A POLITICAL SCIENTIST AS CONSTITUTIONAL LAWYER

A REPLY TO LOUIS FISHER[1]

"a little learning is a dangerous thing..."
-Alexander Pope

Noting that "Current writings by political scientists depend heavily on Professor Raoul Berger," Louis Fisher sets out In "Raoul Berger on Public Law," an omnibus review of the four books I have published since 1969,[2] to prove that they lack "solid scholarship," and "urge[s] political scientists to proceed with caution before adopting Berger as an authoritative and reliable source. "[a] Presumably he assumes that social scientists like Alpheus Thomas Mason, Arthur Schlesinger, Jr., and C. Vann Woodward, and constitutional scholars like Alexander Bickel, Willard Hurst, and Philip Kurland, with whom one or another of these books found favor,[4] were ill-equipped to assay "solid scholarship." Fisher, who charges me with being "one-sided," with "unidimensional lawyer briefs,"[5] who is so quick to stress that Berger does not "mention" this or the other fact,[6] makes "no mention" of such respected reviewers, or of any views opposed to his own, but relies on lesser fry whose merit is

1. *The Political Science Reviewer,* Vol. VIII, 1978, p. 173. [Hereinafter, Fisher]. This response to Louis Fisher was first published in the *Ohio State Law Journal* (Vol. *41,* no. 1, 1980). Reprinted with permission.

2. *Congress v. The Supreme Court* (1969) [hereinafter, CvC]; *Impeachment: The Constitutional Problems* (1973) [hereinafter, IMP]; *Executive Privilege: A Constitutional Myth* (1974) [hereinafter, EP]; *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977) [hereinafter, GBJ].

3. Fisher, p. 174.

4. Their encomia appear on the dust jackets of my books.

5. Fisher, pp. *178,* 198.

6. *E.g.* "This is basic history but I find no mention of it anywhere in Berger's four books....Do we ignore information that becomes inconvenient and upsetting to tidy accounts?" *Ibid.* , pp. 176-77; and see *ibid.* pp. 178, 180. But see note 175 *infra.*

obvious-they criticized my writings.' This is but one illustration of Fisher's unfailing unwillingness to take account of discrepant facts and opposing opinions, a prime requisite of scholarship, the absence of which casts doubt on his qualifications to pass judgment on the scholarship of others. So packed with error is Fisher's tirade that but for the fact, to quote him, that for political scientists "[t]he temptation is strong to take at second-hand what they are unprepared and unwilling to study directly,"[8] I should consider it unworthy of further remark, particularly because it is more laborious to remove than to smear graffiti.

I. THE EXECUTIVE POWER

As a prelude to his assault upon my study of executive privilege, Fisher seeks to rehabilitate an uncircumscribed Executive Power, endowed with undescribed "implied, inherent" powers, not limited by the accompanying enumeration of granted powers. To begin with his discussion of the 1793 exchange between Hamilton and Madison respecting the Executive Power in the "Pacificus" and ¨Helvidius¨ papers, he opines that my treatment

> is one-sided and idiosyncratic. [Berger] relies on Madison's writings as "Helvidius," which conform to Berger's scenario, while discounting Hamilton's essays as "Pacificus," which do not. He tries to discredit the "Pacificus" essays by quoting John Quincy Adams' remark in 1836 that Madison "scrutinized the

7. Although Fisher cites profusely to my replies, it is to select "polemical"phrases, never to examine any of my refutations on the merits. Several reviewers have commented that my critics "have given singularly unsatisfactory answers" to some of my questions. Kommers, Book Review, *Review of Politics,* Vol. 40, 1978, pp. 409, 413; Perry, Book Review, Columbia Law Review, Vol 78, 1978, pp. 685, 694: "Regrettably fewer constitutional scholars and theorists than one might think seem prepared to acknowledge the serious challenge Berger's argument poses." And Perry adds, "Berger effectively destroys whatever might have remained of the notion that modern constitutional cases involving legislative reapportionment, school desegregation, criminal procedure, or first amendment issues are somehow rooted (however tenuously) in the original understanding...of the fourteenth amendment." *Ibid.* pp. 694, 688. Professor John Burleigh, who disagrees with my view of the Court's role, stated that my book "not only raises all the right questions, but is carefully documented and rigorously argued, at once learned, illuminating and challenging." Burleigh, "The Supreme Court vs. The Constitution," *The Public Interest,* Vol. 50, (Winter, 1978), pp. 151, 152-53.

8. Fisher, p. 173.

> doctrines of Pacificus with an acuteness of intellect never perhaps surpassed." A convenient quote, no doubt, but it is thin analysis to dismiss Hamilton by quoting someone else.'

This is a blatant misrepresentation. In fact, I had first demonstrated that Hamilton had executed *a volte face,* repudiating assurances he had made in *The Federalist* to procure adoption of the Constitution.[10] Adoption was touch and go and Hamilton, aware of the "aversion of the people to monarchy," and their readiness to regard "the intended President...as the full grown progeny of that detested parent," had soothingly downgraded one after another of the enumerated Executive Powers. For example, the "Commander-in-Chief was merely to be the `first General' "; he assured the Ratifiers that nothing was "to be feared" from an Executive "with the confined authorities of a President."[11] Now as "Pacificus" he turned his back on the representations upon which the Ratifiers had relied, as Madison pointed out in "Helvidius," and plumped for a plenary executive power, brushing aside the enumeration of specific presidential powers as not "derogating from the more comprehensive grant of the Executive power."[12] So I did not "dismiss Hamilton [merely] by quoting from someone else."

Is Adams' testimony of less weight than Louis Fisher's views? Adams' evaluation, it may be added, was later shared by Edward Corwin, who remarked on the "essential truth of `Helvidius' contention that `Pacificus' reading of the executive power clause contravened, certainly in effect, the express intention of the Constitution that the war-declaring power...should lodge with the legislative authority."[13] as Hamilton himself had said in the Convention.[14] "When pushed by one critic of the Helvidius-Pacificus issue," Fisher asserts, "Berger *flips* to another position (quoting again from some one): `As Professor Henry Steele Commager put it, "It is Madison, not

9. *Ibid.,* p. 178 (footnotes omitted).

10. EP, p. 135. Throughout I shall cite to my books for citations to the sources to show that those materials were spread before Fisher, to direct attention to confirmatory materials, and to conserve space.

11. *Ibid.,* p. 53.

12. *Ibid.,* pp. 135-36.

13. *Ibid.,* p. 136.

14. Hamilton stated in the Convention that the "Executive ought to have but little power," and proposed that the Senate should "have the sole power of declaring war." *Ibid.,* p. 67 n.39.

Hamilton, who has a just claim to be considered not only the Father of the Constitution but its most authoritative interpreter." ' "[15] The truth of this statement is hardly controvertible, and not more so because it is uttered by Commager. To cite it is not to "flip to another position" but to justify my reliance on Madison's analysis, which represents the views of the Framers.'[16] Of such demonstrations, rooted in the historical facts, Fisher asserts that Berger "surrounds himself with oracles instead of demonstrating to the reader (his jury) the congency of his arguments"I[17] Why too are Fisher's citations to my critics or those who differ with me to be taken as gospel whereas mine to Adams, Corwin, and Commager, in confirmation of a recital of historical facts, are ridiculed as "supposed authorities," "so-called authority"?[18]

Consider next Fisher's charge that my "handling of Hamilton is opportunistic" because I also state that he was "said to reflect the consensus of the Framers," resorting to "flattery" because "Hamilton is going to be of use to Berger."[19] Corwin's statement that Hamilton reflected the consensus, as Jefferson also stated,[20] is dismissed because Corwin cited *Federalist* No. *78,* which discusses judicial review (as if that refutes *a consensus* in that important frame), and because no one would "ever seriously present him [Hamilton] as the archetype of the Framers."[21] The "archetype" is one of Fisher's own "overstatements";[22] he overlooks, as Jefferson pointed out, that in *The Federalist* Hamilton was attempting to set

15. Fisher, p. 179 (emphasis added).

16. On the war power see, for example, EP, pp. 64-69.

17. Fisher, p. 203.

18. *Ibid., pp.* 202, 201.

19. *Ibid.,* p. 178. On the other hand, it is not "flattery" when Fisher writes of one of my critics, "this issue is explored with greater care" than by Berger, *ibid., p. 197. For discussion of the latter, see note 120 infra.*

20. Jefferson regarded *The Federalist* as "evidence of the general opinion of those who framed" the Constitution. Clinton Rossiter, *Alexander Hamilton and the Constitution* p. 227 (1964).

21. Fisher, p. 179.

22. It is a mark of Fisher's callowness that he calls my attention to William Strunk's caution to neophyte writers against "overstatement" in his primer *Elements of Style. Ibid.,* p. 201.

forth the views of the Framers, even when he did not share them. [23] Moreover, the consensus reference is fortified by my demonstration that Hamilton had represented to the Ratifiers that only limited power was granted to the Executive, a representation that faithfully reflects the views of the Framers.[24]

From Fisher's espousal of "Pacificus" one may infer that he too regards the "Executive Power" as generic, that the subsequent enumeration of specific powers does not derogate "from the more comprehensive grant in the general clause."[25] In lordly fashion he dismisses Randolph's assurance that "the powers of Government are enumerated. Is it not, then, fairly deducible, that it has no power but what is expressly given to it?-for if its powers were to be general, an enumeration would be needless. "[26] This was an article of faith with the Founders, as is evidenced by similar remarks of Lee of Virginia and Madison in *The Federalist* No. *41*.[27] Madison had

23. Letter from Jefferson to Madison, November 8, 1788, *Writings of Thomas Jefferson,* Vol. 5, p. 53 (Ford ed. 1895): "In some parts it is discoverable that the author means only to say what may be best said *in* defense of opinions in *which* he did not concur." At the close of the Convention Hamilton urged the delegates to sign the proposed Constitution, notwithstanding that "No man's ideas were more remote from the plan than his own were known to be...." Max Farrand, *The Records of the Federal Convention of 1787,* Vol 2, pp. 645-46 (1911).

24. EP, pp. 52-53. In the Convention, Madison noted: "Limited as the powers of the Executive are...." Farrand, *ibid.,* p. 109.

25. *Ibid.,* p. 136.

26. Fisher, p. 175. Fisher states that Berger "takes comfort in the statement of H. Lee at the Virginia ratification convention: 'When a question arises with respect to the legality of any power, exercised or assumed, ' the question wil be 'Is it enumerated in the Constitution?...It is otherwise arbitrary or unconstitutional.' "

27. For Lee, see note 26 *supra.* Madison stated: "For what purpose could the enumeration ofparticular powers be inserted, if these and all others were meant to be included in the preceding general power?" Such an "absurdity" could not be attributed to the Framers. *The Federalist No. 41,* p. 269 (Luce ed. 1978). Fisher does not explain why Randolph-Lee-Madison are entitled to no weight. Instead he argues that "[t]he methods used by Berger are poorly grounded" because the First Congress rejected the proposal to make the tenth amendment read powers "not *expressly* delegated." Fisher, p. 176 (emphasis added). But as his citation to Madison shows, this was because "every minutiae" could not be expressed. The rejection of "expressly" was not meant to expand the enumerated powers but to leave room for implied powers needed for execution of the express powers.See text accompanying notes 37-39 *infra.* After the rejection of "expressly," Madison reiterated in 1792, "those who proposed ... [and "ratified"] the Constitution conceived-that this is not an indefinite Government, deriving its powers from the general terms prefixed to the specified powers, but a limited Government, tied down to the specified powers *which* explain and define the general terms." Far-

stated at the outset that it was essential "to fix the extent of the Executive authority"; "cerain powers...must be given"; the Executive powers "shd. be confined and defined." Later he stated in *Federalist* No. 45 that the "powers delegated...to the federal government are few and defined."[28] "Enumeration," therefore, was not merely a canon of construction; emphasis thereon was meant to reassure Ratifiers jealous of an overblown federal government.2[9] To be sure, the Pacificus-Fisher view was adopted by Chief Justice Taft in *United States V. Myers* over the vigorous dissents of Holmes and Brandeis.[30] Not Taft but Holmes and Brandeis won the later approval of Justices Black, Douglas, Frankfurter, and Jackson.[31] Jackson flatly repudiated "the view that this [executive] clause is a grant in bulk of all conceivable power but regard[ed] it as an allocation to the presidential office of the generic powers thereafter stated."[32]

To the confirmatory statements of Chief Justice Marshall and Justice Samuel Miller that "the powers of the government are limited," Fisher retorts that "such exhortations" do not tell us "where limits are to be drawn."[33] To begin with, the "enumerated" powers themselves constitute "limits." So, the commander-in-chief power, as the legislative history shows, was not designed to authorize presidential warmaking as distinguished from conduct of

rand, *ibid., p.* 366.

Fisher's theory held no charms for Justice Story. Writing in 1832, he stated: "The Constitution declares that the powers of Congress shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretensions to a general legislative authority. Why? Because an affirmative grant of special powers would be absurd, as well as useless, if a general authority were intended." J. Story, *Commentaries on the Constitution of the United States,* Vol. 1, §448 (5th ed., 1905).

28. EP, p. 58.

29. CvC, pp. 8-16.

30. 272 U.S. 52 (1926); EP, pp. 55-59. In IMP, I noted with respect to the trial of Andrew Johnson that the President's power to remove a member of his cabinet was "settled in our time by *Myers v. United States* [272 U.S. 52 (1926)]." Fisher finds my "depend[ence] on a court ruling" ironic. Fisher, p. 191. Were Ito stop and examine the underpinning of each and every court ruling in the course of a particular study, I would be launched on an endless task.

31. EP, p. 59, n. 59.

32. *Ibid.,* p. *59.*

33. Fisher, p. 176.

the war once declared by Congress.[34] Instead of meeting my historical demonstration, Fisher loses himself in a fog of "implied" powers;[35] Berger "reject[s] the notion of implied power, inherent powers... or any other *extraconstitutional* power that is not expressly vested in one of the branches."[38] Implied powers and inherent powers are not the same, nor can "extraconstitutional" power be "implied." The test of an *implied* power, the Supreme Court held, is whether it is "necessary and proper to carry into effect" an express power.[37] Although Fisher refers to *McCulloch v. Maryland,*[38] he overlooks that Marshall restricted it to the "choice of means" to execute a granted power.[38] An *inherent* power, on the other hand, is "enjoyed by the possessor of natural right, without being received from another;" in other words, it is not granted by the Constitution.[40] The doctrine of "inherent" powers would set the

34. It is a half-truth to say "From pre-1787 developments Berger finds evidence that the commander-in-chief clause should be construed narrowly," *ibid.,* p. 177, for the bulk of my proof drew on the records of the Convention and explanations by the Founders. See EP, pp. 81-69. Professor Louis Henkin concluded, "There is little evidence that the Framers intended more than to establish in the President civilian command of the forces for wars declared by Congress...." L. Henkin, *Foreign Affairs and the Constitution,* p. 50 (1972). See also, Lofgren, "War-Making Under the Constitution: The Original Understanding," Yale Law Review, Vol. 81, p. 672 (1972).

Broad war-making power of the commander-in-chief is not demonstrated by *delegations* from the Continental Congress to General Washington to meet "emergencies" when "all particulars cannot be foreseen," so that he may meet them as they "may arise upon the place." Fisher, p. 178. In short, the conduct of war in the field necessarily must be left to the "first General." Fisher's failure to appreciate the significance of such facts vitiates many of his judgments.

35. Again and again, Fisher upbraids me for not "analys[ing] the issue of implied powers," *ibid.,* p. 180; and he looked "in vain for a reasoned position on implied powers," *ibid.,* p. 179.

38. *Ibid.,* pp. 175-76 (emphasis added).

37. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936); EP, p. 180.

38. Fisher, p. 177.

39. GBJ, pp. 375-76; Marshall repudiated "the most distant allusion to *any extension by construction of the powers* of Congress." *Ibid.,* p. 377. In the Convention Rufus King said, given a provision "for the end. Their discretionary power to provide for the Means is involved according to an established axiom." Farrand, *op. cit.* Vol. 2, p. 70.

40. Bouvier Law Dictionary, p. 2646 (8th ed., 1914). The claim to "inherent" power collides with the fact that the Founders, in the words of James Iredell, considered that "unlimited power ...was not to be trusted, without the most imminent danger, to any man or body of men on earth." G. McBee, *Life and Correspondence of James Iredell,* Vol. 1, p. 146 (1857-58).

enumeration of powers of limited government at naught. Justice Jackson, adverting to the express presidential authorization to "require the Opinion in writing" of each Department head, which "would seem to be *inherent* in the Executive if anything is,"rebuffed the claim to a "grant of all conceivable power."[41] Madison's insistence on *defining and confining* the executive power is incompatible with a claim to inherent powers. To this demonstration, culminating in my remark that "[i]t is incongruous to attribute to a generation so in dread of executive tyranny an intention to give a newly created executive a blank check," Fisher retorts that this is "another straw man (who contends that the Framers wanted to give the President a `blank check'?)."[42] Apparently he is unaware that his espousal of Pacificus' views, of "extraconstitutional" power, lays claim to just such "a grant in bulk of all conceivable power" and of ungranted power to boot.

A futher mark of confusion is Fisher's failure to distinguish between a "pre-1787 attribute of executive power" and "inherent power."[43] The latter is "extraconstitutional," whereas an "attribute" is a property of a granted power. For example, the Constitution makes no provision for the right to challenge jurors, so anxious Ratifiers were assured that the words "trial by jury" embraced all of its attributes at common law.[44] So, too, as will appear, the

41. EP, p. 59; see also the quotation from Madison at note 133 *infra.* Oliver Ellsworth commented *in* the Convention: "The Executive will be regarded by the peoplewith a jealous eye. Every power for augmenting unnecessarily his influence will be disliked." Farrand, *op. cit.,* p. 81.

42. Fisher, pp. 199-200; but see text accompanying notes 210-14 *infra.*

43. "What is meant by a pre-1787 attribute of executive power? For someone who inveighs against the doctrine of inherent power, this is a curious approach." Fisher, p. 186.

44. GBJ, p. 403. Another example of incomprehension is Fisher's comment on my remark, drawn from Justice Holmes, that "[s]tatements...are themselves facts, not merely `evidence' to substantiate 'a theory of what the author believed.' "Fisher, p. 201. In Holmes' words, a "party's conduct" may "consist in uttering certain words." O. Holmes, *The Common Law,* p. 132 (1923). This was directed to Scott Bice's argument that to test the statements of the framers, we must inquire into what they really believed as distinguished from what they said." Berger, "Judicial Review: Countercriticism in Tranquillity," *Northwestern University Law Review,* Vol. 69, pp. 390, 393 (1974). My point was that a leader's representation to the Senate that, for example, suffrage is excluded from the bill precludes inquiry into what he secretly believed. Fisher is wildly off course when he deduces from this my belief "that a point is nailed down by bringing in a statement from a so-called [?] authority." Fisher, p. 201. As a final fillip Fisher has the gall to say "the authors' credentials are often ignored," *ibid.,* this from one who dismisses citations to J.Q. Adams, H.S. Commager, *et al.!*

legislative power to investigate into executive conduct was an attribute of Parliament, on which our Congress was modelled, whereas the Executive claimed no power to resist.

II. ENGLISH PRE-1787 PRACTICE

It can hardly be disputed that from the beginning the Court has looked to English practice for the meaning of common law terms employed in the Constitution and for the scope of the legislative and executive powers created thereby.[45] Fisher himself has done so.[4e] But he is bemused by the role of pre-1787 English history in constitutional construction. First heconcludes that English history "is a poor guide to understanding executive-legislative relationships in America." As evidence he instances a departure from the Crown's power to appoint officers and create offices, in favor of Senate participation, noting Madison's warning against an "overgrown and all-grasping prerogative of an hereditary magistrate."[47] He fails to grasp that the departure *curtailed* executive power and *enlarged* the legislative power, unwittingly lending support to my thesis that Congress was empowered to investigate the Executive branch. The history has been well-summarized by Professor Louis Henkin:

> [U]nhappy memories of royal prerogative, fear of tyranny, and distrust of any one man, kept the Framers from giving the President too much head...In the end and over-all, Congress clearly came first...; the Executive came second, principally as executive-agent of Congressional policy. Every grant to the President, including those relating to foreign affairs, was in effect a derogation from Congressional power, eked out slowly, reluctantly, and not without limitations and safeguards.'[e]

45. For numerous citations, see Berger, "Bills of Attainder," *Cornell Law Review,* Vol 63, pp. 355, 360-65 (1979).

46. See text accompanying n. 53 *infra.*

47. Fisher, p. 184.

48. EP, p. 50. This is another Fisher exhibit for my weakness for "associating" myself "with men of eminence," and is brushed aside because "Berger and Henkin are worlds apart in their approach to the Presidency and constitutional law." Fisher, p. 202. Be that assumed, it strengthens rather than impeaches a statement in which we concur. In truth, our parallel studies were published at about the same time, late in 1972, and we were in basic agreement as to the historical sources and nature of the "commander-in-chief" power, of the presidential foreign relations power, executive agreements, etc. See Berger, "The Presidential Monopoly of Foreign Relations," *Michigan Law Review, Vol.* 71, p. 1 (1972); Berger, "War Making by the President," *University of Pennsylvania Law Review,* Vol. 121, p. 29 (1972).

When Fisher asserts that "[q]uestions of executive privilege,... congressional investigation, and the war power cannot be resolved by recounting British practices,"[49] he overlooks that the Framers' curtailment of crown prerogatives[60] and allocation of this and the other Crown power to Congress is incompatible with the argument that Congress' power of investigation was less than Parliament's sweeping power to inquire. To invoke a rejection of British practice in 1921 for light in the role played by the pre-1787 "British model" is a higgledy-piggledy approach to constitutional interpretation.[61] What counts is the British practice prior to adoption of the Constitution.

Fisher himself observes that Chief Justice Taft "accepted English practice as *authoritative* in construing the pardon power," and quotes from an 1833 case, *United States v. Wilson:*[52]

> As this [pardon] power had been exercised from time immemorial by the executive of the nation whose language is our language, and to whose judicial *institutions* ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.[63]

But Fisher regards the "pardon power" as *"the one* area in which it is appropriate to turn to British precedents for guidance," the reason being that "the power granted to the President was in general language, the phraseology familiar to the common law of England, and no attempt was made at the Philadelphia Convention to define or limit it."[54] The same may be said of high crimes and misdemeanors, habeas corpus, ex post facto, bills of attainder, trial by jury. It was because they *were* familiar that there was no felt need to "define" them, except as in the case of "treason," which the Framers considered too broad.[55] Is the "legislative power" really less "general" than "pardon"? Allusions in the several Conventions to

49. Fisher, p. 184. It is misleading to suggest that I look to British practice to define the scope of the "war power." See no. 34 *supra.*

50. EP, pp. 49-52.

51. Fisher, p. 185.

52. 32 U.S. 150 (1833).

53. Fisher, pp. 187-88 (emphasis added), quoting U.S. at 160.

54. Ibid., **p. 187 (emphasis added).**

55. U.S. Const. Art. III, §3.

the function of the House as the Grand Inquest of the Nation[68] supply some definition, although lacking in the case of pardon. Fisher's partiality to "pardon" may be explained by the fact that he studied the pardon power and I did not, apparently a sinful omission.[57]

He allows that "[t]he Framers did think in common law terms, but for institutions and individual liberties they adopted structures and values so unique that it is misleading to place such heavy stress on British history."" In sharp contrast Professor Harry W. Jones stated, "even with respect to the distinctive American practice of judicial review, the common law tradition had the last word....Being common lawyers to the core, early Justices simply took it for granted... that the distinctive *method* of the common law...was to be used in carrying out the challenging new assignment."" So completely did the Framers assume that the terms they employed would be given their common-law meaning that they felt constrained to define treason narrowly in order to restrict its excessive common-law scope.[80] Even so, Chief Justice Marshall, like Justice Iredell before him, considering the meaning of "levying war," held that treason "is a technical term....It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it."[81] In the very case Fisher cites, Chief Justice Taft declared, "The language of the Constitution cannot be intrepreted safely except by reference to the common law *and to British institutions* as they were when the instrument was framed and adopted."[82] Two such institutions were the legislative and the executive, from which the Framers made a "unique" departure in cutting down the royal prerogative and

56. EP, pp. 35-36.

57. Fisher, p. 187.

58. Ibid., p. 183.

59. Jones, "The Common Law in the United States: English Themese and American Variations," in *Political Separation and Legal Continuity* pp. 91, 133-34 (H.W. Jones ed. 1976). Enumerating the powers enjoyed by the Crown but not by the President, Pierce Butler yet observed: "We, in many instances took the Constitution of Britain, when in its purity, for a model..." Farrand, *op. cit.* Vol. 3, p. 102. See also *ibid.,* p. 301. And Luther Martin complained: "[W]e were eternally troubled with arguments and precedents from the British government...." *Ibid.,* p. 203.

60, U.S. Const. Art. III, §3; see also Fisher, p. 185.

61. United States v. Burr, 25 F. Cas. 5, 159 (C.C.D. Va 1807) (No. 14,693); Fries Case, 9 F. Cas. 826, 911-12 (C.C.D. pa. 1799) (No. 5,126).

62. *Ex parte* Grossman, 267 U.S. 87, 108-09 (1925) (emphasis added).

allocating some of its powers to Congress. By Fisher's own testimony, we are therefore justified in looking to pre-1787 English practice in construing the relation of the executive and legislative branches.

Although Fisher turns to English history for the content of the "pardon power, he does not really understand the uses of history. Thus he states, "For his books on *Impeachment* and *Executive Privilege,* Berger races back centuries in English history to place his story in proper perspective. In sharp contrast, *Government by Judiciary* freezes history by taking a snapshot of the antislavery movement as it stood at the time of the 39th Congress."[83] Impeachment, Hamilton tells us, was "borrowed" from England and patterned on its practice-prosecution by the Commons and judgment by the Lords.[84] Where but to England could one look for the meaning of "high crimes and misdemeanors," also borrowed from English impeachments? Similarly, the terms employed in the fourteenth amendment' can only be understood in light of the meaning the framers attached to them, as is copiously documented in the records of the 39th Congress." Whether it be "high crimes and misdemeanors" or "due process," once that meaning is found it is equally frozen,[86] unless Fisher would have it, like Congressman Gerald Ford, that an "impeachable offense" is whatever the House, with the concurrence of the Senate "considers [it] to be."[67] Apparently

63. Fisher, p. 194.

64. *The Federalist* No. 65, p. 425 (A. Hamilton) (Luce ed. 1976).

65. See GBJ, pp. 20-38, 166-200.

66. Justice Story wrote that: "The policy of one age may ill suit the wishes or the policy of another. The Constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be ... the same yesterday, today, and forever." Story, *op. cit.* §426, Vol 1 (5th ed. 1905). A fixed Constitution was for the Founders a basic postulate. See P. Kurland, *Watergate and the Constitution,* p. 7 (1978).

In 1872, a unanimous Senate Judiciary Committee report, signed by Senators who had voted for the thirteenth, fourteenth, and fifteenth amendments in Congress, stated: "A construction which would give the phrase [in the fourteenth amendment] ... a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution in any other particular." A. Avins, *The Reconstruction Amendments' Debates,* preface p. 2, 571 (1967). See also United States v. Barnett, 376 U.S. 681, 693 (1964) (" [O]ur inquiry concerns the standard prevailing at the time of the Constitution, not a score or more years later.")

67. IMP, p. 53

that is exactly what Fisher does mean, for he states that "[w]hatever lessons British history contained for America on the impeachment issue were quickly extinguished by [American] political developments."[68] Over the years, however, the Court has regarded the common law meaning of constitutional terms as "authoritative," as his own "pardon" example shows.

III. EXECUTIVE PRIVILEGE

Since no mention is made in the Constitution of a Congressional power to investigate or an executive power to withhold information from its partner in government, Congress, inquiry must perforce begin with the scope of the respective powers in English practice. So the Supreme Court did in a case arising out of the Teapot Dome scandal, *McGrain v. Daugherty*,[69] holding that at the adoption of the Constitution

> the power in inquiry-with enforcing process-was regarded and employed as a necessary and appropriate *attribute* of the power to legislate... [T]he constitutional provisions which commit the *legislative functions* to the two houses are *intended to include this attribute* to the end that the function may be effectively exercised.[70]

McGrain involved a Congressional subpoena to a private person and therefore had,no occasion to examine inquiry into executive misconduct. Consequently I studied parliamentary investigations over a long period and showed that Parliament was accustomed to peer into every corner of executive conduct[71] and that, but for one

68. Fisher, p. 185.

69. 273 U.S. 135 (1927).

70. Ibid., p. 175, quoted in EP, p. 207 (emphasis added). Fisher's comment exemplifies his "scholarly" approach: "From *McGrain v. Daugherty* (1927) [Berger] *extracts* a statement that the British Parliament regarded the power to secure needed information-by investigatory means-as an attribute of the power to legislate,...*fhJaving proved to his satisfaction* that the power to investigate is grounded solidly in British constitutional history,..."I Fisher, p. 186 (emphasis added). If *McGrain is* to be rejected, some reason needs to be adduced. That this was the British practice I demonstrated in many pages.

71. EP, pp. 15-31. See also, H. Hallam, *Constitutional History of England,* Vol. 3, p. 143 (1884), quoted in EP, p. 18, and Charles Davenant, quoted by Bestor, "Separation of Powers in the Domain of Foreign Affairs: The Original Intent of the Constitution Historically Examined," *Seton Hall Law Review,* Vol. 5, pp. 527, 558-59 (1974).

explicable instance,[72] the British executive had never resisted Parliament's requests for information. By the logic of *McGrain,* the fact that the British executive did *not* claim the right to withhold information from Parliament demonstrates that it was *not* an attribute of the executive power conferred by the Constitution, and so it was understood by the Founders.[73] This sufficiently answers Fisher's "What is meant by pre-1787 attribute of executive power?"[74] His suggestion that "such precedents [could not] be discovered in America" because "a separate national executive was not recognized by a constitutional charter in the years prior to 1787"[76] misconceives the test *McGrain* employed with respect to the legislative power-whether a given *attribute* existed in the prior British practice. Certainly the thoroughgoing divorce of the President from crown prerogatives is irreconcilable with a withholding power that was not recognized in England.

True to his "penchant" for "ignoring" , unpalatable facts, Fisher skips lightly over the summary of controlling history contained in my Reply to Sofaer,[7B] which he confessedly read.[77] Apart from the fact, as *McGrain* held, that the investigatory power was an "attribute" of the "legislative power," and that inquiry into executive conduct by Parliament ran across-the-board, there are the facts that: (1) Montesquieu, the Founders' oracle on the separation of

72. EP. pp. 24-29.

73. See text accompanying note 76-78 *infra.* Executive privilege cannot be drawn from the blue. Thus Madison directed attention to "the necessity of considering what privileges ought to be *allowed* to the Executive." Farrand, *op. cit.* Vol. 2, p. 503 (emphasis added). In 1800, Charles Pinckney, who had been an active Framer and Ratifier, explained to the Senate that the Convention well knew "how oppressively the power of undefined provileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here."Accordingly, they confined the privileges of Congress "within the narrow limits mentioned in the Constitution." To the President they did not even allow the "privilege from arrest": "No privilege of this kind was intended for your Executive..." Farrand, Vol. 3, p. 385. Against this background it is absurd to claim for the President a privilege to withhold information that not even the English executive had enjoyed.

74. Fisher, p. 186.

75.Ibid., In his haste, Fisher overlooked the colonial precedents, of which *McG rain* took cognizance. EP, pp. 31-34. But early American experience did not exercise as much influence as the British practice. ***Ibid.,*** *p.* 34, no. 118.

76. Berger, "Executive Privilege: A Repy to Professor Sofaer," *Columbia Law Review,* Vol. 75, pp. 603, 609-10 (1975).

77. Fisher, p. 174, n. 1.

powers, had stated that the legislature "has a right, and ought to have the means of examining in what manner its laws have been executed." (2) James Wilson, second only to Madison as an architect of the Constitution, had exalted the Commons as the Grand Inquest of the Nation because it had "checked the progress of arbitrary power.... The proudest ministers...have appeared at the bar of the house, to give an account of their conduct." In the Pennsylvania Ratification Convention, Wilson stated, "The executive power is better to be trusted when it has *no screen*... [the President cannot] hide either his negligence or inattention...not *a single privilege is* annexed to his character." Such representations were designed to reassure fearful Ratifiers. (3) References to the House as the Grand Inquest of the Nation appear in the several Conventions; not one voice was raised on behalf of curtailing the inquisitorial power in the President's interest. (4) The Treasury Act of 1789 made the executive's duty to supply information explicit, an authoritative construction by the First Congress.[78] In the teeth of these and still other facts Fisher asserts, "It is idle to pretend that the separation of powers doctrine has no application to congressional inquiry."[79]

Fisher's feeble attempt to diminish the import of this history only underscores how little qualified he is to assay constitutional matters. Thus he loftily brushes Montesquieu aside: "A statement from Montesquieu does not constitute, for me `historical proof' "I Why not? Because "[n]otwithstanding the praise bestowed on Montesquieu in the *Federalist Papers* and at the Philadelphia Convention, the connection between his writings and the American Constitution is quite tenuous. Clearly the Framers departed from his model in fundamental ways."[80] But the fact that Madison felt constrained to defend the Constitution against charges that it departed from Montesquieu's alleged insistence on an airtight separation of powers, testifies to the hold Montesquieu had on the Framers.[81] Montesquieu's espousal of the legislative power of investigating the executive is evidence that even he did not consider that the separation of powers barred legislative inquiry into executive conduct, and that it therefore undergirded Madison's defense. Montesquieu's witness,

78. See n. 76 *supra.*
79. Fisher, p. 180.
80. Ibid.
81. The Federalist, No. 47, pp. 314-15 (J. Madison) (Luce ed. 1976).

so slightingly regarded by Fisher, was viewed quite differently by the Framers, to cite only two. Pierce Butler observed, "The great Montesquieu says, it is unwise to entrust persons with power, which by being abused operates to the advantage of those entrusted with it."[82] And Edmund Randolph said, "What relates to suffrage is justly stated by the celebrated Montesquieu as a fundamental article of Republican Govts."[83]

While lustily flailing away at "strawmen," Fisher sets up a towering one of his own, citing an early discredited case opposing *McGrain,* which overruled it sub silentio, a lapse not suffered even in a fledgling lawyer. He exhumes *Kilbourn v. Thompson*[84] for the proposition that Congress's contempt power "can derive no support from" parliamentary practice,[85] ignoring *McGrain's* overturn of *Kilbourn's* "neither house of Congress has the power to make inquiries and exact evidence in aid of contemplated legislation."[86] Fisher himself notes that in 1821 *Anderson v. Dunn*[87] "recognized that Congress possessed a number of implied powers: the power to investigate,...to compel a party's appearance, and the power to punish for contempt."[88] *Kilbourn is* regarded as historically unsound,[89] and the practice since *McGrain, to* cite only the *Nixon*[90] case, evidences that Congress has a power of investigation enforceable by contempt.[91]

To my demonstration the the Treasury Act of 1789-which instructed the Secretary of the Treasury to "give information to either branch of the legislature...(as he may be required), respecting *all matters...which shall appertain to his office"-reflects* the English practice,[82] Fisher replies that "Berger *ignores* the basic difference in the statute creating the Foreign Affairs and War Departments...

82. Farrand, op. *eft.* Vol. 1, p. 391.
83. *Ibid., p.* 580. For a citation by Wilson, see Farrand, vo. 2, p. 530.
84. 103 U.S. 168 (1881).
85. Fisher, p. 187.
86. McGrain v. Daugherty, 273 U.S. at 171, 174 (1925).
87. 19 (6 Wheat.) U.S. 204 (1821).
88. Fisher, pp. 201-02; and see text accompanying notes 193-95 *infra.*
89. For citations, see EP, p. 31, n. 101.
90. Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977).
91. See also, Berger, "Congressional Subpoenas to Executive Officials," *Columbia Law Review,* Vol. 75, pp. 865, 866-70 (1975).
92. EP, pp. 38-40.

[which] did not specifically require the Secretaries of those departments to furnish information."[93] So eager is Fisher to discredit Berger that he has been betrayed into another reckless misstatement. For I did not "ignore" the latter Departments but considered the difference at length and showed that the "specific" Treasury provision was designed to forestall Hamilton's feared tendency "to obtrude his sentiments perpetually on this body," and therefore limited him to giving information "as he may be required."[94] No reason to suspect such instrusiveness from the Foreign Affairs and War Departments had appeared, and consequently no such declaratory provision was called for.[95] That the latter Departments were not exempted from demands for information appears from an opinion of Attorney General Cushing in 1854: `By express provision of law, it is made the duty of the Secretary of the Treasury to communicate information to either House of Congress when desired; and it is practically and by legal implication the same with other secretaries...."[96] How can a crusader against "one-sidedness" "ignore" such facts?

Next Fisher refers to Washington's cabinet meeting to consider Congress's request for information about the disastrous St. Clair expedition. The information was turned over, but the cabinet concluded that information could be withheld from Congress.[97] There is no evidence that this conclusion was ever disclosed to Congress; disclosure would gratuitously have chilled relations with Congress. Jefferson's notes of the meeting did not find their way into government files;they first came to light after his death,and were published many years later.[98] From these facts Fisher concludes that, "[t]he principle of executive privilege, even if not invoked, *had been established* by a vest-pocket "decision."[99] Since the "principle"

93. Fisher, p. 180 (emphasis added).

94. EP, pp. 38-40.

95. *Ibid.,* pp. 198-200; see also, Berger, "Executive Privilege v. Congressional Inquiry,"U.C.L.A. *Law Review,* vol. 12, pp. 1044, 1080-62 (1965).

96. EP, p. 200.

97. *Ibid., pp.* 167-68; Fisher, pp. 180-81.

98. EP, pp. 168-69.

99. Fisher, p. 181 (emphasis added). Fisher adds a later "precedent in 1794, in which Washington withheld from the Senate certain parts of correspondence between France and the United States," citing one of his "authorities," Sofaer. Fisher, p. 181, n. 12. Repetition of an unwarranted claim does not convert it to a constitutional power. It is these "precedents" of which Fisher says, "What counts is the executive *practice* of withholding information from Congress..." Fisher, p. 181.

involves conflicting jurisdictional claims of Congress and the President, he was not empowered unilaterally to settle such differences in his own favor,[100] as the *Nixon* case shows. It is a measure of Fisher's shallow learning that he is oblivious to such considerations.

For futher rebuttal Fisher relies on Chief Justice Burger's opinion in *United States v. Nixon,'"* in which he stated that the privilege for presidential communications is "inextricably rooted in the separation of powers" and that "the importance of this confidentiality is too plain to require further discussion."[102] Eminent scholars chided Burger for ignoring the historical data I had spread before him,[103] Against the background of the Watergate scandal and the firestorm that swept the nation after the "Saturday Night Massacre" (the abrupt firing of special prosecutor Archibald Cox), withholding of the Nixon White House tapes from the district court was unthinkable. So Burger grudgingly made a breach in the separation of powers: the privilege "cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice."[104] At the time I prophesied that this "principle" would burgeon by analogy, that the public interest in the criminal prosecution of a White House aide hardly rose to its interest in the "full disclosure of the facts" before Congress when it is engaged in the impeachment of a President, or currently, as in weighing ratification of SALT II (the missile limitation agreement with Russia) .[106] My prophecy was speedily fulfilled in the second *Nixon* case, in which Nixon invoked executive privilege against Congress to shield some forty million documents that had poured into the White House from

100. In *The Federalist,* Madison stated that none of the departments "can pretend to an exclusive or superior right of settling the boundaries between their respective powers." *The Federalist* No. 49, p. *328* (J. Madison) (Luce ed., 1976). Neither department, Justice Jackson wrote, can "be left to judge the limits of its own power." R. Jackson, *The Struggle for Judicial Supremacy,* p. *9* (1941).

101.418 U.S. *683* (1974).

102.Ibid., p. *708, 705.*

103. See Kurland, "United States v. Nixon: Who KilledCock Robin," *U.C.L.A. Law Review,* vol. *22,* pp. *68, 74* (1974); Mishkin, "Great Cases and Soft Law: A Comment on United States v. Nixon," *U.C.L.A. Law Review,* vol. *22, pp. 76,* 83-84 (1974).

104. 418 U.S. at 713. Fisher makes no mention of this breach in the "principle," contrary to his sage counsel that Berger should look to what courts *do* rather than what they say. See text accompanying note 195 *infra.*

105. See Berger, "The Incarnation of Executive Privilege," *U. C.L.A. Law Review,* vol. ***22,*** *pp.* 4, *8-9* (1974).

all quarters of the government.[100] Although Burger insisted that a breach in presidential confidentiality was warranted only when "the conduct of criminal proceedings would be impaired."[107] The Court no longer constrained to furnish Nixon with a "unanimous" decision that even he could not disobey,[108] held that "the claims of Presidential privilege clearly must yield to the important congressional purposes of preserving the materials and maintaining access to them for lawful governmental and historical purposes."[108] Protection of the public right to information, upon which *Nixon II* was largely pitched,. is not nearly as important as the right of Congress to inquire into executive misconduct, to ascertain the facts behind unauthorized entry into another Vietnam war. Nixon helped to kill Cock Robin; no sooner had the "doctrine" of executive privilege been born through Burger's midwifery than it was rendered virtually meaningless. It is this learning that allegedly "illustrates Berger's affinity for excesses [also "Hyperbole"]." "There is something tragic about a book," says Fisher, "that contains in its title the general theme the proposition that executive privilege is a `myth',"[110] a title I borrowed from George Ball, the respected Under Secretary of State. I"

IV. JUDICIAL REVIEW

Fisher is an adherent of a "living Constitution," of "adaptation by usage,"[112] euphemisms for executive or judicial revision of the Constitution, designed to render palatable successive usurpations that

106. Nixon v. Administrator of Gen. Servs. 433 U.S. 425 (1977).

107. Ibid., p. 515 (Burger, C.J., dissenting).

108. See Mishkin, *supra* note 103, pp. 86-87.

109. 433 U.S. at 454.

110. Fisher, p. 199.

111. Although my citation to Ball is on the first page of *Executive Privilege,* Fisher comments, in the "myth" context: "Perhaps others ... share Berger's view, but no name comes to mind." Fisher, p. 199. Professor Philip Kurland wrote, "[i]n the face of strong, if not conclusive, evidence that 'executive privilege' is a 'myth,'as Professor Berger has asserted, the Court simply assumed its existence." Kurland, *op. ci.t.,p.* 74. The "tragedy" is that Fisher framed his indictment before he looked at the evidence.

112. Fisher, p. 181.

were not disclosed to the people.[113] The shocking alternative, he stresses, "would require hundreds of amendments to the Constitution" in place of judicial construction of "ambiguities," for example, does the pardon grant "mean *full* pardons only or may the President grant a conditional pardon."[114] No one denies the need for judicial construction of *ambiguities.*[115] The usurpation consists in judicial *amendment,* such as substitution of "one person-one vote" in place of the framers' unmistakable intention to leave suffrage to the States.[116] The evidence that the framers meant to *exclude* suffrage from the fourteenth amendment, first demonstrated in dissent by Justice Harlan, and increasingly accepted as "irrefutable" even in activist circles,[117] is thus met by Fisher: "Holding to *his* position that the Amendment excluded questions of suffrage, Berger takes issue with Holmes' opinion" in *Nixon v. Herndon.*[118] Nowhere does Holmes refer to the legislative history that is clearly to the contrary; even a

113. EP, pp. 88-100. Professor Kurland declared that "the most immediate constitutional crisis of our present time [is] the usurpation by the judiciary of general governmental powers on the pretext that its authority derives from the Fourteenth Amendment." Letter to Harvard Univesity Press, August 15, 1977. Fisher, however, opines that "Berger worries excessively about an uncontrolled judiciary." Fisher, p. 182. An activist, Professor Henry J. Abraham, "concur[s] with the heart of Berger's charge: that the judicial branch has indeed been guilty of engaging in vital aspects of governmental policy formation that are constitutionally delegated to other branches, particularly the legislature." Abraham, "Equal Justice Under Law" or "Justice at any Cost?" The Judicial Role Revisited, *Hastings Constitutional Law Quarterly,* vol. 6, pp. 467, 472 (1979).

114. Fisher, p. 182.

115. See GBJ, p. 284.

116. Of this Justice Harland stated: "When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect." Oregon v. Mitchell, 400 U.S. 112, 203 (1970) (Harlan, J. concurring and dissenting in part). Such views are not to be ridiculed as "another straw man." Fisher, pp. 182-83.

117. For citations, see Berger, "The Fourteenth Amendment: Light from the Fifteenth," *Northwestern University Law* Review,v.ol. 74, pp. 311-12 (1979). Professor Henry Abraham states: "[A]ny genuinely objective, factual and rigorous examination of the debates and history of the framing of the Fourteenth Amendment demonstrates that the authors and supporters of that provision specifically rejected its application to segregated schools and the franchise, that, to the contrary, they designed the Amendment 'to leave suffrage and segregation beyond federal control, to leave it with the States.' " Abraham, *supra* note 113, pp. 467-68. See also Perry, *supra* note 7, pp. 687-88.

118. Fisher, p. 194 (emphasis added).

revered justice may not contradict the intention of the Framers, as Holmes would have been the first to agree.[119] This history Fisher treats as a "straw man," a "false premise" that the Justices have acted "in direct contradiction of the plain intention of the Framers. But to promulgate "one person-one vote" in the teeth of the Framers intention to exclude suffrage incontrovertibly is "in direct contradiction" of the plain intention of the Framers.[120] It is childish to assimilate my demonstration that "one person-one vote" is irreconcilable with theFramers'unmistakable exclusion of suffrage from the fourteenth amendment with "the mechanical task of placing statutes alongside the Constitution to see that [they] conform."[121] If a given provision of the Constitution is ambiguous such a comparison is of course unilluminating; but that cannot be said of an express prohibition or limitation, or of the unmistakable intention to exclude suffrage with the "one person-one vote" doctrine.

Another example of Fisher's skewed evaluation of constitutional materials is disclosed by his comment on my statement that in *Reynolds v. Sims*[122] the Supreme Court "violated the injunction of the

119. Holmes held that when a legislature "has intimated its will, however, indirectly, that will should be recognized and obeyed ... it is not an adequate discharge of duty for courts to say: 'We see what you are driving at, but you have not said it.' "GBJ, p. 369. See also text accompanying note 149 *infra.*

120. See Justice Harland's remarks in note 116 *supra.* Another reference to the suffrage-segregation issue is Fisher's invocationof Hermine Herta Meyer's "more objective and coherent [analysis] than Berger's treatment." Fisher, p. 197. But Meyer reads against him: "[S]he independently *reaches the same conclusion* that the Supreme Court has misued the Amendment in applying it to voting rights and segregation at the state levels, [but] she finds the *Brown* decision 'acceptable' on the theory that there should be no classification according to race.' " ***Ibid.,*** (emphasis added). If, however, the amendment was "misapplied," segregation is outside the reach of "classification," a post-1866 judicial construct. Stripped of pejoratives, Fisher states Meyer's view that "the Fourteenth Amendment was conceived in ambiguity and confusion," instancing "the discrepancy between what its language says and what its framers said it was supposed to mean." ***Ibid.*** What the "framers said it was supposed to mean" cures the "ambiguity." If I may trade primer law with Fisher, the Court has held that "A Things may be within the letter of a statute and not within its meaning, and within its meaning ***though*** *not within its letter.* The intention of the lawmaker is the law." Hawaii v. Mankichi, 190 U.S. 197, 212 (1903), cited in GBJ, pp. 7-8, n. 24 (emphasis added); and see the remarks of Justice Holmes, note 119 *supra.* Throughout Fisher praises those who differ with me, see, e.g., Fisher, p. 185, n. 24, but ignores those who agree with me, rendering his attacks on *my* "onesidedness" sheer cant.

121. Fisher, p. 190.

separation of powers, `made *explicit* in the 1780 Massachusetts Constitution, that "the judiciary shall never exercise the legislative power." ' " "Since when," he fatuously asks, "is the Supreme Court bound by the Massachusetts Constitution of 1780?"[123] That constitution merely articulated what Madison later expressed in the Convention, the general assumption that it was "essential to the preservation of liberty [echoing Montesquieu] that the Legisl: Execut: & Judiciary powers be separate...."[124] In the First Congress Madison repeated the "1780" formulation virtually *in haec verba.*[125] And he there repeated that "if there is a principle in our Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers."[129] Of this Fisher patronizingly states, "Anyone familiar with the adoption of the Bill of Rights understands that the kind of language found in Article XXX [of the Massachusetts Constitution] was *rejected* by the First Congress"; it was "struck from the list of amendments submitted to the States for ratification."[127] This amendment, as he notices, was submitted by the House to the Senate. There it was *struck,* as was a "substitute ,amendment (to make the three departments *`separate and distinct'...)"* without recorded discussion.[128] Patently no "rejection" by the First Congress could abrogate what was regarded as a central principle by the Framers, to which Madison had again referred in *Federalist* No. 47 as the "maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct." Minimally, such abrogation required

122. 377 U.S. 533 (1964).

123. Fisher, p. 179.

124. Farrand, *op. cit.* vol. 2, p. 34. John Dickinson likewise considered that "the Legislative, Executive & Judiciary departments ought to be made as independent as possible...." Farrand, vol. 2, p. 36, n.*, 56 (Madison); *ibid.,* p. 66 (Mr. King); *ibid.,* p. 537 ("as separate as possible") (Col. Mason); Farrand, vol. 3, p. 108 ("separate and distinct") (Mr. Pinckney); *ibid.,* p. 341 (Mr. Davie).

125.Annals of Congress, vol. *1,* pp. 435-36 (1789) (Gales & Seaton ed. 1836) (print bearing running title "History of Congress").

128. ***Ibid.,*** p. 581.

127. Fisher, p. 179 (emphasis added).

128. L. **Fisher, *President and Congress,*** pp. **25-26** (1972) (emphasis added). Fisher argues that the motivation was "to protect against legislative usurpations... [not] fear of executive power." *Ibid., p.* 26. Be that assumed and it does not follow that the *principle* does not bar exacutive usurpation, for the Founders had even less stomach for Executive encroachments on the legislature. In *The Federalist* No. 51, p. 338 (J. Madison) (Luce ed. 1978), Madison wrote, "In republican government, the legislative authority necessarily predominates."

specific expression.[129]

Having thus read the separation of powers out of the Constitution, Fisher astonishingly asserts on the very next page, "It is idle to pretend that the separation of powers doctrine has no application to congressional inquiry."[130] Of course, the separation of powers remains vital, as the Supreme Court attested in 1974, in terms reminiscent of the 1780 Massachusetts Constitution:

> [T]he judicial Power...vested in the federal courts...can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. *The Federalist* No. 47....[131]

But the separation of powers does not generate power; instead it poses the crucial question: What is the *content* of each of the three "separate" segments, for example, if the power to veto is executive, it cannot be "shared with the judiciary. Consequently we must turn to English practice for the content of the respective powers.

Fisher taxes me with failure to "offer constructive solutions to the problem of malapportionment...to descend to the real world and confront the crisis that exists," with failure to refer to "some of the major events between 1946 and 1964."[132] With Marshall I hold that the "constitution...was not intended to furnish the corrective for every abuse of power which may be committed by the State

129. Chief Justice Marshall held that "an opinion which is...to establish a principle never before recognized, should be expressed in plain and explicit terms." United States v. Burr, 25 F. Cas. 55, 165 (C.C.D. Va 1807) (No. 14, 693). The case is even stronger against *rejection* of a "recognized" principle. Pierson v. Ray, 386 U.S. 547, 554-55 (1985).

130. Fisher, p. 180.

131. United Stator v. Nixon, 418 U.S. 683, 704 (1974). Doubtless Fisher would count this citation as one of my "inconsistencies" because the case, contrary to my opinion, adopted the view that the President has a "qualified" privilege to withhold information. See text at notes 101-09 *supra.* But agreement on a basic principle-separation of powers-does not require concurrence in dubious deductions therefrom.

132. Fisher, pp. 198, 195. Respectable commentators consider that the malapportionment "crisis" was blown up. W. Elliott, *The Rise of Guardian Democracy* (1974). For further criticism of some ill-considered assumptions, see A. Bickel, *The Supreme Court and the Idea of Progress,* pp. 109-16, 151-82 (1978).

governments."[133] Much less does it authorize the Court to amend the Constitution for that purpose. What it does provide is *amendment by the people.* Fisher is disquieted because "[i]f Congress decided not to invoke its `ample powers' [?] what then-sit back and tolerate systematic disfranchisement. What could be more hostile to a democratic system?"[134] Unauthorized judicial amendment of the Constitution is worse. Prior to 1940, activist Stanley Kutler wrote, liberals condemned the Justices for "arrogat[ing] a policymaking function not conferred upon them by the Constitution."[135] Such arrogation smells no more sweet when it satisfies Fisher's aspirations. Action in excess of delegated power is no more tolerable in a Chief Justice Warren than in a Richard Nixon.'" Constitutional construction must not turn on whose ox is gored. As President Washington cautioned in his Farewell Address,

> let there be no change by usurpation; for though this, in one stance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always overbalance in permanent evil any partial or transient benefit which the use can at any time yield.'"

Fisher twits me with inconsistency in insisting that the 600-year-long practice of a twelve-man jury furnishes the criterion for "trial

133. GBJ, p. 379. Where Fisher would have the Court supply what the Constitution lacks-in Fisher's chaste terms, to function "not merely as anay-sayer" but to "suggest more appropriate options," Fisher, p. 196-I hold with Madison: "Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the Constitution." GBJ, p. 381, n. 32.

Fisher praises Bickel for "offering alternative courses of action" despite his sharp criticism of the desegregation decision, Fisher, pp. 196-97. That alternative was a tentative hypothesis: possibly the framers of the fourteenth amendment employed "open-ended" terms in order to enable posterity to reverse their exclusion of segregation. See GBJ, pp. 100-10. Professor Michael Perry has written: "Berger's exhaustive study of the legislative history ... discloses no reliable support for this open-endedness claim. In fact, the evidence quite clearly points the other way...." Perry, *supra* note 7, p. 691. See also Fisher's own witness Herta Meyer, *supra* note 120.

134. Fisher, p. 198.

135. Kutler, "Raoul Berger's Fourteenth Amendment: A History or Ahistorical?," *Hastings Constitutional Law Quarterly,* vo. 6, pp. 511, 512 (1979).

136. Leonard Levy stated that "result-oriented jurisprudence... [is a] judicial monstrosity that gains nothing when the Court reaches a just result merely because of its identification with underdog litigants." GBJ, p. 343.

137. Ibid., **p. 299.**

by jury" while rejecting "adaptation by usage," an historical practice of "alter[ing] our Constitution, especially when the practice has been accepted by the people."[138] He cannot distinguish between looking to English practice for the meaning of a common law term (as he does for the "pardon power) and post-Constitution *alteration* of such meaning by the courts,[139] which constitutes judicial amendment. Nor was judicial "alteration" "accepted by the people." They could hardly accept what was never disclosed. The Court has never told them that it was only giving effect to, not revising, it.[140] What is not disclosed, the law teaches, is not ratified.[141] Moreover, as Hamilton stated in *Federalist No. 78,* even knowledge of the people's will does not authorize their representatives to dispense with the amendment process in conformity with Article V.[142] No power to circumvent this process was conferred upon the Court.

My demonstration that the "nay-saying function [of the Court] should not expand into a legislative, policymaking role," is rejected by Fisher; he spurns a "dichotomy between `naysaying' (permissible) and `initiating' [national policy] (Impermissible),"[143] thereby exposing his ignorance of basic principles, of the distinction between declaring legislation unconstitutional because beyond the power conferred and a judicial takeover of legislative policymaking. Justice James Iredell, who anticipated Hamilton's defense of judicial review, stated, "The power of the legislatures is limited" by the several Constitutions:

> *Beyond* these limitations...their acts are void, because they are not warranted by the authority given. But *within* them, I think, they are in all cases obligatory...because...the legislatures only exercise a discretion expressly confided to them by the constitution....It is a discretion no more controllable [or exercisable]...by a court of justice, than a judicial determination is by them....[144]

138. Fisher, p. 182.

139. See note 66 *supra.*

140. For similar views of Professors Felix Frankfurter and Robert Bork, see GBJ, pp. 281, n. 143, 319. For Justice Jackson, see ***ibid.*** p. 130.

141. Ibid., p. 155 n. 93.

142. "Until the people have, by some solemn and authoritative act, annulled or changed the established law, it is binding...and no presumption or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act." ***Ibid.,*** p. 318.

143. Fisher, p. 188.

144. Ware v. Hylton, 3 U.S. (3 Dail.) 199, 265 (1976) (emphasis added); see also United States v. Nixon, quoted in the text accompanying note 131 *supra.*

That distinction, rooted in the Constitution,[145] was reaffirmed by James Bradley Thayer, Judged Learned Hand,[146] and was recently reiterated by Professor Archibald Cox. Cox observed that "[t]hroughout most of our history the form of the Supreme Court's contributions to public policy was negative," that "where the older activist decisions merely blocked legislative initiatives, the decisions of the 1950's and 1960's forced changes in the established order."[147] Fisher counters with Judge Cardozo's statement: *"Within limits a* judge legislates, and does so in a creative, not merely a negative way."[148] Cardozo wrote in the frame of judicial administration of the common law, for example, torts and contracts, traditionally left to the courts, subject to being overruled by Parliament. Even so, Justice Holmes held, "judges do and must legislate, but they can do so interstitially....A common law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it."[14B] Even less is a court authorized to set aside the unmistakable intention of the Framers. As said by an ardent apologist for the Warren Court, Judge J. Skelly Wright, respecting "constitutional choices," "the most important value choices have already been made by the framers of the Constitution," and judicial value choices "are to be made only *within the parameters"* of those choices.'" Fisher is free to entertain a contrary view, but he will be hard put to produce one candid claim by the Court of power to displace the Framers' choices by its own.

Fisher chides me for failing to advert to the cases that paved the way for *Brown v. Board of Education,*[151] which show that "[j]udicial policy making is not an invention of the Warren

145. The Convention distinguished between laws that were merely "pernicious," "unwise," and those that were unconstitutional. GBJ, p. 301.

146.Ibid., p. 305.

147.Ibid., p. 305, n. 27, p. 428.

148. Fisher, p. 188 (emphasis added), citing B. Cardozo, *The Nature of the Judicial Process,* pp. 113-15 (1921). Cardozo wrote that judges do not have "the right to ignore the mandate of a statute, and render judgment in despite of it." *Ibid.,* p. 129.

149. GBJ, p. 321, n. 32. Oblivious of such learning, Fisher pulls out another Jack Horner plum: "It is too late in the day to pretend that judges `find' the law rather than `make' it," illustrating by Jeremiah Smith's classic reply to "Do judges make law?" "Course they do. Made some myself." Fisher, p. 189. But Smith laid no claim to power to revise a Constitution, and *that is* what is in issue.

150. GBJ, p. 322 (emphasis added).

151. 347 U.S. 483 (1954).

Court."[152] But usurpation is not legitimated by repetition.[188] No chain is stronger than its weakest link; the first and the last cases equally fail if they are in contravention of the Framers' intention. Another sophomoric Fisher observation is, "Berger urges us to look at the Constitution itself, `stripped of judicial incrustations.' A nice phrase, but elsewhere his writings are filled with court rulings that support his conclusions...."[154] The "nice phrase" was a paraphrase of then Solicitor General Robert Jackson's comparison of the recent emergence of the constitutional text (after the eclipse of the Four Horsemen) from beneath a laissez faire gloss to the rediscovery of an old master after the retouching brushwork of succeeding masters has been removed.'[155] Since then Justices as divergent as Burger, Douglas, and Frankfurter have claimed the right to look at the Constitution rather than what their predecessors have said about it.[1be] It is one thing to cite cases that confirm the historical evidence and something else again to reject those that revise the Constitution in the face of the historical evidence, a distinction that escapes Fisher.[157] Concurring opinions are not discredited because of dissent in part;

Fisher summarily dismisses effectuation of the "original intention" remarking that we cannot "seek guidance on *every* issue as understood by men who lived two centuries ago without taking into account the changes in our own political culture since that time."[158] Test that by the unmistakable intention in 1866 to exclude

152. Fisher, pp. 190, 192-93.

153. "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." Powell v. McCormack, 395 U.S. 486, 546-47 (1969).

Professor Nathaniel Nathanson wrote that Bickel "quite convincingly demonstrated...that the Fourteenth Amendment...would not require school desegregation," and that "Berger's independent research and analysis confirm and also adds weight to those conclusions." Nathanson, Book Review, *Texas Law Review, vol.* 56, pp. 579, 580-81 (1978). An ardent proponent of the desegregation decision, Howard Jay Graham, conceded that his view was not entertained in 1866. See Berger, "The Scope of Judicial Review: An Ongoing Debate," *Hastings Constitutional Law Quarterly, pp.* 527, 597 (1979); see also note 117 *supra.*

154. Fisher, p. 191.

155. Jackson, "Back to the Constitution," *A.B.A. Journal,* vol. 25, p. 745 (1939).

156. GBJ, p. 344.

157. Compare note 30 *supra.*

158. Fisher, p. 191 (emphasis added).

suffrage from the fourteenth amendment: where is the Court authorized to override that intention in order, as Justice Black sarcastically states, "to keep the Constitution in tune with the times."[159] Nor is it *every* issue that can be illuminated by legislative history; of times the history is inconclusive; but the case is different where the Framers leave an unequivocal record of their intentions. Further to discredit the "original intention," Fisher invokes *Dred Scott v. Sandford*.[160] *Dred Scott* was execrated not because it employed the wrong rule of interpretation but because, as George Bancroft wrote, Chief Justice Taney sought "to come to the rescue of the theory of Slavery."[161] The case, Professor Wallace Mendelson observes, constitutes a "warning to judges" against an "attempt to impose extraconstitutional policies upon the community under the guise of interpretation,"[162] precisely the course on which Fisher is embarked.

He stamps as "one-sided" my showing that a powerful underlying reason for the narrow scope of the fourteenth amendment was that the North was shot through with Negrophobia-an undeniable fact[163]-because "there was obviously, operating at the same time, a deep repugnance to Slave Codes and Black Codes," making "it incomprehensible why Congress and the States" would add the fourteenth and fifteenth amendments.[164] The Black Codes were designed to return the liberated Negroes to slavery, to serfdom; they were, said Senator Henry Wilson, "nearly as iniquitous as the old slave codes,"[165] designed to keep the Negro "as near to the condition of slavery as possible."[166] This the Framers meant to outlaw,[167] and for

159. GBJ, p. 101, n. 9.

160. Fisher, pp. 191-92, citing 60 U.S. (19 How.) 393 (1857).

161. GBJ, p. 222, n. 4.

162. Mendelson, "Raoul Berger's Fourteenth Amendment-Abuse by Contraction," *Hastings Constitutional Law Quarterly,* pp. 437, 453 (1979); see also Berger, *supra* note 117, pp. 350-51. Fisher cites Bickel's reference to *Dred Scott* as illustrating the evils of resort to the "original intention." Fisher, p. 192, n. 38. That reference was in 1955; subsequently he referred to "the misbegotten attempt in the *Dred Scott* case to put the riven society back together." A. Bickel, *supra* note 132, p. 178.

163. A Reconstruction historian, Harold Hyman, wrote, "Negrophobia tended to hold even the sparse Reconstruction that the nation created at low throttle, and played a part in Reconstruction incompleteness." GBJ, p.233, n.17. For more forcibly expressed views to the same effect by William Gillette, see Berger, *supra* note 117, pp. 312-13.

164. Fisher, p. 194.

165. GBJ, p. 25.

166.Ibid., p. 25, n. 19.

167.Ibid., pp. **25-26.**

that purpose to enable the Negro to own property, to contract for his labor, and to have access to the courts for protection of those interests, rights the Black Codes denied, and which were first embedded in the Civil Rights Act of 1866.[168] The consensus was expressed by Senator James W. Patterson of New Hampshire; he was "opposed to any law discriminating against [blacks] in the security and protection of life, liberty, person, and property," but states that *"beyond this I am not prepared to go,,"* explicitly rejecting "political and social equality."[169] Whether history bears out this recital is not nearly as important for my thesis as the fact that suffrage and segregation[170] *were excluded* from the scope of the fourteenth amendment. Let Fisher explain why this is so.

V. CARPING CRITICISM

Having throughout "proved to his [own] satisfaction"[171] that "[c]oexistent with [Berger's] quest for dispassionate analysis is a penchant for polemics, hyperbole, and literary gerrymandering,"[172] Fisher concludes that those "qualities...need to be underscored." Not content, therefore, with exposing mistaken judgments or incompetence in evaluation of constitutional materials, Fisher devotes his last six pages to pure denigration. His bill of particulars merits consideration if only because it betrays the bias that has crippled his analysis and rendered him unfit to instruct his brethren. And it further reveals his incapacity to discriminate.

He launches his criticism of my "unidimensional lawyer brief" by an attack on my "penchant for polemics." As evidence of my "crusading spirit" he quotes my statement that "a polemical tone is inescapable; a student of history can no more avoid criticism of views which seem to him erroneous than did the chemists who disputed the tenability of the phlogiston theory of combustion."[173] That can rest on the example of the distinguished historian, Charles McIlwain, who explained that during the course of his study of the

168. Ibid., **p. 24.**

169. Ibid., **pp. 170-71 (emphasis added). Proposals to bar** *all* **discrimination were repeatedly rejected,** *ibid.,* **pp. 163-64.**

170. See note 153 *supra.*

171. The phrase is borrowed from Fisher, p. 188.

172. Ibid., **p. 198.**

173. Ibid.

High Court of Parliament,

> I came to the conclusion that the weight of contemporary evidence was against some views held by men whom I have always looked up to....As these divergences...concerned things which are the very marrow of the subject under discussion, this has unavoidably given to certain parts of the book a polemical case.... [194]

Instead of probing whether my criticism distorted or misrepresented the views of others or whether I was mistaken, [15] Fisher pettishly devotes himself to my rhetoric. Thus he instances my comment on an "unfriendly reviewer.. .`Paul Brest-a young man in a hurry.' " [18] Brest had charged that my *Government by Judiciary* "persistently distorted [the historical data] to support [my] thesis," that I exhibited "fancy footwork against the text," indulged in "brief parodies of opposing theories." [17] My ad hominem is [Berger's] reaction to what he regards as a `rancorous review' by Ralph Winter, who Berger claims `substitutes derision and expletives for analysis.' In defense, Berger *simply notes* that Winter's views misrepresent my point-by-point refutation, running sixteen to seventeen pages. Illustrative of Winter's rancor was his alignment of my views respecting executive privilege with those of the "John Birch Society," with "those who would have impeached Earl Warren."" Why are Brest

174. C. Mcllwain, *The High Court of Parliament and Its Supremacy, p. ix* (1910).

175. Professor Perry concluded that "Berger is meticulous in exploring [the records of the 39th Congress]; he does not merely announce conclusions, but marshals the evidence (statements by the Framers) for the reader, without ignoring conflicting evidence." Perry, *supra* note 7, p. 688. Professor Donald Kommers wrote, "Berger's careful scouring of the record and his incisive critique of what he regards as the misuse of that record by others seriously undermines the conventional wisdom concerning the intent of the Fourteen [Amendment]." Kommers, Book Review, *supra* note 7, p. 413. Earlier Professor Alpheus Thomas Mason had written of my 1969 study, "Berger takes *on* all comers.... [His] critical analysis is, by and large persuasive-sometimes devastating." IMP, dust jacket.

178. Fisher, p. 198.

177. Brest, Book Review, N.Y. *Times,* December 11, 1977, §7, p. 10. Commenting on Brest's charge that Berger "persistently distorted [the historical data] to support his thesis," Professor Perry wrote, "This is a grave charge, and I cannot myself see the basis for it." Perry, *supra* note 7, p. 689 n. 14. See also note 175 *supra.*

178. Fisher, p. 202 (emphasis added).

179. Berger, "Executive Privilege: Some Counter Criticism," *University of Cincinnati Law Review,* vol. 44, pp. 188, 168 (1975).

and Winter "much abused" whereas my reply to unfair denigration demonstrates a "petulant and pugnacious quality?"[180]

To illustrate my "proclivity for ridicule" Fisher states that a memorandum by Deputy Attorney General William Rogers, claiming uncontrolled presidential discretion to withhold information, "receives this evaluation from Berger: `it is a farrago of internal contradictions, patently slipshop analysis, and untenable inferences.' "[181] Sofaer, one of Fisher's "authorities," referred to my "devastating barrage of criticism" of Rogers' "precedents for executive resistance," which Berger "so ably leaves in ruins."[182] To such evidence Fisher turns a blind eye. J.W.N. Sullivan, an eminent British scientist, wrote that one of the glories of science is "its one simple but devastating criterion, `Is is true?' "[183] Fisher would have been better occupied testing my proof instead of captiously deploring my rhetoric. My statement that Rogers' claim of "absolute `uncontrolled' presidential discretion to withhold information" was untenable as was "confirmed...in *United States v. Nixon," is* labelled as "grossly misleading. The fact that Rogers was wrong does not make Berger right."[184] But the Supreme Court's confirmation of my view shows (to one like Fisher who worships at the feet of judicial cases) that "Berger [was] right." "Moreover," Fisher continues, "although the Court *dismissed an absolute claim* for constitutional privilege, surely it parted company with Berger by recognizing a qualified privilege."[185] That, however, does not make my statement that the Court rejected "uncontrolled"discretion "grossly misleading." And as we have seen, the Court, in the second *Nixon*[186] case, left little of the "qualified privilege standing.

Fisher apparently finds it a mark of inconsistency that in my books I "look with alarm at each of the three branches," successively emphasizing "congressional tyranny," "executive tyranny," and "judicial tyranny."[187] There is no inconsistency in criticizing action in excess of power by each of the three branches; such excesses are no

180. Fisher, p. 198.
181.Ibid., p. 199.
182. Sofaer, Book Review, *Harvard Law Review, vol.* 88, pp. 281, 288 (1974).
183. J. Sullivan, *The Limitations of Science,* p. 174 (Mentor ed. 1933).
184. Fisher, p. 199.
185Ibid., *pp.* 199-200 (emphasis added).
186. See text accompanying note 101-09 *supra.*
187. Fisher, p. 200.

more justifiable in an Earl Warren than in a Richard Nixon. Of my observation that-the Court's substitution of its own policies for the choices of the Framers (for example, its promulgation of the "one person-one vote" doctrine in manifest contradiction of theFramers' undeniable exclusion of suffrage from the fourteenth amendment) "should be submitted in plainspoken fashion to the people" for approval of government by judiciary, Fisher exclaims that this is an "extravagant statement," a "straw man," because "[n]o *one* responsibly argues for `government by judiciary' (whatever that means...."[188] It means substitution of the judicial will for that of the Framers, the takeover of legislative functions, as he himself urged.[189] Academe makes no bones about turning government over to the Court. A fellow activist, Robert Cover, wrote that a reading of the Constitution

> must stand or fall not upon the Constitution's self-evident meaning....[I]t is for us, not the framers, to decide whether that end of liberty is best served by entrusting to judges a major role in defining our governing political ideas and in measuring...[legislative action] in majoritarian politics against that ideology.[190]

Such views are endemic in academe.[191] So busy was Fisher with culling condemnatory phrases from my critics that he never paused to ask: *Who* "entrusted" the judges with this awesome power?

Another example of alleged inconsistency, which again reveals Fisher's inability to discriminate, is that "Berger holds discordant views...he is highly critical of freewheeling interpretations by

188Ibid., p. 201 (emphasis added).

189. See text accompanying note 134 ***supra.*** Justice Harlan, who may be regarded as a "responsible" jurist, said much the same as I did. See note 116 ***supra.*** Dean Car Auerbach, who regards the reapportionment decision with favor, lamented that "the failure of the Court to mention, let alone deal with [Harlan's] argument is indeed, as he charged, remarkable and confounding." GBJ, p. *54.* Fisher himself notes that "In 1895, in the Income Tax case, Justice White (joined by Harland) charged that the Court had amended the Constitution by judicial fiat...." Fisher, p. 189. What is this but government by judiciary. To be sure, Fisher adduces this example to show that "[j]udicial policymaking is not an invention of the Warren Court," *ibid.,* p. 190, as if misconduct can be legitimated by earlier infractions. And he remains oblivious that in setting the income tax law aside the Court was engaged in "nay-saying," not in in*itiating* policy.

190. Book Review, *New Republic,* Jan. *14,* 1978, *pp. 26, 27.*

191. Academe's endowment of the Justices with "the constitutional function of countering the democratic process" was candidly acknowledged by Professor Arthur Sutherland. GBJ, pp. 312-13. See also text accompanying note 210 *infra.*

Justices who impose their own predilections upon the public," but in his *Impeachment* "Berger discovers magical powers of judicious calm and sweet reasonableness in the courts."[192] That one should prefer *a trial* by a court rather than by the politicized Senate that tried Andrew Johnson is not "discordant" with rejection of judicial displacement of policy choices by the Framers. Trials are a traditional judicial staple; constitutional revision is not.

"Literary gerrymandering" is allegedly demonstrated by my quotation from *Anderson v. Dunn,*[193] "the genius and spirit of our institutions are hostile to the exercise of implied powers."[194] A "dandy statement," Fisher remarks, "for Berger can use it to decry the use of the doctrine of implied powers when applied to executive privilege. But...it is fundamental to look at what the Court *did* and not simply what it said."[195] To instruct a veteran lawyer in so elementary a proposition is laughable-Little Jack Horner *redivivus!*[196] And what did the court *do?* It "recognized that *Congress* possessed a number of implied powers: the power to investigate, to issue warrants, to compel a party's appearance, and the power to punish for contempt,"[197] all bottomed on the English pre-1787 practice."[198] Would that Fisher had brought forth a similar history for *a presidential* implied power to withhold information. But, alas, English history affords Fisher small comfort.

Additional evidence of "gerrymandering" is that Berger is "indiscriminate in reaching out for 'evidence,'...[he] relies on Myres

192. Fisher, p. 190.

193. 19 (6 Wheat.) U.S. 204 (1821).

194.Ibid., p. 225.

195. Fisher, p. 201.

196. Though I had made the point earlier, Fisher commented, "When someone outside the legal profession [Joseph Cooper] had the nerve to challenge Berger's scholarship he was tossed to the side with this rejoinder: 'A veteran lawyer may be permitted to smile when lectured by a political scientist.' " Cooper's statement that the "arising under" clause "has never been understood to mean every conceivable case, but only those cases properly within the judicial sphere," i.e., "cases or controversies." Apparently Fisher is equally unaware that this is a law student's primer learning, that to belabor a veteran lawyer with such bromides exhibits callowness. Political scientists who mistake such banalities for profundity discredit their profession.

197.Ibid. p. 201.

198. See McGrain v. Daugherty, 273 U.S. 135 (1927), quoted in text accompanying note *70 supra ;* and Berger, "Constructive Contempt: A Post Mortem," *University of Chicago Law Review,* vol. 9, p. 602 (1942).

McDougal in *Government by Judiciary* after excoriating him in *Executive Privilege."*[199] In the former I cited McDougal for a truism: The American people are averse to "government by a self-designated elite";[200] in the latter I demonstrated that his substitution of "executive agreements" with foreign powers for treaties, unconstitutionally excluded Senate participation in treatymaking contrary to the Founders' intention.[201] One can not make a mule a horse by calling it a horse.[202] Fisher simply cannot conceive that to concur in part and dissent in part does not evidence double dealing.

Under the head of "literary gerrymandering" Fisher further states:

> As though uncertain of his case, Berger constantly associates himself with men of eminence....Berger especially likes to fraternize with illustrious members of the Court [is this not "ridicule"]. At one time he remarks: 'Like Chief Justice Burger and Justices Douglas and Frankfurter, I assert the right to look at the Constitution itself, stripped of judicial incrustations,' while at another point he suggests that a critic 'might have added that Berger does not stand alone but is in the company of Justice Holmes, Justice Frankfurter, and Judge Learned Hand.'[203]

Anticipating that my critics, whom Fisher parrots, would say as he himself does, "[h]aving proved to his satisfaction," "[a]ccording to Berger," "[h]olding to his position that the Amendment excluded questions of suffrage,"[204] to indicate that my views were eccentric and without support, I sought throughout to show thay my documentation corresponded with the views of "eminent" men. At least, unlike Fisher, I analyzed the facts and opposing opinions.[205] Nor do my citations to "eminent" men stand lower than Fisher's to

199. Fisher, p. 202.

200. GBJ, p. 314.

201. See EP, pp. 140-52.

202. Professor Philip Kurland asked: "Should the Constitution really be read to mean that by calling an agreement an executive agreement rather than a treaty, the obligation to secure Senate approval is dissolved?" EP, p. 145. See also, L. Henkin, *supra* note 23, p. 179.

203. Fisher, p. 202. Fisher harps on this theme: "As though uncertain of his case, Berger constantly associates himself with men of eminence." Fisher, p. 202. Berger "surrounds himself with oracles instead of demonstrating to the reader...the cogency of his argument." *Ibid.,* p. 203.

204. Ibid. pp. *186,* **175,** 194 (emphasis added).

205. See note 175 ***supra.***

my critics. Even-handed, "solid scholarship" bars a double standard in this and other instances.

VI. CONCLUSION

Fisher's attempted demolition of my scholarly "reliability" has instead revealed his own serious shortcomings-his inability to distinguish between different facts, even to understand the thrust of his own citations, and his unwillingness to face up to discrepant facts and opinions. His essay is a pastiche of expletives culled from my critics, with never a look at my dissection of their counterarguments. That so ill-equipped a critic should undertake to instruct his political science brethren in the intricacies of constitutional law is an insult to his profession. Constitutional analysis requires more than a few rags and tags of primer precepts-look at what courts do, not what they say; courts do not discover but make the law. Great issues are obscured by such trivia.

Consider executive privilege, which he seeks to rescue from the ill repute of Nixon's excesses. Former Solicitor General Archibald Cox observed that "control over the release of information is a critical factor in wielding governmental, power....A President's power to bomb a small and distant country is greater if the bombing can be kept secret than if will be detailed in public." [200] Nowhere does Fisher explain where or why the President is "impliedly" empowered to withhold such vital "secrets" from his partner in government, the Congress. Instead he cites *Nixon I* without noticing that it was virtually emasculated by *Nixon II.* [207] *This* is "scholarship"?

His views on government by judiciary reflect the "new faith," which turned its back on Academe's earlier excoriation of judicial arrogation of a "policymaking function not conferred upon [the courts] by the Constitution," "negat[ing] the basic principles of representative government. "[208] Because he considers that something simply had to be done about malapportionment, he averts his eyes from the threshold question: whence does the Court derive power to reverse the framers' decision to withhold power over suffrage. Instead, in his wooly fashion he equates his wishes with constitutional

206. Cox, "Executive Privilege," *Univ. of* ***Pennsylvania Law Review,*** **vol. 122,** pp. 1383, 1430, 1431 (1974).

207. See text accompanying notes 101-09 *supra.*

208. Kutler, *supra* note 135, p. 512.

power to effectuate them. A more "sophisticated"[E09] activist, Professor E.G. White, candidly asks: "[W]hy should it [the Court] not openly acknowledge that the source of [newly-invented rights] is not the constitutional text but the enhanced seriousness of certain values in American society,"[210] never mind that, as in the case of busing, there is widespread opposition to those "values." Whence does the Constitution confer such power on the Court? Scholars-not including Fisher-are groping for answers. Professor Louis Lusky would explain the Court's "assertion of the power to revise the Constitution, bypassing the cumbersome amendment procedure prescribed by article V," by attributing to the Founders an *intention* "to empower the Court to serve as the Founders' surrogate for the indefinite future...,"[211] "conforming the Constitution to what its makers would...have prescribed...had they been living and acting in the middle of the 20th century."[212] This begs the question: where was that intention evidenced? The historical evidence is that the Court was *excluded* from participation in policymaking, from acting as a continuing constitutional convention.[213] Professor John Hart Ely finds that the framers of the fourteenth amendment issued an "invitation" to the Court to displace their choices, although he finds the implications so "frightening" that he counsels against employing such "untethered discretion" unless "limiting" principles

209. Fisher, p. 196, n. 48.

210. White, "Reflections on the Role of the Supreme Court: The Contemporary Debate and the 'Lessons' of History," *Judicature,* vol. 63, pp. 162, 168 (1979). Baldly stated, this means cramming down the throat of a resisting public such "values" as busing. Crane Brinton wrote of Robespierre: "If Frenchmen would not be free and virtuous voluntarily then he would force them to be free and cram virtue down their throats." C. Brinton, J. Christopher Sr R. Wolff, *A History of Civilization,* vol. 2, p. 115 (1955).

211. L. Lusky, *By* ***What Right?*** p. ***21*** (1975).

212. Lusky, " 'Government by Judiciary': What Price Legitimacy?," *Hastings Constitutional Law Quarterly, vol. 6, pp. 403, 406 (1979); Lusky, supra* note 211.

213. See GBJ, pp. 300-11. Indeed Lusky rejects the "notion that the Supreme Court can legitimately function as a continuing constitutional convention...." Lusky, "Government by Judiciary...' *op.cit.* pp. 403, 411 (1979). But his only limitation on the "surrogate" power is that the Justices should "accept the Founders' political philosophy," Lusky, *supra* note 211, p. 21, calling for soothsaying of a very high order.

can be developed.[214] The activists, in a word, are in disarray, seeking various rationalizations of the undoubted judicial take-over of self-government from the people.[215] Of such activist soul-searching Fisher makes "no mention." Yet, these are the central issues, not my shortcomings as a polemicist. Indeed, Fisher allows that "Berger deserves great credit; he draws attention to subjects of great moment, he challenges prevailing authorities, and he sparks a livelier debate than would exist without his prodding."[216] This is no mean achievement.

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214. See Ely, "Constitutional Interpretivism: Its Allure and Impossibility," *Indiana Law Journal,* vol. 53, pp. 399, 404, 411, 415, 425, 448 (1978). See Berger, "Government by Judiciary: John Hart Ely's `Invitation,' " *Indiana Law Journal,* vol. 53, p. 277 (1978).

215. The need for such rationalization was stressed by Grey, "Do We Have an Unwritten Constitution?" *Stanford Law Review, vol.* 27, p. 703 (1975). Perry, *supra* note 7, p. 697, reemphasizes the need "to develop a political-constitutional theory in defense of constitutional policymaking by the Supreme Court."

216. Fisher, p. 174; see also note 7 *supra.*