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ARTICLES

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I. INTRODUCTION

Ostensibly a review of my *Federalism: The Founders' Design*,[1] J.M. Balkin employs the bulk of forty-three pages to launch his own deconstructionist theory of judicial adjudication.[2] He uses me as a whipping boy, as if the doctrine that judges construe and do not make law, that the clearly discernible intention of the draftsmen is to be given effect sprang full-armed from my brow, when in fact I merely restated 600 years of Anglo-American practice.[3] Thomas Grey, himself an activist, wrote that "interpretivism"—the doctrine of original intention—is a view "of great power and compelling simplicity . . . deeply rooted in our history and in our shared principles of political legitimacy. It has equally deep roots in our formal constitutional law."[4]

One who is committed to an opposing theory is unlikely to write an unbiased review; and from time to time Balkin's bias discolors his tale. Thus he converts my measured critique of Hamilton's about-face after 1787 into "Hamilton was a scoundrel."[5] And he finds that my replies evince "increasing stri-

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1. R. BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987) [hereinafter R. BERGER, FEDERALISM].

2. Balkin, *Constitutional Interpretation and the Problem of History* (Book Review), 63 N.Y.U. L. REV. 911 (1988).

3. *See infra* text accompanying notes 63-79.

4. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975).

5. Balkin, *supra* note 2, at 923. Balkin refers to my statement that Hamilton

dency,"[6] with never a word about the outrageous charges by neophytes[7] against one who has published for more than half a century. Are brickbats to be met by a shower of roses? So too, "the shortcomings of Berger's historical analysis" have been "admirably" disclosed by a fellow activist,[8] without so much as a reference to my demonstration that his views were anti-historical and verge on the absurd.[9] Such one-sided citations abound.

Why, it may be asked, should a writer of established reputation[10] reply to such criticism? The answer long ago was given by Locke: a rebuttal is required lest victory be "adjudged not to him who had the truth on his side, but by the last word in the dispute."[11] The passage of three centuries has not dulled the force of that remark. One who is unfamiliar with the subject matter is apt to be influenced by unanswered criticism of a film, a book, or a concert.

Noting that my earlier works, which "served to rebut the Nixon Administration's views about the executive privilege and impeachment" made "Berger the darling of liberal scholars," Balkin remarks, "All of this [was] changed" by my 1977 *Government by Judiciary*, which met with "a host of attacks" from my

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"turned his back on the representations made to the Ratifiers . . . and tried 'to secure by interpretation what the Convention had rejected.' " *Id.* at 923 n.72. And he refers to "Berger's ascription of the basest of motives to Hamilton." *Id.* at 924 n.74. I have never ascribed "base" motives to a politician's struggle for power, nor ever labelled one with whom I differ a "scoundrel." Balkin's over-heated rhetoric casts doubt on his impartiality.

6. *Id.* at 913-14.

7. Consider Aviam Soifer: "Berger grossly misuses Professor Horwitz," "very poor history," "abuses the quotations," "startling penchant for selective quotation," "ignores the myriad statements . . . that directly contradict his single-minded theory," and "glaring omissions." Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History* (Book Review), 54 N.Y.U. L. REV. 651, 679, 654, 681, 657, 676 (1979).

8. Balkin, *supra* note 2, at 923 (citing Powell, *The Modern Misunderstanding of Original Intent* (Book Review), 54 U. CHI. L. REV. 1513 (1987)). *See also* Balkin, *supra* note 2, at 924 n.74.

9. *See generally* Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986). My response to Powell's 1987 article, *The Founders' Views—According to Jefferson Powell*, appears in 67 TEX. L. REV. 1033 (1989). A scholar should comment on discrepant evidence and opposing inferences. H. BUTTERFIELD, GEORGE III AND THE HISTORIANS 225 (1959).

10. Of my CONGRESS V. THE SUPREME COURT (1969), Alexander Bickel wrote, Berger's "analysis is independent and rigorous and so his book offers much fresh interpretations and insight. . . . He is always deeply informed and powerful and altogether convincing. . . . A distinguished work." Bickel, Book Review, 73 AM. HIST. REV. 1509, 1530 (1970).

11. J. LOCKE, AN ESSAY CONCERNING THE HUMAN UNDERSTANDING 360 (T. Tegg. 13th ed. 1846).

liberal confreres.[12] Balkin comments that "Berger's sharp break in choice of subject matter before and after 1977 . . . reflects an increasing frustration with modern American liberalism."[13] Not so. My pre-1977 critiques of executive excesses were paralleled by my post-1977 rejection of excesses by the judiciary. In both cases the standard was the same, uncolored by political considerations: constitutional boundaries bind all the branches. As long ago as 1942 I divorced my personal predilections from my evaluation of constitutional mandates, indicating that I liked it no more when Justice Black read my predilections into the Constitution than when the Four Horsemen read in theirs.[14] From that credo I have never wavered. After all, liberals, the traditional reformers and advocates of change, look to the Constitution for protection.

II. The History

The bulk of my *Federalism* is devoted to historical sources bearing on the distribution of power between the State and federal governments, the General Welfare and Commerce Clauses. A few pages summarize the relevance and importance of the original intention of the Founders. Most of Balkin's review, however, is devoted to the "relevance of history to constitutional interpretation."[15] But he often finds himself "agreeing with [Berger's] history."[16] Although he discusses some areas of disagreement, he emphasizes "that these are relatively minor points of disagreement with Berger's historical conclusions":[17]

> Berger's main points about federalism, and especially about the commerce clause, remain intact.[18] The degree of federal intrusion into the states' police powers today is much greater than even the most ardent nationalist living in 1787 would have imagined. Even Hamilton, Marshall, and Story, in their

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12. Balkin, *supra* note 2, at 913.

13. *Id.* at 914. Tired of delving in the 1787 sources for many years, I turned to the 1866 Reconstruction materials for a change of scene.

14. Berger, *Constructive Contempt: A Post-Mortem*, 9 U. Chi. L. Rev. 602, 604, 641-42 (1942).

15. Balkin, *supra* note 2, at 915.

16. *Id.*

17. *Id.* at 924.

18. It is of no moment therefore that "[o]ne would hardly recognize modern commerce clause doctrine from the picture that Berger paints of the intentions of the Founders." *Id.* at 915. My task was to find those intentions, not to rationalize modern deviations.

> most unbridled assertions of national power, would not have contended that the Constitution created the equivalent of a general federal police power whose operation could displace virtually any contrary state economic policy at will.[19] Thus, Berger's major thesis remains indisputable—as far as federal-state relations are concerned, we have indeed come a long way from the original concrete intentions of the Framers and Ratifiers of the Constitution.[20]

Given Balkin's conclusion, after detailed examination, that "Berger's main points about federalism and especially about the commerce clause, remain intact," why does he summarily dismiss Berger's studies of "original intent" because they exhibit "the shortcomings of Berger's historical analysis" on the say so of another. Historiographical competence is not vitiated by a change of subject matter.

Because the history is of great importance, I take leave to examine Balkin's points of disagreement. To begin with James Wilson's demarcation of governmental objects which extend "*beyond the bounds* of a particular state" in their "operation or effects" from those confined "*within the bounds* of a particular state" in their "operation and effects,"[21] Balkin observes, a "loose constructionist" would approve federal regulation of a school janitor's wages if it had economic effects that "cross state

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19. Balkin refers to the Founders' "desires to preserve state police power." *Id.* at 922. Compare this with his "*[a]ccording to Berger*, among those retained powers was the police power of the States over their local affairs," *id.* at 916 (emphasis added), suggesting that this was merely a matter of opinion rather than an admitted fact. Throughout he employs this disingenuous tactic.

If, as Balkin acknowledges, "Berger's main points about federalism . . . remain intact," if "Berger's major thesis remains indisputable—as far as federal-state relations are concerned," *supra* text accompanying notes 15-17, then it is difficult to reconcile Balkin's statements that "[t]hroughout the book Berger neglects the *possibility* that the Ratifiers' intentions on the issue of federal-state relations *could* have been equivocal, or that there *might* have been a variety of differing intentions." Balkin, *supra* note 2, at 923 (emphasis added). Such speculation cannot overcome the uncontradicted federalist assurances that the States retained all jurisdiction that had not been surrendered for national purposes—war, foreign commerce and negotiation of treaties. The massive evidence on this score defies summary. A critic of my views, Michael McConnell, furnishes additional evidence that "the 'police power'—the protection of public health, safety, and morals—was left to the states, with the federal government entrusted with less sensitive powers like those over interstate and foreign commerce." McConnell, *Federalism Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1506 (1988). He cited additional "powerful support" for "Berger's substantive conclusions about the preservation of state autonomy." *Id.* at 1510.

20. Balkin, *supra* note 2, at 925.

21. *Id.* at 917 (emphasis in original).

boundaries."[22] But he conceded that we can rely "correctly upon the Founders' assumption that one can distinguish purely local issues from national ones without making question-begging claims about effects."[23] For this we have the words of Jefferson and Madison. Of the contrary view Madison wrote that the "inevitable tendency . . . must be to convert a limited into an unlimited government," because in "the great system of political economy, having for its general object the national welfare, everything is related immediately or remotely to every other thing; and, consequently, a power over any one thing, if not limited by some obvious and precise affinity, may amount to a power over every other."[24] That view was reiterated in our own time by Justices Cardozo and Frankfurter.

Cardozo joined in invalidating the application of the National Recovery Act to poultry bought by the Schecters from local commission men who had brought it into New York, saying, "[t]here is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce."[25] On behalf of the Court, Justice Frankfurter declared that "[s]cholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity."[26] At any rate, we are not justified in substituting our present understanding for that of the Founders. Balkin quotes, without answering my argument, "[p]ressed to its logical conclusion . . . [the] reasoning [that everything is immediately

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22. *Id.* at 917-18.

23. *Id.* at 918. "It is, to be sure," Balkin continues, "a distinction that we now find difficult to make, but it was very real to the Founders." *Id.* And he writes, "Berger's major historical point—that the Framers believed in a workable distinction between local and national subjects of regulation—remains substantially correct." *Id.* at 923. Yet he writes, the distinction was "fuzzy even at the time of the Framers." *Id.* at 921. How can what was "very real" be "fuzzy"?

24. E. CORWIN, THE TWILIGHT OF THE SUPREME COURT 10 (1934). The path to the school janitor was carved out by a process satirically portrayed by Jefferson in a comment on an 1800 proposal to incorporate a copper mining company: "Congress are authorized to defend the nation. Ships are necessary for defence; copper is necessary for ships; mines, necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played at '[t]his is the House that Jack Built?'" 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 501 (1922). The Congress rejected a proposal to authorize congressional charters of corporations. 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 at 615-16 (1911).

25. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring).

26. Polish Nat'l Alliance v. N.L.R.B., 322 U.S. 643, 650 (1944).

or remotely related to every other thing] collides with the Founders' categorical rejection of unlimited power and their unyielding resolve to retain State control over internal matters."[27]

Against the confessedly restrictive Founders' view of the scope of "effects" reiterated by Justices Cardozo and Frankfurter, Balkin urges that "intrastate activities can almost always be shown to have interstate effects, if one uses the word 'effect' in anything close to its [present] everyday sense."[28] But that was not, as he acknowledges, the Founders' view. He plumps for "an empirical approach" and concludes that "[i]f the Founders' intentions are to be respected above all, our commitment to modern understandings of economic cause and effect must bow to our commitment to constitutional legitimacy."[29] This is an elegant justification of the Court's substitution of its will for that of the Founders. But where is the Court authorized to revise the Constitution? For it is established learning that words are to be given the sense of those who used them to accomplish their purposes.[30]

In discussing *Garcia v. San Antonio Metropolitan Transit Authority*[31]—which involved federal regulation of mass transit *within* San Antonio, without any suggestion that the local subway or bus transportation had any interstate impact—I stated that under that decision a trip in Manhattan from 42d Street to 72d Street would be in interstate commerce. Balkin labels this an "outrageous claim" and turns several verbal somersaults, pointing out the hardship of a trip from a Connecticut suburb to Wall Street. On its face this is interstate commerce, commerce "between" one state and another.[32] Nor is his citation of the *Shreveport Rate Case* more apposite.[33] There the freight rate from Shreveport, Louisiana to Marshall, Texas, a distance of only 42 miles, was 56 cents, while the rate from Dallas to Mar-

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27. Balkin, *supra* note 2, at 920.

28. *Id.*

29. *Id.*

30. *E.g.*, Hawaii v. Mankichi, 190 U.S. 197, 211-13 (1903).

31. 469 U.S. 528 (1985).

32. Balkin, *supra* note 2, at 920 & n.56. Balkin speculates that my FEDERALISM "was inspired . . . by Berger's dissatisfaction with the Supreme Court's 1985 decision in Garcia v. San Antonio Metropolitan Transit Authority." *Id.* at 914. As a matter of fact, I entered upon my studies of federalism long before *Garcia*, which merely pointed up the lengths to which the Court has gone in jettisoning federalism.

33. Houston, E. & W. Texas Ry. Co. v. United States, 234 U.S. 342 (1914), *cited in* Balkin, *supra* note 2, at 920.

shall, a distance of 148 miles was 37 cents. No such discrimination against out-of-state traffic can be levelled at a subway trip from 42d to 72d Street. Balkin acknowledges that "modern commerce clause doctrine raises the specter of an all powerful federal government overshadowing the regulatory powers of the states. Indeed, this is precisely the point that Berger makes in his book."[34] In *Garcia* the specter became flesh; the federal government took over the State's power to regulate the most local of state functions, the wages of a street car conductor in a municipal system.

My insistence on Wilson's differentiation is labelled by Balkin as a "formalistic—and admittedly [by whom?] circular-style of reasoning"[35] and leads him to criticize my view of *Garcia*, saying that "virtually no one would be willing to accept Berger's theory of why the case is wrongly decided."[36] "Berger's theory" is that of Powell's powerful dissent. Nowhere does Balkin mention that the Court split five to four, or refer to Powell's dissent. Powell stated that *Garcia* rejected "the intention of the Framers of the Constitution,"[37] that the majority "rejects almost 200 years of the understanding of the constitutional status of federalism,"[38] that henceforth Congress is to determine "the extent to which the States may exercise their authority" in commerce clause cases, and that these decisions "will not be subject to judicial review."[39] It is well settled that no branch of the government may abdicate its powers; for example, " 'it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to . . . the Judicial branch.' "[40] This view was reiterated by William Van Alstyne and A.E. Dick How-

34. Balkin, *supra* note 2, at 950. Justice Story wrote, the people "have made it a limited government . . . they have restrained it to the excercise of certain powers, and reserved all others to the States or to the people." J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 397 (5th ed. 1905). And in section 957 he wrote, the Constitution "is founded on a wholesome and strenous jealousy, which, foreseeing the possibility of mischief, guards with solicitude against any excercise of power which may endanger the States, as far as it is practicable."

35. Balkin, *supra* note 2, at 919.

36. *Id.* at 914-15.

37. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 577 (1985) (Powell, J., dissenting).

38. *Id.* at 560. Justice Holmes stated, "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

39. *Garcia*, 469 U.S. at 560.

40. Buckley v. Valeo, 424 U.S. 1, 121-22 (1976). *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935).

ard,[41] but Balkin is unmoved by the problem of leaving the States at the mercy of an unreviewable Congress.[42] Instead, he complacently states that in *Garcia* "the Court ended its flirtation with a rehabilitated tenth amendment."[43] Balkin's airy acceptance of judicial deletion of what was the most important amendment of the Bill of Rights is truly astonishing. The Tenth Amendment was designed to rivet down the representation that the federal power "extends to certain enumerated objects only, and leaves to the several states a residuary and *inviolable* sovereignty over all other objects."[44] As late as 1975 the Court affirmed that "[t]he Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[45]

A. The Records of the Framers and Ratifiers

Another source of wonderment is Balkin's view of the rela-

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41. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985); Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789 (1985).

42. Michael McConnell agrees that *Garcia* "leave[s] state constitutional claims to the mercies of Congress." McConnell, *supra* note 19, at 1488 n.17.

43. Balkin, *supra* note 2, at 914.

44. THE FEDERALIST No. 39, at 249 (J. Madison) (Mod. Lib. ed. 1937) (emphasis added).

> Indeed, according to Berger's logic, if the tenth amendment prevented federal interference with traditional state functions, the most traditional state function of all was the state's power to police the health, safety, and welfare of its citizens. However, not even the most conservative of the Justices was prepared to hold that the tenth amendment offered immunity from federal regulations affecting only private parties. Such reasoning would have returned the Court to results reached in cases like *Hammer v. Dagenhart*.

Balkin, *supra* note 2, at 919. But according to Balkin, the Court's "intrusion into the states' police powers today is much greater than even the most ardent nationalist living in 1787 would have imagined." *Id.* at 925. That the Court has strayed so far is justified by Balkin on result-oriented grounds. In 1885, Justice Field declared on behalf of the Court, "[n]either the [Fourteenth] amendment . . . nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health . . . education . . . good order of the people." Barbier v. Connolly, 113 U.S. 27, 31 (1885).

Chief Justice Stone stated, "[t]he amendment states but a truism that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 124 (1941). A truism is a proposition that "is so obviously true as not to require discussion." OXFORD UNIVERSAL DICTIONARY (3d ed. 1955). Story said of the Tenth Amendment, "[i]ts sole design is to exclude any interpretation by which other powers should be assumed beyond those that are granted." 2 J. STORY, *supra* note 34, § 1908, at 653 (5th ed. 1905).

45. Fry v. United States, 421 U.S. 542, 547 n.7 (1975).

tion between the records of the Framers and the Ratifiers. Madison repeatedly stressed that the Framers' draft was merely a blank until it was ratified by the state conventions.[46] It was ratification that gave effect to what was merely the Framers' draft. For this reason "Berger believes that the assurances received by the state ratifying conventions that the federal government would not interfere with the states' purely internal affairs trump any understandings the Framers had in Philadelphia."[47]

Balkin regards the written Constitution as "a compromise that a majority of the Ratifiers could live with," leaving the centralists and localists to "fight out the actual meaning of their agreement later on."[48] He puts the cart before the horse; the Ratifiers were not parties to the "agreement" in the Philadelphia Convention. Balkin notes that the issue of federal-state relations was "hotly contested."[49] Midway in the Philadelphia Convention, Washington wrote, "independent sovereignty is so ardently contended for, . . . the local views of each State . . . will not yield to a more enlarged scale of politicks."[50] When the document was submitted for ratification, it raised large doubts; and in order to win votes for adoption the Federalists had to explain that its general language was actually narrower in scope than was being painted by the opposition. This it was that con-

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46. "As the instrument came from [the Framers] it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions." 5 ANNALS OF CONG. 776 (J. Gales ed. 1796).

47. Balkin, *supra* note 2, at 917.

48. *Id.* at 924. For Balkin, "it is highly significant that the debate between Jefferson and Hamilton about constitutional construction began nearly as soon as the ink was dry on the last state resolution of ratification. . . . [I]t was a necessary consequence of adopting a document that had to please persons of fundamentally different political views." *Id.* Hamilton is an unhappy citation for "the essentially contested character of federal-state power that existed even at the moment of ratification." *Id.* Of Hamilton's plan, Dr. William Johnson said in the Convention that "he had been supported by none." 1 M. FARRAND, *supra* note 24, at 363. Ultimately Hamilton urged the delegates to sign the Constitution, saying, "No man's ideas were more remote from the plan than his were known to be." 2 M. FARRAND, *supra* note 24, at 645-46. Certainly the document did not "have to please" Hamilton. He repudiated the very representations he had made in THE FEDERALIST, as Madison pointed out: "So visionary a prophet as would have foretold in 1788 that Hamilton would in 1793 elevate an admittedly inconsequential power to that of imposing on Congress an obligation to declare war, would not have been believed." 6 J. MADISON, WRITINGS 162-63 (G. Hunt ed. 1900-1910). For details see R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 135-38 (1974).

49. Balkin, *supra* note 2, at 923.

50. 3 M. FARRAND, *supra* note 24, at 51. For additional comments by other Founders see R. BERGER, FEDERALISM, *supra* note 1, at 50 n.8.

strained Madison to assure the Ratifiers that all unenumerated cases remained the "inviolable" preserve of the States. Where are the statements that contradict such assurances and that would indicate "localist" acceptance that the issue was to be postponed for later negotiation? Balkin's question, "why the localists' understandings were not foreclosed by their acceptance of the new Constitution,"[51] is answered by the fact that what they accepted was the Constitution *as explained* by its advocates, representations on which they were entitled to rely. To overcome opposition to the delegation of broad power to a remote newcomer, the advocates had to give "assurances" that the powers were *not* in fact as broad as was being charged. Such representations, Justice Story declared in similar circumstances, cannot be repudiated without committing a fraud upon the American people.[52]

Balkin has a pat explanation: "[T]he Founders' simultaneous desires to preserve state police power and to provide for federal regulation of commercial matters that the states were incompetent to deal with individually, were on a collision course from the beginning."[53] Citing to my FEDERALISM, Balkin claims that Madison "clearly saw a tension early on."[54] There Madison *rejected* a broad interpretation of "effects," without the faintest suggestion that he foresaw incompatible aims. Such incompatibility is a product of Balkin's misreading of "commerce." The States were far from acknowledging that they were "incompetent" to regulate commerce *within* their individual States. They *were* incompetent to deal with foreign commerce; the federal government alone could negotiate treaties or enact statutes regulating foreign commerce. Balkin, however, considers that "the more general purpose of the commerce power . . . [was] to legislate where a national economic policy is necessary."[55] On the other hand, he notes that "as Berger has taken great pains to remind us, limiting this power to interstate commerce also reflected a general purpose to preserve the inviolability of state

51. Balkin, *supra* note 2, at 924.

52. "If the constitution was ratified under the belief, sedulously propagated on all sides, that such protection was afforded, would it not now be a fraud upon the whole people to give a different construction to its powers." 2 J. STORY, *supra* note 34, § 1084, at 33.

53. Balkin, *supra* note 2, at 922.

54. *Id.*

55. *Id.* at 950.

sovereignty."[56] In fact, the States' exclusive concern with interstate commerce was to prevent exactions by one State from another.

Although I quoted Ellsworth, Madison, Sherman, Wilson, and Justice Story to this effect, and cited to Davie, Dawes, Patrick Henry, and Mercer,[57] Balkin reduces this to "Berger *claims* that the great domestic evil . . . was the States' erection of obstacles against the passage of goods from one State to another."[58] Similarly, he writes, "Berger *argues* that the correct construction of 'among' is 'between,' so that Congress is only empowered to regulate commerce of the states with each other,"[59] neglecting to comment on my four pages of proof on this score.[60] Hamilton, for example, referred to "the regulation of commerce with other nations and between the States."[61] Such devices mislead the reader into thinking that Balkin found no evidence to support my "claims," whereas Balkin admits that "Berger's main points . . . especially about the commerce clause, remain intact."[62]

B. Powell's Theory of Interpretation

We should not leave Balkin's historicizing without comment on his adoption of Jefferson Powell's thesis that "at the end of the eighteenth century the 'intention' behind a document was that purpose constructed from a reading of the text itself."[63] "Intention," according to Powell, "was an attribute or concept attached primarily to the document itself, and not elsewhere."[64] Balkin reminds us of the law student who concludes, after read-

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56. *Id.* at 951.

57. R. BERGER, FEDERALISM, *supra* note 1, at 128-29.

58. Balkin, *supra* note 2, at 916 (emphasis added).

59. *Id.* at 916 (emphasis added).

60. For "among" as "between" or "with each other," see R. BERGER, FEDERALISM, *supra* note 1, at 126-27. That usage has survived. *See, e.g.*, A. TROLLOPE, BARCHESTER TOWERS 524 (Mod. Lib. ed. 1940) ("Let that which passed between Dr. Proudie and his wife . . . be understood to be among them."). James Madison wrote, "The meaning of the power to regulate commerce is to be sought . . . in the objects generally to be embraced when it was inserted in the Constitution." 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 521 (1865).

61. THE FEDERALIST No. 23, at 142 (A. Hamilton) (Mod. Lib. ed. 1937) (emphasis added).

62. Balkin, *supra* note 2, at 925.

63. *Id.* at 924 n.74.

64. Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1534 (1987).

ing the plaintiff's brief, that it is an "open and shut case." For he makes no mention of my elaborate refutation of Powell. Only the barest summary must here suffice. In his *New Abridgment of the Law of England*, Matthew Bacon stated, "Such a construction ought to be put on a statute, as may best answer the Intention which the Makers of it had in view."[65] Powell remarks that "[t]he central concept—the goal—of common law interpretation was indeed what the common lawyers called 'intention.' "[66] Confessedly, Powell's is a "curious usage":[67] the "basic notion of 'intent' is a product of the interpretive process rather than something locked into the text by the author."[68] Thus, despite their constant differentiation between "words" and "intention," between the "makers' intention" and the "words," the common lawyers, according to Powell, excluded the actual intention and looked only to the words. It would have been far simpler merely to inquire what the words meant without any reference to intention. If we are to look only to the words then, Justice Holmes said, "[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English."[69] All of Powell's indefatigable dredging could not bring up one solid common law precedent for his "curious" theory.

The common law cases speak against him:

(1) After citing a thirteenth century precedent, a fifteenth century sage, Chief Justice Frowicke, said, "And so, in our own days, have those that were the *penners & devisors* of statutes bene the grettest lighte for exposicion of statutes."[70]

(2) In 1586 Coke emphasized that a devisor's "intent" prevails over his "words."[71] And in the *Magdalen College Case* (1615), Coke stated, "in Acts of Parliament which are to be construed according to the *intent and meaning of the makers* [not

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65. 4 M. BACON, A NEW ABRIDGMENT OF THE LAW 647-48 (3d ed. 1768).

66. Powell, *supra* note 64, at 1533.

67. *Id.* at 1534.

68. Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 899 (1985).

69. O.W. HOLMES, COLLECTED LEGAL PAPERS 204 (1921).

70. A DISCOURSE UPON THE EXPOSITION AND UNDERSTANDINGS OF STATUTES 10-11 (S. Thorne ed. 1942) [hereinafter DISCOURSE] (emphasis added). S. B. Chrimes concluded that the "rule of reference to the intention of the legislators . . . was certainly established by the second half of the fifteenth century." S. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY 293 (1936).

71. Matthew Manning's Case, 77 Eng. Rep. 618, 620-21 (1586).

their words] of them, the original intent and meaning is to be observed."[72]

(3) Lord Chancellor Hatton, writing circa 1587-1591, said, "whensoever there is a *departure* from the words to the intent, that must be proved that there is such a meaning."[73] Necessarily proof must be drawn from extrinsic evidence, not from the words.

(4) A leading legal historian, Samuel Thorne, concluded that "[a]ctual intent . . . is controlling from Hengham's day to that of Lord Nottingham (1688)."[74]

Neither Powell nor Balkin allude to these authorities. Balkin needs to reconcile his adoption of Powell with his statement that "misunderstanding or misreading a text involves drawing a meaning other than the one *intended by the person who created* the text."[75]

It is the essence of communication that a writer be permitted to explain what his words mean; the reader may not insist that he knows better what the writer meant.[76] To maintain the contrary is, as Judge Frank Easterbrook wrote, to assume that "it is the readers rather than the writers who matter."[77] The common law tradition clearly is to the contrary as it was aphoristically stated by the seventeenth century scholar, John Selden: the "one true sense of a document is that which the Author

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72. The Case of the Master and Fellows of Magdalen College in Cambridge, 77 Eng. Rep. 1235, 1245 (1615) (emphasis added).

73. C. HATTON, A TREATISE CONCERNING STATUTES OR ACTS OF PARLIAMENT AND THE EXPOSITION THEREOF 14-15 (1677) (emphasis added).

74. DISCOURSE, *supra* note 70, at 60 n.126.

75. Balkin, *supra* note 2, at 932 (emphasis added).

76. Locke fully understood this:

> When a man speaks to another, it is that he may be understood; and the end of speech is, that those sounds, as marks, may make known his ideas to the hearer. That, then, which words are the marks of are the ideas of the speaker; nor can any one apply them, as marks, immediately to anything else but the ideas he himself hath. For this would be to make them signs of his own conceptions, and yet apply them to other ideas; which would be to make them signs and not signs of his ideas at the same time; and so, in effect, to have no signification at all.
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> . . . .
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> [T]his is certain, their signification, in his use of them, is limited to his ideas, and they can be signs of nothing else.

J. LOCKE, *supra* note 11, at 291, 293. I am indebted for this reference to Dr. Gary McDowell.

77. Easterbrook, *The Influence of Judicial Review on Constitutional Theory*, in A WORKABLE GOVERNMENT: THE CONSTITUTION AFTER 200 YEARS 170, 173 (1988).

meant when he writ it."[78] Just fifty years after the framing, Martin Van Buren stated in his Inaugural Address that he would be governed by "a strict adherence to the letter and spirit of the Constitution as it was designed by those who framed it," viewing it "as limited to national objects; regarding it as leaving to the people and the States all power not explicitly parted with."[79]

III. Balkin's Theory of Interpretation

Balkin's "primary concern" is "Berger's discussion of interpretive theory," of which he says,

> It is admittedly difficult to embrace a theory of constitutional interpretation, which, if accepted, would dictate the unconstitutionality of almost all federal civil rights, securities, antitrust, food and drug, and health and safety laws. The *expanded* powers of the federal government under the commerce and spending powers *since the New Deal* have become so much a part of our lives that the consequences of a narrowed conception along the lines Berger suggests would simply be disastrous.[80]

Balkin invokes a species of squatter sovereignty—judicial "expansion" "since the New Deal" confers unimpeachable title. But squatter sovereignty does not run against the people;[81] and even they, said Hamilton, are bound by the Constitution until they amend it.[82]

Regardless of pragmatic considerations, scholars may inquire whether in fashioning the reforms extolled by Balkin the Court acted in excess of its delegated powers.[83] The Court, in

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78. J. Selden, Table Talk: Being the Discourses of John Selden, Esq. 10 (1696).

79. Inaugural Address, March 4, 1837, compiled in 4 J. Richardson, Messages and Papers of the Presidents 1530, 1536 (1897).

80. Balkin, *supra* note 2, at 925 (emphasis added).

81. "No one acquires a vested or protected right in violation of the Constitution by long use." Walz v. Tax Comm'r of New York, 397 U.S. 664, 678 (1970). *See also* Chief Justice Cooley *infra* note 121.

82. "Until the people have, by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves." The Federalist No. 78, at 509 (A. Hamilton) (Mod. Lib. ed. 1937). Madison was of the same opinion. 1 Annals of Cong. 739 (1789) (J. Gales ed. 1789 print bearing running head "History of Congress").

83. Balkin's reductio ad absurdum is the

> strong evidence that the Founders did not intend to allow the government to issue paper money, which, as everyone knows, is the surest means of debauching the currency and bringing a nation to ruin. If one takes Berger's theory of original intention seriously, all of our paper money is of dubious constitutionality.

Justice Black's scornful phrase, is not authorized to keep the Constitution "in tune with the times."[84] And demonstration that it acted unconstitutionally should counsel a halt to further "expansion." Thirty-five years ago Willard Hurst declared, "[T]he real issue is *who is to make* the policy choices in the Twentieth Century, judges or the combination of legislature and electorate that make the constitutional amendments."[85] I am therefore not abashed by Balkin's paraphrase of my views: "we cannot turn to the judiciary to make new garments for us; we must make them for ourselves through the amendment provisions of Article V."[86] He discards Article V into the dustbin of history.

Balkin assails my commitment to the Rule of Law, which "requires that [laws] be predictable, nonretroactive, and equally applicable to all citizens."[87] Proceeding from the "fundamental liberal principle that a person should never be subjected to the arbitrary will of another," he raises a specter: "a majority might decide that the 1,000 richest persons in society should surrender all of their wealth."[88] But the fifth amendment prohibits the taking of private property without just compensation. According to Balkin, such protective limitations—rules he calls them—create "a further tension with democracy, since [they place] certain types of decisions beyond the power of popular majorities to implement."[89] That was the price the majority paid to win adoption of the Constitution; and despite 200 years of "tension," the majority has not attempted to repeal these "rules." The American system rests on majority rule; in THE FEDERALIST No. 58, Hamilton stated it is a "fundamental principle of free government" that the majority "would rule," a power that cannot "be transferred to the minority."[90] Minority protec-

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Balkin, *supra* note 2, at 945. Berger's fatal flaw is that his "concentration on getting the historical facts right has diverted his attention from the practical consequences of those facts." *Id.* at 943. Is an historian to turn his back on the "historical facts" for fear of their "practical consequences?" Balkin's horrible example could be met by an amendment which would validate the paper money; it would meet with nation-wide favor. Balkin's attitude is "damn the Constitution—full speed ahead."

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

85. W. HURST, "DISCUSSION" IN SUPREME COURT AND SUPREME LAW 75 (E. Cahn ed. 1954) (emphasis added).

86. Balkin, *supra* note 2, at 925.

87. *Id.* at 926 ("Berger sees [the Rule of Law] as essential to democratic government.").

88. *Id.*

89. *Id.* at 927.

90. THE FEDERALIST No. 58, at 382-83 (A. Hamilton) (Mod. Lib. ed. 1937).

tion against majority abuse is spelled out in the Constitution; and in accepting the document the minority acceded to majority rule in non-protected areas.

Again, Balkin urges that rules must be applied by people who may be arbitrary, in particular that England and the United States "have entrusted rule application to the judiciary" entrusting judges "with the task of creating law through the process of common law adjudication. Such law, although reversible through subsequent legislation, has always been produced without democratic accountability . . . heedless of majority will."[91] The overhanging threat of legislative reversal constitutes "democratic accountability." Democracy does not demand that every governmental act be instantly taken to the people. Even when a president raises a "firestorm," he must be rejected at the polls or impeached. Nevertheless, Balkin observes that "the decision to assign the task of interpreting, but not [of] making, law to a group of people whose sole other task is the development of a body of substantive principles heedless of majority will seems wrongheaded in the extreme."[92] If these statements intimate that the common law process of adjudication carried over to constitutional adjudication, they are wrong.

From earliest times, the making of substantive law in the field of contracts, torts and similar private law, was entrusted to the courts, subject to being overturned by Parliament.[93] Far different is the judicial role under our written Constitution which limits all delegated power. The American people have at no time delegated to the courts the development of "substantive [constitutional] principles heedless of majority will" as expressed in the Constitution. Referring to several of my works, Balkin notices

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91. Balkin, *supra* note 2, at 928.

92. *Id.*

93. The Statute of Westminster (13 Ed. I, C. 24 (1285)), for example, gave rise to the vast jurisdiction of the Action on the Case. But Parliament reserved the right to overrule judicial decisions, and did so from time to time. Very different was the judicial power over *statutes*. Lord Ellsmere declared in the Earl of Oxford's Case that "our books are that the Acts and Statutes of Parliament ought to be reversed by Parliament, and not otherwise." ELLSMERE, OBSERVATION ON THE [COKE] REPORTS 21, *quoted in* Dr. Bonham's Case, 77 Eng. Rep. 638, 652 n.C (1610). Madison noted in THE FEDERALIST No. 53 that in England "the authority of the Parliament is transcendent and uncontrollable, as well with regard to the Constitution, as the ordinary objects of legislative provision." THE FEDERALIST No. 53, at 348 (J. Madison) (Mod. Lib. ed. 1937). "[T]here can be no such steady and imperceptible change in their [Constitution's] rules as inheres in the principles of the common law." T. COOLEY, CONSTITUTIONAL LIMITATIONS 88 (7th ed. 1903).

that the "maxim that judges are to interpret law but not make it captures the idea of separation of functions that is intended to preserve the Rule of Law."[94] The judicial function is to confine the branches within the written boundaries; but the judiciary acts in excess of its jurisdiction when it proceeds to revise those boundaries.[95]

Balkin is aware of the issue. How, he asks, "will we know that [judges] have not simply *changed the law* under the guise of interpretation? Such a result would be *inconsistent* not only with the Rule of Law, but also with the principle of majority rule."[96] To avoid this difficulty he sets out in search of a "theory of adjudication." My own approach, in the common law tradition, did not start out with a grand overarching theory but summoned a clear-cut case that condemns itself: the one man-one vote decision in the teeth of the incontrovertible exclusion of suffrage from the ambit of the Fourteenth Amendment. Not a peep from Balkin about this decision, or a handful of similar examples I collected.[97]

Examining the relation of original intention and the Rule of Law, Balkin notes the advantages of resort to original intention: "[it] avoids uncertainty and arbitrariness and promotes predictability and consistent application."[98] It also represents the "meaning understood by the person or persons who had the political authority to create the text in the first place,"[99] *i.e.* the Framers and Ratifiers. But he maintains that "the Rule of Law

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94. Balkin, *supra* note 2, at 927-28.

95. This reflects the common law tradition; Lord Mansfield stated: "Whatever 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). From Francis Bacon on, it has been reiterated that the courts are to construe, not to make, law. For citations see R. BERGER, SELECTED WRITINGS ON THE CONSTITUTION 286-87 (1987).

Thomas Sowell observes that at any given moment, the popular will may be thwarted by

> constitutional provisions representing more enduring popular wills, which include the reining in of transitory popular wills. . . . Many generations . . . have given in turn the 'contemporary ratification' of the Constitution [*e.g.* every amendment tacitly attests that the Constitution needs no other alteration]. . . . Minorities receive their *constitutional* rights from that enduring majority to which transient majorities bow.

T. SOWELL, THE JUDICIAL ACTIVISM RECONSIDERED 22 (1989).

96. Balkin, *supra* note 2, at 928 (emphasis added).

97. *See generally* Berger, *The Activist Legacy of the New Deal Court*, 59 WASH. L. REV. 751 (1984).

98. Balkin, *supra* note 2, at 928-29.

99. *Id.* at 929. *See also* J. SELDEN, *supra* text accompanying note 78.

actually requires that original intention *cannot* be the foundation of constitutional interpretation," that "legal evolution is required by the operation of the Rule of Law itself."[100] If "change" of the law "under the guise of interpretation" would be inconsistent with the Rule of Law, how can it require "legal evolution?" In place of original intention, Balkin maintains that "constitutional decision making must come instead from the constitutional tradition itself,"[101] that is to say what the Court has said about the Constitution,[102] never mind that at times what it has said, as in the one man-one vote case, flies in the face of the constitutional text itself, let alone that this "tradition" is admittedly "a bewildering collection of conflicting purposes and principles."[103]

Thus far I have experienced little difficulty in comprehending Balkin; now he sets sail on the troubled seas of modern philosophy and linguistics, the new Saussure vocabulary—synchronic and diachronic ways of looking at systems of law—of deconstruction and Derrida,[104] issues beyond the ken of an earthbound lawyer. But I am heartened by the fact that Charles Fried, professor of Jurisprudence at Harvard, deplored "the uncontrolled eruption into law" of philosophy and "the poor quality of the philosophy."[105] I am prepared to assume that Balkin's appeal to Derrida and deconstruction do not reveal such shortcomings, but then I recall Judge Bork's remark about

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100. Balkin, *supra* note 2, at 929, 931.

101. *Id.* at 953.

102. Balkin emphasizes that law school students do not look to the Constitution, but to constitutional law and what the courts say about it. *Id.* at 934. Given that casebooks do the same, students have little alternative. That judges do likewise is a bootstrapping argument. Lawyers can hardly admonish the Justices "Back to the Constitution," let alone the considerable segment of the bar which advocates causes that find no lodgment in the instrument. A practice that plainly departs from the Constitution is not its own justification.

Activists who defend this approach should consider Paul Brest's plea to his fellows "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, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981).

103. Balkin, *supra* note 2, at 953.

104. *Id.* at 930, 932. Andrzej Rapaczynski refers to "the fashionable but perniciously vague works of the so called 'deconstructionist' school of philosophy and literary interpretation." Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177, 199 n.47 (1988).

105. Fried, *Discussion: Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 331, 331 (1988).

those who "discourse learnedly, or appear to do so for all the rest of us can tell, about . . . hermeneutics, Mill, Marx, Derrida, Habermas . . . and so on until working lawyers and judges can only despair in the knowledge that they will never have the time to master the materials of the argument."[106] Even so, let a groundling essay to come to grips with Balkin's esoteric theory of adjudication. Preliminarily it may be noted that a Canadian scholar, Alan Hutchinson, observes that "American scholars struggle to offer some theoretically valid account of the jurisprudential enterprise."[107] Despite a sea of apologetics for judicial revisionism, activists have not, according to Michael Perry himself an activist, come up with "a defensible nonoriginalist conception of constitutional text/interpretation and judicial role."[108]

Balkin's is only the latest of such efforts, the nub of which is the "principle of iterability," *i.e.* different readers may read texts differently.[109] This assumes, to borrow from Judge Frank Easterbrook, that "it is the readers rather than writers who matter,"[110] contrary to the centuries old tradition. The "principle of iterability means that texts cannot be understood unless they can be misunderstood—cannot be read unless they can be misread."[111] It does not follow that misunderstandings therefore ac-

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106. Bork, *Introduction* to G. McDOWELL, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY at vi (1985).

107. Hutchinson, *Alien Thoughts: A Comment on Constitutional Scholarship*, 58 S. CAL. L. REV. 701, 701 (1985).

108. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 551, 602 (1985). In a recent article, Justice Scalia considers it a grave defect of the nonoriginalists that they have been unable to agree upon an alternative theory. Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-63 (1989). Originalism, on the other hand, as Thomas Grey observed, *supra* text accompanying note 4, is a doctrine of great simplicity, deeply rooted in history and in the Constitution. In THE FEDERALIST No. 38, at 236 (J. Madison) (Mod. Lib. ed. 1937), Madison asked critics before discarding a proposed remedy to "at least agree among themselves on some other remedy to be substituted . . . ." If they differ "from one another," one may prudently prefer the former. Justice Scalia observed,

> If the law is to make any attempt at consistency and predictability, surely there must be general agreement not only that judges reject one exegetical approach (originalism), but that they adopt another. And it is hard to discern any emerging consensus among the nonoriginalists as to what this might be.

Scalia, *supra*, at 855.

109. "This same property," Balkin continues, "creates the possibility that a text will mean something different to a given reader in a given context than it meant to earlier readers in other contexts, or even to the person who created the text in the first place." Balkin, *supra* note 2, at 932. This is a chameleon theory: the text changes color according to who looks at it.

110. Easterbrook, *supra* note 77, at 173.

111. Balkin, *supra* note 2, at 932. In common parlance, "misunderstanding" implies

quire canonical status. The Western tradition is to rectify, not build on, mistakes. Balkin emphasizes that "misunderstanding or misreading a text involves drawing a meaning other than the one intended by the person who created the text";[112] and he celebrates the capacity of a text "to break free from an author's private meaning and mean something other than or in addition to the author's private meaning."[113] "[E]ven when we understand a text," he asserts, "what we understand is the text and not the author's private meaning."[114] Those who shut their eyes to the draftsmen's explanation will have a limited understanding of the text. He is led to conclude that "a text cannot be understood unless it can be misunderstood repeatedly . . . [and] the Rule of Law cannot operate over time unless the content of legal norms can be altered repeatedly. . . . The ideals of the Rule of Law depend upon the very thing that they deny—change, unpredictability, and retroactivity."[115] Fashioning such paradoxes may be an agreeable scholarly pastime, but they run counter to fundamental presuppositions of our constitutional system. Justice Story wrote that the Constitution "is to have a fixed, uniform, permanent construction. It should be . . . the same yesterday, today and forever."[116] "To what purpose are powers limited," asked Marshall, "and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"[117] "If the Constitution is alterable at the pleasure of the legislature [or the

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an honest failure to understand, not a deliberate flouting of the draftsmens' unmistakable intention, as when the court announced the one man-one vote rule in the teeth of the exclusion of suffrage from the fourteenth amendment. Balkin's rationalization does not support such decisions.

112. *Id.*

113. *Id.* "Private" does scant justice to legislative history. The exclusion of suffrage from the Fourteenth Amendment does not represent the "private meaning" of the Framers; they published the debates and the report of the Joint Committee on Reconstruction which explained the exclusion.

114. *Id.* Balkin also maintains that "the Rule of Law requires that texts rule us, and not the persons who created those texts." *Id.* at 931. This is specious rhetoric; texts do not come from on high; they are the product of persons who fashion texts to accomplish their purpose. Why is the draftsmen's explanation of their purpose more the product of persons than the text?

115. *Id.* at 939.

116. J. STORY, *supra* note 34, § 426, at 326. In Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 355 (1827), Chief Justice Marshall stated, "In framing an instrument, which was intended to be perpetual, the presumption is strong, that every important principle introduced into it is intended to be perpetual also." (Marshall, C.J., dissenting).

117. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

courts]," he continued, "then written Constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable."[118]

According to Balkin, misreadings rise to high stature under the principle of stare decisis, whereby they "become part of the corpus of legal precedents that are read and reread in successive cases."[119] Then too, there are misreadings of misreadings, and yet other misreadings piled thereon,[120] all of which are sheltered by "expectations" that come to cluster around the misreadings.[121] In short, "the Rule of Law creates the possibility that a particular misreading, like that of the privileges and immunities clause in the *Slaughter-House Cases*, could become fixed into the law and profoundly influence its future development."[122] In consequence, he asserts, "[t]he Rule of Law, diachronically understood, guarantees that the actual process of adjudication over time will have surprisingly *little to do with* either *the text* of the Constitution or with the concrete intentions of its Framers."[123] In essence, Balkin defends judicial revision of the Constitution on the ground that misreadings confirmed by judges over a period acquire a status higher than the text itself.

The hallowed place he assigns to post-New Deal precedents ignores the fact that, as Philip Kurland observed, "[t]he list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook."[124] Why are the precedents of the last forty years more sacrosanct than those of the prior 150?[125] Francis Lieber, the high priest of hermeneu-

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118. *Id.* at 178.

119. Balkin, *supra* note 2, at 933.

120. *Id.* If the conduct was wrong *ab initio*, it cannot be legitimated by repetition. *See* Powell v. McCormack, 395 U.S. 486, 546-47 (1969) (that an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date).

121. *Id.* at 925-26; *supra* text accompanying note 80. Thomas Cooley rejected the notion that a "Constitution should be disregarded" because of long acquiescence in a departure from its terms. T. COOLEY, *supra* note 93, at 107. Courts, he declared, "have nothing to do with the argument *ab inconvenienti*, and should not bend the Constitution to suit the law of the hour." *Id.*

122. Balkin, *supra* note 2, at 934.

123. *Id.* (emphasis added). Justice Story wrote, "[w]e are to construe, not to frame, the instrument." J. STORY, *supra* note 34, § 424, at 324.

124. P. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT 90-91 (1970).

125. Balkin is troubled "by disregarding the cumulative effects of stare decisis." Balkin, *supra* note 2, at 940. How "cumulative" were the old precedents discarded by the Warren Court? I respect stare decisis for precedents soundly rooted in the Constitution, not for those rendered in its despite.

tics, wrote, "that which is wrong in the beginning cannot become right in the course of time."[126] "Strange," wrote Sir Frederick Pollock to Justice Holmes, "that a proved series of blunders should be more sacred than one."[127] In *Erie R.R. v. Tompkins*, wherein the Court overruled the century-old doctrine of *Swift v. Tyson*, which had engendered many commercial "expectations," Justices Holmes and Brandeis branded it 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."[128] If judicial alteration of the Constitution by "misreading" was wrong *ab initio*, it cannot be legitimated by repetition. This, Balkin charges, "is attempting to wipe away the encrustations of historical development"[129]—read judicial arrogation. Stripping barnacles from a vessel makes it seaworthy. In 1939, then Solicitor General Robert H. Jackson, in an article entitled "Back to the Constitution," compared the recent emergence of the constitutional text from beneath layers of laissez-faire glosses to the rediscovery of an Old Master after the retouching brushwork of succeeding generations has been removed.[130]

Stripped of its philosophical veneer, Balkin is defending judicial revision of the Constitution, dissolving the limits imposed by the written document. And what is the glorious goal? Mark Tushnet, a fellow activist, wrote that throughout the twentieth century "judges have been able to deploy theories of constitutional interpretation to advance their own ends. . . . [T]hese theories have been used in the recent past to advance the goals of contemporary political liberalism in many areas."[131]

Balkin charges me with ignoring "the practical consequences" of the historical facts I gathered; and he shrugs off the

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126. F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS 210 (3d ed. 1880). Lord Justice Denman stated, "[T]he mere statement and restatement of a doctrine . . . cannot make it law, unless it can be traced to some competent authority." O'Connell v. Regina, 8 Eng. Rep. 1061, 1143 (1844). Maitland too taught that "some statement . . . does not become true because it has been constantly repeated, that a 'chain of testimony' is never stronger than its first link." C. FIFOOT, FREDERIC WILLIAM MAITLAND: A LIFE 11 (1971).

127. Letter from Sir Frederick Pollock to Justice Holmes (Nov. 23, 1916), *reprinted in* 1 HOLMES-POLLOCK LETTERS 239 (1946).

128. 304 U.S. 64, 79 (1938).

129. Balkin, *supra* note 2, at 945.

130. Jackson, *Back to the Constitution*, 25 A.B.A. J. 745, 748 (1939).

131. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 690 (1985). *See* L. LEVY on Justice Brennan, *infra* text accompanying note 141.

facts if there "is no logically coherent method of putting [my] ideas into practice."[132] In effect, he demands a usable past, whereas I conceive the historian's duty, as Ranke taught, is to ascertain what happened, be the consequences what they may. The whole enterprise of history responds to man's thirst to know what occurred in the past. One can quarrel with the *uses* to which another puts the historical facts, but that is not "a problem of history";[133] it in no way discredits the effort to collate the facts.

It is erroneous to attribute to me the view that "the Court should overrule all precedents that are inconsistent with the concrete intentions of the Framers and Ratifiers,"[134] instancing as a glaring example my view of *Brown v. Board of Education.* What I said was that *I* would be prepared as a matter of constitutional logic to overrule *Brown*,[135] but I never urged the *Court* to do so, recognizing that attitudes had hardened. And I underscored that " 'to accept unerasable ends on practical grounds is not to condone *continued* employment of unlawful means . . . [D]o not continue to apply unconstitutional doctrine in ever expanding fashion,' "[136] as in *Garcia.*

Balkin twits me with failure to furnish "a practical theory of constitutional adjudication."[137] His own solution, which "most constitutional scholars today would choose, would be to argue that we should preserve and even extend some 'misinterpretations'—such as *Brown v. Board of Education*—but that no such deference should be given to others," instancing *McCleskey v. Kemp*[138] as "mistaken."[139] *McCleskey* rejected a challenge to a

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132. Balkin, *supra* note 2, at 943.

133. *Id.* at 944.

134. *Id.*

135. *Id.* at n.133.

136. *Id.* at 942-43 (emphasis changed).

137. *Id.* at 943. Throughout Balkin dwells on the undesirable "practical" consequences of giving effect to the constitutional design. If practicalities demand a Constitution better tuned to contemporary needs, let the issue be submitted to the people for change by an amendment, not change by judicial usurpation. Said Madison, "[H]ad the power of making . . . treaties been omitted, however necessary it might have been, the defect could only have been . . . supplied by an amendment to the Constitution." 2 ANNALS OF CONG. 1800-01 (J. Gales ed. 1791).

Philosophers say that it is more important to ask the right question than to furnish the right answer. That I did so is attested by the ongoing debate about the scope of judicial power and original intention that was triggered in 1977 by my GOVERNMENT BY JUDICIARY. Balkin's is but the latest attempt to supply an adequate defense of activist expansionism.

138. 481 U.S. 279 (1987).

Georgia death penalty based on statistical evidence that racial considerations affected capital sentencing decisions. So too, Balkin considers that *Bowers v. Hardwick*,[140] wherein the Court refused to strike Georgia's sodomy statute, "is inconsistent" with "correct standards of interpretation."[141] Thus the Court's "misreadings" must yield to Balkin's tastes. Non-originalists, Leonard Levy observed, "tend to stress current values, usually their own, which they find in some philosophy or alleged consensus of which they approve, and they insist that judges ought to decide accordingly," pressing on the judiciary their own "bias."[142] Although Balkin recommends that judges must have the right "to choose between misinterpretations,"[143] he concludes that "one should be very suspicious, under this strategy, about which doctrines will get treated more generously than others"[144]—particularly when Balkin would dictate the choice. Judicial discretion, moreover, is like an unbridled stallion.[145]

Balkin's real fear is that future "litigants could well overturn most of the national economic regulation of the post-New Deal period,"[146] so he looks for guidance to "the concepts and principles derived from precedent—*especially recent precedent*."[147] He protests against "wrenching us away from our *settled* expectations as to the content and course of development of constitutional law,"[148] revealing that his goal is to preserve the "achievements" of the Warren Court. He regards it as self-evidently absurd that "since all of these laws were beyond the

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139. Balkin, *supra* note 2, at 941.

140. 478 U.S. 186 (1986).

141. Balkin, *supra* note 2, at 941-42.

142. L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION xv (1938). What Professor Steven Goldberg of City College, New York, says of sociology is equally applicable to the activist approach: "the pathetic state of sociology, a discipline in which ideological requirement and psychological need have come to replace evidence as the condition for acceptance of fact and explanation." N.Y. Times, Apr. 15, 1989, at 26, col. 3.

143. Balkin, *supra* note 2, at 941.

144. *Id.* at 948.

145. A Tory judge, Chief Justice Hutchinson of Massachusetts, said in 1767, "the *Judge* should never be the *Legislator*: Because then the Will of the Judge would be the Law: and this tends to a State of Slavery." Horwitz, *The Emergence of an Instrumental Conception of American Law*, 1780-1820, in 5 PERSPECTIVES IN AMERICAN HISTORY 287, 292 (1971).

146. Balkin, *supra* note 2, at 944.

147. *Id.* at 952 (emphasis added). But he experienced no difficulty in recommending that the Court overrule decisions of which *he* disapproved. *Supra* text accompanying notes 138-141.

148. *Id.* at 945 (emphasis added).

power of the Congress to enact, the sooner their enforcement is ended, the better for the health and safety of constitutional government."[149] Yet that most philosophical of judges, Cardozo, said of a judge's substitution of his individual sense of justice: "[T]hat might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law."[150] For me, too, the benign result does not condone the ongoing judicial revision of the Constitution. Cardozo was aware, as Balkin apparently is not, that judicial intervention can be malign as well as benign.

Against this, Balkin conjures up a parade of horribles[151] which reduces to the argument that past usurpations have created a momentum that demands ever fresh judicial arrogations—a veritable Juggernaut. That argument found small favor with the Court in *Bowers v. Hardwick*.[152] There Justice Byron White for the majority observed that despite the procedural implications of the due process clause, the Court has read substantive restrictions into due process and recognized "rights that have little or no textual support in the constitutional language."[153] The majority refused "to discover new fundamental rights imbedded in the Due Process Clause," explaining that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[154] "Otherwise," Justice White stated, "the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority."[155]

My "failure" to come up with a "theory of adjudication" pales beside the theory he offers. For 600 years the Anglo-American courts have managed to decide cases without his theory of adjudication, and I believe that they will continue to do so. He would encourage headstrong judges to pursue their own ends.[156]

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149. *Id.*

150. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 136 (1921).

151. Balkin, *supra* note 2, at 936, 944; *see supra* text accompanying note 80.

152. 478 U.S. 186 (1986).

153. *Id.* at 191.

154. *Id.* at 194.

155. *Id.* at 195.

156. An arch-activist, Mark Tushnet, observes that "constitutional theory must sufficiently contain judges' ability to invalidate such [enacted] laws so that we cannot characterize invalidation as mere exercises of individual will." Tushnet, *supra* note 131, at 690.

Consider Justice Brennan's stand on death penalties. Leonard Levy said:

> Brennan's humanistic activism runs amok and he evinces an arrogance beyond belief. . . . He believed that the ban on cruel and unusual punishments embodies uniquely 'moral principles' that prevent the state from inflicting the death penalty because it irrevocably degrades 'the very essence of human dignity.' What makes this humane opinion so arrogant is that Brennan knows that the Fifth Amendment three times assumes the legitimacy of the death penalty as does the Fourteenth Amendment (no denial of life without due process). Moreover, he also understands that the majority of his countrymen and his fellow Justices disagree with his opinion, yet he holds it, he said, because he perceived their interpretation of the text 'to have departed from its essential meaning' making him 'bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path.' No one has a right to veto the Constitution because his moral reasoning leads him to disagree with it in a particular case. Brennan and Thurgood Marshall corrupt the judicial process and discredit it.[157]

Brennan is a demigod in the activist Pantheon, and I doubt not that Balkin shares his views.

Balkin is nothing if not thorough. My citation of Confucius' warning that "he who thinks the old embankments useless and destroys them, is sure to suffer the desolation caused by overflowing water,"[158] impels him to assert that "[these] words actually deconstruct this theory of constitutional interpretation. To continue the metaphor, the Framers were not the only ones who built embankments. *Brown v. Board of Education* and *United States v. Darby* are also foundations or embankments of their own kind."[159] Balkin misses the point—*Brown* destroyed the old embankments in order to erect the new.[160]

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157. L. LEVY, *supra* note 142, at 372-73. Sidney Hook decries those "who know what the basic human needs *should* be, who know not only what these needs are but what they require *better* than those who have them or should have them." S. HOOK, PHILOSOPHY AND PUBLIC POLICY 28, 29 (1980) (emphasis added).

158. Balkin, *supra* note 2, at 946.

159. *Id.*

160. For citations to commentators, including activists, who acknowledge that *Brown* was without constitutional warrant because the Framers had excluded segregation from the Fourteenth Amendment, see Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311 (1979).

Lenin and Stalin also replaced old embankments with new, and Gorbachev's critics consider that his breach in the new embankments will lead to desolation. That we today approve of *Brown*—it could not have carried as an amendment[161]—does not lessen the fact that it had no constitutional warrant, that it unloosed an expansionist Court that moved on to ever fresh feats of constitutional revision, striking down the right of a State to require a twelve-man jury,[162] to regulate the wages of a janitor in its own schools,[163] conducing to government by judiciary. Madison, Marshall and Story would not have agreed that judicial alteration of the Constitution for the best of motives was an improvement on the Constitution adopted by the Founders. The question—was the replacement of the old embankments by the new legitimate—will not vanish because the new now meet with our approval. "The end justifies the means" is no slogan for a democracy.

APPENDIX

A number of Balkin's far-out versions of history call for comment.

"The greatest fear of the Ratifiers was a tyrannical federal government that would invade the rights of individuals."[164]

In his sparse enumeration of the rights secured by the original Constitution, Hamilton listed the privilege of habeas corpus, the prohibition of bills of attainder or ex-post facto laws, and the circumscribed treason provision.[165] Zecheriah Chafee concluded that the original Constitution "did very little to protect human rights against the State."[166] Meager were the rights added by the Bill of Rights. Four amendments are concerned with criminal procedure, another with civil suits, and the others

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161. Edmond Cahn, a Warren enthusiast, acknowledged 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, 156-57 (1955).

162. Williams v. Florida, 399 U.S. 78 (1970). The idiosyncratic nature of the six-man jury decision is pointed up by the subsequent Burch v. Louisiana, 441 U.S. 130, 137 (1979), rejecting a 5-man jury, though ruefully admitting that "the line between six members and five was not altogether easy to justify." One is reminded of the chant by the pigs in George Orwell's Animal Farm: "FOUR LEGS GOOD, TWO LEGS BAD." G. ORWELL, ANIMAL FARM 36 (1946).

163. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

164. Balkin, *supra* note 2 at 949-50.

165. THE FEDERALIST No. 84, at 556 (A. Hamilton) (Mod. Lib. ed 1937).

166. Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 at 90 (1956).

safeguard freedom of speech and religion, the right to bear arms, and a ban on quartering soldiers in private homes. Alpheus Thomas Mason correctly observed that "[i]n the Conventions and later, states rights—not individual rights—was the real worry."[167] For the Founders, Gordon Wood explained, the collective interest rose above that of the individual.[168] Patrick Henry, for example, stated in the Virginia Convention that "the necessity of securing our personal rights seems not to have pervaded the minds of men."[169]

Balkin refers to the 1866 Framers' "general commitment to equality."[170]

The incontrovertible exclusion of suffrage from the fourteenth amendment—the quintessential right which could serve to protect all others—alone argues against a "general commitment to equality." Then too, the framers rejected every attempt to bar *all* discriminations.[171] In truth, "equal protection" was identified with the "limited category" of rights protected by the Civil Rights Act of 1866,[172] embodied in the Fourteenth Amendment.

The Fourteenth Amendment was designed both to prevent repeal of the antecedent Civil Rights Act and to embody, to constitutionalize, it. Charles Fairman justly concluded that "[t]he provisions of the one are treated as though they were essentially identical with those of the other."[173] So, George Latham stated that "the 'civil rights bill' which is now a law . . . covers exactly

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167. A. MASON, THE STATES' RIGHTS DEBATES—ANTI-FEDERALISM AND THE CONSTITUTION 75 (1964). So far as individual rights came into question, Hamilton wrote, "the State legislatures" would be the "vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government." THE FEDERALIST No. 26, at 163 (A. Hamilton) (Mod. Lib. ed. 1937).

168. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 at 53-67 (1969).

169. 3 J. ELLIOT, DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 588 (1836) (emphasis added). In THE FEDERALIST No. 84, at 559 (A. Hamilton) (Mod. Lib. ed. 1937), Hamilton emphasized that the Constitution "is merely intended to regulate the general political interests of the nation," not like a state constitution "which has the regulation of every species of personal and private concerns." *See also supra* note 34.

170. Balkin, *supra* note 2, at 950.

171. R. BERGER, GOVERNMENT BY JUDICIARY—THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 163-64 (1969) [hereinafter R. BERGER, GOVERNMENT BY JUDICIARY].

172. *Infra* text accompanying note 180.

173. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 44 (1949).

the same ground as the amendment."[174] Martin Thayer said, "it is but incorporating in the Constitution the principle of the civil rights bill which has lately become a law."[175]

The bill prohibited discrimination with respect to the right to contract, to own property, and to have access to the courts.[176] Nevertheless, John Bingham, draftsman of the Fourteenth Amendment, took violent exception to the oppressive scope of the general preliminary words "civil rights and immunities."[177] His opposition led to the deletion of those words in order, said Wilson, to obviate "a latitudinarian construction not intended," to remove "the difficulty growing out of any other construction *beyond the specific rights named* in the section."[178] Summarizing this history in *Georgia v. Rachel*,[179] the Court declared, "the legislative history of the Act clearly intended to protect a *limited category* of rights."[180] Mixed schools, Wilson assured the Framers, was not among them.[181] Alexander Bickel advised Justice Frankfurter, "[I]t is impossible to conclude that the 39th Congress intended that segregation be abolished."[182] To quote only Samuel Shellabarger, the bill "secures *equality of protection* in those enumerated civil rights"[183] This is what the Framers contemplated by "equal protection," not "a general commitment to equality." The reason, as David Donald observed, was that racism "ran deep in the North," and the suggestion that "Negroes should be treated as equals to white men woke some of the deepest and ugliest fears in the American mind."[184]

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174. CONG. GLOBE, 39th Cong., 1st Sess. 2883 (1866).

175. *Id.* at 2465. Howard Jay Graham, an early activist, wrote that "[v]irtually every speaker in the debates on the Fourteenth Amendments—Republican and Democrat alike—said or agreed that the Amendment was designed to embody or incorporate the Civil Rights Act." H. GRAHAM, EVERYMAN'S CONSTITUTION 291 n.73 (1968). In a contemporary decision Justice Bradley declared that "the first section of the bill covers the same ground as the fourteenth amendment." Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas 649, 655 (C.C.D. La. 1870) (No. 8,408).

176. A. AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES 185, 188 (1967).

177. *Id.* at 186.

178. A. AVINS, *supra* note 176, at 191 (emphasis added).

179. 384 U.S. 780 (1966).

180. *Id.* at 791 (emphasis added).

181. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (emphasis added).

182. R. KLUGER, SIMPLE JUSTICE 654 (1976). *See also supra* note 160.

183. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866). *See also* Leonard Myers, *id.* at 1621, and R. BERGER, GOVERNMENT BY JUDICIARY, *supra* note 171, at 170-71.

184. D. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 202, 252 (1970).

The "text and intentions of the Framers . . . were . . . always equivocal."[185]

Activists read the "cruel and unusual punishments" of the Eighth Amendment to prohibit death penalties, despite the due process provision for the deprival of life.[186] Balkin, however, has an illustrious precursor, Justice Frankfurter, who referred to due process as a phrase of "convenient vagueness,"[187] although Hamilton stated on the eve of the Convention, "[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 the legislature."[188]

"Constitutional construction is precisely that—construction," i.e. *"addition and supplementation."*[189]

Such word play ignores that "construction" is merely a synonym for "interpretation," meaning to "construe," that such was Chief Justice Marshall's understanding of the judicial function: "The difference between the departments undoubtedly is, that the legislature *makes*, the executive *executes*, and the judiciary *construes* the law."[190] Emphatically, he wrote, the exercise of the judicial power "cannot be the assertion of a right to change that instrument," the Constitution.[191] Balkin's verbal sleight of hand runs into the separation of powers.

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185. Balkin, *supra* note 2, at 953.

186. *See* L. LEVY, *supra* text accompanying note 142.

187. F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 7 (1938). Yet he later stated that "an amendment to the Constitution should be read in a 'sense most obvious to the common understanding at the time of its adoption.' " Adamson v. California, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring).

188. 4 THE PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett & J. Cooke eds. 1962).

189. Balkin, *supra* note 2, at 937.

190. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825) (emphasis added).

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