a Council of Revision that would assist the President in exercising the veto power, on the ground that "[l]aws may be unjust, may be unwise, may be dangerous, may be destructive and yet not be so unconstitutional as to justify the Judges in refusing to give them effect."²⁶ Mark the distinction, later repeated by Marshall: an unwise law is not necessarily unconstitutional.²⁷ But Elbridge Gerry objected, stating that "[i]t was quite foreign from the nature of ye office to make them judges of the policy of public measures."²⁸ Nathaniel Gorham chimed in that judges "are not to be presumed to possess a peculiar knowledge of . . . public measures."²⁹ Rufus King added that judges ought not to be legislators for they "ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation."³⁰ This, Edward Corwin commented, was "the first important step in the clarification of the Convention's ideas with reference to the doctrine of judicial review," the "rejection of the Council of Revision idea on the basis of the principle . . . 'that the power of *making* ought to be kept distinct from that of *expounding* the laws."³¹ The pervasiveness of this view is attested by Judge Henry's statement in *Kemper v. Hawkins*,³² a landmark assertion of the power of judicial review:

The judiciary from the nature of the office . . . could never be designed to determine upon the equity, necessity or usefulness of a law; that would amount to an express interference with the legislative branch Not being chosen immediately by the people, nor being accountable to them . . . they do not, and ought not, to represent the people in framing or repealing any law.³³

Given that suffrage was unmistakably excluded from the fourteenth

26. 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 73 (rev. ed. 1937) (statement of James Wilson). This proposal was also supported by James Madison but was ultimately rejected. See R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 300-06 (1977).

27. JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 190-91 (G. Gunther ed. 1969). Justice Holmes has also added that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." *Adkins v. Children's Hospital*, 261 U.S. 525, 570 (Holmes, J., dissenting).

28. 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 97-98 (rev. ed. 1937).

29. 2 *id.* at 73.

30. 1 *id.* at 98.

31. E. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASES* 42 (1914).

32. 3 Va. (1 Va. Cas.) 20 (1793).

33. *Id.* at 47.

amendment, it is therefore not for the Court to assert jurisdiction over state voting practices in the interest of a higher political morality.

Those who rejoice in what Lusky describes as the Court's "assertion of the power to revise the Constitution, bypassing the cumbersome amendment procedure prescribed by article V,"³⁴ rely on the choice by the framers of the fourteenth amendment of allegedly "open-ended"³⁵ terms, what Professor John Hart Ely labels an "invitation" to import extra-constitutional values.³⁶ Professor Ely agrees, however, that "due process" had a fixed procedural content.³⁷ Support for this interpretation is provided by Hamilton's statement, made on the eve of the convention, summarizing 400 years of English and Colonial history:³⁸ "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts at justice; they can never be referred to as an act of [the] legislature."³⁹ The Reconstruction debates disclose that this was the thinking of the framers of the several amendments.⁴⁰

Ely himself labels the "privileges and immunities" clause as "quite inscrutable," and the "equal protection" clause as "also unforthcoming."⁴¹ How can "inscrutable" terms override the framers' unmistakable intention to exclude suffrage? How can they curtail rights reserved to the states by the tenth amendment, rights said by Madison to be "inviolable?"⁴² Respecting these reserved rights, the interpretive standard was furnished by Chief Justice Marshall, in rejecting applicability of the Bill of Rights to the states: "Had congress engaged in the extraordinary occupation of improving the constitutions of the several states . . . they would have declared this purpose in plain and intelligible language."⁴³ In the *Slaughter-House Cases*,⁴⁴ Justice Miller similarly declined to embrace a construction that would subject the states' local concerns to the control of Congress "in the absence of language which expresses such a purpose too clearly to admit of

34. L. LUSKY, *BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* (1975).

35. See generally Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277, 304-08 (1979); Ely, *Constitutional Interpretivism: Its Allure and Impossibility,* 53 IND. L.J. 399, 446 (1978).

36. Ely, *supra* note 35, at 415.

37. *Id.* at 416-18.

38. Berger, "Law of the Land" Reconsidered, 74 NW. U.L. REV. 1, 29 (1979).

39. 4 THE PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett & J. Cooke eds. 1962).

40. R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 201-06* (1977).

41. J. ELY, *DEMOCRACY AND DISTRUST* 98 (1980).

42. THE FEDERALIST NO. 39, at 262 (J. Madison) (Tudor Publishing ed. 1947).

43. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833).

44. 83 U.S. (16 Wall.) 36 (1873).

doubt."⁴⁵

In fact, however, the terms are not "inscrutable." "Privileges and immunities" had throughout been associated with the rights of "trade and commerce" drawn from article IV and its antecedent in the Articles of Confederation.⁴⁶ These rights had been carefully enumerated in the Civil Rights Act of 1866 as the rights to own property, to contract, and to have access to the courts. Justices Bradley and Field recognized this early on, and Chief Justice White later reiterated the point.⁴⁷ "Equal protection" had been associated in the debates with those enumerated rights.⁴⁸ For example, Samuel Shellabarger of Ohio said that "whatever rights as to each of these enumerated civil (not political) matters the States may confer upon one race . . . shall be held by all in equality. . . . It secures equality of protection in those enumerated civil rights."⁴⁹ As Chief Justice Taney stated, "The members of the Convention unquestionably used the words they inserted in the Constitution in the same sense in which they used them in their debates."⁵⁰

But, the activists maintain, words change their meaning over time, a thinly-disguised claim of judicial power to revise the Constitution. Chief Justice Taney emphasized, however, that "[i]f in this court we are at liberty to give old words new meanings when we find them in the Constitution, there is no power which may not, by this mode of construction, be con-

45. *Id.* at 78.

46. H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 111 (7th ed. 1963). See Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO ST. L.J. 87, 103 (1981).

47. Justice Bradley held in 1870: "[T]he civil rights bill was enacted at the same session and shortly before the presentation of the fourteenth amendment . . . [it] was in pari materia; and was probably intended to reach the same object . . . the first section of the bill covers the same ground as the fourteenth amendment." *Live Stock Dealers & Butchers Ass'n v. Crescent City Live Stock Co.*, 15 F. Cas. 649, 655 (C.C.D. La. 1870) (No. 8,408).

Led by Justice Field, the four dissenters in the *Slaughter-House Cases* asked: "What, then, are the privileges and immunities which are secured against abridgment by State legislation?" 83 U.S. (16 Wall.) 36, 96 (1872). They answered: "In the first section of the Civil Rights Act Congress has given its interpretation of these terms . . . [which] include the right to make and enforce contracts . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . ." *Id.* See also Chief Justice White's statement, in *United States v. Wheeling*, 254 U.S. 281, 294 (1920), that "the Constitution plainly intended to preserve and enforce the limitations as to discrimination imposed by Article IV of the Articles of Confederation . . . the text of Article IV, § 2 of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations . . ."

48. See generally *Civil Rights Cases*, 109 U.S. 3 (1883) and *SlaughterHouse Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

49. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866).

50. *The Passenger Cases*, 48 U.S. (7 How.) 283, 477 (1849) (Taney, C.J., dissenting).

ferred on the general government and denied to the States."⁵¹ In this, he echoed Madison: if "the sense in which the Constitution was accepted and ratified by the nation . . . be not the guide in expounding it, there can be no security . . . for a faithful exercise of its powers."⁵² This remained the view of the Reconstruction Congress. In January, 1872, a unanimous Senate Judiciary Committee, signed by senators who had voted for the fourteenth amendment, stated, "A construction which should give the phrase . . . a meaning different from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and expressed language of the Constitution."⁵³ The task of the interpreter, Justice Holmes wrote, is to ascertain what the words meant to the writer and to effectuate that intention.⁵⁴ Where that intention is manifest, Judge Learned Hand held, it "overrides even the explicit words used."⁵⁵ Men do not use words to defeat their purpose. If the framers meant to conceal their purpose, they committed a fraud on the ratifiers. Of course, there is not a shred of evidence for such a purpose.

"The new 'substantive equal protection,'" Professor Herbert Packer justly affirmed, "has under a different label permitted today's Justices to impose their prejudices in much the same manner as the Four Horsemen once did."⁵⁶ That reflects what John Stuart Mill considered the universal "disposition of mankind . . . to impose their own opinions and inclinations as a rule of conduct on others," cautioning that it is restrained only by "want of power."⁵⁷ In a revealing autobiographical disclosure, Justice Douglas wrote that "the 'gut' reaction of a judge at the level of constitutional adjudication, dealing with the vagaries of due process . . . and the

51. *Id.* at 478.

52. 9 J. MADISON, *THE WRITINGS OF JAMES MADISON* 191 (G. Hunt ed. 1900-1910), quoted in R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 3 (1977).

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

54. O.W. HOLMES, *Theory of Legal Interpretation*, in *COLLECTED LEGAL PAPERS* 206 (1920). See also *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930); *Lochner v. New York*, 198 U.S. 45, 74 (1905); *Eisner v. Macomber*, 252 U.S. 189, 219 (1920). For a discussion of Holmes' participation in these cases, see R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 377-84 (1977).

55. *THE ART AND CRAFT OF JUDGING, DECISIONS OF JUDGE LEARNED HAND* (H. Shanks ed. 1968).

56. Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process"*, 44 S. CAL. L. REV. 490, 491-92 (1971).

57. J. MILL, *ON LIBERTY* 28 (1885), quoted in *Furman v. Georgia*, 408 U.S. 238, 467 (1972) (Rehnquist, J., dissenting).

like, was the main ingredient of his decision.”⁵⁸ Why should millions of Americans prefer the “gut reaction” of some Justices against death penalties, for instance, to their own choice of death penalties? Judge J. Skelly Wright, a devoted activist, pointed out that “the most important value choices have already been made by the Framers of the Constitution” and that judicial “value choices are only to be made within [those] parameters,” implying that Justices may not supplant the framers’ choices.⁵⁹

The fundamental issue, then, is whether the people may govern themselves or whether they have surrendered self-government to a nonelected, life-tenured, self-constituted set of Platonic Guardians. Like Charles McIlwain, I believe that “the two fundamental correlative elements of constitutionalism for which all lovers of liberty must yet fight are the legal limits to arbitrary power and a complete responsibility of the government to the governed.”⁶⁰ Nothing in the Constitution or its history warrants the inference that, alone among the branches, the judiciary was given unlimited, unaccountable power, checked only by judicial “self-restraint.”

58. W. DOUGLAS, *THE COURT YEARS 1939-1975*, at 8 (1981).

59. Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 784-85 (1971). Justice Douglas also declared that “[t]he choice was made by the Framers The Framers made it a standard.” *Rochin v. California*, 342 U.S. 165, 178-79 (1952) (Douglas, J., concurring).

60. C. MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 146 (rev. ed. 1947).