the officials of eleven States had "violated in every sense of the word these provisions of the Constitution of the United States, the enforcement of which are absolutely essential to American nationality."

Bingham's colleagues could not make him understand that the provisions of the Federal Bill of Rights were not grants of power, but special restrictions on the federal government, not on the States. There was, therefore, nothing to "enforce" for the officers of a State. And as regards the "privileges and Immunities of Citizens in the several States" of Article IV, sect.2 of the Constitution, these are indeed restrictions on the States, and a congressional enactment to "enforce" them had been on the statute books since 1789: any denial to a citizen of a State claiming to be entitled to the "privileges and immunities" under that article by the highest court of a State has always been appealable to the Supreme Court of the United States by virtue of an act of Congress which originally was Section 25 of the Judiciary Act of 1789.

Bingham assured the House "that the proposed amendment does not impose upon any State of the Union or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution." [41] However, the House understood very well that the proposed amendment conferred upon Congress a general power to legislate for the States on civil rights and practically any other matter, including the federal Bill of Rights. Representative Hotchkiss expressed what the majority of the House felt, when he said: "I am unwilling that Congress shall

41) Cong.Globe, 39th Cong. 1st Sess. 1034.

have any such power."[42] The proposal was postponed indefinitely and never taken up. It was never debated in the Senate.

When the Reconstruction Committee resumed discussions on the amendment proposal, it became clear that any hope to include voting rights had to be abandoned.[43] Section 1 of the new proposal offered by Stevens was therefore clearly restricted to "civil rights." It read:

> "Section 1. No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color or previous condition of servitude." 44/

A second section had first tried to forbid discrimination as to the right of suffrage because of race, color, or previous condition of servitude from and after the 4th of July 1876. This was later stricken. Instead, the States retained their power to regulate voting rights, but were threatened with a loss of representation if they denied the right to vote to male inhabitants over 21 years of age because of race, color, or previous condition of servitude.[45]

This later became Section 2 of the Fourteenth Amendment.[46]

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42) Id. 1095. H.H.Meyer, Fourteenth Amendment 63 (supra n.26).

43) See for details H.H.Meyer, id. 5-12,71-74.

44) Journal of the Joint Committee on Reconstruction 28 (supra n.39).

45) Id. 28-29, 37.

46) The provisions of the Voting Rights Act restricting the authority of the States to set voter qualifications are not supported by the Fourteenth Amendment, nor are the decisions of the Supreme Court concerning the apportionment of State legislatures. See J.Harlan's dissents in Baker v. Carr, 369 U.S.186, 330-349 (1962); (see also id.at 266-330, Frankfurter, J., dissenting); Reynolds v. Sims, 377 U.S.533, 589-632(1964); Carrington v. Rask, 380 U.S.89, 97-101 (1965); Oregon v. Mitchell, 400 U.S.112, 152-229 (1970). See also H.H.Meyer, Fourteenth Amendment 5-11 (supra n.26).

Section 3, as finally adopted, prohibited any person from holding public office who, having previously sworn to support the Constitution, had participated in, or given aid to, the rebellion.

Section 4 prohibited the payment of debts incurred in aid of the war against the Union and of claims for loss of slaves.

Section 5 provided:

> "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." 47/

Bingham had first moved to amend the first section by adding an equal protection clause and the just compensation clause of the Fifth Amendment, as follows:

> "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without compensation." 48/

After a discussion, this motion was rejected. Senator Howard voted against it.[49] The nature of this discussion is not known, but it is significant that no further attempt was made to include the just compensation clause into the proposed constitutional amendment.

Bingham then moved to insert as sect.5 the following:

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47) Journal of the Joint Committee on Reconstruction 28/(supra n.39); H.H.Meyer, Fourteenth Amendment 72 (supra n.26). -29

48) Journal of the Joint Committee on Reconstruction 29 (supra n.39); H.H.Meyer, Fourteenth Amendment 73 (supra n.26).

49) As mentioned above, supra 28, Senator Howard's speech, with which he introduced the adopted version of the Fourteenth Amendment to the Senate, was the only speech during the debates on the accepted version which mentioned Amendments 1-8. Therefore, special attention is focused on Senator Howard's action in the Committee.

> "Sec.5. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equel protection of the laws." 50/

Here, now, Bingham had offered another clause of the Federal Bill of Rights, the due process clause of the Fifth Amendment. It was to remain the only clause. No other clause of the Federal Bill of Rights was ever offered or accepted for inclusion into the Fourteenth Amendment.

This section was first adopted, Howard voting for it, but later stricken, Howard voting for striking. 51)

However, Bingham did not give up. He tried to get the section just stricken adopted as a separate article, but he did not succeed, Howard voting against it. Finally Bingham moved to replace the first section of the amendment proposed by Stevens by the section proposed by Bingham which had been stricken. This was accepted, Howard voting against it. 52)

This version was reported to both Houses of Congress. It became the first section of the Fourteenth Amendment minus the citizenship clause. This was later prefixed to it in the Senate almost as an afterthought.53)

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50) Journal of the Joint Committee on Reconstruction 30 (supra n.39).

51) Id. 35.

52) Id. 35-36.

53) Cong.Globe, 39th Cong.1st Sess. 2869; H.H.Meyer, Fourteenth Amendment 86 (supra n.26).

4. The Fourteenth Amendment was intended to protect the Civil Rights Bill of 1866, but was misdrafted.

Why the Reconstruction Committee replaced the clear words of the first section of Steven's plan with the involved version offered by Bingham, is nowhere expressly explained. Some indications are given by the speech with which Stevens introduced it to the House. It seems that Bingham had succeeded in convincing the Reconstruction Committee that the provisions of his version of the first section were already in the Declaration of Independence or in the Constitution, and that they prevented the States from enacting unequal civil rights legislation. Stevens said:

> "The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the 'equal' protection of the laws." 54/

Stevens did not explain the meaning of these clauses, but went on to say: "They are all asserted, in some formor other, in our DECLARATION or organic law", and that the amendment was intended to protect the Civil Rights Bill. But Stevens said nothing about the Bill of Rights, nor is there anything in his words which might indicate that any of the three clauses which he mentioned was intended to contain the Federal Bill of Rights.

It should be noted that the second, final, version of the proposed amendment was introduced to the House by Stevens, not by Bingham. He took the floor for a closing speech. 55) It is possible that after the debacle of the first version, he had received a

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54) See Cong.Globe, 39th Cong. 1st Sess. 2459; H.H.Meyer, Fourteenth Amendment 75, 94_95, 118. (supra n.26).

55) Globe id. 2541-2544; H.H.Meyer, id. 78-80, 119.

hint to leave the Bill of Rights alone, because he was careful not to say that the amendment was intended to enforce the Bill of Rights. But his speech showed his usual confusion, and he could not refrain from bringing in at least one provision of his favorite subject, this time "cruel and unusual punishment," which, he said, had been inflicted under State law upon citizens, "not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none." 56)

In the Senate, Jacob M. Howard of Michigan introduced the second version of the proposed amendment. He stated that he was doing this in place of Senator Fessenden who was ill, and he promised to present to the Senate the views and motives which influenced the Committee, "so far as I understand those views and motives."57) But it was obvious that he did not understand the version drafted by Bingham. Sensibly, he had voted against it in Committee (supra 37-38). Now, his speech sounded as if he had been coached by Bingham. He identified "the privileges or immunities of citizens of the United States" in the proposed amendment with the "Privileges and Immunities of Citizens in the several States" in Art.IV, sect.2 , and he said:

> "I do not propose to go at any length into that question at this time. It would be a somewhat barren discussion. But it is certain the clause was inserted in the Constitution for some good purpose. It has in view some results beneficial to the citizens of the several States or it would not be found there." 58/

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56) Globe,id. 2542; H.H.Meyer, id. 79.

57) Globe, id. 2764-2765.

58) Id. 2765.

To these privileges and immunities of citizens of the several States secured by the second section of the fourth article of the Constitution, Senator Howard added "the personal rights guaranteed and secured by the first eight amendments of the Constitution." Then he threw them all together into "a mass of privileges, immunities, and rights" and said that "all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizens solely as citizens of the United States and as party in their courts ... States are not affected by them ... there is no power given in the Constitution to enforce and to carry out any of these guarantees." "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees ... This is done by the fifth section of this amendment, which declares that 'The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.'"[59]

There was no immediate reaction to Howard's speech. It seems, however, that the amendment was in danger of being defeated in the Senate. Therefore the Republicans withdrew the amendment from the Senate and called a caucus.[60] No one knew what was discussed in the caucus, but it became obvious that party discipline had been forced on them which made it possible to adopt the amendment with

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59) Id. 2765-2766.

60) Id. 2938; H.H.Meyer, Fourteenth Amendment 85 (supra n.26).

simple majority vote on the part of the Republicans.[61] After their return, the citizenship clause was pre-fixed, and finally Senator

61) Cong. Globe, 39th Cong. 1st Sess. 2938-2939. -- The substitution of the caucus rule for the constitutionally required two-third majority was not the only irregularity surrounding the adoption of the Fourteenth Amendment. The amendment proposal was debated in a Congress from which the delegations of the 11 secessionary States had been excluded. When the proposed amendment was submitted to the States for ratification, all Southern States promptly rejected it. By 1868, Congress had established over the South an oppressive occupational regime under its plan of reconstruction. In 1868, it ratified the 14th Amendment for the occupied States. Also in 1868, three Northern States -- Ohio, New Jersey and Oregon -- rescinded their former ratification. Congress repudiated this action. -- See Charles W. Collins, The Fourteenth Amendment and the States, 4-7 (Boston 1912); H.H.Meyer, The History and Meaning of the Fourteenth Amendment, 2-5, 85-86 (New York 1977).

Poland assured the Senate that the clause that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" secures nothing beyond what was intended by the original provision in the Constitution that "The citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States."[62] Senator Poland mentioned the due process clause and the equal protection clause, but he gave no explanation of their meaning. He only said that after the abolition of slavery, it seemed to him that there could be no real objection to these clauses.

Neither Senator Poland nor any other Senator mentioned the Federal Bill of Rights, that is Amendments 1-8.

That the privileges and immunities clause of Art.IV, Sect.2 were the civil rights, was well known, as well as what they were. They had been litigated in the State courts over the years.[63] They were defined in the Civil Rights Bill of 1866 which had been debated in the 39th Congress almost simultaneously with the Fourteenth Amendment.[64] But what Bingham had put into the Fourteenth Amendment was not the "privileges and immunities of the citizens of the several States" of Art.IV, Sect.2. The words "privileges" and "immunities" worked like a charm so that no one in the 39th Congress had noticed that the "privileges or immunities of citizens of the United States," which Bingham had put into the Fourteenth Amendment, were something different which never before existed in the Constitution.

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62) Cong.Globe, id. 2961; H.H.Meyer, Fourteenth Amendment 88 (supra n.26).

63) See H.H.Meyer, id. 20-26.

64) Id. 40-47, 64-71.

When in 1873 the clause came for the first time under the scrutiny of the Supreme Court in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the Court discovered it and held correctly that the "privileges or immunities of citizens of the United States" did not concern the civil rights embodied in the "privileges and immunities of citizens in the several States" under Art.IV, sec.2. The great mass of privileges and immunities embracing nearly every civil right belong to the citizens of the States as such and are left to the State governments for security and protection. Id.76-78 . The privileges and immunities of citizens of the United States which no State can abridge are only those "which owe their existence to the Federal Government, its National character, its Constitution, or its laws." Id.79 . The Supreme Court mentioned as examples thereof to come to the seat of government, to have the right of free access to its seaports, to the subtreasuries, land offices, and courts of justice in the several States; to demand the care and protection of the Federal Government over life, liberty and property when on the high seas or within the jurisdiction of a foreign government; the right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to American citizens by treaties with foreign nations -- all such rights are dependent upon citizenship of the United States, and not citizenship of a State. Id.79-80.

Thus, the Supreme Court correctly saw that the privileges or immunities clause of the Fourteenth Amendment does not contain the prohibition of racial discrimination as to civil rights.

However, it would have made no difference if Bingham had simply copied the privileges and immunities clause of Art.IV, sect.2 of the Constitution. That clause merely imposes on each State the duty to extend to a citizen from another State the same civil rights as are enjoyed by its own citizens.[65] It does not prevent a State from discriminating between its own citizens. At the time the Fourteenth Amendment was adopted, all States had different property laws for married and unmarried women. If a white married woman who was a citizen of a State went temporarily to another State, that State had to extend to her only the civil rights which it extended to its own white married women citizens, not the civil rights which it accorded to its white unmarried women or white males. Similarly, under Article IV, Sect.2, each State has the duty to extend to a black citizen from another State only such civil rights as it extends to its own black citizens, which may be different from those it extends to its white citizens. Bingham's bungling had omitted to put into the Fourteenth Amendment a prohibition of racial discrimination as to civil rights , and the 39th Congress failed to notice it because it was in a hurry to pass the proposed Fourteenth Amendment.

There is, however, a prohibition of discrimination, racial or other, implicit in the due process clause and in the equal protection clause.

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65) See H.H.Meyer, Fourteenth Amendment 39 (supra n.26).

Both clauses were older than the U.S.Constitution, but only the due process clause was in the Constitution, namely in the Fifth Amendment.

The Supreme Court has always rejected arguments that the privileges or immunities of citizens of the United States in the Fourteenth Amendment had incorporated Amendments 1-8. The most logical argument against it is the presence of the Fifth Amendment's due process clause in the Fourteenth Amendment. If it was already included in the privileges or immunities clause, there would have been no need to mention it in the Fourteenth Amendment as a special clause.

5. The equal protection clause imposes on each State the duty to extend to every person on its territory the same protection of its laws. It does not guarantee equal rights.

The equal protection clause says:

> "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

It is older than the U.S.Constitution, although it was not a part of the constitutional text before the adoption of the Fourteenth Amendment.

The words "protection of the laws" appear already in the Journals of the Continental Congress. A resolution of June 24, 1776, provided:

> "That all persons abiding within any of the United Colonies and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony; and that all persons passing through visiting, or make a temporary stay in any of

> the said colonies, being entitled to the protection of the laws during the time of such passage, visitation or temporary stay, owe, during the time of such passage, visitation or temporary stay, allegiance thereto." 66/

The idea here expressed is, that every individual within the jurisdiction of one of the colonies is entitled to the protection of its laws or, differently stated, the laws of each colony will protect without distinction of person, meaning equally, every individual within its jurisdiction, residents as well as transients.

The same idea appeared in some of the earliest State constitutions, namely in Article VIII of the Declaration of Rights of the Pennsylvania Constitution of 1776 and in almost the same words in Article X of the Declaration of Rights of the Massachusetts Constitution of 1780, as well as in Article VII of the Bill of Rights of the New Hampshire Constitution of 1784.

During the debates of the 39th Congress which adopted the Fourteenth Amendment, Senator Wilson of Massachusetts had cited the Massachusetts provision which reads:

> "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property according to standing laws."67/

In the Civil Rights Bill of 1866 the same was expressed with the words that every citizen of the United States shall have the same right "to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens."

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66) V Journals of the Continental Congress 475, June 24, 1776, Library of Congress ed. Emphasis added.

67) Cong. Globe 39th Cong. 1st Sess. 1255.

Bingham must have known of Senator Wilson's citation of the Massachusetts provision, because the language of his first draft of the Fourteenth Amendment resembles it very closely. It wanted to give Congress power to make all laws to secure to the citizens of each State all civil rights "and to all persons in the several States the equal protection in the rights of life, liberty and property." (Supra 38).

Since the major objection to this version had been that it would have given Congress the power to legislate directly for the States in matters which belonged to their retained rights, the final version of the Fourteenth Amendment merely prohibits each State from denying "to any person within its jurisdiction the equal protection of the laws."

During the debates, Bingham, the drafter of the clause, tried to explain that it meant the equal protection of rights which a person already had. He had repeatedly complained that freedmen and white Unionists travelling in the South had been attacked, driven from their property, and even murdered, and that the States would not protect them. These people had a right to be equally protected.[68] In other words, equal protection of the laws does not mean that all rights shall be equal, but only that the protection shall be equal. Each country can, and each civilized country will, give to <u>any person</u>, women as well as men, children as well as adults, citizens as well as aliens, the same protection of his person and property in accordance with the country's laws. But

68) See for details Alfred Avins, <u>Fourteenth Amendment Limitations on Banning Racial Discrimination</u>, 8 Arizona Law Rewiew 236(1967); and Avins, <u>The Equal "Protection" of the Laws: The Original Understanding</u>, 12 New York Law Forum 385 (1966).

no country will give to every person the same rights. Each country has different laws for adults and children, and for citizens and aliens. If the "equal protection of the laws," which under the Constitution no State may deny to "any person," meant equal rights, no State could prevent any alien from running for public office and from voting in the elections. All a hostile government would have to do, would be to send plane loads full of its followers at election time to swamp the ballot boxes. This would be a peaceful way of taking over the United States.

The equal protection clause is a very important provision. If, for instance, the law protects only the property of white persons against trespass and not the property of blacks, the right to acquire and own property would be of little value to the blacks; and unless the criminal laws will extend the same protection against assault and murder to every person, all the rights an unprotected person may have will not benefit him much. In short, if a State by its laws accords to a person a right, it owes him the benefit of all such laws which the State has enacted for the protection of such a right.

It is interesting that the Supreme Court never tried to construe the privileges or immunities clause in accordance with its intended meaning, notwithstanding its incorrect language, namely to impose on the States the duty not to discriminate as to civil rights on account of race. Instead, the Supreme Court misused the equal protection clause for that purpose, although it fitted neither into the language, nor had it been intended by the framers. Therefore the Supreme Court changed "equal protection of the laws" into "equal rights," but only when it suited the Court.[69] The

69) See for details H.H.Meyer, Fourteenth Amendment 150-157, 242-263 (supra n.26).

Supreme Court "incorporated", so to speak, "equal rights" into the equal protection clause. For instance, in Ex parte Virginia, 100 U.S. 339, 347 (1879), J. Strong, speaking for the Court, said that "equal protection of the laws" meant "equal rights to all persons," but in Strauder v. West Virginia, 100 U.S. 303, 309-310 (1879), the same J.Strong said that a Negro male citizen of Virginia on trial for a murder was denied "equal legal protection" if tried by a jury from which black males were excluded, but women, children and aliens did not have the same right of being represented at the jury. Thus, the Supreme Court undertook to dictate to the States the composition of their juries, although, as J.Field pointed out in his dissenting opinion, 100 U.S., at 367, the Fourteenth Amendment was only intended to apply to civil rights, and juries were not part of the civil rights (see supra p.30). During the debates on the Civil Rights Bill, special assurance was given that juries were not included in the bill,[70] and since the Fourteenth Amendment merely was intended to protect the Civil Rights Bill, the people of the several States were entitled to believe that their jury courts were not affected by the Fourteenth Amendment.

Similarly, schools were not included in the civil rights (supra p.30) and were, therefore not intended to be affected by the Fourteenth Amendment. But on May 17, 1954, the Supreme Court decreed in Brown v. Board of Education, 347 U.S. 483, 495 (1954), that racially segregated schools were unequal and therefore violate the equal protection clause of the Fourteenth Amendment. Of course,

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70) Cong. Globe, 39th Cong. 1st Sess., App.156; H.H.Meyer, Fourteenth Amendment 92-93 (supra n.26).

there were no complaints that the police did not give black schools the same protection as white schools. What was meant by the Supreme Court, was explained in the second Brown decision, 349 U.S. 294, 301 (1955), namely that black children had an equal right as white children to be admitted to a public school. I believe that the country would have adjusted to this innovation, because there was at that time a widespread feeling that it was unfair to refuse a child admission to a public school solely because of his race. But soon it became clear that "equal rights" in school desegregation meant a numerical balance of black and white skins without any regard of what was behind the skins, that is without regard to their educational standing. As dictated by the Supreme Court in Swann v. Board of Education, 402 U.S.1, 16 (1971),"each school should have a prescribed ratio of Negro to white students reflecting the proportion of the district as a whole." Since the Supreme Court created a "constitutional equal right" to education by its incorporation of "equal rights" into the equal protection clause, federal judges have assumed the oversight of public schools. In order to force on them the judge approved ratio of racial mix, unelected life-tenured judges have overruled elected school boards, have seized the administration of schools, have even ordered elected government officials to find millions of dollars to pay for the costs of compulsory racial integration and unwanted bus transportation.[71]

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71) For instance, on July 1, 1983, the Washington Post (A-2) and the Washington Times (4A) reported that U.S.District Judge Shadur has "ordered" the federal government to find at least $14.6 million to help desegregate Chicago's public schools and to set aside 250 million to aid in financing the effort over the next 5 years. — On July 6, 1983, the Washington Post reported that Governor Bond of Missouri would appeal an order of U.S. Distr.Court J. Hungate "approving" a "voluntary" desegregation plan between the City of St.Louis and its suburbs because of

Having accustomed themselves to reach into the classrooms of State supported schools for racial reasons, federal judges did this for the purpose of interfering with school regulations and school discipline, where no racial questions were at stake. Since there was no constitutional authority for such actions, the courts differed as to whether they should base their interference on their "incorporation" of "equal rights" into the equal protection clause or on their incorporation of the First and Ninth Amendments into the due process clause of the Fourteenth Amendment.[72)]

Dissenting in Tinker v. DesMoines School District, 393 U.S. 503, 515 (1969), J.Black remarked that the Supreme Court's holding ushered in

> "an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools ...' in the United States is in ultimate effect transferred to the Supreme Court."

Justice Black also voiced concern over the disruptive effect which the Court's interference must have on the efforts of school officials to keep discipline in the schools. It is not hard to imagine the effect on school discipline when immature high school boys are told by a U.S.Court of Appeals that they do not have to obey a school rule concerning length and style of one's hair

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Note 71 continued.
the cost estimated between $37 million and well over 100 million in the first year.

72) See Tinker v. Des Moines School District, 393 U.S.503 (1969) and other cases cited in Macklin Flemming, The Price of Perfect Justice. The Adverse Consequences of Current Legal Doctrine on the American Courtroom 129-134 (New York 1974); and H.H. Meyer, Fourteenth Amendment 249-254 (supra n.26).

because ~~xxxxxx~~ they had a "constitutional" right secured by the "penumbras" of the First and Ninth Amendments, as made applicable to the States through the due process clause of the Fourteenth Amendment, to wear their hair "at any length or in any desired manner;"[73] or that the equal protection clause (read equal rights) was violated by a school authority which permitted girls to wear their hair longer than boys.[74]

The deterioration of the public schools has long been a matter of common knowledge, but almost never have the news media mentioned the responsibility of Congress and the federal courts. However, on June 30. 1983, the Washington Post had a headline, "Reagan Blames Courts for Education Decline"(p.A-2), and the Washington Times wrote on the same day,"Reagan pins school decay on Government." (4-A). Both newspapers reported a speech of President Reagan in which he pointed out that interference by Congress and the federal courts had left students without "the quality teaching they need and deserve," and which took a back seat to other objectives, Federal court decisions had public schools "leading in the correction of long-standing injustices in our society: racial segregation, sex discrimination, lack of opportunity for the handicapped."

President Reagan understands the importance of the public schools for the Nation's welfare. He also understands the necessity

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73) Breen v. Kahl, 432 F.2d 1259, 1266 (7th Cir.1970); Stull v. School Board of Western Beaver, 459 F.2d 339, 347 (3rd Cir. 1972).

74) Crews v. Clones, 432 F.2d 1259, 1266 (7th Cir.1970).

of returning control over them to the States and local communities. I think he can also be made to understand that legislation designed to prevent federal courts from taking jurisdiction in matters relating to schools, religion and abortion do not take from the federal courts, including the Supreme Court, any authority which they rightfully exercise under the Constitution, but would prevent them from exercising an authority over rights retained by the States over which the Constitution has granted no federal judicial power.

Many people have also begun to understand that regaining control over their schools depends on whether or not democracy in the United States will prevail. Eliza Paschall, writing in the Washington Times (July 5, 1983, p.2-C), criticized that since May 17, 1954, the date of the Brown decision, "the racial mix of student bodies has been our national education priority." "Schools are not subject to judicial oversight for poor science curricula, but schools with low racial scores are subject to scrutiny by our highest judicial authorities who may overrule duly elected school officials on school matters." She ends her article with the words:

> "If in any community we do not have the schools we want, then our claims of self-government are a sham and a pretense, and there is no hope for democracy."

The American people should understand that they cannot have the ~~public~~ schools they want unless the people in the States can again exercise their retained right protected by the Tenth Amendment, to make their own laws with respect to schools, undisturbed by federal interference.

In 1972, Congress, with the blessing of the Supreme Court, even dictated to the States their employment practices by including into the Equal Employment Opportunity Act of 1972 employees "subject to the civil service laws of a State government, governmental agency or political subdivision," and even "authorized" the federal courts to award money damages in favor of a private individual against a State government. Plainly, this is incompatible with the sovereign immunity of the States secured by the Eleventh Amendment, but the Supreme Court upheld it.[75]

Thus, the "incorporation" of "equal rights" into the equal protection clause of the Fourteenth Amendment has finally had the effect of resurrecting the first version proposed as Fourteenth Amendment which was not even able to pass the House of the 39th Congress because it would never have been ratified by the States (supra 33-36).

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75) 42 U.S.C.§2000e-2(a). Fitzpatrick v. Bitzer, 427 U.S.445 (1976).

6. The due process clause guarantees to any person charged with crime access to a proof procedure, today called trial, where he has an opportunity to defend himself against the accusation.

(a) The Constitution cannot be changed by the "incorporation" of alien matters.

The due process clause of the Fourteenth Amendment is the clause most misused by the Supreme Court as a conduit to "incorporate" into the Constitution matters which had been retained by the States, in order to place them under federal control.

Those Americans who ever have taken the trouble of knowing their U.S.Constitution ought to understand that this Constitution was drafted and ratified by the States, acting through men elected by the people of the several States, and that, in order to create a "general government", the States gave up some of their powers and delegated them to the "general government." These powers were enumerated in the Constitution. In order to carry into execution these enumerated powers, the Constitution has authorized Congress to make laws "necessary and proper" for this purpose. Madison explained in No.44 (pp.285-286) of the Federalist Papers that they are the means for carrying out the powers enumerated in the Constitution. They are the only "implied" or "inherent" powers possible in the Constitution. "Inherent powers" can only be such powers as are necessary and proper for carrying into execution powers expressly given in the Constitution.[76)]

76) See also Hamilton in The Federalist Papers, No.33, pp.202-203 (New American Library ed. 1961)

As clearly expressed by the Tenth Amendment, unless a power is enumerated in the Constitution or expressly prohibited by it to the States, that power has been retained by the States. Powers retained by the States are not in the U.S.Constitution and therefore not under federal control. The powers mentioned in amendments 1-8 are not powers granted by the Constitution to the Federal Government, but special restrictions on the Federal Government. It ought to be obvious that, to transfer a power retained by the States into the Constitution and thereby place it under federal control, requires a constitutional amendment according to Art.V of the Constitution. The Constitution has given the authority to amend it only to persons elected by the voters, namely to two-thirds of Congress and to the legislatures or conventions of three-fourths of the States. The Constitution has given the Supreme Court no authority to change it.

Consequently, when the Supreme Court puts something into the Constitution which is nowhere in it, as, for instance, abortion; or if the Supreme Court takes one of the retained State rights mentioned in Amendments 1-8 as special restrictions on the Federal Government and places it into the Fourteenth Amendment, the Supreme Court has attempted to change the Constitution. A legal amendment made in accordance with Const.Art.V will change the constitutional text. An illegal amendment attempted by the Supreme Court in the guise of constitutional interpretation cannot change the constitutional text, a sure sign that the Supreme Court cannot change the Constitution. But with the help of raw federal enforcement powers the Supreme Court could prevent the people of the several States from exercising their constitutionally protected right to make their own laws respecting religion, abortion, apportionment of State legislatures and many other matters.

(b) The purpose of the due process clause is to guarantee to any person accused of crime a proof procedure before he can be sentenced to death, or imprisonment, or forfeiture of property.

The Supreme Court's misuse of the Fourteenth Amendment's due process clause as tool for its incorporation theory has turned this clause into incomprehensible nonsense. But its language can be easily understood by those who know its history. The due process clause of the Fourteenth Amendment reads:

> " ... nor shall any State deprive any person of life, liberty, or property, without due process of law."

There was no discussion with respect to that clause, when the Fourteenth Amendment was debated in 1866 in the 39th Congress. An explanation of what Congress had in mind when it adopted the due process clause came five years later, in 1871, in the 42nd Congress, when a debate arose concerning the meaning of the first section of the Fourteenth Amendment. Representative Garfield who had attended the debates of the 39th Congress which adopted the Fourteenth Amendment, said with respect to the due process clause that it was copied from the Fifth Amendment. There, it operates only as a restraint on Congress, while here it is a direct restraint on the States.

> "It realizes the full force and effect of the clause in Magna Charta, from which it was borrowed, and there is now no power in either the State or the national Government to deprive any person of ... life, liberty and property, except by due process of law; that is by an impartial trial according to the laws of the land."77/

77) Cong. Globe, 42nd Cong., 1st Sess., App.153 (1871).

The reason for the lack of controversy is not hard to find. It was well known that in most States procedural rules for blacks, and in some States also for Chinese, differed from those that applied to whites, and it was also well known that in many cases this situation had resulted in an outright denial of justice. There was agreement that "any person", meaning any human being without distinction as to race or color, should be entitled to the same procedural rules, because otherwise he could not have, in Garfield's words, "an impartial trial according to the laws of the land."

The history of due process of law shows that in the minds of the men who adopted the Fourteenth Amendment the phrase still had substantially the meaning which it had since its inception in Chapter 39 of the Magna Carta of 1215.[78)]

One of the chief grievances of the baronage and commonalty against King John was that he had violated their right to have law - habeat legem - that is court proceedings with judgment and proof, by issuing writs of execution without court proceedings. In Chapter 39 of the Great Charter, the barons forced the king to promise that no freeman[79)] should be arrested and imprisoned, or disseized or outlawed, or in any way destroyed, nor would the king himself go, nor send his men, to inflict punishment on him through the use of armed force, except by the lawful judgment of his peers and by the lex terrae (literally, "by the law of the land.")

78) See for details H.H.Meyer, Fourteenth Amendment 125-149 (supra n.26).

79) "Freeman" in the Magna Charta very probably referred to free-holder; see William S.McKechnie, Magna Carta.(2d ed. Glasgow 1914)

The Norman legal sources used the expression lex for one of the recognized modes of proof. They were the compurgation oath with oath helpers, called lex disraisinae or lex probabilis, which could be challenged by the judicial duel, called lex ultrata; the ordeal, called lex apparens or manifesta; and attesting witnesses who testified and swore to the genuineness of a recorded transaction which they had been selected to witness, called lex recordationis. Together they were called the lex terrae.

In 1354, in a formal confirmation of "the Great Charter, and the Charter of the Forest, and all other statutes before this time made and used," 28 Edw.3, c.1,3 (1354), King Edward III extended the benefit of the provision to any man "of what estate and condition that he be" and replaced "except by the lawful judgment of his peers and per legem terrae" with "without being brought to answer by due process of law." The right to answer meant the right to defend himself against an accusation and, in case of denial, have a proof procedure. By 1354 the old modes of proof of the Magna Carta had partly been abolished, partly died out, and had been replaced by other types of procedure: in the common law courts by the jury procedure, in the King's Council by the ecclesiastical procedure which developped into the equity procedure. While the lex terrae had referred to a particular proof procedure, due process of law now referred to any regular procedure pursuant to law. Later, the expression "due process of law" was adopted by New York, from where it got into the Fifth Amendment of the U.S.Constitution. When it was included in the Fourteenth Amendment, it was already more than 600 years old. During all that time, it had essentially

preserved the same meaning, namely that no person could be sentenced to death (deprived of life), or to imprisonment (deprived of liberty), or to forfeiture of property (deprived of property) without first having been given access to a proof procedure, today called trial. In short, it guarantees to any person charged with crime a trial pursuant to law.

(c) When interpreting the Fourteenth Amendment, the Supreme Court ruled that the due process clause guaranteed to any person charged with crime a trial pursuant to law, and that it did not apply to the States any of the other provisions of Amendments 1-8.

When the Supreme Court truly interpreted the language of the due process clause in the Fourteenth Amendment and gave it its natural meaning, it had to arrive at fundamentally the same result, namely that the due process clause guaranteed to any person charged with crime a trial pursuant to law. At the same time, the Court also had to rule that none of the other provisions of Amendments 1-8 had been included in the Fourteenth Amendment, because this is the only logical conclusion which can be drawn from the language and history of the Fourteenth Amendment.

Thus, in 1875, the Supreme Court held in Walker v. Sauvinet, 92 U.S. 90, 93 (1875), that the Seventh Amendment which provides for jury trials in suits at common law, has not been made applicable to the States by the Fourteenth Amendment, and that "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State."

Also in 1875, the Supreme Court held in United States v. Cruikshank , 92 U.S.542, 551, 553 (1875), that the First and Second Amendments, like the other amendments proposed and adopted at the same time, were not intended to limit the powers of the State governments, but to operate upon the national government alone.

In 1884, the Supreme Court held in Hurtado v. California, 110 U.S. 516, 534-535 (1884), "The natural and obvious inference is, that in the sense of the Constitution, 'due process of law' was not meant or intended to include, ex vi termini, the institution and procedure of a grand jury." In the Fourteenth Amendment, due process of law "refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State."

In 1915, the Supreme Court said in Frank v. Magnum, 237 U.S. 326 (1915):

> "As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction according to established modes of procedure, is 'due process' in the constitutional sense," citing a long line of Supreme Court decisions.

In 1922, the Supreme Court stated in Prudential Insurance Co. v. Cheek, 259 U.S. 530, 538 (1922):

> "... neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' or the 'liberty of silence;' nor, we may add, does it confer any right of privacy upon either persons or corporations."

Finally, in 1959, in Bartkus v. Illinois, 359 U.S.121, 124 (1959), J.Frankfurter, speaking for the Court, said:

> "We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such. The relevant historical materials have been canvassed by this Court and by legal scholars. These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a shorthand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States." (Citations omitted).

It is, therefore, clear that the due process clause of the Fifth Amendment is the only clause of the Federal Bill of Rights, that is Amendments 1-8, which the Fourteenth Amendment has made applicable to the States, and that the language of the due process clause makes it impossible to include any of the other provisions of Amendments 1-8.

(d) The Supreme Court invaded the retained rights of the States for the purpose of enlarging its jurisdiction and force federal control on powers reserved to the people of the several States. To achieve this, the Supreme Court had to depart from the Constitution in disregard of the oath imposed by the Constitution on every judge,"to support this Constitution."

It became soon clear that the judges of the Supreme Court were not willing to stay within the limits of the Constitution, their oath of office to support this Constitution notwithstanding. An indication came as early as 1798 in Calder v. Bull, 3 U.S. (3 Dall.) 386. The only question in that case was whether a Connecticut statute granting a new trial in a particular civil case was an ex post facto law within the meaning of the U.S.Constitution. The Supreme Court held that the constitutional prohibition to Congress and the States to pass an ex post facto law applied only to criminal laws. But J.Chase, who delivered the opinion of the Court, could not resist to add to it his personal philosophy concerning the powers of the legislatures. He said: "I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control, although its authority should not be expressly restraint by the constitution, or fundamental law of the State."

There are certain vital principles in our free republican governments which will determine and overrule an abuse of legislative power. An act of the legislature contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority. 3 U.S., at 387-388.

J.Iredell, concurring with the Court's opinion, found it necessary to state his disagreement with J.Chase's views. He reminded him that the people, through their representatives, have defined the objects and limits of legislative powers in the constitutions of the States and of the United States. These are the sole limitations on the legislatures. They are also limitations on the powers of the courts, for only when the legislatures transgress these boundaries is there any justification for the courts to declare a legislative act invalid. 3 U.S., at 398-399.

In Calder v. Bull the views of J.Chase were merely dicta. They were soon to become the guiding principle of the Supreme Court. Judges began to rule, not by the written Constitution and laws, but by "fundamental principles of right and justice inherent in the nature and spirit of the social compact," or "the nature of free government," or "the principles of civil liberties," or "natural rights."[80)]

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80) See Charles G. Haines, The Revival of Natural Law Concepts, 94-95 (Cambridge 1930); J.A.C.Grant, The Natural Law Background of Due Process, 31 Columbia L.Rev.56 (1931).

The first case of the incorporation of a provision of the Federal Bill of Rights into the due process clause of the Fourteenth Amendment was Chicago, Burlington and Quincy R.R.Co. v. Chicago, 166, U.S. 226 (1897), and the provision was the just compensation clause of the Fifth Amendment, which prohibits the Federal Government from taking private property for public use without just compensation.

The case involved the extension of a public street across the right of way of the railroad company. After a jury trial, the jury awarded a compensation of one dollar. The Illinois Supreme Court affirmed. It found that the railroad was not damaged. The U.S.Supreme Court granted a writ of certiorari. J.Harlan I delivered the opinion of the Court. He contemplated at length about the importance of the protection of private property as "a vital principle of republican institutions," and about the requirement of just compensation for property taken for public use as a doctrine of the common law, founded in "natural equity", and laid down by jurists as a principle of "universal law." He concluded:

> "The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. ... Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public." 166 U.S. at 236.

The Supreme Court, nevertheless,affirmed the judgment because it found that the last clause of the Seventh Amendment, "and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law," prevented the Court from reexamining the facts on which the verdict in the State court was based.

The irony of it was that the Constitution of Illinois did embody the principle of natural law that the State must protect private property, and if it takes it for public use, it must pay compensation; and Illinois statutes did provide for a procedure in condemnation proceedings. Logically, Illinois guaranteed the right of compensation as part of its substantive law, where it belonged, and not as part of its procedural law, where it had no place. There was, therefore, no reason for the Supreme Court to display its concern for a fundamental law of universal fairness and justice, much less for the illegal creation of a new "constitutional" concept to protect it and illegally write into the due process clause of the Fourteenth Amendment the just compensation clause which the framers deliberately had omitted (supra p.37), a fact which Supreme Court judges had acknowledged on various occasions.[81] Moreover, J.Harlan's attempt to write into the due process clause, which is a procedural provision, the substantive provision of just compensation, makes no sense. But henceforth, Chicago, Burlington and Quincy R.R. v. Chicago, supra, became "authority" for the new "constitutional" rule that the just compensation clause of the Fifth Amendment had been made "applicable" to the States by the due process clause of the Fourteenth Amendment.

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81) Davidson v. New Orleans, 96 U.S. 97, 193-194 (1877); Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 158 (1896); Milwaukee and St. Paul R.R.Co. v. Minnesota, 134 U.S. 418, 465 (1890), Bradley, J., dissenting.

On the same day (March 1, 1897), the Supreme Court evidently discovered that the word "freedom" in the due process clause of the Fourteenth Amendment could be used to connect it with any "freedom" the Supreme Court wished to force on the States. On that day it was "freedom of contract." This is not part of amendments 1-8. In fact, it appears nowhere in the Constitution. In Allgeyer v. Louisiana, 165 U.S. 578 (1897), and a few years later in Lochner v. New York, 198 U.S.45 (1905), the Supreme Court read freedom of contract directly into the Fourteenth Amendment's due process clause.

In Lochner v. New York, the Supreme Court held unconstitutional a New York statute limiting the working hours of employees in bakeries to 60 hours a week, or 10 hours a day. The Court said:

> "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U.S. 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right." 198 U.S., at 53.

It should be noted that the complainant was not a worker who wanted to work longer hours, but a baker who had been fined for having violated the statute.

But how can such a statute violate the due process clause? The clause clearly permits the States to take freedom, that is sentence a person to imprisonment, but not without the protection of the procedural rules applicable to his case, designed to ascertain his guilt or innocence (supra 58-61). Interpreted differently, the due process clause makes no sense. Only by depriving it of its meaning, could the due process clause serve as a "constitutional" excuse for the federal courts to sit in judgment over the social

or economic values of a State statute. Thus, without constitutional authority, in a clear departure from the constitutional language, the U.S.Supreme Court seized the power to suppress in the bud the attempts of the State legislatures to pass needed social legislation. Later, when the social conscience struck a sufficiently number of judges, the Supreme Court "permitted" the States to pass certain welfare laws under the guise of "police power."[82] J.Holmes objected to this practice. He said:

> "... when legislatures are held to be authorized to do anything considerably affecting public welfare, it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use ...
>
> I do not believe in such apologies. I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." Tyson & Brother v. Banton, 273 U.S. 418, 445-446 (1927), Holmes, J., dissenting.

The simple truth is that in all such cases the Supreme Court was not really interested in an honest interpretation of the Constitution. The Court's interest was directed/~~in~~ towards creating new "constitutional" restraints on the States in order to be able to take jurisdiction over forever more retained State rights, so as to deprive the people of their constitutionally protected right to make their own laws in these matters in accordance with their own wishes.

Occasionally, a majority of the Supreme Court had an attack of honesty and remembered the Constitution. But it never lasted long.

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82) See H.H.Meyer, Fourteenth Amendment 219-221, and cases their cited (supra n.26).

Thus in 1922, in a 6 to 3 decision, in Prudential Insurance Co. v. Cheek, 259 U.S. 530, 538, the Supreme Court said:

> "... the Constitution of the United States imposes upon the States no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence."

And id. at 543:

> "... as we have stated, neither the Fourteenth Amendment nor any other provision of the Constitution imposes upon the States any restrictions about 'freedom of speech' or the 'liberty of silence;' nor, we may add, does it confer any right of privacy upon either person or corporations."

But only three years later, in 1925, in a 7 to 2 decision, in Gitlow v. New York, 268 U.S. 652 (1925), the Supreme Court said:

> "For present purposes we may and do assume that freedom of speech and of the press -- which are protected by the First Amendment from abridgment of Congress -- are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."268 U.S.. at 666.

In 1963, in Ferguson v. Skrupa, 372 U.S.726, 730 (1963), J.Black, speaking for a unanimous Court, declared:

> "The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases -- that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws... Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment intended to secure.'" (emphasis added).

However, at the same time, in 1962 in Engel v. Vitale 370 U.S. 421, and in 1963 in Abington School District v. Schempp, 374 U.S. 203, the Supreme Court ruled unconstitutional voluntary prayers in State public schools by inventing a "constitutional" mandate of separation of State and church which, according to the Supreme Court, the framers had intended to include in the First Amendment's religion clause, and by declaring that the due process clause of the Fourteenth Amendment had made it "applicable" to the States. The religion clause reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Obviously, there is nothing in its language which suggests an interpretation that it intended to mandate "a wall of separation of State and Church," nor do the debates of the First Congress where the First Amendment was drafted mention separation of state and church with one word. On the contrary, these debates and the preamble placed by the Senate as introduction to the Bill of Rights make absolutely clear that the First Amendment's religion clause, like all the other provisions of the first eight amendments, was requested by the States as a special restriction on the Federal Government (see supra pp.21-24), and that the purpose of the religion clause was to prevent Congress from establishing a national church or national religion and from interfering with the free exercise of religion in the States. 1 Annals of Congress 729-731.

The due process clause of the Fourteenth Amendment reads:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law."

The Supreme Court's explanation as to how the due process clause could have made the religion clause applicable to the States has just as little connection with its language and its constitutional meaning. (Cf.supra 58-63). Thus, the Supreme Court said in Abington v. Schempp, 374 U.S., at 215-216,"this Court has decisively settled" that the First Amendment's religion clause "has been made wholly applicable to the States by the Fourteenth Amendment," citing as "authorities" Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), a number of other Supreme Court decisions and, in a footnote, Gitlow v. New York, 268 U.S. 652, 666 (1925). In Cantwell v. Connecticut the Supreme Court said that the "fundamental concept of liberty" embodied in the due process clause of the Fourteenth Amendment "embraces the liberties guaranteed by the First Amendment;" and in Gitlow v. New York, supra, the Supreme Court "assumed" "that freedom of speech and of the press -- which are protected by the First Amendment from abridgment by Congress -- are among the fundamental rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

But the Supreme Court had not said that prayers in State public schools violated freedom of religion. It said that they violated the clause that Congress shall make no law respecting an establishment of religion. The prayer which the Supreme Court had declared to be unconstitutional in Engel v. Vitale, 370 U.S.421 (1962), was:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country."

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83) See Engel v. Vitale, 10 N.Y.3d, 174, 179; 176 N.E.2d 579, 580 (1961)

How could that honestly be called an establishment of religion? And how could the "freedom" of the First Amendment, being part of a substantive provision, serve as connection with the word "liberty" in the due process clause of the Fourteenth Amendment, being part of a procedural provision? But the Supreme Court's opinionsin the school-prayer cases show that the Court was not interested in an honest interpretation of the Constitution. because in each of these cases the Supreme Court carefully avoided to look at the debates of the First Congress which drafted the First Amendment and where the Court could have found the true intention of the framers of the religion clause. Nor did the Supreme Court try to explain the constitutional meaning of the due process clause. The Supreme Court's sole interest was to force its belief on the Nation that there should be a "wall of separation between Church and State" which could not tolerate that children said a little prayer in a public school. 84)

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84) On July 5, 1983, the Supreme Court decided Marsh, Nebraska State Treasurer v. Chambers, No.82-23, where it held that prayers by a Chaplain,paid by the State of Nebraska, at the beginning of each session of its legislature, do not violate the establishment clause. Ch.J.Burger delivered the opinion of the Court. He emphasized the long tradition of opening legislative sessions with prayer going back to the Continental Congress, so that "there can be no doubt" that this practice "has become part of the fabric of our society."

In a spirited article, entitled: "If Legislators Can Pray, Can Kids Be Far Behind?" (Washington Post 7-17-83, C-1), Mary McGrory pointed out that all this reasoning does "is buttress the case for prayer in school," and she informed the Chief Justice, "The first public school in this country was Boston Latin School, which was founded in 1635. Long before the Continental Congress was dreamed of, Boston Latin was opening its sessions with prayer, and lots of it, you better believe. God always came first in the Massachusetts Bay Colony." In short, Mary McGrory tried to show that the tradition of school prayers is at least as old, if not older than that of legislative prayers.

However, as usual, the Supreme Court avoided the issue, namely who under the Constitution has the power to make laws respecting religion, which includes school- as well as legislative prayers. As shown above, that power has remained in the States. (supra 21-24, and ch.2).

Similarly, in Griswold v. Connecticut, 381 U.S. 479 (1965), only two years after Ferguson v. Skrupa (supra p.69), the Supreme Court substituted its social beliefs for the judgment of the legislature of Connecticut and declared unconstitutional its law forbidding the use of contraceptives which violated no constitutional provision. Coming so shortly after Ferguson v. Skrupa, J.Douglas, who delivered the opinion of the Court, tried to avoid the due process clause by fabricating a "constitutional" right of privacy and placing it in a "penumbra" of the First Amendment which, of course, he also fabricated, and then declared it directly applicable to the States not withstanding the fact that the First Amendment applies only to the Federal Government. However, J.Goldberg, Ch.J. Warren and J.Brennan kept up the appearance by declaring it applicable to the States by the due process clause of the Fourteenth Amendment which, according to the Supreme Court, "absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights." 381 U.S. at 488.

Note 84 continued:

Although congressional Chaplains' prayers were not in issue, the Supreme Court nevertheless considered them, probably because a case attacking them was already pending in the lower courts. Jon Garth Murray, et al., v. Buchanan, et al, (D.C.Circuit No.81-1301). - The Supreme Court also tried to justify their constitutionality with long unbroken tradition. But if, as the Supreme Court has held, the establishment clause was intended to mean "a wall of separation between State and Church," an act of Congress providing for congressional Chaplains would clearly violate it, since the clause says clearly, "Congress shall make no law respecting an establishment of religion." But if the Supreme Court had given it its true constitutional meaning, the Court could easily have seen that there is no conflict: "establishment of religion" was merely the expression of the time for an official church. A law establishing congressional Chaplains certainly does not establish an official church, and certainly not a nationwide church which this clause was intended to prevent. (see supra 70), nor does it interfere with the free exercise of religion. - At any rate, any doubt as to the constitutionality of a law establishing legislative Chaplains can only arise with respect to an act of Congress, not with respect to a State law.

J.J. Harlan and White, concurring in the judgment, found that the Connecticut law violated the due process clause of the Fourteenth Amendment, in J.Harlan's opinion, "because the enactment violates basic values 'implicit in the concept of ordered liberty,'" 381 U.S. at 500, in J.White's opinion, because, as applied to married couples, it "deprives them of 'liberty' without due process of law, as the concept is used in the Fourteenth Amendment." Id. at 502.

As J.J.Black and Stewart showed in their dissent. id. at 507-531, the Connecticut contraception law did not violate any provision of the U.S.Constitution, nor, as shown above (supra 24- 26), did the abortion laws. The only reason for the Supreme Court to destroy these laws was that the set of values of the Court's majority differed from that of the State legislature .

To disregard the language of a constitutional provision, the intent of its framers and the purpose for which it was created, cannot be called constitutional interpretation.

Fortunately, the Supreme Court itself has given us an example of constitutional interpretation in Gardner v. Massachusetts, 305 U.S.559 (1938). The case concerned the same problem as Griswold v. Connecticut, namely conviction of several defendants under a Massachusetts law forbidding the sale and furnishing of contraceptives, Commonwealth v. Gardner, 15 N.E.2d 222 (1938). The defendants appealed to the U.S.Supreme Court. Its decision was brief and to the point. It said: "The appeals herein are dismissed for want of a substantial federal question. 305 U.S.559 (1938).

This was a clear recognition that legislation concerning contraception belongs to the retained rights of the States, and the same holds true for legislation concerning abortion.

As mentioned above (supra 2-4), with its decision in Cooper v. Aaron, 358 U.S. 1, 18 (1958), the Supreme Court tried to establish itself as the supreme law- and policy-maker of the Nation, although such authority had been expressly withheld from the Court by the Federal Convention of 1787 (supra 3-5, 20). However, it appeared that that decision had opened the flood gates, because the 1960s initiated a period in which the Supreme Court felt free to dispose of whatever was left of the retained rights of the States. During that time, the Supreme Court established federal court supervision over the criminal justice system of the States. One favorite target was the retained power of the States to define and punish crimes. The Supreme Court brought it under federal control by virtue of the cruel and unusual punishments clause of the Eighth Amendment, which reads:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It was taken from the English Bill of Rights of 1689. From the debates of two of the State ratifying conventions and from the debates of the First Congress which drafted the first ten amendments, we know that what was generally understood as "cruel and unusual punishments" was barbarous punishments amounting to torture. The States simply wanted to make sure that Congress would not invent "the most cruel and unheard of punishments." [85]

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85) See 2 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as recommended by the Federal Convention in Philadelphia in 1787. Together with the Journal of the Federal Convention, etc., 111; 3 id. 447 (2d ed. Washington 1954); 1 Annals of Congress, 1st Cong., 1st Sess. 754 (1789)

Until that time, the Supreme Court had not yet made the cruel and unusual punishments clause applicable to the States. That came in 1962, in Robinson v. California, 370 U.S.661 (1962), as usual, by a simple declaration. The defendant in that case was convicted, after a jury trial, and sentenced to 90 days in the county jail under §11721 of the California Health and Safety Code. It provided that "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe or administer narcotics." The Supreme Court was of the opinion that the statute made "status" of narcotic addiction a criminal offense, and that the law making a criminal offense of a disease was "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."

The only "authority" invoked by the Supreme Court for its new ruling that the Fourteenth Amendment had made the cruel and unusual punishments clause of the Eighth Amendment applicable to the States was Louisiana ex rel. Francis v. Resweber, 329 U.S.452 (1947). But in that case, the Supreme Court had expressly declared that it was not deciding that the violation of the principles of the Eighth Amendment as to cruel and unusual punishments would be violative of the due process clause of the Fourteenth Amendment. 329 U.S.459, 462 (1947). The Supreme Court mentioned, however, that "The Fourteenth [Amendment] would prohibit by its due process clause execution by a State in a cruel manner.[4)]" In footnote 4 the Court cited In re Kemmler, 136 U.S.436, 446 (1890). But that language referred to the Constitution of New York which contains a cruel and unusual punishments clause identical with that in the Eighth

Amendment of the U.S.Constitution, and in In re Kemmler the Supreme Court held that the Eighth Amendment does not apply to the States.

When the Supreme Court first attempted to declare the provisions of the First Amendment applicable to the States via the due process clause of the Fourteenth Amendment, it tried to make some textual connection between the words "freedom" and "liberty". But such a connection can only be made when taken out of context, because in the First Amendment the federal government is told not to interfere with the freedoms there mentioned, and in the Fourteenth Amendment's due process clause the States are told that they may deprive a person of liberty but not without a certain procedure. It is only necessary to put the provisions of the First Amendment into the due process clause to see their incompatibility. In such a case, the due process clause would read:

> nor shall any State deprive any person of freedom of speech, of the press, or of religion without due process of law.

This means that a State may deprive a person of freedom of religion, or of speech, or of the press provided the State does so by due process of law. Exactly what kind of procedure a State must use for such a purpose, the Supreme Court never tried to explain. It could not, because it makes no sense.

Between the cruel and unusual punishments clause and the due process clause there is no textual connection whatsoever. If the cruel and unusual punishments clause were part of the due process clause, this clause would read:

> nor shall any State deprive any person of life, liberty, or property without cruel and unusual punishments.

Or: nor shall any State deprive any person of cruel and unusual punishments without due process of law.

In either case, it is manifest nonsense.

However, in his opinion concurring with the judgment of the Court in Francis v. Resweber, 329 U.S.459, 466 (1947) , J.Frankfurter tried to explain why the language of the due process clause as well as its historical and constitutional meaning are of no importance to the judges of the U.S.Supreme Court. It also sounded like an attempt to find an explanation for the contradiction why, as he himself had said in Bartkus v. Illinois,(supra 62), "the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments," and why nevertheless it does. J.Frankfurter said:

> "insofar as due process under the Fourteenth Amendment requires the States to observe any of the immunities 'that are valid as against the federal government by force of the specific pledges of particular amendments,' (meaning amendments 1-8), it does so because they 'have been found to be implicit in the concept of ordered liberty and thus, through the Fourteenth Amendment, become valid as against the States,'"

citing Palko v. Connecticut, 302 U.S.319, 324-325 (1937).

"In short," J.Frankfurter continued,

> "the Due Process Clause of the Fourteenth Amendment did not withdraw the freedom of a State to enforce its own notions of fairness in the administration of criminal justice unless, as it was put for the Court by Mr.Justice Cardozo, 'in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" 329 U.S., at 468-469.

J.Cardozo, on whom J.Frankfurter so much relied, showed in Palko v. Connecticut, 302 U.S.319, 327 (1937), that he knew very well the constitutional meaning of due process of law, namely "condemnation shall be rendered only after trial." But he tried

to find a connection between that clause and his concepts of "ordered liberty" and "fundamental." He said, "Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial."

What does all this mean?

In simple English: Because the due process clause embodies a fundamental concept of justice, the Supreme Court feels justified to misuse the due process clause as a conduit to reach into the States and destroy as "unconstitutional" any State law which no more than five Supreme Court judges consider offensive to their fundamental concept of ordered liberty, or which differs from their notions of "fundamental fairness." It means that a provision twice mentioned in the U.S.Constitution has, in the hands of the U.S. Supreme Court, become meaningless. It should, therefore, surprise no one that the Supreme Court found that the Fourteenth Amendment's due process clause is quite unnecessary for the incorporation of amendments 1-8. In its newest decision, the Supreme Court applied the cruel and unusual punishments clause of the Eighth Amendment directly to the States, without even mentioning the Fourteenth Amendment. In Solem v. Helm, No.82-492. decided June 28, 1983, the Supreme Court declared that a life sentence rendered by a South Dakota court under State law for a seventh non-violent felony conviction was cruel and unusual punishment in violation of the Eighth Amendment. J.Powell delivered the opinion of the Court. He declared that the Eighth Amendment's proscription of cruel and unusual punishments prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

At the end of his opinion, he said: "The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime." As a member of the Supreme Court, J.Powell knew or should have known that the Constitution does not require a federal court to examine a criminal judgment of a State court under State law whether it complies with the Supreme Court's "interpretation" of the Eighth Amendment, because the Eighth Amendment was not intended to apply to the States and has never been made applicable to the States by a constitutional amendment in accordance with Article V of the U.S.Constitution.

Summary and Conclusion.

An act of Congress preventing the Supreme Court from taking appellate jurisdiction, and the lower federal courts from taking jurisdiction, over cases wherein a party alleges the abridgement by a State or any of its subdivisions, of any right claimed under the first nine amendments to the Constitution of the United States, would merely re-establish constitutional conditions and, at the same time, relieve the Supreme Court of its heavy case load without expense to the taxpayers.

The declared purpose of the Judicial Reform Act is the restoration of the constitutional role of the federal courts. There can be no doubt that, under the leadership of the Supreme Court, the federal courts have departed from the U.S.Constitution.

This departure began early, and the reason was an insatiable thirst of Supreme Court judges to shape the Nation in accordance with their own beliefs.

In the beginning, their impact on the Nation was not generally noticeable for two reasons:

(1) A Supreme Court decision was treated as what it was intended to be under the Constitution, namely as a decision settling with finality a legal dispute, properly before the Court, between individual litigants, which was binding only on these litigants (supra 2-20). Therefore, neither early Presidents nor Congress considered themselves bound by the Supreme Court's interpretation of a constitutional provision (supra 9-11).

(2) The Constitution has created the Supreme Court as a court of limited jurisdiction. The Constitution has granted no federal judicial power over cases arising under the retained powers of the States in suits between citizens of the same State, by individuals against a State, and between a State and its own citizens (supra 19).

Americans, especially members of the news media and of the legal profession, are very much in need of being reminded of what these retained State rights really are.

With the Constitution of the United States, the 13 original States created a "general government" which never before existed. The Constitution was drafted by the Federal Convention of 1787 by delegates of the legislatures of 12 States (Rhode Island had sent no delegates). As Madison explained in No.39 of the Federalist Papers (at p.243), the assent to, and the ratification of, this Constitution "is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State -- the authority of the people themselves."

As shown above (supra 34-36), a first version of the proposed Fourteenth Amendment wanted to give Congress the power to legislate with respect to civil rights and the "equal protection in the rights of life, liberty and property." However, this version died in the House and was not even debated in the Senate. It was too clear that none of the States was willing to give the federal government such powers.

The final, adopted, version of the Fourteenth Amendment did not give Congress any powers to legislate in addition to those which had been in the Constitution before. Specifically, the Fourteenth Amendment did not give Congress authority to legislate with respect to civil rights or voting rights or schools. These powers remained in the States. As the Supreme Court put it, the Fourteenth Amendment only prohibits the States from denying certain rights. The only obligation resting upon the United States is to see that the States do not deny such rights.[86] And "until some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any other proceeding under such legislation, can be called into activity.[87]

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86) In re Rahrer, 140 U.S.545, 554-555 (1891); United States v. Cruikshank, 92 U.S.542, 555 (1875); United States v. Harris, 106 U.S.629, 638 (1882).

87) Civil Rights Cases, 109 U.S. 3, 13 (1883).

Obviously, the Fourteenth Amendment did not change the federal structure of the United States. Therefore, if the Supreme Court wanted to satisfy its desire to force its beliefs on the entire Nation, it had to reach into the retained rights of the States. The Supreme Court did this in the guise of constitutional interpretation.

But what is constitutional interpretation?

Obviously, that depends, not on whether the instrument to be interpreted is a constitution, but on the nature of the specific constitution to be interpreted.

The U.S.Constitution created a government with limited powers which all were delegated by the States. Madison, one of the chief framers of that Constitution, had reminded the First Congress "that the powers not given were retained;" that "those given were not to be extended by remote implications;" and "that the terms necessary and proper gave no additional powers to those enumerated." 88) Consequently, the nature of the United States Constitution requires that it must be strictly construed, because otherwise it leads to a violation of the retained rights of the States and their people. There is no vacuum in the Constitution of the United States!

Significantly, Madison called the Constitution of the United States the "national code." 89) It is indeed a legal code which must be interpreted like any other legal code, that is according to its language; if this is not clear, the intent of those who made it and the purpose a provision was intended to accomplish may be ascertained

88) First Cong., 3rd Sess., 2 Annals of Congress 1901 (1791).
89) Letter to Peter S. Duponceau, partly printed in 4 Farrand 85.

Interpretation according to its language means, of course, that words must be given their natural meaning. It was no other than Chief Justice Marshall who said the beautiful words:

> "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." 90/

Marshall continued: "If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given ... should have great influence in the construction." But, concluded Marshall, "We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purpose for which they were conferred."91)

But Ch.J.Marshall's successors on the Supreme Court bench did not follow these rules. Instead, they created a body of "constitutional law" which has little resemblance to the United States Constitution.

As shown above (supra 63-80), the judges first arrogated to themselves the power to decide whether a law offended their "fundamental concept of ordered liberty," or differed from their notions of "fundamental fairness," all matters of policy, the decision of which rightfully belongs to the legislatures, and which had been expressly withheld from the judges by the Federal

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90) Gibbons v. Ogden, 22 U.S.(9 Wheat.) 1, 188 (1824).
91) Id., at 189.

Convention of 1787 which drafted the Constitution.[92] Then the Supreme Court "incorporated" one by onemost of the provisions of amendments 1-8 into the due process clause of the Fourteenth Amendment and declared them "applicable" to the States. To make this appear plausible, the Supreme Court tried to find some textual connection with the due process clause as, for instance, between the word "freedom" in the First Amendment and the word "liberty" in the due process clause, although there is no real connection, because in the First Amendment Congress is told not to interfere with the freedoms there mentioned, while in the due process clause the authority of the States to take liberty is recognized, except they cannot do so without a procedure according to law. When no textual connection could be found as, for instance, with the establishment clause of the First Amendment, or the cruel and unusual punishments clause of the Eighth Amendment, the Supreme Court simply declared that, because the due process clause embodies a fundamental concept, namely that condemnation shall be rendered only after trial, therefore any right which the Supreme Court declares to be "fundamental" has been made applicable to the States by the due process clause of the Fourteenth Amendment (supra 79-80).

In addition, J.Goldberg discovered that the Ninth Amendment could be used as an inexhaustible source for the creation of "fundamental rights protected by the Constitution," simply by changing its language from "rights retained by the people" into "fundamental rights." Later, this "interpretation" was taken up by a U.S.District

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92) 1 Farrand 97-98; 2 id. 74-75, 80.

Court in Texas and approved by the Supreme Court in Roe v. Wade (supra 25-26) for the purpose of creating a "constitutional right" to abortion and declare the Texas abortion laws unconstitutional. By such methods, the Supreme Court feels justified to destroy any law which no more than five Supreme Court judges consider offensive to their "fundamental concept of ordered liberty," or which differs with their notions of "fundamental fairness," or, in later years, where the Supreme Court can find no governmental purpose.

Evidently, this cannot be called constitutional interpretation by any stretch of imagination. Yet, as shown above (supra 2-3), the Supreme Court had the audacity to declare that its decisions "interpreting" a constitutional provision are "the supreme law of the land" and binding on the entire Nation. Thereby the Supreme Court arrogated to itself the power to amend the Constitution, although the Constitution has given the Supreme Court no such authority. Incomprehensibly, Congress which could have stopped the usurpations of the Supreme Court by making use of its constitutional power over the jurisdiction of the federal courts (supra 14-16), was never able to pass necessary legislation. Rather, Congress permitted the Nation to be ruled by the dictates of life tenured judges rendered in a law suit. When the people objected to the disappearance of their self-government, for instance with respect to schools and religion, in particular school prayers, they were told, falsely, that what the judges said was THE LAW which must be obeyed.

A government of life-tenured judges, with no responsibility to the people, who are free to change the Constitution in the guise of "interpretation" is irreconcilable with the U.S.Constitution.

The Constitution of the United States is based on the democratic principles of sovereignty and self-government of the people. The most important part of self-government is the people's participation in the law-making process, either through elected representatives, or through initiative and referendum. When unelected life-tenured judges can destroy any law enacted by the elected representatives of the people because it differs with the ideas of the judges as to what laws the Nation or a State ought to have, then the elected representatives of the people have become puppets, and democracy has become a sham.

If a majority of Congress could be made to see that democracy itself is at stake and that a law, preventing federal courts from taking jurisdiction over cases wherein a party claims the violation by a State or any of its subdivisions, of a right secured under amendments 1-9, is merely a first step to re-establish constitutional conditions, it might be possible that such a law would be passed. And it might also be possible to get the active support of the President, if the real issues were explained to him, for he will see that he cannot travel all over the world and preach democracy, if he permits it to be eroded at home.

However, most important -- and what can be achieved without any legislation -- Congress and the President must cease to treat a Supreme Court decision as if it were the supreme law of the land, binding them and the entire Nation. They must learn to give such a decision only the importance which the framers of the Constitution intended it to have, namely that of a final settlement of a legal dispute properly brought before the Court which binds only the parties to that dispute as to the object of that dispute (supra 8-20).

This has been the function of courts of law since time immemorial, and still is in the entire civilized world, with the sole exception of the United States, because the federal courts have departed from the Constitution.

When Stephen A. Douglas wanted the Supreme Court's Dred Scott decision to have the importance of a supreme law of the land, Abraham Lincoln marveled at the "sacredness that Judge Douglas throws around this decision." He called it "an astonisher in legal history", "a new wonder of the world." He quoted Jefferson who had called such a view "a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy."[93] Today, the whole Nation has been tricked into accepting this "dangerous doctrine" with generally deplorable consequences.

As pointed out before, a government of life tenured judges who are responsible to no one, is anti-domocratic and, above all, anti-constitutional. A re-establishment of constitutional conditions through Congress and the President is required by their oath of office to support this Constitution, that is the Constitution as written and intended by the framers and as legally amended; no one has sworn to support a Supreme Court decision.

A return to the Constitution would also benefit the Supreme Court by relieving it of its heavy case load of which the judges have complained so much, and without expense to the taxpayers. The great majority of cases concern the retained rights of the States to which the Supreme Court has wrongfully extended its jurisdiction. By preventing them from reaching the Supreme Court, that Court would no longer be plagued by an unmanageable case load.

93) Created Equal? 36-37 (supra note 12. See also supra pp.11-13).

If those judges feel that the Constitution needs changes, they ought to recommend them to Congress so that such changes can be made openly and honestly through constitutional amendments, as provided for by the Constitution of the United States.

Finally, a few words for those who always express fear that they will not know what THE LAW is when a Supreme Court decision is not binding on the Nation as a whole. But do they know now? I suggest that they read J.Black's words pronounced in 1971 and cited by Ch.J.Burger in 1983 at the end of his dissenting opinion in Solem v. Helm, supra p.80:

> "The Court would do well to heed Justice Black's comments about judges overruling the considered actions of legislatures under the guise of constitutional interpretation:
>
> > 'Such unbounded authority in any group of politically appointed or elected judges would unquestionably be sufficient to classify our Nation as a government of men, not the government of laws of which we boast. With a 'shock the conscience' test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test wilfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics.' Boddie v. Connecticut, 401 U.S. 371, 393 (1971) (Black, J., dissenting)."

Precisely! Certainty and security lie in written laws, not in individual court decisions. Under the Constitution of the United States, the laws of the land are the U.S.Constitution, acts of Congress, treaties made under the authority of the United States, and the laws of the several States. Among them, the U.S.Constitution, acts of Congress made in pursuance thereof, and treaties made under the authority of the United States, are the supreme law of the land.

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