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Sean Moynihan

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BOOK REVIEW

THE CASE FOR CONSTITUTIONAL EVOLUTION: REBUTTING CONSERVATIVE COMPLAINTS OF JUDICIAL ACTIVISM IN "THE IMPERIAL JUDICIARY: WHY THE RIGHT IS WRONG ABOUT THE COURTS"

*Reviewed by Sean Moynihan**

INTRODUCTION

In late June 2003, the United States Supreme Court handed down a landmark decision that had been eagerly anticipated in many different corners throughout the American populace. In *Lawrence v. Texas*,[1] a five-member majority held that a Texas law criminalizing homosexual sodomy was an unconstitutional infringement on an individual's liberty interest in privacy as guaranteed by the Due Process Clause of the Fourteenth Amendment.[2] In overturning the Court's previous holding in *Bowers v. Hardwick*,[3] which had denied gay individuals a constitutional right to engage in intimate sexual conduct, the majority adamantly declared that the homosexual petitioners in the case, like heterosexuals in general, were "entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[4]

Justice Scalia, joined in dissent by Chief Justice Rehnquist and Justice Thomas, was stinging in his rebuke of the majority's invocation of the "right to liberty under the Due Process Clause" as a basis for overturning the Texas law.[5] "[T]here is no right to 'liberty' under the Due Process Clause," he wrote.[6] Furthermore, the majority's contention that there was no rational basis for upholding the Texas law was "so out of

* J.D. Candidate, 2004, University of Denver College of Law. The author would like to thank Barry Brooks and Tom DeVine for their support during the preparation of this Book Review and Professor Martin Katz for his helpful insights into constitutional law issues.

1. 123 S. Ct. 2472 (2003).
2. *Lawrence*, 123 S. Ct. at 2484. Justice O'Connor concurred in the result but reasoned that the Texas law should be ruled unconstitutional on Equal Protection grounds. *Id.* (O'Connor, J., concurring).
3. 478 U.S. 186, 190-91 (1986).
4. *Lawrence*, 123 S. Ct. at 2484.
5. *Id.* at 2488-98 (Scalia, J., dissenting).
6. *Id.* at 2491 (Scalia, J., dissenting).

accord with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion."[7] Perhaps his most ardent argument in opposition to the majority, though, was one based on the impropriety of the Court's willingness to impose itself into the dispute in the first place:

> I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. . . . But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. . . . What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.[8]

Percolating just under the surface of Justice Scalia's words is the longstanding and fundamental question of the proper role of the judiciary in the American polity. What is the true, legal scope of judicial power in our nation's tripartite system of government? What authority exists to tell us how to define the limits of such a power? Moreover, has the judicial branch already exceeded these limits whatever they may be? These enduring questions have vexed legal scholars and interested observers alike ever since Chief Justice John Marshall bluntly declared in *Marbury v. Madison*[9] that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[10] At issue in this great debate over the role of the judiciary in a republican form of government is the extent to which judges, particularly those in the federal judiciary who are granted life tenure during good behavior,[11] should be allowed to superimpose their own belief systems and their own policy goals into their adjudicative function.

Understandably, these questions have become hot-button issues in political discourse as the nation has moved into the twenty-first century, and library shelves have correspondingly become loaded with books,

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7. *Id.* at 2495 (Scalia, J., dissenting).
8. *Id.* at 2497 (Scalia, J., dissenting) (citations omitted).
9. 5 U.S. (1 Cranch) 137 (1803).
10. *Marbury*, 5 U.S. (1 Cranch) at 177.
11. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . .").

treatises, and articles opining on the matter. In one of the more recent of these works, *The Myth of the Imperial Judiciary: Why the Right Is Wrong about the Courts*,[12] Mark Kozlowski examines the history and validity of a conservative-based movement over the past forty years to decry the so-called judicial activism of a judiciary that conservative voices have accused of being overly pious to the liberal cause.[13] As his title suggests, Kozlowski clearly takes the side of those who believe that this charge against the judicial branch is misguided.[14] Presenting a compelling case against the conservative contention that judges need only look to the "original intent" of the founders to interpret the law and that an out-of-control judiciary has largely served liberal policies over the past four decades, Kozlowski posits that the judicial branch was never meant to be a marginal or insignificant branch, has not, in fact, always sided with presumptively liberal policies, and is at all times safely constrained by democratic forces.[15] In the end, though, one is left with a feeling that, despite the author's rigorous scholarship supporting his view of the true nature of judicial power in the United States, the rebuttal argument he presents in *The Myth of the Imperial Judiciary* is exactly that—a rebuttal argument in opposition to another argument that may be just as valid, legitimate, and supported by historical fact.

This Review is an exploration of these opposing theses concerning the role of the judiciary in American life. Part I examines the sources of conservative unrest over the judicial branch's alleged abuse of its constitutionally granted powers and considers how some of these conservative voices have expressed their umbrage over what they view as court activism run amok. Part II analyzes the central arguments that Kozlowski uses to rebut these conservative complaints issuing forth against the courts and summarizes his own viewpoint regarding the proper role of the judiciary. Part III assesses the two opposing views of the judiciary and attempts to show that Kozlowski's position is ultimately the most practicable one in light of the continuing need for constitutional interpretation in an absence of detailed constitutional directive from the Founding Fathers. Finally, Part IV concludes by reaffirming the strength of Kozlowski's opinion, while at the same time noting the inherent ambiguities involved in an age-old and ongoing struggle to define the place of the judiciary in American government.

12. MARK KOZLOWSKI, THE MYTH OF THE IMPERIAL JUDICIARY: WHY THE RIGHT IS WRONG ABOUT THE COURTS (2003).

13. *See generally* KOZLOWSKI, *supra* note 12.

14. *See id.*

15. *Id.* at 9.

I. THE IMPERIAL JUDICIARY THEORISTS: ATTEMPTING TO REIN IN THE JUDICIARY

A. Origins of Conservative Court Bashing

In terms of when, exactly, the recent scourge of conservative court-bashing all began, Kozlowki points to an era when "'something was supposed to happen, and didn't.'"[16] From 1953 until 1969, the Supreme Court under Chief Justice Earl Warren effected what is generally regarded as a revolution in American jurisprudence.[17] Beginning with its unanimous decision in *Brown v. Board of Education*,[18] the Warren Court embarked on a course of liberal and equalitarian rulings that encompassed "the elimination of officially sanctioned racial discrimination,"[19] "the expansion of criminal procedure guarantees to the state and local levels,"[20] and the implementation of reapportionment plans devoted to the ideal of "one man, one vote . . . ."[21]

In response to this sustained burst of judicial overriding of long-standing precedent, many conservative and, contrary to popular belief, some liberal critics arose to question the Court's methodology of arriving at such novel decisions.[22] When President Richard M. Nixon was elected to the presidency in November, 1968—largely on an anti-Warren Court platform[23]—and Warren Burger was confirmed as Chief Justice, conservatives were hopeful that, at last, a restrained Court would pursue "a comprehensive rollback of Warren Court precedents in as many areas as possible . . . ."[24] This hope, however, was ultimately dashed because, as mentioned above, "something was supposed to happen, but didn't."[25] "What did not happen, of course," says Kozlowski, "is that the Burger Court did not answer the fondest hopes of conservatives by overruling Warren Court precedents, one after another."[26]

Indeed, the Burger Court did more than just continue the tradition of pro-civil rights, Warren Court decision making.[27] It also went even further into the territory of judicial review of majoritarian legislation by

16. *Id.* at 17 (quoting Nathan Glazer, *Towards an Imperial Judiciary?*, PUB. INT., Fall 1975, at 106).

17. *Id.* at 13-14.

18. 347 U.S. 483 (1954); *see also* STEPHEN P. POWERS & STANLEY ROTHMAN, THE LEAST DANGEROUS BRANCH?: CONSEQUENCES OF JUDICIAL ACTIVISM 38 (2002) (noting that *Brown* "is widely regarded as the point of origin for the judicial activism of the Warren Court").

19. FREDERICK P. LEWIS, THE CONTEXT OF JUDICIAL ACTIVISM: THE ENDURANCE OF THE WARREN COURT LEGACY IN A CONSERVATIVE AGE 25 (1999).

20. *Id.* at 26.

21. *Id.* at 27.

22. KOZLOWSKI, *supra* note 12, at 14-16.

23. *See id.* at 14 (observing that President Nixon "made opposition to the Warren Court a centerpiece of his successful 1968 presidential campaign").

24. *Id.* at 18.

25. *See id.* at 17.

26. *Id.*

27. *Id.* at 18.

recognizing two new important areas of rights guaranteed under the Constitution: gender equality and certain liberties under the Due Process Clauses that pertain to privacy, personhood, and family relations.[28] Of course, perhaps the most influential and controversial of these decisions was *Roe v. Wade*,[29] where the Court held that the right of privacy guaranteed under the Due Process Clause of the Fourteenth Amendment included a woman's fundamental right to choose to have an abortion subject to certain constraints.[30] In the wake of decisions like *Roe* that further cemented the Court's so-called "liberal" and "activist" leanings, formerly tempered criticisms of the Court's wisdom eventually burgeoned into full-scale attacks on its perceived descent into "judicial power madness."[31]

B. The Imperial Judiciary Thesis

At the forefront of these attacks were commentators advocating what Kozlowski terms "the Imperial Judiciary thesis."[32] These individuals, usually tending to the conservative end of the ideological spectrum, have come to view the American judiciary as a wayward institution that has "strayed so far from its intended powers and functions that it has become unmoored from the values of a democratic order."[33] Perhaps the most celebrated of these critics, and certainly one of the most articulate, is Robert Bork, the failed Reagan nominee for the Supreme Court and a prominent antagonist throughout Kozlowski's book.[34] Bork is presented as one of the more passionate proponents of what has been called the "originalist" view of interpreting the Constitution.[35] Under this view, the Supreme Court should only find a right to exist when it is expressly provided for in the text of the Constitution or when it can be shown that the framers clearly intended for it to exist.[36] As Bork himself says in *The Tempting of America: The Political Seduction of the Law*,[37] "lawyers and

28. *Id.*
29. 410 U.S. 113 (1973).
30. *Roe*, 410 U.S. at 153-54, 164-65.
31. KOZLOWSKI, *supra* note 12, at 16.
32. *See id.* at 5-6 (describing the essence of the Imperial Judiciary argument as the belief that the judiciary has "become 'imperial'—that is, monarchical—and [has] also become imperialist in the sense that its self-aggrandizing tendencies have resulted in its usurped powers and functions that are properly exercised by other political institutions, especially legislatures peopled with elected representatives").
33. *Id.* at 5.
34. *See, e.g., id.* at 33 (describing how Bork has "attained martyr status on the right because of the defeat of his 1987 nomination to the Supreme Court" and how his book, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990), has surpassed all others "[i]n terms of impact upon conservatives generally").
35. *See id.* at 34-38, 48-49.
36. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 1.4, at 17 (2d ed. 2002).
37. BORK, *supra* note 34.

judges should seek in the Constitution what they seek in other legal texts: the original meaning of the words."[38]

In Bork's opinion, the originalist view, or as he terms it, "original understanding,"[39] is the sole legitimate method of constitutional interpretation.[40] Indeed, it is a method whose consistent application is absolutely necessary for the very survival and preservation of our fundamental civil rights and our tripartite system of government.[41] As Bork says in the closing passages of his chapter entitled *The Original Understanding*, "The interpretation of the Constitution according to the original understanding, then, is the only method that can preserve the Constitution, the separation of powers, and the liberties of the people."[42]

In a broader sense, though, the Imperial Judiciary thesis does not merely concern itself with weighing the validity of particular methods of constitutional interpretation.[43] It also depends in large part upon a view that the American judiciary is knowingly taking affirmative steps to promote a social policy agenda that it actively subscribes to.[44] As Kozlowski puts it, under the Imperial Judiciary view, "the judiciary is said to be engaged in the imposition by fiat of a comprehensive vision of a social order that judges prefer."[45] In addition to *Brown v. Board of Education*[46] and other seminal Warren Court decisions that appeared to favor "liberal" causes,[47] a cursory glance at Supreme Court cases over the past three decades gives the reader an idea of what sort of decisions may have fueled this belief in a grand policy-making judiciary that has allegedly chosen to rule in favor of liberal policies "without any warrant in law."[48]

As mentioned above, the Court in *Roe v. Wade*[49] affirmed a fundamental right of a woman to terminate her pregnancy;[50] in *Regents of the University of California v. Bakke*,[51] and again more recently in *Grutter v. Bollinger*,[52] the Court upheld the right of public universities to use race

38. *Id.* at 145.
39. *Id.* at 143.
40. *See id.* (asserting that "only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy").
41. *Id.* at 159-60.
42. *Id.* at 159.
43. *See* KOZLOWSKI, *supra* note 12, at 5.
44. *Id.*
45. *Id.*
46. 347 U.S. 483 (1954).
47. *See infra* notes 46-54 and accompanying text.
48. *See* KOZLOWSKI, *supra* note 12, at 30 (discussing how Bork, in particular, believes that the American courts are a regime, making cultural and moral decisions for the public outside the jurisdiction of the law).
49. 410 U.S. 113 (1973).
50. *Roe*, 410 U.S. at 153-54, 164-65.
51. 438 U.S. 265 (1978).
52. 123 S. Ct. 2325 (2003).

as a factor in admissions;[53] in *Romer v. Evans*,[54] the Court invalidated an amendment to the Colorado State Constitution that prohibited the state or local municipalities from enacting statues or ordinances protecting gay individuals from discrimination;[55] finally, in the previously mentioned *Lawrence v. Texas*,[56] the Court furthered this protection of homosexuals when it ruled unconstitutional a Texas law that criminalized homosexual sodomy.[57]

C. The Outlaw Liberal Judiciary

To the adherent of the Imperial Judiciary theory, decisions like these represent the worst of what Lino Graglia, another celebrated conservative critic of the judiciary, calls "government by and for an educational and cultural elite."[58] Here, Graglia is echoing a common refrain among conservative detractors of the judicial branch:[59] in overstepping its constitutionally-imposed bounds, the judicial branch is significantly influenced by a profound liberal strain found within the academic community, particularly the community existing in American law schools.[60] As noted conservative news columnist George F. Will has written:

> Alexander Hamilton considered [the judiciary] the "least dangerous" branch because it supposedly is the least responsive to opinion. But it has become the most dangerous, in part because it is the most susceptible to gusts of opinion.
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> . . . .
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> But the judiciary is even more blown about by opinion that is more volatile, and often less sober, than the opinion of the public—that of the intelligentsia. Change the academic culture of six law schools—Harvard, Yale, Columbia, Michigan, Chicago, Stanford—and the intellectual content of the judiciary will follow, quickly.[61]

This view of an elite ruling class of liberal judges acting in contravention of the Constitution was etched out in great detail, much to the approval of the conservative faithful,[62] in Raoul Berger's *Government by*

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53. *Grutter*, 123 S. Ct. at 2347; *Bakke*, 438 U.S. at 320.
54. 517 U.S. 620 (1996).
55. *Romer*, 517 U.S. at 635-36.
56. 123 S. Ct. 2472 (2003).
57. *Lawrence*, 123 S. Ct. at 2484.
58. Lino A. Graglia, *The Legacy of Justice Brennan: Constitutionalization of the Left-Liberal Political Agenda*, 77 WASH. U. L.Q. 183, 189 (1999); *see also* KOZLOWSKI, *supra* note 12, at 26.
59. *See* KOZLOWSKI, *supra* note 12, at 27 (noting that statements attributing the outcome of certain Supreme Court decisions to a strong liberal influence from academics and scholars "are legion among conservative commentators").
60. *See id.*
61. George F. Will, *Myth of the Solomonic Senate*, WASH. POST, Dec. 27, 1998, at C7; *see also* KOZLOWSKI, *supra* note 12, at 7.
62. *See* KOZLOWSKI, *supra* note 12, at 31 (stating that Berger's book became "a central text of the originalist movement" elevating Berger to the status of an intellectual American hero).

Judiciary: The Transformation of the Fourteenth Amendment.[63] Berger's central thesis was that, in the latter half of the twentieth century, the United States Supreme Court had overstepped its authority under the Constitution and had effectively rewritten the Constitution through its controversial Fourteenth Amendment jurisprudence.[64] According to Kozlowski, Berger attempted to support this thesis by separating his analysis into two essential parts: first, "an attack on the legitimacy of all modern Fourteenth Amendment jurisprudence;"[65] and second, an attempt to show that the true intent of the framers was to define the scope of judicial review in a much narrower way than the modern judiciary had actually undertaken it.[66]

Regarding the former, Kozlowski states that much of Berger's criticism surrounds the concept of "incorporation," the process by which the protections afforded to an individual in the Bill of Rights are made applicable to the states via the Due Process Clause of the Fourteenth Amendment.[67] According to Kozlowski, "Berger's argument is that incorporation is all a mistake or, more properly, a delusion."[68] Instead of subscribing to the Court's view that these fundamental rights are, indeed, properly applied to the states through the Fourteenth Amendment, Berger's position, explains Kozlowski, is that:

> [T]he framers of the Fourteenth Amendment had no intention whatever of nationalizing the Bill of Rights, or any part of it. On the contrary, the Fourteenth Amendment's framers had only the most modest goals in mind. In spite of the sweeping phrases they used—"equal protection," "due process," "privileges and immunities"—Berger argues that their intention was no greater than to constitutionalize the provisions of the Civil Rights Act of 1866, which guaranteed the rights of freed slaves to own property and make contracts. What it did not guarantee was an end to racial segregation generally, which leads Berger to the conclusion that, upon an originalist reading of the Fourteenth Amendment, *Brown v. Board of Education*, the foundation of modern civil rights law, was wrongly decided.[69]

Thus, as Berger himself states in *Government by Judiciary*, if one looks to the historical record, "the framers of the Fourteenth Amendment excluded both suffrage and segregation from its reach: they confined it to protection of carefully enumerated rights against State discrimination, deliberately withholding federal power to supply those rights where they

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63. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997).
64. *Id.* at 18.
65. KOZLOWSKI, *supra* note 12, at 31.
66. *Id.* at 32.
67. *See id.* at 31.
68. *Id.*
69. *Id.* at 31-32.

were not granted by the State to anybody, white or black."[70] Through its illegitimate interpretation of the Fourteenth Amendment, he concludes, "The Court, it is safe to say, has flouted the will of the framers and substituted an interpretation in flat contradiction of the original design: to leave suffrage, segregation, and other matters to State governance."[71]

Berger's second argument pertaining to the scope of judicial review is, in Kozlowski's opinion, even more important to the discussion in *The Myth of the Imperial Judiciary*.[72] According to this argument, the true intent of the framers was to narrowly confine judicial review to a binary function of policing the limits of each governmental branch's constitutional power and serving as "a vehicle by which the specific intentions of the framers would be applied to legislative acts."[73] By reducing the scope of the judiciary's power of review in this manner, Berger argued, "the framers 'drew a line between the judicial reviewing function, that is, *policing* grants of power to insure that there were no encroachments beyond the grants, and legislative policymaking *within* those bounds.'"[74]

Of course, in this vision of judicial review where outright policymaking is forbidden, the original intent of the framers is paramount, and "any departure from their intent is nothing but an exercise of arbitrary judicial discretion."[75] This has produced, says Kozlowski, "a central tenet of the Imperial Judiciary thesis:"[76] that "virtually *all* modern civil rights and civil liberties jurisprudence [has been] an exercise of arbitrary judicial discretion."[77] It is this view of the modern American judiciary—that of an arrogant power that has disregarded the limitations on its constitutionally-granted authority and has imposed its own legislative will on the populace—that Kozlowski attempts to debunk in *The Myth of the Imperial Judiciary*.

II. COUNTERING THE IMPERIAL JUDICIARY THESIS: HISTORICAL UNDERPINNINGS FOR A STRONG AND INDEPENDENT JUDICIARY

A. Historical Support for an Independent Judiciary

In presenting his case against those who would condemn the practices of the modern American judiciary, Kozlowski makes it clear from the beginning that he doesn't wish to become merely another partisan fountain of liberal views and policies:

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70. BERGER, *supra* note 63, at 457.
71. *Id.* at 458.
72. KOZLOWSKI, *supra* note 12, at 32.
73. *Id.*
74. *Id.* (quoting BERGER, *supra* note 63, at 302).
75. *Id.*
76. *Id.*
77. *Id.*

> I will generally avoid stating my opinions regarding the correctness of particular judicial decisions . . . . I do not intend to advocate that American courts pursue any particular jurisprudential course. Most especially, even as I attack the Imperial Judiciary thesis, I am not engaged in an effort to rouse liberal support for the defense of an independent judiciary by proving that the courts have been "good" for liberals.[78]

What Kozlowski does intend is to "attempt to make a *realistic* appraisal of the power of the American judiciary as a means of showing that conservatives have a highly *unrealistic* conception of this power."[79] To do this, he tells the reader, he must first embark, as the Imperial Judiciary theorists had before him, on "an investigation into original intent" and the nation's founding history.[80]

Contrary to what the Imperial Judiciary theorists have contended, Kozlowski says, the American judiciary, although famously declared "the least dangerous" branch by Alexander Hamilton in *The Federalist No. 78*,[81] was never meant to be constrained to the point of becoming insignificant or marginalized within the polity.[82] Indeed, as Kozlowski points out in his introduction, Alexis de Tocqueville, the French aristocrat who traveled to the United States in 1831 and recorded his observations of American life and politics in his classic two-volume *Democracy in America*, noted in his musings that "'[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one.'"[83] Tocqueville even went as far as declaring that judges in Jacksonian America were "'invested with immense political power.'"[84]

This important role of the courts as a check on power in the American system of government was assured by the framers at the inception of the Constitution in large part because of a fear of oppressive tyranny in the form of overwhelming political majorities.[85] As James Madison warned in *The Federalist No. 10*:

> AMONG the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. . . . Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and

78. *Id.* at 10.
79. *Id.*
80. *Id.* at 51.
81. THE FEDERALIST NO. 78, at 396 (Alexander Hamilton) (Max Beloff ed., 1987); *see also* KOZLOWSKI, *supra* note 12, at 8 ("The phrase 'least dangerous branch' has now achieved a talismanic power among right-wing critics of the judiciary.").
82. *See* KOZLOWSKI, *supra* note 12, at 9.
83. *Id.* at 8 (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (George Lawrence trans., J.P. Mayer ed., Anchor Books ed., 1969)).
84. *Id.* (quoting DE TOCQUEVILLE, *supra* note 83, at 100).
85. *See id.* at 57-61.

> personal liberty . . . that measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority.
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> . . . .
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> . . . When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.[86]

Madison and his fellow founding representatives, then, acknowledged the great need for an independent judiciary that could act as an "excellent barrier to the encroachments and oppressions of the representative body."[87] Moreover, an independent judiciary was, of course, viewed as the governmental entity that was uniquely skilled and positioned to assess the validity of laws passed by the popular branches.[88] As Alexander Hamilton bluntly observed in *The Federalist No. 22*, "Laws are a dead letter, without courts to expound and define their true meaning and operation."[89]

This authority to review legislative acts of the representative branches, Kozlowski asserts, was also closely tied to the aforementioned desire on the part of the engineers of the new republic to protect disenfranchised minorities from majority oppression.[90] As he states in his subchapter entitled *Interpreting Statutes*, "It was hoped that the practice of elucidating the meaning of laws through statutory interpretation would be undertaken with an eye toward the protection of minorities from the unjust acts of legislative majorities."[91] Moreover, to some of the leading framers of the Constitution, the fact that judicial review *per se* was not expressly provided for in the national charter was not a problem.[92]

In Chapter Two of *The Myth of the Imperial Judiciary*, entitled *The Constitution and the Judiciary*, Kozlowski presents Alexander Hamilton, eventual Chief Justice John Marshall, and Patrick Henry, among others, elaborating at the height of their oratorical powers on the great need for an independent judiciary that could declare void laws that were in oppo-

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86. THE FEDERALIST NO. 10, at 41, 44 (James Madison) (Max Beloff ed., 1987) (footnote omitted).

87. THE FEDERALIST NO. 78, *supra* note 81, at 396.

88. *See id.* at 398 ("The interpretation of the laws is the proper and peculiar province of the courts.").

89. THE FEDERALIST NO. 22, at 108 (Alexander Hamilton) (Max Beloff ed., 1987).

90. *See* KOZLOWSKI, *supra* note 12, at 76 ("[T]he supporters of the Constitution very much wanted judges to engage in statutory interpretation guided by considerations of equity.").

91. *Id.*

92. *See id.* at 65-67.

sition to the Constitution.[93] Kozlowski's presentation of Marshall's plea to the Virginia ratification convention is perhaps the most pointed:

> If [the legislature] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming within their jurisdiction. They would declare it void. . . .
>
> To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection.[94]

B. The Flaws of the Imperial Judiciary Theory

Kozlowski's point, it seems, is that from the earliest point in the nation's history under the Constitution, "a substantive judicial power was a central element of the federalist constitutional program."[95] Furthermore, he contends, the "originalist" views of Berger, Bork, et al., mentioned *supra*,[96] do not have as much historical support as they have suggested because the framers were, in fact, well aware of the Constitution's inherent breadth and ambiguity of language.[97] As James Madison said in *The Federalist No. 37*, "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas."[98]

Noted constitutional scholar and lawyer Laurence Tribe reiterated Madison's point in *God Save This Honorable Court*,[99] an exploration into the effect that the process of choosing United States Supreme Court Justices has on the American population at large.[100] "The central flaw of strict constructionism,"[101] begins Tribe, "is that words are inherently indeterminate—they can often be given more than one plausible meaning."[102] "But the meanings of the Constitution's words are especially difficult to pin down," he continues.[103] For instance, he asks, "what, in heaven's name, is 'due process'?"[104] After conceding that the Court can by no means "take the position of Humpty Dumpty, that 'a word means just what I choose it to mean—neither more nor less,'"[105] Tribe con-

93. *See id.*
94. *Id.* at 66 (quoting 1 THE DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 553, 554 (Jonathan Elliot ed., 2d ed. 1836)).
95. *Id.* at 85.
96. *See supra* notes 33-41, 61-71, and accompanying text.
97. *See* KOZLOWSKI, *supra* note 12, at 68-75.
98. THE FEDERALIST NO. 37, at 180 (James Madison) (Max Beloff ed., 1987).
99. LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT (1985).
100. *See id.* at ix.
101. *Id.* at 42.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 43.

cludes by stating flatly that "the constitutional text is not enough—we need to search for, and explain our selection of, the *principles behind* the words."[106]

C. Other Eras of Judicial Activism

These arguments are certainly not insignificant and lend considerable credence to Kozlowski's view that a dynamic judicial branch with the authority to interpret the broadly textured language of the Constitution was in the minds of the framers when they first convened to form the republic. For all of the persuasiveness of Kozlowski's attempt to show that a strong independent judiciary was intended at the nation's founding, perhaps more compelling is his subsequent survey of three distinct periods in American history when, he asserts, the judicial branch exhibited "activist cycles" well before the era of the Warren Court.[107] Beginning with (1) the activist role of the courts in designing a national economic order in the first half of the nineteenth century; turning next to (2) essentially a judicial nullification of the Civil War Amendments in the first few decades following the Civil War; and finally concluding with (3) the judiciary's active role in opposing labor unions in the late nineteenth and early twentieth centuries, Kozlowski presents a substantial case refuting the view that court activism first "sprang fully grown from the forehead of Chief Justice Warren."[108]

Regarding the economic activism of the early nineteenth century, Kozlowski shows that, in the areas of property, torts, contract, and corporate law, the courts came to assume a central active role in facilitating market growth and entrepreneurial spirit and energy.[109] The court decisions exemplifying this role of the judiciary as a catalyst for economic growth encompassed, among other innovations, the creation of greater operating areas for railroad companies that necessarily allowed for greater intrusion into communities,[110] the placement of costs of industrial accidents on injured workers to encourage more entrepreneurial opportunities for businesses,[111] and the favoring of free competition "over the protection of [individual] corporate rights that threatened to slow development."[112] The general theme thriving throughout all of these varied judicial opinions, though, was an abiding fidelity to the view that "'[t]he onward spirit of the age must, to a reasonable extent, have its way.'"[113] As Kozlowski puts it: "Contrary to nostalgic cant, America did not de-

106. *Id.*
107. *See* KOZLOWSKI, *supra* note 12, at 87.
108. *Id.*
109. *Id.* at 88-98.
110. *Id.* at 90-91.
111. *Id.* at 93-94.
112. *Id.* at 95-96.
113. *Id.* at 91 (quoting Lexington & Ohio R.R. Co. v. Applegate, 38 Ky. 289, 309 (1839)).

velop a market [economy] that grew of itself, governed by minimal legal intrusion."[114]

In his discussion of the post-Civil War era, Kozlowski states that, following the enactment of the Civil Rights Amendments after the war, American courts, especially the Supreme Court, displayed this activist bent to a very harmful degree by effectively nullifying the meaning of the Thirteenth, Fourteenth, and Fifteenth Amendments and inflicting a half century of segregationist Jim Crow laws on the nation.[115] This was done largely through the Court's imposition of very narrow constructions of provisions within the amendments in cases such as the *Slaughter-House Cases*,[116] *United States v. Cruikshank*,[117] the *Civil Rights Cases*,[118] and *Plessy v. Ferguson*.[119] Critically, these decisions ignored what many believe to be the true meaning behind the amendments, and, as Kozlowski points out, "[a]s long as the federal judiciary forsook the mandate of the Civil War Amendments and left local majorities free to define rights as they wished, those amendments were of no practical value."[120]

Finally, concluding his brief examination of these particular eras of judicial activism, Kozlowski summarizes how, near the end of the nineteenth century and into the twentieth, the judicial branch acted affirmatively to counter the rise of the labor unions.[121] At that point in the nation's history, courts viewed the unions largely as a threat to peaceable order, and the jurisprudence emanating from the time "was therefore less marked by a rigid adherence to the tenets of laissez-faire and more by a dogged effort to counter this perceived threat."[122] In fact, the judicial animus towards the unions was of such magnitude, says Kozlowski, that it significantly exceeded what the modern-era courts have done in the realm of so-called judicial activism:

> What happened during this era was more than what Imperial Judiciary theorists contend has happened today with respect to matters like abortion. That is, the era saw more than a judicial arrogation of power that took political questions out of the hands of the public and imposed judicial solutions upon them. The anti-union era was marked by a judicial attempt to actually suppress a political movement.[123]

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114. *Id.* at 88-89.
115. *See id.* at 99, 109.
116. 83 U.S. 36 (16 Wall.) (1872).
117. 92 U.S. 542 (1875).
118. 109 U.S. 3 (1883).
119. 163 U.S. 537 (1896).
120. KOZLOWSKI, *supra* note 12, at 109.
121. *See id.* at 110-15.
122. *Id.* at 110.
123. *Id.* at 115.

D. The True Nature of the Courts in the American System

Thus, Kozlowski says, Robert Bork's opinion that judicial activism has never been more popular with law schools, the press, and "'elite groups generally'"[124] than in the present day is "flatly incorrect."[125] Courts in America had long before the Warren era "exercised a substantial influence upon great social and political questions . . . ."[126] Moreover, he explains, the Warren Court's most radical rights-expanding decisions during the era were not victories solely for the left wing in American politics.[127] As examples, *Baker v. Carr*[128] in the area of redistricting, and *New York Times Co. v. Sullivan*[129] in the area of political speech, were, along with their respective progeny, landmark decisions that favored no particular ideology.[130] In addition, says Kozlowski, much of the judicial branch's authority and power has, in fact, been conferred by the elected branches of government, and these branches, even apart from the already constitutionally enumerated limits on the judiciary, can significantly constrain the powers of the courts.[131]

The American judiciary, Kozlowski argues then, is not, as some would claim, a lofty entity "standing apart and above the polity, descending on occasion . . . to impose [its] purportedly superior legal and ethical comprehension upon the wayward popular branches of government."[132] On the contrary, he opines, "[i]t is in fact *embedded* in the political process,"[133] and as such, remains a vigorous institution that is eminently useful and conducive to keeping the American system in functional operation.[134] And that, according to the author, is something worth defending.[135]

III. ANALYSIS: ORIGINALISM VS. NONORIGINALISM: A FLAWED IMPERIAL JUDICIARY THEORY AND THE UTILITY OF MORE FLEXIBLE METHODS OF CONSTITUTIONAL INTERPRETATION

A. The Weakness of Original Intent

The central issue presented in *The Myth of the Imperial Judiciary*—how judges should go about interpreting the provisions of the nation's supreme legal document—presents a confounding puzzle for those battling to control the legal and political landscape of the country. Who is

124. *Id.* at 114 (quoting BORK, *supra* note 34, at 7).
125. *Id.*
126. *Id.* at 87.
127. *Id.* at 125.
128. 369 U.S. 186 (1962).
129. 376 U.S. 254 (1964).
130. KOZLOWSKI, *supra* note 12, at 128, 133.
131. *See id.* at 9, 178.
132. *Id.* at 178.
133. *Id.*
134. *Id.* at 217-18.
135. *Id.* at 217.

correct ultimately? Robert Bork and advocates of the Imperial Judiciary thesis, from their entrenched battlements of original understanding, would, of course, hold that the framers alone are right and should be given deference at all costs. But how should the views of the framers be ascertained now, well over two centuries later, when the American populace finds itself living in an era that the framers could not have dreamed about from their horse-drawn carriage, slave-ownership vantage point in the late eighteenth century?[136]

Bork answers this question by asserting that the original understanding can be uncovered in "the words used and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like."[137] This answer is certainly well and good when an explicit reference to the intent surrounding the drafting of a constitutional provision can be found, but what about those situations when no discernible manifestation of intent is present in any extant writings? To reiterate Laurence Tribe's plea, "what, in heaven's name, is 'due process'?"[138] This question reveals the ultimate ascendancy of Kozlowski's argument and exposes a central flaw in the Imperial Judiciary thesis's position: not all cases and situations calling for constitutional interpretation can be readily answered by reference to original intent. Bork himself acknowledges this fact in *The Tempting of America* when he states that, in some cases, "very little or nothing" is known about the particular meaning behind certain constitutional provisions.[139]

This flaw, though, is not insurmountable in Bork's mind. The remedy in such a situation is very simple. To use an analogy from the game of football, the judge who cannot discern any original intent in a constitutional provision should merely "punt"—i.e. turn the issue over to the democratic process. As Bork says:

> If the meaning of the Constitution is unknowable, if, so far as we can tell, it is written in undecipherable hieroglyphics, the conclusion is not that the judge may write his own Constitution. The conclusion is that judges must stand aside and let current democratic majorities rule, because there is no law superior to theirs.[140]

Thus, concludes Bork, "The judge who cannot make out the meaning of a provision is in exactly the same circumstance as a judge who has no

136. *See, e.g.*, MARK N. GOODMAN, THE NINTH AMENDMENT: HISTORY, INTERPRETATION, AND MEANING 13 (1981) (stating that "[i]t can be asserted with a great degree of certainty that the Framers were unable to foresee the emergence of automobiles, airplanes, and sojourns to the moon," and noting that many observers "believe that a constitution must be able to be adapted to changing eras, unforeseen exigencies, and the development of new sociological conditions beyond the realm of human comprehension two hundred years ago").

137. BORK, *supra* note 34, at 144.

138. TRIBE, *supra* note 99, at 42.

139. BORK, *supra* note 34, at 165.

140. *Id.* at 166-67.

Constitution to work with. There being nothing to work with, the judge should refrain from working."[141]

The problem with this rather pat answer, of course, is that it leads to the very danger that the framers so wished to avoid in forming their new republic: domination under "the superior force of an interested and overbearing majority."[142] The framers were keenly aware of the potentially harmful effects that a dominant majority could have on the country and on vulnerable minorities, and, contrary to popular myth, the majority that they feared the most was the one that would be comprised of the common proletarian citizen. In *Toward Increased Judicial Activism*,[143] Arthur Selwyn Miller says: "The true unifying theme of the period was the power of a burgeoning plutocracy versus that of the yeomanry—the creditor class against the debtors."[144] Alexander Hamilton and his fellow drafters of the Constitution believed in the propriety of a ruling class of educated, propertied aristocrats, and an independent judiciary made up of these elite individuals was the precise vehicle that could counteract the encroaching forces of the non-propertied "debtor class."[145] As Miller explains:

> Drafters of the Constitution were men of property, zealously interested in protecting it and in the liberty to increase it. They did not believe in democracy (however defined). Indeed, John Adams waxed choleric about the possibility of a "democratical despotism." He was not alone: the Framers wanted government by "the wise, the good and the rich," which they tended to lump together as one aristocratic group. The Document thus was a counter-revolution to the ideas of the Declaration of Independence, particularly those dealing with equality, which was aimed at controlling excessive governmental power. As written, the Document *seemed* to establish a government too weak to protect the rich, the moneyed, and the propertied. . . . Something more was needed if the "wise, the good, and the rich" were to receive the protection they believed was necessary. Producing that "something" became a major function of the Supreme Court.[146]

These are strong words, to be sure, but as Kozlowski points out in *The Myth of the Imperial Judiciary*, none other than James Madison endorses them in both *The Federalist* and in other writings.[147] "[T]he most common and durable source of factions has been the various and unequal

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141. *Id.* at 166.
142. THE FEDERALIST NO. 10, *supra* note 86, at 41.
143. ARTHUR SELWYN MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT (1982).
144. *Id.* at 55.
145. *See id.*
146. *Id.* (footnotes omitted).
147. *See* KOZLOWSKI, *supra* note 12, at 58-60.

distribution of property," Madison states in *The Federalist No. 10*.[148] "Those who hold, and those who are without property, have ever formed distinct interests in society."[149] Kozlowski thus frames the dilemma: "[W]hat sort of institutional mechanisms would preserve republican government while at the same time providing the best hope of alleviating the increasing capacity of popular majorities to invade the rights of the propertied minority?"[150] One of the primary answers to this question, of course, is what Kozlowski argues for throughout his book: a strong and independent judiciary.

B. The Ninth Amendment Factor

Kozlowski is astute also in revealing another weakness in the conservative wing's condemnation of the so-called activist judiciary: the Ninth Amendment.[151] This amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[152] Although legal scholars and commentators have argued for the recognition of unenumerated rights under the Ninth Amendment,[153] courts have generally been reluctant to do so[154] and a significant number of claims asserting rights under the provision have been denied.[155]

The fact remains, though, that the Ninth Amendment remains in place and in effect in the Constitution. Furthermore, the United States Supreme Court has not completely ignored the amendment's force and applicability in the course of the Court's jurisprudence.[156] The key point here is that, by the Ninth Amendment's very wording, the framers felt that it was necessary to include in the nation's charter a provision that protected rights that were not specifically listed therein.[157] As Kozlowski notes in his discussion of the Ninth Amendment, "[t]he Constitution thus explicitly recognizes the existence of rights other than those set forth in

148. THE FEDERALIST NO. 10, *supra* note 86, at 43.

149. *Id.*

150. KOZLOWSKI, *supra* note 12, at 59.

151. *See id.* at 40-41, 79-80.

152. U.S. CONST. amend. IX.

153. J.D. Droddy, *Originalist Justification and the Methodology of Unenumerated Rights*, 1999 DETROIT COLL. L. MICH. ST. U. L. REV. 809, 812.

154. *Id.*

155. *Id.* at 813-14 (listing various claims of rights under the Ninth Amendment that have been rejected by courts).

156. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (finding that the Supreme Court's jurisprudence "suggest[s] that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy"(citations omitted)); *see also* Droddy, *supra* note 153, at 815-17 (noting several other cases in which the Ninth Amendment was either expressly invoked or implicitly referred to).

157. *See* Droddy, *supra* note 153, at 829 ("It would seem that the plain meaning of the words of the Ninth Amendment should put the question of the existence and reservation by the framers of unenumerated rights beyond the scope of debate . . . .").

its text."[158] Logic and common sense would not seem to hold otherwise, for to include the Ninth Amendment in the Constitution without intending to give it real meaning would essentially reduce it to, in Chief Justice John Marshall's words, "mere surplusage, [that] is entirely without meaning . . . ."[159] This wasteful result surely cannot be what the authors of the Constitution intended. As Marshall said of methods of constitutional interpretation that would effectively nullify constitutional provisions, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."[160]

C. The Presence of Conservative Judicial Activism

Of course, the ultimate irony in all of this discussion of the so-called liberal activism of the courts is that conservative courts have been just as guilty as their alleged liberal counterparts in issuing certain "activist" decisions.[161] To see this, one need only look as far as the controversial United States Supreme Court decision in *Bush v. Gore*[162] that ultimately determined the outcome of the 2000 presidential election.[163] To liberal commentators, this decision was handed down by a five-member majority of conservative justices who, "confident of their power, and brazen in their authority, engaged in flagrant judicial misconduct that undermined the foundations of constitutional government."[164] To those who championed the decision, however, it was perhaps only a very difficult case that "arose in extraordinary circumstances and . . . legitimately required extraordinary action."[165]

Regardless of the political ramifications of the decision, however, the lesson to be learned from the collision of such disparate viewpoints of a particular court's actions is that these viewpoints are exactly that—viewpoints that are dependant upon each individual's own peculiar political, legal, and moral compasses. In 1992, Judge William Wayne Justice of the United States District Court for the Eastern District of Texas

158. KOZLOWSKI, *supra* note 12, at 40.

159. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

160. *Marbury*, 5 U.S. (1 Cranch) at 174.

161. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1092 (2001) (observing that the liberal activism of the Warren Court "has been replaced with one much harsher and more conservative, protecting state governments from civil rights plaintiffs, state officers from federal regulatory mandates, property owners from environmental regulation, and whites from affirmative action"); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1254-55 (2002) (concluding that "conservative judicial activism is pervasive, expansive, and transgresses nearly all activism norms"). *See generally* Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000) (critiquing the recent federalism-based judicial activism of the Rehnquist Court).

162. 531 U.S. 98 (2000).

163. *See* Balkin & Levinson, *supra* note 161, at 1049.

164. *Id.* at 1049-50.

165. Marshall, *supra* note 161, at 1222.

wrote: "Though it is infrequently a thing of beauty, jurisprudential activism is definitely in the eye of the beholder."[166] By this, he appears to mean that one person's perception of an illegitimate act of judicial policymaking could be another person's perception of a triumphant ruling in favor of justice and human equality. Thus, from this perspective, the appearance or non-appearance of judicial activism is largely a product of each individual's own personal predilections and value systems. Or, as Professor Ernest A. Young recently put it: "[P]articipants in both academic and political debates generally use 'judicial activism' as a convenient shorthand for judicial decisions they do not like."[167]

Where Kozlowski's viewpoint surpasses that of the Imperial Judiciary theorists in terms of efficacy and productivity is in its inherent adaptability to American society's ever changing sociological and technical evolution. Without the authority to interpret the nation's founding document in relation to the particular era that the constitutional issue is being litigated, the courts would be forced to surrender to those who, as Arthur Selwyn Miller has described, "would have modern America repair to the shades of men long dead and allow them—in theory—to rule from their graves."[168] This grim prospect, it seems, would be a first in the nation's history, for as Miller attests: "No nation, no society, has ever been ruled that way, certainly not the United States."[169] In view of a nation's history that is full of stories of slavery, discrimination against women and minorities, and a myriad of other shames, it is Kozlowski's view that best allows an ever-changing society to cure its ills and provide for protections against this lingering desire to remain stunted in the past, to give effect to a "dictatorship over the living by the dead."[170]

CONCLUSION

In *The Myth of the Imperial Judiciary*, Mark Kozlowski has chosen to confront an uncertain charge against the judiciary that it has overstepped its constitutional bounds in the name of liberal ideology, and in the process of doing so, he has written a significant defense of the courts in the American polity. Instead of merely dismissing the conservative claim of judicial overreaching, he has chosen to meet the critics on their own fields of battle—American history and American jurisprudence—and has put up a considerable fight to defend what Alexander Hamilton

166. J. William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 4 (1992).

167. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1141 (2002).

168. MILLER, *supra* note 143, at 249.

169. *Id.*

170. *Id.*

once exaltedly called "the CITADEL of the public justice and the public security."[171]

In the end, Kozlowski presents the most viable vision of constitutional interpretation for an era that is drastically different from the time in which the framers lived. Because the drafters of the Constitution did not and could not leave succeeding generations with a comprehensive instructional guide to their intentions behind the forging of the founding charter, it has been left up to "the least dangerous" branch,[172] the judiciary, to apply its wisdom in adjudicating contemporary problems and disputes that plague American life. Still, as evidenced by the decades-long battle over the issue of judicial authority and by the wealth of scholarly material springing from either side on the subject, the fact remains that judicial activism and constitutional interpretation are matters that may simply be too perplexing to ever allow for clearly ascertainable answers. As Kozlowski himself points out, "the meaning of the Constitution's terms has been *contested* right from the beginning of the operation of government under that document."[173]

Thus, this question of the proper role of the judicial branch in the American experiment will most certainly endure throughout the life of the republic. The tides of political opinion will ebb and flow, critics will decry the arrogance of the judges, and—as Hamilton reminded his fellow citizens so many years ago at the birth of their nation—the courts will continue, despite it all, to be "the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."[174]

171. THE FEDERALIST NO. 78, *supra* note 81, at 397.
172. *Id.* at 396.
173. KOZLOWSKI, *supra* note 12, at 75.
174. THE FEDERALIST NO. 78, *supra* note 81, at 396.