REVITALIZING DEMOCRACY

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Government—organized, legitimized coercion—presents a dilemma. On the one hand, government is necessary to obtain certain benefits, such as the creation and enforcement of property rights that are essential to the efficient use of resources. On the other hand, giving some individuals organized power over others is very dangerous. Power, the ability to command and enforce obedience, is not good for the soul; it seems inevitably to lead to an exaggerated appraisal of one's wisdom and goodness as compared to those qualities in others. Power expands ego, and ego yearns for more power, with the result that government tends inexorably to grow far beyond what justifies its existence and therefore to limit human freedom unnecessarily.

Because government is dangerous, we should have no more of it than necessary and strive to make what we must have as little dangerous as possible. The only way this can be done is by making it effectively democratic, that is, subjecting it in a fairly direct and immediate way to popular control. Three of the ways in which the American system as it now operates can be made more democratic are the decentralization of policymaking, the adoption of measures of direct democracy, and most importantly, the limitation of the policymaking power of judges.

I. DECENTRALIZATION OF POLICYMAKING

Government can be made more responsive to the popular will by keeping the policymaking unit closer to the people. As a matter of simple arithmetic, the smaller the policymaking unit, the fewer the number of people who will be discontented

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by any policy choice. Individual freedom means leaving policy choices with the individual; if a choice must be removed from the individual by government, individual freedom is served to the extent that it is removed no farther than necessary.

We should therefore resist the centralization of government power and favor decentralization absent a strong showing of efficiency or other losses. We cannot, however, expect to be helped in this regard by the Supreme Court.[1] The division of government power is not something that can be made a matter of judicially enforceable law. Because policymaking power is not a physical thing that can be divided into separate areas or spheres, there cannot be two legally defined independent power centers in a single polity; dual sovereignty is a contradiction in terms. The power to regulate interstate commerce, for example, necessarily includes—in fact, is not distinguishable from—the power to regulate things that affect interstate commerce.[2] It will therefore necessarily conflict with or impinge upon the power to regulate commerce that may not be considered "interstate" and things that may not be considered "commerce." When conflicts occur, the sovereign is the lawmaker whose policy will prevail.

Because everything affects interstate commerce to some degree, the question in every case challenging a purported exercise of the commerce power is whether the regulated activity affects interstate commerce enough to justify national regulation and the consequent lessening of local autonomy. This is a policy issue, and there is no reason to think that it is better left to courts than to elected representatives. More broadly, when the people want a policy issue—for example, assisted suicide—to be decided at the national rather than the state level, it is hard to see why the federalism issue—the appropriate limits on federal power—should be decided according to the preferences of federal judges. The judges' claim that they find the answer in the Constitution will here, as elsewhere, be fictional. Congressional power has undoubtedly grown far beyond original expectations, but there is much to be said for the notion of a "living Constitution," a Constitution

1. *See* Lino A. Graglia, United States v. Lopez: *Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719 (1996) (discussing how the Court has facilitated rather than resisted the centralization of government power).

2. *See id* at 728.

adaptable to new circumstances, when the effect of a doctrinal change is not to expand but to loosen constitutional restraints—to relax the grip of the hand of the dead—and the adapting is done not by judges but by elected representatives.

In any event, it is a serious mistake to rely on the Supreme Court to limit national power. From the beginning with *McCulloch v. Maryland*[3] in 1819 and *Gibbons v. Ogden*[4] in 1824, judicial review has historically had the opposite effect. For sixty years—up to *United States v. Lopez*[5] in 1995—it served only to rubber stamp and therefore seemingly legitimize expansions of federal power.[6] Congress leaves the constitutional question to the Court while the Court defers to Congress' presumed but non-existent constitutional judgment. The result is only pretend review, which is worse for state autonomy than no review. There can be no realistic expectation, despite *Lopez*, that this situation will significantly change, at least where the federal government is not directly regulating the states. For one thing, the states are frequently quite happy to have the federal government decide or participate in the resolution of an ever-widening range of issues; it is not the states but individuals who typically assert the states' supposed autonomy interest.[7]

The most we can or should ask of the Court on the federalism issue is that it cease its pretend review and thus make clear that the responsibility for the growth of federal power lies solely with Congress. Congress will undoubtedly continue to legislate freely on almost all issues, but this shows only that, at least since the New Deal, we have had a true

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3. 17 U.S. (4 Wheat.) 316 (1819).

4. 22 U.S. (9 Wheat.) 1 (1824).

5. 514 U.S. 549 (1995).

6. *See, e.g.*, Hoke v. United States, 227 U.S. 308 (1913) (upholding federal regulation of sexual conduct under the Commerce Clause); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding federal regulation under the Commerce Clause of wheat production for farmer's private consumption); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding application of federal anti-discrimination regulations against local restaurant as legitimate exercise of Commerce Clause power).

7. *See, e.g.*, United States v. Morrison, 120 S. Ct. 1740, 1773 (2000) (Souter, J., dissenting) (observing that "Attorneys General from 38 States urged Congress to enact the Civil Rights Remedy [of the Violence Against Women Act]. . . . the States will be forced to enjoy the new federalism whether they want it or not."); New York v. United States, 505 U.S. 144, 181-82 (1992) (discussing "the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests," as evidenced by the fact that "public officials representing the State of New York lent their support to" the Act New York now challenges); *see also Lopez*, 514 U.S. at 551.

national government, like a "normal" country—as they say in the Russia that is emerging from the Soviet Union[8]—and it seems very clear that, rightly or wrongly, this is what the people want. Decentralization, to repeat, is an aid to democracy and protection against tyranny, but we do not further democracy by having the Supreme Court take the issue out of the political process.

Most important, we contradict ourselves when we complain of the Justices' willingness to assume decision-making power on every issue of basic social policy only to turn around and ask them to protect us from our elected representatives in Congress. A Court powerful enough to do that is too powerful to be expected to uphold policies with which it disagrees and too powerful to be left free of electoral accountability. Democracy requires protection only from, not by, the Supreme Court.

II. DIRECT DEMOCRACY

Almost half the states now provide for some form of direct democracy on important issues by allowing initiatives and referenda.[9] It would greatly revitalize and enhance democracy in this country if such measures were adopted by all of the states, if they were made easier to implement in the states that already have them, and perhaps most important, if they were adopted by the national government.

The initiative and referendum were promoted at the turn of the century by so-called progressives who saw direct democracy as a way of overcoming the conservative political influence of corporate and financial interests.[10] Today, however, the dominant influences on government are not conservative, and direct democracy therefore serves primarily to protect conservative and traditional interests. Whatever may have been the case earlier, it now seems that the leaders of any

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8. *See* Yabloko Party of the Democratic Opposition, *Grigory Yavlinsky, in an Interview with the Italian Newspaper* La Stampa *December 19, 1999, at* http://www.eng.yabloko.ru/Publ/Old/Papers/Yavl_La_Sta.html.

9. *See* Todd Donovan & Shaun Bowler, *An Overview of Direct Democracy in the American States, in* CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 1, 5 (Shaun Bowler, Todd Donovan & Caroline J. Tolbert, eds., 1998).

10. *See* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 50-52 (1989) (discussing the role of progressives in creating referenda and initiatives).

political organization in the United States, from the local school board to the United States Senate, will be substantially to the left of its membership or constituents. It is apparently an inherent property of democratic government that it will inevitably fall into the hands of liberals, who are inherently distrustful of their fellow citizens, and thus become less and less democratic. Liberals are by definition (in the modern American context) unhappy the world is not better, while conservatives are grateful it is not worse. Liberals, therefore, are up and doing, seeking new ways to improve the world, which always results in more government, law, coercion, and, inevitably, more power to liberals. Conservatives, convinced that most changes would be for the worse, are largely content to leave the world alone and hope it reciprocates the favor.

The unfortunate tendency of democratic governments to fall into the hands of liberals has greatly increased in recent times as current leaders tend to be more highly educated than leaders in the past. Studies indicate that people tend to become more conservative, that is, more skeptical of innovation, as they become better educated, but only through college.[11] The over-educated, those with post-graduate degrees, tend to become more liberal.[12] Perhaps they become disoriented from living too long in a world of words or perhaps it is only the already disoriented who stay too long in academia. The respect that was once given to business leaders for worldly success is today more typically given to our more educated leaders for their intellectual attainment. The Supreme Court Justices all have post-graduate degrees—albeit only from law schools—and usually from the most liberal of institutions. Like other government officials, they seek the commendation of academics and others of our intellectual elite, and this requires that they give evidence of their intellectual growth by moving to the left.

Whatever the reason, it seems clear that the influence of academics and other intellectuals on policymaking has greatly increased since the New Deal, which was openly founded and implemented by a "brain trust." The nightmare of the

11. *See* Eric L. Day, *Undergraduate Political Attitudes: Peer Influence in Changing Social Contexts*, J. HIGHER EDUC., July 17, 1997, at 399.

12. *See id.*

American intellectual, overwhelmingly on the far left of the American political spectrum, is that policymaking should fall into the hands of the American people. The American people, after all, favor such things as neighborhood schools, capital punishment, prayer in schools, restrictions on pornography, and the prohibition of flag burning, all anathema to the enlightened academic and certainly to the typical law professor. For them, direct democracy is a realization of their nightmare.

The effect of direct democracy in recent years has been, in almost every case, to reject liberal policy measures adopted by political leaders and substitute more conservative measures favored by a majority of the people. It is hardly too much to say that every socially beneficial policy choice in recent years to come out of California, the bellwether of the nation, has been the result of a referendum. Referenda have enabled Californians to impose limits on taxation,[13] reinstitute capital punishment,[14] terminate school busing for racial balance,[15] abolish compulsory bilingual education,[16] and prohibit the use of racial preferences in higher education, employment, and contracting.[17] It is hardly possible to ask more from any political device. Racial preferences were also ended by referendum in the state of Washington.[18] In Colorado, it was used to reinstitute the right of property owners to make individual choices on the basis of sexual orientation.[19] The latter result, of course, was overturned by the Supreme Court,[20]

13. *See* CAL. CONST. art. 13A, § 1 (amendment to the California Constitution by Proposition 46 in 1986).

14. *See id.* art. 1, § 27 (amendment to the California Constitution by Proposition 17 in 1972).

15. *See id.* art. 1, § 7(a) (amendment to the California Constitution by Proposition 1 in 1979).

16. *See* CAL. EDUC. CODE § 300 (amendment by Proposition 227 in 1998).

17. *See* CAL. CONST. art. 1, § 31 (amendment to the California Constitution by Proposition 209 in 1996) (making affirmative action illegal).

18. *See* WASH. REV. CODE ANN. § 49.60.400 (West 1999) (Initiative Measure No. 200, approved November 3, 1998) (providing that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting").

19. *See* COLO. CONST. art 2, § 30b (enactment proposed by initiative, submitted to the electorate, approved at the general election of Nov. 3, 1992, and effective upon proclamation of the governor).

20. *See* Romer v. Evans, 517 U.S. 620 (1996).

illustrating that the results of referenda, no less than ordinary legislation, are subject to the basic rule of our peculiar system that elections are fine as long as Supreme Court Justices get the last vote.

George Orwell is supposed to have remarked that there are some ideas so preposterous that only the highly educated can believe them. William Buckley expressed the same idea with the observation that he would rather be governed by the first 2000 names in the Boston phone book than by the Harvard faculty.[21] The ordinary Boston citizen is much less educated than a typical Harvard faculty member and therefore much less likely to devise a grand scheme of social improvement that would probably leave us worse off and surely make us less free. The source of many of our current problems is that we *are* to a large extent being ruled by the Harvard faculty and their academic counterparts, with the Supreme Court functioning essentially as their mirror, mouthpiece, and enacting arm. Initiatives and referenda are means of escaping or modifying this rule, of counteracting the socially destructive schemes of deep thinkers with the native realism and inherent good sense of the average citizen.

III. JUDICIAL REVIEW

One cannot speak of revitalizing democracy, of course, without seeking some means of limiting judicial power, the most undemocratic and anti-democratic feature of our system of government. It would be incredible, if it were not true, that for the past four or five decades virtually every change in basic issues of domestic social policy has come not from state or federal legislatures but from the U.S. Supreme Court. The Court has decided for the entire nation issues literally of life and death, such as abortion[22] and capital punishment,[23] of sexual morality, such as contraception,[24] pornography,[25] and

21. *See* William F. Buckley, Jr., *Au Pair Case No Reason to Condemn Courts*, HOUSTON CHRON., Nov. 8, 1997, at 36.

22. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

23. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972).

24. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding state laws forbidding birth control unconstitutional).

25. *See, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413 (1966) (ruling that a book, although obscene by community standards, was protected under the First Amendment because an 18th century court found it had some literary merit).

homosexuality,[26] and of public order, such as vagrancy control[27] and street demonstrations.[28] The Court has disallowed provisions for prayer in schools[29] while also picking and choosing which forms of government aid to religious schools[30] and which public displays of religious symbols[31] are permissible. It has rewritten and severely limited the law of libel,[32] disallowed nearly all distinctions on the basis of sex,[33] legitimacy,[34] and alienage,[35] and so on almost endlessly. For some reason, we permit the most fundamental issues of social policy, issues that determine the nature of our society and quality of our civilization, to be decided for us by the Supreme Court. Is it not strange that public policy in each of the fifty states on such questions as abortion and prayer in schools should be determined today very largely by how Justice O'Connor chooses to vote? There are only two things, incidentally, that these decisions have in common: first, they have very little to do with the Constitution, and second, on every issue they have moved public policy to the left. On every issue it was the position favored by the ACLU but rejected in

26. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding state laws forbidding sodomy).

27. *See, e.g.*, Papachristou v. Jacksonville, 405 U.S. 156 (1972) (finding a local vagrancy ordinance unconstitutional on its face).

28. *See, e.g.*, Cox v. Louisiana, 379 U.S. 559 (1965) (reversing conviction under state law for picketing near a courthouse).

29. *See, e.g.*, Sante Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266 (2000) (prohibiting student led school prayer prior to school football games); Lee v. Weismann, 505 U.S. 577 (1992) (prohibiting prayer at junior high school graduation); Engel v. Vitale, 370 U.S. 421 (1962).

30. *See, e.g.*, School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (holding that a state cannot pay parochial teachers to conduct secular remedial classes in the parochial school). *But see, e.g.*, Mitchell v. Helms, 120 S. Ct. 2530 (2000) (allowing states to "lend" educational materials to parochial schools); Agostini v. Felton, 521 U.S. 203 (1997) (allowing states to provide public employees to teach remedial classes at private religious schools).

31. *See, e.g.*, Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (prohibiting the posting of the Ten Commandments in public school classrooms); Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding city-sponsored display of Nativity scene during Christmas season in heart of city's shopping district); County of Allegheny v. ACLU, 472 U.S. 573 (1989) (forbidding display of Nativity scene outside county courthouse).

32. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964).

33. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 519 (1996) (holding that a state may not maintain an all-male military school); Craig v. Boren, 429 U.S. 190 (1976).

34. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968).

35. *See, e.g.*, Nyquist v. Mauclet, 432 U.S. 1, 12 (1977); Graham v. Richardson, 403 U.S. 365 (1971).

the ordinary political process that prevailed in the Supreme Court. Is that not an amazing coincidence?

The power we have allowed our judges to assume seems to have no discernible limits. Who would have thought, for example, that a court could order that children be excluded from their neighborhood schools and transported to more distant schools because of their race in a self-defeating attempt to increase school "racial balance"?[36] Though these orders imposed enormous costs for no apparent benefit, they were faithfully executed across the nation decade after decade. Who would have thought that a single megalomaniacal federal district judge in Kansas City could order the expenditure of $2 billion in the futile hope of luring white students into a predominantly black school district and order that taxes be raised to provide the funds?[37] At what point, if any, are American citizens of today or their elected representatives prepared to stand up and say no to a federal judge? When the cost reaches $10 billion? $100 billion? The pharaohs could require the ancient Egyptians to waste their lives and wealth building pyramids because the pharaohs were considered gods; what is our excuse? A nation founded on the revolutionary idea of representative self-government in a federalist system has been allowed to degenerate into a system of government by majority vote of a committee of nine lawyers, unelected and holding office for life, issuing orders for the nation as a whole under the pretense of interpreting the Constitution.

A frequently stated advantage of federalism is that it allows the states to serve as laboratories for experiments in social policy. The greatest contribution a state could make today to the general welfare would be to abolish judicial review and thereby provide at least the beginning of a demonstration that it is possible, even in America, to maintain a viable society without the supervision and guidance of electorally unaccountable judges. It may seem too radical to suggest abolishing judicial review on the national level, even though it is not explicitly provided for in the Constitution, as one would

36. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

37. *See* Jenkins v. Missouri, 672 F. Supp. 400 (W.D. Mo. 1987), *rev'd in part, aff'd in part*, Missouri v. Jenkins, 495 U.S. 33 (1990); *The Cash Street Kids*, THE ECONOMIST, Aug. 28, 1993, at 37.

certainly expect for so obviously dangerous an innovation in the science of government. That the suggestion is not entirely beyond the pale, however, is indicated by the fact that it has recently been made by such prominent constitutional scholars as Mark Tushnet[38] on the left and Michael Klarman[39] somewhat on the right. Professor Tushnet, a self-declared Marxist, has given up on judicial review because the Court has failed to enact an income redistribution scheme and has recently begun disallowing some racial preference programs.[40] Professors Bruce Ackerman[41] and Akhil Amar[42] have not, like Tushnet and Klarman, recommended abolishing judicial review, but they have suggested new ways of amending the Constitution that could possibly provide additional means of counteracting judicial power.

Whatever might be said for judicial review, there can be no doubt that it was born in sin. It was boldly asserted by Chief Justice John Marshall in *Marbury v. Madison*,[43] a case in which he should not have sat because he was personally involved,[44] in order to enhance the power of the one branch of government from which the voters could not oust his political party. He was able to do so only by concocting a statute that did not exist in order to invalidate it on the basis of a constitutional objection that also did not exist.[45] We need a sort of national baptism to erase this original sin so that we can begin again and try to build a respectable legal system on an honest foundation.

Overruling *Marbury* is not necessary, however, to end our present regime of government by the judiciary. If judicial review were in practice what it is in theory—the power to invalidate laws prohibited by the Constitution—it would be a

38. *See* MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

39. *See* Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145 (1999).

40. *See, e.g.*, Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 425 (1981).

41. *See generally* 1 BRUCE A, ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

42. *See generally* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

43. 5 U.S. (1 Cranch) 137 (1803).

44. *See* Samuel R. Olken, *Review Essay: Chief Justice John Marshall in Historical Perspective*, 31 J. MARSHALL L. REV. 137, 151-52 (1997).

45. *See* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1; MORRIS RAPHAEL COHEN, THE FAITH OF A LIBERAL 8 (1948).

matter of little more than academic interest. Our very short Constitution wisely contains very few prohibitions, and American legislators are rarely tempted to violate them. The result is that an example of a clearly unconstitutional law is difficult to find.[46] It is not judicial review but judicial activism—the invalidation of laws *not* prohibited by the Constitution—that is the true source of our problem.

Realism requires that we abandon the futile hope that the remedy for judicial activism is the appointment of judges willing to confine themselves to the judicial function of interpreting rather than rewriting the Constitution. The pressures and temptations toward liberal activism are simply too great for most Justices to resist. Apart from the fact that Earl Warren and William J. Brennan, Jr. were Republican appointees,[47] there is the fact, surely conclusive, that the appointment of ten consecutive Justices by Republican presidents supposedly committed to a policy of strict construction did not result in the overruling of a single one of the revolutionary decisions of the Warren Court. On the contrary, it only resulted in the further expansion of judicial power with the Court asserting control over such vast new areas of policymaking as abortion,[48] busing for school racial balance,[49] and discrimination on the basis of sex,[50] legitimacy,[51] and alienage.[52] Though these are post-Warren Court decisions, they, too, it should be noted, have very little to do with the Constitution and continue to uniformly move public policy to the left.

We are incessantly told that now, however, we have a "conservative" Court, so much so that the ACLU complains that it is sometimes forced to resort to legislatures. To academia and the media, a "conservative" Court is merely one in which

46. Ironically, the clearest example of such a law might have been the Minnesota Mortgage Moratorium *upheld* by the Court in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

47. *See* Linda Greenhouse, *William Brennan, 91, Dies; Gave Court Liberal Vision*, N.Y. TIMES, July 25, 1997, at A4.

48. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

49. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

50. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 519 (1996); Craig v. Boren, 429 U.S. 190 (1976).

51. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968).

52. *See, e.g.*, Nyquist v. Mauclet, 432 U.S. 1, 12 (1977); Graham v. Richardson, 403 U.S. 365 (1971).

liberal victories come less quickly or certainly. It is not necessary that the Court overturn prior liberal victories or give comparable victories to conservatives by, for example, finding that the Constitution *prohibits* abortion or *requires* that the provision be made for prayer in the schools. This is the Court that has reaffirmed abortion rights[53] and the ban on prayer in schools,[54] disallowed an all-male military school,[55] overturned a denial of special rights for homosexuals,[56] rejected term limits,[57] invalidated a ban on child pornography on the internet,[58] disallowed state and federal prohibitions of flag burning,[59] and so on. What do you suppose a "liberal" Court would do?

To borrow from Clausewitz, constitutional law is politics by other means,[60] and it is and will continue to be overwhelmingly left-wing politics. There is, however, a solution short of abolishing judicial review, though it, too, unfortunately, will probably require a constitutional amendment. It lies in the fact that the vast majority of rulings of unconstitutionality concern state rather than federal law, and nearly all of them purport to be based on a single constitutional provision: one sentence—and indeed four words, "due process" and "equal protection"—of the Fourteenth Amendment. This sentence largely *is* the Constitution for the Supreme Court's purposes, having replaced the original. Without it, constitutional law would largely disappear. The endless scholarly quarrel about methods of constitutional interpretation is therefore irrelevant and grossly misleading. No question of interpretation was in fact involved in any of the Court's controversial rulings of unconstitutionality in the past several decades. What do you think Harry Blackmun was interpreting in *Roe v. Wade*,[61] for example, the word "due" or the word "process"?

The Court has made the Fourteenth Amendment an empty

53. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992).
54. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964).
55. *See* United States v. Virginia, 518 U.S. 515, 519 (1996).
56. *See* Romer v. Evans, 517 U.S. 620 (1996).
57. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).
58. *See* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727 (1996).
59. *See* United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).
60. *See* CARL VON CLAUSEWITZ, ON WAR 119 (Anatol Rapoport, trans., Penguin Books 1968) ("War is a mere continuation of policy by other means.").
61. 410 U.S. 113 (1973).

vessel into which it can pour any meaning, converting it into a grant of unlimited policymaking power. Judicial review on the basis of constitutional provisions with ascertainable meaning is judicially enforced constitutionalism; judicial review on the basis of a constitutional provision that can be made to mean anything is simply government by judges. Our judges have effectively empowered themselves to make the final decision on any issue that in their opinion has been incorrectly decided in the political process. Judicial review has become the American equivalent of the *junta* system formerly prevailing in some Latin American countries, where the results of elections were allowed to stand only so long as they did not displease the generals.

An adequate remedy for this bizarre system of government is simply to restore the Fourteenth Amendment to its original, limited meaning or to give it any other *definite* meaning. Its original purpose to prohibit certain discriminations by the states against blacks[62] can and should be expanded into a general prohibition of all racial discrimination by government. This would be a worthy addition to the Constitution in its own right, and more important, would return basic policymaking power on most issues to state legislators, making an enormous contribution both to democracy and federalism. Nearly five decades of experience has shown, in my opinion, that government by majority vote of nine electorally unaccountable lawyers is not an improvement on the system of representative self-government on a state-by-state basis created by the Constitution. It has shown, on the contrary, that it is a path toward the disintegration of America as a viable society.

There is perhaps no more succinct or pointed way to put the issue than: Do you really want to be governed by David Souter?

62. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2nd ed. 1997); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 139 (1949).