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Frank R. Strong

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ESSAYS

FOREBODING FISSURES IN THE BEDROCK OF POPULAR SOVEREIGNTY

FRANK R. STRONG†

*It is the winners who write history—their way.**

Of the few certainties in political history, among the clearest is that the founders of this nation vested sovereignty in the people. Recall the assertion in the Declaration of Independence that to secure the unalienable rights with which men are endowed by their creator, "Governments are instituted among Men, deriving their just powers from the consent of the governed."¹ Furthermore, the Constitution of the United States, drafted and ratified after independence had been secured by force of arms, opens with the Preamble that "We the People of the United States . . . do ordain and establish this Constitution for the United States."²

Nearing the midpoint between the 200th anniversaries of the Declaration and the Constitution, we of this age fail to appreciate the revolutionary character of the founders' commitment to lodge sovereignty in the people. It was a first in political practice. It had been dreamed of in political theory, and was shortly to erupt in the abortive French Revolution. Sovereignty was an awesome power that had belonged only to kings, emperors, dukes, parliaments, and the like; it was madness to place it in the hands of those fit only to be subjects of a ruler. But the late 18th century was a period of revolutionary ideas. Adam Smith, in his *Wealth of Nations*,³ advocated an entirely different pattern for economic organization in the year of the Declaration. In the two centuries since, conditions have vastly changed and so have economic and political views. Dictatorships are common; "free enterprise" in an oligopolistic capitalism is no equivalent of Smith's free market system, despite attempts to palm it off as such; and many despair of the effectiveness of citizen sovereignty in the management of the affairs of great masses of population, which requires dependence upon representation rather than direct political action. Must it be concluded with respect to the democratic ideal of popular sovereignty that its time has come—and passed?

† Cary C. Boshamer University Distinguished Professor Emeritus, University of North Carolina at Chapel Hill; Dean and Professor of Law Emeritus, Ohio State University. B.A. 1929, J.D. 1934, Yale University; LL.D. 1978, North Carolina Central University and Ohio State University.

* E. PAGELS, *THE GNOSTIC GOSPELS* 142 (1979).

1. DECLARATION OF INDEPENDENCE.

2. U.S. CONST. preamble.

3. A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776).

In some of the earliest state constitutions enacted after the Declaration of Independence, no provision was made for either immediate ratification or later amendment of the constitution.⁴ These omissions stemmed from a sincere conviction that it was possible for a convened group of citizens to formulate at one point in time, on the basis of eternal verities, an all-embracing instrument adequate for the present and the future.⁵ By the time the Federal Convention met in Philadelphia, this naivete had been abandoned; provision for amendment was made in article V and for ratification in article VII. These inclusions reaffirmed and buttressed the proposition that in this nation sovereignty resided in the people. Their Constitution was the fundamental law of the land, changeable only by them through a two-part mechanism. The fissures in this foundation that forebode ill for popular sovereignty stem from pressures to alter the intent and usage of this mechanism. These fissures take one of two forms: (1) the contention that affirmative constitutional revision can better be effectuated by the Supreme Court acting as constitution maker; (2) the reasoning that recall of judicial interpretation of the Constitution is inconsistent with the function of the Supreme Court as the exclusive guardian of the instrument. Either type of fissure premises judicial oligarchy; in combination they work a shift from popular to judicial sovereignty.

The first type of fissure appeared some time ago and has widened with the passing years. It has spawned endless articles and a considerable number of volumes in attack and defense. My own two lengthy ventures in scholarly print⁶ sample the massive literature pro and con that had appeared at time of publication. One of the major relevant writings not therein treated is *The Brethren*, the volume researched and written by two journalists purporting to reveal the inner workings of the Supreme Court.⁷ The mad rush to defend the Court is reminiscent of that occurring upon announcement of the Roosevelt Court Plan, only that time it was a different crowd crying foul. Scathing reviews denounced the book as silly,⁸ its disclosures replete with falsehood resulting from reliance upon the worst of hearsay. In due course a quasi-official refutation was offered by a member of the Court. In an American Bar Association Journal article, Justice Powell reassuringly explained *What Really Goes On at the Supreme Court* as if nothing unusual was afoot.⁹ I read the book far differently. Even if one-half of the contents of *The Brethren* is dismissed as inaccurate or groundless, a generous allowance to claims of the critics, there remains evidence of a politicalization within the institution that does not square with the conception of a Court committed to the function of constitu-

4. Strong, *Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes*, 55 N.C.L. REV. 11 (1976).

5. *Id.* at 11-12.

6. Strong, *supra* note 4; Strong, *Contributions of ERA to Constitutional Exegesis*, 14 GA. L. REV. 389 (1980).

7. B. WOODWARD & S. ARMSTRONG, *THE BRETHERN* (1979).

8. See, e.g., Fletcher, Book Review, 68 CAL. L. REV. 185 (1979); Henry, Book Review, 47 TENN. L. REV. 495 (1980); Kurland, Book Review, 47 U. CHI. L. REV. 185 (1979); Navansky, Book Review, 89 YALE L.J. 1028 (1980).

9. Powell, *What Really Goes On at the Supreme Court*, 66 A.B.A.J. 721 (1980).

tion enforcer in the tradition of *Marbury v. Madison*.¹⁰ Defenders of the Court excuse the revelations of internal politicking and conniving as but proof of vigorous interchange of viewpoint in a wholly constructive context.¹¹ For me, concededly a devil's advocate, this just does not wash. Evidence of vigorous interchange of views is in itself not sufficient to assure *reasoned* judgment. Lack of mutual respect, backbiting, prejudgment, jockeying for votes, and toleration of open conniving by the law clerks—such behavior negates the likelihood of decisions reached by juristic process. If the authors' statement at the end of their volume¹² cannot be disproved, then indeed the situation within the Court is hardly reconcilable with faithful performance as an agency for the implementation of citizen sovereignty. Commenting on the first half-term of Justice Stevens, they wrote:

By the end of the term, Stevens was accustomed to watching his colleagues make pragmatic rather than principled decisions—shading the facts, twisting the law, warping logic to reconcile the unreconcilable. Though it was not at all what he had anticipated, it was the reality. What Stevens could not accept, however, was *the absence of real deliberation*.¹³

In an American law review some five years ago Professor H. L. A. Hart, noted English legal scholar, observed that "the most famous decisions of the Supreme Court have at once been so important and controversial in character and so unlike what ordinary courts ordinarily do in deciding cases that no serious jurisprudence or philosophy of law could avoid asking with what general conception of the nature of law were such judicial powers compatible."¹⁴ Lecturing at the Salzburg Seminar in American Studies in July of 1980, Edward H. Levi, of high repute among the legal scholars of this country, offered an explanation. The title given the lecture, *The Sovereignty of the Courts*, provides the clue.¹⁵ Not only have American courts successfully asserted the power of nullification of governmental acts as exclusive enforcer of empowerments and limitations mandated by the Constitution; they have latterly, by treating constitutional provisions as "common law concepts" to be altered by the "common-law type of reasoning," gained a position of "superintendence over the country."¹⁶ This situation "is compatible with, possibly one should say it arises out of the necessities of American life. It is a companion of the freedom we desire and the cruelty and ruggedness of human nature."¹⁷ However unsatisfactory this explanation may be for Professor Hart,

10. U.S. (1 Cranch) 137 (1801). See Janofsky, *President's Page: Court Reigns Supreme*, 66 A.B.A.J. 242 (1980).

11. Janofsky, *supra* note 10.

12. B. WOODWARD & S. ARMSTRONG, *supra* note 7.

13. *Id.* at 442-43 (emphasis added).

14. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 971 (1977).

15. E. Levi, *The Sovereignty of the Courts* (July, 1980) (Lecture at Salzburg Seminar in American Studies, Session on American Law and Legal Institutions).

16. *Id.* at 12-13.

17. *Id.* at 13.

It is a description of perhaps the most important aspect of the present American form of governance. The form is a unique answer to the problems of popular sovereignty and of federalism. It has its proponents and its critics. Critics see the courts deciding policy matters which perhaps life tenured judges do not hold their commissions to determine, and of turning policy matters into principles beyond the reach of political discussion and voting. The critics see the courts as having made it easy for democratic assemblies not to grow in responsibility, and as having failed to have made the national Congress and not the Court the legislative assembly on many issues now made national. The assumption of executive powers by the courts seems to the critics often to have been awkward and irresponsible. The proponents see the growth of court government as a wonderful invention through which the Court as a tribune of the people incorporates a kind of participatory democracy, keeps fresh the discussion of basic values, protects popular sovereignty while limiting it, corrects voting by special protection for the weak and minorities, and helps steer the course of a country by an inner compass.¹⁸

Now in manuscript form, awaiting the publication it richly merits, is a volume-length analysis by Professor Michael Perry of the strengths and weaknesses of both interpretivism and noninterpretivism.¹⁹ The work follows the volumes of Professors Choper and Ely²⁰ in marking the emergence of constructive maturity in the ongoing debate over justification of the Court as policy maker. Similarity ends at this point, however, for Perry does not agree with the positions taken by his noted colleagues. He regards the interpretivist approach to constitutional review as acceptable with respect to issues of federalism and separation of powers, but vigorously justifies Court exercise of noninterpretivism when human rights are involved in the conflicts between government and the individual. His justification is novel, surprising, and impressive. Its essence is caught in the following paragraph:

Recall that the justification for noninterpretive review in human rights cases, if any, is functional. Whether the function I have attributed to the practice constitutes a successful justification is the question-in-chief. The answer depends, I submit, on whether noninterpretive review in human rights cases has in fact enabled us, as a people, to keep faith with the two most basic aspects of our collective self-understanding: our "democratic" understanding of ourselves as a people committed to electorally accountable policymaking, and our "religious" understanding of ourselves as a people committed to struggle incessantly to see beyond, and then to live beyond, the imperfections of whatever happens at the moment to be the established moral conventions. Together those two commit-

18. *Id.* at 16.

19. M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1980) (unpublished manuscript).

20. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980); J. ELY, *DEMOCRACY AND TRUST: A THEORY OF JUDICIAL REVIEW* (1980).

ments are largely constitutive of our collective self-understanding, and my claim is that noninterpretive review in human rights cases enables us to maintain a tolerable accommodation between the two, sometimes seemingly irreconcilable commitments.²¹

Perry is thus at complete odds with Learned Hand, whose counsel was that judges "should not have the last word in those basic conflicts of 'right and wrong—between whose endless jar justice resides.'"²² Employing analytical terminology that I find helpful, it is clear that the two men clash over the propriety of Court exercise of direct constitutional review, that is, Court review of that type of constitutional limitation which directly identifies and outlaws certain behavior against individuals on the part of government. For Hand the courts should abandon constitutional review of this type of limitation because the inevitably noninterpretive task is too much for them; for Perry, courts should remain engaged in this form of constitutional adjudication, openly operating on a noninterpretive basis on behalf of human rights.

Professor Perry's thesis is quite appealing compared with other justifications that have been advanced in full or partial support of noninterpretive constitutionalism. Nevertheless, one has misgivings. If some select group out of the collectivity is to forge ahead with pioneering in the moral evolution of society, its assumed power of implementation ought to have some authority besides self-appointment. Even interpretive constitutional review by courts has never had more than tacit acceptance by the sovereign; it is going too far, in the absence of affirmative acceptance, to add another layer of judicial power onto a Constitution that scarcely authorizes anything beyond judicial (nonconstitutional) review. If agency is established, questions remain concerning the degree of finality to be accorded the "findings" of the select group. Leadership through persuasion, urging a refined form of appeal from the people drunk to the people sober, is one thing. Dictating the level of morality that must be observed is something else. And certainly the institution of the Supreme Court as we know it does not inspire confidence that it can successfully perform the priestly-type function required of noninterpretivism in human rights cases. The history of presidential nomination is far from impressive; the search is always for the politically desirable individual, not for the unique person who has the qualities to lead the nation in its moral evolution. Senate power to deny confirmation functions only minimally to bar major incapability. Elevation of Benjamin Cardozo to the Court only proves the point that seldom will one well qualified for that task make the grade.

21. M. PERRY, *supra* note 19, at 4.32-33. Professor Perry would not, however, allow the Court carte blanche. He relies upon congressional possession of an electorally-accountable checkmate through the provision of article III that authorizes Congress to vary the extent of the Court's appellate jurisdiction. *Id.* at 5.53-54. The proper interpretation to be given this provision has long been debated because of its seeming inconsistency with Court's insistence on the exclusiveness and finality of judicial exercise of constitutional review. Both the dependability of this provision and its effectiveness in the role Perry assigns it are to be doubted.

22. Hand, *The Contribution of an Independent Judiciary*, in *THE SPIRIT OF LIBERTY* 164 (3d ed. I. Dillard ed. 1960).

Just emerging is the second type of fissure, that employment of article V of the Constitution to recall a Court decision is somehow inconsistent with the Court's function as the exclusive guardian of the instrument. There can be no doubt that the founders devised a scheme for constitutional amendment in order to provide for alteration in the fundamental law when change is the registered desire of a heavy majority of sovereign citizens. Any other arrangement would be inconsistent with the accepted theory of government by consent of the governed. Precedent accords with theory; amendment of the Constitution as originally drafted and ratified began almost immediately with the addition in 1791 of the Bill of Rights, and before 1800 the first recall of a Supreme Court decision had occurred.

The eleventh amendment, made a part of the Constitution in 1798, recalled the 1793 decision in *Chisholm v. Georgia*.²³ The Supreme Court there had sustained against Georgia a suit by a South Carolinian to recover for unpaid Revolutionary War supplies. That federal judicial power as defined in article III encompassed such an action to collect on this debt was a reasonable interpretation of constitutional language.²⁴ But Georgia and other states saw in this construction a threat to state finances and demanded its immediate repudiation. Their contention was that the Court's interpretation was contrary to the understanding that the new Constitution did not negate their sovereign immunity, which they contended derived from English legal theory that the sovereign could do no wrong. By the eleventh amendment there was withdrawn from judicial power "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."²⁵ There was certainly no hesitance about recalling *Chisholm*. However, the decision antedated by a decade Chief Justice Marshall's celebrated assertion of the authority of the Supreme Court to declare on constitutionality. It is with *Marbury v. Madison*²⁶ that there began the claims of judicial power to exercise affirmative constitutional review, although in a technical sense the facts of that famous case required only the exercise of a defensive constitutional review designed to protect the Court as an independent third branch of government.

*Dred Scott v. Sanford*²⁷ was recalled on two levels. Its finding of lack of diversity of citizenship jurisdiction on the ground that as a Negro of African descent Scott could not be a citizen of Missouri was repudiated by the first sentence of section 1 of the fourteenth amendment.²⁸ Its substantive assertion that congressional destruction of property in black chattels was violative of due process of the fifth amendment was voided by adoption of the thirteenth

23. 2 U.S. (2 Dall.) 419 (1793).

24. U.S. CONST. art. III, § 2 reads: "The judicial power shall extend to all Cases . . . between a State and Citizens of another State . . ."

25. U.S. CONST. amend. XI.

26. 5 U.S. (1 Cranch) 137 (1803).

27. 60 U.S. (19 How.) 393 (1857).

28. U.S. CONST. amend. XIV, § 1 begins: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

amendment.²⁹ The position of the Court was at low ebb in 1857, the date of the decision; although Lincoln did not challenge the result in the case itself, he did not feel bound by it as precedent. In these circumstances there could be no suggestion of any restriction on the power under article V to recall the decision on either count.

With women confirmed in citizenship by virtue of the new fourteenth amendment, a Mrs. Minor, also from Missouri, reasoned that in the American type of government it must be her right, if not duty, to exercise the franchise.³⁰ But her effort to register for voting was refused on the basis that the constitution of her state limited voting eligibility to males. Her challenge fared no better in the Supreme Court of the United States than in the state courts: "The Constitution of the United States does not confer the right of suffrage upon any one."³¹ Suffragettes fought for forty-five years to overcome this decision. Victory finally resulted in 1920 with ratification of the nineteenth amendment.³²

Meantime, there had been raised and resolved in the mid-1890's the power of Congress to levy a national tax on income. In *Pollock v. Farmers' Loan & Trust Co.*³³ the Supreme Court had invalidated the Taxing Act of 1894 to the extent that it included income from real estate. To tax such income, the majority asserted, was equivalent to taxation of the property itself, which amounted to a direct tax that under article I of the Constitution must be apportioned according to population.³⁴ Familiar is the recall of this decision by the sixteenth amendment that became a part of the Constitution in 1913.³⁵

The *Minor* and *Pollock* decisions, like that in *Dred Scott*, were bitterly denounced³⁶ and never was there an utterance against the propriety of relief by recall through amendment of the Constitution. To the contrary, only the safety valve of article V provided escape from an impasse between Court and people. How intolerable it would have been had the nation been forced to accept as final any one of these decisions because of a view that they were sacrosanct as a consequence of the Court's exclusive authority over the Constitution!

29. U.S. CONST. amend. XIII, § 1 reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

30. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

31. *Id.* at 178.

32. U.S. CONST. amend. XIX reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

33. 157 U.S. 429 (1895).

34. *Id.* at 580-81. U.S. CONST. art. I, § 9, cl. 4 provides: "No capitation, or other direct, tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

35. U.S. CONST. amend. XVI reads: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

36. For examples of contemporary criticism of the *Pollock* decision, see James, *Pollock v. Farmers' Loan and Trust Company*, 9 HARV. L. REV. 198 (1895); Pennoyer, *The Income Tax Decision and the Power of the Supreme Court to Nullify Acts of Congress*, 24 AM. L. REV. 550 (1895).

In its origins the poll tax³⁷ was a progressive development in repudiation of the barnacle on universal suffrage resulting from conditioning the right to vote on possession of property. Even with growing realization that levy by the poll was effectively disenfranchising the very poor, especially among blacks, there lingered the view of the reasonableness of this exaction as imposing a low minimum contribution to support of government and engendering in the taxpayer some concern in exercising the franchise. This feature enabled the poll tax to escape invalidity in three attacks on various grounds during the period 1937 to 1951.³⁸ Its demise, however, came in the 1960s. For federal elections these judicial sustainments were recalled by the twenty-fourth amendment in 1964;³⁹ for state and local elections the Supreme Court put an end to state poll taxes in *Harper v. Virginia Board of Elections*.⁴⁰

The twenty-fourth amendment's limitation to federal elections cannot be taken as any evidence of hesitancy on the part of the Congress to challenge Supreme Court decisions in this area, all of which concerned state use of levy by the poll.⁴¹ What deterred Congress from all-out elimination of the poll tax by constitutional amendment was the strong federalistic opposition to banning it in state and local elections. On the other hand, in the action of the Court only two years later in *Harper*, there is an implicit suggestion of the Court's dominance that could lay the basis for incubation of the view that when the Court has spoken on the Constitution that is the end of the matter. By this time the Court had successfully laid claim to its power to exercise constitutional review with respect to every type of constitutional provision. And in *Cooper v. Aaron*⁴² it had declared its ultimate authority as exclusive guardian of the Constitution in categorical terms reaching quite beyond the authority that Chief Justice Marshall had asserted in *Marbury v. Madison*. However, there is no trace of development of an extended concept of judicial finality in disposition of the voting age issue precipitated by the legacy from Vietnam that "[i]f a young man of eighteen is old enough to fight, he is old enough to vote." Congress had responded to this political polemic by revising the Voting Rights Act of 1965 to reduce to eighteen the voting age for both federal and state elections.⁴³ In a badly split set of opinions, *Oregon v. Mitchell*⁴⁴ sustained the statutory change for federal elections but denied it for state elections. The prevailing views of the bare majority could not be fairly criticized for unacceptable reading of the pertinent provisions of the Constitution. But

37. An example of a poll tax was the levy of one dollar required of voters in Georgia. GA. CODE § 92-108 (1933) (repealed).

38. *Breedlove v. Suttles*, 302 U.S. 277 (1937) (sustaining the Georgia tax); *Saunders v. Wilkins*, 152 F.2d 235 (4th Cir.), cert. denied, 328 U.S. 870 (1945); *Butler v. Thompson*, 97 F. Supp. 17 (E.D. Va.), aff'd per curiam, 341 U.S. 937 (1951).

39. U.S. CONST. amend. XXIV reads: "The right of citizens of the United States to vote in any [federal] . . . election shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

40. 383 U.S. 663 (1966).

41. See cases cited in note 38 *supra*.

42. 358 U.S. 1 (1958).

43. Voting Rights Act Amendment of 1970, Pub. L. No. 91-285, 84 Stat. 314.

44. 400 U.S. 112 (1970).

so great was the consensus on age eighteen for all elections that the twenty-sixth amendment achieved quick adoption.⁴⁵ Absent was any hint that recall was an affront to the position in our political system of the Supreme Court of the United States.

Innumerable drives to secure amendment of the Constitution have failed. Among the many attacks on the "infamous" decision of the Court in *Lochner v. New York*,⁴⁶ which for nearly three decades resulted in invalidation of federal and state legislation inconsistent with socio-economic concepts of competitive capitalism, were various proposals for constitutional amendment. One "for the books" was Felix Frankfurter's cry that "The due process clauses ought to go."⁴⁷ During the same time period the amendment process was advocated for recall of Supreme Court decisions under the commerce clause that blocked the expansion of federal legislation into areas traditionally held to be those for state action. Most detested was *Hammer v. Dagenhart*⁴⁸ in which a narrowly divided Court invalidated 1916 federal legislation forbidding interstate commerce in the products of child labor. When these issues came to crisis proportions at the outset of the second administration of Franklin Roosevelt, he rejected solution by amendment in favor of his famous Court Plan.⁴⁹ His explanation to the nation in his fireside chat of March 1937 was that "There are many types of amendment proposed. Each one is radically different from the other. There is no substantial group within the Congress or outside it who are agreed on any single amendment."⁵⁰ Possibly he had in mind that Congress had proposed to the states in the 1920s a Child Labor Amendment,⁵¹ only for it to fail of ratification by the states because of conflicts among them over the minimum age to be fixed and the exemptions to be permitted from it. Although numerous proposed constitutional amendments failed during this period, it is clear that these failures were not because of any notion that Court decisions were not to be overthrown. Quite the contrary; hostility toward the Court in this period was such that pressure existed for stripping it of its power to pass on constitutionality.

For a time in the 1950s debate raged over the Bricker Amendment,⁵² so-called although it never mustered the two-thirds required vote in Congress. Senator Bricker's objective was recall by constitutional amendment of the 1920 decision in *Missouri v. Holland*.⁵³ Language in that opinion had led to

45. U.S. CONST. amend. XXVI reads: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

46. 198 U.S. 45 (1905).

47. Frankfurter, *The Red Terror of Judicial Reform*, NEW REPUBLIC, Oct. 1, 1924.

48. 247 U.S. 251 (1918).

49. As introduced in Congress it was S. 1392, H.R. 4417, 75th Cong., 1st Sess. § 1 (1937).

50. Excerpts From Radio Address of President Franklin D. Roosevelt, March 9, 1937, on Reorganization of the Supreme Court, 81 CONG. REC. A471 (1937) (Judiciary Committee Report on Reorganization of the Federal Judiciary).

51. H.R.J. RES. 184, 68th Cong., 1st Sess. (1924).

52. S.J. RES. 43, 83d Cong., 1st Sess. (1953).

53. 252 U.S. 416 (1920).

legitimate concern that under the treaty power there was no effective limit to congressional authority vis-à-vis the states.⁵⁴ Yet in the prolonged debate it developed that proponents of amendment could not formulate a limit that did not emasculate the constitutional grant of power. No "middle way" could be found. Ultimate rejection came from this dilemma; I do not detect a trace of enthronement attitude although opponents were understandably gratified by one of Holmes' major opinions.

The situation changes, however, with the 1960s. Strenuous efforts to secure recall of the *School Prayer*,⁵⁵ *School Bible Reading*,⁵⁶ and *Reapportionment Cases*⁵⁷ provoked on the part of defenders not only substantive reasons justifying these decisions but also observations suggestive of a position that they are somehow insulated against rejection through the amendment process. Evidence of such extremism in rationalization was unmistakable when former Senator Joseph Tidings issued an alert that those pressing for recall are "tampering with the Constitution."⁵⁸ Representative John Anderson employed the same language in condemning efforts during the 1970's to induce Congress to propose to the states a constitutional amendment recalling the busing decisions⁵⁹ of that decade.⁶⁰

The two types of fissure have now converged in the conflict over abortion. It is conceded that the Court's ruling in *Roe v. Wade*⁶¹ "cannot be explained by reference to any value judgment constitutionalized by the framers."⁶² It is certainly judicial embracement of noninterpretive constitutionalism. Opposition to the "free choice" policy thus impregnated in the Constitution by artificial insemination, so to speak, has inevitably brought on an impassioned movement to be rid of *Roe* through resort to the mechanism of article V. In turn, excited alarums greet the movement to recall *Roe*. Each side is entitled to its position as a matter of debate over the merits of "right to life" or "free choice." But it is another matter when the campaign to save *Roe* is infiltrated with insinuation that there is something illegitimate about seeking its recall. A year ago the American Civil Liberties Union described resort to a constitutional convention for *Roe*'s recall as a "reckless course [that] could undermine the Constitution and end by repealing the Bill of Rights."⁶³ Concededly, it is

54. See, e.g., Black, *Missouri v. Holland—A Judicial Milepost on the Road to Absolutism*, 25 ILL. L. REV. 911 (1931).

55. *Engel v. Vitale*, 370 U.S. 421 (1962).

56. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

57. *Reynolds v. Sims*, 377 U.S. 533 (1964); *YMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Maryland Comm. v. Tawes*, 377 U.S. 656 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Roman v. Sincok*, 377 U.S. 645 (1964); *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964).

58. Tydings, *They Want to Tamper with the Constitution*, SAT. EVE. POST, June 17, 1967, at 10. The Senator spoke specifically with respect to reapportionment.

59. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

60. 125 CONG. REC. H 6,452 (daily ed. July 24, 1979) (remarks of Rep. Anderson).

61. 410 U.S. 113 (1973).

62. M. PERRY, *supra* note 19, prologue 2.

63. Open Letter from Ira Glasser, American Civil Liberties Union I (received by author in March 1980).

not clear from this pronouncement whether the ACLU opposed only recall by the method of convention, because of the unresolved questions attending its use, or opposed, as well, use against *Roe* of the familiar process of amendment by congressional proposal and state ratification. That the latter is the likely position of the organization appears confirmed by recent expressions of viewpoint on its behalf. Writing in support of ACLU's current challenge to the New Right, former Senator George McGovern asserts that this movement "is seeking to subvert the Constitution itself."⁶⁴ Further confirmation is found in an ACLU letter of general distribution over the signature of ACLU President Norman Dorsen. It is there stated that the Extreme Right "is seeking to destroy our basic rights and individual liberties by bending the Constitution to its shape."⁶⁵ From a later passage it is clear that at least for abortion the reference is to the familiar method of constitutional amendment.⁶⁶

While these broadsides are directed against numerous objectives of "the anti-civil liberties movement," a major concern is unmistakably the drive to recall *Roe* by one or another of the anti-abortion amendments that have now been introduced in Congress. Accusations of subverting, bending, tampering with, or undermining the Constitution have powerful dissuasive effect. After all, what citizen would trample on his country's flag! But upon looking behind the beguiling rhetoric, one sees that the threat is not to the Constitution the people have ordained, but to pronouncements of a self-ordained new Delphi. What has been introduced is the novel theory that, inasmuch as a decision like *Roe* is not grounded in the Constitution, it follows that there is no predicate upon which to rest popular authority to reject it.

Convergence of the two kinds of fissure places the country face to face with an intolerable dilemma. For if Court indulgence in noninterpretivism cannot be rectified through constitutional amendment, judicial sovereignty has replaced popular sovereignty. That is the blunt fact of political life if a majority of Supreme Court Justices can with impunity force on the citizenry what as Platonic Guardians they determine to be the best for society, with no recourse open for breaking out of the judicial vise. Such an incredible predicament stands on its head the most fundamental of American political principles, that of citizen sovereignty effectuated through government by consent of the governed. It is a philosophy alien to all the premises upon which this nation was founded as the great experiment in democratic governance.

64. Open Letter from George McGovern, American Civil Liberties Union (received by author in January 1981).

65. Open Letter from Norman Dorsen, American Civil Liberties Union 1 (received by author May 1, 1981). See also Open Letter from Karen Mulhauser, American Civil Liberties Union 4 (received by author May 13, 1981) ("dogmatic effort to rewrite our Constitution").

66. *Id.* at 3. There is a misstatement in the reference to constitutional change: "And now Congress could pass a constitutional Amendment banning abortion for all women." *Id.* Congressional action could be only the first step; article V of the Constitution requires ratification by three-fourths of the states.

