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## SOIFER TO THE RESCUE OF HISTORY

RAOUL BERGER\*

In his belated review of my *Government by Judiciary: The Transformation of the Fourteenth Amendment*,<sup>1</sup> Professor Aviam Soifer<sup>2</sup> gallops furiously to the rescue of history from Berger's perilous heresy, "There is a crescendo building up toward revision or reversal of the *recent* interpretation of *constitutional alteration* [judicial amendment of the Constitution]." <sup>3</sup> The history Berger mustered "may be extremely useful to a vanguard of judges or Justices convinced of the need strictly to construe the Civil War Amendments and civil rights statutes."<sup>4</sup> Already—this I had not known—three federal judges and three state court justices have been infected; they have cited Berger's work.<sup>5</sup>

Soifer focuses on the "original sources"; his "foremost con-

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

2. Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U.L. REV. 651 (1979).

3. *Id.* at 652 (emphasis added). The Court was "determined to carry through a constitutional revolution . . ." Kelly, *Clio and the Constitution: An Illicit Love Affair*, SUP. CT. REV. 119, 158 (1965). Professor Louis Lusky refers to "the Court's new and grander conception of its own place in the governmental scheme," and the "assertion of power to revise the Constitution, *bypassing* the cumbersome amendment procedure prescribed by Article V." Lusky, *Essay-Review*, 6 HASTINGS CONST. L.Q. 403, 408, 406 (1979) (emphasis added).

4. Soifer, *supra* note 2, at 652.

5. *Id.* at 652 n.9. See Appendix A for an extract from the dissenting opinion of Circuit Judge Graafeiland, in which three of his Second Circuit brethren concur.

cern is with the [historical] evidence," to which he brings a "diachronic sense of historical development," on the basis of which he charges me with "the worst type of law office history," "emphasiz[ing] how badly Berger misuses historical materials."<sup>6</sup> His fifty-five page screed represents an effort to quarrel his way into notice by clawing up the back of one whom he describes as "a distinguished author."<sup>7</sup> Strident invective fills his every page.<sup>8</sup> So gross and reckless are his many misrepresentations that one might attribute them to malice but for his inability to weigh evidence, to comprehend what he reads. For him "a veil of rhetoric supplants proof."<sup>9</sup> On the most charitable view, he "was in haste to teach what he had not learned."<sup>10</sup>

Why answer one who is so patently a novice? Because his fellow activists take in each other's washing, quoting their bare assertions so long as they are derogatory. How much more will Soifer's fifty-five pages of "documentation" become activist gospel.<sup>11</sup> Then too, having nailed my thesis to the door, I am not minded to leave it bespattered with mud.

Soifer's egregious misrepresentations can quickly be demonstrated. (1) In my Introduction I wrote by way of "Background" that

*At the inception of their crusade the abolitionists peered up at an almost unscalable cliff. Charles Sumner destined to become a leading spokesman for extreme abolitionist views, wrote in 1834, upon his first sight of slaves, "My worst preconception of their appearance and their ignorance did not fall as low as their actual stupidity [etc.] . . . ."*<sup>12</sup>

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6. *Id.* at 654-55.

7. *Id.* at 652.

8. *E.g.*, "Berger grossly misuses Professor Horwitz," *id.* at 679; "very poor history," *id.* at 654; "abuses the quotations," *id.*; "startling penchant for selective quotation," *id.* at 681; "ignores the myriad statements . . . that directly contradict his single-minded theory," *id.* at 657; "glaring omissions," *id.* at 676; etc., etc.

9. O. HANDLIN, *TRUTH IN HISTORY* 289 (1979).

10. S. JOHNSON, *RASSELAS, POEMS AND SELECTED PROSE* 400 (B.H. Bronson ed. 1958).

11. Already, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 219 n.55 (1980), cites Soifer to show that my book has not been "well received," though despite Soifer's disparagement of my history Brest concedes that "the adopters of the equal protection clause probably intended it not to encompass voting discrimination at all," *id.* at 234 n.115, the central proposition of my book. Earlier, Brest agreed that "the nation was not ready to eliminate [school segregation] in the 1860's." Brest, Book Review, N.Y. Times, Dec. 11, 1977, § 7 (Book Review), at 11.

12. R. BERGER, *supra* note 1, at 10-11 (emphasis added).

This Soifer transforms into Berger's "attempt to show that Sumner, though an extreme abolitionist was racist . . . [;] [it] apparently is meant to prove that the 39th Congress was deeply racist in 1866."<sup>13</sup> Patently an "extreme abolitionist" would be antiracist, not racist, and he could understandably be appalled by his first sight of slaves. Nor did I remotely intimate that Sumner's reaction in 1834 constituted *proof* that the 39th Congress "was deeply racist in 1866." Such methods I leave to Soifer. Instead I delineated the perceptions of the 39th Congress by what was said in its halls in 1866.

(2) In my Introduction I observed that

Time and again Republicans [in the 39th Congress] took account of race prejudice as an inescapable fact. George W. Julian of Indiana referred to the "proverbial hatred" of Negroes, Senator Henry S. Lane of Indiana to the "almost ineradicable prejudice," Shelby M. Cullom of Illinois to the "morbid prejudice," Senator William M. Stewart of Nevada to the "nearly insurmountable" prejudice, James F. Wilson of Iowa to the "iron-cased prejudice" against blacks.<sup>14</sup>

At a later point I stated that "the framers shared the prejudices of their Northern constituency, to recall only George W. Julian's statement in the House: '*The real trouble* is we hate the negro.'" <sup>15</sup> Soifer comments, "Berger's reading of this statement in isolation *clearly indicates* to him that Julian hated the Negro . . . . [H]owever, the statement is clearly a lament on the difficulty in overcoming race hatred, not an endorsement of it."<sup>16</sup> Self-evidently Julian's emphasis on "[t]he real trouble" indicates his disapproval of pervasive prejudice. To wrest from that bare quotation an intent to prove Julian's own racism is a blatant perversion.

Soifer's discussion of racism further illustrates his inability to comprehend what he reads:

Berger is correct, of course, in his assertion that many Northerners were Negrophobic. That does not mean that they all were, or even that a majority in most Congressional districts

13. Soifer, *supra* note 2, at 694-95 n.205.

14. R. BERGER, *supra* note 1, at 13.

15. *Id.* at 91 (emphasis added and omitted).

16. Soifer, *supra* note 2, at 667 (emphasis added).

were racist . . . . Nor does it prove that a majority of their elected representatives were committed to pandering to prevalent racism.<sup>17</sup>

Yet he quotes Julian: “no fact is more notorious, and at the same time more discreditable, than the *nearly universal* prejudice of the white race in our country against the negro.”<sup>18</sup> Senator Henry Wilson, the Massachusetts Radical, stated in the Senate in January 1869 before the fifteenth amendment was ratified, “There is not today a square mile in the United States where the advocacy of the equal rights and privileges of those colored men has not been in the past and is not now unpopular.”<sup>19</sup> That the Congress “pandered” to those prejudices will shortly appear from their exclusion of suffrage from the fourteenth amendment. As notes William Gillette,<sup>20</sup> whose work bears the imprimatur of Professor David Donald,<sup>21</sup> a Reconstruction historian to whom Soifer pays tribute,<sup>22</sup> “Most Congressmen did not intend to risk drowning by swimming against the treacherous current of racial prejudice and opposition to Negro suffrage.”<sup>23</sup> They read the election returns, as I shall now show.

The exclusion of suffrage, my central thesis, never really noticed by Soifer,<sup>24</sup> may serve as the acid test of his numerous di-

17. *Id.*

18. *Id.* at 667 n.74 (emphasis added).

19. R. BERGER, *supra* note 1, at 240. See also the remarks of Justice Davis, note 95 *infra*, and Professor Donald, note 187 *infra*. Throughout this Article I shall cite to my book where the original source is cited in order (1) to call attention to confirmatory materials, (2) to show that those materials were spread before Soifer, and (3) to conserve space.

In an article published in *The Nation*, Thomas G. Shearman wrote: “The members from Indiana and Southern Illinois well knew that their constituents had barely overcome their prejudices sufficiently to tolerate even the residence of negroes among them, and that any greater liberality would be highly repulsive to them.” 3 *The Nation* 81, 90 (1866), quoted in C. FAIRMAN, *infra* note 43, at 1283 n.246. During the ratification of the fourteenth amendment, Senator John Sherman of Ohio stated in the Senate, “We do not like Negroes. We do not conceal our dislike.” Woodward, *Seeds of Failure in Radical Race Policy*, in *NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION* 128 (H. Hyman ed. 1966).

20. W. GILLETTE, *THE RIGHT TO VOTE: POLITICS AND PASSAGE OF THE FIFTEENTH AMENDMENT* (1969).

21. *Id.* at 15.

22. See Soifer, *supra* note 2, at 693 n.205.

23. W. GILLETTE, *supra* note 20, at 25.

24. His versions of my “central” point, e.g., Soifer, *supra* note 2, at 660, are wildly

vagations, detours that serve only to sidetrack the central issue. In my opening pages I stated,

the proof is all but incontrovertible that the framers meant to leave control of suffrage with the States, which had always exercised such control, and to exclude federal intrusion . . . . If that intention is demonstrable, the "one man, one vote" cases represent . . . a 180-degree revision, taking from the States a power that unmistakably was left to them. That poses the stark issue whether such revisory power was conferred on the Court.<sup>25</sup>

To round out the picture, I examined the *meaning* the terms of the fourteenth amendment *had for the framers*, and in course thereof, examined the history of the antecedent Civil Rights Act<sup>26</sup> enacted by the same Congress at the very same session. Soifer bogs down in details of the Civil Rights Act and ignores the central issue: given a clearly discernible intention to bar suffrage, may the Court replace the framers' choices by its own? Whatever the scope of the terms of Act or amendment, they cannot on traditional canons comprehend the suffrage that was unmistakably excluded.<sup>27</sup> Because that issue is central, a few facts are in order.

Justice Brennan observed that "17 or 19" Northern States had rejected black suffrage between 1865 and 1868.<sup>28</sup> Consequently, Roscoe Conkling, a member of the Joint Committee on Reconstruction of both Houses, which drafted the amendment, stated that it would be "futile to ask three-quarters of the States to do . . . the very thing most of them have already refused to do . . . ."<sup>29</sup> Another member of the Committee, Senator Jacob Howard, who explained the amendment to the Senate, said that "three-fourths of the States . . . could not be induced to grant

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off the mark.

25. R. BERGER, *supra* note 1, at 7-8. This is not, as Soifer indicates, a matter of "strict construction," Soifer, *supra* note 2, at 653, but of flouting the unmistakable intention of the framers.

26. Act of Apr. 9, 1866, ch. 21, 14 Stat. 27.

27. "'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.'" *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903) (quoting *Smythe v. Fiske*, 92 U.S. (23 Wall.) 47, 49 (1874)).

28. R. BERGER, *supra* note 1, at 90.

29. *Id.* at 59.

the right of suffrage, even in any degree or under any restriction, to the colored race.”<sup>30</sup> The unanimous Report of the Joint Committee stated that it “was doubtful . . . whether the States would consent to surrender a power [over suffrage] they had always exercised, and to which they were attached.”<sup>31</sup> Hence, it was thought best to “leave the whole question with the people of each State,”<sup>32</sup> that is, to leave State control untouched. An activist, Professor Louis Lusky, refers to “Justice Harlan’s irrefutable and unrefuted demonstration in dissent that the Fourteenth Amendment was not intended to protect the right to vote, much less to guarantee the right to vote.”<sup>33</sup> Professor Ger-

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30. *Id.* at 109-10. Another member of the Joint Committee, Senator George W. Williams of Oregon, stated,

the people of these United States are not prepared to surrender to Congress the absolute right to determine as to the qualifications of voters in the respective States, or to adopt the proposition that all persons, without distinction of race or color, shall enjoy political rights and privileges equal to those now possessed by the white people of the country. Sir, some of the States have lately spoken upon that subject. Wisconsin and Connecticut, northern, loyal, and republican States, have recently declared that they would not allow the negroes within their own borders political rights; and is it probable that of the thirty-six States more than six, at the most, would at this time adopt the constitutional amendment proposed by the gentleman?

. . . .

Put it before the country and commit the Union party to it, the amendment will be defeated and the Union party overwhelmed in its support—and the control of this Government would pass into the hands of men who have more or less sympathized with the rebellion; and I say that it is of more consequence, in my judgment, that the control of this Government should remain in the hands of the men who stood up for the Union during the late war than any constitutional amendment should be adopted by which the right of suffrage should be extended to any person or persons not now enjoying it.

CONG. GLOBE, 39th Cong., 1st Sess., S. App. 95, 96 (1866).

31. R. BERGER, *supra* note 1, at 84.

32. *Id.* Against this background measure Soifer’s “Berger also does not consider the possibility that retrospective editorial control might have altered the transcript, as it frequently does the Congressional Record *today*,” Soifer, *supra* note 2, at 656 n.28 (emphasis added). Bearing in mind that the leaders and the Committee Report are echoed by numerous statements by other Republicans, it would have required a gigantic conspiracy to alter the statements of all concerned. The defeat of suffrage proposals by votes of 125 to 12 and 34 to 4 alone show such speculation to be chimerical. See text accompanying notes 42 & 43 *infra*. Although Soifer deplores my “faith in the validity of legislative debates,” Soifer, *supra* note 2, at 655 n.18, the Supreme Court attaches great weight to “explicit statements of the meaning of the statutory language made by Committee reports and members of the Committees on the floor.” *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 225 (1942).

33. Lusky, *supra* note 3, at 406. Suffrage was the crucial, basic right: “Freedom for the freedman, moreover, was meaningless unless he had the ballot to protect himself.”

ald Gunther wrote that "most constitutional lawyers agree" that the "one person-one vote" lacks all historical justification.<sup>34</sup> In a solitary remark Soifer grudgingly allows that

Berger is probably correct in arguing that suffrage was not deemed a civil right in 1866 . . . [and] a majority of the 39th Congress, *if they gave any thought to it* at all might not *then* have included a right to integrated schooling in their definition of civil rights. But the members of the 39th Congress *did not* carefully *limit and specify* the civil rights with which they were concerned.<sup>35</sup>

This is belied by the facts, as will more particularly appear in the subsequent discussion of the Civil Rights Act. That the framers "gave thought" to "integrated schooling" is demonstrated by James Wilson's—chairman of the House Judiciary Committee—assurance that the words "civil rights" *do not*

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W. GILLETTE, *supra* note 20, at 22; *see* note 173 *infra*. Contrast Soifer's addiction to glittering generalities: "[I]dealistic concern for the negro was not an insignificant impulse shared by only a few men of noble intellect; rather it was a compulsive and complex force that powerfully shaped the minds and actions of . . . the great body of Republicans," with their treatment of Negro suffrage. "[W]hite Americans resented or resisted it," W. GILLETTE, *supra* note 20, at 27. Even in 1868 the Republican suffrage plank handed "Negro suffrage in the North over to the northern states." *Id.* at 37. Soifer always prefers resounding rhetoric to brute fact.

Morton Keller stated, "The off-year elections of 1867," during which ratification of the fourteenth amendment was being debated, "made clear the popular hostility to black suffrage in the North." R. BERGER, *supra* note 1, at 56. And he noted that "most congressional Republicans were aware of (and shared) their constituents' hostility to black suffrage." *Id.* at 105. Soifer shrugs this off because Berger "fails to notice Keller's central point" that after the Civil War "a broader view of civil equality left its mark everywhere in Congress" and Soifer concludes that "[t]he possibility of oscillation is foreign to Berger's world of static text and static history," ever preferring vague generalities to unpleasant particulars: the 39th Congress rejected suffrage by votes of 125 to 12 and 34 to 4. The pendulum stopped "oscillating" here.

34. Gunther, *Too Much a Battle With Strawmen*, Wall St. J., Nov. 24, 1977, at 4, col. 4. Gunther also wrote, "The ultimate justification for the *Reynolds* ruling is hard, if not impossible, to set forth in constitutionally legitimate terms. It rests, rather, on the view that courts are authorized to step in when injustices exist and other institutions fail to act. That is a dangerous—and I think illegitimate—prescription for judicial action." Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots and Prospects*, 1979 WASH. U.L.Q. 817, 825. In the debates on the fifteenth amendment there are frequent references to the need for the amendment because the fourteenth had failed to confer suffrage. Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 313, 321-23 (1979). Soifer erroneously states that Berger "purports to do a history of the legal thought of the period," Soifer, *supra* note 2, at 688, when I focused almost exclusively on the framing of the fourteenth amendment.

35. Soifer, *supra* note 2, at 705 (emphasis added).



“mean that all citizens shall sit on juries, or that their children shall attend the same schools.”<sup>36</sup> An activist, Professor Henry J. Abraham, concludes that “any genuinely objective . . . examination of the debates . . . demonstrates that the authors and supporters [of the fourteenth amendment] specifically rejected its application to segregated schools and the franchise . . . [and meant] ‘to leave suffrage and segregation beyond federal control, to leave it with the States . . . .’ ”<sup>37</sup> Honest debate must proceed from the undeniable facts and deal with the questions they pose:<sup>38</sup> whence did the Court derive power to reverse the framers’ decisions, to revise the amendment?

If Soifer ever faced up to that issue, it is lost in the welter of irrelevant discussion—the impact of the Declaration of Independence, of natural law, of abolitionist theology—that burdens his pages. Instead Soifer dwells on Berger’s omission to “consider changes in the thought or voting patterns of the North during the 1850’s,” even “the most obviously relevant events just beyond the halls of Congress . . . in the winter of 1865-1866. Yet these events are crucial to an understanding of congressional intent.”<sup>39</sup> Be the “complexity and mutability of popular thought on such matters as race and federalism immediately following the Civil War”<sup>40</sup> what they may, “popular and political thought” undeniably rejected suffrage and desegregation when it came to drafting the Act and amendment in 1866. What boots the “impact” of abolitionist theology when John Bingham, “a leading

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36. R. BERGER, *supra* note 1, at 27 (emphasis added). For confirmatory evidence see *id.* at 117-33.

37. Abraham, Essay-Review, 6 HASTINGS CONST. L.Q. 467-68 (1979)(quoting R. BERGER, *supra* note 1, at 245). Professor Nathaniel Nathanson wrote about my view that the framers contemplated that the fourteenth amendment would not require desegregation or Negro suffrage:

These are not surprising historical conclusions. The first was quite conclusively demonstrated by Alexander Bickel. . . . [T]he second was also convincingly demonstrated by the dissenting opinion of Mr. Justice Harlan. . . . Mr. Berger’s independent research and analysis confirms and adds weight to those conclusions.

Nathanson, *Constitutional Interpretation and the Democratic Process*, 56 TEX. L. REV. 579, 581 (1978).

38. For an activist’s honest evaluation of these questions, see Perry, Essay-Review, 78 COLUM. L. REV. 685 (1978).

39. Soifer, *supra* note 2, at 668 n.79, 690.

40. *Id.* at 688.

congressional antislavery constitutional theorist,"<sup>41</sup> led the fight during ratification of the amendment for the admission of Tennessee despite the absence of a black suffrage provision in its constitution, and was upheld by a vote of 125 to 12.<sup>42</sup> Charles Sumner's parallel effort to bar Tennessee—he was the unremitting advocate of abolitionist ideals—was voted down by the Senate 34 to 4.<sup>43</sup> These facts are immediately relevant to the scope of the amendment (for a state suffrage provision was unnecessary if already provided for by the amendment), and they testify to Abolitionist impotence when the chips were down. Soifer's canting insistence on "context, nuance," on ideals outside the halls of Congress—"[t]he political context does much to explain the language and votes of the 39th Congress"<sup>44</sup>—cannot explain away such decisive votes, votes that swamp his whole argument. Whatever the influence of the Declaration of Independence, of Abolitionist theology, of natural law, *they did not suffice to prevent the exclusion of suffrage and segregation*. Soifer has yet to learn from the Lord High Executioner that "[t]he flowers that bloom in the spring, Trala, [h]ave nothing to do with the case . . . ."<sup>45</sup>

# I. THE CIVIL RIGHTS ACT, NATURAL LAW, AND ABSOLUTE RIGHTS

Soifer misleadingly attributes to me three premises of the Civil Rights Act: judicial enforcement of fugitive slave laws, dislike of abolitionists by a Negrophobic North, and concepts of state sovereignty. "From these assertions Berger derives the central point in his argument that natural law had little impact in 1866, and that the Civil Rights Act of 1866 was strictly limited to narrowly defined rights."<sup>46</sup> Natural law emphatically was *not* "[t]he central point" in my demonstration of the 1866 legislative intention. For that I relied on the text of the Act and its explanations by the framers; and they relied for their enumeration of

41. R. BERGER, *supra* note 1, at 207 n.49. See note 187 *infra*.

42. *Id.* at 79, 95.

43. *Id.* at 59-60. Sumner's proposal "that all persons were 'equal before the law, whether in the courtroom or at the ballot-box' received 8 yeas to 39 nays." 6 C. FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 1264 (1971).

44. Soifer, *supra* note 2, at 654, 696.

45. W. GILBERT & A. SULLIVAN, *THE MIKADO*, Act II (Mod. Lib. Ed. 1917).

46. Soifer, *supra* note 2, at 559-60.

“absolute” “fundamental” rights on Blackstone and Kent rather than natural law. It is important to examine the Act closely, because the framers meant by the amendment merely to constitutionalize the Act, *i.e.*, to dispel constitutional doubts and to put it beyond the possibility of repeal.<sup>47</sup> And it furnishes the background against which to evaluate Soifer’s drumfire of misrepresentation.

Section 1 of the Bill provided in pertinent part:

[t]hat there shall be no discrimination in civil rights or immunities . . . on account of race . . . but the inhabitants of every race . . . shall have the *same right* to make and enforce *contracts, to sue, be parties, and give evidence, to inherit, purchase . . . hold and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property*, and shall be subject to like punishment . . . and no other.<sup>48</sup>

Soifer seizes on my “glaring omission” of the opening sentence which made blacks citizens,<sup>49</sup> an omission cured a few pages later by my quotation of that sentence, “all persons born in the United States . . . are hereby declared to be citizens of the United States,” and are “to be free from discrimination.”<sup>50</sup> The significance of my “glaring omission” is that now “[a]ll citizens were to have the same rights—and the complete and equal benefit of all laws and proceedings for *security of person and prop-*

47. The general agreement on this fact is set forth in R. BERGER, *supra* note 1, at 23, 43. In addition, Henry Raymond of New York adverted to the Civil Rights Bill “by which Congress proposed to exercise precisely the powers which that [Bingham] amendment was intended to confer.” Cong. GLOBE, 39th Cong., 1st Sess. 2502 (1866). In 1870, Justice Bradley declared, “the civil rights bill was enacted at the same session, and but shortly before the presentation of the fourteenth amendment . . . 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).

48. R. BERGER, *supra* note 1, at 24 (emphasis added).

49. Soifer, *supra* note 2, at 676.

50. R. BERGER, *supra* note 1, at 40. In one of the decisions that Soifer taxes me with ignoring (Soifer, *supra* note 2, at 697), *United States v. Rhodes*, Justice Swayne held, “The fact that one is a subject or citizen determines nothing as to his rights as such. They vary in different localities. Citizenship has no necessary connection with the franchise of voting . . . or indeed any other rights, civil or political.” 27 Fed. Cas. 785, 790 (C.C.D. Ky. 1866) (No. 16,151).

erty—as enjoyed by paradigmatic white citizens.”<sup>51</sup> Never does Soifer inquire what was embraced by “security of person and property,” the key words.

Instead he rings the changes on the framers’ intention to protect “fundamental rights,” pivoting on Senator Trumbull’s assurance that the Act would protect “such fundamental rights as belong to every free person.”<sup>52</sup> He charges me with omitting “Trumbull’s next words, which were that these fundamental rights were ‘such as the rights *enumerated* in this bill,’ ”<sup>53</sup> unaware that my constant identification of “fundamental rights” with those “enumerated” absolved me of needless repetition. Soifer’s word-play, “such as” does not mean “limited to,”<sup>54</sup> overlooks that “such as” must at least go no further than rights of the same nature, so that the right to contract does not comprehend suffrage. Finally Soifer asks, “But what were such fundamental rights as belong to every free person?”<sup>55</sup> Let the framers answer.

## II. FUNDAMENTAL RIGHTS

Martin R. Thayer of Pennsylvania stated that “to avoid any misapprehension” as to what the “fundamental rights of citizenship” are, “*they are stated* in the bill. The same section goes on to define with great particularity the civil rights and immunities which are to be protected by the bill.” And he added, “when those civil rights which are first referred to in general terms [that is, “civil rights and immunities”] are subsequently enumerated, that enumeration *precludes* any possibility that the general words which have been used can be *extended beyond* the particulars which have been enumerated,” that the Bill was for “the protection of the *fundamental rights of citizenship and nothing else*.”<sup>56</sup> Answering his question, what are “the rights of

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51. Soifer, *supra* note 2, at 676 (emphasis added).

52. *Id.* at 671.

53. *Id.* (emphasis added). See note 166 *infra*.

54. Soifer, *supra* note 2, at 670.

55. *Id.* at 672.

56. R. BERGER, *supra* note 1, at 28 (emphasis added). Senator John Sherman had stressed at the outset the need of “naming them, defining precisely what they should be.” *Id.* at 24. Later he said that the bill “defines what are the incidents of freedom and says that these men must be protected in certain rights, and so careful is its language that it goes on and defines those rights, the right to sue and be sued . . . to acquire and

citizens," Trumbull said, they are "[t]he great *fundamental rights set forth* in this bill: the right to acquire property, the right to come and go at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property."<sup>57</sup> It was these rights that Trumbull subsumed in stating that the free man "must be fully protected in all his *rights of person and property*."<sup>58</sup> Without these rights he could not exist;<sup>59</sup> he was to be protected against lynchings and barn burnings.

Soifer heaps scorn on my head for citing Blackstone and Kent to "squeeze" fundamental rights into my "Procrustean bed," because Blackstone's "star had fallen" by 1866.<sup>60</sup> The news had not reached the 39th Congress. Chairman Wilson explained that Blackstone had classified the "great fundamental rights" dealt with by the Bill "under three articles": "1. The right of personal security [for life and limb] . . . [:] 2. The right of personal liberty [freedom of locomotion without imprisonment] . . . [:] 3. The right of personal property." From Kent he quoted, "The *absolute rights* of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property." These, Wilson ex-

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hold property . . . ." *Id.* at 30.

57. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (emphasis added).

58. Soifer, *supra* note 2, at 672 n.107 (emphasis added). Bickel summarized: "Radicals and Moderates alike—who spoke in favor of the bill were content to rest on the point Trumbull had made. The rights to be secured by the bill were those specifically enumerated in section 1." R. BERGER, *supra* note 1, at 29 n.31.

Among the "crucial" "events just beyond the halls of Congress," that I am charged with "ignoring," is "the irreparable split between the Executive and the leaders of Congress," Soifer, *supra* note 2, at 690-91, a "political context that does much to explain the language and the votes of the 39th Congress." *Id.* at 696 (emphasis added). Soifer spends six portentous pages on this "split." Unquestionably it led to the override of Johnson's veto of the Civil Rights Act, *id.* at 695, but it did not change the "language" by one iota. In seeking the override, Trumbull repeated that the "rights of a citizen" are "those inherent, fundamental rights . . . such as the rights enumerated in this bill," also quoting Kent's "the right of personal security, the right of personal liberty, and the right to acquire and enjoy property." CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

Consider against this background Soifer's comment that Berger "does not accept Harold Hyman's point that, after the Civil War, 'all certitude vanished with respect to workaday civil rights.'" Soifer, *supra* note 2, at 673. The framers, however, left no doubt about what they conceived "civil rights" to be.

59. See statements by Windom, text accompanying note 96 *infra*, Senator Howe, note 83 *infra* and William Lawrence, text accompanying note 67 *infra*.

60. Soifer, *supra* note 2, at 677-78.

plained, were the rights comprehended by "civil rights."<sup>61</sup> In rejecting my reference to Blackstone and Kent to show that "fundamental," "natural" rights "had become words of received meaning,"<sup>62</sup> Soifer "ignores" the fact that this was expressed in one of the activists' sacred texts, that of Alfred Kelly:

Ultimately Revolutionary natural-rights theorists insisted liberty was derived from a state of nature, but it had long before been given a very positive and specific content. It was to be found . . . above all in the common law as expounded by Coke and Blackstone. . . . The notion of pulling new natural rights from the air to allow for an indefinite expansion can hardly be considered to be within the original spirit of the amendment.<sup>63</sup>

When, therefore, Soifer insists upon "the *unbounded* nature of absolute rights,"<sup>64</sup> he substitutes wishful thinking for hard historical fact.

It needs to be noted that "life, liberty, and property" were equated by the framers with the "fundamental rights" of "person and property." Thus Wilson emphasized that the rights enumerated were *no* "greater than the rights which are included in the general term 'life, liberty, and property.'" <sup>65</sup> Senator James Patterson of New Hampshire was opposed to "any law discriminating against [blacks] in the security of life, liberty, person, property and the proceeds of their labor."<sup>66</sup> William Lawrence said that the enumerated rights were the "necessary incidents of those absolute rights," that is, of "life, liberty and property," without which these "fundamental rights" could not be en-

61. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (emphasis added).

62. Soifer, *supra* note 2, at 677.

63. R. BERGER, *supra* note 1, at 35 n.55. James Otis, Samuel Adams, Thomas Cushing, and Thomas Gray, in a letter to Dennys de Berdt dated December 20, 1765, stated, "the primary, absolute, natural Rights of Englishmen . . . are *Personal Security, Personal Liberty and Private Property*." 1 S. ADAMS, WRITINGS 65 (1904).

Soifer states that the abolitionists "wanted natural rights for the colored man." Soifer, *supra* note 2, at 665 n.68. Ten Broek, one of his authorities, wrote that the "principal spokesmen and theorists of the abolitionist movement, Lysander Spooner and Joel Tiffany," regarded "privileges and immunities" (which presumably caught up natural rights) as a right to "full and ample protection in the enjoyment of his personal security, personal liberty and property; . . . protection against oppression [and] . . . against lawless violence." R. BERGER, *supra* note 1, at 22.

64. Soifer, *supra* note 2, at 677.

65. R. BERGER, *supra* note 1, at 28 (emphasis added).

66. *Id.* at 29.

joyed.<sup>67</sup> An “obvious illustration of [Berger’s] *startling penchant for selective quotation*,” says Soifer, “is to be found in Representative Lawrence’s statement in the very speech Berger describes as ‘patently’ revealing the ‘limited objectives of the Civil Rights Act.’”<sup>68</sup> What was my omission? Lawrence described the Act as “*the Magna Charta*.”<sup>69</sup> But said he, “[i]t does not affect any political right, as that of suffrage, the right to sit on juries . . . . This it leaves to the States . . . . But it does provide that as to certain enumerated civil rights”—enumerating making contracts, owning property, bringing law suits—there shall be no discrimination.<sup>70</sup> Such are the facts that “obviously” betray my “startling penchant for selective quotation.”

The framers underscored their narrow aims by deleting the introductory sentence of section one of the bill: “That there shall be no discrimination in civil rights or immunities . . . on account of race . . . .” Notwithstanding the explanations of Thayer and others that this general language was limited by the enumerated rights, John Bingham, who is thought to have been the abolitionist torchbearer, protested that the “civil rights” phrase was “oppressive,” that it would “embrace every right that pertains to a citizen as such” and strike down “every state constitution which makes a discrimination on account of race or color in any of the constitutional rights of the citizens.”<sup>71</sup> At his insistence the “no discrimination in civil rights” was deleted.<sup>72</sup> Soifer notes that this deletion dismayed “Alfred Kelly and other historians assisting Thurgood Marshall and his legal team in *Brown v. Board of Education*,” and considers that Alexander Bickel too became “entangled by the mysteries of silent legislative activity” in concluding that the view that “the bill dealt only with a distinct and limited set of rights was conclusively validated” by the deletion.<sup>73</sup> Only Soifer has not lost his head: “Bingham’s motion was resoundingly defeated, one hundred and thirteen to thirty-seven,” indicating to Soifer that there was no support “for any states’ rights manifesto Bingham intended to

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67. *Id.* at 25.

68. Soifer, *supra* note 2, at 681 (emphasis added).

69. *Id.*

70. CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866).

71. R. BERGER, *supra* note 1, at 119-20 (emphasis added).

72. *Id.* at 119.

73. Soifer, *supra* note 2, at 685 n.169; see also R. BERGER, *supra* note 1, at 121.

issue.”<sup>74</sup> This was on March 9, and the measure was recommit-  
ted. On March 13, Wilson returned with the Judiciary Commit-  
tee’s deletion amendment, explaining,

Some members of the House thought, in the general words of  
the first section in relation to civil rights, it might be held by  
the courts that the right of suffrage was included in those  
rights. To obviate that difficulty and the difficulty growing out  
of any other construction *beyond the specific rights named* in  
the section, our amendment strikes out all of those general  
terms and leaves the bill with the rights specified in the  
section.<sup>75</sup>

And he stated the deletion was made because “some gentlemen  
were apprehensive that the words we proposed to strike out  
might give warrant for a latitudinarian construction not in-  
tended.”<sup>76</sup> With this explanation before them, the deletion was  
approved.<sup>77</sup> Soifer comments that “to attribute a great deal to  
the deletion after Bingham’s motion was overwhelmingly de-  
feated . . . is to guess about silent legislative intent, and not  
simply to read the legislative transcript, as Berger purports to  
do.”<sup>78</sup> Thereby he exhibits his own neglect to read beyond the  
first vote to the subsequent definitive deletion.

Soifer also relies on Lawrence’s statement that there are  
“anterior to and independent of all laws and constitutions . . .  
certain absolute rights . . . of which a state cannot constitution-  
ally deprive” a person. Hence, Soifer asserts, “[i]t is simply im-  
possible to reconcile an intention to guarantee blacks fixed and

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74. Soifer, *supra* note 2, at 686.

75. CONG. GLOBE, 39th Cong., 1st Sess. 1366-67 (emphasis added).

76. *Id.* at 1366.

77. *Id.* at 1296. Lawrence commented, “for the purpose of obviating [Bingham’s]  
objection this clause was stricken out and forms no part of the bill as it finally passed.”  
*Id.* at 1837.

78. Soifer, *supra* note 2, at 685 n.109. In *Georgia v. Rachel*, 384 U.S. 780 (1966), the  
Court, per Justice Stewart, said of the Civil Rights Act of 1866,

The legislative history of the 1866 Act clearly indicates that Congress intended  
to protect a limited category of rights . . . . [T]he Senate bill did contain a  
general provision forbidding discrimination in civil rights or immunities pre-  
ceding the specific enumeration of rights . . . . Objections were raised in the  
legislative debates to the breadth of the rights of racial equality that might be  
encompassed by a prohibition so general . . . . [A]n amendment was accepted  
striking the phrase from the bill.

*Id.* at 788.



absolute civil rights with an intention to defer to the states in the determination of what civil rights are to be protected.” To tie these “absolute natural rights” to “variable state law absolutely destroys Berger’s arguments.”<sup>79</sup> Lawrence followed Chancellor Kent’s definition of “absolute rights”: “The right of personal security, personal liberty, and the right to acquire and enjoy property.”<sup>80</sup> The rights enumerated in the Civil Rights Bill, he said, were the “necessary incidents of these absolute rights,”<sup>81</sup> and privileges and immunities were “confined to those [privileges and immunities] which [are] in their nature fundamental [:] . . . the rights of protection of life and liberty, and to acquire and enjoy property.”<sup>82</sup> He emphasized that the Civil Rights Bill “does not confer any civil right[;] . . . all these are left to the States. But it does provide that as to certain enumerated civil rights,” what “may be enjoyed by any shall be shared by all citizens in each State . . . .”<sup>83</sup> In short, Lawrence, in con-

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79. Soifer, *supra* note 2, at 681 n.151, 682-83. The Supreme Court declared in 1873 that “the most liberal advocate of the rights conferred by [the fourteenth] amendment have contended for nothing more than that the rights of the citizen *previously existing*, and *dependent wholly on State laws* for their recognition, are now placed under the protection of the Federal government . . . .” *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 133 (1873) (emphasis added). Senator William M. Stewart stated in the 39th Congress, “This section [§ 1] is simply to remove the disabilities existing by laws tending to reduce the negro to a system of peonage. It strikes at that; nothing else. . . . That is the whole scope of the law.” CONG. GLOBE, 39th Cong., 1st Sess. 1785 (1866). His explanation of the Civil Rights Act of 1866, which was embodied in the fourteenth amendment, was intended to reassure the framers.

80. CONG. GLOBE, 39th Cong., 1st Sess. 1832, 1833 (1866).

81. *Id.* at 1833.

82. *Id.* at 1835-36.

83. *Id.* at 1832. Soifer obliterates Lawrence’s distinction between “absolute” and “civil” rights, his affirmation that the “absolute” rights were protected by the Bill’s enumerated “incidents of those absolute rights.” In our own time, the Supreme Court stated with respect to the privileges and immunities of article IV,

At one time it was thought that this section recognized a group of rights which . . . were classed as “natural rights”; and that the purpose of the section was to create right of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State.

But

It has come to be the settled view that Article IV, § 2, does not import that a citizen of one State carries with him into another State fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but on the contrary, that in every State every citizen of every other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.

tradition to Soifer, left it to each State to determine which of the enumerated rights should "be enjoyed by any" and therefore without discrimination "shall be shared by all."

It cannot be unduly emphasized that the framers sought solely to prevent *discrimination* with respect to *enumerated* rights which the states saw fit to grant. This plainly appears from the face of section one of the Civil Right Bill, which forbade "discrimination in civil rights" and provided that blacks should have "the same" enumerated rights as whites.<sup>84</sup> That was made clear beyond peradventure by a number of framers. Samuel Shellabarger of Ohio stated that the Civil Rights Bill secures "equality of protection in these enumerated rights which the States *may deem proper to confer* upon any race."<sup>85</sup> Thaddeus Stevens explained that the amendment "allows Congress to correct unjust legislation of the States *so far* that the law which operates upon one shall *operate equally* upon all," e.g., "[w]hatever law punishes a white man for a crime shall punish the black man precisely in the same way. . . . Whatever means of redress *is afforded* to one shall be afforded to all. . . . Your civil rights bill secures the same thing."<sup>86</sup> The point was nailed down by Trumbull's assurance to the Senate: "If the State of Kentucky *makes no discrimination* in civil rights between its citizens, this bill *has no operation* whatever in the State of Kentucky."<sup>87</sup> After the Johnson veto of the Bill, Trumbull reiterated that it "in no manner interferes with the municipal regulations of any State which *protects* all *alike* in their rights of person or property."<sup>88</sup> What Soifer totally misses was perfectly understood

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Hague v. C.I.O., 307 U.S. 496, 511 (1939). It is to be borne in mind that such discrimination is inhibited only with respect to a narrow enclave of privileges.

84. Section 1 of the Civil Rights Bill is set out in CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

85. R. BERGER, *supra* note 1, at 176-77 (emphasis added).

86. *Id.* at 172 (emphasis added).

87. *Id.* at 178. In the House, Samuel Shellabarger of Ohio said of the Civil Rights Bill "Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866). Similarly, William Lawrence, after stating that the Bill "leaves [political rights] to the States, to be determined by each for itself," said, the bill "does not confer any civil right . . . . But it does provide that as to certain enumerated civil rights" what "may be enjoyed by any shall be shared by all citizens in each State." *Id.* at 1832.

88. R. BERGER, *supra* note 1, at 178 n.49 (emphasis added). Against these Trumbull explanations, Soifer argues, "Trumbull may have been mistaken in his factual assump-

by Horatio Burchard of Illinois in the 1871 debates: the equal protection clause “does not enjoin upon the State that it shall provide protection by its laws, but that it shall not discriminate in that protection.”<sup>89</sup> Soifer cannot bring himself to believe that “[t]here was no national standard of civil rights,”<sup>90</sup> but a more prestigious scholar, Dean Phil Neal, concluded that “the equality ordained” is “a Statewide equality, encompassing the persons ‘within its jurisdiction’ and not a nationwide or external equality.”<sup>91</sup> For it is the laws of each individual State, not of the nation, that are required to afford “equal protection.”

Similar inability to grasp the facts is exhibited by his rejection

tions about the amount of protection afforded blacks in the North . . . but that does not contradict Trumbull’s legal theory—that government had a duty to protect legal rights.” Soifer, *supra* note 2, at 673 n.111. A “mistaken” assumption does not vitiate Trumbull’s assurances—echoed by Shellabarger, see text accompanying note 85 *supra*, and by Lawrence, see text accompanying note 83 *supra*—on which the framers acted; nor do *general* statements about “fundamental rights” override *specific* assurances that the bill had no operation where there was no discrimination. There could be no “mistake” as to Northern resistance to the central right of suffrage: “Negro voting in the North was out of the question.” W. GILLETTE, *supra* note 20, at 32.

Two of the early cases which I am taxed with failing to mention, Soifer, *supra* note 2, at 697, make plain that the Act struck at certain discriminations. *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1871), held that the Civil Rights Act gives civil actions “whenever in the State courts any right enjoyed by white citizens is denied to them.” *Id.* at 592. *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151), held that whether white citizens enjoyed the right “is vital to the case. Without it our jurisdiction cannot be maintained.” *Id.* at 786.

89. CONG. GLOBE, 42d Cong., 1st Sess. H. App. 315 (1871). In the 1871 debate, James Garfield, a participant in the 39th Congress, “reviewed fully the legislative history” of the fourteenth amendment and stated: “It is not required that the laws shall be perfect. They may be unwise, injudicious, even unjust, but they must be equal in their provisions . . . resting upon all with equal weight.” R. BERGER, *supra* note 1, at 181 n.57. Harold Hyman, an authority extolled by Soifer, Soifer, *supra* note 2, at 688, wrote, “Instead of formulating positively national civil rights minima, as some Republicans preferred to do, the Amendment forbade unequal deprivation of the broad, uncodified mass of civil rights protection which a state professed to afford . . .” R. BERGER, *supra* note 1, at 181 (emphasis added). Justice Field stated that the fourteenth amendment “only inhibits discrimination and partial enactments, favoring some to the impairment of the rights of others,” and does not transfer “to the federal government the protection of all private rights . . .” *Butchers Union Co. v. Crescent City Co.*, 111 U.S. 746, 759 (1884) (concurring opinion).

90. Soifer, *supra* note 2, at 682. Citing *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129 (1873), Justice Stone stated that the fourteenth amendment “created no new privileges and immunities of United States citizenship . . .” *Colgate v. Harvey*, 296 U.S. 404, 443 (1935) (dissenting opinion, joined by Brandeis and Cardozo, JJ.). *Colgate* was overruled by *Madden v. Kentucky*, 309 U.S. 83, 93 (1940).

91. R. BERGER, *supra* note 1, at 184.

tion of "the crucial distinction between full and equal protection," invoking the Civil Rights provision for "full and equal benefit of all laws and proceedings for the security of persons and property."<sup>92</sup> "Full benefit" went no further than the italicized rights. Reasoning, however, that now government had a "duty at least to secure protection of person and property as enumerated in section 1," Soifer nimbly leaps to the conclusion that "[i]f a state created a legal right to an education, it could not restrict that right to whites."<sup>93</sup>

Nowhere does Soifer explain how he derives from a grant of *A* and *B* (that is, "security of persons and property") a grant of *C*—"education." Assume such a derivation, and it yet does not comprehend desegregation, for Chairman Wilson assured the framers that desegregated schools were not among the "civil rights" of the Act.<sup>94</sup> Wilson is confirmed by other observations. In a discussion of the fourteenth amendment, for which he voted, Senator Patterson said he was opposed "to any law discriminating against [blacks] in the security of life, liberty, person, property . . . . These civil rights all should enjoy. Beyond this I am not prepared to go . . . ." <sup>95</sup> William Windom of Minnesota said that the Civil Rights Bill affords to the Negro "an equal right, nothing more . . . to make and enforce contracts[;] . . . [i]t does not . . . confer the privilege of voting," nor "social privileges. It merely provides safeguards to shield them from wrong and outrage and to protect them in the enjoyment of . . . the right to exist."<sup>96</sup>

92. Soifer, *supra* note 2, at 684 (emphasis added). This was how the leading abolitionist theorists, Spooner and Tiffany, associated "full protection." See note 63 *supra*.

93. Soifer, *supra* note 2, at 705. But compare note 187 *infra* and text accompanying notes 198 & 199 *infra*.

94. See text accompanying note 36 *supra*. Resistance to desegregated schools persisted in the 1870s, and the Civil Rights Act of 1875 was shorn of a provision for desegregated schools. Berger, *supra* note 34, at 329-31.

95. R. BERGER, *supra* note 1, at 29. During a visit in April 1868 to South Carolina, Justice David Davis, an Illinoisan, wrote, "There is more repugnance to negroes at the West than here—repugnance I mean to any and every idea of equality." C. FAIRMAN, *supra* note 43, at 482.

96. R. BERGER, *supra* note 1, at 29 n.30. As Senator Timothy Howe of Wisconsin emphasized, the South would deny Negroes

the plainest and most necessary rights of citizenship. The right to hold land[.] . . . the right to collect their wages by the processes of the law when they had earned their wages [this sheds light on what the framers had in mind by "due process"][,] the right to appear in the courts as suitors for any wrong done

At the outset, Stevens, whom Soifer describes as “the unquestioned leader of the House,”<sup>97</sup> had submitted to the Joint Committee on Reconstruction a proposal that “[a]ll laws, state or federal, shall operate impartially and equally on all persons . . . .” But in summing up in favor of the fourteenth amendment, he said that while he had hoped to remodel “all our institutions as to have freed them from every vestige of . . . inequality of rights . . . [and so] that *no* distinction would be tolerated . . . . This bright dream has vanished.”<sup>98</sup> In fact, sweeping proposals to abolish *all* discriminations repeatedly fell by the wayside,<sup>99</sup> so that Senator William Fessenden, chairman of the Joint Committee acknowledged that “[w]e cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions.”<sup>100</sup> Soifer simply cannot look such facts in the face but prefers to gaze into the word “full” as if it were a crystal ball that reveals ultimate truth.

Similar crystal-gazing is disclosed by Soifer’s attempt to root an expansive reading in the provisions for enforcement: “Sections of the Civil Rights Act of 1866 that Berger altogether ignores created both federal penalties and removal to the federal courts *for the right specified* in section 1 . . . . The very existence of ongoing and open-ended enforcement power threatens Berger’s strict construction of constitutional limits.”<sup>101</sup> “Removal to federal courts” and federal enforcement sprang from the framers belief that blacks could not secure protection in southern courts.<sup>102</sup> Consequently there was no alternative to delegation of enforcement to the federal courts, because Congress is

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them . . . .

CONG. GLOBE, 39th Cong., 1st Sess., S. App. 219 (1866). *See also* remarks of Senator Stewart, note 79 *supra*.

97. Soifer, *supra* note 2, at 693.

98. R. BERGER, *supra* note 1, at 163, 173 (emphasis added). Stevens explained that the proposed fourteenth amendment “is all that can be obtained in the present state of public opinion . . . . Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this.” CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866); *see* Sumner’s proposal, *supra* note 40.

99. R. BERGER, *supra* note 1, at 163-64.

100. *Id.* at 99.

101. Soifer, *supra* note 2, at 689 (emphasis added).

102. R. BERGER, *supra* note 1, at 201. *See* CONG. GLOBE, 39th Cong., 1st Sess. 744 (1866) (remarks of Senator John Sherman).

not empowered to adjudicate violation of its laws.<sup>103</sup> To refer to “open-ended enforcement power” begs the question; federal enforcement was designed to insure that “specified” rights would be protected, not to add to them.<sup>103.1</sup> So too, in one of his many bursts of empty rhetoric, Soifer has it that “the enforcement clauses of the Civil War Amendments indicate a new genre of constitutional provisions, explicitly doing something quite different from limiting governmental power. Yet Berger gives section 5 of the fourteenth amendment short shrift.”<sup>104</sup> In *Blyew v. United States*,<sup>105</sup> an adverse judgment on a charge that whites murdered blacks was appealed on the ground two black witnesses were not permitted to testify. The Court observed that section three of the Civil Rights Act confers jurisdiction of causes “affecting persons who are denied” rights under section one; and it held that witnesses “are no more affected . . . than is any other person.”<sup>106</sup> Although a party has the right to testify, a witness, it held, has not. And the Court held, “It will not be thought that Congress intended to give the District Courts jurisdiction over all causes . . . . They have expressly *confined it* to causes affecting certain purposes.”<sup>107</sup> Let Soifer explain how this differs “from limiting governmental power.”

Soifer’s “Berger gives section 5 of the fourteenth amendment short shrift” exposes his ignorance of the field. My chapter

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103. Soifer also alludes to the expansion of “the jurisdiction of the lower federal courts . . . across various areas of litigation . . . .” Soifer, *supra* note 2, at 680 n.148. Jurisdiction in bankruptcy and admiralty was expanded because Congress could hardly take over needed judicial functions in traditional litigation.

103.1. Alexander Bickle considered that “there isn’t any constitutional power granted by the fifth section of Article 14 to enlarge the meaning of the due process, equal protection or privileges and immunities clauses.” He based his conclusion on the history of the provision and “on principle.” *Hearings on the Supreme Court before the Senate Subcommittee on Separation of Powers*, 90th Cong., 2d Sess. 40 (1968). Professor Gerald Gunther agreed, *id.*; see also text accompanying note 199 *infra*.

104. *Id.* at 689.

105. 80 U.S. (13 Wall.) 581 (1871).

106. *Id.* at 591.

107. *Id.* at 592 (emphasis added). Soifer comments that the Court “both anticipated and helped to lead the national retrenchment from civil rights.” Soifer, *supra* note 2, at 698. Nevertheless, he urges, “even the Court’s early narrow construction in *Blyew* recognized broad congressional intent;” the Act “was intended to remedy such evils as prejudices . . . which naturally affect the administration of justice in the State courts,” and that the Act was meant to reach laws which inflicted “different . . . and often severer” punishments upon blacks.” *Id.* And this narrow aim to bar discriminatory punishments is deemed to reveal a “broad congressional intent.” Pitiful reasoning.

on section five attempted to inquire into the sources and meaning of section five: "Congress shall have power to enforce . . . the provisions of this article." The source was acute distrust of the courts engendered by pro-slavery decisions in the years preceding the Civil War. The Court itself held in 1879 that section five conferred power of enforcement on Congress, *not the courts*.<sup>108</sup> Study of the parallel section two of the fifteenth amendment shows that the framers considered, in the words of Senator Oliver Morton, that by both section five and section two

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108. R. BERGER, *supra* note 1, at 221-29. To quote Senator Howard, § 5 constitutes a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution. . . . It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith . . . . It thus imposes upon Congress this power and this duty.

CONG. GLOBE, 39th Cong., 1st Sess. 2766, 2768 (1866).

Charles Fairman comments on Thaddeus Stevens' proposal that "'all laws . . . shall operate impartially and equally'" that it "would work by its own force; courts would be bound to disregard invidious laws." Not so Bingham's [proposal: "The Congress shall have power to make all laws necessary . . ."] *Congress* would be empowered—yet nothing would result save as it legislated, and anything that was enacted could be repealed." C. FAIRMAN, *supra* note 43, at 1271. Senator Luke Poland, former Chief Justice of Vermont, "like the rest, contemplated action by Congress and ignored direct enforcement by the courts." *Id.* at 1296. Senator Howard explained that § 5 constitutes

a direct affirmative delegation of power to Congress to carry out all the principles of these guarantees, a power not found in the Constitution . . . . It casts upon Congress the responsibility of seeing to it . . . that no State infringes the rights of person and property . . . . It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional amendment.

CONG. GLOBE, 39th Cong., 1st Sess. 2766, 2768 (1866). While the fourteenth amendment was in course of ratification, in January 1868, it was for Bingham "the Congress, rather than the Court, that was to be Valiant-for-Truth; through legislative power to enforce the amendment would the rights of citizenship and common humanity be made secure." C. FAIRMAN, *supra* note 43, at 462. In *United States v. Guest*, 383 U.S. 745, 783 n.7 (1966), Justice Brennan, concurring in part and dissenting in part, stated, "Congress, not the judiciary, was viewed as the more likely agency to implement fully the guarantees of equality, and thus it could be presumed the primary purpose of the Amendment was to augment the power of Congress, not the judiciary." In the same volume of the reports, Justice Black emphasized that "the people, in § 5 of the Fourteenth Amendment, designated the governmental tribunal they wanted to provide additional rules to enforce the guarantees of that Amendment. The branch of Government they chose was not the Judicial Branch but the Legislative. . . . But this legislative power which was granted to Congress by § 5 of the Fourteenth Amendment is limited to Congress." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 678-79 (1966) (Black, J., dissenting) (citing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)) (footnote omitted). Unfortunately, the Brethren did not notice that on such reasoning the Court had rushed in to desegregation and reapportionment where Congress feared to tread.

"the remedy for violation of the 14th and 15th amendments . . . was expressly not left to the courts," that it was for Congress to delegate powers of enforcement to the judiciary.<sup>109</sup> That "great fact" is what is to be learned from the several enforcement provisions; there is not a glimmer of intention by section five to endow *the courts* with "open-ended enforcement powers."<sup>110</sup>

Soifer's ignorance of elementary principles of federal jurisdiction leads him to condemn my statement that "a reasoned argument for a judicial power of enforcement of the Fourteenth Amendment—apart from that derived from the grant in the Civil Rights Act of 1866, which Congress is free to withdraw—has yet to be made." "The reason," he tells us, "is probably that most people still accept *Marbury*"; "judicial enforcement of the fourteenth amendment," he explains, rests on *Marbury*.<sup>111</sup> Very early the Court held in *Cary v. Curtis* that "the judicial power of the United States, although it has its origin in the Constitution, is . . . dependent for its distribution . . . entirely upon the action of Congress, who possess the sole power . . . of investing them with jurisdiction . . . and of withholding it from them . . ."<sup>112</sup> As later stated in *Sheldon v. Sill*, "Courts created by statute [as are the inferior courts] can have no jurisdiction but such as the statute confers."<sup>113</sup> That is confirmed by the fact that it was not until 1866 that Congress conferred *any* federal question jurisdiction on the federal courts.<sup>114</sup>

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109. R. BERGER, *supra* note 34, at 351-53.

My quotation of Justice Douglas' remark anent § 5 that "the manner of enforcement involves discretion; but that discretion is largely entrusted to Congress, not the courts," leads Soifer to comment that "this *peculiar* assertion raises several problems; the fourteenth amendment says nothing of 'discretion' for either Congress or the judiciary." Soifer, *supra* note 2, at 689 (emphasis added). But § 5 does not command Congress to enforce; it provides, "Congress shall have power to enforce," leaving to its discretion whether and what to enforce. Cf. *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 266 (1796). When he argues that nobody else was aware that "judicial power was withheld," Soifer, *supra* note 2, at 690 n.193, he overlooks that federal jurisdiction must be delegated by Congress (see text accompanying note 112 *infra*) and that it had been withheld by § 5. For the framers' knowledge that it had been withheld, see Senator Morton's above-quoted statement.

110. The "open-ended" theory has been rested on the terms of § 1 not § 5. See R. BERGER, *supra* note 1, at 99-116.

111. Soifer, *supra* note 2, at 690 n.193.

112. 44 U.S. (3 How.) 236, 245 (1845).

113. 49 U.S. (8 How.) 441, 448 (1850).

114. See C. WRIGHT, *FEDERAL COURTS* 4 (1963).



In short, federal jurisdiction is not drawn from *Marbury* but must be conferred by Congress. What Congress delegates, according to *Sheldon v. Sill*, it can withdraw. This Soifer labels “peculiar” reasoning, but it is his obliviousness of the elements of federal jurisdiction that is “peculiar.”

### A. *Natural Law*

It bears repetition that whatever the influence of natural law, it did not overcome the framers’ unmistakable exclusion of suffrage and segregation from both the Civil Rights Act and the amendment. Nor did it expand their careful enumeration of rights in the Act. Nevertheless, Soifer, like a clown who lustily thwacks away with a bag of soot, charges me with “unwillingness to concede the influence of natural law theory and antislavery thought on the Republicans of the 39th Congress.”<sup>115</sup> He charges that “Berger supports his assertion that natural law had little if any influence on the *legislators* of the 39th Congress chiefly by reference to Professor Cover’s discussion of judges who faced a crisis of conscience in fugitive slave cases.”<sup>116</sup> Now my discussion of natural law was entirely in the frame of *judicial* claims to extra-constitutional power, as can speedily be discerned in my chapter “From Natural Law to Libertarian Due Process.”<sup>117</sup> Soifer considers “Cover’s key point is that *judges* thought themselves bound to follow law they despised,” that they deemed themselves “committed to what they took to be a clear constitutional command to return fugitive slaves.”<sup>118</sup> That was exactly my point: “Prior to the Civil War, the *courts* were most inhospitable to ‘natural rights’ as Robert Cover convincingly shows . . . .”<sup>119</sup> At no point did I deduce from this that legislators were or were not influenced by natural law. If it played

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115. Soifer, *supra* note 2, at 657.

116. *Id.* at 662 (emphasis added).

117. R. BERGER, *supra* note 1, at 249-82.

118. Soifer, *supra* note 2, at 662.

119. R. BERGER, *supra* note 1, at 390. Contrast this with Soifer’s statement that Berger “misrepresents one of Cover’s central points. Cover says that ‘[t]he notion that out beyond lay a higher law to which the judges *qua* judges was responsible was never a part of the mainstream of American jurisprudence.’ Berger’s quotation . . . omits the italicized portion, which is of critical importance.” Soifer, *supra* note 2, at 662. Since the context of the quotation in my book was *judicial* reaching for extra-constitutional power, R. BERGER, *supra* note 1, at 250-54, there was no need to repeat the judicial theme.

a role in drafting the Civil Rights Act, the fear of a considerable number of framers that it was unconstitutional led to the framing of the fourteenth amendment.<sup>120</sup> There was no need for an amendment if legislators considered that natural law was available. In drafting an amendment they could write their own ticket, without reliance on natural or other law, for what the people adopted was "law." So my reading of Cover does not prove that Berger "chops out quotations . . . misreads or misuses Cover."<sup>121</sup>

By way of prelude to his promised treatment of the "history," Soifer states,

For points basic to his history and his theory, Berger *relies heavily* on the subtle and important work of Robert Cover . . . and of Morton Horwitz. . . . The way in which Berger misreads or misuses those recent secondary works should serve as a warning for his reading of the older and murkier [?] primary sources.<sup>122</sup>

Cover, we have seen, was cited merely to show that *judges* did not in the pre-1866 years rely on natural law to override positive law; so Soifer himself reads Cover. In discussing the presuppositions of the Founders in 1787, I cited Horwitz for the proposition that they feared judicial discretion. And in process I quoted Horwitz' citation of Chief Justice Hutchinson's statement in 1767, "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."<sup>123</sup> In dismissing Hutchinson, Soifer mounts to sublime heights of absurdity:

It will not do to rely, as Berger does . . . on quotations from Thomas Hutchinson of all people . . . to describe mid-nineteenth century thought [a gross misrepresentation]. . . . Reliance on the Tory Governor of Massachusetts is particularly peculiar in a book . . . which is strident about strict separation of powers, since Hutchinson simultaneously held high office in the executive, legislative and judicial branches.<sup>124</sup>

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120. R. BERGER, *supra* note 1, at 23 n.12.

121. Soifer, *supra* note 2, at 660.

122. *Id.* (emphasis added).

123. R. BERGER, *supra* note 1, at 306-07.

124. Soifer, *supra* note 2, at 679 & n.144.

To insist on the separation of powers when they are wielded by the same hands—as in modern administrative agencies—makes Hutchinson's self-denying view of judicial power the more impressive. If he was "not generally revered by Americans,"<sup>125</sup> in *this* particular he reflected their anxieties; and I leave Soifer to quarrel with Horwitz, who cited Hutchinson, let alone that Horwitz is corroborated by Gordon Wood's view that the colonists had "a profound fear of judicial independence and discretion."<sup>126</sup>

Coupled with my citation of Horwitz for the 1787 presuppositions of the Founders respecting the narrow scope of the judicial function, I noted his complementary view that instrumentalism, *i.e.*, courts as instruments of change, first emerged in the 19th century,<sup>127</sup> and therefore exerted no influence on the Founders. Soifer maintains that Berger "grossly misuses Professor Horwitz' point, however, in not noting that it *had arrived* by 1866."<sup>128</sup> But that was irrelevant to its influence on the Founders. Moreover, Horwitz dealt with courts as instruments of change of the common law, *i.e.*, torts and contracts, not as claimants of power to revise the Constitution, the subject of my book.<sup>129</sup> Despite the fact that "'common law rules were [being] conceived of as made not discovered,'"<sup>130</sup> judicial claims of power to change the Constitution had to wait for our time.<sup>131</sup> The grant by section five of the enforcement power to Congress, not the Court, is at war with an endorsement by framers distrustful of the courts of judicial instrumentalism as a medium of constitutional change.<sup>132</sup> Change, they were showing, could be

125. *Id.* at 679 n.144.

126. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 298 (1969).

127. R. BERGER, *supra* note 1, at 307-08.

128. Soifer, *supra* note 2, at 679 (emphasis added).

129. These involve quite different considerations. R. BERGER, *supra* note 1, at 320-23. From judicial instrumentalism Soifer concludes, "if section 1 of the Civil Rights Act was intended to refer to common law, it was not a reference to something 'fixed.'" Soifer, *supra* note 2, at 679. Again he is carried away by his theorizing; the enumeration of the rights to contract, to own property, etc., did not refer to an overarching "common law" but to those described rights alone.

130. Soifer, *supra* note 2, at 679.

131. See statements by Lusky, note 3 *supra*, and by Chief Justice Marshall, text accompanying note 202 *infra*.

132. In 1868, Fairman remarks, "the court did not enjoy and did not deserve confidence in the lofty disinterest of its members." C. FAIRMAN, *supra* note 43, at 514. For additional citations, see Berger, *The Fourteenth Amendment: Light From the Fifteenth*,

accomplished by means of the amendment process provided by article V.

### B. State Sovereignty

Soifer's incomprehension of facts leads him repeatedly to misrepresent my views as to State sovereignty. He attributes to me the foolish view that "the Civil War had *no* impact on the states' rights and state sovereignty theories he wishes to impose as the postwar congressional intent."<sup>133</sup> Who could overlook the thirteenth amendment which outlawed slavery within the States? He charges me with an "absolutist state sovereignty concept," and damningly states, Berger "can still assert—in the face of the statute he regards as key to understanding the fourteenth amendment—that '*no* trace of an intention by the Fourteenth Amendment to encroach on State control [Soifer omits "for example, of suffrage and segregation"] . . . is to be found in the records of the 39th Congress.'<sup>134</sup> Of course I was not so idiotic as to assert "in the face" of the Civil Rights Act that there was *no* encroachment on state control. In the Southern states, as Senator Daniel Clark of New Hampshire stated, slaves, "had no rights which a white man was bound to respect";<sup>135</sup> they were simply chattels, nonpersons. If the framers were to shield blacks from violence and oppression, as Windom noted, to protect their "right to exist," *some* "encroachment" on states' rights was inescapable. But that "encroachment" *was limited*; it did not embrace, "for example, suffrage and segregation,"<sup>136</sup> the very words

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74 NW. U.L. REV. 311, 350-51 (1979).

133. Soifer, *supra* note 2, at 687 (emphasis added).

134. *Id.* at 683, 676 (emphasis added).

135. R. BERGER, *supra* note 1, at 201.

136. So it was understood by the Supreme Court in the Civil Rights Cases, 109 U.S. 3 (1883). Justice Bradley declared that the Civil Rights Bill of 1866 undertook to secure "those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties . . . and to inherit, purchase . . . property, as is enjoyed by white citizens. . . . [C]ongress did not assume . . . to adjust what may be called the social rights of men . . . but only to declare and vindicate those fundamental rights . . ." *Id.* at 22. And in response to the question whether "admission to an inn, a public conveyance, a place of public amusement" is "one of the rights which the states by the Fourteenth Amendment are forbidden to deny to any person," the Court held that "no countenance of authority for the Civil Rights Act of 1875 which purported to convey such ['rights'] . . . can be found in . . . the fourteenth amendment of the Constitution . . ." *Id.* at 24, 25.

“omitted” by the Soifer ellipsis, the self-same Soifer who cries alarm at my every innocuous omission for purposes of compression.

Having established by the statements of the framers their intention to exclude suffrage and segregation from the amendment, I found by their own testimony two factors that led them thus to limit the “encroachment”: Negrophobia and attachment to state sovereignty. “The proposition to prohibit states from denying civil or political rights to any class of persons,” said Roscoe Conkling, “encounters a great objection on the threshold. It trenches upon the principle of existing local sovereignty . . . . It takes away a right which has always been supposed to inhere in the States.”<sup>137</sup> Samuel Marshall of Illinois stated, “It is a fundamental principle of American law that the regulation of the local police of all the domestic affairs of a State belongs to the State itself, and not to the Federal Government.”<sup>138</sup> This sentiment emerged even more sharply when suffrage was in issue. Chairman Fessenden observed in the Senate, “every body has admitted . . . that the power to fix the qualifications of voters rested with the States.”<sup>139</sup> Several pages of my book are crowded with such quotations, summarized by Harry Flack: “The Radical leaders were aware as anyone of the attachment of a great majority of the people to the doctrine of States’ rights . . . the right of the States to regulate their own internal affairs.”<sup>140</sup>

To such statements I added the confirmatory remarks of three commentators who enjoy Soifer’s esteem: Harold Hyman, M.L. Benedict, and Philip Paludan. Soifer asserts that “Berger misrepresents their sophisticated argument . . . .”<sup>141</sup> Let them speak for themselves. Hyman wrote, “One reason the Reconstruction of the South loomed so high to northerners was less that blacks were involved than that every one understood the preeminence of states . . . .”; “[a] heavy phalanx of Republican

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137. R. BERGER, *supra* note 1, at 61.

138. *Id.* at 61 n.39. Concurring in *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 138 (1873), Justice Field averred, “No one has ever pretended, that I am aware of, that the fourteenth amendment interferes in any respect with the police power of the State. . . . It was not adopted for any such purpose.”

139. R. BERGER, *supra* note 1, at 62.

140. *Id.* at 60-64, 63.

141. Soifer, *supra* note 2, at 688.

politicos, including Sherman and Trumbull . . . were States right nationalists, suspicious of any new functional path the nation travelled."<sup>142</sup> Benedict wrote, "the proposed amendment again demonstrated Republican reluctance to expand the national government's jurisdiction over its citizens," and that it "in no way challenged the tradition that the states had primary jurisdiction over citizens in matters of police regulation . . . ."<sup>143</sup> Paludan repeatedly emphasized that the pervasive attachment to federalism—state control of local institutions—was "the most potent institutional obstacle to the Negroes' hope for protected liberty."<sup>144</sup> Whatever the thrust of their ultimate conclusions, Hyman-Benedict-Paludan can hardly maintain that their unequivocal utterances do not mean what they plainly say. A leading Reconstruction activist, Alfred Kelly, declared that the "commitment to traditional state-federal relations meant that the radical Negro reform program *could be only a very limited one*."<sup>145</sup>

Soifer's heroic labors enabled him to unearth a citation that I had lost in the recesses of the debates and correctly attribute the quotation to James Wilson rather than Senator Henry Wilson.<sup>146</sup> But again his incomprehension of what he reads recalls the New Yorker cartoon that pictured a father disconsolately looking at his little son's report card, captioned "But why did you get an A for effort?" He cites my reference to Wilson as an example of "misleading" and "internally inconsistent" history, another example of "how badly Berger misuses historical materials."<sup>147</sup> In his version of my words, Wilson

fully appreciated the difference between congressional authority over the District [of Columbia where desegregation was proposed] and over the states. Because Wilson "lamented that in

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142. R. BERGER, *supra* note 1, at 63 n.50.

143. *Id.* at 242 n.53, 190 n.91.

144. *Id.* at 155.

145. *Id.* at 64 (emphasis added).

It was not the purpose of the fourteenth amendment's privileges and immunities clause "to transfer the security and protection of all the civil rights which we have mentioned . . . from the States to the Federal Government . . . ." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1872). "[O]ur statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential . . . ." *Id.* at 82.

146. Soifer, *supra* note 2, at 654 n.17.

147. *Id.* at 654-55.

'dealing with the States,' State 'constitutions block up the way and we may not overleap the barriers,' " Berger is certain that he recognized the inviolability of state sovereignty, "which the framers were zealous to preserve."<sup>148</sup>

He has me describing Wilson "as zealous to preserve state sovereignty,"<sup>149</sup> an arrant misrepresentation. *Before* the Wilson quotation, I had stated "it is unrealistic to presume that a Congress which has plenary jurisdiction over the District and yet refused to bar segregation there would turn around to invade State sovereignty, which the framers were zealous to preserve, in order to impose a requirement of desegregation upon the States. The difference was fully appreciated by Wilson."<sup>150</sup> To recognize a difference manifestly is different from being "zealous to preserve" it, let alone that Wilson "lamented" the difference. And it is I who am charged with "carelessness," and "misuse [of] historical materials"!

Soifer's explanation falls in the category "the more he explains the less I understand it." Wilson's point, he says, "was quite different. Certainly his remarks were not a paean to state sovereignty [who said they were?]. His theme was that state constitutions and state laws had in the past *blocked* the broad, bright surface of the Constitution."<sup>151</sup> Soifer's change of diction does not alter Wilson's recognition that "we may not overleap the barriers of State constitutions." When Soifer goes on to state that "Wilson's speech here, and his words *in opposition* to the famous Bingham 'deletion' . . . were paradigmatic statements of the optimistic political theory of the congressional leadership,"<sup>152</sup> he is deluded by his own rhetoric. Wilson had in fact *recommended* the deletion to avoid a "latitudinarian construction" and preclude a "construction beyond the specific rights named . . .";<sup>153</sup> he had assured the House that the Civil Rights Bill did not extend to desegregated schools or to service on juries, that it did not include "the right of suffrage."<sup>154</sup> Such are

148. *Id.* at 655 n.20.

149. *Id.*

150. R. BERGER, *supra* note 1, at 124.

151. Soifer, *supra* note 2, at 655 n.20 (emphasis added). But compare text accompanying notes 74-78 *supra*, and see notes 75 & 78 *supra*.

152. *Id.* (emphasis added).

153. See text accompanying note 77 *supra*.

154. See text accompanying notes 36 & 77 *supra*.

the statements representing the "optimistic political theory of the congressional leadership," which allegedly "cannot be reconciled with Mr. Berger's entire historical interpretation . . . ." <sup>155</sup>

In this connection, Soifer remarks that "with disarming simplicity, Berger asserts that '[t]he converse of the fact that the "radicals did not dominate" is that the Conservative-Moderate coalition did.' " <sup>156</sup> He neglects to mention Benedict's statement that the radicals "did not dominate Congress during the Reconstruction era," but that the "Conservatives, Moderates (Centrists)" did. And Benedict concluded that "the non-radicals had enacted their program with the sullen acquiescence of some radicals and over the opposition of many." <sup>157</sup> David Donald had earlier arrived at similar conclusions. <sup>158</sup> Soifer considers that the work of Benedict and Donald represents the "best two recent efforts to place the men of the 39th Congress along the political spectrum . . . ." <sup>159</sup> Thus what Soifer regards as notable scholarship becomes "simplicity" when repeated by me! Who is wearing "blinders"? <sup>160</sup>

Soifer's discussion of the tenth amendment again misunderstands and misrepresents the facts: "One does not find many references to the tenth amendment in the debates of the 39th Congress. Berger does not find a single reference to quote. His *frequent reliance* on the tenth amendment, therefore, appears based on his own interpretation, akin to that of Justice Rehnquist," <sup>161</sup> in activist eyes guilt by association. Exactitude requires notice that my index contains *no* reference to the tenth amendment; I located a footnote statement that "[t]he proposition that 'the Fourteenth Amendment incorporated the Bill of Rights' constitutes an invasion of rights reserved to the States by the Tenth Amendment, an invasion of such magnitude as to

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155. Soifer, *supra* note 2, at 656 n.20. Soifer invokes Wilson to demonstrate "Berger's apparent incapacity to understand the thrust of Wilson's remarks because they do not fit his theory." *Id.* at 654 n.17.

156. *Id.* at 670.

157. R. BERGER, *supra* note 1, at 237, 239.

158. *Id.* at 237.

159. Soifer, *supra* note 2, at 681 n.96. The rejection of the radical suffrage proposals by 125 to 12 and 34 to 4 speak for themselves. See text accompanying notes 42 & 43 *supra*.

160. "Berger's preconceptions and his carelessness provide him with a convenient set of blinders." Soifer, *supra* note 2, at 681.

161. *Id.* at 688 n.185 (emphasis added).



demand proof that such was the framers' intention."<sup>162</sup> Whether or not the tenth amendment figured in the debates is beside the point; it remained in the Constitution and is to be read with the other provisions. That is elementary learning. A framer who construed the amendment broadly, Senator Frederick Frelinghuysen, said in 1871 that "the Fourteenth Amendment must . . . not be used to make the General Government imperial. It must be read . . . together with the tenth amendment."<sup>163</sup> Here Soifer comes up with his strawman: "The absolute state sovereignty concept employed by Berger [?] is obviously [not] contained in the tenth amendment, which reserves *to the people* powers which Berger vilifies [over-heated advocacy] as open-ended."<sup>164</sup> My discussion of "open-ended" denied that the terms of the *fourteenth*—not the tenth—amendment constituted an "invitation" *to the courts* to revise and amend the Constitution.<sup>165</sup> Throughout I insisted that by article V that power was reserved *to the people* alone. The Court is not the people. So I did not "vilify" the tenth amendment's reservation of power to the people but insisted rather that it be respected.

### C. Declaration of Independence, Sumner and Abolitionism

Soifer beats a tattoo on the influence of the Declaration of Independence and natural law on the framers. Just as he cited one Congressman, Lawrence, to prove that the framers adopted the notion that absolute rights could not be withdrawn in the teeth of copious evidence to the contrary, so he dwells on Charles Sumner's "devotion" to the "principles" of the Declaration.<sup>166</sup> So too, on the basis of Henry Wilson's (Sumner's Massachusetts' colleague) statement that the "men who promulgated the Declaration of Independence" were "those same radicals" who "made the Constitution," Soifer taxes me with "a simplistic Beardian notion that 'the Declaration was a product of rebels and revolutionaries' and the Constitution 'in no small part' was

162. R. BERGER, *supra* note 1, at 137 n.17.

163. Berger, *supra* note 34, at 325.

164. Soifer, *supra* note 2, at 683 (emphasis added).

165. R. BERGER, *supra* note 1, at 99-116.

166. Soifer, *supra* note 2, at 661 n.51. He gains little by stressing that "Trumbull and James Wilson . . . constantly invoked God and the fundamental rights in the Declaration," *id.*, for that did not alter their view that the rights were limited and that suffrage and segregation were excluded. See text accompanying notes 57-61 *supra*.

a recoil from the 'excesses' of popularly controlled legislatures."<sup>167</sup> The "unquestioned leader of the House,"<sup>168</sup> Thaddeus Stevens, said however that "while the Declaration clearly proved what the intention *then* was, the action of the Convention in framing the Constitution . . . bartered away . . . some of those inalienable rights . . . ."<sup>169</sup> By the time of the Convention, said Samuel Eliot Morison and Henry Steele Commager, "The democratic movement was in abeyance, a 'thermidorean reaction' was in full swing. Hence the Federal Constitution put a stopper to those levelling and confiscatory demands of democracy."<sup>170</sup> A "simplistic Beardian notion"!

The views of Henry Wilson and Sumner gain little from the fact that abolitionist philosophy "was taken from the Declaration of Independence," that it was "an official Republican party policy at the 1860 Republican Convention."<sup>171</sup> For what counts is the views of the framers who did the drafting and voting in Congress in 1866.<sup>172</sup> Stevens, as we have seen, denied that the Declaration and Constitution were identical. Incontrovertible proof that this dichotomy persisted is the exclusion of suffrage from the amendment, suffrage, the central right which would enable the black to protect himself.<sup>173</sup> Senator Jacob Howard, a favorite of the neoabolitionists, stated that he could not discover the Negro right to vote in the Declaration of Independence and

167. Soifer, *supra* note 2, at 656 n.20, 661 n.51.

168. *Id.* at 693.

169. CONG. GLOBE, 40th Cong., 2d Sess. 1967 (1868) (emphasis added). Stevens had earlier stated in the 39th Congress,

Sir, our fathers made the Declaration of Independence . . . but . . . when our fathers came to reduce the principles on which they founded this Government into order . . . an institution hot from hell [slavery] appeared among them . . . and precluded them from carrying out their own principles into the organic law of this Union.

R. BERGER, *supra* note 1, at 88.

170. 1 S. MORISON & H. COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 300 (4th ed. 1950).

171. Soifer, *supra* note 2, at 665 n.68, 666. Undeniably Sumner and other radicals meant to "extirpate slavery," *id.* at 666 n.70, and the thirteenth amendment owed a great deal to their efforts. But the issue is whether their influence carried to the abolition of *all* discriminations, and here the incontrovertible evidence is that they failed. See text accompanying notes 29-37, 41-43, 56-63, & 71-77 *supra*.

172. See the views expressed in text accompanying notes 42-43, 95-100.

173. Sumner insisted that "if the Fourteenth is inadequate to protect persons in their . . . right to vote, it is inadequate to protect them in anything." CONG. GLOBE, 40th Cong., 3d Sess. 1008 (1869).

that “notwithstanding the Declaration of Independence, it is the right of every organized community to regulate the right of suffrage.”<sup>174</sup> Contrast the Stevens-Howard statements with Soifer’s charge that “the ‘historical facts’ Berger invokes to dismiss any influence of the Declaration of Independence are simply his assertion . . . .”<sup>175</sup> He “simply” is incapable of weighing evidence, of appreciating that in the construction of legislation the decisive facts are the explanations of the framers, not what some may think outside the legislative halls.

#### D. Sumner and the Abolitionists

Soifer’s inability to weigh evidence is again illustrated by his treatment of Sumner. My quotation of David Donald’s statement that “more and more Senators came to distrust [Sumner] when they did not detest him,” is dismissed because “It is sloppy to take a single quotation . . . out of context to prove Sumner’s lack of influence”; “Sumner was not an ineffective outcast, as Berger contends.”<sup>176</sup> To counter Donald’s bald statement, Soifer recounts that Sumner “had an enormous impact on public opinion”; he was “a heroic figure” and “the spokesman of a movement which transcended politics,” “who sought to secure to all its citizens equal rights,”<sup>177</sup> facts which I would not deny. But this does not meet Sumner’s repeated rebuffs *in the Senate*, and it is those votes that count in construing the amendment. For example, his proposal that in the rebel States “there shall be no denial of rights, civil or political on account of race” was re-

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174. R. BERGER, *supra* note 1, at 88. Nevertheless Soifer “wonders how Berger ignored” the “many references to the Declaration of Independence” in the 39th Congress, Soifer, *supra* note 2, at 681, and maintains that “Berger overlooks the remarkably frequent references to the Declaration of Independence in the debates in the 39th Congress.” *Id.* at 661 n.51 (emphasis added).

175. Soifer, *supra* note 2, at 661 n.51. Soifer’s slippery exegesis is illustrated by his statement that “for Berger, Justice Samuel Chase’s reliance on natural law in 1798 in *Calder v. Bull* ‘departed from the Founders’ commitment to written limits on all power.’ Therefore, any reference to the natural rights of the Declaration of Independence to aid in understanding of the Constitution is, to Berger ‘[m]anifestly . . . out of tune with the historical facts.’” *Id.* at 661 (emphasis added). The latter sentence is contained at my page 88 wherein I set out the above-quoted Stevens statement and others in the 39th Congress. The Chase statement at my page 252 had no reference whatever to the Declaration of Independence. But Soifer heedlessly mixes all ingredients into his Mulligan stew.

176. *Id.* at 693.

177. *Id.* at 693-94 n.205.

jected 39 to 8; his proposal that the Tennessee Constitution should provide for black suffrage was defeated 34 to 4.<sup>178</sup> Stevens excoriated Sumner for "slaughter[ing]" the prototype amendment because it did not give Negroes the vote, reciting some of Sumner's corrosive criticism and scornfully branding it as "puerile and pedantic."<sup>179</sup> As the Reconstruction debate proceeded, Senator Trumbull scathingly considered him "by far the greatest fool of the lot."<sup>180</sup> Fessenden declared in 1870 that "it has been over the idiosyncracies, over the unreasonable propositions, over the impractical measures of [Sumner] that freedom has been proclaimed and established."<sup>181</sup>

Undaunted, Sumner continued to press for broadened human rights, citing the "great rule of interpretation conquered at Appomattox," and insisting that "the Constitution must be interpreted by the Declaration."<sup>182</sup> He was met with remarks such as that of Senator Morrill of Maine, "If the Senator from Massachusetts cannot put his fingers on the provision of the Constitution which warrants this measure, those impassioned appeals to these higher considerations should have no weight."<sup>183</sup> Of Sumner's attempt to achieve "complete equality before the law," Morrill observed, "There is no doubt how he feels on that subject, but the misfortune after all, is that *the Senate has never agreed with him upon the subject*."<sup>184</sup> What boots it that "[a]lmost all congressmen were awed by . . . Senator Sumner's undimmed passion for good causes and unequalled knowledge of classical history,"<sup>185</sup> if it could not be translated into Senate votes, and it is those votes that reveal the framers' intent.

Soifer's reliance on abolitionist theory is of the same kidney:

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178. R. BERGER, *supra* note 1, at 164, 59-60 (emphasis added). See also Sumner's defeated proposal, note 43 *supra*.

179. R. BERGER, *supra* note 1, at 236; CONG. GLOBE, 39th Cong., 1st Sess. 2549 (1866). Stevens confessed his "mortification at its defeat . . . especially because it almost closed the door of hope for the amelioration of the condition of the freedmen." *Id.*

180. R. BERGER, *supra* note 1, at 236.

181. *Id.* See statement by Stevens, note 179 *supra*.

182. CONG. GLOBE, 42d Cong., 2d Sess. 727, 728 (1872).

183. *Id.* at app. 1-2. Senator Matthew Carpenter of Wisconsin scornfully remarked that Sumner "is not trammelled by the Constitution. He ascends into the higher, serener, more general atmosphere of the Declaration of Independence." *Id.* at 827.

184. *Id.* at 11 (emphasis added).

185. Soifer, *supra* note 2, at 693 n.205.

"the theory of the antislavery movement is basic to comprehension of the rights that antislavery veterans, *who controlled Congress*, hoped to secure in 1866."<sup>186</sup> Of course the abolition of slavery by the thirteenth amendment, and the protection of the freedmen from violence and oppression by the fourteenth, reflected abolitionist influence. But beyond this abolitionist aspirations were balked; they could not obtain suffrage, desegregation, and abolition of *all* discriminations.<sup>187</sup> That is revealed by Sumner's losing struggle. Bingham, whom Soifer's authorities, Jacobus ten Broek and Howard Jay Graham, regard as the conduit through which abolitionist concepts of substantive due process and equal protection were poured into the fourteenth amendment,<sup>188</sup> moved for deletion of the "no discrimination in civil rights" clause; he fought against compulsory incorporation in the Tennessee Constitution of black suffrage and won by a vote of 125 to 12,<sup>189</sup> an irreducible fact that speaks more loudly than abolitionist ebullitions outside of Congress. Benedict, so warmly praised by Soifer, justly concluded that the Conserva-

186. *Id.* at 658.

187. *See, e.g.,* text accompanying notes 95-99 *supra*.

The "masterful" David Donald, *id.* at 693 n.205, concluded that "the Radical wing of the Republican party had rarely exercised effective control." R. BERGER, *supra* note 1, at 236 n.30. *See* statement by Benedict, text accompanying note 157 *supra*.

Professor C. Vann Woodward noted that during the war years "the great majority of citizens in the North still abhorred any association with abolitionists." C. WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 79 (1960). Beyond doubt the North emerged from the fiery furnace determined to end slavery, and did so by the thirteenth amendment. But as Woodward remarked, the eradication of inequality required a "revolution in the North." Charles Fairman observed, "Whereas the Thirteenth Amendment had been generally popular among Northerners, the Civil Rights Bill [of 1866], as James G. Blaine recalled, was legislation 'of a different type,' which particularly in the Middle and Western States, touched upon deep feelings." C. FAIRMAN, *supra* note 43, at 1168. David Donald commented that the suggestion that "Negroes should be treated as equals to white men woke some of the deepest and ugliest fears in the American mind." D. DONALD, *CHARLES SUMNER AND THE RIGHTS OF MAN* 252 (1970).

Soifer, who so heartily commends "context," who condemns my omission to "consider changes in the thought or voting patterns of the North during the 1850's," text accompanying note 39, *supra*, is oblivious of the more immediate and radical shift in the voting pattern in 1865-1868, when Negro suffrage was repeatedly rejected to Northern unreadiness to undertake a "revolution" in the interests of across the board "equality." "Even abolitionists," Brock states, "were anxious to disclaim any intention of forcing social contacts between the races." W. BROCK, *AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION* 286 (1963). *See* Thaddeus Stevens' apprehensive comment on the arm-in-arm walk of Theodore Tilton and Frederick Douglass, R. BERGER, *supra* note 1, at 15.

188. R. BERGER, *supra* note 1, at 119-20.

189. *See* text accompanying notes 42 & 71 *supra*.

tive-Moderate coalition, not the "radicals" (abolitionist extremists) controlled the 39th Congress.<sup>190</sup> While the amendment was up for ratification, Senator John Sherman boasted in Cincinnati, "we defeated every radical proposition in it."<sup>191</sup> Such are the facts Soifer describes as "*Berger asserts away* the influence of abolitionist thought on the 39th Congress!"<sup>192</sup>

In Soifer's catalog of matters "*Berger fails to mention*," are some "early judicial interpretations."<sup>193</sup> They were wiped out by the *Slaughter-House Cases* which, as Soifer himself notes, "eviscerated the privileges and immunities clause,"<sup>194</sup> and which were capped by the *Civil Rights Cases* declaration "that it was time the black man 'cease[d] to be the special favorite of the law.'"<sup>195</sup> There civil rights slumbered for about half a century. Nevertheless it is worthwhile to examine his exegesis of at least one of his citations, for it underlines his abiding preference for rhetoric over fact. *United States v. Rhodes* (1866) "held that a black woman had a right to testify against a gang of white men who had forcibly entered her home."<sup>196</sup> Since the Civil Rights Act specifically granted the right "to sue, be parties and give evidence," the right to testify could not be denied. Soifer stresses the

190. See note 187 *supra*.

191. R. BERGER, *supra* note 1, at 105.

192. Soifer, *supra* note 2, at 659 (emphasis added). In another of his misrepresentations, Soifer alleges that "In a sentence which is both imprecise and incorrect, Berger states that Phillips and Garrison 'overshadowed' the Western abolitionist theorists. Therefore, Berger believes, he can dismiss the arguments of legal historians with whom he disagrees, like Jacobus ten Broek and Howard Jay Graham . . ." *Id.* at 665 (emphasis added). My "imprecise and incorrect" statement was drawn from one of Soifer's demigods, Robert Cover. R. BERGER, *supra* note 1, at 230. And my dismissal of ten Broek and Graham was based upon a painstaking analysis of their views, which can be located through the index of my book.

Instead of "asserting away" abolitionist theory, I devoted a fact-crammed chapter to it. See *id.* at 230-45. Among the facts are that Senators Fessenden and Grimes, Republican leaders, held "the extreme radicals" in "abhorrence," *id.* at 235, that Senator Edgar Cowan, a Pennsylvania Conservative, bitinglly condemned the Anti-Slavery Society. *Id.* at 235. And the repeated rejection of proposals to bar discrimination with respect to *all* rights by overwhelming votes shows how little influence the abolitionists exercised with respect to the issues that are my central concern—suffrage and segregation.

193. Soifer, *supra* note 2, at 696-97.

194. *Id.* at 699. Notwithstanding, Soifer upbraids me for not noting Justice Miller's "important comments": "the people . . . [gave] additional power to the Federal Government," *id.*, forgetting that Miller "eviscerated the privileges and immunities" clause which was the vehicle of those substantive rights. *Id.*

195. *Id.* at 698.

196. *Id.* at 697.

Court's statements that the "thirteenth amendment 'trenches directly upon the power of the state,'" that it "was an 'act of national grace' which would continue to perform its function . . . ." "This language," he comments, "plainly indicates neither attachment to state sovereignty, nor a sense of limitation on federal power imposed by the tenth amendment."<sup>197</sup> How could a court oppose its "attachment to state sovereignty" to the breach made by the thirteenth amendment? Nor could the tenth amendment derogate from the later unequivocal ban of slavery by the thirteenth, adopted in due form by the people. Justice Bradley, whose dissent in *Slaughter House* excites Soifer's admiration,<sup>198</sup> rejected the assumption, in the subsequent *Civil Rights Cases*, that a power to enforce a prohibition with respect to a particular subject "gives Congress power to legislate generally upon the subject" as "repugnant to the Tenth Amendment."<sup>199</sup> To activist zealots like Soifer the tenth amendment represents a barrier that must at all costs be razed.

Instead of belaboring Soifer's analysis of his other cases, let me close with his comment on my quotation from *McCulloch v. Maryland*: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended,"<sup>200</sup> an unchallengeable truism. This he translates as my attempt "to illustrate basic democratic limitations on judicial power"; and such is his indignation that English invective no longer suffices, so he brands my view with the Yiddish "sheer chutzpah," i.e., consummate gall.<sup>201</sup> Yet when the decision came under attack, Chief Justice Marshall affirmed that the exercise of judicial power "cannot be the assertion of a right to change that instrument,"<sup>202</sup> the Constitution. That is the essence of my thesis.

There are many more examples of curdled learning, of incomprehension and misrepresentation, but it is time to take pity on the patient reader. Already I have gone far beyond Justice Jackson: "if the first decision cited does not support [the pro-

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197. *Id.*

198. *Id.* at 698-99.

199. R. BERGER, *supra* note 1, at 76 n.18.

200. *Id.* at 2 n.4.

201. Soifer, *supra* note 2, at 669 n.88.

202. R. BERGER, *supra* note 1, at 377 (emphasis added).

position] I conclude that the lawyer has a blunderbuss mind and rely on him no further."<sup>203</sup>

### III. CONCLUSION

There is no need to recapitulate Soifer's shortcomings. Suffice it that one who exalts Sumner's "enormous impact on northern public opinion"<sup>204</sup> while ignoring that *in the Senate* he was time and again resoundingly rejected manifestly has not learned to weigh evidence. As with other activists, facts are not really congenial to him. Robert Bork remarked that one cannot "swing a cat by the tail in the faculty lounge without damaging some stern young philosopher."<sup>205</sup> They have yet to learn, however, that a philosophy not rooted in the soil of fact is delusory. "Only where evidence exists," Professor Oscar Handlin observes, "can theory complement it."<sup>206</sup> Consider Soifer's guru, Robert Cover, whose recommended

reading of the Constitution must stand or fall not upon the Constitution's self-evident meaning, nor upon the intention of the 1787 or 1866 framers. . . . [I]t is for *us*, not the framers, to decide whether that end of liberty is best served by *entrusting to judges* a major role in defining our governing political ideas and in measuring the activity of the primary actors [Congress and the legislatures] in majoritarian politics against that ideology.<sup>207</sup>

Thus no warrant is required for setting aside the Constitutional *text* in favor of an ideology framed by judges for the measurement of "majoritarian politics." Nowhere does Cover point to a referendum of the people *entrusting* that awesome role to judges; instead he blandly identifies the preferences of his small academic coterie—"us"—with constitutional warrant, substituting "a theoretically grounded formula for evidence."<sup>208</sup>

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203. Jackson, *Advocacy Before the Supreme Court*, 37 A.B.A.J. 801, 804 (1961).

204. Soifer, *supra* note 2, at 693 n.205.

205. Address before the American Enterprise Institute conference on "The Role of the Judiciary in America," in Washington, D.C. (Dec. 13, 1978) mimeographed copy, p. 4.

206. O. HANDLIN, *supra* note 9, at 274. Handlin reminds us that long before Ranke, "historians had insisted that there could be no good interpretation that did not rest on valid fact." *Id.* at 157.

207. Cover, Book Review, *New Republic* 26, 27 (Jan. 14, 1978) (emphasis added).

208. O. HANDLIN, *supra* note 9, at 273.



In justice to Soifer, he has not been content to indulge in theorizing only but assayed the task of sorting out the facts. Unfortunately he is ill-equipped to understand them, and in seeking to demonstrate my "misuse of the historical materials" he has only betrayed his own incompetence.<sup>209</sup> Soifer is an impassioned crusader whose overwrought zeal clouds his vision and who makes his predilections the test of constitutionality. Long since I refused to identify my predilections with constitutional mandates;<sup>210</sup> and I came to my study of the fourteenth amendment in the service of no cause other than the integrity of constitutional construction. For that purpose I sought to ascertain what the framers intended the fourteenth amendment to mean, being without preconceptions as to what it ought to mean. It came as no surprise to me that Soifer and his fellow True Believers should be dismayed by my findings;<sup>211</sup> rather I remain hopeful, in the words of Samuel Johnson, that "the most obstinate incredulity may be shamed or silenced by the facts."<sup>212</sup> The facts will speak for themselves long after the present actors are gone from the scene.

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209. Senator Edgar Cowan, a conservative Republican from Pennsylvania, ridiculed the notion that the "antipathy that never sleeps, that never dies" is "to be swept away by half a dozen reports from certain abolitionist societies." R. BERGER, *supra* note 1, at 235.

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

211. Commenting on the neo-abolitionist efforts of ten Broek & Co. to rationalize the Warren Court's segregation and reapportionment decisions, Professor Max Beloff, an eminent British political scientist, wrote, "The quite extraordinary contortions that have gone into proving the contrary [of the fourteenth's limited nature] make sad reading for those impressed by the high quality of American legal-historical scholarship." Beloff, *Arbiters of America's Destiny*, *The Times*, Higher Ed. Supp. II (London, Apr. 7, 1978).

212. J. BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 1077 (Mod. Lib. ed. 1952).

*Appendix A\**

## I.

Commentators who advocate the judicial adoption of a "modern Constitution" tend to look with disdain upon the intentions of those who labored so hard to frame the written document. That standards of interpretation should be based upon these intentions is labeled as a "filiopietistic notion" completely out of place in what these advocates are convinced is a more enlightened age.<sup>3</sup> Judges are more circumspect. Rare indeed is the judge who will concede that his decision departs in the slightest from the meaning and intent of the carefully prepared text. The American public must be "mercifully soothed" into a belief that each judicial pronouncement, no matter how autocratic, is made in compliance with the people's constitutional mandate.<sup>4</sup> However, a court which pays only lip-service to a "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms,"<sup>5</sup> is derelict in fulfilling the obligations carefully imposed upon it by the framers of our Constitution. Consistent with this belief, we deem it important to reexamine, even though briefly, the role that the federal judiciary was designed to play in our democratic society.<sup>6</sup>

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\* Excerpt from *Turpin v. Mailet*, 579 F.2d 152, 172-73 (2d Cir. 1978), Circuit Judge Van Graafeiland (with whom Mulligan, Timbers and Meskill, Circuit Judges, concur), dissenting. Footnotes are numbered as in the original.

3. A. Miller & R. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 683 (1960).

4. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 92 (1962). Professor Forrester writes that the time has come for candor, that if judges are not basing their decision on law in any usual sense but "are, in fact, legislating under the guise of judging," they should be frank and say so. W. Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A.J. 1212 (1977).

5. *Griswold v. Connecticut*, 381 U.S. 479, 501, 85 S. Ct. 1678, 1691, 14 L. Ed.2d 510 (1965) (Harlan, J., concurring).

6. "Clio [the muse of history] deserves no throne; but may she not claim a corner seat at the conference table?" L. Henken, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 657 (1961).

## A.

Students of constitutional history are agreed that one of the primary factors which motivated the authors of our Constitution was the fear of unchecked power in the institutions which they created.<sup>7</sup> It is clear, moreover, that this apprehension was not directed against the legislative branch alone.<sup>8</sup> Unlimited judicial power was to be guarded against, and this meant, among other things, that the judiciary was to be precluded from participating in the legislative process.<sup>9</sup> “Judicis est jus dicere non dare”<sup>10</sup> was an established maxim of the English law which served as a guide and inspiration for the constitutional framers. Rufus King, one of the Constitutional delegates, stated “that the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation.”<sup>11</sup>

One may wonder how we have moved from the clearly documented position of the framers of the Constitution to the position taken by the majority herein, as illustrated in the above quoted passages from Chief Judge Kaufman’s opinion. The answer is that, as a practical matter, the only restraint upon the

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7. “That all lawful power derives from the people and must be held in check to preserve their freedom is the oldest and most central tenet of American constitutionalism.” L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1-2 (1978).

8. *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 647, 69 S. Ct. 1173, 93 L. Ed. 1556 (1949) (Frankfurter, J., dissenting), *see also* R. BERGER, *GOVERNMENT BY JUDICIARY* 303 (1977).

9. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *Hart and Wechsler’s THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 7-8 (2d ed. 1973); BERGER, *supra* note 8, 300-11; *see also* *Griswold v. Connecticut*, 381 U.S. 479, 513 n.6 (1965) (Harlan, J., concurring).

10. “It is the duty of a judge to administer, not to make laws” Lofft, No. 42 (1790). The following quotations also illustrate the centuries-old English tradition of judicial restraint:

Though in many other countries everything is left in the breast of the Judge to determine, yet with us he is only to *declare* and *pronounce*, not to *make* or *new-model*, the law.

3 W. BLACKSTONE, *COMMENTARIES* 335.

We cannot make a law, we must go according to the law. That must be our role and direction.

\* *Parkyns Case*, 13 How. St. Tr. 72 (1696) (per Holt, C.J.).

11. 1 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 97-98, 109 (1911) (quoted in HART and WECHSLER, *supra* note 9, at 8). Alexander Hamilton thought, somewhat naively, it turns out, that judicial encroachment upon legislative authority could be prevented through the impeachment process. *See* *Federalist* No. 81 at 526-27 (quoted in BERGER, *supra* note 8, at 294).

power of the federal judiciary is that which is self-imposed.<sup>12</sup>

One need only skim through the all too numerous Supreme Court dissents to recognize that on occasion judicial activism has been checked with a very loose rein.<sup>13</sup> Sometimes this has pleased the so-called conservatives; at other times, it has gratified the so-called liberals. During the early decades of the twentieth century, those who are today's staunchest supporters of judicial activism were the most vocal critics of the Supreme Court's "usurpation" of congressional powers in striking down social and welfare legislation.<sup>14</sup> When the focus of the judiciary swung from property rights to personal rights, a new and different set of critics came to the fore.<sup>15</sup> The issue, as these critics see it, is not one of liberalism versus conservatism, but one of representative democratic government versus judicial autocracy.<sup>16</sup>

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12. *Trep v. Dulles*, 356 U.S. 86, 119, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (Frankfurter, J., dissenting); *United States v. Butler*, 297 U.S. 1, 79, 56 S.Ct. 312, 80 L.Ed. 477 (1936) (Stone, J., dissenting).

13. See, e.g., *Harper v. Virginia Board of Elections*, 383 U.S. 663, 677-78, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (Black, J., dissenting).

14. See BERGER, *supra* note 8, 312-37; TRIBE, *supra* 7, 446-49; A. Miller & R. Howell, *supra*, 27 U. CHI. L. REV. at 674; see also *Griswold v. Connecticut*, 381 U.S. 479, 522-27, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Black, J., dissenting).

15. See BERGER, *supra* note 8; BICKEL, *supra* note 4; L. HAND, *THE BILL OF RIGHTS* (1958); Henkin, *supra*, 109 U. PA. L. REV. 367.

16. "The critics start from the assumption that, in a political society which aspires to representative democracy or at least to popular representation, exercises of power which cannot find their justification in the ultimate consent of the governed are difficult, if not impossible, to justify." TRIBE, *supra* note 7, at 48.

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