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# THE SIXTH AMENDMENT: JUDICIAL POWER AND THE PEOPLE'S RIGHT TO GOVERN THEMSELVES\*

WILLIAM GANGI\*\*

"No authority shall on any pretense be exercised over the people or members of this state but such as shall be derived from and granted by them."<sup>1</sup>

## I. INTRODUCTION

In 1641 the good people of Massachusetts specified in their Body of Liberties that:

no man shall be forced by torture to confesse any crime against himself nor any other unlesse it be in some capital case, where he is first fullie convicted by cleare and suffittient evidence to be guilty, after which if the cause be of that nature, that it is very apparent there be other conspiratours, or confederates with him, then he may be tortured, yet not with such tortures as be barbarous and inhumane.<sup>2</sup>

To the modern ear the rights mentioned do not offer much protection. They contain too many conditions and compromises. These specified rights, however, presupposed the authority of citizens and their representatives to think about, discuss and determine public policy. The right to make public policy—the right to self-government—was at the heart of the American Revolution. It was a right that preceded and was considered superior to any individual right.<sup>3</sup> And it is the very right that this

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\* The lecture upon which this article is based was delivered on September 15, 1987, at a Washington University School of Law conference on "Original Intent and the Sixth and Seventh Amendments." This conference was the seventh in a series of eight conferences, sponsored by the Center for Judicial Studies, exploring the original intent and current interpretation of key provisions in the Bill of Rights. The article is printed here with the permission of the Center for Judicial Studies, Washington, D.C.

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1. Constitution of the State of New York (1777).

2. W. KENDALL & G. CAREY, *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION* 52 (1970).

3. "[T]he rights of all individuals will be safest if *first* the rights of the people are assured, and above all the right or rights of the people to *govern themselves*, that is, the very right that . . . emerg[ed] in America from the Mayflower Compact; through the Body of Liberties." KENDALL & CAREY, *supra* note 2, at 66. Elsewhere they note: "the representative assembly is supreme . . . in the sense that no other *political* authority can challenge or gainsay it . . ." *Id.* at 71.

article contends has been eroded by the Supreme Court of the United States.<sup>4</sup>

Under English rule, any absolute individual rights were procedural; such rights were those considered necessary to protect citizens from traditional executive and judicial abuses.<sup>5</sup> After the American Revolution, absolute rights against the legislature would have, in effect, amounted to rights against the people themselves, and thus would have inhibited their ability to respond to unforeseen circumstances.<sup>6</sup> When our forefathers proposed and ratified a system of government, the *written* document that they called a constitution contained no absolute rights. Two years later, the ratified Bill of Rights contained essentially procedural protections.<sup>7</sup> Both documents purposely utilized phrases having long common law histories, and because of those histories, citizens of the

4. See, e.g., R. BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* (1982).

5. KENDALL & CAREY, *supra* note 2, at 51-52.

6. Publius made very clear that a statement of rights, equivalent to the *Magna Carta* or *Petition of Right*, "have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants." Referring to the Preamble he concludes: "Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bill of rights and which would sound much better in a treatise of ethics than in a constitution of government." THE FEDERALIST No. 84, at 513 (A. Hamilton, J. Madison, and J. Jay)(Classic Edition) (hereinafter THE FEDERALIST). Publius was equally frank about power: "It rests upon axioms as simple as they are universal; the *means* ought to be proportioned to the *end*; the persons from whose agency the attainment of any *end* is expected ought to possess the *means* by which it is to be attained." On the most important matters he was the most frank:

These powers [of common defense] ought to exist without limitation, *because it is impossible to foresee or to define correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.

THE FEDERALIST No. 23, at 153.

7. The Bill of Rights had been proposed, lest one forget, by opponents of the Constitution. See THE FEDERALIST, *supra* note 6, No. 84 (addition of a bill of rights unnecessary and dangerous). After the Constitution was ratified, however, the federalists sought to reassure opponents that even the limited powers granted the federal government would be exercised within the context of familiar procedures. "Madison labored persistently on behalf of the Bill of Rights not because he thought it essential but because others did." Rossum, *To Render These Rights Secure: James Madison's Understanding of the Relationship of the Constitution to the Bill of Rights*, III BENCHMARK 11 (1987).

Furthermore, contrary to contemporary belief, I contend the amendments bearing on criminal matters were written from the perspective of innocence, not guilt—to avoid the probable misuse of power. See Gangi, *The Exclusionary Rule: A Case Study in Judicial Usurpation*, 34 DRAKE L. REV. 35, 41 n. 15, 44-46, 99 (1985).

several states were familiar with their meanings. In sum, by ratification these common law meanings became constitutionalized, protected from the ordinary power of legislatures to modify the law.<sup>8</sup>

Before exploring the sixth amendment, permit me to raise this question: if we can clearly discern what the Framers meant by a particular clause, are judges bound to respect that meaning? I propose that they are, and I contend that the admittedly considerable difficulties that inhere in this position, are more easily surmounted than the issues created by the contrary view. For that contrary view raises the questions of what is a written constitution, and whether the Framers' design—government by the people—can be abandoned legitimately without obtaining the people's consent. Before returning to those issues, let us turn to the sixth amendment.

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8. In sum, to those meanings the consent of an extraordinary majority was obtained. To change those meanings a similar extraordinary act is required. Article V affords that opportunity: the amendment procedures. "The Founders resorted to a written Constitution the more clearly to limit delegated power, to create a fixed Constitution; and an important means for the accomplishment of that purpose was their use of common law terms of established and familiar meaning." BERGER, *supra* note 4, at 61. "[A]s Justice Story stated . . . the common law 'definitions are necessarily included, as much as if they stood in the text of the Constitution.'" *Id.* (quoting *United States v. Smith*, 18 U.S. 153, 160 (1820)).

To recognize the pertinence of intent and to concede its importance does not foreclose difficulties of interpretation. For example, constitutional *grants of power* must be approached differently from *prohibitions*. Although both demand judicial vigilance, what is protected must be distinguished from what is not. See Gangi, *The Supreme Court: An Intentionist's Critique*, 28 CATH. LAW. 253, 306-08 n.283 (1983) (additional comments). For an excellent critique of the intentionist view see Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). The quality of this piece deserves serious response, but for now permit a few brief comments. Powell does not seem to use the term "intent" consistently. After rightly distinguishing motivation from intent and public declaration from private understanding, he fails to apply those distinctions. On other occasions, in violation of acceptable canons of construction, Powell defends his rejection of intent by using opponents: Randolph instead of Hamilton, Gerry instead of Madison. Most importantly, Powell *never* addresses the issue of the scope of the judicial power. He apparently assumes that by sheer legal sleight of hand the judicial power legitimately can be converted into the legislative power. I reject on principle any discussion of "interpretation" that by logic defies historical reality. A next to nothing power cannot by interpretation be elevated to the center of the governing process. Finally, as one probes the intentionist problem, opponents of original intent seem to suggest that the meaning of all statutes or constitutional provisions are incomprehensive. Certainly, those who proposed the Constitution and ratified it and legislators who propose legislation must mean to address some evil, suggest some cure? In sum, some nonintentionalists render the whole constitution making process irrational.

## II. THE RIGHT TO COUNSEL

### A. *English Background*

Until 1695 those accused of felonies in England, including treason, were not allowed counsel at all.<sup>9</sup> In that year, however, Parliament not only granted defendants the right to “retain counsel [in treason cases], but [also] . . . provided that the court must appoint counsel . . . upon the request of the accused.”<sup>10</sup> These were harsh times. Most felonies committed throughout the 17th and 18th centuries were capital offenses. Nevertheless, not until 1836 did Parliament extend to all felony defendants the right to counsel as we know it today. Despite the absence of *statutory* authority between 1695 and 1836, English judges extended the right to counsel to felony defendants on a case by case basis.<sup>11</sup>

### B. *American Colonies*

In the American colonies, instead of relying on judicial discretion, local legislatures actively secured the right to retained counsel.<sup>12</sup> Furthermore, in several colonies “courts appointed counsel where a capital crime was charged and the accused requested it.”<sup>13</sup> These colonial courts

9. W. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* (1955). As Professor Beane describes it the right to retained counsel “illogically” existed in misdemeanor cases (e.g., libel, perjury, battery) and crimes of a political nature under the jurisdiction of the Star Chamber. In the latter, counsel was “mandatory.” *Id.* at 8-10. For reasons stated later, *see infra* comments accompanying notes 56-60, I am uncomfortable with characterizations such as “illogically” because they often demonstrate the researcher’s inability to grasp the thought processes of his subject. Professor Beane does make a stab at it (“the state’s interest was apparently deemed so slight that it could afford [in misdemeanor cases] to be considerate toward defendants.”), but I would be cautious in placing great weight on such judgments. *Id.* at 8.

10. *Id.* at 9. Beane notes that this gesture resulted largely from the “frequent alternations of political power which characterized “England at the time” and “which made treason a likely concomitant of a political career for many who felt themselves ‘loyal’ and decent citizens.” *Id.* For some time I have been doubtful of the modern assumption that concern for criminal defendants was a primary motivation for the proposal of the Bill of Rights. *See Gangi, supra* note 7, at 98. *Cf. W. BEANEY, supra* note 9, at 17-18.

11. W. BEANEY, *supra* note 9, at 9. Despite the fact that no *statutory* basis existed, “in many cases the court of its own volition, and without pretending to change the rule, permitted counsel to argue points of law.” *Id.* Such power, absent contrary statutory law is within the traditional common law power of the judge. Judicial lawmaking, however, is superceded by statutory law, and while a judge’s good faith application may modify application of the statute, intentional disregard of the lawmaker’s intent is an impeachable offense.

12. W. BEANEY, *supra* note 9, at 25, 15-18. *See also* Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 *YALE L.J.* 1000, 1030-31 (1964) [hereinafter *Historical*].

13. W. BEANEY, *supra* note 9, at 18.

therefore provided more protection than Parliament contemporaneously provided for English citizens in treason cases.<sup>14</sup>

### C. *After the Revolution*

In the words of Justice Roberts the thirteen sovereign states “exhibit[ed] great diversity” respecting the right to counsel.<sup>15</sup> Some states did not grant the right to counsel constitutional status. In those states that did, the right apparently consisted only of “the right to retain counsel of one’s own choice and at one’s own expense.”<sup>16</sup> Citizens of the several states remained free to define the right to counsel as they saw fit because at that time the sixth amendment only applied to the federal government.<sup>17</sup>

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14. See *infra* text accompanying notes 9-11.

15. *Betts v. Brady*, 316 U.S. 455, 467 (1941). Justice Roberts commented: “In the light of . . . common law practice . . . constitutional provisions to the effect that a defendant should be ‘allowed counsel’ . . . were intended to do away with the rules which denied representation . . . but were not aimed to compel the State to provide counsel for a defendant.” *Id.* at 466. See also W. BEANEY, *supra* note 9, at 21 (“no uniform practice,” “Diversity of policy”). Beaney notes that the colonialists had “greater distrust of government” and because they had a “greater opportunity to indicate that distrust in legislative form . . . [it] may go far to explain the widespread statutory concern in the colonies over the right to counsel and the absence of any substantial change in actual judicial procedure.” He then concludes “[a]s yet we have insufficient evidence upon which to base any claim that the American practice was in sharp contrast to the English. Advance there was, but in many ways it was a technical advance.” *Id.* at 21-22.

Of course what comes to mind is the awkward situation colonialists found themselves in when they tried to assert the rights of Englishman, only to find that the rights practiced in the colonies may have exceeded those in the mother country. But don’t get distracted by the specific content of those rights—concentrate on the *right* to make them—the right to self-government.

16. W. BEANEY, *supra* note 9, at 21. Only two states made provision for appointed counsel. In New Jersey appointed counsel was provided “by statute” and in Connecticut the right existed “by practice.” *Id.* In neither case, therefore, was the right to appointed counsel a constitutional one.

Justice Roberts summarized the situation thusly:

Rhode Island had no constitutional provision on the subject until 1843, North Carolina and South Carolina had none until 1868. Virginia has never had any. Maryland, in 1776, and New York, in 1777, adopted provisions to the effect that a defendant accused of crime should be “allowed” counsel. A constitutional mandate that the accused should have a right to be heard by himself and by his counsel was adopted by Pennsylvania in 1776, New Hampshire in 1774, by Delaware in 1782, and by Connecticut in 1818. In 1780 Massachusetts ordained that the defendant should have the right to be heard by himself or his counsel at his election. In 1798 Georgia provided that the accused might be heard by himself or counsel, or both. In 1776 New Jersey guaranteed the accused the same privileges of witnesses and counsel as their prosecutors “are or shall be entitled to.”

*Betts v. Brady*, 316 U.S. at 465.

17. *Barron v. Mayor of Baltimore*, 32 U.S. 243 (1833).

#### D. Federal Courts

The sixth amendment provides that “in all criminal prosecutions, the accused shall enjoy . . . the assistance of counsel for his defense.”<sup>18</sup> For the Framers the amendment assured only the right to retained counsel, nothing more.<sup>19</sup> Two occurrences compel this conclusion. First, on the day before the sixth amendment was proposed, Congress (presumably upon Article III “regulations” authority) passed a statute authorizing the use of retained counsel in federal courts.<sup>20</sup> Second, and even more significant, seven months before the amendment was ratified, Congress further provided for assigned counsel where a defendant is “indicted of treason or other capital crime.”<sup>21</sup> From these two statutes Professor William Beaney concluded that for Congress “the sixth amendment was irrelevant . . . to the subject of appointment of counsel.”<sup>22</sup>

In sum, the amendment guaranteed only the right to *retained counsel*. Both Congressional statutes had gone further by not only extending the right to match the English practice of assignment in treason cases, but also authorizing assignment in all capital cases.<sup>23</sup> After the amendment was adopted no one suggested that Congress was obliged to assign counsel in all felony cases, and in fact Congress never did.<sup>24</sup>

18. U.S. CONST. amend. VI.

19. It may be “impossible” to know with certitude “the intentions of Congress” because we have no record of what transpired. W. BEANEY, *supra* note 9, at 24. I contend, however, that when the information provided by Beaney is considered along with (a) an objective understanding of what the Bill of Rights and division of powers between the federal government and the states did and did not provide, (b) appropriate canons of construction and (c) due weight is given to contemporaneous and subsequent actions by Congress and the states, Beaney’s somewhat reluctant conclusion that the sixth amendment right was confined to retained counsel is irrefutable.

20. W. BEANEY, *supra* note 9, at 28. The statute provided that “the parties may plead and manage their own causes personally or by the assistance of counsel.” *Id.* This provision was contained in the very significant Judiciary Act of 1789, wherein Congress exercised power granted it in Article III: “In all other Cases . . . such Exceptions, and under such Regulations as the Congress shall make.” U.S. CONST. art. III, § 2. Presumably these measures were taken to allay the fears of anti-federalists that rights already being enjoyed in several states would not be respected in federal courts. “The people wanted a Bill of Rights, and even though there was no need for it, Madison was prepared to give it to them—but only if it was “properly executed.” Only then could there be “something to gain” and “nothing to lose.” Thus, Madison proposed amendments that were “of such a nature as will not injure the Constitution.” Rossum, *supra* note 7, at 12.

21. W. BEANEY, *supra* note 9, at 28.

22. *Id.*

23. *Id.*

24. Professor Beaney comments:

The ratification of the Sixth Amendment was not followed by statutory changes, and the acts of 1789 and 1790 remained the sole guides to the legal import of the Sixth Amendment until 1938. Story described the right contained in the Sixth Amendment as “the right to

In federal courts, as a matter of constitutional law, neither the fifth nor sixth amendments applied to police interrogation because those clauses did not become operative until a criminal prosecution commenced,<sup>25</sup> and that did not occur until arraignment.<sup>26</sup> Instead, with respect to police interrogation, in both federal and presumably in state courts, common or statutory rules of evidence governing confession admissibility applied.<sup>27</sup> Such rules, however, did not enjoy constitutional stature, and for more than a century after the adoption of the fifth and sixth amendments, the sole issue with respect to police interrogation was whether an obtained confession was "voluntary."<sup>28</sup> In fact, as late as 1955 Professor David Fellman could state that "[A]n accused does not have a constitutional right to the assistance of a lawyer during the police interrogation following arrest, and the overwhelming weight of authority holds that a confession is not necessarily bad because it was made without the advice of counsel."<sup>29</sup>

Not until 1938 did the Supreme Court in *Johnson v. Zerbst*<sup>30</sup> rule that the sixth amendment required assignment of counsel in all capital cases.

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have counsel employed for the prisoner," and Cooley permitted the phrase to stand as Story had written it. If there had been any general understanding that federal courts were required by the Sixth Amendment to appoint counsel in other than capital cases, *which were covered by the 1790 act*, it seems remarkable that these two astute observers failed to say so.

W. BEANEY, *supra* note 9, at 28-29.

25. The fifth amendment provides: "No person . . . shall be compelled in any criminal case to be witness against himself." U.S. CONST. amend. V. The compulsion prohibited referred to that of a legal nature, to put one on oath, not physical coercion. See Pittman, *The Fifth Amendment: Yesterday, Today and Tomorrow*, 42 A.B.A. J. 509, 510 (1956). See also *Brown v. Mississippi*, 297 U.S. 278, 285 (1936).

26. *Historical, supra* note 12, at 1005.

27. *Wilson v. United States*, 162 U.S. 613 (1896) (confession found voluntary despite fact that defendant was in custody, manacled and questioned by a commissioner who neither apprised him of his right to counsel nor was represented by same). See generally H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIAL IN COMMON LAW 232-46 (1940) and Gangi, *The English Common Law Confession Rule and Early Cases Decided by the United States Supreme Court*, Information Report Series, #205, AM. JUDICATURE SOC. (1974).

28. Until *Lisenba v. California*, 314 U.S. 219 (1941), "voluntary" probably meant "trustworthy". See Gangi, *supra* note 27, at 5-8. See also Gangi, *The Inbau-Kamisar Debate: Time for Round 2?*, 12 W. ST. U.L. REV. 117, 142-43 (1984). The original purpose of the confession rule was the admission of reliable evidence. *Id.* at 143 n.148. Even a staunch defender of defendant rights such as Yale Kamisar concurs in that opinion. See Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS 254 n.49 (1980).

29. Fellman, *The Right to Counsel Under State Law*, 1955 WIS. L. REV. 281, 292 (1955).

30. *Johnson v. Zerbst*, 304 U.S. 458 (1938). "'The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.'" *Id.* at 463. Professor Beaney character-



That case in turn drew upon a fourteenth amendment due process case.<sup>31</sup> In *Powell*, to which we shall return in a moment, Justice Sutherland “applied to the states through the due process clause of the fourteenth amendment the same requirement that a *federal statute* had since 1790 imposed on federal courts in capital cases.”<sup>32</sup> I contend, however, that in both instances the Supreme Court exceeded its authority. In confusing statutory and constitutional rights the Court majority illegitimately imposed upon the American people the *Justices’* “deep concern for the rights of all criminal defendants.”<sup>33</sup> Neither opinion cited credible evidence to support two implicit contentions: (1) that the Court is authorized to elevate rights from statutory or common law to constitutional status, and (2) that those who framed the fourteenth amendment intended any definition of due process to apply against the states other than that which had applied against the federal government through the fifth amendment.

The *Powell* case is nevertheless instructive because Justice Sutherland refused to employ a traditional canon of construction, enumeration ex-

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izes Justice Black’s statement as a “new rule” (W. BEANEY, *supra* note 9, at 42) and elsewhere comments:

There was no feeling before 1938 that defendants who pleaded guilty, or those who failed to request counsel, had a constitutional right to be advised and offered counsel, or that a conviction without counsel was void. History denied such a meaning to the counsel provision of the Sixth Amendment, and no responsible authority, scholarly or judicial, had held it to be within the scope of the Amendment.

*Id.* at 32-33.

31. *Powell v. Alabama*, 287 U.S. 45 (1932). Defendants, black, were charged with assaulting whites, including two women. *Id.* at 49-52. Beaney comments that “Justice Sutherland carefully limited the decision to the facts in the case.” W. BEANEY, *supra* note 9, at 34. Justice Sutherland had stated:

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .

*Powell v. Alabama*, 287 U.S. 45, 71 (1932).

32. W. BEANEY, *supra* note 9, at 34 (emphasis added). I object to Beaney’s characterization, omitted in the text, of the Court as “merely” having elevated a statutory requirement to a constitutional one. The Court’s reasoning fails because of what Beaney elsewhere notes: “If Congress in 1790 had chosen to strengthen a weak constitutional requirement by a more generous statute where capital offenses were involved, it had obviously decided against extending this treatment to noncapital cases.” *Id.* at 38. Furthermore, if the Court can elevate statutory protections to constitutional ones, it simultaneously contracts the people’s right to govern themselves. It places restrictions on the peoples’ ability to make policy decisions without their consent. They are bound to respect the *intent* of ratifiers — not the *Justices*.

33. *Id.* at 34.

cludes the nonmentioned,<sup>34</sup> that had been employed in an analogous due process case.<sup>35</sup> In *Hurtado* Justice Matthews had noted: "According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, *we are forbidden to assume*, without clear reason to the contrary, that any part of this most important amendment is superfluous."<sup>36</sup> He further argued that "[t]he conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent," and had the framers of the fourteenth amendment wished to impose more specific requirements they would have made, as they had done in the fifth amendment, "express declarations."<sup>37</sup>

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34. See Gangi, *Judicial Expansionism: An Evaluation of the Ongoing Debate*, 8 OHIO N.U.L. REV. 1, 9 (1981); Gangi, *O What a Tangled Web We Weave . . .*, 19 THE PROSECUTOR 15, 17-18 (1986) [hereinafter *Tangled*]. The Framers of the Constitution were both aware of canons of construction and used them, including the one noted in the text. Publius notes: "'Specification of particulars is an exclusion of generals.'" See *Federalist*, *supra* note 6, No. 41, at 263. For a general discussion, see text and comments accompanying notes 57-66 in *Tangled*, *supra*. Professor Beane noted:

Nor does the Fifth Amendment due process clause furnish any guidance. . . . Apart from the logical difficulty in arguing that a broader right to counsel should be included under the vague term "due process," when a more explicit provision was available, the concept of due process was limited, at least until 1850, to its historic meaning "law of the land"; the law of the land, as Cooley explained, required procedural safeguards comparable to those extended at common law. . . . [T]here was no common-law precedent which called for the appointment of counsel except in treason cases. Thus, the requirement that due process of law be observed could add nothing to the right to counsel granted by the Sixth Amendment.

W. BEANEY, *supra* note 9, at 29.

35. *Hurtado v. California*, 110 U.S. 516 (1884) (The words "due process of law" in the Fourteenth Amendment of the Constitution of the United States do not necessarily require an indictment by a grand jury in a prosecution by a State for murder.)

36. *Id.* at 534 (emphasis added). Justice Matthews noted that the fifth amendment text included the phrase, "unless on a presentment or indictment of a grand jury" yet toward the end also stated, "nor be deprived of life, liberty, or property, without due process of law." Hence, for the Court to declare that "due process of law" incorporated an "indictment of a grand jury" would be to render specific grand jury language "superfluous." *Id.*

37. *Id.* at 534-35. Justice Harlan, dissenting, specifically pointed out the consequences of this Court's position. *Id.* at 547-49. He stated: "[t]his line of argument . . . would lead to results which are inconsistent with the vital principles of republican government," specifically mentioning protections such as double jeopardy, compulsory self-incrimination, taking of property without just compensation and others. *Id.* at 547-58. In reply, it appears that Justice Matthews countered with, among other reasons, that (1) common law practices should be put in context (i.e., since a grand jury then "heard no witnesses in support of the truth of the charges to be preferred . . . or indicted upon common fame and general suspicion . . . that it is better not to go too far back into antiquity for the best securities for our 'ancient liberties,'" ) *Id.* at 530; (2) "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law," *Id.* at 530; and (3) the virtues of

Nor did Justice Sutherland in *Powell* “overlook” Justice Matthew’s application in *Hurtado* of the aforementioned canon.<sup>38</sup> Instead of submitting, however, he countered with the statement that “the *Hurtado* case [did] not stand alone,”<sup>39</sup> citing two groups of precedents. In the first group were cases where the Court had ignored the canon in order to protect substantive economic rights<sup>40</sup> while in the second group<sup>41</sup> were more *modern*, personal liberty, cases. In *Powell*, Justice Sutherland seems to be saying that just as a majority of Justices had used their votes to elevate economic rights to constitutional proportions so were he and his colleagues prepared to elevate personal rights. In sum, if good “results” demanded that traditional canons of construction be abandoned, so be it.<sup>42</sup>

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federalism: “the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure,” *Id.* at 535, then quoting Justice Bradley (citation omitted): “Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding.” *Id.*

38. *Powell v. Alabama*, 287 U.S. 45, 65 (1932). Justice Sutherland stated that “[i]n the face of the reasoning of the *Hurtado* Case, if it stood alone, it would be difficult to justify the conclusion that the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause.” *Id.* at 66.

39. *Id.* at 66.

40. *Id.* (citing *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 241 (1897)) (“private property . . . taken for public use without just compensation, was in violation of the due process of law required by the Fourteenth Amendment, notwithstanding that the Fifth Amendment explicitly declares that private property shall not be taken for public use without just compensation.”) (citations omitted). The *Powell* majority in fact was a transitional one, one that used earlier infusions of economic rights to justify elevation of personal liberties to constitutional status. Beane comments: “The eloquence of Justice Sutherland (whose economic predilections caused American liberals to tag him as a reactionary) in discussing the right of an indigent accused to make his defense by counsel had had an influence far beyond the facts and the holding in the particular trial.” W. BEANEY, *supra* note 9, at 34.

41. *Powell v. Alabama*, 287 U.S. at 67 (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925)); *Stromberg v. California* 283 U.S. 359, 368 (1931); *Near v. Minnesota*, 283 U.S. 697, 707 (1931). The tactic of eventually citing yourself for authority is not a lesson ignored by Chief Justice Earl Warren and his successors. See *Tangled*, *supra* note 34, at 20.

42. With respect to the “results” orientation of contemporary adjudication, see Gangi, *supra* note 34, at 33-37. The problem has been with us for some time, see Gangi, *supra* note 8, at 260-64. Cf. Shattuck, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which “Protects Life, Liberty and Property,”* 4 HARV. L. REV. 365, 375-76 (1891).

*Powell* in fact marks a transition case, before the *laissez faire* cases were repudiated by the New Deal Court and so thereafter an economic and personal liberty double standard would emerge, wherein the Justices deferred to Congress’ definition of economic rights but with “new faith” took on an active role in the expansion of personal liberties. Kutler, *Raoul Berger’s Fourteenth Amendment: A History or Ahistorical?*, 6 HASTINGS CONST. L. Q. 511, 513 (1979). See also Gangi, *Expansionism*, *supra* note 34, at 40-42 (double standard).

That is about as far as I wish to trace the development of the sixth amendment. After the 1930's the sixth amendment right to counsel, the common law confession, and fifth amendment compulsory self-incrimination cases become intertwined with fourth amendment exclusionary rule cases in the Supreme Court's dialectic march to the fantasy world of *Miranda v. Arizona*.<sup>43</sup>

Thus, the *Powell* and *Johnson* cases demonstrate only this: by the 1930's the newest variation of progressivist principles were beginning to be injected into constitutional law. However these principles are expressed, whether in terms of "fundamental principles of liberty and justice,"<sup>44</sup> of "ordered liberty,"<sup>45</sup> or of "methods that commend themselves to a progressive and self-confident society,"<sup>46</sup> none are traceable to the intentions of the Framers. Therefore, none should enjoy constitutional stature. Judges have no authority to impose such standards on Congress or the states. Sutherland's defense amounts to an early version of what Professor Yale Kamisar calls the "time lag argument": an earlier judicial abuse is cited to justify a subsequent one.<sup>47</sup> On the contrary, I contend that if cited precedents do not rest on the Framers' intentions, or do not establish upon what authority the court makes law, then the precedents cited, *as well as the opinion being challenged*, become suspect.<sup>48</sup>

### III. JUDICIAL REVIEW AS A LIMITED POWER

All citizens and agents of the government are bound by the clearly discernible intentions of those who framed and ratified the constitution and its subsequent amendments. Judicial review is legitimate, intended by the Framers to impede executive or legislative overreaching or attempts to reduce the protection afforded by the meaning the common law terms had when they were elevated to constitutional status.<sup>49</sup> Publius summed it up nicely: "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their represent-

43. *Miranda v. Arizona*, 384 U.S. 436 (1966). See *Tangled*, *supra* note 34, at 20.

44. *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926), cited in *Powell v. Alabama*, 287 U.S. at 67.

45. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.).

46. *McNabb v. U.S.*, 318 U.S. 332, 344 (1943) (Frankfurter, J.).

47. Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?*, 62 JUDICATURE 67, 74 (1978).

48. Gangi, *supra* note 7, at 94-95.

49. See Gangi, *supra* note 34, at 10-14 and *Tangled*, *supra* note 34 at 16-17.

atives in a departure from it prior to such an act.”<sup>50</sup>

Judges remind the majority’s presently elected representatives of the limits on their power that were agreed to by a past extraordinary majority. Note well, however, that the power wielded by the judge—the power of judicial review—does *not* stem from personal wisdom but instead from the judge’s conclusion that the Framers’ intent is inconsistent with what the contemporary representatives desire. Constitutionalism meant to the Framers and the subsequent draftsmen of amendments that the judiciary must be bound to the intent of those who wrote and ratified the relevant constitutional text.<sup>51</sup> If that understanding of constitutionalism has changed, the American people are entitled to know by what “solemn and authoritative act” “the established form” of their government has been “annulled or changed.” When did the American people abandon republican self-government and embrace rule by judges?<sup>52</sup>

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50. *Federalist*, *supra* note 6, No. 78, at 470. Hamilton makes a distinction between the intent of the people as expressed in the Constitution, and the contemporary expression of intent voiced by the people’s legislators. When the former conflicts with the later, the former is to prevail.

51. A unanimous 1872 Judiciary Committee Report noted:

In construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended to be accomplished by those who framed . . . and adopted it . . . A construction which should give . . . [a] phrase . . . a meaning different from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution. . . . A change in the popular use of any word employed in the Constitution cannot retroact upon the Constitution, either to enlarge or limit its provisions. . . . Judge Thomas Cooley . . . wrote: ‘The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time . . . [T]he object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it.’

As quoted in Berger, *‘Government by Judiciary’: Judge Gibbons’ Argument Ad Hominem*, 59 B.U.L. REV. 783, 785 n.12 (1979) (citations omitted).

52. The Framers believed judges possessed no special expertise for public policymaking. Elsewhere I have stated:

An expanded judicial role requires members of the judiciary to become experts on topics ranging from anatomy to zoology—to presume an expertise sufficient to resolve differences of opinions within each field, as well as to evaluate periodic challenges to essential assumptions therein. The intentionist recognizes that such expertise is inherently presumptuous and leads to the probability that members of the judiciary will substitute personal preferences for those of the Framers or legislators. The judiciary’s responsibility is to guard constitutionalized principles and not to decide the common good where those principles are not at issue. In summary, the intentionist believes that it is quite enough for a judge to be required to have constitutional competency and to exercise judicial power prudently. The Constitution did not burden members of the judiciary with more. On the historical record, the intentionist believes the Framers were correct, for experience has taught that when members of the judiciary do not so confine themselves, they have become neither competent nor prudent.

Gangi, *supra* note 8, at 302. See also DuPont, *No Matter What You Think About —, The Consti-*

Given the above views, won't the Constitution become inflexible, unable to adapt to changing circumstances? No! Societal adaptability to changing circumstances traditionally has been a legislative function.<sup>53</sup> For example, although the sixth amendment secured only the right to retained counsel, Congress already had provided statutory rights to assigned counsel in treason and capital cases. All the sixth amendment did was to guarantee that the right to retained counsel would not ordinarily be denied. The sixth amendment provision, however, does not inhibit the legislature from providing more extensive statutory protections.

Hence, although I contend that the *Supreme Court* cannot as a matter of constitutional law legitimately require assignment of counsel to all defendants in federal courts charged with felonies, the Constitution does not prevent *Congress* from imposing such a requirement. Indeed, if Congress wishes, it might provide that counsel be assigned in all misdemeanor cases, regardless of ability to pay, and that that right shall commence either once an investigation begins to focus on the accused or once the accused's freedom of action is limited in any significant way.<sup>54</sup>

But unless judges establish that any requirements they impose can be located in the intentions of those who framed relevant constitutional provision, they cannot legitimately inhibit the people's representatives from addressing public policy matters as these representatives see fit. If, on one level, some citizens believe that there should be a law permitting or prohibiting certain conduct, they must convince their fellow citizens of their cause. If, on another level, other citizens believe statutory laws provide inadequate security from feared abuse, they must do what their ancestors did to obtain the constitutional protections presently enjoyed: use the amendment process. To counter with the argument that both the legislative and amendment processes are cumbersome not only fails to address the legitimacy issue but also reveals ignorance of our history and constitutional structures.<sup>55</sup> Individuals making that argument gamble

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*tion Should Not be Compromised*, LEGAL BACKGROUNDER, WASHINGTON LEGAL FOUNDATION 1, 6-7 (June 26, 1987) (court contributed to segregation and economic recession and depression).

53. See generally W. HURST, DEALING WITH STATUTES 4 (1982) (primary task of legislatures is to adopt society to changing circumstances) and Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810 (1974) (critique of democratic process difficult to sustain).

54. Some of the language in the text of course is borrowed from *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964) ("investigation . . . has begun to focus") and *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) ("freedom of action . . . any significant way").

55. See Gangi, *supra* note 34, at 37-39. See also Choper, *supra* note 54.

that any short term good results obtained will not in the long term undermine constitutional structures. But who authorized such risk taking? No one. It is illegitimate.

Freedom to decide public policy questions is on the other side of the coin demanding submission to the Framers' intentions. The Framers never authorized the judiciary to adapt the constitution to changing circumstances or to create constitutional rights; they only authorized the judiciary to guard original intent. Judicial review was never intended as an alternative to the legislative power. It was but one device to protect citizens from the natural tendency of democratic republics to tyranny: the consolidation of power. But, being in the minority on public policy issues is not identical with tyranny in the constitutional sense simply because, in the eyes of those in the minority, the rights extended or the public policies adopted are not as broad, as humane or as just as the minority thinks they ought to be. Bluntly put, no judge as a matter of constitutional law can legitimately impose on the people even the most just or moral proscriptions. As a human being and citizen I might applaud those proscriptions, I might even prefer them to the ones offered by the Framers, but judicial imposition is not what republicanism is about; it is not what our tradition is all about, and it is certainly not what constitutional law is about.<sup>56</sup> In the words of James Wilson, "laws may be unjust, may be unwise, may be dangerous, be destructive, and yet not be so unconstitutional as to justify the judge in refusing to give them effect."<sup>57</sup>

#### IV. THREE CONTEMPORARY MYTHS

Before addressing three myths that today sustain abusive judicial power, let me discuss a problem that pervades contemporary scholarship. Today scholars cannot talk definitively about constitutional provisions because they often lack a good understanding of what the people in the several states did before, during and after adoption of both the federal

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56. Choper, *supra* note 54, at 59-62. Professor Berger states: "Nowhere in the Constitution or its history is there an intimation that judges were given a power of attorney to fashion unenumerated 'minority rights' in order to remedy 'injustice, as they perceive it.'" Berger, *The Scope of Judicial Review: An Ongoing Debate*, 6 HASTINGS CONST. L.Q. 527, 605 (1979) (citations omitted). See Bridwell, *The Federal Judiciary: America's Recently Liberated Minority*, 30 S.C.L. REV. 467 (1979) and Carey, *Separation of Powers and the Madisonian Model: A Reply to the Critics*, 72 AM. POL. SCI. A. J. 151 (1978) (purpose of separation of powers was to thwart governmental tyranny — not thwart majority rule or protect minority interests).

57. As quoted in Berger, *supra* note 57, at 628.

and state constitutions and bills of rights.<sup>58</sup> At one time I thought all it took was curiosity, extensive reading and a logical mind. But over the past twenty years I have learned that facts are not self-interpreting. I have learned that unless one re-examines original sources, one will follow the conclusions of earlier scholars who probably, though unintentionally, misinterpreted the facts.<sup>59</sup> Being weaned on progressivist assumptions, they often biased their interpretations to reflect an implicit faith in progress—in nutshell form, the belief in a natural movement from a closed to an open society.<sup>60</sup> Hence, for the last fifty years, Justices have attempted to anticipate the future, and while the dreams dreamed, like those of their laissez-faire predecessors, turned out to be fantasies,<sup>61</sup> those fantasies prevented accurate interpretation of every Bill of Rights provision I have researched, including, of course, the sixth amendment.<sup>62</sup> In that context I now explicitly state what I have thus far implied: identifying abuses of rights and providing remedies for those abuses are either legislative tasks or powers reserved to the people by Article VI of our Constitution.<sup>63</sup> Having said that, let me briefly describe three myths that support abusive judicial power and inhibit representative institutions

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58. "Unless we can see a *correspondence* between the symbols we have in hand and the people's action in history, the symbols we have in hand do not represent that people, and we must look a second time for the symbols that do in fact represent them." KENDALL & CAREY, *supra* note 2, at 26. Today we are faced with two difficulties: (1) obtaining an accurate historical record — e.g., on the sixth amendment; (2) to convince others that history (intent) is relevant to constitutional law. These issues are discussed elsewhere. See Gangi, *supra* note 7, at 60-63. Scholars today consider history irrelevant because of arguments I group under the title: "The past is DEAD — the Constitution LIVING." See Gangi, *supra* note 34, at 18-22.

59. See Gangi, *supra* note 8, at 285-87.

60. See *supra* sources accompanying note 58, and Gangi, *supra* note 7, at 88, 105; Gangi, *supra* note 34, at 65-67 and G. GILMORE, *THE AGES OF AMERICAN LAW* 99-101 (1977); A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1977). Regarding particulars see, e.g., R. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982) (Supreme Court distorts the Framers' first amendment establishment and free exercise of religion clauses); R. BERGER, *supra* note 4 (Supreme Court distorts the Framers' eighth amendment cruel and unusual punishment clause); L. LEVY, *LEGACY OF SUPPRESSION* (1960) (Supreme Court distorts first amendment of freedom of speech and press clauses).

61. See Voegelin, *Wisdom and the Magic of the Extreme: A Mediation*, S. REV. 235 (Spring, 1981) ("activist dreamers who want to liberate us from our imperfections").

62. For example, the infusion of progressivist criteria in one of the cited works, Note, *Historical*, *supra* note 12, rendered it largely unusable. Professor Beaney's work (W. BEANEY, *supra* note 9) also periodically does the same thing, but, you can spot it much easier, and, as far as I can tell, he never fails to relate the traditional understanding. Many contemporary scholars no longer bother to master the traditional understanding; hence, it is slipping out of the consciousness of the bar.

63. Article VI of the Constitution refers to the amendment procedures.



from identifying abuses of rights and providing remedies.<sup>64</sup>

The first myth consists of the belief that the Framers considered the three branches of government equal and coordinate. Nonsense! As Madison stated, “in republican government, the legislative authority necessarily predominates.”<sup>65</sup> Contemporary supporters of judicial power, however, paint an entirely different picture. They assert that unlike legislators concerned with re-election, judges can do what is appropriate even if it lacks majority support.<sup>66</sup> That view is diametrically opposed to the views of the Framers. Thus, the problem today is both an arrogant judiciary and legislators who avoid taking responsibility for difficult public policy choices.<sup>67</sup>

The second myth assumes that adoption of the Bill of Rights elevated individual rights above the peoples’ right to self-government, such that the Bill of Rights consisted of absolute bars against legislative policymaking. This too is nonsense.<sup>68</sup> The Bill of Rights applied only against the federal government; and more importantly, even after its adoption Congress engaged in policymaking. While Congress could not breach (“abridge” is an excellent term to convey the point<sup>69</sup>) specific common law meanings, it was otherwise free to do what it pleased.<sup>70</sup> I have already demonstrated that the sixth amendment did not preclude additional legislative protections. Similarly, when Congress successfully passed the Alien and Sedition Acts the Sedition Act actually afforded *greater* protection than what has been provided by the first amendment.<sup>71</sup>

64. In another piece I provide the reader with a list of some fourteen erroneous Bill of Rights assumptions. See Gangi, *supra* note 7, at 90-118.

65. FEDERALIST, *supra* note 6, No. 51, at 322.

66. See Gangi, *supra* note 8, at 264-68 (supporters of contemporary judicial power assume the failure of democratic government).

67. See, e.g., Bridwell, *supra* note 56 and Choper, *supra* note 53.

68. See Gangi, *supra* note 34, at 39-41.

69. Publius, for example, uses the term “abridged” when discussing the right of legislatures to provide trial by jury in civil cases. I conclude, similarly, that with respect to the first amendment Congress can pass laws it believes proper as long as they do not *abridge* the original constitutionalized common law meaning: no prior censorship or licensing of press. (I’d go further and suggest that those conditions apply to peace time.) See *Tangled*, *supra* note 34, at 40 n.64.

70. When the Framers did not approve of the common law meaning they specifically used other language: e.g., *two* witnesses in treason cases. See R. BERGER, *supra* note 4, at 63. Congress did the same thing when they extended the common law meaning of retained counsel constitutionalized by the sixth amendment. See *supra* text accompanying notes 20-24. Professor Berger details Congress’ rejection of the common law privilege of “benefit of clergy” (able to read) as providing an exemption from the death penalty. R. BERGER, *supra* note 4, at 42.

71. Section 3 of the act provided:

That if any person shall be prosecuted under this act, for the writing or publishing any libel

The third, and most pervasive contemporary myth, is the belief that those who framed the fourteenth amendment intended in whole or part to apply the first eight amendments to the states.<sup>72</sup> Whatever the choice of implementation—the due process or equal protection clauses, total or selective incorporation—those interpretations lack historical support. Imposition on the states of first, fourth, fifth, sixth, and eighth amendment rights, whatever their policy merits, rests on no more substantial foundation than did imposition of economic rights that the *laissez-faire*sts favored.<sup>73</sup> Thus, unfortunately, today much of law school constitutional law training in my opinion rests upon a foundation of sand, a convenient ignorance of history, or worse, this generation's abandonment of historical truth for the sake of good results.<sup>74</sup>

In sum, those today who claim constitutional rights often cannot locate them in our traditions or in the consent of the governed. Those who turn to the judiciary to secure these rights take refuge in the exercise of an illegitimate power. The judicial lawmaking of Holmes and Cardozo<sup>75</sup> has grown to the functional equivalent of arguing that the United States fought World War I to keep the world safe for judicial oligarchy. Today, judges make major public policy decisions and/or leave to the people's representatives the trivial task of implementing them. Instead of self-government, we have what Raoul Berger aptly calls, "*Government by Judiciary*."<sup>76</sup>

## V. CONCLUSION

For several generations those persons whom the Framers anticipated would guard the constitutional law tradition—attorneys and legislators—have abandoned it. Surely law students should suspect something

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aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

SOURCES & DOCUMENTS OF UNITED STATES CONSTITUTIONS 482 (W.F. Swindler ed., 2d. ed. 1982).

Both truth as a defense and jury determination of the law (whether the label was seditious) was not part of the first amendment protections.

72. See Henkin, *Selective Incorporation in the Fourteenth Amendment*, 73 YALE L.J. 74, 77 (1963); R. BERGER, *supra* note 4, at 16.

73. See Gangi, *supra* note 7, at 123-25.

74. See Gangi, *supra* note 34, at 62-63 n.472. See also Gangi, *supra* note 7, at 131 n.545 ("The sharp eye of the . . . lawyer becomes . . . demurely averted. . .").

75. C. WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* 223-29 (1986).

76. R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

is amiss when in one class they learn how to protect from judicial interference a client's intent to leave all earthly possessions to a cat, but in their constitutional law class they learn that the Justices may ignore even the Framers' clearest intentions. As a result of a century of illegitimate judicial law-making, original common law constitutionalized protections have become intertwined with newer, more fashionable terminology—initially, liberty of contract language, but now such things as penumbras and emanations,<sup>77</sup> expectations of privacy<sup>78</sup> walls of separation,<sup>79</sup> and on and on. But when this bubble bursts, as did earlier such progressivist bubbles, can contemporary proponents of judicial power be sure that the original protections afforded by the Framers will not also be swept away in the Court's effort to rid constitutional law of the accumulated self-indulgences of their predecessors?<sup>80</sup> Today we have no rule of law, only the rule of five votes. Upon what possible principled grounds will contemporary proponents of judicial power object when those five votes go in a less benign direction?

The situation is getting even more ominous. We have, on the one hand, some citizens passionately committed to particular rights such as abortion, speech, or privacy. They sincerely believe that those rights are part of our tradition. Would they take up arms to preserve those rights? On the other hand, some citizens passionately believe that the judiciary abuses its authority, renders self-government incompetent and undermines the legitimacy of the government. Are they too prepared to fight? In sum, we might eventually have the classical ingredients for civil war, and the first opportunity to measure our potential for such conflict may come over the nomination of Robert Bork.

The Framers' intentions are the only principles sanctioned by the people. We can and must deconstitutionalize much of contemporary constitutional law and regain for the American people their most precious right—that of self-government—a most appropriate task in this bicentennial year.<sup>81</sup>

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77. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

78. *Katz v. United States*, 389 U.S. 347, 350-51 (1967).

79. *Everson v. U.S.*, 330 U.S. 1, 16 (1947).

80. *See Gangi, supra* note 8, at 310-14.

81. "It is one of the happy incidents of the federal system that a . . . State may . . . serve as a laboratory; and try novel social and economic experiments." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting).

## VI. EPILOGUE

This paper was delivered on the first day of Judge Robert Bork's testimony before the Senate Judiciary Committee. I am of two minds regarding his subsequent rejection. The ignorance of the constitutional law tradition displayed by almost all Senators was appalling. Assuming that ignorance, however, many of those same senators were seeking to preserve what they thought to be constitutional rights: e.g., privacy. The fact that even after two hundred years so many seek to remain obedient to the instrument is quite admirable. Ignorance of particulars should not blind citizens to the fidelity of their representatives. The task today, thus, is not entirely unlike that faced by progressivists between the 1890s and the 1930s. To rekindle the flame of self-government (and responsibility) should not be the exclusive task of either conservatives or liberals. It is the task of both, for unless they join forces to wrest the governing power away from the courts, public policy debates between them are largely meaningless—they debate at the sufferance of a Court majority. That, I suggest, is not what the American political tradition is all about.

