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The Path to Judicial Supremacy: How the Supreme Court has Disregarded the Advice of Robert H. Jackson in Interpreting the Fourteenth Amendment and Undermined the Separation of Powers

Abstract: Robert H. Jackson wrote *The Struggle for Judicial Supremacy* while serving as Attorney General of the United States in the Roosevelt Administration. His primary purpose in writing was to criticize the pre-1937 Supreme Court for expanding the Fourteenth Amendment as a justification for handing down rulings on the basis of the justices' social values. He was at least partly motivated by a desire to see Roosevelt's New Deal programs upheld rather than struck down, but also objected on the principle that courts are necessarily poor engineers of social policy. This paper will address the following points:

-Robert Jackson emphatically rejected the expansion of the Fourteenth Amendment, particularly the doctrine of "substantive due process" as illegitimate, and as leading to dangerously excessive judicial power.

-The most visible Supreme Court decisions of the past six decades have involved similarly unprincipled expansions of the Fourteenth Amendment, and are susceptible to the very same criticisms that Jackson hurled at the pre-1937 Court.

-Although no one can say for certain how Jackson would have decided cases that have occurred since his death, the position that he took in *The Struggle for Judicial Supremacy* demonstrates that either:
1. He was correct in labelling the pre-1937 Supreme Court's activism in favor of business interests as constitutionally incorrect, AND every subsequent case asserting that the Fourteenth Amendment protects unenumerated rights has also been constitutionally incorrect.
OR
2. Attorney General Jackson was wrong, the Fourteenth Amendment is a gateway through which judges may give their social values the force of law, AND both the pre-1937 Court's activism and the Court's later expansion of the Fourteenth Amendment were both legally correct.

-The history of the Fourteenth Amendment demands, and Justice Robert Jackson properly understood, that the first possibility is legally correct, and, if embraced, would subdue judicial supremacy. However, it would also invalidate several decades of precedent and its application has not been without negative practical consequences.

-Accepting the second possibility constitutes an implicit endorsement of rule by judges as more desirable than a republican system of government in which social policy must originate in legislatures.

-A historically accurate application of the Fourteenth Amendment, though keeping the power to formulate policy in the hands of the legislature, has the unfortunate effect of confirming rather odious past decisions including the 1883 *Civil Rights Cases.* More lamentable still, it would prohibit the Court from ruling, as it did in *Brown v. Board of Education,* that segregation in public schools was unconstitutional.

-We are left with the choice of endorsing the expansion of the Fourteenth Amendment that Jackson decried and surrendering our government into the hands of judges who would inevitably produce some decisions with which we agree and some by which we are morally repulsed, or of insisting that legislatures, though often frustrating, are the proper and only legitimate engines of social policy.

In 1940, the United States Supreme Court was three years beyond the "Switch in Time that Saved Nine," when Justice Owen Roberts began to vote to uphold President Roosevelt's New Deal policies rendering the President's court packing plan to load the Court with sympathetic justices unnecessary and leaving the Court's conservative bloc made up of Justices Van Devanter, Sutherland, McReynolds, and Butler, the "Four Horseman," outnumbered.[1] Though the so-called Lochner Era, during which the Court proved willing to strike down virtually any law regulating business on the grounds that such legislation violated a constitutionally-protected "Liberty of Contract,"[2] had come to an end, New Dealers including Attorney General Robert H. Jackson were eager to articulate their view that the Supreme Court's creative use of the Fourteenth Amendment posed a threat to the Constitution's requirement that policy be set by the legislature.

Jackson, with this purpose in mind, wrote *The Struggle for Judicial Supremacy*, summarizing what he believed to be the errors of the Lochner Era Court, and urging a new way forward. It is the focus of this essay to discuss Jackson's concerns in a modern context, demonstrating that the judicial supremacy he warned against has advanced at a steady pace since his death in 1954. The major factors contributing to this shift in the balance of power have been the use of substantive due process and unprincipled expansion of the Equal Protection Clause to allow judges to make their policy preferences law under the guise of protecting unenumerated rights. I will additionally argue that adhering to the discoverable original meaning of the Fourteenth Amendment would prevent the judiciary from attaining supremacy, and address the essential question that Jackson weighs throughout the body of his book, namely, where should social change come from in a free society? More than three-quarters of a century have passed since *The Struggle for Judicial Supremacy* first went to print, but developments in constitutional law over these decades make the question as relevant today was at the height of the New Deal. After examining Robert Jackson's insights as to why the judiciary is a poor instrument for formulating social policy, discussing the route that the Supreme Court has taken towards judicial supremacy since Jackson's death, and articulating the proper legal interpretation of the Fourteenth Amendment, it becomes possible to think clearly about the fundamental question of where social change should come from in a free society.

Concerns Surrounding Judicial Supremacy

When Jackson uses the term "judicial supremacy," he is referring to a situation in which the federal judiciary occupies a position of greater power than the two elective branches, upsetting the proverbial balance of power, and allowing it to make policy decisions independent of, and often contrary to, the popular will. His definition comes through in his opening polemic against the pre-1937 Supreme Court, "the Court had not only established its ascendancy over the entire government as a source of constitutional doctrine, but it had also taken control of a large and rapidly expanding sphere of policy. … And it had used that supremacy to cripple other departments of government."[3] By taking on a political role, Jackson argues, the Court took power out of the hands of the private citizen, theoretically the source of all power under the Constitution, by making unchallengeable law through a panel of nine unelected and

[1] "When Franklin Roosevelt Clashed with the Supreme Court – and Lost," *Smithsonian*, *http*://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/#UClkHOyLHamiIolx.99.
[2] *Lochner v. New York*, 198 US 45.
[3] Robert H Jackson, *The Struggle for Judicial Supremacy*, (New York: Vintage Books, 1941), xi.

unaccountable judges. Thus, "the basic inconsistency between popular government and judicial supremacy" that Jackson writes of.[4]

Though critical of the Court's practice, prior to 1937's flip-flop beginning with the 5-4 decision in *West Coast Hotel v. Parrish* to uphold a Washington state minimum wage law[5], of operating, "almost as a continuous constitutional convention which, without submitting its proposals to any ratification or rejection, could amend the basic law."[6], he does not go on to argue that the Constitution may only be altered through the Article V amendment process. He instead takes a pragmatic approach, noting that the Supreme Court's decisions effectively admit that constitutional law develops as a result of changing private interests and popular opinion. Arguing that "constitutional law is not a fixed body of immutable doctrine,"[7] he asserts that this development should be free of the influence of private interests and more responsive to the public will. According to Jackson, past generations had influenced the development of the Supreme Court's doctrine whether or not they had been aware of it, "What we demanded for our generation was the right consciously to influence the evolutionary process of constitutional law."[8]

Considering these statements in their historical context, as the diatribe of a rising star in the Roosevelt administration against the conservative forces that had, until recently, stood in the way of cherished New Deal programs, brings up a few points to address. First, it may be tempting to interpret Jackson's argument as a strictly partisan one to be embraced by liberals and rebutted by conservatives. However, as society changes, situations in which liberals have celebrated the Court's siding with interest groups against popular will have presented themselves. Additionally, Jackson's avowed purpose in writing is to document and support an effort, "to confine judicial power to its traditional and proper sphere."[9], hardly a goal that conservatives would be expected to reject outright. Of course, there may be honest debate about what the federal judiciary's traditional and proper sphere is. Secondly, Jackson is not advocating an arrangement in which the Court becomes a super legislature for the general public to turn to when the Congress is delayed in addressing, or unresponsive to popular opinion. This would constitute the very judicial supremacy that he so determinedly opposes. His argument is that the Court should acquiesce to the will of the majority as expressed through acts of Congress and executive initiatives. This would have resulted in New Deal programs such as the first Agricultural Adjustment Act and the National Industrial Recovery Act, being upheld as constitutional.[10] [11]

Leaving Jackson's personal politics there, and having acknowledged that judicial supremacy can serve the immediate needs of liberals and conservatives alike, one must wonder what Jackson finds so alarming about an ascendant judiciary. When explaining himself, he offers a number of apolitical reasons, both practical and theoretical, as to why judicial rule is undesirable. These include the very nature of Supreme Court cases, which Jackson, as solicitor

[4] Ibid, vii.
[5] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379.
[6] Jackson, x-xi.
[7] Ibid, xiv.
[8] Ibid, xiv.
[9] Ibid, xvi.
[10] *United States v. Butler*, 297 U.S. 1.
[11] *A.L.A. Schecter Poultry Company v. United States*, 295 U.S. 495.

general-emeritus, understood to consist of lawyers arguing before other lawyers.[12] If any fields of knowledge not within the "learning and limited understanding of a single profession-the law,"[13] are given voice at all, it is often limited to the appendices of ponderous "briefs" that justices have little time for and often ascribe little weight to.[14] The Court is consequently left to make unreviewable decisions based on little more than, "the conflicting and unsupported assertions of two attorneys."[15] The limitations of oral arguments compound these shortcomings. With only half an hour to argue their case, attorneys are unlikely to persuade any justice to change his or her initial opinion. Instead, Jackson eloquently states, "Argument is likely to leave each judge just where it found him."[16] Labeling judicial supremacy as "government by lawsuit"[17], Jackson unequivocally renders judgment against the judiciary as an improper engine of social change in a free society by writing that, although effective at applying legislative rules, judicial justice, "is inherently ill suited, and never can be suited, to devising or enacting rules of general social policy."[18]

Robert Jackson was not alone in opposing what he viewed as judicially-dominated government, nor was 1940 the first time that anyone noticed a tendency towards judicial supremacy. He is in the company of no less a figure than Abraham Lincoln, who, in his first inaugural address, warned that because the most vital questions were put beyond debate by the decisions of a supreme court, "the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."[19] There can be little doubt that a system in which lawsuits argued and decided by lawyers result in fundamental law for an entire nation is inconsistent with popular government.

Judicial Supremacy and the Fourteenth Amendment

It should be emphasized that the tendency towards "government by lawsuit" did not end with Justice Owen Roberts' change of heart. Jackson identified a conspicuous and ongoing trend, in which the Supreme Court has used the Fourteenth Amendment to elevate itself above its two "coequal" branches. Even in 1940, Robert Jackson felt confident in proclaiming, "there can be little question that it [the Supreme Court] has expanded the 'due process' clauses [of the Fifth and Fourteenth Amendment] into greater limitations than they originally were meant to embody."[20] Commentators of vastly different political leanings have written much on this trend since, and Jackson freely admits that he was not the first to recognize it. As early as 1877, just nine years after the Fourteenth Amendment's ratification, Justice Miller, writing for the Court in *Davidson v. New Orleans,* mentioned "some strange misconception of the scope," of the Fourteenth Amendment's Due Process Clause which would allow the Court to test, "the abstract opinions of every unsuccessful litigant," as well as the merits of the state legislation which the

[12] Jackson, 291.
[13] Ibid, 291.
[14] Ibid, 300.
[15] Ibid, 298.
[16] Ibid, 301.
[17] Ibid, 287.
[18] Ibid, 288.
[19] *Political Debates between Lincoln and Douglas* (Sparks Edition. Cleveland; 1895), Ibid, 29, 299.
[20] Jackson, 23.

litigants challenged.[21] This statement of Justice Miller's amounts to a rejection of the doctrine of substantive due process, which holds that the Fourteenth Amendment's Due Process Clause confers not only procedural protections, but also the protection of fundamental rights which need not be enumerated anywhere in the text of the Constitution.

Rejection of substantive due process, a doctrine which a majority of the Supreme Court has adhered to at least since 1965[22], poses the enormous problem of invalidating some of the most momentous precedents of the second-half of the twentieth century. Should one side with the historical record on the scope of the Due Process Clauses, the question of whether being legally correct is worth the potential instability and loss of prestige accompanying the abandonment of a half-century of precedent remains to be answered. Leaving that to be dealt with separately and returning to Jackson, his own interpretation of the Fourteenth Amendment's Due Process Clause rejects a substantive reading. This comes through most clearly in his rejection of the Court's 1905 holding in *Lochner v. New York* that the Constitution protects an unenumerated "Liberty of Contract" that prohibited the state of New York from limiting bakers to working ten hours per day.[23] His condemnation of *Lochner* includes railing against the Court's practice of drawing unenumerated rights, "out of the big top hat of Due Process," and an expression of confidence that the states which ratified the Amendment did not believe themselves to be giving up the power to regulate prices and wages.[24] He is arguing, by implication, that the meaning of the Fourteenth Amendment and all its clauses must be found in the meaning that it had at the time of adoption, and that its original meaning did not include a substantive element.

It must be said that this interpretation of Jackson is not universally held. In 2016, Laurence Tribe indicated that he believed Robert Jackson's interpretation of the Constitution to be consistent with the Court's holdings in such substantive due process cases as *Griswold v. Connecticut*, *Roe v. Wade*, and *Obergefell v. Hodges*. Tribe largely bases this argument off of a statement that Jackson made in a 1949 case involving a New York state dairy regulation characterizing much of the work of the Supreme Court as filling in the "great silences of the Constitution."[25] [26] Taking this as a definitive statement of Jackson's jurisprudence, Tribe extrapolates on it to argue that Constitutional silence on a social issue does not necessarily "close the door" on the possibility that the Constitution may require a certain course of action regarding that issue. Tribe focuses on *Obergefell* to make his point, "The Constitution's text says nothing about marriage, let alone about same-sex marriage. But *those silences were rightly treated by the Court as invitations to fill in the gaps.*" (the emphasis is his).[27] Tribe labels this and other substantive due process cases, "children of *Griswold v. Connecticut*,"[28] the 1965 case which famously ruled a Massachusetts state ban on the use of, or education about, contraceptives unconstitutional on the grounds that it violated a "Right to Privacy" which, according to Justice Douglas, although not mentioned in the Constitution, could be found in "penumbras" which

[21] Jackson, 49. *Davidson v. New Orleans*, 96 U.S. 97.
[22] *Griswold v. Connecticut*, 381 U.S. 479.
[23] *Lochner v. New York*, 198 US 45.
[24] Jackson, 53-4.
[25] *HP Hood & Sons Inc. v. Du Mond*, 336 U.S. 525.
[26] Laurence H. Tribe, *Soundings and Silences*, 115 MICH. L. REV. ONLINE 26 (2016), 31.
[27] Tribe, 46.
[28] Tribe 46.

"emanate" from the 3rd, 4th, 5th, and 9th Amendments, all incorporated against the states through the Due Process Clause of the 14th Amendment.[29]

Tribe would argue that Robert Jackson's admission that the Court must fill in, "the great silences of the Constitution" is evidence that he would have recognized the unenumerated rights of privacy and dignity that have been the great liberal victories of the past fifty-odd years. However the Robert H. Jackson of 1940 expresses clear disdain, in *The Struggle for Judicial Supremacy*, for the use of the Fourteenth Amendment to create rights not mentioned in the text of the Constitution. It is true that Jackson focuses specifically on the Fourteenth Amendment's Due Process Clause, with less emphasis on the Equal Protection and Privileges or Immunities Clauses, which could also be used to "fill gaps" in the text of the Constitution, but his treatment of the original public meaning of the Amendment as an indispensable factor in determining its scope strongly suggests that he would not be willing to interpret it as protecting rights that were far from the minds of the members of the 39th Congress and state legislatures of 1868. While Jackson voted with his conscience, and against his understanding of the Fourteenth Amendment, in *Brown v. Board of Education*, he did not pretend that he was interpreting the Constitution in doing so.[30] Tribe's argument, therefore, should be taken as an agenda-driven attempt to defend a recent landmark decision that he approved of against Chief Justice Roberts' assertion that it, "had nothing to do with the Constitution."[31] He seeks to dress up a political determination as a decision involving some degree of legal analysis and reasoning by claiming the support of a deceased justice who is generally well respected by both liberals and conservatives.

The Neither or Both Dilemma

Jackson's position on the scope of the Fourteenth Amendment, and Tribe's distortion of it, bring up a fundamental dilemma in American constitutional law that few are willing to face honestly. This conundrum could be called the neither or both dilemma, because it unavoidably requires the conclusion that the Constitution either protects neither a "Liberty of Contract" nor a "Right of Privacy" or it protects both. Since 2015, a right to same-sex marriage can be added to the side of "Right of Privacy." While conservatives would love to believe that *Lochner* was right, and that *Griswold, Roe, Planned Parenthood v. Casey,* and *Obergefell* were wrong, and as much as liberals would like to believe the opposite, there is little beyond one's own political prejudices to support a belief that a certain unenumerated right is protected by any provision of the Fourteenth Amendment while another is not. The history of the Amendment, if it is to be taken as authoritative, reveals that it was intended to have a fixed and surprisingly narrow purpose which did not include bestowing any unmentioned fundamental rights.[32] This leaves would-be supporters of unenumerated rights with Jackson's argument that the Constitution should be interpreted to reflect changes in public opinion rather than bound to its original meaning. But Jackson would not carry this principle to the extent of recognizing rights not mentioned in the Constitution. In fact, he writes that no one, not even Franklin Roosevelt at the height of his frustration with the Court, had ever claimed that the Court should add or remove fundamental rights with the winds of public opinion.[33] Jackson is actually arguing against courts taking on

[29] *Griswold v. Connecticut*, 381 U.S. 479.
[30] Richard Kluger, *Simple Justice,* (New York: Vintage Books, 1975), 609.
[31] *Obergefell v Hodges*, 576 U.S. ___.
[32] Raoul Berger, *Government by Judiciary,* (Cambridge: Harvard UP, 1977): see also Appendix briefly and wholly inadequately summarizing evidence revealing the original meaning of the Fourteenth Amendment.
[33] Jackson, vii.

enormous power by translating public opinion into fundamental law, proposing instead that they restrain themselves by deferring to majority will expressed through legislatures. This means that advocates of an activist Supreme Court turning popular opinion into unalterable law cannot claim to have the esteemed Justice in their corner. Furthermore, the Court's more "activist" decisions often do not align with majority will. Jackson makes it abundantly clear that an overwhelming majority of Americans opposed the Court's continued recognition of a "Liberty of Contract" at the time of his writing, but the Court was not responding to majority will in *Griswold* (The people and state of Connecticut were content to act as though the statute in question did not exist)[34], while *United States v. Windsor* scrapped the Defense of Marriage Act usurping the power of the majority to express its opinion through its duly elected Congress, and *Obergefell* invalidated statutory or constitutional provisions of a majority of the states, prohibiting the people from expressing their will through their state representatives as well. Jackson's argument insisting that the Constitution's Due Process Clauses do not create a "Liberty of Contract" inescapably applies to these later cases with equal force. In short, if the goal is to arrive at a system that will inevitably side with whichever ideology we happen to adhere to, then removing the judiciary as a restraint on popular will by making it subservient to majorities will not always produce the desired effect. If we would not answer the question of how to best affect social change in a free society, "In whichever manner suits my opinion on this particular matter.", then Jackson's insights leave only two options available: that the Constitution protects neither a "Liberty of Contract" nor a "Right of Privacy," or it protects both.

Why "Neither or Both" is Important to Judicial Supremacy

Answering the neither or both question is significant because one's solution to the dilemma has a major effect on the relative power of the judiciary. If the Fourteenth Amendment allows the Court to expand its language to create protections that were clearly neither contemplated by its framers nor part of the ratifying public's understanding, then the Court is free to substitute its own moral judgements for duly enacted legislation. The Court in this scenario really becomes a super legislature in which the opinion of any five justices becomes law above review and repeal. While this arrangement would inevitably produce some favorable outcomes for any particular ideology, it would not, over time, unbendingly align with any. Additionally, because the Court's decision is final, it leaves the losing parties with no reason to express their discontent through the safe channels of political advocacy. The legislative and executive branches could be irreversibly frustrated at any time by a disaffected individual who gains the ear of a sympathetic court. A situation in which the will of the American people expressed through their state and national representatives can be undermined by a determined interest group with good lawyers really would amount to what Robert Jackson calls "government by lawsuit," and what Raoul Berger calls "government by judiciary." It is possible to argue that such a thing is more desirable than the system of republican government that came into being in 1789, but Robert Jackson insisted that we acknowledge its fundamental difference from representative democracy if such judicial power is to be preferred and exercised in the United States of America.

The modern Court, having rejected *Lochner* while maintaining that *Griswold* and its progeny are good law, has not escaped the "neither both dilemma" of unenumerated rights, but has chosen what I will call a "modified both" position. It has disregarded Jackson's pleas for

[34] Alexander Bickel, *The Least Dangerous Branch,* (NewHaven: Yale UP, 1962), 147-148.

restraint and reached into the "big top hat of due process," which Jackson loathed, to identify fundamental rights mentioned nowhere in the Constitution, a practice which Jackson abhorred. As a result, the Court has taken on the power to invalidate state and federal laws by invoking these imaginary rights and to replace properly enacted law with its own system of values. Americans who share the values expressed by the Court may applaud this development with some semblance of logical consistency. They might argue that public opinion today supports the Court's relatively recent activist decisions and condemns the notion of "Liberty of Contract." Since the Constitution grows with society's changing preferences, the Court is correct to reject the unenumerated right declared in *Lochner* and embrace others such as rights of privacy and marriage equality. This position rests on the false premise that *Griswold* and its successors reflected the will of American voters at the time when they were decided. Each of these cases, as has already been noted, ran counter to the will of majorities as expressed in state laws by striking them down and replacing them with the values of an elite lawyer class. When this fact is acknowledged, all that is left of the argument is a thinly veiled assertion that the morality of educated elites is superior to that of the general public, and should therefore be the supreme law of the land regardless of the outcome of the democratic process. It also means that *Lochner* was correct for the duration of time when the elites of American society favored a "Liberty of Contract," and thus amounts to a "both" position. However modified this "both" position may be, it still amounts to a defense of judicial supremacy.

If, however, Jackson was right to argue that the Fourteenth Amendment is bound by the meaning that the 39th Congress gave to it, then the Court may not exercise legislative power, but it may face a situation in which it must stand idly by when a wider reading of the Amendment might empower it to end great injustice at the state or federal level. This, despite efforts of conservative scholars to skirt around it, is a perfectly valid and potentially fatal weakness of the judicial restraint that would result from originalism.[35] As an associate justice of the Supreme Court, Robert Jackson faced this scenario at the end of his career.[36]

Answering, "Neither" to Combat Judicial Supremacy

[35] Still other accusations against a narrow reading of the Fourteenth Amendment have less merit. One tactic of those who object to an originalist reading is to try to demonstrate that such an approach is so inflexible as to be untenable, and that jurists who supposedly embrace this philosophy in fact admit in certain contexts that the meaning of a clause changes with changing social and economic realities. One might point to *Kyllo v. United States* 533 U.S. 27, in which the late Justice Scalia wrote for a majority that included Justice Thomas, expanding the Fourth Amendment's protection against unreasonable search and seizure to classify the use of thermal imaging to look inside a person's home as a search requiring a warrant.[35] Original intent's modern day poster children were apparently willing to abandon their principles for expediency to rule that the Fourth Amendment was intended to apply to a technology which did not exist when James Madison drafted the Bill of Rights. There is, however, a distinction between Scalia's reasoning in *Kyllo* and that of Fourteenth Amendment expanders. Thermal imaging technology is an example of a new fact that falls within the existing meaning of a Constitutional right. *Kyllo* is consistent with the claim that any search that would have required a warrant in 1791 would require a warrant now and vice versa. Asserting that warrantless thermal imaging searches would have violated the Fourth Amendment had they existed in the eighteenth century is not the same as asserting that the meaning of "unreasonable searches and seizures" has changed. Far from the rigidity that opponents would attribute to it, the principle that underlies this position allows judges to recognize that new facts can fall under the existing meanings of constitutional language. What the principle does not allow, is for existing meanings of constitutional language to be changed by expanding or contracting them to fit changing social preferences that are arrogantly labelled as "facts."

[36] See *Brown v Board of Education* heading pg. 11

Notwithstanding the weaknesses of either persuasion, a choice must be made either in favor of reading unintended and unenumerated rights into the Fourteenth Amendment (both) or against the practice entirely (neither). Libertarian scholars of constitutional law such as Randy Barnett provide ammunition to those who would choose the "both" option, but the "neither" option is the one that Jackson's writing supports. Still, Jackson's reasoning is not the legally correct approach. The legally correct position also answers "neither," but differs somewhat from Jackson's in holding that the meaning of provisions of the Constitution are immutable, whereas Jackson thought that they should be subject to reinterpretation by popular will through legislatures. I say that Jackson's recommended approach of extreme judicial deference to legislatures is not legally correct because, though it could be wiser than what the Constitution prescribes, it runs afoul of the Supremacy Clause and Article V amendment process which render a fixed Constitution superior to ordinary acts of the legislature.[37] The legally correct position holds that the Fourteenth Amendment protects no rights whatsoever beyond those which its framers intended it to, while still incorporating the Bill of Rights. This approach makes judicial supremacy impossible because it requires policy to come from a legislature with limited authority, and can therefore be labelled "partial legislative supremacy." Because it has the potential to neutralize the threat of judicial supremacy, this alternative deserves consideration in some detail.

The Legally Correct Position's "Partial Legislative Supremacy:" An Alternative to Judicial Supremacy

The legally correct position is perhaps best expressed in Clarence Thomas' concurring opinion in *McDonald v. Chicago*. Thomas does not express a belief that *Lochner* was wrong to recognize a "Liberty of Contract," but as much logically follows from the reading of the Fourteenth Amendment that he lays out. In *McDonald,* the Court ruled 5-4 that the Second Amendment right to keep and bear arms applies to the states through the Due Process Clause of the Fourteenth Amendment. Thomas wrote separately to express his belief that, "there is a more straightforward path… that is more faithful to the Fourteenth Amendment's text and history." He continues, "I cannot agree that it is enforceable against the States through a clause that speaks only to 'process.' Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause."[38] Rejecting substantive due process, Thomas' interpretation of the Privileges and Immunities of citizens of the United States allows for the incorporation of the protections of the Bill of Rights without enabling the Supreme Court to overstep its bounds by "discovering" new unenumerated rights. To avoid entirely rehashing Justice Thomas' reasoning in applying the Bill of Rights to the states through the Fourteenth Amendment, suffice it to reproduce the following regarding Senate floor remarks of Republican Jacob Howard of Michigan, who sponsored the Fourteenth Amendment in the Senate,

> [He spoke of] 'a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, . . . some by the first eight amendments of the Constitution,' and that 'there is no power given in the Constitution to enforce and to carry out any of these guarantees' against the States. 39th Cong. Globe 2765. Howard then stated that 'the great object' of §1 was to

[37] United States Constitution, Art. VI, Clause II and Art. V
[38] *McDonald v Chicago*, (Thomas, J. Concurring) 561 U.S. 742.

'restrain the power of the States and compel them at all times to respect these great fundamental guarantees.' *Id.*, at 2766. Section 1, he indicated, imposed "a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States." *Id.*, at 2765.[39]

Likewise, Representative John Bingham of Ohio, the author of Section 1, "emphasized that §1 was designed 'to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today.' *Id*., at 1088."[40] So much for any argument that rejecting substantive due process prevents the incorporation of the Bill of Rights.

According to the legally correct position, the Privileges or Immunities Clause can be said to incorporate the Bill of Rights because the 39th Congress intended it to, it also requires similar evidence of intent to show that additional rights are protected. Unfortunately, this requirement means that some of the most odious decisions in our nation's history were, lamentably, proper applications of constitutional law. Because its intended purposes were so limited,[41] many unjust laws and individual actions were unfortunately not violations of the Amendment. This reality is a fact that proponents of an expansive Fourteenth Amendment often cite as a reason to reject the original meaning and embrace an interpretation that, whether they intend it to or not, radically empowers the judiciary and places it above the other two branches of government. As much as able conservatives have tried to dodge this issue, it can only be done by willfully misinterpreting the historical record. Robert Jackson was no doubt aware of this issue when he made his defense of the historical meaning of the Fourteenth Amendment. It is fitting that he was ultimately faced with a contemporary situation in which the tragically limited Fourteenth Amendment was called upon to right a deeply entrenched social wrong. Before coming to that dramatic scene, we must leave Jackson for a moment to explore just how feeble the Fourteenth Amendment proved to be, when limited to its historical meaning.

The Negative Effects of Applying the Legally Correct Position

At the end of Reconstruction, and shortly thereafter, the Court properly applied the Fourteenth Amendment in several cases with disturbing consequences. Of these, I will discuss two. The undesirability of the Court's holdings in these cases have led members of both the liberal and conservative camp to argue that they were erroneously decided. These attempts notwithstanding, understanding the repercussions of a correct reading of the Fourteenth Amendment requires accepting that the following were proper applications of constitutional law.

The first of these, known as the *Slaughterhouse Cases*, occurred in 1873 when the Court upheld an act of the Louisiana state legislature granting one company the exclusive right to do all of the butchering in New Orleans against suits from angry butchers contending that the law violated the Privileges or Immunities Clause by interfering with their right to earn a living.[42] Justice Samuel Miller wrote for a 5-4 majority, confirming that the purported purpose of protecting the health of consumers justified the law as a legitimate use of the state's police powers, which were generally understood to include health, safety, and morals legislation. With regard to the Privileges or Immunities Clause, Miller drew what would become the much vilified distinction between state and national citizenship, out of which arose different privileges and

[39] Ibid.
[40] Ibid.
[41] See Raoul Berger, *Government by Judiciary*, (Cambridge: Harvard UP, 1977).
[42] *The Slaughterhouse Cases*, 83 U.S. 36.

immunities. The right to practice one's profession, he correctly argued, did not arise from national citizenship, and was therefore outside the protection of the Privileges or Immunities Clause of the Fourteenth Amendment, which only protects those rights arising from national citizenship. As much as it is criticized as a cripplingly narrow construction of that Clause, Justice Miller's reading is supported by the text. Section 1 of the Amendment 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."[43] The 39th Congress therefore clearly conceived of a dual citizenship, both state and national. While it can be inferred from this single line of text that different forms of citizenship carry with them different rights, more direct evidence is also available.

Confusingly enough, the text of the original Constitution includes, in Article IV, a Privileges *and* Immunities Clause (emphasis added), which reads, "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[44] This clarifies that there are rights arising out of state citizenship.[45] The words of members of the 39th Congress also support Miller's claim that the distinction between state and national citizenship is significant. William Lawrence, a Republican Representative from Ohio stated that, "all privileges and immunities are of two kinds, to wit, those which [are] inherent in every citizen of the United States, and such others as may be conferred by local law and pertain only to the citizens of the state."[46] [47] The duality of citizenship comes into play when interpreting the Fourteenth Amendment due to its second sentence, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;"[48] It forbids the states from violating rights that arise from national citizenship, but is silent on the rights that arise from state citizenship. Accusations that *Slaughterhouse* incorrectly hamstrung the Privileges or Immunities Clause dismiss this evidence, and do not take into account the fact that the decision still allows this clause to serve the very useful purpose of incorporating the Bill of Rights without stretching the notion of due process past its breaking point.

Ten years after the *Slaughterhouse* decision, borrowing from reasoning first elucidated in 1875 in *United States v. Cruikshank*, the Court decided the *Civil Rights Cases* declaring that the

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[43] Fourteenth Amendment, *Cornell Law*, https://www.law.cornell.edu/constitution/amendmentxiv.

[44] United States Constitution, Art IV Section 2.

[45] As an aside, it is not an arbitrary choice of mine to use "rights" and "privileges and immunities" interchangeably, as Justice Thomas declared them to have the same meaning in *McDonald*, citing more evidence than can be repeated here (See Thomas concurring in McDonald v Chicago). While his concurrence does not amount to an endorsement of *Slaughterhouse*, its conclusion that the Privileges or Immunities Clause can incorporate the first eight amendments is entirely consistent with Justice Miller's opinion because all of the protections listed in the Bill or Rights arise out of national, rather than state, citizenship.

[46] Earl Maltz, "Brown v Board of Education and 'Originalism,'" in *Great Cases in Constitutional Law*, (Princeton: Princeton UP, 2000), 144.

[47] Still more evidence of the significance of this dichotomy comes straight from the pen of James Madison, who wrote in *The Federalist No. 42* that, "Those who come under the denomination of free inhabitants of a State, although not citizens of such State, are entitled, in every other State, to all the privileges of free citizens of the latter; that is, to greater privileges than they may be entitled to in their own State . . . ." Madison perhaps not very clearly, explains that state citizenship exists separately from national citizenship, and that rights arise from that state citizenship to which citizens are entitled when within the jurisdiction of a state other than their own. Because, as Madison confirms, one may be entitled to privileges in one state that do not exist in his own, it must follow that those privileges are the result of state, not national, citizenship.

[48] Fourteenth Amendment.

section of the Civil Rights Act of 1875 which forbade the segregation of public transportation and accommodations exceeded the power granted to Congress by the Fourteenth Amendment. With only John Marshall Harlan dissenting, the Court reasoned that the Amendment only reached state action, not the actions of private citizens acting in their roles as business owners. The section of the 1875 Civil Rights Act in question was directed against the conduct of individuals whereas the Amendment is clearly worded, "No state shall." There can be little doubt that the Court correctly interpreted the language of the Amendment as applying only to state action, but their correctness had tragic consequences. The two decades following the *Civil Rights Cases* decision witnessed no fewer than 3,000 lynchings.[49] It is impossible to estimate how many of these acts of barbarism were encouraged by the knowledge that the federal government would not step in to ensure that states punished murders fueled by racial hatred. Still, no Court could have completely eliminated the social attitudes that produced lynch mobs.

Many conservatives and libertarians, including Randy Barnett have argued that the decisions in *Slaughterhouse* and the *Civil Rights Cases* were not legally correct.[50] But they have the ulterior motive of avoiding the accusation that the legally correct position is indefensible because it requires that such repulsive decisions as these stand. Truthfully, the premise of this accusation is valid, and extends far beyond the nineteenth century to what is probably the single most celebrated decision ever rendered by the Supreme Court of the United States.

Brown v. Board of Education as the Gateway to Judicial Supremacy

Ironically, the most impactful decision that Justice Robert H. Jackson took part in did more than any other single case to advance the judicial supremacy which he loathed. It is a particularly cruel reality that the same case which put the egregious doctrine of "separate but equal" to rest and brought about the desegregation of public schools also freed the judiciary from its Constitutionally-prescribed moorings and set it on a course to judicial supremacy by apparently discrediting the legally correct position. Jackson had his reservations about Chief Justice Warren's opinion alleging that school segregation violated the Equal Protection Clause of the Fourteenth Amendment. To support this interpretation, Warren falsely claimed that the historical record of the Amendment is equivocal, writing, of the justices' own investigations into the subject, "At best, they are inconclusive."[51] The remainder of the opinion relies heavily on the

[49] Kluger, 67.

[50] See Randy Barnett, *Our Republican Constitution*, (New York: Broadside Books, 2016), 116-118. Barnett criticizes Justice Miller in *Slaughterhouse* for avoiding the issue of, "whether the restrictions imposed on the liberty of New Orleans butchers…were irrational and arbitrary."[50] Yet he is able to cite nothing in the text or history of the Fourteenth Amendment to suggest that it empowers the Court to invalidate state laws simply because it deems them unwise. Barnett also concurs with Justice Harlan's dissent in the *Civil Rights Cases*, arguing that the Thirteenth Amendment goes beyond outlawing slavery, and allows Congress to prevent what Harlan called, "burdens and disabilities which constitute badges of slavery and servitude." But if Harlan's "badges of servitude" approach were correct, and the Thirteenth Amendment alone were sufficient to eliminate all legally-sanctioned racial prejudice, the Fourteenth and Fifteenth Amendments would have been unnecessary. It would be in foolish violation of logic to construe one amendment in such a way as to render two others which quickly followed it meaningless. Like Laurence Tribe's agenda driven argument that Robert Jackson would have voted with the majority in *Griswold v. Connecticut*, Barnett is trying to turn what he calls "Our Republican Constitution" into "Our Libertarian Constitution" by passing over historical evidence and willfully misconstruing the Fourteenth Amendment to read something to the effect of, "The Supreme Court shall strike down any state law which diminishes the sovereignty of the individual."

[51] *Brown v. Board of Education of Topeka*, 347 U.S. 483 : Evidence that the Court was aware that the historical record was far from equivocal includes a now-famous memo that William H. Rehnquist wrote to Robert Jackson

work of sociologists and psychologists who demonstrated that segregated schools had a harmful effect on both black and white children.[52] He was substituting sociology for legal principles. Jackson was convinced, in the words of his clerk E. Barrett Prettyman, that, "The history of the Fourteenth Amendment didn't really point to the conclusion that *Plessy* should be reversed," and wanted the Court to admit that it was writing "new law for a new day."[53] Although he ultimately joined Warren's decision, Jackson had sufficient respect for the history of the Amendment to write several drafts of a concurring opinion in which he argued that school segregation was unconstitutional without claiming that it violated the Fourteenth Amendment.[54]

Among the evidence for the constitutionality of segregated schools, which seemed irrefutable to Jackson, was the fact that, at the time of the Amendment's ratification, eight Northern states provided for segregated schools or allowed localities to segregate if they chose, five states that had not been part of the Confederacy excluded black children from public schools entirely, and the 39th Congress allowed for the segregation of schools in the District of Columbia, over which it had direct control.[55] This evidence was considered to be so strong that several of the NAACP lawyers arguing *Brown* concluded that, as Richard Kluger put it, "[T]hey could not reasonably argue that the framers intended the [Fourteenth] amendment to prohibit school segregation."[56] This state of affairs makes it abundantly clear that the decision in *Brown v. Board*, though extremely socially desirable and possibly even necessary, was wrong as far as law is concerned. This fact serves at least as much to remind us that law is an imperfect approximation of justice as it does to call the merits of relying on legislatures as the only legitimate source of social change into question.

Rutgers Law Professor Earl Maltz proves extremely helpful in articulating how the Court's departure from the legally correct position in *Brown* empowered the judiciary to take on the legislature's constitutional role as the engine of social change. In no way does he disparage the social importance of the Court's ruling against school segregation, writing that it may well have been indispensable, "in creating the moral and political climate that produced…the Civil Rights Act of 1964 and the Voting Rights Act of 1965."[57], two of the crowning achievements of the Civil Rights Movement. Had the Court armed opponents of the Civil Rights Act in the Senate with ammunition to claim that the Constitution endorsed racial discrimination, it could have narrowly failed rather than narrowly passed.[58] Still, initiating the moral imperative of

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emphasizing that the history of the Equal Protection Clause showed that it did not forbid segregated public schools. Justice Felix Frankfurter also received a memo from his clerk, the revered Alexander Bickel, who had a special assignment for the term: reading through the records of the 39th Congress to determine whether the Fourteenth Amendment reached segregation of schools. The cover letter to this memo read, in part, "it is impossible to conclude the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting."(Berger, 118).

[52] *Brown v. Board of Education of Topeka*, 347 U.S. 483: The validity of the sociological evidence submitted to the Court has also been seriously challenged.

[53] Kluger, 609.

[54] E. Barrett Prettyman, Jr., *Jackson's Unpublished Brown Opinion*, Presentation to Robert H. Jackson Center, 2003. https://www.youtube.com/watch?v=nIhV_fjwhQ8.

[55] Berger, 123.

[56] Kluger, 640-41.

[57] Maltz, 140.

[58] Ibid.

desegregation by judicial rather than legislative means was an enormous leap towards judicial supremacy.

Brown can indeed be identified as the gateway through which the judiciary became the preeminent branch of government. While Chief Justice Warren's opinion paid token homage to the historical record of the Fourteenth Amendment before ignoring it, the Court was gradually emboldened to openly deny the importance of the original meaning of constitutional provisions. By 1966 a majority of the Court claimed not to be bound by original intent, declaring in *Harper v. Virginia Board of Elections* that the Equal Protection Clause was not, "shackled to the political theory of a particular era."[59] [60] After *Brown*, the Court was free to follow the precedent of disregarding the legally correct interpretation of the Fourteenth Amendment, and to invent the right of privacy, among other rights, to impose its own preferred social policies on the nation. The question at the core of the Court's post-1954 transition away from legal reasoning is not whether the decisions rendered by this approach have been good social policy, but, as Maltz puts it, "whether the justices of the Supreme Court are more competent to make basic political or moral judgements than members of other branches of the state and federal governments."[61]

If we like the most far-reaching rulings of the modern Court: *Griswold, Roe, Obergefell*, it is tempting to answer that, at least in some cases, "Yes, the Supreme Court is more competent." But we should understand that by contending that social policy should be set by judges, we are, as Robert Jackson pointed out in 1940, taking a position that is fundamentally at odds with representative democracy. We must consider whether there is a principle for determining when judicial supremacy is appropriate other than, "whenever the courts are likely to adopt my viewpoint and the legislature is not." If a better principle does not exist, we are making the selfishly childish claim that, "government should do what *I* want it to at all times." If we dislike the effects of the Supreme Court as super legislature, then we cannot ignore the fact that legislatures sometimes fail to produce needed social change in a timely manner. We must argue that patient resort to the political process is always a better option than the potential quick fix that can be had by circumventing politics and resorting to unreviewable judicial settlement. The reason being that the potential costs of surrendering government to a handful of elite lawyers outweighs the immediate gratification of having any individual policy question come out our way.

Where *Should* Social Change Come From? And Why So Much Discussion of the Fourteenth Amendment?

The preceding lengthy, but still almost cursory, discussion of the Court's treatment of the Fourteenth Amendment was an essential part of the discussion of judicial supremacy. It bridges the seventy-six year gap between the publication of Jackson's book and the present day by demonstrating that acceptance of the modern interpretation of due process that produced such decisions as *Griswold*, *Roe*, and *Obergefell*, and the use of sociology as a substitute for legal principles that began with *Brown*, is an implicit endorsement of the judicial supremacy that Jackson so passionately opposed when writing *The Struggle for Judicial Supremacy*. The same threat to democracy that Jackson identified in the *Lochner* Court's willingness to create fundamental rights on the basis of nothing but their own judgement under the guise of due

[59] Maltz, 141.
[60] *Harper v. Virginia Board of Elections*, 383 U.S. 663.
[61] Maltz, 146.

process, exists in each of the cases most celebrated by liberals since 1965 (no doubt conservatives would have celebrated judicial supremacy similarly had the Court leaned their way on major social issues). To dismiss the reality that these decisions were produced by and encourage "government by lawsuit" and "government by judiciary" is to dismiss the insights of one of the most renowned legal minds of the twentieth century.

On the other hand, the legally correct approach of constricting the Fourteenth Amendment to its intended limits would leave the constitutional order intact, but it also would have prevented the Supreme Court from making its most morally lauded decision, striking down segregation in public schools in *Brown v. Board of Education*.[62] Accepting the Constitution's arrangement, which could be called "partial legislative supremacy," in which social change must originate in the legislature but can be checked by the courts, requires accepting that there have been times in our history when national and state legislatures were unable and/or unwilling to make the social changes that decency demanded in a timely manner. Robert Jackson, in failing health, faced such a situation in ruling on the legality of public school segregation. His decision to join Chief Justice Warren's opinion signifies that he believed, at least in this particular instance and in spite of his earlier writings, that legislatures could not always be relied on. It is not inconceivable, however, that political processes would have achieved the correct result in a comparable period of time, and so the option of partial legislative supremacy remains open. To choose it, and the judicial review-tempered legislature as the proper source of social change, is to argue that the people, through their legislatures, are better equipped than judges to make social change.

The American flavor of democracy, however, does not carry this line of logic to its fullest extent. A pure application of this principle would allow the people, through their legislators, to amend the Constitution through normal statutes at any time. Rather than subordinating the national legislature to the Constitution as the Supremacy Clause does,[63] the Constitution would be subordinate to Congress. This can be called "true legislative supremacy," and is effectively the system of government that the United Kingdom has in place. While there are a number of documents partially making up the English Constitution, and Parliament has limited its own power through delegation to other bodies, Parliament technically retains the power to repeal these documents and reclaim the power it has surrendered at any time.[64] Ultimately, the law and constitution of the United Kingdom is whatever Parliament says it is. *The Struggle for Judicial Supremacy* does not reveal Jackson's opinion on true legislative supremacy beyond his mentioning that it has never been proposed by any government official in the United States.[65] Still, his advocacy of a Constitution responsive to majority opinion bears a close resemblance to this form of legislative supremacy.

Robert Jackson intended for *The Struggle for Judicial Supremacy* to persuade Americans to reject the judiciary as an engine of social policy. I have dedicated a large part of this essay to arguing that his warnings have not been heeded, and that judicial supremacy is the path that the

[62] Paul Craig Roberts and Lawrence Stratton present evidence that social change was taking place since the end of the Second World War that may have enabled desegregation at a comparable rate of speed without the *Brown* ruling. (see *The New Color Line*, (New York, Regnery, 1995).)
[63] United States Constitution, Art. VI, Clause 2.
[64] "Parliamentary Sovereignty," *United Kingdom* Parliament, https://www.parliament.uk/about/how/role/sovereignty/.
[65] Jackson, vii.

United States has travelled down since the time of Jackson's writing. I have also more than hinted that I share Jackson's opinion that the judiciary is not the proper source of social change. I have, perhaps not very subtly, favored the partial legislative supremacy brought into being by the framers of the Constitution and Reconstruction Amendments, acknowledging that it is not without its faults, and does not invariably serve the interests of any political persuasion. Robert H. Jackson's *The Struggle for Judicial Supremacy* advocates a more powerful legislature than the actual Constitution creates. By arguing that judges should passively endorse acts of Congress that do not blatantly violate the document as constitutional, Attorney General Jackson would effectively remove the judiciary as a check on the legislature. Those who would choose to argue in favor of judicial supremacy over either of these alternatives may do so in an intelligent and potentially persuasive manner, but should acknowledge that kritocracy is not the equivalent of democracy. Almost two hundred years ago, Frenchman Alexis de Tocqueville wrote *Democracy in America* in an attempt to explain the United States to Europeans. In it, he astutely observed that, "There is hardly a political question in the United States which does not sooner or later turn into a judicial one."[66] We are free to choose to embrace this tendency, but let us not forget that we have the option of insisting that political questions remain political.

[66] Alexis De Tocqueville, *Democracy in America*, ed. J. P. Mayer, trans. George Lawrence, vol. 1, part 2, chapter 8, 270 (1969). Originally published in 1835–1840.

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Appendix: Evidence of the Meaning of the Fourteenth Amendment

(Information derived from Raoul Berger's *Government by Judiciary*)

Berger summarizes the intent of the Fourteenth Amendment as succinctly as possible: "The three clauses of Section 1 were three facets of one and the same concern: to insure that there would be no discrimination against the freedmen in respect of 'fundamental rights,' which had a clearly understood and narrow compass. Roughly speaking, the substantive rights were identified by the privileges or immunities clause; the equal protection clause was to bar legislative discrimination with respect to those rights; and the judicial machinery to secure them was to be supplied by nondiscriminatory due process of the several States." (18).

Privileges or Immunities Clause: Berger first seeks to establish that Section 1 of the Amendment was largely intended to constitutionalize the Civil Rights Act of 1866. The Amendment's author, Representative John Bingham (R-OH), seriously doubted the "power of Congress to pass" the Bill in the absence of an amendment. Senator Jacob Howard (R-MI), supported the Amendment in part to prevent future Congresses from repealing the Act (23). Having thus far determined that the Amendment was designed to protect the Civil Rights Bill, Section 1 of the Bill can be used to help define the privileges or immunities of citizens of the United States.

> That there shall be no discrimination in civil rights or immunities…on account of race…but the inhabitants of every race…shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment…and no other. (24)

Berger notes that, "The specific enumeration was in response to a sentiment expressed at the very outset by Senator John Sherman, who desired to secure such rights to the freedmen, 'naming them, defining precisely what they should be.'" (24).

House Chairman James Wilson (R-Iowa) said of these "civil rights and immunities,"

> What do these terms mean? Do they mean that in all things, civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed…Nor do they mean that all citizens shall sit on juries, or that their children shall attend the same schools.

Further distinguishing between the civil rights mentioned in Section 1 of the 1866 Bill, and political rights, Senator Howard explained that suffrage is not, "one of the privileges and immunities thus secured by the Constitution." Senator Lyman Trumbull (R-Ill), Chair of the Senate Judiciary Committee, likewise said that the Bill, "has nothing to do with the right of suffrage, or any other political rights." (30). Protection of the rights enumerated in Section 1 of the 1866 Civil Rights Act, and applying the protections of the first eight amendments to the states, as Bingham and Howard explained was intended (recall their quotation in Clarence Thomas' *McDonald* opinion), are the 39th Congress' full intentions for the Privileges or Immunities Clause.

Due Process Clause: The great exponent of federal power Alexander Hamilton made a remark to the New York Assembly in 1787 which sheds light on the supposedly vague meaning of "due process" as used in the Fifth and Fourteenth Amendments, "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of the legislature." Berger shares that no contrary

statement was uttered, “in any of the constitutional conventions, in the First Congress, nor in the 1866 debates.” (194). One can look back to fourteenth-century statutes from the reign of Edward III to show that the concept of due process had always been strictly procedural, essentially meaning that no one would be subject to criminal punishment without a fair trial and being summoned and heard in accordance with the laws of criminal procedure (197-202). Furthermore, such leading radical abolitionists as Lysander Spooner and Joel Tiffany did not believe that due process could be applied to strike down laws hindering the social or political equality of blacks (207).

Equal Protection Clause: Berger opens his chapter on the Equal Protection Clause with the blunt assertion that, “there is virtually no evidence that the framers meant by resort to those words to open goals beyond those specified in the Civil Rights Act and constitutionalized in the Amendment.” (167). In an early draft of the Amendment, Bingham made provision for, “the same political rights and privileges and…equal protection in the enjoyment of life, liberty, and property” (171). This indicates, as Berger points out, that “equal protection” did not include “political rights and privileges.” The final version, of course, had replaced “political rights and privileges” with “privileges and immunities” which, we have seen, included only the civil rights listed in the 1866 Civil Rights Bill.

With regard to the phrase, “equal benefit of all laws and proceedings for the security of person and property” in section 1 of the 1866 Civil Rights Act, even its opponents, including Senator Thomas Hendricks (D-IN), and President Andrew Johnson, who vetoed it, understood it to, “place all men upon an equality before the law…in regard to their civil rights” (Hendricks) and that “perfect equality” was intended with respect to the “enumerated rights” of Section 1 (Johnson) (170).

Berger concludes that, “the words ‘equal protection of the laws’ were meant to obviate discrimination by laws-that is, statutes- so that with respect to a limited group of privileges the laws would treat a black no differently than a white.” The concept of “substantive equal protection,” which would apply the clause to cases not concerning the civil rights of blacks enumerated in the 1866 Civil Rights Act, would not only exceed the intention of the framers, but represents an interpretation that they “unmistakably excluded.” (191).