

# Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic

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## I. INTRODUCTION

Lawrence Sager's seventy-page, densely packed assault upon "court-stripping,"<sup>1</sup> which he labels as an attempt to "neuter"<sup>2</sup> (*i.e.*, castrate) the Court, is written in an "icily abstract"<sup>3</sup> vacuum, virtually ignoring the ongoing debate<sup>4</sup> about what activist Louis Lusk admiringly describes as the Court's "assertion of the power to revise the Constitution," and to repudiate "the limits on judicial review."<sup>5</sup> Although Sager recognizes that "court-stripping" proposals "are the product of deep hostility . . . [in] the nation"<sup>6</sup> to the school prayer, mandatory busing and similar decisions, he lamely renders the impetus for this development as differences with the Court's "erroneous interpretations of the Constitution,"<sup>7</sup> when they involve nothing less, as Philip Kurland wrote, than the Court's "usurpation of general governmental powers on the pretext that its authority derives from the Fourteenth Amendment."<sup>8</sup> Instead, therefore, of an attempted rape of a vestal virgin, the "stripping" measures constitute the sovereign people's attempt to "curb a judiciary run amok"<sup>9</sup> and to restore their right to self-government—for example, to reinstate their unrestricted right to enact death penalties, a right that never had been questioned prior to 1972.<sup>10</sup> This it is that Sager condemns as a "tawdry precedent [for] sabotaging the integrity of

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1. Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). For a critique of the article, see Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143 (1982).

2. Sager, *supra* note 1, at 20.

3. *Id.* at 72.

4. Some of the articles are collated in Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 285 n.100 (1981). For evaluation of the debate, see Bridwell, *The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule?* 31 S.C.L. REV. 617 (1980); Gangi, *Judicial Expansionism: An Evaluation of the Ongoing Debate*, 8 OHIO N.U.L. REV. 1 (1981).

5. Lusk, Book Review, 6 HASTINGS CONST. L.Q. 403, 406 (1979).

6. Sager, *supra* note 1, at 18.

7. *Id.*

8. Letter to Harvard University Press (August 15, 1977) (available in Ohio State University Law Library).

9. Sager, *supra* note 1, at 38.

10. R. BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 1-2 (1982) [hereinafter cited as R. BERGER, DEATH PENALTIES]. Of the same nature is *Shapiro v. Thompson*, 394 U.S. 618 (1969), cited by Sager, *supra* note 1, at 70 n.159. There the Court, overturning a centuries old practice, held that the "right to travel" entitles an indigent migrant to immediate support at the terminus. An advocate of an unrestricted right to travel, Zechariah Chafee, said, "[T]here is a queer uncertainty about what clause in the Constitution established this right." Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 188 (1956). For 600 years the "right to travel" had been limited by a sovereign right to exclude paupers, recognized in the prior decisions of the Court. Berger, *Residence Requirements for Welfare and Voting: A Post-Mortem*, 42 OHIO ST. L.J. 853 (1982).

the judicial process."<sup>11</sup> Respect for the "integrity of the judicial process," however, requires that the Court stay within the confines the Framers contemplated, for "integrity" is defined as "uncorrupted condition; original perfect state."<sup>12</sup> More than "integrity of the judicial process" is involved. At issue is the integrity of our democratic system, whereunder the people have delegated law-making power to elected, accountable officials, not to life-tenured judges who are all but unaccountable,<sup>13</sup> reserving to themselves the power to amend the Constitution. In short, Sager has performed Hamlet without the Dane.

Lest the reader too hastily conclude that the foregoing is the product of an overheated imagination, let me adduce some activist statements. Michael Perry concluded that "[t]here is no plausible textual or historical justification for constitutional policymaking by the judiciary."<sup>14</sup> Although Chief Justice Warren declared that the "provisions of the Constitution" are "the rules of government"<sup>15</sup> and that "[w]e cannot push back the limits of the Constitution . . . [but] must apply those limits as the Constitution prescribes them,"<sup>16</sup> his worshipful biographer and former clerk, G. Edward White, tells us that "Warren was never concerned with constitutional text or intention. Rather, he believed that his job as judge lay in discovering and articulating the 'ethical imperatives' *he felt* were (or *should be*) embedded in the Constitution."<sup>17</sup> Paul Brest, a flaming apostle of activism, boldly challenged the assumption that "judges . . . [are] bound by the text or the original understanding of the Constitution,"<sup>18</sup> notwithstanding they are sworn to support it.<sup>19</sup> But he has since adjured academe "simply to acknowledge that most of our writings [about judicial review] are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good."<sup>20</sup> Of all this,

11. Sager, *supra* note 1, at 89.

12. 5 THE OXFORD ENGLISH DICTIONARY 368 (Murray ed. 1933).

13. We "are philosophically [and historically] committed," Perry observes, to the "principle that governmental policymaking . . . ought to be subject to control by persons accountable to the electorate." This principle is "axiomatic; it is judicial review, not the principle, that requires justification." M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 9 (1982) (footnotes omitted).

14. *Id.* at 24. In the face of pronouncements such as Kurland's, *see supra* text accompanying note 8, of Perry, and of a broad activist consensus that modern "constitutional rights" of individuals have no constitutional footing, *see infra* note 44, Sager refers to "allegedly erroneous decisions that [Senator Jesse Helms] regards as judicial usurpation of power." Sager, *supra* note 1, at 19 n.5 (emphasis added). An ardent activist, Paul Brest now acknowledges that "[f]undamental rights adjudication is open to the criticisms that it is not *authorized* and not *guided* by the text and original history of the Constitution." Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1082 (1981) (emphasis in original).

15. *Trop v. Dulles*, 356 U.S. 86, 103 (1958).

16. *Id.* at 104.

17. McDowell, Book Review, *Wall St. J.*, Aug. 26, 1982, at 20, col. 3 (emphasis added). This is Gary McDowell's summary of White's exposition. It is richly confirmed by White's narrative. *See* G. WHITE, EARL WARREN: A PUBLIC LIFE (1982). *See also infra* text accompanying notes 219-97.

18. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 224 (1980).

19. Chief Justice Marshall asked, "Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

20. Brest, *supra* note 14, at 1109.

and of activist scrambling to rationalize the Court's exercise of extraconstitutional power and policy making,<sup>21</sup> there is scarcely an intimation in Sager's article.

Sager notices that there are opponents of his view, among them Herbert Wechsler, a seminal scholar in the field, who deserves more than mere mention in a footnote.<sup>22</sup> Wechsler concluded that "Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction" of the federal courts.<sup>23</sup> The constitutional plan, he added, "was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power."<sup>24</sup> To this may be added the comment of a redoubtable activist, Charles Black: "I am not sure that I could defend, as consistent with the postulates of democracy, a system which really did put nine men, with life tenure, in an absolutely invulnerable position of final power,"<sup>25</sup> a view in which Michael Perry concurs.<sup>26</sup> Black could avouch Alexander Hamilton who, in *Federalist No. 81*,<sup>27</sup> rejected the argument that the "usurpations of the Supreme Court . . . will be uncontrollable and remediless" as based upon "false reasoning."<sup>28</sup> He went on to declare that "usurpations on the authority of the legislature" could be checked by impeachment.<sup>29</sup> But the fact that impeachment provides an alternate remedy does not reduce the provisions of article III to surplusage, particularly because, as James Bryce observed, impeachment is so heavy a "piece of artillery" as "to be unfit for ordinary use"<sup>30</sup>—a good reason for giving effect to the unequivocal provisions of article III.

21. See *Symposium: Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981); *Symposium: Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981). Mark Tushnet considers that the academicians seek to "superimpose a facade of rationality on the Court's decisions." Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1325 (1979). After examining "seven representative scholars who favor one or another form of fundamental rights adjudication," Brest indicates that their conclusions derived from their particular predilections. Brest, *supra* note 14, at 1089. Of elaborate efforts to construct such a theory, Sanford Levinson, a dedicated activist, wrote, "[i]t is naive to pretend that the construction will be an easy task or that we can so easily shed the view of the Constitution, and its limits, articulated by Berger." Levinson, *Book Review*, 236 NATION 250 (1983). See also *infra* note 40.

22. Sager, *supra* note 1, at 21 n.10.

23. Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965).

24. *Id.* Michael Perry considers that "congressional power over the jurisdiction of the federal judiciary, including the appellate jurisdiction of the Supreme Court, is not disputed." Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 332 (1981). Louis Lusky refers to Congress' "undoubted authority to strip away virtually all power of the federal courts to engage in judicial review." Lusky, *Book Review*, 6 HASTINGS CONST. L.Q. 403, 412 (1979). Sanford Levinson is "inclined to accept the view that Congress indeed has power, subject to extremely few constraints, to determine federal jurisdiction however it sees fit." Levinson, *The Turn Toward Functionalism in Constitutional Theory*, 8 U. DAYTON L. REV. 567, 575 (1983). To my mind the cases abundantly justify such views, as will appear.

25. Black, *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 847 (1975). Scharpf likewise insists "that judicial review in a democracy remains defensible only to the extent that the Court itself will be defenseless against the processes through which the community may assert and enforce its own considered understanding of its basic code." Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 589 (1966).

26. See M. PERRY, *supra* note 13, at 138.

27. THE FEDERALIST NO. 81 (A. Hamilton).

28. *Id.* at 523-24 (Mod. Libr. ed. 1937).

29. *Id.* at 526-27.

30. I J. BRYCE, THE AMERICAN COMMONWEALTH 212 (new ed. 1914) (discussing relations between Congress and the President).

Congressional control of the courts' jurisdiction under article III has the sanction of the First Congress, draftsmen of the Judiciary Act of 1789,<sup>31</sup> and of an unbroken string of decisions stretching from the beginning of the Republic.<sup>32</sup> Such control of the Supreme Court's appellate jurisdiction derives from the article III provision that it shall be subject to "such exceptions and under such regulations as the Congress shall make." William Van Alstyne considers that "[t]he power to make exceptions to Supreme Court appellate jurisdiction is a plenary power. It is given in express terms and without limitation."<sup>33</sup> Sager himself observes that "[i]t seems odd—indeed inappropriate—to find in as barren an expression as 'with such Exceptions . . . as the Congress shall make' the existence of some category of jurisdiction beyond Congress' reach."<sup>34</sup> For activists, according to John Hart Ely, "*the most important datum bearing on what was intended is the constitutional language itself*,"<sup>35</sup> adding that "the only reliable evidence of what 'the ratifiers' thought they were ratifying is obviously the language of the provisions they approved."<sup>36</sup> It is therefore refreshing to find Sager so frequently turning to the legislative history,<sup>37</sup> for in their efforts to undergird the desegregation, reapportionment and Bill of Rights decisions, activists have consigned legislative history to the outermost bounds of limbo.<sup>38</sup> Let Paul Brest speak:

[M]any scholars and judges reject Berger's major premise, that constitutional interpretation should depend chiefly on the intent of those who framed and adopted such a provision. . . . [W]hatever the framers' expectations may have been, broad constitutional guarantees require the Court to discern, articulate and apply values that are widely and deeply held by our society.<sup>39</sup>

31. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. Charles Warren considered that the First Congress was "almost an adjourned session" of the Constitutional Convention. C. WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 99 (1925). Sager notes that 19 Framers, including Oliver Ellsworth, Elbridge Gerry, James Madison, William Paterson and Roger Sherman, were members of the First Congress. Sager, *supra* note 1, at 31 n.37. To these may be added many who had participated in the state ratification conventions.

32. See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 567-68 (1962); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869); *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845); *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321 (1796). See *infra* text accompanying notes 74-93.

33. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 260 (1973).

34. Sager, *supra* note 1, at 45.

35. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 418 (1978) (emphasis in original).

36. *Id.* at 419.

37. But he notes the argument that "[t]he broad license that article III gives Congress to limit the jurisdiction of the Supreme Court . . . is beyond restraints spun from threads as slender as perceptions about intent of the framers." Sager, *supra* note 1, at 44. He tells us that the

"exceptions and regulations" language . . . was adopted by the Convention . . . without a ripple of recorded debate, concern, or explication. In light of this quiescence, it is hard to imagine that the framers were consciously adopting a provision that could completely unravel one of the most basic aspects of the constitutional scheme to which they had committed themselves.

*Id.* at 51 (footnotes omitted); see also *id.* at 42. This is an extraordinary interpretive approach: *silence* authorizes the curtailment of an express, unmistakable text! The First Congress (see *supra* note 24) speedily embodied in the Judiciary Act of 1789 the very unravelling provision—on a grand scale—that Sager condemns: federal question jurisdiction was made the exclusive province of the state courts subject to limited review by the Supreme Court. And even more "basic" was the mandate that every branch comply with constitutional limits. R. BERGER, *DEATH PENALTIES*, *supra* note 10, at 77-79; see *infra* text accompanying notes 282-87.

38. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Alfange, Book Review, 5 HASTINGS CONST. L.Q. 603, 608-15, (1978).

39. Brest, Book Review, N.Y. Times, Dec. 11, 1977, § 7 (Book Rev.), at 44. For comment on "values that are widely and deeply held," see *infra* text accompanying notes 218-42.

Activists cannot have it both ways; resort to legislative history must be evenhanded. Were effect given to the history of the fourteenth amendment, the motivation for "court-stripping" would disappear. The history of the fourteenth amendment, more and more activists agree, shows that jurisdiction over suffrage and segregation was withheld and the Bill of Rights was not incorporated therein,<sup>40</sup> thereby undermining the Court's desegregation, reapportionment, school prayer and like decisions—areas Sager would shield from "stripping."<sup>41</sup>

Against this background, Sager's repeated emphasis on the Court's duty to safeguard "constitutional rights"<sup>42</sup> begs the question. "Constitutional rights" are those created by the Constitution, not those pulled out of thin air by the Court without constitutional warrant.<sup>43</sup> Increasingly, activists agree that most modern "rights" are not specified in the Constitution, but have been fashioned by the Court.<sup>44</sup> Perry

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40. An activist, Nathaniel Nathanson, wrote about my conclusion that segregation and suffrage were excluded by the framers from the fourteenth amendment: "These are not surprising historical conclusions. The first was quite conclusively demonstrated by Alexander Bickel . . . ; the second was also quite convincingly demonstrated by . . . Mr. Justice Harlan . . . Mr. Berger's independent research and analysis confirms and adds weight to those conclusions." Nathanson, Book Review, 56 TEX. L. REV. 579, 581 (1978). Perry observed, "The framers of the fourteenth amendment did not intend to ban state-ordered racial segregation, and yet the Supreme Court has done so." M. PERRY, *supra* note 13, at 92. For additional citations see Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 285 n.100 (1981), who adds that my finding that the fourteenth amendment was not intended to make the Bill of Rights applicable to the States "is amply documented and widely accepted." *Id.* at 286.

41. See Sager, *supra* note 1, at 17-18, 88-89.

42. *Id.* at 68, 70, 72, 77, 79.

43. In his classic post-Civil War commentary on the Constitution, Chief Justice Thomas Cooley stated that a court cannot "declare a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution." T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 341 (8th ed. 1927). Similar sentiments were uttered by the Framers in rejecting the Council of Revision. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 301 (1977) [hereinafter cited as R. BERGER, GOVERNMENT BY JUDICIARY]. For Chief Justice Warren's flagrant disregard of such canons, see *infra* text accompanying notes 218-42.

44. Perry observes that since "there is neither a textual nor a historical justification . . . for noninterpretive review in human rights cases, [unless there is a functional justification] virtually all of constitutional doctrine regarding human rights fashioned by the Supreme Court in this century must be judged illegitimate." M. PERRY, *supra* note 13, at 91. It "becomes virtually impossible to justify the Court's actions [in providing 'vigorous protection for constitutional rights of minorities'] on the ground that it is doing no more than 'finding' the law of the Constitution and fulfilling the intention of its framers." J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 137 (1980). Terrance Sandalow emphasizes the difference between "two quite different problems"—(1) "the protection of individual and minority rights," and (2) "the definition of the rights that individuals and minorities *should* have." He questioned "what mandate courts can claim for exercising powers to determine what the rights of individuals and minorities *should* be, especially since decisions regarding those rights will have an important impact upon the interests of others." Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. REV. 446, 460 (1981) (emphasis added). Gary C. Leedes considers that "[t]he framers did not intend article III to empower a federal judge to invalidate legislation simply because he decides that, beyond its limitations, the Constitution should protect a claimant's rights." Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1385 (1979). See also Berger, *Paul Brest's Brief for an Imperial Judiciary*, 40 MD. L. REV. 1, 18-22 (1981). Perry considers that a person's claim that his "human rights" have been violated is "really a claim about what human rights he *ought* to be deemed to have . . . when no value judgment constitutionalized by the framers is determinative." M. PERRY, *supra* note 13, at 112 (emphasis added). Sager affirms that "[a]bsent a cognizable body of rights, the justification for judicial review is all but conclusively dissipated." Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417, 420 (1981) (footnotes omitted). Gary C. Leedes also considers that there are "no extra-constitutional minority rights." Leedes, *Supra*, at 1385.

When Ira Lupu writes that "Perry's noninterpretivism removes most modern constitutional protection of the individual from the written Constitution," he assumes that "modern" individual rights were *in* the written Constitution, when as activists now acknowledge, they are extraconstitutional constructs without roots in the "written Constitution." Lupu, *Constitutional Theory and the Search for the Workable Premise*, 8 U. DAYTON L. REV. 579, 608 (1983). A recent acknowledgement of the fact is that of Larry Alexander: "There is no power delegated to Congress under article I or the

understands Sager to doubt "that very much modern constitutional doctrine regarding human rights can be grounded in the *written* Constitution."<sup>45</sup> For present purposes it may be assumed that congressional control of jurisdiction does not extend to "rights" specified in the Constitution.<sup>46</sup> The issue, rather, is whether such control may be exercised to curb judicial arrogation of power that proceeds in despite of the Constitution. In *Federalist No. 83* Hamilton wrote that the judicial authority extended to "certain cases *particularly specified*. The expression of those cases marks the *precise limits*, beyond which the federal courts cannot extend their jurisdiction."<sup>47</sup> Consequently, the specification of cases "arising under this Constitution" excludes cases not "arising" thereunder but drawn from external sources.<sup>48</sup> And if, as Hamilton stated, Congress was confined to laws passed "in pursuance of their just and constitutional powers of legislation,"<sup>49</sup> the Court equally was bound to stay within its "just and constitutional powers" of adjudication.<sup>50</sup>

Sager stresses "the firm commitment to federal supervision of the states reflected in the history and logic of the Constitution."<sup>51</sup> But that is only half of the story. The states' rights advocates at the Constitutional Convention, as Sager notes, "were most concerned with bridling the federal government" and "least supportive of a substantial judiciary."<sup>52</sup> Their unrelenting pressure left a deep imprint on the structure and powers of that judiciary. Because many, like William Grayson of Virginia, felt that state courts were "the principal defence of the states,"<sup>53</sup> their stubborn insistence on state court arbitrament of federal-state conflicts persisted and soon was expressed in the Judiciary Act of 1789.<sup>54</sup> The supremacy clause, Hamilton

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enforcement provisions of the Civil War Amendments to enact legislation enforcing values not constitutionalized." Alexander, *Painting Without Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 458 (1983).

Centuries ago Dante noted that the "usurpation of a right does not create a right." W. DURANT, *THE AGE OF FAITH* 1063 (1950).

45. M. PERRY, *supra* note 13, at x n.‡ (emphasis in original). Notwithstanding, Sager refers only to "highly controversial federal court decisions recognizing individual rights." Sager, *supra* note 1, at 68.

46. For the factors implicated in that assumption, see Berger, *Michael Perry's Functional Justification for Judicial Activism*, 8 U. DAYTON L. REV. 466, 511-12 (1983).

47. *THE FEDERALIST* No. 83, at 541 (A. Hamilton) (Mod. Libr. ed. 1937) (emphasis added).

48. "[A]rticle III grants the federal courts power to decide cases 'arising under the Constitution,' but it does not grant the power to decide cases involving extra-constitutional value judgments." Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 458 (1983).

49. *THE FEDERALIST* No. 80, at 515 (A. Hamilton) (Mod. Libr. ed. 1937).

50. The Founders were more attached to the legislatures than to the courts. Of the three branches, Hamilton assured the ratifiers, the judiciary is next to nothing. *THE FEDERALIST* No. 78, at 504 n.\* (A. Hamilton) (Mod. Libr. ed. 1937) (quoting MONTESQUIEU, *THE SPIRIT OF LAWS*). In his 1791 lectures, Justice James Wilson admonished America that it was time "to chastise our prejudices" (*i.e.*, courts had been "objects of aversion and distrust"). 1 *THE WORKS OF JAMES WILSON* 292-93 (R. McCloskey ed. 1967).

51. Sager, *supra* note 1, at 45.

52. *Id.* at 58. For discussion of the Founders' passionate attachment to state sovereignty, see R. BERGER, *CONGRESS V. THE SUPREME COURT* 261-63 (1969) [hereinafter cited as R. BERGER, *CONGRESS*].

53. 3 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 563 (J. Elliott ed. 1827-30 & photo. reprint 1941). In the North Carolina Convention Spencer declared, "[T]he state governments are the basis of our happiness security and prosperity." A. MASON, *THE STATES RIGHTS DEBATE: ANTI-FEDERALISM AND THE CONSTITUTION* 161 (2d ed. 1972). Contrast with Grayson's observations Sager's remark that all congressional control can accomplish is to "take Congress out of the grip of the federal courts and put it in the grip of state judiciaries." Sager, *supra* note 1, at 41. That choice was made by the First Congress and it remains for Congress to make it. So far as Congress invades the sovereignty over local matters reserved to the states, the Framers made the state courts the first resort.

54. See *supra* note 31 and accompanying text.

wrote in *Federalist No. 33*, "expressly confines this supremacy to laws made pursuant to the Constitution;"<sup>55</sup> federal acts which are not pursuant thereto but "are invasions of the residuary powers of the smaller societies . . . will be merely acts of usurpation and will deserve to be treated as such."<sup>56</sup> His condemnation of usurpation extended to judicial arrogation.<sup>57</sup> Madison assured the ratifiers in *Federalist No. 39* that federal jurisdiction "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."<sup>58</sup> He particularized in *Federalist No. 45* that federal powers "will be exercised principally on external objects, as war, peace, negotiation and foreign commerce . . . . The powers reserved to the several States will extend to all the objects which . . . concern . . . the internal order . . . of the State."<sup>59</sup> To Madison and Hamilton, Garry

55. THE FEDERALIST NO. 33, at 202 (A. Hamilton) (Mod. Libr. ed. 1937) (emphasis in original).

56. *Id.* (emphasis added); R. BERGER, CONGRESS, *supra* note 52, at 13-16, 266-67. The Constitution's restrictions on federal jurisdiction are discussed *infra*, text accompanying notes 279-97. Against this Sager argues, It is hard to imagine that total congressional control of Supreme Court jurisdiction was deliberately embraced by the same body that had worried for months about restraint of the states, had fought to a compromise over the structure of Congress, and had engaged in a tug-of-war over congressional control of judicial appointment until the final hour of its deliberations.

Sager, *supra* note 1, at 52 (footnotes omitted). The great "compromise," which assured the states equal representation in the Senate, responded to the states rights proponents' fears that "[p]roportional representation would strike 'at the existence of the lesser States.'" A. MASON, *supra* note 53, at 37. A states' rights leader, William Paterson, "virtually equated state sovereignty with equal state representation." *Id.* at 40. Alpheus Thomas Mason concluded that "[e]nemies of a strong national government, as well as friends of the small states, had good reason to hail the Connecticut Compromise as a victory. The term 'compromise' is a misnomer." *Id.* at 49. Another victory was scored when the final compromise left creation of inferior courts in the discretion of Congress, and the First Congress then left federal jurisdiction exclusively with the state courts with spotty appeals to the Supreme Court. The nationalists "were convinced that they had suffered fatal defeats." *Id.* at 58.

57. See THE FEDERALIST NO. 33, at 201-02 (A. Hamilton) (Mod. Libr. ed. 1937). Sager observes that the jurisdiction of the Court "was consciously tailored to the role of supervising the enforcement of the supremacy clause," Sager, *supra* note 1, at 51, but fails to note that it did not extend to invasions of the residuary powers of the states. Justice James Iredell stated, "The question then under this [supremacy] clause, will always be whether congress has exceeded its authority. If it has not exceeded it we must obey, otherwise not." A. MASON, *supra* note 53, at 165. And he said, "If Congress, under pretence of exercising the power delegated to them, should in fact, by the exercise of any other power, usurp upon the rights of the different [State] Legislatures, . . . [i]t would be an act of tyranny." *Id.* at 128.

58. THE FEDERALIST NO. 39, at 249 (J. Madison) (Mod. Libr. ed. 1937) (emphasis added). See also comments of A. Hamilton, *infra* text accompanying notes 157-58.

59. THE FEDERALIST NO. 45, at 303 (J. Madison) (Mod. Libr. ed. 1937) (emphasis added). Madison proposed "complete authority in all cases where uniform measures are necessary." A. MASON, *supra* note 53, at 62. Wilson likewise emphasized that federal power extends to matters "to the direction of which no state is competent," *id.* at 15, which "extend beyond the bounds of the particular States," *id.* at 76, therefore not embracing, for example, local control of education or criminal law enforcement. Iredell assured the North Carolina Ratification Convention that "[w]ith the mere internal concerns of a State, Congress are to have nothing to do." *Id.* at 127. Chief Justice Marshall, who in the Virginia Ratification Convention had vigorously defended judicial review to curb action in excess of constitutional bounds, stated in *Gibbons v. Ogden* that the federal powers applied

to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

22 U.S. (9 Wheat.) 1, 195 (1824).

Contrast this with Sager's view that

[f]ederal judicial supervision of state conduct is particularly important because of the daily impact of state and local government on the lives of individuals . . . . States or their municipal constituents register voters, run public schools, control access to speech opportunities, employ the police personnel with whom citizens regularly have contact, regulate the use of land, license professionals, and regulate families.

Sager, *supra* note 1, at 55 n.112. In short, Sager would have Big Brother take over administration of local matters which Madison assured the Framers were left to the states, to be forever "inviolable." See THE FEDERALIST NO. 39, at 249 (J. Madison) (Mod. Libr. ed. 1937). This is the mainspring of Sager's attack on congressional curtailment of jurisdiction to continue on this path.

Wills observes, "it seemed inconceivable . . . that a central authority would want to descend to the enforcement of local laws."<sup>60</sup> Their assurances to the ratifiers were calculated to allay intense fears that the federal government would invade or swallow up the sovereignty of the States.<sup>61</sup>

The basic issue, therefore, is whether the people may protect themselves from a judicial takeover of local government that was reserved to the states. Instead of meeting that issue, Sager asserts that "if Congress were able to free the States from federal judicial supervision, the constitutional order would be badly wrenched,"<sup>62</sup> when in truth it has been "badly wrenched" by the Court's arrogation of jurisdiction withheld. One can agree that "the framers put critical restraints on state autonomy into the Constitution itself"<sup>63</sup> and yet reject the non sequitur that states are equally bound by restraints imported by the Court that the Framers did not put into the Constitution. The federal courts, Hamilton stated, were to overrule state laws that "might be in *manifest contravention* of the articles of Union";<sup>64</sup> that was the scope of the "firm commitment" to federal supervision of state courts relied on by Sager.<sup>65</sup> It is not breached when Congress intervenes to deprive the Court of jurisdiction to enter decisions that manifestly deprive states of rights reserved to them by the Constitution.

Current assaults on the long-recognized congressional power are without historical or judicial warrant; they are simply, as activist Michael Perry wrote, "attacks, by those enthusiastic about the modern Court's activist work product."<sup>66</sup> Such academicians, having cheered on the Court in the realization of their social aspirations, now seek to barricade the way to correction of the Court's excesses.

## II. THE CASES

Sager's discussion of the cases is replete with remarkable readings of what they held. He finds "ambiguous statements in early decisions,"<sup>67</sup> but concludes that "article III itself contains a direct, self-executing grant of jurisdiction" to the Court,<sup>68</sup> a matter "well established"<sup>69</sup> when Chief Justice Taney wrote for the Court

60. G. WILLS, *Introduction* to THE FEDERALIST at xiv (1982). Oliver Ellsworth stated in the Convention, "The Nat[ional] Gov[ernment] could not descend to the local objects on which this [individual rights] depended. It could only embrace objects of a general nature. He turned his eyes therefore for the preservation of his rights to the State Gov[ernment]s." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 492 (M. Farrand ed. 1911). "In the Convention and later, states rights—not individual rights—was the real worry." A. MASON, *supra* note 53, at 78.

61. R. BERGER, CONGRESS, *supra* note 52, at 261–62.

62. Sager, *supra* note 1, at 45. He insists that to conclude that "Congress can sweep aside the entire federal judicial establishment in order to facilitate state court repudiation of Supreme Court doctrine . . . seems at war with our commitment to national constitutional government." *Id.* at 74. That commitment was to *limited* national government, to state sovereignty over local matters; it did not contemplate shelter for lawless judicial infringements of that sovereignty. Justices as diverse as Chief Justice Burger and Justices Douglas and Frankfurter insist on looking at the Constitution for themselves, never mind what their predecessors said about it. See R. BERGER, GOVERNMENT BY JUDICIARY, *supra* note 43, at 297 & n.57. The right of the sovereign people is no more limited.

63. Sager, *supra* note 1, at 46.

64. THE FEDERALIST No. 80, at 516 (A. Hamilton) (Mod. Libr. ed. 1937) (emphasis added).

65. See Sager, *supra* note 1, at 45–57.

66. M. PERRY, *supra* note 13, at 138.

67. Sager, *supra* note 1, at 23.

68. *Id.* at 23–24.

69. *Id.* at 24 n.16.

in *Barry v. Mercein*.<sup>70</sup> Taney apparently was unaware that it was "well established," for he held that "[b]y the constitution . . . the Supreme Court possesses no appellate power in any case, *unless conferred* upon it by act of Congress."<sup>71</sup> Congress, moreover, Sager notes, "has never chosen to act as though the Supreme Court's jurisdiction were self-executing. From the Judiciary Act of 1789 on, Congress has assumed the statutory voice of affirmatively *granting* the Court jurisdiction."<sup>72</sup> Regarding Congress' power "to subtract legal issues" from the Court's jurisdiction, he observes that "[t]he Court itself has shared this understanding. In no opinion has the Court taken a contrary view. Indeed, . . . the Court displays an almost unseemly enthusiasm in discussing Congress' power to lop off diverse heads of the Court's article III jurisdiction."<sup>73</sup> Thus, in defending the Court against "stripping," Sager is more royalist than the king.

Among the allegedly "ambiguous statements" Sager finds is that of *Wiscart v. Dauchy*,<sup>74</sup> in which Chief Justice Ellsworth held that, "[i]f Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction"<sup>75</sup>—a tolerably unambiguous statement that in the absence of congressional action the Court has no appellate jurisdiction. Ellsworth had been a draftsman of the exceptions clause as a member of the Committee on Detail, and of the Judiciary Act of 1789<sup>76</sup> in the First Congress, and therefore was presumably familiar with the Framers' intentions as well as those of the First Congress. His statement is to be read against that background. Sager notes that in the Judiciary Act, after excluding federal question jurisdiction from the purview of the inferior courts—an exclusion that survived until 1875—"a Congress familiar with the drafting of article III withheld from the Court *large portions* of section 2 jurisdiction. This was no oversight, to be corrected in short order, but the forging of an enduring pattern,"<sup>77</sup> so that some exclusions remained for 125 years or more.<sup>78</sup>

70. 46 U.S. (5 How.) 103 (1847).

71. *Id.* at 119 (emphasis added).

The pivotal language . . . —to the effect that the Court possesses no jurisdiction unless Congress has conferred it—is ambiguous; it may do no more than restate the practical result of the rule of *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810); . . . that purportedly positive grants of jurisdiction by Congress are to be read to exclude the jurisdiction not granted.

Sager, *supra* note 1, at 23 n.16. What is ambiguous about restating that in the absence of a positive grant there is no jurisdiction? The unequivocal terms of the exceptions clause speak for themselves.

72. Sager, *supra* note 1, at 24–25 (emphasis added) (footnotes omitted).

73. *Id.* at 32 (footnotes omitted). In *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1927), the unanimous Court declared, "This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions." *Id.* at 412 (citations omitted).

74. 3 U.S. (3 Dall.) 321 (1796).

75. *Id.* at 327.

76. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

77. Sager, *supra* note 1, at 31 (emphasis added) (footnotes omitted). The First Congress' withholding was confirmed by the Court: "[W]hole classes of cases [may] be kept out of the jurisdiction altogether." The "Francis Wright," 105 U.S. 381, 386 (1882). The "Francis Wright" is cited by Sager for the proposition that article III "contains a direct, self-executing grant of jurisdiction." Sager, *supra* note 1, at 24 & n.17.

78. Sager observes that "[t]he First Judiciary Act was not especially generous to the Court, and for a number of years there remained some rather surprising gaps in the Court's jurisdiction." Sager, *supra* note 1, at 52–53. For example, the "Court was not granted general power to review major federal criminal cases until 1891." *Id.* at 53 n.105. Compare

Little wonder that *Cary v. Curtis*<sup>79</sup> declared, "[T]he 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."<sup>80</sup> *Daniels v. Railroad Co.*<sup>81</sup> repeated, "[I]t is for Congress to determine how far . . . appellate jurisdiction shall be *given*, and when *conferred*, . . . it is wholly the creature of legislation."<sup>82</sup> And in 1892, after Congress had granted it jurisdiction in criminal cases, the Court held, "The appellate jurisdiction of this court *rests wholly* on the acts of Congress."<sup>83</sup> Even Chief Justice Warren, that paragon of activist judges, stated, "It is axiomatic, as a matter of history as well as doctrine, that the *existence* of appellate jurisdiction in a specific federal court over a given type of case is *dependent* upon authority expressly *conferred* by statute."<sup>84</sup>

All this is burlesqued by Sager: "Congress acts as though it were giving the Court jurisdiction in measured statutory doses, and ordinarily the Court has no occasion to take umbrage at this *pretense*."<sup>85</sup> And he states that "[t]he judiciary has never had the occasion to rule decisively on such incursions into federal jurisdiction."<sup>86</sup> *Ex parte McCordle*<sup>87</sup> is to the contrary. Henry Hart, no friend of "court-stripping," wrote of *McCordle*,

[I]n perhaps the most spectacular of historic examples a unanimous Court recognized the power of Congress to frustrate a determination of the constitutionality of the post-Civil War reconstruction legislation by withdrawing, during the very pendency of an appeal, its jurisdiction to review decisions of the federal circuit courts in habeas corpus.<sup>88</sup>

*McCordle*, Sager comments, "endorse[d] the broad power of Congress to *tamper* with [the Court's] jurisdiction."<sup>89</sup> But he speculates that *McCordle* might be decided differently today; among other things, "the Court did not address itself to issues of equal protection and due process—which is not surprising in view of the fact that the fourteenth amendment had not yet been passed."<sup>90</sup> But the due process clause of the fifth amendment was available because a federal act was involved, although the distorted version of due process that characterized the laissez-faire Court was yet unborn. Without pausing to consider such possibilities, the Court approved *McCordle*

with this Sager's assertion that "[a]n 'exception' implies a minor deviation from a surviving norm; it is a nibble, not a bite. And there is reason to believe that this sense of the term was, if anything, clearer at the time the Constitution was drafted than now"! *Id.* at 44.

79. 44 U.S. (3 How.) 236 (1845).

80. *Id.* at 245.

81. 70 U.S. (3 Wall.) 250 (1866).

82. *Id.* at 254 (emphasis added).

83. *United States v. Sanger*, 144 U.S. 310, 319 (1892) (emphasis added).

84. *Carroll v. United States*, 354 U.S. 394, 399 (1957) (emphasis added).

85. Sager, *supra* note 1, at 25 (emphasis added).

86. *Id.* at 19.

87. 74 U.S. (7 Wall.) 506 (1869).

88. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1362-63 (1953). In *Oregon v. Mitchell*, 400 U.S. 112 (1970), Justices Brennan, White and Marshall stated, "Radical disenchantment with decisions of this Court had led . . . to the Act of March 27, 1868, . . . withdrawing our appellate jurisdiction over certain habeas corpus cases. See *Ex parte McCordle* . . ." *Id.* at 275 n.43 (citation omitted) (Brennan, J., concurring and dissenting).

89. Sager, *supra* note 1, at 54 (emphasis added).

90. *Id.* at 77 n.187.

in *Glidden Co. v. Zdanok*.<sup>91</sup> And the continuing vitality of *McCardle* was recognized by no less an activist than Justice Douglas: "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of § 2, Art. III. See *Ex parte McCardle* . . ."<sup>92</sup> Justice Frankfurter, a pioneer student of federal jurisdiction, stated, "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*. *Ex parte McCardle*."<sup>93</sup> So far as the cases go, therefore, Sager patently has a hard row to hoe.

He is not helped by *United States v. Klein*<sup>94</sup> to which he repeatedly turns.<sup>95</sup> "When Congress manipulates jurisdiction in an effort to deny recognition and judicial enforcement of constitutional rights, it has deliberately set itself against the Constitution as the Court understands that document. . . . *Klein* stands for nothing less."<sup>96</sup> The *Klein* decision merely rejected a congressional attempt "to prescribe a rule for the decision of a cause in a particular way," explaining that "this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."<sup>97</sup> Much later, *Glidden Co. v. Zdanok*<sup>98</sup> stated that in *Klein* "the claimant had already been adjudged entitled to recover by the Court of Claims"; hence application of the statute was rejected as "an unconstitutional attempt to invade the judicial province by prescribing a rule of decision in a pending case,"<sup>99</sup> and therefore distinguishable from *McCardle*, wherein the Court was deprived of jurisdiction. Sager's failure to perceive the difference between the two is of a piece with his insistence that since Congress cannot *reverse* a particular decision, it cannot withdraw the Court's jurisdiction to decide.<sup>100</sup> But as Michael Perry points out, article III "gives Congress the jurisdiction-limiting power, but not the power legislatively to reverse."<sup>101</sup> That distinction was drawn by Hamilton in *Federalist No. 81*: although a "legislature . . . cannot reverse a determination once made in a particular case,"<sup>102</sup> "usurpations [by] the Supreme Court . . . will [not] be uncontrollable and remediless."<sup>103</sup> In the very same *No. 81* Hamilton declared that the Court's appellate jurisdiction will be "subject to any *exceptions* and *regulations*

91. 370 U.S. 530, 567-68 (1962).

92. *Flast v. Cohen*, 392 U.S. 83, 109 (1968) (citation omitted).

93. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (citation omitted) (Frankfurter, J., dissenting on other grounds). Louis Lusky refers to Congress' "undoubted authority to strip away virtually all power of the federal courts to engage in judicial review." Lusky, Book Review, 6 *HASTINGS CONST. L.Q.* 403, 412 (1979) (footnotes omitted).

94. 80 U.S. (13 Wall.) 128 (1872).

95. Sager, *supra* note 1, at 70, 71, 72, 73, 76-77.

96. *Id.* at 76-77. Among Sager's citations is *Shapiro v. Thompson*, 394 U.S. 618 (1969), an excellent example of how "the Court understands" the Constitution. There the Court found that the "right to travel," as to whose provenance no two Justices agreed, entitled an indigent migrant to immediate support at the terminus! See Berger, *Residence Requirements for Welfare and Voting: A Post-Mortem*, 42 *OHIO ST. L.J.* 853 (1981); see also *supra* note 10.

97. 80 U.S. (13 Wall.) 128, 146 (1872).

98. 370 U.S. 530 (1962).

99. *Id.* at 568.

100. For a discussion of his statement to that effect see *infra* text accompanying notes 106-07.

101. M. PERRY, *supra* note 11, at 135.

102. *THE FEDERALIST* No. 81, at 526 (A. Hamilton) (Mod. Libr. ed. 1937).

103. *Id.* at 523.

which may be thought advisable,"<sup>104</sup> thus distinguishing the power to reverse from the power to control jurisdiction. Sager's failure to perceive this distinction leads him to say that "there is no indication that the framers saw Congress' power over jurisdiction as a way to manipulate federal jurisdiction."<sup>105</sup> Time and again he insists that "Congress cannot use jurisdiction to undermine the decisions of the Supreme Court,"<sup>106</sup> that it cannot "undo the Supreme Court's constitutional doctrine by simple legislative fiat, and it should not be able to accomplish the same end by manipulating federal jurisdiction."<sup>107</sup> But impeachment for judicial usurpation might equally be labelled manipulation of federal doctrine, yet the ratifiers were assured by Hamilton that impeachment would furnish the cure;<sup>108</sup> article III merely furnishes an alternate remedy.

### III. SAGER'S LIMITATION ARGUMENTS

Sager observes that "while Congress does enjoy great discretion in molding federal jurisdiction, serious restrictions nevertheless limit congressional authority to enact" the current jurisdiction withdrawal bills.<sup>109</sup> In undertaking to limit jurisdiction Congress, he asserts, "is fully bound by the constitutional limitations that ordinarily constrain its behavior."<sup>110</sup> But he notices that "from Supreme Court dicta and academic commentary there occasionally emerges a sense that Congress is immune from full constitutional scrutiny when the distribution of jurisdiction is at stake."<sup>111</sup> The burden is on Sager to demonstrate that the plenary, unequivocal terms of the exceptions clause mean less than they say. In *McCardle*, he tells us, "[t]he Court implicitly followed Chief Justice Marshall's view that these enumerated powers should be construed broadly."<sup>112</sup> Early on, Justice James Wilson's view in dissent that "a positive restriction" by Congress would have to yield to the "superior authority"<sup>113</sup> of the Constitution was rejected by the Court in *Wiscart v. Dauchy*.<sup>114</sup> Sager's bill of particulars fails to make out his case.

104. *Id.* at 533 (emphasis in original).

105. Sager, *supra* note 1, at 42 n.71.

106. *Id.* at 38. "One starts with the observation that Congress cannot override the constitutional decisions of the Supreme Court by a simple legislative act." *Id.* at 39. He notes without differentiating that "[a] proposal that the 'judicial power shall be exercised in such manner as the Legislature shall direct' was repulsed." *Id.* at 49 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 425, 431 (M. Farrand ed. 1911) (emphasis added) (footnotes omitted)).

107. *Id.* at 68 (footnotes omitted).

108. See *infra* text accompanying note 158.

109. Sager, *supra* note 1, at 21-22.

110. *Id.* at 37.

111. *Id.*

112. *Id.* at 77 n.187.

113. 3 U.S. (3 Dall.) 321, 325 (1796) (Wilson, J., dissenting).

114. *Id.* at 327. See *supra* text accompanying notes 74-75. As an example of "patently unconstitutional limitation" on federal court jurisdiction of federal questions under existing statutes, Sager instances "a provision restricting jurisdiction to plaintiffs of a particular . . . religion." Sager, *supra* note 1, at 26. Federal jurisdiction over religion was first claimed by the Court in the mid-twentieth century, resting on the alleged incorporation of the Bill of Rights in the fourteenth amendment, which activists increasingly agree is historically untenable. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Alfange, Book Review, 5 HASTINGS CONST. L.Q. 603 (1978); for citations see Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 285-86 (1981). As late as 1922 the Court held that the first amendment does not apply to the states. *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530, 538 (1922). The Court's subsequent decisions to the contrary do not settle the issue when the authority of the Court itself is being challenged.

### A. Congressional Discretion

Sager argues that "[a]rticle III does not say 'Congress shall withhold such jurisdiction as it may deem appropriate.'"<sup>115</sup> That hardly squares with his view that "Congress does enjoy great discretion."<sup>116</sup> Moreover, such exceptions "as Congress shall make" patently leaves the judgment of what is appropriate to Congress. Hamilton said in *Federalist No. 81* that the exceptions clause "will enable the government to modify [appellate jurisdiction] in such a manner as will best answer the ends of public justice and security"<sup>117</sup>—a judgment necessarily left in the discretion of Congress, who could make "any exceptions and regulations which may be *thought advisable*."<sup>118</sup> A vigorous advocate of adoption of the Constitution, Justice James Iredell, declared that given a grant of power to the legislature, action within the grant "only exercise[s] a discretion expressly confided to them by the constitution."<sup>119</sup> A grant of power carries with it discretion how to exercise it. So the Supreme Court held in the present context in *Daniels v. Railroad Co.*<sup>120</sup> that "it is for Congress to determine how far . . . appellate jurisdiction shall be given."<sup>121</sup> When Sager appeals to a Committee report for the proposition that "such open discretion was rejected by the framers,"<sup>122</sup> he overlooks that the proposal—"the judicial power shall be *exercised in such manner* as the Legislature shall direct"<sup>123</sup>—sought congressional control of *how* a court shall decide as distinguished from curtailment of its jurisdiction to decide, a power exercised and accepted from the beginning.

Congressional discretion is attacked by Sager from another angle under the heading "The Vice of Selective Deprivation of Jurisdiction": current bills, he urges, "deprive federal courts of jurisdiction in a highly selective way."<sup>124</sup> What could be more selective than the Norris-LaGuardia Act's withdrawal of federal jurisdiction to issue injunctions in labor disputes?<sup>125</sup> Yet the Act was sustained by the Court.<sup>126</sup> So too, as Sager notes, the 1789 Judiciary Act left "surprising gaps in the Court's jurisdiction."<sup>127</sup> In contrast with his strident charge that control advocates are engaged in "tawdry . . . sabotag[e of] the integrity of the judicial process"<sup>128</sup> he

115. Sager, *supra* note 1, at 44.

116. *Id.* at 21.

117. THE FEDERALIST No. 81, at 532-33 (A. Hamilton) (Mod. Libr. ed. 1937).

118. *Id.* at 533 (emphasis added).

119. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 266 (1796). Control of executive discretion also lies beyond the judicial function. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169-70 (1803); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840).

120. 70 U.S. (3 Wall.) 250 (1866).

121. *Id.* at 254. Justice Stone declared many years later that "[w]hen the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body." *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 190-91 (1938).

122. Sager, *supra* note 1, at 44 (footnote omitted). See also *id.* at 50.

123. *Id.* at 50 n.95 (emphasis added) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 425, 431 (M. Farrand ed. 1911)); see *supra* text accompanying notes 94-108.

124. Sager, *supra* note 1, at 68.

125. 29 U.S.C. §§ 101, 115 (1976).

126. *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329-30 (1938).

127. Sager, *supra* note 1, at 53.

128. *Id.* at 89. An example of Sager's loaded rhetoric: "If . . . Congress removes slices of federal jurisdiction in order to insulate *federal* conduct from disfavored constitutional challenges," it "will be insulating its own unconstitutional conduct . . ." *Id.* at 69. Consider this against the Court's invalidation of the Child Labor Law in *Hammer*

understates the congressional concern, shared by more and more activists, that has been "provoked by highly controversial federal court decisions recognizing individual rights."<sup>129</sup> Despite the "highly controversial" character of these decisions, Sager dwells on "the vice of selectively depriving the federal courts of jurisdiction over discrete and disfavored claims of *constitutional right*."<sup>130</sup> But rights drawn by the Court *dehors* the Constitution are *not* constitutional rights, and Congress' exercise of power under an unequivocal and, in terms, unlimited grant to curb such "discrete" judicial arrogations can hardly be dismissed as "tawdry sabotage." The current proposals, he states, "are plainly efforts to undermine the enforcement of prevailing constitutional doctrine in order to facilitate other, favored substantive outcomes."<sup>131</sup> Thus, he assumes that "prevailing constitutional doctrine" is legitimate; that it must be shielded at all costs; that opposing "substantive outcomes" are merely a matter of taste rather than based on the fundamental principle that the Court, like the other branches, must stay within constitutional limits; that it is not free to revise the Constitution by importing values the Framers excluded. For him, the "argument against such legislation is simple: Congress ordinarily cannot undo the Supreme Court's constitutional doctrine by simple legislative fiat, and it should not be able to accomplish the same end by manipulating federal jurisdiction."<sup>132</sup> He "simply" will not perceive the distinction, drawn by Hamilton, between the power to *reverse* a decision, which was not granted, and the power to withdraw jurisdiction to decide, which was conferred.<sup>133</sup> Sager experiences no difficulty in concluding that the existence of inferior courts "was left to the discretion of Congress," under the article III provision for "such inferior Courts *as the Congress may from time to time ordain and establish*."<sup>134</sup> What distinguishes "such exceptions . . . *as the Congress shall make*"?<sup>135</sup> Why is the former discretionary and the latter not?

### B. Cure by Amendment

Sager points out that amendment requires a two-thirds vote as does the override of a veto, and that "[c]ontrol of jurisdiction as a majoritarian check on the judiciary does not fit easily into this institutional setting," so that "it makes no sense to single

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v. Dagenhart, 247 U.S. 251 (1918), generally regarded as a mere reflection of the Court's laissez-faire prepossessions, having no constitutional warrant. Would Congress' withdrawal of jurisdiction of such cases justly be regarded as "insulating its own unconstitutional conduct"? Such are the perils of "icily abstract" analysis.

And if Congress may not insulate "its own unconstitutional conduct," why does the Court stand higher? Of the three branches, Hamilton assured the ratifiers, "the judiciary is next to nothing." THE FEDERALIST NO. 78, at 504 n.\* (A. Hamilton) (Mod. Libr. ed. 1937). Madison wrote in *Federalist No. 51*, "In republican government, the legislative authority necessarily predominates." THE FEDERALIST NO. 51, at 338 (J. Madison) (Mod. Libr. ed. 1937). Justice Brandeis referred to the deep-seated conviction of the English and American people that they "must look to representative assemblies for the protection of their liberties." *Myers v. United States*, 272 U.S. 52, 294-95 (1926) (dissenting opinion in which Justice Holmes concurred). Elbridge Gerry expressed similar views in the First Congress. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97-98 (M. Farrand ed. 1911); and 2 *id.* at 75.

129. Sager, *supra* note 1, at 68.

130. *Id.* at 70 (emphasis added). Since even some activists consider that these decisions have no constitutional warrant, *see supra* note 44, they are justly disfavored.

131. Sager, *supra* note 1, at 68.

132. *Id.* (footnotes omitted).

133. *See supra* text accompanying notes 94-108.

134. Sager, *supra* note 1, at 48; U.S. CONST. art. III, § 1 (emphasis added).

135. U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

out one rather bizarre form of legislation to which no supermajority requirement attaches and make it the last democratic hurrah."<sup>136</sup> The short answer is that the First Congress read article III in just that "bizarre" fashion. And what is "bizarre" about giving effect to the express, unequivocal terms of article III when Sager swallows the Court's continuous amendment of the Constitution, which is without express sanction?<sup>137</sup>

The proper procedure, Sager suggests, is to amend.<sup>138</sup> Activists defend the Court's extraconstitutional forays on the ground that resort to amendment is too cumbersome. So, Louis Lusky refers to the Court's "assertion of the power to revise the Constitution, bypassing the cumbersome amendment procedure prescribed by Article V."<sup>139</sup> If it is too cumbersome to seek popular consent to judicial alteration of the Constitution, it is too cumbersome to require the people to reverse judicial usurpation by amendment.<sup>140</sup> Resort to statutory "exceptions" to correct the Court's unconstitutional excesses has express constitutional authorization; activist judicial review has none.

### C. Hart's "Essential Function"

Sager considers that removal of jurisdiction "to hear or review constitutional challenges to State conduct," such as school prayer legislation, "would be subject to a substantial constitutional objection"—it undercuts the constitutional objective of "ensur[ing] state compliance with federal constitutional norms,"<sup>141</sup> again begging the question of judicial authority to outlaw school prayer legislation. He notes that this is "a narrowed form of the 'essential function' view of the Supreme Court's appellate jurisdiction"<sup>142</sup> formulated by Henry Hart: "'exceptions must not be such as will destroy the essential role of the Supreme Court in the Constitutional plan.'" <sup>143</sup> That plan did not contemplate judicial revision of the Constitution in order to invade state sovereignty over local matters reserved to the states.<sup>144</sup> As Michael Perry observes, it is "self-serving in the extreme to suppose" the essential role to be "anything more than to enforce the value judgments constitutionalized by the framers."<sup>145</sup>

136. Sager, *supra* note 1, at 39-40.

137. "When the Court disregards the express intent and understanding of the Framers [as with suffrage and segregation], it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect." *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970) (Harlan, J., concurring in part and dissenting in part).

138. "Congress can attack Supreme Court decisions by presenting a constitutional amendment to the States for ratification." Sager, *supra* note 1, at 39.

139. Lusky, Book Review, 6 HASTINGS CONST. L.Q. 403, 406 (1979); see also Kutler, Book Review, 6 HASTINGS CONST. L.Q. 511, 525; P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 978-79 (1975).

140. Charles Black, a dyed-in-the-wool activist, observes that an amendment "can be thwarted by thirty-four senators out of a hundred, or by states containing as few as nine million people." He is "staggered by the implied assertion, or assumption, that such a position can be consonant with the root-ideas and greater sayings of democracy." C. BLACK, DECISION ACCORDING TO LAW 38 (1981) (footnotes omitted).

141. Sager, *supra* note 1, at 43 (emphasis added).

142. *Id.*

143. *Id.* (quoting Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953)).

144. See *supra* text accompanying notes 56-61.

145. M. PERRY, *supra* note 13, at 133.

Viewing “essentiality” in the frame of *federal* conduct, Sager recognizes that “the sources . . . are more equivocal when review of federal conduct is at stake.”<sup>146</sup> He notes that “Hart never gave clear shape to his view of the essential function premise,”<sup>147</sup> that there was a large, clear “hole in the Supreme Court’s jurisdiction: for much of the nineteenth century, the Supreme Court could not directly review federal criminal cases,” that the remedy by habeas corpus was “decidedly restricted” and had its own jurisdictional complications.<sup>148</sup> He concludes that “[i]f the essential function claim is understood to require that the Supreme Court itself be able to review all cases that require federal judicial review, then the Court’s toleration of *this hole* in its jurisdiction places the claim in jeopardy.”<sup>149</sup> To bolster the “federal conduct version of the essential function claim,” he therefore resorts to the farfetched analogy furnished by “the constitutional limitation on giving article III business to a non-article-III tribunal,” a “point of departure” that he rightly anticipates will raise his “reader’s hackles.”<sup>150</sup> Since “Congress’ ability to give article III business to federal tribunals whose judges do not enjoy article III security is limited,” Sager argues, “Congress should be similarly limited in its ability to relegate article III cases to the state courts, whose judges do not and cannot enjoy article III security.”<sup>151</sup> Precisely such a relegation en masse was made by the First Congress in excluding federal courts from federal question jurisdiction, which was left to the state courts.<sup>152</sup> Legislative courts, moreover, are not mentioned in the Constitution; they are a judicial construct and are therefore subject to court-imposed limitations on their own creation. Congressional control stands on higher ground because the Framers gave it express sanction without a hint that it might be curtailed in the interest of tenure-salary protection. Let us consider Sager’s explanation under the head of “judicial independence.”

#### D. Judicial Independence

The keystone of Sager’s “essential function” argument is that “[t]he tenure and compensation provisions of article III manifest a clear commitment to judicial independence.”<sup>153</sup> Let that be admitted, and the question arises: independence for what? Independence is essential to protect judges who enforce constitutional limitations, but it does not constitute a commission to ride roughshod over rights reserved

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146. Sager, *supra* note 1, at 57.

147. *Id.* at 57 n.114.

148. *Id.* at 60 (footnotes omitted).

149. *Id.* (emphasis added) (footnotes omitted).

150. *Id.*

151. *Id.* at 63 (footnotes omitted).

152. “For 125 years, the Supreme Court lacked jurisdiction over state cases upholding federal claims of right; for ninety-six of these years, the lower federal courts lacked federal question jurisdiction. During this period, it was thus impossible for many cases to reach any federal court.” *Id.* at 36 (footnotes omitted). Contrast Sager’s statement: “Unrestricted use of the state courts as the exclusive forum for article III business is as inconsistent with the constitutional commitment to a radically independent federal judiciary as would be unrestricted use of article I tribunals.” *Id.* at 64–65. How is this to be reconciled with the Founders’ exclusive commitment of federal question jurisdiction to the state courts, with large gaps in appellate review?

153. *Id.* at 61.

to the states by the tenth amendment.<sup>154</sup> Hamilton wrote that independence was necessary so that judges could act as "faithful guardians . . . [against] legislative invasions" of the Constitution.<sup>155</sup> Little did the Framers contemplate that the judges were free to substitute their own "invasions" for those of the legislature. To the contrary, the Supreme Court declared that the judicial power was "indispensable, not merely to maintain the supremacy" of federal law "but also to *guard the States* from any *encroachment* upon their reserved rights by the General Government."<sup>156</sup> The Framers did not mean the "guardians" to behave after the fashion of a fox guarding a chicken yard—quite the contrary. The courts, Hamilton states, may not, "on the pretense of a repugnancy, . . . substitute their own pleasure to the constitutional intentions of the legislature";<sup>157</sup> and by the same token, they may not override the powers reserved to the states without clear constitutional warrant. He assured the ratifiers that judges could be impeached for "deliberate usurpations on the authority of the legislature,"<sup>158</sup> and a fortiori for setting aside the will of the Framers. Independence, in short, was not intended to be a shield for judicial usurpation.

Sager argues that "[t]he framers did not intend to put in article III two major premises at war with one another."<sup>159</sup> The "war" between the tenure-salary provisions and congressional control of jurisdiction is a figment of his imagination. The First Congress withheld "large portions" of the Court's appellate jurisdiction and all federal question jurisdiction from the inferior courts,<sup>160</sup> utterly oblivious to the alleged incompatibility with judicial independence. Independence requires that judges be left free to *decide* causes committed to them; it has no relevance to what jurisdiction must be conferred upon them. It is late in the day to argue, for example, that removal of jurisdiction by the Norris-LaGuardia Act to issue labor injunctions undermined judicial independence. That argument had to wait for Sager.

He observes that "[t]he point of the article III compromise was to give Congress discretion over the size and shape of the subordinate federal judiciary, and the tenure and salary provisions should not be read to swallow up this clear understanding."<sup>161</sup> The unequivocal grant of power to make "exceptions" is no less clear and no more "swallowed up" by those provisions. As long as courts remain free to *decide* cases that are confided to them, their independence is not "swallowed up." Whether they should be vested with jurisdiction to decide cases arising in any given jurisdictional area was left to Congress, as the Court repeatedly has recognized, with never an intimation that judicial independence was threatened in the slightest.

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154. Hamilton affirmed that "every act of a delegated authority, contrary to the tenor of a commission [*e.g.*, desegregation] under which it is exercised, is void." THE FEDERALIST No. 78, at 505 (A. Hamilton) (Mod. Libr. ed. 1937).

155. *Id.* at 509.

156. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 520 (1859) (emphasis added).

157. THE FEDERALIST No. 78, at 507 (A. Hamilton) (Mod. Libr. ed. 1937).

158. THE FEDERALIST No. 81, at 527 (A. Hamilton) (Mod. Libr. ed. 1937).

159. Sager, *supra* note 1, at 67.

160. *See supra* note 152.

161. Sager, *supra* note 1, at 65.

### E. Uniformity

Sager also attaches great weight to the need for preserving the Court's appellate jurisdiction in the interest of uniformity: "With the courts of fifty states ruling independently on the constitutionality of challenged federal programs, the frequent result would be chaos of a magnitude that we have thus far been unable to produce in our legal system."<sup>162</sup> If a choice had to be made between preservation of uniformity and shielding the Court from congressional correction of its invasion of rights reserved to the states, there can be little doubt that the Framers would have sacrificed uniformity. That they did not regard uniformity as indispensable is evidenced by the following: (1) the Judiciary Act "authorized review of only certain types of state cases 'arising under' federal law";<sup>163</sup> (2) "The Court was not granted general powers to review major criminal federal cases until 1891";<sup>164</sup> (3) the First Congress withheld "large portions of section 2 jurisdiction" from the Court;<sup>165</sup> (4) Hamilton, who had perceived the need for uniformity in *Federalist No. 22*,<sup>166</sup> nevertheless rejected the argument that the "'usurpations of the Supreme Court . . . will be uncontrollable and remediless.'"<sup>167</sup>

Sager himself states that "[i]n the context of state court rulings on the constitutionality of *state* conduct, I think that the need for uniformity is very much overstated."<sup>168</sup> This takes in most of the areas—segregation, suffrage, death penalties, school prayer—in which judicial interference has engendered hostility, and where the Court, in the absence of federal legislation, interposed to strike down "state conduct."<sup>169</sup> With respect to review of federal conduct, Sager states that "uniformity and institutional self-defense were matters that could have been safely entrusted to the discretion of Congress."<sup>170</sup> Finally, he states that the Court need not "itself review state court decisions that repudiate constitutional claims against state conduct" and that it would suffice to provide "effective supervision of state conduct by employing the existing lower federal judiciary."<sup>171</sup> Hamilton was more specific: "instead of being carried to the Supreme Court, [appeals] may be made to lie from the State courts to district courts of the Union."<sup>172</sup> The decisions of the district courts are by no means uniform.

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162. *Id.* at 40 (footnotes omitted).

163. Sager, *supra* note 1, at 53 n.105.

164. *Id.*

165. *Id.* at 31. See *supra* text accompanying note 77.

166. THE FEDERALIST NO. 22, at 138–39 (A. Hamilton) (Mod. Libr. ed. 1937).

167. THE FEDERALIST NO. 81, at 523 (A. Hamilton) (Mod. Libr. ed. 1937).

168. Sager, *supra* note 1, at 40 n.67 (emphasis in original).

169. See *supra* note 59.

170. Sager, *supra* note 1, at 57.

171. *Id.* at 56.

172. THE FEDERALIST NO. 82, at 538 (A. Hamilton) (Mod. Libr. ed. 1937).

## F. Due Process

Sager considers that "divestiture of both state and federal jurisdiction would create fatal due process problems."<sup>173</sup> Although he regards the due process clause as "vague and abstract,"<sup>174</sup> he does not pause to inquire how rights expressly reserved to the states by the tenth amendment can be curtailed under cover of "vague" language. The Founders scarcely contemplated that the fifth amendment would constitute an instrument for emasculating the tenth. Rather, the fifth was meant to apply to delegated powers and "constitutional" rights, not to those created by the Court without constitutional warrant. In truth, the clause is "vague" only for those whose purposes are served by vagueness. Summarizing 400 years of English history, Hamilton stated on the eve of the Convention that "[t]he words '*due process*' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature."<sup>175</sup> Charles P. Curtis, whose *Lions Under the Throne*<sup>176</sup> is a paean to the Justices, said that the meaning of due process in the fifth amendment "was as fixed and definite as the common law could make a phrase . . . . It meant a procedural due process . . . ."<sup>177</sup> The meaning of due process in the fourteenth amendment is the same as in the fifth.<sup>178</sup> Consequently, the Court may not in the name of due process invalidate a statute. The Court itself declared in *Davidson v. New Orleans*,<sup>179</sup> per Justice Miller, that the Barons did not by Magna Carta's "law of the land" intend to "protect themselves against the enactment of laws" by Parliament.<sup>180</sup> They sought protection against arbitrary deprivations by King John without the shelter of judicial proceedings under standing law. One who was brought to trial had to be charged with violation of a "standing law" and to have a fair trial of the issues posed by that law; but a change in the "standing law" after trial nowise violated due process.<sup>181</sup> There is not the faintest

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173. Sager, *supra* note 1, at 41 n.70. I was of the same opinion in 1969; but more extended research and reflection led me to change my view. For detailed explanation see R. BERGER, *DEATH PENALTIES*, *supra* note 10, at 158-72.

Sager also invokes "the equal protection tradition of the fifth amendment's due process clause." Sager, *supra* note 1, at 78. That "tradition" was born in *Bolling v. Sharpe*, 347 U.S. 497 (1954), wherein Chief Justice Warren, his biographer tells us, said that segregation "was being outlawed because its continuance was 'unthinkable' after the outlawing of segregation in the states in *Brown*. That argument made sense primarily as an ethical proposition." G. WHITE, *supra* note 17, at 227. In terms of constitutional analysis it compounded the rape of the fourteenth amendment, from which the framers had excluded segregation, by reading into the fifth amendment the equal protection of the fourteenth. An ardent admirer and former clerk of Warren, John Hart Ely, condemned this as "gibberish both syntactically and historically." J. ELY, *DEMOCRACY AND DISTRUST* 32 (1980). Some tradition!

174. Sager, *supra* note 1, at 44.

175. 4 THE PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett & J. Cooke eds. 1962) (emphasis in original); see generally Berger, "Law of the Land" Reconsidered, 74 NW. U.L. REV. 1 (1979).

176. C. CURTIS, *LIONS UNDER THE THRONE* (1947).

177. Curtis, *Review and Majority Rule*, in *SUPREME COURT AND SUPREME LAW* 170, 177 (E. Cahn ed. 1954). The Court itself confessed error, referring to "our abandonment of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise." *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (footnotes omitted). "We have returned," it said, "to the original constitutional principle that courts do not substitute their social and economic beliefs for the judgment of the legislative bodies, who are elected to pass laws." *Id.* at 730.

178. See *Hurtado v. California*, 110 U.S. 516, 535 (1884).

179. 96 U.S. 97 (1877).

180. *Id.* at 102.

181. See Berger, "Law of the Land" Reconsidered, 74 NW. U.L. REV. 1, 2-5, 29-30 (1979).

historical foundation for an argument that Magna Carta rendered Parliament powerless to change "standing law."

An attempt to insulate decisions that unconstitutionally<sup>182</sup> strike down state statutes on the ground that a claimant is entitled to a fair trial on such issues is the sheerest bootstrap lifting. To insist that a claimant of a right created by judicial arrogation must be given a judicial hearing for assertion of that right is to maintain that the Court must be allowed to pass on its own violation of the Constitution, to be the judge in its own cause for the insulation of judicial wrongdoing.

Whatever may be the limitations of congressional power under article III, so far as rights are asserted against the states under the fourteenth amendment, they are subject to section 5, which, as "the last expression of the will of the lawmaker, prevails over an earlier one."<sup>183</sup> Section 5 provides, "Congress shall have power to enforce . . . the provisions of this article."<sup>184</sup> Giving effect to the negative pregnant, the Court emphasized in *Ex parte Virginia*<sup>185</sup> that this power was given to Congress, not the courts,<sup>186</sup> as a number of Justices have reemphasized.<sup>187</sup> Judicial enforcement against the will of Congress would convert "Congress shall" into "the Court shall," usurping a power withheld, for discretion to enforce was left to Congress. Section 5 does not provide that "Congress shall enforce," but rather that "Congress shall have power to enforce."<sup>188</sup> Elsewhere I have collected the historical evidence that the framers meant to exclude the Court from making "political decisions."<sup>189</sup> Commenting on section 2 of the fifteenth amendment, the analogue of section 2 of the fourteenth, Senator Oliver Morton, a framer of the fourteenth, stated that "the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts," but was to "be enforced by legislation on the part of Congress."<sup>190</sup> Senator Matthew Carpenter said, "We must legislate, and then commit the enforcement of our laws to the Federal tribunals . . ."<sup>191</sup> What Congress "commits" it can withdraw.

Moreover, the due process clause, like other provisions of section 1, is governed by section 5. The clause is one of the "provisions" that "Congress shall have power

182. In *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the Court, per Justice Brandeis, branded the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), as an "'unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.'" 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

183. *Schick v. United States*, 195 U.S. 65, 68-69 (1904).

184. U.S. CONST. amend. XIV, § 5 (emphasis added).

185. 100 U.S. 339 (1879).

186. *Id.* at 345.

187. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 678-79 (1966) (Black, J., dissenting); *United States v. Guest*, 383 U.S. 745, 783 n.7 (1966) (Brennan, J., dissenting, joined by Warren, C.J., and Douglas, J.).

188. U.S. CONST. amend. XIV, § 5 (emphasis added). In *Oregon v. Mitchell*, 400 U.S. 112 (1970) (separate opinion), Justice Douglas declared that "[t]he manner of enforcement involves discretion; but that discretion is largely [in fact, entirely] entrusted to the Congress, not to the courts." *Id.* at 143. Justice Iredell stated that where the legislators "only exercise a discretion expressly confided to them by the constitution . . . [i]t is a discretion no more controllable . . . by a Court . . . than a judicial determination is by them . . ." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 266 (1796).

189. See R. BERGER, *DEATH PENALTIES*, *supra* note 10, at 169-70.

190. CONG. GLOBE, 42nd Cong., 2d Sess. 525 (1872) (emphasis added).

191. *Id.* at 897 (emphasis added).

to enforce." Consequently, even the due process clause comes into play only after Congress exercises that "power" and "commits" enforcement of the clause to the courts. To require a judicial trial against the will of Congress would be to take over the power granted to Congress alone, thereby depriving section 5 of its intended effect. In short, the due process clause of the fourteenth amendment is subordinate to section 5, for the framers left it in the discretion of Congress whether to provide an enforcement proceeding.<sup>192</sup>

### G. *Jurisdiction to Decide Jurisdiction*

"Courts and commentators," Sager notes, "agree that Congress' discretion in granting jurisdiction to the lower federal courts implies that those courts take jurisdiction from Congress and not from article III."<sup>193</sup> The "lower federal courts do not have a constitutional grant of jurisdiction on which to fall back. Still, this structural embarrassment does not render the lower courts as vulnerable to congressional bullying as one might suppose."<sup>194</sup> His escape hatch is "jurisdiction to decide jurisdiction."<sup>195</sup> Recognizing that a court "cannot generate its own jurisdiction," that "jurisdiction has to come from some external source—typically the relevant constitution or legislature"<sup>196</sup>—he considers that the "court's responsibilities as a court within our constitutional scheme would require it to invalidate a restriction on its capacity to measure its grants of jurisdiction against the Constitution."<sup>197</sup> This he deduces from the postulate that "[a]s long as the district court continues to exist as a court, it enjoys jurisdiction to determine whether it has jurisdiction. Without such pump-priming jurisdiction, a court could not function . . . ."<sup>198</sup> But a district court "exists as a court" by the grace of Congress; such existence does not generate its own jurisdiction.<sup>199</sup> "Jurisdiction to decide jurisdiction," Sager recognizes, is "not self-generated; it is implicit in the grant or grants of jurisdiction upon which the court is founded."<sup>200</sup> How can an "implicit" grant survive the withdrawal of the express grant from which it is derived? It is part and parcel of the express grant and falls with it. Otherwise the "implicit" grant would authorize the court to defeat withdrawal of the express grant.<sup>201</sup> Although the 1789 Judiciary Act withheld all federal question jurisdiction, no district court ever questioned the constitutionality of that withholding

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192. [T]he jurisdiction having been conferred [by Congress on the inferior courts] may, at the will of Congress, be taken away in whole or in part; and if withdrawn . . . all pending cases though cognizable when commenced must fall. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.

*Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (citations omitted).

193. Sager, *supra* note 1, at 25 (footnote omitted).

194. *Id.* at 26.

195. *Id.* at 22.

196. *Id.*

197. *Id.* at 27.

198. *Id.* at 26.

199. Sager observes that the "existence" of the inferior courts "was left to the discretion of Congress." *Id.* at 48 (footnote omitted).

200. *Id.* at 22.

201. See *supra* note 192.

(which stands on the same plane as a withdrawal) by virtue of its jurisdiction to decide jurisdiction. Sager overlooks what *McCardle* held:

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court *cannot proceed at all* in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.<sup>202</sup>

Next Sager turns to "the possibility that the lower courts can fall back on the statutory grants of jurisdiction that they enjoyed before Congress employed the limitation."<sup>203</sup> Assuming that Congress "does not intend to dismantle the federal judiciary,"<sup>204</sup> he argues that the

strong likelihood that the pre-existing general grants of jurisdiction would survive an unconstitutional attempt to limit them . . . enables the lower courts to strike down the offending limitation and to hear the excluded case in exercise of their surviving jurisdiction. This is in fact what took place in the wake of *United States v. Klein*.<sup>205</sup>

*Klein*, we have seen, merely rejected Congress' attempt to "prescribe a rule for the decision of a cause in a particular way"<sup>206</sup> for a case that had already been decided; it did not involve a withdrawal of jurisdiction.<sup>207</sup> On Sager's reasoning, once a grant of general jurisdiction is made, Congress is powerless to withdraw particular subject matters except with the consent of the courts. That would undo Congress' plenary power over the jurisdiction of the inferior federal courts; and it conflicts with the holding of *McCardle* and of *Kline v. Burke Construction Co.*<sup>208</sup> "Surviving jurisdiction" allows the district courts to decide subject matter cases that Congress left untouched, not to resist particular withdrawals from the general grant.

#### IV. CONCLUSION

Sager's attack on Congress' control of federal jurisdiction is a tapestry of cobwebs. In essence, he urges that the unequivocal terms of article III cannot mean what they say.<sup>209</sup> The legislative history lends him cold comfort; from its silence he would wrest an inference that the Framers could not so drastically have altered their scheme of judicial review,<sup>210</sup> overlooking that the Framers regarded the proposed federal judiciary with far more apprehension than does Sager<sup>211</sup> and at most authorized it to police the constitutional boundaries,<sup>212</sup> not to redraw them. The Judiciary Act of

202. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869) (emphasis added); see also *supra* note 192.

203. Sager, *supra* note 1, at 27.

204. *Id.* at 28.

205. *Id.* at 29 (footnote omitted).

206. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872).

207. See *supra* text accompanying notes 94-104.

208. See *supra* notes 202 & 192 and accompanying text.

209. See Sager, *supra* note 1, at 42, 44-45.

210. See *supra* note 37.

211. See *supra* note 50. The exclusion of the lower courts from the federal question jurisdiction is one item of evidence. Another is Hamilton's assurance that of the three branches "the judiciary is next to nothing." *THE FEDERALIST* No. 78, at 504 n.\* (A. Hamilton) (Mod. Lib. ed. 1937).

212. R. BERGER, *CONGRESS*, *supra* note 52, at 13-16. For John Marshall's statement in the Virginia Ratification Convention, see *id.* at 16 n.39.

1789, enacted by the First Congress, which was privy to the Framers' intention, stands like a roadblock before every branch of Sager's arguments. It withheld the entire "arising under" jurisdiction from the lower courts and, by Sager's own testimony, left large gaps and gaping holes in the appellate jurisdiction of the Supreme Court.<sup>213</sup> The few particularized removals proposed by current bills do not remotely approach the 1789 Act's wholesale withholding. Manifestly, the First Congress did not consider that it was "unravel[ling] one of the most basic aspects of the constitutional scheme."<sup>214</sup> Its construction was immediately accepted by the Court, and in no case has the Court repudiated its unbroken line of decisions. A prior attempt to distinguish those cases dismissed them as "dicta";<sup>215</sup> but 175 years of dicta by respected Justices, in which a unanimous Court joined, may be preferred to Sager's novel and palpably untenable readings. He has journeyed far afield for analogies, but in vain; the cases simply are not to be shrivelled by his theorizing. He concedes that "two hundred years of consistent behavior by Congress and the Supreme Court" indicate that Congress has "at least some power to limit the Court's jurisdiction."<sup>216</sup> What are the boundaries of that power? Sager's attempts to frame limitations on the plenary grant to Congress are, in my judgment, fruitless.

By all but exclusively focusing on the proposed congressional cure while resolutely shutting his eyes to the disease, Sager recalls a comment by a member of the House of Commons in 1742 (when it was considering an inquiry into the fallen regime of Robert Walpole): "Would not a Physician be a Madman, to prescribe to a Patient, without first examining into the State of his Distemper, the Causes from which it arose."<sup>217</sup> Sager has not paused to inquire into the causes which led Congress to propose its cure—the substitution by the Justices of their predilections for the Framers' choices. That is the cardinal problem going to the roots of our democratic system—the right of the people, however misguided, to govern themselves.

Now we have a study which lays bare with startling clarity what hitherto has only been a subject of inference and surmise—the process whereby Chief Justice Warren, that beau ideal of activist Justices, identified his personal beliefs with constitutional mandates. It has been noted that Warren "was never concerned with constitutional text or intention. Rather he believed that his job as a judge lay in discovering and articulating the 'ethical imperatives' *he felt* were (or *should be*) embedded in the Constitution for what it provided or its Framers intended."<sup>218</sup> That substitution is catalogued by his worshipful biographer, G. Edward White, in fascinating detail, and because it is rarely acknowledged by most academicians and generally concealed from the public,<sup>219</sup> it deserves to be highlighted. Warren's lip

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213. See *supra* note 78, and text accompanying note 149.

214. Sager, *supra* note 1, at 51.

215. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 173-83 (1960). But see *supra* note 73.

216. Sager, *supra* note 1, at 33.

217. 13 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS 85 (R. Chandler ed. 1743).

218. See *supra* note 17.

219. In the midst of Franklin Roosevelt's Court-packing plan (1937), Professor Felix Frankfurter wrote him: "People have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is *they* who speak and *not* the Constitution." ROOSEVELT AND

service to "the limits of the Constitution" was at odds with his actions, as *Trop v. Dulles*<sup>220</sup> exemplifies. While purporting to "apply those limits as the Constitution prescribes them,"<sup>221</sup> he was in fact rewriting them to fit his private notions of "the dignity of man."<sup>222</sup>

At issue was the constitutionality of an act expatriating a citizen for desertion of the armed forces in time of war. For Warren, citizenship was "man's basic right,"<sup>223</sup> though, as White notes, it had no "support in the case law," and "there was no indication in the Constitution that citizenship was a specially protected right that could not be divested, let alone that it was a fundamental right."<sup>224</sup> Since "five justices had rejected his view of citizenship," he invoked the eighth amendment: expatriation was a cruel and unusual punishment.<sup>225</sup> But banishment had been a staple of English law and that of the Revolutionary American states.<sup>226</sup> Warren reasoned, however, that expatriation destroyed the "political existence"<sup>227</sup> of the individual, though as White remarks, the language of the Constitution

suggested that a political existence could be restricted to qualified persons. . . . Warren, in short, had made no serious effort . . . to analyze the doctrinal history or the current doctrinal status of the Eighth Amendment. He had *simply asserted* that since citizenship was man's most basic right, involuntary expatriation was necessarily a cruel and unusual punishment.<sup>228</sup>

Thus he substituted what he felt the law should be for the unvarying English and American law to the contrary.

Warren's most spectacular decision—*Brown v. Board of Education*,<sup>229</sup> the desegregation case—was to serve as his inspiration for future forays. That decency called for an end to the detestable practice must not obscure the fact that the Constitution does not authorize the Court to strike it down.<sup>230</sup> Judicial revision of the Constitution for benign purposes is not its own justification. Addressing a judge's resort to his "individual sense of justice," Cardozo wrote, "That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the

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FRANKFURTER: THEIR CORRESPONDENCE 1928–1945, at 383 (M. Freedman ed. 1967) (emphasis in original). See also Kauper, *The Supreme Court: Hybrid Organ of State*, 21 Sw. L.J. 573, 579–80 (1967). Michael Perry remarks, "After all, it is a radical thing to say, and a thing not often said, that the source of judgment is the judge's own values." M. PERRY, *supra* note 13, at 123. Martin Shapiro wrote, "It would be fantastic indeed if the Supreme Court, in the name of sound scholarship, were to disavow publicly the myth on which its power rests." M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 27 (1964). It is not "scholarship," but obedience to constitutional limitations that calls for candid renunciation of unauthorized practices.

220. 356 U.S. 86 (1958).

221. *Id.* at 104. See *supra* text accompanying notes 14–16.

222. 356 U.S. 86, 100 (1958). For detailed discussion of *Trop v. Dulles* see R. BERGER, *DEATH PENALTIES*, *supra* note 10, at 116–22.

223. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

224. G. WHITE, *supra* note 17, at 233–34.

225. *Id.* at 232.

226. See R. BERGER, *DEATH PENALTIES*, *supra* note 10, at 117.

227. 356 U.S. 86, 101 (1958).

228. G. WHITE, *supra* note 17, at 233 (emphasis added).

229. 347 U.S. 483 (1954).

230. See *supra* note 43.

reign of law."<sup>231</sup> Our system is committed to "Equal Justice *Under Law*" not to "Justices Above the Law." They were not authorized to revise the Constitution in the interests of "justice."

Two of the most practiced constitutional lawyers on the Court, Justices Frankfurter and Jackson, "were hardpressed to find an adequate rationale for overruling *Plessy [v. Ferguson]*."<sup>232</sup> Frankfurter had suggested that "nothing in the Fourteenth Amendment prevented racial segregation in the states,"<sup>233</sup> a view that even activist academicians have now been constrained to accept.<sup>234</sup> Warren began with rejecting the "premise that blacks were inferior to whites" and hence "was prepared to invalidate segregation."<sup>235</sup> As Warren saw it, "The practice of racial segregation in the public schools . . . was immoral and therefore wrong; the Court's duty was to eradicate it. . . . [I]f the doctrinal analysis offended, he would modify it or delete it"<sup>236</sup>—a short and easy way with constitutional obstacles. The *Brown* opinion, White remarks, "declared racial segregation unconstitutional through appeal to contemporary social perceptions rather than to constitutional doctrine."<sup>237</sup> But that approach had been rejected at the very outset by Hamilton: "Until the people have, by some solemn and authoritative act [amendment], annulled or changed the established form, it is binding . . . and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act."<sup>238</sup>

The "social perceptions" were Warren's, not those of the people for whom he purported to speak, as is illustrated in the Court's rejection of Jackson's plea that they tell the people they were "declaring new law for a new day,"<sup>239</sup> well knowing that such an admission would raise a fire storm. Activists acknowledge that in 1954 it would have been impossible to procure an amendment barring segregation in the schools,<sup>240</sup> since then racism has been exacerbated.<sup>241</sup> White states, "The ideal behind *Brown*—the intuitive justice of equality of opportunity—was an ideal not

231. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 136 (1921). Lord Mansfield said that "[w]hatever doubts I may have in my own breast with respect to the policy and expedience of this law, . . . I am bound to see it executed according to its meaning." *Pray v. Edie*, 99 Eng. Rep. 1113, 1114 (1786).

232. G. WHITE, *supra* note 17, at 162.

233. *Id.* at 166.

234. *See supra* note 40.

235. G. WHITE, *supra* note 17, at 165.

236. *Id.* at 228. On the other hand, Chief Justice Marshall declared that "the constitution . . . was not intended to furnish the corrective for every abuse of power which may be committed by the state governments." *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 563 (1830).

237. G. WHITE, *supra* note 17, at 170.

238. *THE FEDERALIST* NO. 78, at 509 (A. Hamilton) (Mod. Libr. ed. 1937). For the Framers this was a basic postulate. *See infra* text accompanying note 282.

239. R. KLUGER, *SIMPLE JUSTICE* 681 (1976). In a file memorandum Jackson wrote, "[D]espite my personal satisfaction with the Court's [forthcoming] judgment, I simply can not find, in surveying all the usual sources of law, anything which warrants me in saying that it is required by the original purpose and intent of the Fourteenth or Fifth Amendment." *Id.* at 689.

240. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204, 237 (1980). Edmond Cahn stated that "as a practical matter it would have been impossible to secure adoption of a constitutional amendment to abolish 'separate but equal.'" Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 156 (1955).

241. For citations see R. BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 43, at 327–28.

explicitly codified in the Constitution."<sup>242</sup> That is a masterly understatement, for the framers of the fourteenth amendment restricted equality to a very narrow category of rights: to contract, own property, and have access to the courts.<sup>243</sup> Senator William Fessenden, Chairman of the Joint Committee on Reconstruction, said, "[W]e cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions . . . ."<sup>244</sup> So too, Thaddeus Stevens, the implacable opponent of discrimination, lamented that he had hoped so to remodel "all our institutions as to have freed them from every vestige of . . . inequality of rights, . . . [so] that no distinction would be tolerated . . . . This bright dream has vanished . . . ."<sup>245</sup> Thus the leaders confessed that complete equality was legislatively unattainable, as in fact the repeated rejection of attempts to ban all discrimination attested.<sup>246</sup> That is a deplorable, but nonetheless undeniable, historical fact. It is open to the people to alter it by an amendment—the course activists so blithely recommend to proponents of congressional control of jurisdiction. No power of amendment was granted to the Court.

What Warren regarded as the jewel in his crown,<sup>247</sup> the reapportionment decision,<sup>248</sup> proceeded in the teeth of the framers' incontrovertible exclusion of suffrage from the fourteenth amendment.<sup>249</sup> White notes that "the right to vote was sharply qualified at the time of the framing of the Constitution,"<sup>250</sup> and adds, "If the states were not prohibited by the Constitution from restricting the right to vote itself . . . it would seem to suggest that 'the right to vote freely' was not initially regarded as something essential to a representative form of government."<sup>251</sup> Warren, however, asserted "that a constitutional right to have one's vote counted equally existed" and that a denial of that right violates "'the essence of a democratic society.'"<sup>252</sup> White comments,

Warren had based his purported usurpation of legislative prerogatives on an interpretation of the Constitution that was neither faithful to its literal text nor consistent with the context in which it had been framed. He had substituted homilies such as '[c]itizens, not history or economic interests, cast votes' for doctrinal analysis.<sup>253</sup>

242. G. WHITE, *supra* note 17, at 170.

243. For the massive evidence, see R. BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 43, at 117-33.

244. CONG. GLOBE, 39th Cong., 1st Sess. 705 (1866).

245. *Id.* at 3148.

246. See R. BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 43, at 163-64.

247. G. WHITE, *supra* note 17, at 238.

248. *Baker v. Carr*, 369 U.S. 186 (1962).

249. Justice Harlan reminded the Court that its reapportionment decisions were "made in the face of irrefutable and still unanswered history to the contrary." *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (concurring opinion). Activist Louis Lusk refers to Harlan's "irrefutable and unrefuted demonstration" to that effect. Lusk, *Book Review*, 6 *HASTINGS CONST. L.Q.* 403, 406 (1979). See also Abraham, *Book Review*, *id.* at 467-68; Mendelson, *Book Review*, *id.* at 453; Nathanson, *Book Review*, 56 *TEX. L. REV.* 579, 581 (1978). Gerald Gunther 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.

250. G. WHITE, *supra* note 17, at 236.

251. *Id.* at 238.

252. *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

253. G. WHITE, *supra* note 17, at 239 (footnote omitted) (quoting *Reynolds v. Sims*, 377 U.S. 533, 580 (1964)).

The "history" Warren dismissed was the framers' determination to exclude suffrage from the fourteenth amendment. Let White sum up: "[I]n none of the leading activist Warren Court decisions was a constitutional mandate obvious. *Brown v. Board of Education* reversed a long-established precedent on the basis of social science evidence. *Baker v. Carr* found a judicial power to review the political judgments of legislators where none had previously existed."<sup>254</sup> He concludes, "[W]hen one divorces Warren's opinions from their ethical premises, they evaporate. . . . [T]hey are individual examples of [Warren's own] beliefs leading to judgments."<sup>255</sup>

His thinking was colored by yet another high-handed notion—that the meaning of constitutional terms changes with the times. "The Bill of Rights *needed revision* with time. 'We will pass on,' Warren said, a 'document [that] will not have exactly the same meaning it had when we received it from our fathers.'"<sup>256</sup> Thereby he laid claim to the prerogative of Humpty-Dumpty: "When *I* use a word, . . . it means just what I choose it to mean."<sup>257</sup> A judge who pours his own meaning into constitutional terms lays claim to power to amend the Constitution, as Chief Justice Taney perceived: "If in this court we are at liberty to give old words new meanings . . . , there is no power which may not, by this mode of construction, be conferred on the general government and denied to the States."<sup>258</sup> In this he echoed Madison and Jefferson.<sup>259</sup> And it remained the view of the Reconstruction Congress. In 1872 a unanimous Senate Judiciary Committee Report, signed by Senators who had voted for the fourteenth amendment, stated, "A construction which should give the phrase . . . a meaning differing from the sense in which it was understood and employed by the

254. G. WHITE, *supra* note 17, at 357.

255. *Id.* at 367.

256. *Id.* at 223 (emphasis added). His friend Justice Black tartly dismissed "rhapsodical strains, about the duty of the Court to keep the Constitution in tune with the times. . . . The Constitution makers knew the need for change and provided for it" by the amendment process of article V. *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (dissenting opinion). In a 1784 pamphlet Thomas Tudor Tucker of South Carolina wrote that the Constitution "should prescribe the limits of all delegated power. It should be declared to be . . . unalterable by any authority but the express consent of a majority of the citizens collected by such regular mode as may be therein provided." G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 281 (1969). Wood commented that this "remarkable" pamphlet "summed up what Americans had done in two decades to the conception of a constitution . . . . It was a conclusive statement that has not essentially changed in two hundred years." *Id.* at 280-81.

In the Convention, George Mason said, "The plan now to be formed will certainly be defective . . . . Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way . . . ." 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 202-03 (M. Farrand ed. 1911). He considered article V dangerous because the amendment process required initiation by Congress, so that "the whole people of America can't make, or even propose alterations to it." 2 *id.*, at 629 n.8. Activists would endow the Court with a power denied to the people themselves without congressional intervention.

257. L. CARROLL, *THROUGH THE LOOKING GLASS* 163 (Norton ed. 1971) (emphasis in original). John Hart Ely considers that we are not "free to make the Constitution mean whatever we please." Ely, *The Supreme Court 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

258. *Smith v. Turner* (The Passenger Cases), 48 U.S. (7 How.) 283, 478 (1849).

259. If "the sense in which the Constitution was accepted and ratified by the nation . . . be not the guide in expounding it, there can be no security . . . for a faithful exercise of its powers." 9 *THE WRITINGS OF JAMES MADISON* 191 (G. Hunt ed. 1900-1910). Jefferson pledged as President to administer the Constitution "according to the safe and honest meaning contemplated by the plain understanding of the people at the time of its adoption." 4 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 446 (J. Elliott ed. 1827-30 & photo. reprint 1941) (quoted by John Rutledge) (emphasis in original). Such was also Chief Justice Marshall's view: if a word was understood in a certain sense "when the constitution was framed. . . . [t]he convention must have used it in that sense," and it is that sense which is to be given judicial effect. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824).

people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution . . . ."<sup>260</sup>

Warren strikingly verifies Douglas' frank avowal that in constitutional adjudication "the 'gut' reaction of a judge . . . was the main ingredient of his decision."<sup>261</sup> In White's words, "[t]he ethical imperatives that guided Warren as a judge reflected his personal morality";<sup>262</sup> his "justifications for a result were often conclusory statements of what he perceived to be ethical imperatives."<sup>263</sup> Often those imperatives were at war with those of the people.<sup>264</sup> The idiosyncratic, nakedly personal nature of his imperatives is revealed by *Marchetti v. United States*,<sup>265</sup> in which he decided that gamblers should not receive the protection accorded other taxpayers by the fifth amendment's self-incrimination clause. "[T]here is no evidence," White correctly comments, that the clause "was designed to protect only innocent persons, only some guilty persons, or the disclosure of only some 'incriminating' activities."<sup>266</sup> "It is hard to see," he says, why the law should not "be the same for gamblers as for other taxpayers."<sup>267</sup> "At a point," White comments, "Warren's concern with ethical imperatives comes so close to what appears to be an apology for subjective preferences in judging as to be unsupportable."<sup>268</sup> For, White observes, a judge has not been appointed "with an expectation that he will simply use his power to do what he thinks is fair and just."<sup>269</sup> In the past, liberals derisively compared such adjudication to a caliph dispensing justice under a tree. "On the contrary," White continues, "a judge is expected to 'follow the law,' 'uphold the Constitution,' [he is sworn to do so] and otherwise subordinate his personal preferences to some more legitimized body of wisdom."<sup>270</sup> When he fails to do so, he may be said to be "betraying a trust."<sup>271</sup> Thus, White has richly confirmed Anthony Lewis' early evaluation of Warren: "[T]he closest thing the United States has had to a Platonic Guardian, dispensing law from a throne without any sensed limits of power except what was seen [by him]

260. S. REP. NO. 21, 42nd Cong., 2d Sess. 2 (1872), reprinted in *THE RECONSTRUCTION AMENDMENTS' DEBATES* 571 (A. Avins ed. 1967).

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

262. G. WHITE, *supra* note 17, at 218.

263. *Id.* at 230. Philip Kurland had made the point in 1977: "'History may yet decide' that Warren's chief justiceship was essentially one where 'political power, including judicial power, was . . . exercised for the advancement of what was 'right and good' as [Warren's] personal ideolog[y] defined those . . . terms.'" *Id.* at 220 (quoting Kurland, *Book Review*, 87 *Yale L.J.* 225, 233 (1977) (emphasis in original)).

264. School prayer and busing, for example.

265. 390 U.S. 39 (1968).

266. G. WHITE, *supra* note 17, at 361.

267. *Id.* at 365.

268. *Id.* at 362. "The difficulty is that an approach based on ethics seems inevitably to lead one to justification of one's ethical stance . . . ." *Id.* at 365. Ely has convincingly demonstrated that a divorce between a judge's personal values and the social consensus is delusory, that what he is "really . . . 'discovering' . . . are his own values." Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 *HARV. L. REV.* 5, 16 (1978). Ely notes that "'Lenin used to claim this godlike gift of divination of the people's 'real' interests.'" *Id.* at 51 n.198. (quoting H. MAYO, *AN INTRODUCTION TO DEMOCRATIC THEORY* 97 (1960)).

269. G. WHITE, *supra* note 17, at 364.

270. *Id.* at 364-65.

271. *Id.* at 365.

as the good of society.'"<sup>272</sup> Warren's judicial conduct violated Cardozo's precept: a judge "is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles."<sup>273</sup> Even less is he to overturn constitutional text or the unmistakable intention of the Framers because they do not conform to his "ethical imperatives."

Finally, a brief comment on White's approach to these facts. He is to be warmly commended for his forthright appraisal of what Warren was doing. But he errs, in my judgment, in regarding doubts about Warren's course as merely a matter of taste, a choice between opposing doctrinal premises: "In an area as open-ended and susceptible to change as constitutional interpretation, who can say that Warren's approach, which settled on the ethically dictated result first and derived traditional justifications later, is less sound than an approach conditioning results on the emergence of 'principled' reasoning?"<sup>274</sup> That antiseptic statement obscures that Warren displaced the framers' choices with his own; that he overturned their determination, for example, to leave suffrage to the states, a course that cannot be "derived" from "traditional justifications." White also instances a "line of influential critics in the twentieth century" who rejected *Brown v. Board of Education* because "its reasoning was illegitimate . . . No one wanted to defend 'separate but equal' segregation on moral grounds, but nothing in the Fourteenth Amendment's Equal Protection Clause prevented the practice; to invalidate it on the basis of dubious empirical research was the essence of unbridled judicial glossing of the Constitution," an example of flawed "reasoning."<sup>275</sup> Warren proceeded in the opposite direction, seeking to determine "the ethically required resolution of a given case."<sup>276</sup> White observes that "if one deplores Warren's choice, one might question what empowers him to pick and choose,"<sup>277</sup> or more concretely, to ignore the constitutional text or proceed in spite of the unmistakable intention of the framers to exclude suffrage and segregation from the fourteenth amendment. That is the issue, not "whether ignoring the established jurisprudential canons of judicial performance . . . constitutes 'bad' judicial reasoning."<sup>278</sup> The issue is whether judges are indeed, as Paul Brest asserts, not "bound by the text or original understanding of the Constitution."<sup>279</sup> That is far more than a matter of taste in jurisprudential canons or "principled reasoning"; it involves the Court's violation, in the words of Justice Harlan, of the very "constitutional structure [of government] which it is its highest duty to protect."<sup>280</sup> Since that lesson apparently has been lost on Sager as well as White, I may be indulged for rehearsing a few elementary constitutional facts.

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272. *Id.* at 359 (quoting Lewis, *Earl Warren*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 2726 (1969)).

273. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).

274. G. WHITE, *supra* note 17, at 363-64.

275. *Id.* at 360-61.

276. *Id.* at 361.

277. *Id.* at 365.

278. *Id.* at 236.

279. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 224 (1980).

280. *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970) (Harlan, J., concurring and dissenting).

Fearful of power, the Founders resorted to a written Constitution in order to define and limit it.<sup>281</sup> Their presuppositions were well summarized by Philip Kurland:

The concept of the written constitution is that it defines the authority of government and its limits, that government is the creature of the constitution and cannot do what it does not authorize . . . . *A priori*, such a constitution could only have a fixed and unchanging meaning, if it were to fulfill its function. For changed conditions, the instrument itself made provision for amendment which, in accordance with the concept of a written constitution, was expected to be the only form of change . . . .<sup>282</sup>

First and last, the "limited" Constitution was meant to "bind down" our delegates "from mischief by the chains of the Constitution."<sup>283</sup> Very early, Chief Justice Marshall, who had been a proponent of judicial review in the Virginia Ratification Convention, declared that a written constitution was designed to define and limit power; he asked, "To what purpose are powers limited, . . . if these limits may, at any time, be passed by those intended to be restrained?"<sup>284</sup> Among those to be restrained he included the courts,<sup>285</sup> later specifically disclaiming a judicial "right to change [the] instrument."<sup>286</sup> As we have seen, even Warren affirmed that "[w]e must apply those limits as the Constitution prescribes them."<sup>287</sup>

In turning his back on those limits in the interest of his personal morality, Warren fell within Justice Harlan's charge that "when the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect."<sup>288</sup> That had much earlier been forcibly stated by Justice Story:

281. "Out of this fear of absolute power arose a revolutionary contribution to the idea of establishing constitutions, i.e. from 1776 on constitutions were to be written." Sisson, *The Idea of Revolution in the Declaration of Independence and the Constitution*, in *CONSTITUTIONAL GOVERNMENT IN AMERICA* 411 (R. Collins ed. 1980).

282. P. KURLAND, *WATERGATE AND THE CONSTITUTION* 7 (1978) (emphasis added). Justice William Paterson, a leading Framers, declared, "The constitution is certain and fixed; . . . and can be revoked or altered only by the authority that made it." *Van Horne v. Dorrance*, 28 F. Cas. 1012, 1014 (C.C.D. Pa. 1795) (No. 16, 857). See also S. Adams, *Massachusetts Circular Letter, February 11, 1768* in *DOCUMENTS OF AMERICAN HISTORY* 66 (H. Commager, 7th ed. 1963).

283. 4 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF FEDERAL CONSTITUTION* 543 (J. Elliott ed. 1827-30 & photo. reprint 1941).

284. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). See also *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1874): "The theory of our governments . . . is opposed to the deposit of unlimited power anywhere." *Id.* at 663.

285. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

286. JOHN MARSHALL'S DEFENSE OF *McCULLOCH v. MARYLAND* 209 (G. Gunther ed. 1969).

287. *Trop v. Dulles*, 356 U.S. 86, 104 (1958).

288. *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970). It needs to be remembered, as Justice Daniel vigorously stated in the *License Cases*, 46 U.S. (5 How.) 504 (1847), that "whether the decision of the court in such cases be itself binding . . . must depend upon its conformity with, or its warrant from, the constitution. It cannot be correctly held, that a decision, merely because it be by the Supreme Court, is to override alike the constitution and the laws both of the States and of the United States." *Id.* at 613 (Daniel, J., concurring). (For similar remarks by Justices Douglas, Frankfurter, and Chief Justice Burger, see R. BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 43, at 297 n.57). One hundred years later Justice Brandeis, borrowing the words of Justice Holmes, branded the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), an "'unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.'" *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

Nor should it ever be lost sight of, that the government of the United States is one of limited and enumerated powers, and that a departure from the true import and sense of its powers is *pro tanto* the establishment of a new constitution. It is doing for the people what they have not chosen to do for themselves. It is usurping the functions of a legislator . . . .<sup>289</sup>

In the upshot, White concludes, "the choices made by Warren and other advocates of judicial liberalism [*i.e.*, revisionism] appear less as ordained principles of justice and more as *vulnerable policy judgments*,"<sup>290</sup>—judgments the Constitution reserved to the people and their legislative representatives.

To remain attached to these fundamental principles of our democratic system is not to be "encumbered with professional cant";<sup>291</sup> to condemn Warren's reversal of the framers' exclusion of suffrage and segregation is not "professional cant." Although White concedes that Warren's ideal of "equality of opportunity" was not "explicitly codified in the Constitution,"<sup>292</sup>—in fact it was repeatedly rejected by the framers of the fourteenth amendment—he concludes that "[t]he most eloquent statement of a white supremacist interpretation of the equal protection clauses could not be likely to gain much current acceptance . . . . [T]he premise would be considered flawed."<sup>293</sup> Those whose attachment to integrity of the Constitution overrides their social aspirations are not to be kissed off as "white supremacists."<sup>294</sup> Nor is a demand that the Court observe constitutional "limits" a "flawed premise." Would busing or the bar against school prayer "gain much current acceptance"? At bottom, White and Sager advocate judicial squatter sovereignty; having preempted territory that is not theirs, the Court's preemption is irreversible.<sup>295</sup>

It is unfortunate that the struggle against the substitution of the Justices' personal predilections for the text and original understanding of the framers has fallen to Senator Jesse Helms and his ilk. But scripture is not discredited because it is cited by the devil. It is a reproach to the liberal academicians, for whom the rule of law had been central, that they have abandoned their standard. For myself, I insist with Charles McIlwain that "[t]he two fundamental correlative elements of constitutionalism for which all lovers of liberty must yet fight are the legal limits to arbitrary power

289. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 426 (5th ed. 1891).

290. G. WHITE, *supra* note 17, at 349 (emphasis added).

291. "Warren kept his eye on the essentials of a case—the essential facts, the essential justice of the situation—and in so doing reminded us that when the law gets encumbered with professional cant, it ceases to approximate reality and loses its reason for being." *Id.* at 367. By such statements White renders vain his disclaimer that his "attempt to elucidate Warren's jurisprudence should not be taken as an attempt to defend it in any particular." *Id.* at 230.

292. *Id.* at 170.

293. *Id.* at 364. Taking issue with Michael Perry's statement—"Certainly not many would take issue with . . . the Court's . . . disestablishment of laws and other official practices aimed at maintaining racial segregation"—, Ira Lupu tartly comments, "It requires the rosiest or most disingenuous distortion to make such an assertion in the face of the turbulence of school desegregation efforts since 1954." Lupu, *Constitutional Theory and the Search for the Workable Premise*, 8 U. DAYTON L. REV. 579, 593 (1983). See also Berger, *The Scope of Judicial Review: An Ongoing Debate*, 6 HASTINGS CONST. L.Q. 527, 583 (1979).

294. In 1942 I wrote of a decision that responded to my predilections that I liked it no better when the Court read them into the Constitution than when the Four Horsemen read in theirs. Berger, *Constructive Contempt: A Post-Mortem*, 9 U. CHI. L. REV. 602, 604-05, 642 (1942).

295. For some salty comments on such views, see Bridwell, *The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule*, 31 S.C.L. REV. 617, 632-35, 653 (1980).

and a complete political responsibility of government to the governed."<sup>296</sup> Warren was contemptuous of such limits, and the life-tenured Justices are virtually unaccountable. Sager would make them invulnerable.<sup>297</sup>

## V. APPENDIX

In a symposium<sup>298</sup> on Michael Perry's recent book,<sup>299</sup> which appeared after this article was in the hands of the editors, one activist referred to "existing constitutional doubt about jurisdiction removals."<sup>300</sup> Another stated that the legitimacy of the congressional power "is opposed by the substantial weight of scholarly opinion."<sup>301</sup> Neither referred to the unbroken string of Supreme Court pronouncements, stretching from 1796 to the present day,<sup>302</sup> that recognize the plenary power of Congress. Instead, a commentator cited a 1953 article by Henry Hart,<sup>303</sup> overlooking that in 1962 the Court approved *Ex parte McCardle* unmoved by Hart's theorizing.<sup>304</sup> Activists are defending the Court in contradiction of its own pronouncements. Disregard of the long line of precedents is the more remarkable given Ira Lupu's emphasis that Perry introduces "the possibility of radical discontinuity," departing "from the principles that have previously governed analogous [here the very same] matters," a "rip in the seamless web."<sup>305</sup> What could be more radically discontinuous than the Court's resort in 1972 to the cruel and unusual punishments clause in the teeth of universal attachment for 183 years before *Furman v. Georgia*<sup>306</sup> to death penalties for murder and rape.<sup>307</sup> Or the Court's saddling upon a state support of out-of-state indigents immediately upon their arrival, thereby scrapping the contrary practice of 600 years.<sup>308</sup> Or its substitution in 1970 of the six-man jury for the twelve-man jury to which the Founders were attached and that was rooted in centuries-old English tradition.<sup>309</sup> The "web," in truth, is being "ripped" by "those

296. C. MCLWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 146 (rev. ed. 1947).

297. *But see supra* text accompanying note 25.

298. *Judicial Review and the Constitution—the Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983).

299. M. PERRY, *supra* note 13.

300. Lupu, *supra* note 293, at 616.

301. Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809, 813 (1983). Tushnet proffers no count of noses. Among those who recognize the congressional power are Charles Black, Michael Perry, and Herbert Wechsler. *See* Berger, *Michael Perry's Functional Justification for Judicial Activism*, 8 U. DAYTON L. REV. 465, 503 (1983); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965); Lusky, Book Review, 6 HASTINGS CONST. L.Q. 403, 406, 412 (1979); Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1442-43 (1979); R. BERGER, *DEATH PENALTIES*, *supra* note 10, at 153-72.

302. Berger, *Michael Perry's Functional Justification for Judicial Activism*, 8 U. DAYTON L. REV. 465, 504-05 (1983).

303. Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 455 (1983).

304. *Glidden Co. v. Zdanok*, 370 U.S. 530, 567-68 (1962). Later Justice Douglas stated in *Flast v. Cohen*, 392 U.S. 83 (1968), "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of § 2, Art. III. *See Ex parte McCardle* . . ." *Id.* at 109 (citation omitted).

305. Lupu, *supra* note 293, at 616.

306. 408 U.S. 238 (1972).

307. R. BERGER, *DEATH PENALTIES*, *supra* note 10, at 1, 4. Hamilton wrote, "Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred." *THE FEDERALIST* No. 20, at 124 (A. Hamilton) (Mod. Libr. ed. 1937).

308. Berger, *Residence Requirements for Welfare and Voting: A Post-Mortem*, 42 OHIO ST. L.J. 853 (1981).

309. R. BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 43, at 397-06.

enthusiastic about the modern Court's work product,"<sup>310</sup> a part of the activist drive "to protect the legacy of the Warren Court."<sup>311</sup>

A significant portion of that "legacy" is the extraconstitutional rights created by the Court, which activists acknowledge are without constitutional warrant.<sup>312</sup> In Perry's words, "there is neither a textual nor a historical justification . . . for noninterpretivist review in human rights cases."<sup>313</sup> Lupu therefore begs the question in urging that jurisdiction withdrawal "is designed to prohibit the exercise of rights which the Supreme Court has been willing to protect, and to deprive those who seek to exercise such rights of any judicial forum for their vindication."<sup>314</sup> That the Court is "willing to protect" such rights does not confer upon the Court power that was withheld in the Constitution.<sup>315</sup> Nor is it opprobrious to deprive the Court of jurisdiction to enforce such unconstitutional constructs. The specification in article III of cases "arising under this Constitution" excludes cases drawn outside its bounds, for as Hamilton explained, the judicial authority extends to "certain cases particularly specified," marking "the precise limits, beyond which the federal courts cannot extend their jurisdiction."<sup>316</sup> One may agree with Lupu that the "arising under" jurisdiction is "coterminous with the enumeration of sources of 'supreme law' in article VI. If decisional products of noninterpretivist review are not 'law' for supremacy clause purposes, they cannot be 'law' for purposes of permitting an article III court to hear disputes arising out of interpretation of those decisional products."<sup>317</sup> Precisely. Hamilton wrote in *Federalist No. 33* that the clause "*expressly* confines this supremacy to laws made *pursuant to the Constitution*"; federal acts which are not pursuant thereto but are "invasions of the residuary powers of the smaller societies . . . will be merely acts of usurpation, and will deserve to be treated as such."<sup>318</sup> Acts of usurpation by the judiciary, the branch which Hamilton noted was "less than nothing,"<sup>319</sup> would hardly stand higher than those of the legislative branch.

Lupu urges that for "state courts to ignore the entire corpus of American obscenity law, as a response to an act of congressional jurisdiction control, would simply be lawless,"<sup>320</sup> overlooking that federal imposition of first amendment requirements on

310. M. PERRY, *supra* note 13, at 138.

311. Tushnet, *supra* note 301, at 811. Paul Brest adjured his activist brethren "simply to acknowledge that most of our writings [about judicial review] are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good." Brest, *supra* note 14, at 1109.

312. See *supra* note 44 and accompanying text; see also Berger, *Michael Perry's Functional Justification for Judicial Activism*, 8 U. DAYTON L. REV. 465, 466 n.12 (1983).

313. M. PERRY, *supra* note 13, at 91.

314. Lupu, *supra* note 293, at 617.

315. "The framers did not intend article III to empower a federal judge to invalidate legislation simply because he decides that, beyond its limitations, the Constitution should protect a claimant's rights." Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1385 (1979).

316. THE FEDERALIST No. 81, at 541 (A. Hamilton) (Mod. Libr. ed. 1937).

317. Lupu, *supra* note 293, at 615.

318. THE FEDERALIST No. 33, at 202 (A. Hamilton) (Mod. Libr. ed. 1937) (emphasis in original).

319. THE FEDERALIST No. 78, at 504 n.\* (A. Hamilton) (Mod. Libr. ed. 1937).

320. Lupu, *supra* note 293, at 613.

the states is itself "lawless,"<sup>321</sup> and that under *Erie Railroad v. Tompkins*<sup>322</sup> it is never too late so to hold. Notwithstanding a congressional removal of jurisdiction, Lupu urges state court review of a school prayer law to avoid, among other things, "the corrosive pressures on state courts to move with the popular tide rather than remain bound by authoritative national precedent."<sup>323</sup> A precedent that arrogates unconferrred power should not be regarded as "authoritative." Popular majority will is to be thwarted only when the Constitution so demands. Given nationwide resistance to the school prayer decisions,<sup>324</sup> why should state courts cram Supreme Court predilections down the throat of an unwilling people after Congress withdraws its jurisdiction to do so?

Lupu argues that considerations of "supremacy and uniformity" require state courts to follow the Supreme Court decisions, notwithstanding withdrawal of jurisdiction to decide such cases in the future. There is no need to recapitulate the facts, set forth in the body of this article, that undermine the "uniformity" argument.<sup>325</sup> They demonstrate that the Framers themselves departed from uniformity and did not regard it as indispensable. I would add that as between judicial usurpation and "uniformity" the Framers would have chosen to keep the Court within bounds at the cost of uniformity.<sup>326</sup> For nothing exceeded the Founders' dread of unrestrained power.<sup>327</sup> In the context of the Court's death penalty, school prayer, and obscenity decisions, it may be expected that the state courts, relieved of Supreme Court appellate coercion, will pretty uniformly return to the thwarted state policies, thus achieving the much extolled "uniformity." Moreover, the power of Congress to exclude state courts from decisions of federal matters has long been accepted. From the beginning, Charles Alan Wright wrote, Congress has "provided that in certain instances the jurisdiction of the federal courts shall be exclusive of the courts of the several states."<sup>328</sup> One such instance is the provision of section 3 of the Civil Rights Act of 1866 that "the district courts . . . shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the pro-

321. Perry considers that Berger's "finding that the fourteenth amendment was not intended to make the Bill of Rights . . . applicable to the states—which is confirmatory of earlier findings to the same effect by such eminent historians as Charles Fairman . . . is amply documented and widely accepted." Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 285–86 (1981) (footnotes omitted). For detailed discussion see R. BERGER, *DEATH PENALTIES*, *supra* note 10, at 10–28.

322. 304 U.S. 64 (1938). There the Court, following Holmes, branded the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), "'an unconstitutional assumption of power by courts of the United States which no lapse of time . . . should make us hesitate to correct.'" 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928) (Holmes, J., dissenting)).

323. Lupu, *supra* note 293, at 614.

324. This does not jibe with Lupu's warning against "the undermining of a sense of shared national experience." *Id.*

325. See *supra* text accompanying notes 163–72.

326. Compare *supra* text accompanying note 163.

327. The colonists were unceasingly concerned with the aggressiveness of power, "its endlessly propulsive tendency to expand itself beyond legitimate boundaries." B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 56 (1967).

328. C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 26 (3d ed. 1976). "As a general matter, Congress may restrict the jurisdiction of, and remedies available in, the lower federal courts and may similarly restrict state courts in matters of federal concern." P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 1314–15 (1975).

visions of this act."<sup>329</sup> Such precedents are buttressed by section 5 of the fourteenth amendment—"Congress shall have power to enforce" the provisions of the amendment.<sup>330</sup> Were state courts to proceed in despite of Congress' omission to delegate enforcement power to, or to withdraw it from, the federal and state courts, they would take over power conferred upon Congress alone.

By virtue of the binding force of the supremacy clause, state judges are bound by the Constitution and the laws pursuant thereto. But in the New York Convention Hamilton assured the ratifiers that "the laws of Congress are restricted to a certain sphere, and when they depart from this sphere, they are no longer supreme and binding."<sup>331</sup> Judicial grafts of extraconstitutional claims on the Constitution stand no higher than statutory invasions of the states' "residuary powers." The legislature, not the courts, was the darling of the Founders;<sup>332</sup> it is the Constitution, not judicial encrustations, that bind state judges.<sup>333</sup> The Framers hardly contemplated that the Court could bind states by unconstitutional decisions. Judicial review was conceived in terms of curbing excesses by the other branches,<sup>334</sup> policing the constitutional boundaries,<sup>335</sup> not as a warrant for excesses by the Court itself. Of what use were Hamilton's assurances that the "'usurpations of the Supreme Court . . . will [not] be uncontrollable and remediless,'" that it could be impeached for "usurpations on the authority of the legislature,"<sup>336</sup> and a fortiori for the even graver invasion of rights reserved to the states, if the decisions which gave rise to removal of jurisdiction would continue to bind the states. They sought protection against encroachment on their reserved rights, not merely removal of offenders while leaving the harm in place.

Who shall decide whether a Supreme Court decision is extraconstitutional? Manifestly, the Court should not sit as judge of its own derelictions. But in *Cooper v. Aaron*<sup>337</sup> the Court, citing *Marbury v. Madison*, stressed that "the federal judiciary is

329. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

330. For detailed discussion of section 5 see R. BERGER, *DEATH PENALTIES*, *supra* note 10, at 167-72. For the effect of the due process clause of the fourteenth amendment see *id.* at 171-72.

331. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 362 (J. Elliott ed. 1827-30 & photo. reprint 1941).

332. 1 THE WORKS OF JAMES WILSON 292 (R. McCloskey ed. 1967).

333. Gary C. Leedes considers that there "is no reason, which is based on the Constitution, that suggests why the executive branch ought to obey an extra-constitutional decision." Leedes, *A Critique of Illegitimate Noninterpretivism*, 8 U. DAYTON L. REV. 533, 561 (1983). Given the tenth amendment, there is less reason for state courts to do so. After the breakup of the Four Horsemen, then Solicitor General Robert H. Jackson compared the emergence of the constitutional text from beneath a laissez-faire gloss to the rediscovery of an Old Master after the retouching brushwork of succeeding generations has been removed. Jackson, *Back to the Constitution*, 25 A.B.A. J. 745 (1939). Justices as diverse as Douglas, Frankfurter and Chief Justice Burger have claimed the right to look beneath the gloss of their predecessors to the Constitution itself. See R. BERGER, *DEATH PENALTIES*, *supra* note 10, at 12 n.8. Are states less entitled to do so?

334. R. BERGER, *CONGRESS*, *supra* note 52, at 8-16.

335. James Bradley Thayer and Judge Learned Hand, cited in R. BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 43, at 305. It is worth noting that the Court's appellate jurisdiction was explained as serving the interests of uniformity rather than supremacy. R. BERGER, *CONGRESS*, *supra* note 52, at 272-73; see also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351 (1816). "In the early years of our national history when state's rights fervor was strong, the Supreme Court had some difficulty in establishing its right to reverse a decision of the highest court of a state." A. SAYE, *AMERICAN CONSTITUTIONAL LAW: CASES AND TEXT* 35 (2d ed. 1979).

336. THE FEDERALIST NO. 81, at 523, 527 (A. Hamilton) (Mod. Libr. ed. 1937).

337. 358 U.S. 1 (1958).

supreme in the exposition of the law of the Constitution," that "the interpretation of the Fourteenth Amendment enunciated . . . in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States," and that state officials are "solemnly committed by oath . . . 'to support of this Constitution.'" <sup>338</sup> *Marbury* is not a happy citation; Chief Justice Marshall declared that if the Constitution is not "unchangeable by ordinary means . . . , then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable."<sup>339</sup> That judicial revision was an "ordinary means" is evidenced by his statement that the judicial power "cannot be the assertion of a right to change that instrument."<sup>340</sup> Then too, in holding that Congress may not enlarge the "original" jurisdiction of the Court, *Marbury* was enforcing the unambiguous text of the Constitution, not a judicial importation, whereas *Brown* overturned the framers' plain intention to leave segregation to the states;<sup>341</sup> and as Warren's disciple, G. Edward White, attests, he grafted on the fourteenth amendment his own sentiments, having no roots in the Constitution and in despite of popular sentiment.<sup>342</sup> As regards the "oath" to "support the Constitution," that does not require respect for judicial action which, in defiance of the Constitution, invades the states' "residuary powers." Whatever the case when a state, standing alone, resists a Supreme Court mandate, as in *Cooper*, congressional removal of the Court's jurisdiction alters the situation and, in my judgment, fortifies the state.

In essence, activists would bind the state courts to enforce unconstitutional and unpopular policies which Congress, as authorized by article III, has disabled the Court from enforcing. Neither the supremacy clause nor considerations of uniformity constrain state courts to do so. Obedience to the Court flowed from its power of compulsion on review. With that no longer operative, state courts may return to effectuation of state policy in local matters. As regards jurisdiction, the last word is for Congress. Sanford Levinson is "willing to assign Congress the last word" because "[d]emocratic theory requires . . . that the stopping point be the most democratic branch of the polity, unless special reasons can be offered to defend a different theory."<sup>343</sup> Where Levinson relies upon political theory, I would summon the terms

338. *Id.* at 18 (quoting U.S. CONST. art. VI, cl. 3).

339. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

340. JOHN MARSHALL'S DEFENSE OF *McCULLOCH v. MARYLAND* 209 (G. Gunther ed. 1969). For discussion see R. BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 43, at 373-78.

341. The legislative history of the fourteenth amendment clearly discloses that "the framers did not mean for the amendment to have any effect on segregated schooling." M. PERRY, *supra* note 13, at 68. "The framers . . . did not intend to ban state-ordered racial segregation, and yet the Supreme Court has done so." *Id.* at 92; *see also id.* at 1, 33, 105. For the evidence see R. BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 43, at 117-33. For citations to activists who accept these findings see R. BERGER, *DEATH PENALTIES*, *supra* note 10, at 184 n.14.

342. *See supra* text accompanying notes 236-42 & 254-55. Tushnet observes that "the most significant decisions of [the Warren] Court overturned legislation that substantial local, and probably national, majorities supported both in theory . . . and in practice." Tushnet, Book Review, 57 TEX. L. REV. 1295, 1303 (1979). Philip Kurland wrote, "There is . . . no showing that the judiciary's notion of fundamental values originating outside the Constitution bears any resemblance to the values preferred by the majority of the people." Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts "To Say What the Law Is,"* 23 ARIZ. L. REV. 581, 589 (1981).

343. Levinson, *The Turn Toward Functionalism in Constitutional Theory*, 8 U. DAYTON L. REV. 567, 577 n.41 (1983).

of article III, which, in conferring upon Congress power over jurisdiction of the federal courts, gave it the last word.<sup>344</sup> No activist speculations have persuasively diminished the unequivocal text.

Several symposiasts, as if to show the absurdity of the jurisdiction removal power, argue that if it can remove jurisdiction it should be able to revise the decisions of the Court as well.<sup>345</sup> The Court itself, however, drew a distinction between those two powers in *United States v. Klein*.<sup>346</sup> Sanford Levinson observes that one "might feel differently if the text stated explicitly that Congress shall have no authority to revise Constitution-based judgments of the Supreme Court, but, of course, there is no such patch of text."<sup>347</sup> It would be superfluous. The powers of the federal government are only those that have been granted; what was not granted was reserved to the states.<sup>348</sup> In addition, there is the implication that the express grant of authority to control jurisdiction excludes powers not mentioned. Then too, Hamilton stated in *Federalist No. 81* that a "legislature . . . cannot reverse a determination once made in a particular case,"<sup>349</sup> noting, however, in the same *No. 81* that "usurpations by the Supreme Court . . . will [not] be uncontrollable and remediless."<sup>350</sup> Such distinctions were appreciated by Daniel Webster, who argued in *Gibbons v. Ogden* that

[i]f Congress were to pass an act expressly revoking or annulling this New-York grant, such an act would be wholly useless and inoperative. If the New-York grant be . . . inconsistent with, any constitutional power which Congress has exercised, then, . . . the grant is nugatory and void, necessarily, and by reason of the supremacy of the law of Congress.<sup>351</sup>

One who argues from a power of removal to a congressional power to revise decisions could equally maintain that because a state statute is inconsistent with a congressional power, Congress may annul it. Professor Felix Frankfurter, a leading student of constitutional law and federal jurisdiction, proposed an amendment that would authorize Congress to overrule Supreme Court decisions under certain circumstances,<sup>352</sup> recognizing thereby that article III does not authorize such revision. Perhaps such "niceties" carry little weight with activists, who measure all things by the result. But limits on power remain important to those of us who cling to a democratic system.

344. See the discussion of Perry's and Charles Black's positions in Berger, *Michael Perry's Functional Justification for Activist Review*, 8 U. DAYTON L. REV. 465, 503, 513 (1983).

345. Alexander, *Painting Without the Numbers: Noninterpretivist Judicial Review*, 8 U. DAYTON L. REV. 447, 456 (1983); Levinson, *supra* note 343, at 575.

346. See *supra* text accompanying notes 94-99.

347. Levinson, *supra* note 343, at 576.

348. James Wilson assured the Pennsylvania ratifiers that in contrast with the states' federal power is to be "collected, not from tacit implication, but from the positive grant expressed in the instrument of the union . . . . [E]verything which is not given is reserved." A. MASON, *supra* note 53, at 129. In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816), Justice Story declared that the federal government "can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."

349. THE FEDERALIST NO. 81, at 526 (A. Hamilton) (Mod. Libr. ed. 1937).

350. *Id.* at 523.

351. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 30 (1824).

352. Levinson, *supra* note 343, at 577.

