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The Fourteenth Amendment: the Framers' Design

Raoul Berger
University of Carlifornia at Berkeley

The Fourteenth Amendment: The Framers' Design

RAOUL BERGER*

"[L]egal history still has its claims."**

In an address before the Fellows of the American Bar Foundation, the Honorable Patricia Roberts Harris, Secretary of the Department of Housing and Urban Development, did me the honor of singling out my recent *Government by Judiciary: The Transformation of the Fourteenth Amendment* as a threat to the application of "constitutional principles to all segments of the society."[1] And she intimated that my commentary is among the "attacks of those who resent the court's protection of the minorities."[2] As a lawyer she should, I suggest, allow that a fellow lawyer, devoted these many years to scholarly studies, may seek to rise above his predilections in his devotion to constitutionalism. Back in 1942 I wrote of a decision by the then "reconstructed Court," which engaged my deepest sympathies, that I liked it no better when Justice Black read my predilections into the Constitution than when Justices Butler, McReynolds, Sutherland, and Van Devanter read in theirs.[3]

To her indictment that I insist that "constitutional law must stick to the fundamentals, to the written language of the Constitution itself, and the historical record of the times in which these words were written,"[4] that "[t]he courts . . . cannot tamper

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* Professor of Law, University of California at Berkeley, 1962-65; Charles Warren Senior Fellow in American Legal History, Harvard University, 1971-76. A.B. 1932, University of Cincinnati; J.D. 1935, Northwestern University; LL.M. 1938, Harvard University.

** Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 609 (1942) (Frankfurter, J., concurring).

1. Address by Patricia R. Harris, American Bar Association, Midyear Meeting, in New Orleans, Feb. 1977, *reprinted in* 30 S.C.L. REV. 485 (1979) [hereinafter cited as P. HARRIS].

2. *Id.* at 489.

3. Berger, *Constructive Contempt: A Post Mortem*, 9 U. CHI. L. REV. 602, 604-05, 641-42 (1942).

4. P. HARRIS, *supra* note 1, at 488. Justice Black stated, "it is language and history that are the crucial factors which influence me in interpreting the Constitution—not reasonableness or desirability as determined by Justices of the Supreme Court." H. BLACK, A CONSTITUTIONAL FAITH 8, 10 (1968). In a striking affirmation contemporary with the fourteenth amendment, "a unanimous Senate Judiciary Committee Report [January 25, 1872], signed by senators who had voted for the thirteenth, fourteenth and fifteenth amendments in Congress" declared:

> 'In construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended to be accomplished by those who

with social policy because they were never granted such power,"[5] I plead guilty. The materials relied on by Secretary Harris to counter these propositions are, as will appear, a compound of wishful thinking and remarkably unhistorical inferences.

While Secretary Harris largely focuses on desegregation, a subject to which only 16 of my 450 pages are devoted,[6] I concentrated chiefly on the Court's "one person—one vote" doctrine in light of the framers' intention to exclude suffrage from the ambit of the fourteenth amendment and leave control thereof with the states.[7] The virtually incontrovertible evidence on this score led me to conclude that the "one person—one vote" doctrine represents a 180 degree *revision* of the amendment. Whence, I asked, does the Court derive power to displace the choices of the framers and to amend the Constitution, and I went on to demonstrate that the power was plainly withheld. Addressing this very issue, Justice Harlan declared: "When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect."[8]

Analysis must proceed from the facts, but space permits recital of only a few out of the host of facts on which my thesis is based. In 1865-68, Justice Brennan stated, seventeen northern states rejected black suffrage.[9] Consequently, Roscoe Conkling, a member of the Joint Committee on Reconstruction of both Houses, which drafted the amendment, stated:

> framed it and the people who adopted it.' . . . A conclusion which should give the phrase 'a republican form of government' . . . a meaning differing 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 express language of the Constitution in any other particular. This is the rule of interpretation adopted by all commentators on the Constitution, and in all judicial expositions of that instrument . . . .'

A. AVINS, RECONSTRUCTION AMENDMENTS' DEBATES 2, 571 (1967).

Secretary Harris' interpretive approach represents the recent attempt to rationalize the segregation decision, but as former Senator Sam J. Ervin, Jr. said, the activists would "interpret the Constitution to mean what it would have said if they, instead of the Founding Fathers, had written it." Wall St. J., Aug. 28, 1978, at 10, col. 4.

5. P. HARRIS, *supra* note 1, at 488.

6. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 117-33 (1977). Instead of citing to the sources, I shall throughout cite to the pages of my book where they are quoted, both in the interest of space conservation and of calling attention to the confirmatory materials there set out.

7. *Id.* at 52-116.

8. *Quoted in id.*, at 333.

9. *Quoted in* R. BERGER *supra* note 6, at 90.

> The northern states, most of them, do not permit negroes to vote. Some of them have repeatedly and lately pronounced against it. Therefore, even if it were defensible as a principle for the Central Government to absorb by amendment the power to control the action of the states in such a matter, would it not be futile to ask three-quarters of the States to do for themselves and others, by ratifying such an amendment, the very thing most of them have already refused to do in their own cases?[10]

Senator Jacob Howard, a member of the Joint Committee, who explained the amendment to the Senate, said that "three-fourths of the States . . . could not be induced to grant the right of suffrage, even in any degree or under any restriction, to the colored race."[11] That is confirmed by the Report of the Joint Committee, which stated that the states would not "surrender a power they had exercised, and to which they were attached," therefore it was thought best to "leave the whole question with the people of each State."[12] Hence resort was had to section 2 of the amendment that permits states to *deny* suffrage, but to suffer a reduction of representation in the House of Representatives in consequence. These and many other confirmatory statements in the debates led me to conclude with Justice Harlan that "one person—one vote" lacked all historical justification. Professor Gerald Gunther recently wrote that "most constitutional lawyers agree."[13]

The materials bearing on segregation are not nearly so copious, but they are clear enough for the reason given by the late Alexander Bickel:

> It was preposterous to worry about unsegregated schools, for example, when hardly a beginning had been made at educating Negroes at all and when obviously special efforts, suitable only for the Negroes, would have to be made . . . It is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting.[14]

A few confirmatory facts must suffice. James Wilson, chairman of the House Judiciary Committee and House Manager for the

10. *Id.* at 58-59. Conkling's reference to the "Central Government" reflects a pervasive attachment to state sovereignty. *Id.* at 60-64.

11. *Id.* at 56.

12. *Id.* at 84.

13. Gunther, Book Review, Wall St. J., Nov. 5, 1977, at 4, col. 4.

14. *Quoted in* R. BERGER, *supra* note 6 at 100.

Civil Rights Bill—the antecedent of the amendment, which was designed to protect and embody the ensuing Civil Rights Act[15]—advised the House that the words "civil rights . . . do not mean that all citizens shall sit on juries, or that their children shall attend the same schools. These are not civil rights."[16] Manifestly this was designed to reassure restive framers that desegregation was *excluded* from the Bill. Senator Charles Sumner, leader of a radical fringe, unavailingly sought to "abolish segregated Negro schools in the District of Columbia."[17] With good reason did Judge E. Barrett Prettyman hold that congressional support for segregated schools in the District of Columbia contemporaneously with the adoption of the amendment was conclusive evidence that Congress had not intended § 1 of the Amendment to invalidate school segregation laws.[18] The Senate galleries themselves were segregated.[19] The inescapable fact is that racism held the North in thrall. A leading Radical, George Julian of Indiana, stated during the debates that "[t]he real trouble is *we hate the Negro.*"[20] There were other such utterances;[21] racism remains a stubborn fact today.[22] As Justice Jackson's file memorandum in the course of the desegregation case states, "Neither North nor South has been willing to adapt its racial practices to its professions."[23] "It was into this *moral void,*" Richard Kluger wrote, "that the Supreme Court under Earl Warren now stepped,"[24] not to give effect to a national consensus.

To counter such proofs,[25] Secretary Harris turns to the "overriding concern of the framers . . . with the protection of

15. *Id.* at 22-23.

16. *Id.* at 118; *see* note 71 *infra.*

17. *Id.* at 123.

18. *Id.* at 123-24.

19. *Id.* at 125.

20. *Quoted in id.* at 91.

21. *Id.* at 13.

22. Roger Wilkins, a prominent black journalist, writes, "The attitude of whites towards blacks is basic in this country. And that attitude has changed for the worse." N.Y. Times, Mar. 3, 1978, § A, at 26, col. 1. Chester Finn wrote that the issue of racial discrimination "has been fanned into the most protracted, rancorous, and divisive domestic blaze of the post-war era." *Quoted in* R. BERGER, *supra* note 6, at 328. Today the national mood "opposes aggressive attempts by racial minorities to gain a larger share of the political and economic pie." N.Y. Times, Mar. 13, 1978, § A, at 5, col. 1.

23. *Quoted in* R. BERGER, *supra* note 6, at 133.

24. *Id.*

25. Even devout activists concede that the framers' exclusion of suffrage and segregation from the scope of the amendment is all but incontrovertible. *See* Alfange, Book Review, 5 HASTINGS CONST. L. Q. 603, 606-07 (1978); Nathanson, Book Review, 56 TEX. L. REV. 579, 580-81 (1978); Perry, Book Review, 78 COLUM. L. REV. 685, 687-91 (1978).

minorities."[26] First she invokes Hamilton, who "would brook no possibility of rule by majority fiat. 'The mass of the people,' he said, 'seldom judges and determines right.' "[27] But she overlooks where he drew the line—between "the mass of the people" and "the rich and well born."[28] To keep the masses in check he proposed an analogue to the British king and House of Lords, an executive and senate who would serve for life, to "check the imprudence of democracy" and "form a permanent barrier agst. every pernicious innovation."[29] In a word he would protect the propertied classes by means of a wealthy oligarchy. Madison also is called to witness by Secretary Harris as safeguarding " 'the rights of minor parties' " against the " 'superior force of an interested and overbearing majority' ";[30] but he too feared " 'legislative democracy.' "[31] More important, he emphasized that the conflict of interest between North and South arose out of the "institution of slavery & its consequences formed the line of discrimination."[32] To "defend" Southern interests he proposed that the move to give the South representation in the House of Representatives by computing the voteless slaves in the ratio of 5 to 3, be increased to five fifths![33] Gouverneur Morris objected on the ground that if slaves are "men" they should be made citizens and permitted to vote, and if "property," "[w]hy then is no other property included?"[34] Morris perceived that the 3/5 proportional representation gave a slaveholder more votes than the owner of a New England farm, and it was in fact the instrument whereby the slavocracy fastened its grip on the federal government.[35] Madison is hardly the man to cite for protection of the black minority.

Next Secretary Harris invokes Jefferson: had he been present at the drafting of the Constitution, he "would have agreed with the need to protect the minority."[36] Although Jefferson held

26. P. HARRIS, *supra* note 1, at 488.

27. P. HARRIS, *supra* note 1, at 486.

28. 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 299 (1911) [hereinafter cited as M. FARRAND].

29. *Id.* at 288-89, 299.

30. P. HARRIS, *supra* note 1, at 486.

31. P. KURLAND, WATERGATE AND THE CONSTITUTION 159 (1978).

32. 2 M. FARRAND, *supra* note 28, at 10.

33. U.S. CONST. art. I, § 2(3); 1 M. FARRAND, *supra* note 28, at 486.

34. 2 M. FARRAND, *supra* note 28, at 222.

35. The 3/5 formula gave the South 25 additional members, and enabled "the slave power to keep its grip on the nation." S. BEMIS, JOHN QUINCY ADAMS AND THE UNION 417, 466 (1956).

36. P. HARRIS, *supra* note 1, at 486.

slaves, he predicted emancipation, but wrote, "it is equally certain that the two races will never live in a state of equal freedom . . . so insurmountable are the barriers which nature, habit and opinions have established between them."[37] Then Secretary Harris goes on to state, "[s]o clear was the constitutional intent to protect minorities that in the early years of the Republic Calhoun devised a doctrine of concurrent minorities . . . ."[38] But as Samuel Eliot Morison observed, "Calhoun's conception of liberty, which he held more dear than union, was the liberty of the slaveowner to the full product of his slave's labor, and his right to full protection by the federal government."[39] Hamilton *et al* were not delineating minority *rights*, but advocating a governmental *structure* that would serve to brake assaults on property by the "turbulent democracy"; they sought domination by the propertied minority.

Whatever "protection for minorities" meant, it did not comprehend the black slaves; in the eyes of the slavocracy they were "property," chattels entitled to little or no protection.[40] There is no blinking the fact that the Constitution was a "racist document."[41] "Domestic slavery," Gouverneur Morris stated in the Convention, "is the most prominent feature in the aristocratic countenance of the proposed constitution."[42] Thaddeus Stevens, the scourge of the South, said that when the Founders came to shape the "organic law, an institution hot from hell appeared among them . . . . It obstructed their movements and all their actions, and precluded them from making every human being 'equal before the law.' "[43] That institution was slavery, as is writ large in the Constitution itself. There was article I, section 9(1), which Secretary Harris terms "the infamous but very real twenty-one year prohibition of interference with the slave trade . . . ."[44] The prohibition represented a compromise resulting, according to Charles Pinckney, a delegate to the Convention, in a "compact" that Congress would never "be authorized to touch the question of slavery; that the property of the Southern States in slaves was to be as sacredly preserved . . . as that of land, or any other kind

37. *Quoted in* R. BERGER, *supra* note 6, at 87.
38. P. HARRIS, *supra* note 1, at 487.
39. S. MORISON, OXFORD HISTORY OF THE AMERICAN PEOPLE 432-33 (1965).
40. K. STAMPP, THE PECULIAR INSTITUTION 192-236 (1956).
41. Newmeyer, Book Review, 19 AM. J. LEGAL HIST. 66, 67 (1975).
42. 2 M. FARRAND, *supra* note 28, at 222.
43. *Quoted in* R. BERGER, *supra* note 6, at 88.
44. P. HARRIS, *supra* note 1, at 485-86.

of property . . . ."[45] Article IV, section 2(3) called for delivery of an escaped slave to the owner; when it later was sought to be enforced in the North, it touched off shock waves.[46] Secretary Harris' critique illustrates the hazards, against which the eminent British historians H.G. Richardson and G.O. Sayles cautioned, of imposing "upon the past a creature of our own imagining."[47]

It is a mistake to speak of "minority rights" as if they were a "brooding omnipresence in the sky." "[W]ithin the State itself," Gouverneur Morris (closer to Hamilton's thinking than to the masses), stated in the Convention, "a majority must rule, whatever may be the mischief done among themselves."[48] Justice Johnson early in our history declared that "[i]t may be called the ruling principle of the constitution, to interfere as little as possible between the citizen and his own state government; and hence, with a few safeguards . . . the States are left as they were, as to their own citizens, and as to all internal concerns."[49] Conversely, Madison stated in *The Federalist* No. 45 that the federal powers "are few and defined" and "will be exercised principally on *external* objects, as war, peace, negotiation, and foreign commerce,"[50] doubtless reflecting the popular impression of the proposed federal government. Little did the people consider that the framers had attempted to restructure the states' control of internal matters. That attempt was disclaimed by Hamilton in the New York Ratification Convention: the "laws of the Union" would not "new-model the internal police of any state . . ."[51] Such assurances testify to a pervasive anxiety that the federal government might intrude into local concerns.

Secretary Harris' appeal to the Bill of Rights does not advance her case. First, she states that "specific guarantees of individual liberty were omitted from the basic document only because it was believed they were adequately secured by the com-

45. 3 M. FARRAND, *supra* note 28, at 443.

46. Ableman v. Booth, 62 U.S. (21 How.) 506 (1858); R. COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS (1975).

47. Richardson & Sayles, *Parliament and the Great Councils in Medieval England - I*, 77 LAW Q. REV. 213, 224 (1961); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 673 (1960).

48. 2 M. FARRAND, *supra* note 28, at 439.

49. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 280-81 (1827).

50. THE FEDERALIST No. 45 (J. Madison) at 303 (Mod. Lib. ed. 1937) (emphasis added).

51. 2 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 267-68 (2d ed. 1836).

mon law."[52] This, however, was not the "only" reason. Another, Charles Pinckney explained, was that "[s]uch bills generally begin by declaring that all men are by nature born free. Now, we should make that declaration with a very bad grace, when a large part of our property consists in men who are actually born slaves."[53] Such a declaration is strikingly absent from the Bill of Rights.[54] Then too, the Bill of Rights was designed to protect *all* of the people against the federal government, not to protect a minority against a "crushing majority," for the federal government was widely regarded as a remote and suspect ruler.[55] And in great part it was meant to secure established procedures in federal criminal prosecutions. One vainly searches the Bill of Rights for words upon which to pin, for example, the right to vote or to attend schools. Such matters were the province of the states.

In its inception, the Bill of Rights was aimed solely at the federal government, not the states, as Chief Justice Marshall held in 1833, and as the First Congress earlier had made clear.[56] Protection of the individual against the state was provided by the state's own bill of rights.[57] Even free speech, regarded by Justice Cardozo as "the matrix, the indispensable condition of nearly every other form of freedom,"[58] was protected only against federal interference. It has generally been overlooked that when Madison urged in the First Congress, which drafted the Bill of Rights, that the protection of free speech be extended to the states because they were likely to be the worst offenders, his plea was rejected. Jefferson, the great champion of free speech and free press, wrote in 1804 to Abigail Adams, "While we deny that Congress have a right to controul the freedom of the press, we have ever asserted the right of the states and their exclusive right to do so."[59] So too, Justice Story wrote in his landmark commentary on the Constitution that "the whole power over the subject of religion is left

52. P. HARRIS, *supra* note 1, at 486.

53. 3 M. FARRAND 256.

54. They are to be found in the Pennsylvania Constitution of 1776, article 1 of the Declaration of Rights: " 'all men are born equally free and independent, and have certain natural rights.' " 2 B. POORE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS 1541 (2d ed. 1877). To the same effect is the 1780 Massachusetts Constitution, Declaration of Rights, article 1. 1 POORE, *id.* at 957.

55. R. BERGER, CONGRESS V. THE SUPREME COURT 31-33 (1969).

56. R. BERGER, *supra* note 6, at 134.

57. *Id.*

58. *Quoted in id.* at 272.

59. *Id.*

exclusively to the state governments."[60] The notion that the Bill of Rights was adopted by or incorporated in the fourteenth amendment by the four words "due process of law," borrowed from the fifth amendment, is a fairly recent feat of judicial legerdemain.[61]

When Secretary Harris turns to the Civil War Amendments, she speaks in generalities, lumping the thirteenth amendment, which eliminated slavery, the fourteenth, which granted "citizenship with due process protection," and the fifteenth, which barred racial discrimination respecting the right to vote. These amendments, she finds, "confirmed the constitutional patterns of restricting the degree to which the majority might work its will upon the minority."[62] The fourteenth amendment, as we have seen, did not change the pattern of suffrage and segregation. In truth, the framers sought only to secure the freed slaves from renewed serfdom, from violence and oppression by means of a narrow cluster of rights: to own property, to contract (mainly for their services), and to have access to the courts.[63] The evidence is too voluminous to detail here. Of course, the framers did not "condone lynchings, [and] deprivations of fair trial," for these, I demonstrated, were outlawed by the "privileges or immunities" clause[64]—and, before long, were aborted by the Supreme Court.[65]

To go beyond these goals is to substitute wishful thinking for historical fact. Thus Secretary Harris maintains that the framers "could not, had they been able to predict the future, sanction the development of a system of education of the black people into a status of second-class citizenry, a result that mocked their effort to confer on the ex-slaves the rights of free men."[66] But, as has been noted, it was a limited "effort"; deplorable though it was, the framers quite clearly rejected desegregation, being content to leave to posterity the task of making further advances by amend-

60. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873, at 731 (1833).

61. R. BERGER, *supra* note 6, at 134-56; Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). Fairman "conclusively disproved Black's contention [to the contrary], at least, such is the weight of opinion among disinterested observers." A. BICKEL, THE LEAST DANGEROUS BRANCH 102 (1962); *see* Alfange, Book Review, 5 HASTINGS CONST. L.Q. 603, 607 (1978); Perry, Book Review, 78 COLUM. L. REV. 685, 687-88 (1978).

62. P. HARRIS, *supra* note 1, at 487.

63. *See* text accompanying notes 71-74 *infra.*

64. R. BERGER, *supra* note 6, at 20-36.

65. *Id.* at 37-51.

66. P. HARRIS, *supra* note 1, at 488.

ment.[67] To say that "[w]hat was acceptable to the founding fathers or to those who dealt with the constitutional issues just a century ago would not be acceptable to them today had they been given access to the knowledge available to us today,"[68] is to read current conceptions back into the minds of the framers, who used words to express *their* purposes, not ours. It represents the very thing dismissed by Justice Black as

> rhapsodical strains, about the duty of the Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes . . . The Constitution makers knew the need for change and provided for it by [the article V provision for amendment].[69]

With the help of a different rhetoric, Secretary Harris would have the Court displace the choices of the framers with its own, under the plea that the framers would have shared them were they here today. If so, to follow in her path, they would have resorted to the very machinery they set up—amendment.

Remains her comment that "the significance of the political rights embodied in the due process and equal protection clauses was clear from the beginning."[70] The right of blacks to be free from discrimination with respect to voting was first recognized in the fifteenth amendment, which contains no due process or equal protection clauses. The framers of the fourteenth made quite clear that "political rights" were excluded. Explaining how the phrase "civil rights and immunities," in the Civil Rights Bill, was subsequently watered down to "privileges or immunities," House Chairman Wilson asked,

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67. Thaddeus Stevens, who led the movement to strike the fetters from the freedmen, stated that the amendment "falls far short of my wishes . . . but . . . is all that can be obtained in the present state of public opinion . . . I . . . leave it to be perfected by better men in better times." *Quoted in* R. BERGER, *supra* note 6, at 106. He did not refer to judicial expansion but to amendment, as the statement of Senator William Stewart makes clear: the amendment "does not preclude Congress from adopting other means by a two-thirds vote when experience shall have demonstrated the need for a change of policy," *id.*, as it did in the fifteenth amendment with respect to suffrage.

68. P. HARRIS, *supra* note 1, at 488.

69. *Quoted in* R. BERGER, *supra* note 6, at 101. Black also declared, "[T]here is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems." *Id.* at 264.

70. P. HARRIS, *supra* note 1, at 489.

> What do these terms mean? Do they mean that in all things, civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed . . . I understand civil rights to be simply the absolute rights of individuals, such as "The right of personal security, the right of personal liberty, and the right to acquire and enjoy property."[71]

Similar statements are too numerous to detail here.[72] In a discussion of the fourteenth amendment, for which he voted, James Patterson of New Hampshire declared that he was opposed "to any law discriminating against [blacks] in the security of life, liberty, person, property and the proceeds of their labor. Those civil rights all should enjoy. Beyond this I am not prepared to go, and those pretended friends who urge political and social equality . . . are . . . the worst enemies of the colored race."[73] The chairman of the Joint Committee, Senator William Fessenden, stated, "We cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions."[74] Constitutional analysis must proceed from the historical facts, not from present day crystal-gazing.

A few words should be said about the significance of the "due process" and "equal protection" clauses. In one of the most illuminating statements in legal history, Alexander Hamilton stated on the eve of the Convention: "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice. *They can never be referred to an act of the legislature.*"[75] Hamilton summed up centuries of historical association of "due process" with judicial procedure.[76] No statement to the contrary will be found in any of the records of the conventions in the First Congress that employed "due process" in the fifth amendment, nor in the 39th Congress that drafted the fourteenth. My chapter on due process shows that the 39th Congress conceived of due process in traditional

71. *Quoted in* R. BERGER, *supra* note 6, at 27. In this statement of the limited objectives of the Bill, Wilson was followed by other spokesmen. *Id.* at 27 n.26. *See also id.* at 27-31.

72. *E.g.*, Senator Lyman Trumbull, chairman of the Senate Judiciary Committee said: "The bill is applicable exclusively to civil rights. It does not propose to regulate political rights of individuals; it has nothing to do with the right of suffrage, or any other political right." *Quoted in id.* at 29.

73. *Id.*

74. *Id.* at 99.

75. THE PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett & J. Cooke eds. 1962) (emphasis added); *see* R. BERGER, *supra* note 6, at 194.

76. R. BERGER, *supra* note 6, at 195-200.

judicial procedure terms.[77] Substantive due process is a judicial construct fashioned out of whole cloth in the 1890's in order to defeat socio-economic legislation. The Court itself has confessed that it is discredited.[78] Hamilton spoke of "legislation," *all* legislation, not merely socio-economic legislation, so it is incumbent upon apologists for the Warren Court to explain the magic whereby legislation touching other rights reserved to the states by the fourteenth amendment can be struck down under cover of due process. No less a jurist than Learned Hand wrote that "[t]here is no constitutional basis for asserting a larger measure of judicial supervision over liberty than property."[79] In the due process clause they are on a par.

My chapter on "equal protection of the laws" shows the framers associated that phrase with their purpose to prevent discriminatory legislation with respect to the above-mentioned cluster of rights.[80] For example, Samuel Shellabarger, a leading Radical, said of the Civil Rights Bill that "whatever rights as to each of these enumerated civil (not political) matters the State may confer upon one race . . . shall be held by all in equality . . . . It secures *equality of protection in these enumerated rights* . . . ."[81] In describing their aims, the framers interchangeably referred to "equality," "equality before the law," and "equal protection," but always in the circumscribed context of the rights enumerated in the Bill, thus wedding "equal protection" to those enumerated rights.[82] The judicial expansion of "equal protection" is quite recent; the phrase was convenient because, as Professor Gerald Gunther said, it "did not carry with it the bad reputation that substantive due process had."[83] But as Professor Philip Kurland observed, it was simply the old "substantive due process";[84] and in the words of Professor Gunther, the "bad legacy of substantive due process and of ends-oriented equal protection involves a block to legislative ends, an imposition of judicial values as to objectives"[85]—legislative policy-making.

77. *Id.* at 193-220.

78. Ferguson v. Skrupa, 372 U.S. 726, 731 (1963).

79. *Quoted in* R. BERGER, *supra* note 6, at 267.

80. *See id.* at 266-68.

81. *Quoted in id.* at 170 (emphasis added).

82. *Id.* at 169-72.

83. *Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645, 656 (1975).

84. *Id.* at 661. *See also* comment of Justice Douglas, *id.* at 649.

85. *Id.* at 665.

Objections thereto are not new. Towards the close of his career, Justice Holmes expressed the "more than anxiety" he felt because

> [a]s the decisions now stand, I see hardly any limit but the sky to the invalidating of [the constitutional rights of the states] if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions.[86]

Chief Justice Stone wrote in 1945, "My more conservative brethren in the old days [read their preferences] into the Constitution . . . history is repeating itself. The Court is now in as much danger of becoming a legislative and Constitution making body, enacting into law its own predilections, as it was then."[87] His forebodings were over-fulfilled. "The Warren Court," Professor Archibald Cox averred, "behaved even more like a Council of Wise Men and less like a Court than the *laissez faire* Justices."[88]

Whence does the Court derive the power to displace the choices of the framers by its own, as when it ordained "one person—one vote" notwithstanding suffrage was excluded from the scope of the fourteenth amendment? The very institution of judicial review is regarded by some as of doubtful provenance. Judge Learned Hand, Professor Archibald Cox, and Professor Leonard Levy consider the evidence that the framers provided for judicial review as inconclusive.[89] While Hamilton assured the ratifiers that of the three branches "the Judiciary is next to nothing,"[90] it is now enthroned as a super-legislature. The judges, however, were emphatically excluded from tampering with policy. In the Convention it was proposed that they be included in a Council of Revision that would join with the President in the veto of legislation, on the ground that "[l]aws may be unjust, may be unwise, may be dangerous . . . and yet be not so unconstitutional as to justify the Judges in refusing to give them effect."[91] Mark the distinction between legislation that is merely unjust or dan-

86. *Quoted in* R. BERGER, *supra* note 6, at 383.

87. *Id.* at 278.

88. *Id.*

89. L. HAND, THE BILL OF RIGHTS 15 (1958); R. BERGER, *supra* note 6, at 353, 355 n.16. Bickel stated Hand was "unwilling to rest on the historical evidence." A. BICKEL, THE LEAST DANGEROUS BRANCH 46 (1962).

90. THE FEDERALIST No. 78 (A. Hamilton) at 504 (Mod. Lib. Ed. 1937).

91. *Quoted in* R. BERGER, *supra* note 6, at 301.

gerous and that which is unconstitutional. This was rejected because, as Nathaniel Gorham said, judges "are not to be presumed to possess any peculiar knowledge of the mere policy of public measures,"[92] because, in Elbridge Gerry's words, "[i]t was quite foreign . . . [to] ye office to make them the judges of the policy of public measures. . . ."[93] Then too, at the adoption of the Constitution there was profound distrust of judicial discretion, epitomized in 1767 by Chief Justice Hutchinson of Massachusetts: "the *Judge* should never be the *Legislator:* Because then the Will of the Judge would be the Law: and this tends to a State of Slavery."[94] In that era, "legal change" was brought about by legislation.

It is time to acknowledge, as Justice Jackson vainly urged in the desegregation case, that the Court "is declaring new law for a new day."[95] The first step, as Professor Ray Forrester urged, is to be candid about it.[96] "If," said Judge Learned Hand, "we do need a third [and final legislative] chamber it should appear for what it is, and not as the interpreter of inscrutable principles."[97] And it should seek a warrant from the American people so to act. Candor also requires acknowledgment that the judicial substitution of "one person—one vote" for the framers' exclusion of suffrage from the fourteenth amendment constitutes amendment, not interpretation. Let us be clear that this is not a matter of "strict construction," but of flouting the unmistakable intention of the framers. Amendment is the exclusive prerogative of the people by virtue of article V. Justice Black's dismissal "of the duty of the Court to keep the Constitution in tune with the times"[98] is not popular with advocates of a "living Constitution,"[99] but it stands rock-solid on the assurance of that great proponent of judicial review, Alexander Hamilton: "Until the people have, by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves . . . and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such

92. *Id.*
93. *Id.*
94. *Id.* at 307.
95. *Id.* at 130.
96. Forrester, *Are We Ready for Truth in Judging,* 63 A.B.A.J. 1212 (1977).
97. *Quoted in* R. BERGER, *supra* note 6, at 416.
98. *See* text accompanying note 69 *supra.*
99. For comment on that incantation, see R. BERGER, *supra* note 6, at 373-79.

an act."[100] Hamilton also rejected the notion "that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature"; and he stressed that Congress could impeach the judges for "deliberate usurpations on the authority of the legislature."[101]

Finally, I would remind Secretary Harris of Washington's caution in the Farewell Address:

> If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.[102]

100. *Quoted in id.* at 316.
101. *Id.* at 294.
102. *Id.* at 299.