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Book Review of By What Right? A Commentary on the Superem Court's Power to Revise the Constitution

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BOOK REVIEW

BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION. By Louis Lusky. Charlottesville, Virginia: The Michie Company, 1975. Pp. xiii, 446. $15.50.

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What limits should the Supreme Court observe in interpreting the Constitution? That is the question Professor Louis Lusky tries to answer in this book. He believes that the Court sometimes has the right or authority to revise the Constitution but not that it may do so whenever it wishes. Lusky formulates a test of "implied judicial power" to mark the limits of what the Court may do. Under that test the Court may make a new constitutional rule when, first, the rule can be justified in terms of an objective stated in or inferable from the Constitution, and second, there is a strong reason why the Court is better fitted than other branches of government to promote that objective.[1] It is because of its utility, Lusky claims, that the implied judicial power test is superior to competing theories. In order that utility be optimally advanced, however, that test should not be applied in the same way to all cases. Rather in some areas the Court should be willing to defer to Congressional interpretations of the Constitution while in others it should not.[2] Lusky then employs the implied power test to appraise the work of the Court, principally its decisions since 1937. He discusses in detail cases involving apportionment, criminal procedure, freedom of expression, church and state, and equal protection. His conclusion is that although some decisions pass the implied power test, others do not, and still others must have their rationales recast in order to be acceptable.

Lusky's question is important and his answer interesting. Banners have been waved and charges led across some hundreds of pages in criticism of the recent Court's craftsmanship. Lusky's effort is sig-

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1. L. Lusky, By What Right? 107 (1975) [hereinafter referred to by page number only].

2. Pp. 47-50, 56-58.

nificant because he has a theory of his own and because when he does criticize, it is from a systematic perspective. Hence his book, though much longer than it need be, should prove stimulating and challenging to students of constitutional law. Nevertheless, it is submitted that the substance of his discussion is unsatisfactory. This Review will begin with an examination of Lusky's test of implied judicial power, then consider some of his main doctrinal themes, and conclude with a suggestion as to how these matters might better be approached.

IMPLIED JUDICIAL POWER

An appraisal of the test of implied judicial power requires a more complete statement of its content and supposed connection with utility. Lusky draws his inspiration from *McCulloch v. Maryland*,[3] in which the Supreme Court held that Congress had power to charter a national bank. Chief Justice Marshall argued that although the Constitution says nothing of banking corporations, the power to establish a national bank may be implied—using the necessary and proper clause[4]—from Congressional powers that are expressly mentioned, such as the powers to tax, borrow, and regulate commerce. Similarly, Lusky suggests, the judicial power conferred by Article III brings with it implied judicial power to revise and supplement the Constitution.[5] This implied power does not, or not merely, involve the broad intent of the framers behind the text, but requires seeing what decisions their political philosophy would generate if exposed to present-day conditions.[6] It is, we might say, an informed extrapolation from the political theory to which the framers were committed. The distinction between "tentative" and "definitive" judicial review is crucial to an appreciation of the proper scope of this implied power; in the former the Court does not claim the final word, in the latter it does.[7] Tentative judicial review is almost always adequate when a power belonging to Congress can be exercised by the states unless and until Congress acts; these are typical "silence of Congress" cases.[8] Definitive judicial review is appropriate, on the whole, only when an asserted federal power or

3. 17 U.S. (4 Wheat.) 316 (1819).
4. U.S. CONST. art. I, § 8, cl. 18.
5. *See* pp. 81-82.
6. P. 22.
7. Pp. 47-50.
8. P. 56. The term is from Bikle, *The Silence of Congress*, 41 HARV. L. REV. 200 (1927).

a limitation on governmental power is at issue.[9] Lusky supposes that his test is connected with utility in the following way. Judicial review exists because citizens suffer it to, but their willingness to tolerate abuses is not unbounded.[10] If abuses became rampant, lack of respect for law, disorder, and even rebellion would result, with consequent destruction of a free and open society.[11] Accordingly, the Court must be careful not to exercise its power in a way that conflicts unwisely with the choices of politically responsive institutions such as Congress, the President, and the state legislatures. Tentative judicial review thus is easy to justify because the Court stands ready to acquiesce. But definitive judicial review is quite another matter. Because such review may countermand a decision of institutions responsive to the people, it should be exercised only when the Court can point to an appropriate constitutional objective and show that it is best suited to effectuate it.[12]

A better grasp of Lusky's theory may be had by looking at one example of its application. *Miranda v. Arizona*[13] was, in his opinion, a case in which definitive review was exercised but under the implied power test only tentative review was appropriate.[14] In *Miranda* the Court sought to free itself from the burden of case-by-case assessment of the voluntariness of confessions. It held that statements by a suspect during custodial interrogation are admissible only after he has been advised that he can remain silent, that any words he speaks may be used against him, and that he is entitled to have a lawyer present (court-appointed counsel if he is indigent) during the interrogation. Lusky does not believe that the Court should acquiesce in just any Congressional reprise, such as a joint resolution condemning the decision generally. But he thinks it should retreat if Congress, for example, modified the *Miranda* rule after a careful study of its practical effects and available alternatives. So, although protecting voluntariness is a proper constitutional objective, the Court will not always be in the best position to assess the operation of prophylactic rules in favor of suspects.

Much in Lusky's discussion is useful and many will agree with his criticisms of *Miranda* and other decisions such as *Baker v. Carr*[15]

9. Pp. 56-58.
10. *See* pp. 27-43 *passim*.
11. Pp. 39-43.
12. P. 107.
13. 384 U.S. 436 (1966).
14. Pp. 280-82, 366. *See also* pp. 135, 156-57, 165, 303.
15. 369 U.S. 186 (1962). The case is discussed by Lusky at pp. 132-37, 140-41, 330-31.

and *Roe v. Wade.*[16] There are, however, reasons for doubting that the test of implied judicial power can be defended as a satisfactory general theory of judicial review. First, in many instances the test is too abstract to be helpful. Second, it is unwarranted to extend the notion of tentative review from the narrow class of silence to Congress cases to a much larger share of the Court's business. Third, the utilitarian argument for the implied power test is weak. These matters will be considered in turn.

Abstractness and Vagueness

The test of implied judicial power is extraordinarily vague because the Constitution says little or nothing about judicial review. That the precision of any sort of implied test is a direct function of the specificity of the things from which implications may be drawn is crucial to an understanding of this. If an architect gives a builder a detailed set of plans, specifications, and instructions for a house, it usually will be easy to tell if the builder has implied authority to use asphalt instead of concrete or to landscape before painting. But should the builder be given only vague instructions, the question whether the use of asphalt is allowed may admit of no definite answer. The text of the Constitution does contain a fairly detailed list of Congressional and Presidential powers. Hence, it sometimes may be possible to say, as was said in *McCulloch v. Maryland,* that one power may be inferred from others that are mentioned explicitly - though the reliability and fecundity of such inferences should not be overestimated. Article III, however, does not in terms give the Supreme Court power to pass on the validity of legislative or executive action, still less, detail methods by which such a power might be exercised. That article is concerned largely with technical matters of jurisdiction. Although it may help to mark off those issues that a court has legal competence to decide, it cannot tell us much about how such decisions are, as a matter of judicial strategy and technique, to be reached.

It may be replied that the vagueness of Lusky's test does not render it worthless, just less useful than might have been thought. This reply is sound as far as it goes, but for two reasons the distance it can carry us on Lusky's scheme is severely limited. One is that to be at all helpful the implied power test will have to draw much of

16. 410 U.S. 113 (1973). Lusky discusses this case and its companion, Doe v. Bolton, 410 U.S. 179 (1973), at pp. 13-20, 100-01, 341, 343, 364.

its content from judicial practice. That is, the words of Article III must be supplemented by rules, for the most part judge-made, regarding justiciability and standing, ripeness and mootness, acquiescence and discretionary refusal to review. But to the extent that such rules are constituted by judicial practice they also may be modified by it. If so, the implied power test will be subject to change over time. It is not suggested, of course, that the words of the Constitution bind rigidly like fetters whereas judicial practices can be modified with ease. Nonetheless, the latter are less deeply entrenched in our constitutional law and, because of their fluidity, are less able to provide firm guidance. The other limiting reason stems from Lusky's insistence, discussed in more detail later, that the touchstone of judicial review be "objective." Indeed, he criticizes other constitutional tests as too dependent on judges for their content. But because the implied power test must be filled out by reference to judicial practice, his own account does not in this respect seem measurably superior to competing theories.

Extension of Tentative Judicial Review

Another difficulty with the implied power test is that it would be unwise to extend tentative judicial review as far as Lusky proposes. Such review has been employed in a few cases, chiefly under the commerce clause. For example, the Court occasionally has invalidated state taxation or liquor statutes and thereafter acquiesced by upholding subsequent Congressional legislation consenting to such statutes.[17] Heretofore tentative review has been used only in connection with a few clauses of the Constitution and the actual number of such specific Congressional reprises has been small.[18] In calling attention to these so-called "silence of Congress" cases,[19] Lusky touches on an important but neglected phenomenon: the interpretation of constitutional provisions is often an interactional process over time. Yet his strong preference for tentative review rigidifies this insight and is unwarranted.

17. *Compare* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), *with* Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (state taxation of interstate insurance contracts); and *compare* Leisy v. Hardin, 135 U.S. 100 (1890), *with In re* Rahrer, 140 U.S. 545 (1891) (state liquor regulations).

18. On the latter point see A. BICKEL, THE LEAST DANGEROUS BRANCH 230 (1962). Less specific responses, though of some interest, are not what Lusky has in mind, as his discussion at pp. 365-66 makes plain.

19. Lusky's main treatment of such cases is at pp. 47-50, 55-56, 356-57, 365-66.

The detailed analysis of this issue is too complicated to be attempted here, but one fundamental point can be raised briefly.[20] An important reason for judicial review by a national Supreme Court in any federalist system is to insure that the actions of state legislatures and other regional law-making and law-applying authorities do not disrupt the federal scheme.[21] Lusky asserts that tentative review "is adequate in any governmental power case in which the question is whether a power belonging to Congress can nevertheless be exercised by the states unless and until Congress acts."[22] But this statement fails to take account of how the federal system could be disturbed by state legislative choices. Suppose, for example, that a state passes a statute that severely limits the recognition its courts will give to the judgments of other states. Suppose further that the Supreme Court then invalidates this legislation under the full faith and credit clause.[23] Now if, as I would urge, the Court should have final say on this matter, no risk to the federal system would be posed. But if, as Lusky contends, the Court should be prepared to defer to a subsequent Congressional choice consenting to the state legislation, there seem to be two possibilities, neither of which is acceptable. One is that Congress would *actually* respond by permitting the state legislation to be repassed and consenting to similar legislation in other states. In this case some undesirable disruption of the federal scheme would result. To avoid this untoward consequence, a defender of Lusky might try to avail himself of a second possibility: that though Congress is permitted to consent, it would *not actually* do so, or at least would seldom do so. This suggestion seems contrary, however, to the tenor of Lusky's position, which favors a stronger hand by politically responsive institutions in such areas in formulating the law. Furthermore, if Lusky's preference for tentative review is enfeebled by saying that Congress in fact would rarely respond specifically enough to override the Court's decision, then the situation under his theory would be no different from what it is now. That is, tentative judicial review would be limited to the extremely small class of silence of Congress cases. The net result is

20. For clarification on this point I am indebted to James W. Nickel.

21. *See, e.g.*, Freund, *Review and Federalism*, in SUPREME COURT AND SUPREME LAW 86, 87 (E. Cahn ed. 1954); Holmes, *Law and the Court*, in THE MIND AND FAITH OF JUSTICE HOLMES 387, 390 (M. Lerner ed. 1943). *Cf.* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 75-77, 87-93, 95 (1969). For comparative discussion of federalism and judicial review see W. WAGNER, THE FEDERAL STATES AND THEIR JUDICIARY 73-130 (1959).

22. P. 56.

23. U.S. CONST. art. IV, § 1.

that Lusky's proposed extension of tentative review either risks disruption of the federal system or is so innocuous as to make no difference at all.[24]

The Utilitarian Argument

Finally, there are weaknesses in Lusky's utilitarian argument for the implied power test.[25] Foremost among these is a failure to consider whether utility is the proper standard of justification. Perhaps in some legal academic circles utilitarianism still is regarded not as a debatable theoretical position but as self-evidently true. Among moral and political philosophers, however, it is widely recognized that there are serious objections to the various forms of utilitarianism. Moreover, there are well-developed, sophisticated alternatives in the literature. A conspicuous example is John Rawls' account of justice.[26] Rawls argues that proper moral principles are those that would be chosen by rational people in a hypothetical situation in which they are deprived of knowledge of their own talents and position in society, and that utilitarian principles would not be chosen. The impact of such a theory is that weight might be given to individual rights beyond that which can be founded on utility. If so, the principles selected concerning judicial review might favor definitive review more often than Lusky does, for less weight might be accorded the decisions of politically responsive institutions. The point is not that Rawls is right and utilitarians wrong, but that there exists a serious underlying issue on which Lusky's thesis rests but which his book neglects even to mention.

Lusky presents little evidence, in any case, for the idea that the implied power test best promotes utility. It is true that the electorate has not rebelled against a modest exercise of judicial review. It is also true that it would not tolerate gross excesses such as the

24. The appropriateness of tentative review seems even less defensible when the action whose constitutionality is questioned is that, not of a large politically responsive institution such as a state legislature, but of some subordinate official like a judge or police chief or prison warden. *Cf.* BLACK, *supra* note 21, at 77-93. That Lusky would wish to extend tentative review to such officials seems implicit in his discussion at pp. 280-82, 366 of *Miranda*, in which the action of the police was at issue.

25. Lusky speaks of utility, without more, as his criterion. He does not distinguish between average and total utility, or between act-utilitarianism and rule-utilitarianism. An elementary account of these important distinctions may be found in Smart, *An Outline of a System of Utilitarian Ethics*, in J. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST 3, 9-12, 27-28, 42-57 (1973).

26. J. RAWLS, A THEORY OF JUSTICE (1971).

Court's ordering a declaration of war while passing on a securities case. But Lusky needs more than truisms like these. He must show that the implied power test commands more popular support than alternative theories of judicial review. In this context, his appeal to the disrespect for law and social disruption that allegedly would follow if the Court's current practices are continued seems not only without empirical support but implausible on its face. The root difficulty with the argument is the implicit assumption that recondite divisions in constitutional theory will be reflected in fairly sharp divisions in electoral support. This seems unlikely because citizens are generally unaware of theoretical niceties. They may react to a school prayer decision, but probably not to the technicalities of justiciability. It may be that some sophisticated argument conversant with the sociology of knowledge and opinion about law could supply the right sort of ratiocination for Lusky's test; the book, however, offers no such argument.

Some Doctrinal Themes

Moving the discussion to a more concrete plane, I shall not quarrel with Lusky's analysis of particular cases, though in my view his analyis is not always unexceptionable. Rather, I propose to turn to a middle level of generality and contest some of his main doctrinal themes.

One of Lusky's leading contentions is that the Supreme Court has blocked the full intended use of the fourteenth amendment to protect blacks.[27] He favors repudiation of the doctrine, derived from the *Slaughter-House Cases*,[28] that the privileges and immunities clause covers only a narrow band of rights, not expansible by Congress, pertaining to federal (as opposed to state) citizenship. He also advocates rejection of the state action doctrine stemming from the *Civil Rights Cases*.[29] Lusky's historical and policy arguments for these positions, however, are inadequate. Insofar as appeal is made to the framers' intent, historical evidence is essential. Even if Lusky cannot be expected to be a legal historian, the reader is due a balanced account, with citations, of the evidence. It is not enough, as he does at one point, "simply [to] assert that my own study of the available primary and secondary materials convinces me that [certain]

27. *See* pp. 184-85, 199, 335, and chs. 12-14 generally.
28. 83 U.S. (16 Wall.) 36 (1873).
29. 109 U.S. 3 (1883). For Lusky's views see pp. 191-205, 213-15, 233-35, 243-47, and 335.

propositions [relating to the fourteenth amendment] are provable."[30] As to policy, if utility is the criterion, Lusky must show that better consequences would flow from rejecting the *Slaughter-House* and *Civil Rights* holdings than from what the Court is doing now. But it is not at all clear that the Court could overrule those cases without resistance and doctrinal difficulties. In addition, though Lusky disavows a Negro protection theory of the fourteenth amendment,[31] his view of the framers' intent pushes him toward it, and thus renders doubtful whether all the protections for equality we may wish to retain could be preserved on his account. On the other side, it may be otiose for the Court to do what Lusky suggests. It can be argued that expansion of what constitutes state action[32] and of what is protected under the due process and equal protection clauses has allowed the Court to do about all it could have done anyway. Nor have the *Slaughter-House* and *Civil Rights Cases* prevented the courts today from giving effect to civil rights legislation of the nineteenth century or prevented Congress from passing important new such legislation in the 1960's.

Similar objections apply to Lusky's discussion of the incorporation of the Bill of Rights by the fourteenth amendment. He contends that applying Bill of Rights standards to the states has no historical support in the framers' intent.[33] But Lusky offers no evidence for the assertion that there is "no conceivable historical basis"[34] for selective incorporation, and relies on Professor Fairman for the idea that Justice Black was mistaken about full incorporation.[35] Here again the reader is entitled to a balanced assessment of the historical evidence, especially when constitutional historians of some repute have taken issue with Fairman's criticism of Black.[36] Less persua-

30. P. 200 n.*.

31. P. 246.

32. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948).

33. *See* pp. 162-63, 171. *See also* the discussion at pp. 104-07 of Palko v. Connecticut, 302 U.S. 319 (1937).

34. P. 163.

35. P. 162. Black's view was put forward in Adamson v. California, 332 U.S. 46, 89 (1947) (dissenting opinion). For criticism see Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949). Black later accepted selective incorporation in the face of his colleagues' resistance to full incorporation. *See* Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (concurring opinion).

36. *See* Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 132-34; Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1081 & n.106 (1956). A full picture

sive still is the policy basis for Lusky's position. Selective incorporation has had a wide range of good effects and Lusky is careful to note them.[37] If the Bill of Rights is disincorporated, however, these advantages will be lost. One might, perhaps, brave these results of Lusky's position in the name of doctrinal purity. Yet the implied judicial power test is supposed to rest on usefulness, not purity. Thus, either the test has been misapplied or it yields results counter to utility.

Another important theme, briefly mentioned earlier, is the insistence on an "objective" test for judicial review. Lusky links this theme with Professor Wechsler's call for "neutral principles" of constitutional law.[38] Lusky does not explain what he means by "objective," but the main lines of his discussion suggest that a constitutional test is subjective if judges have great latitude in giving it content, and objective if they are significantly restricted in the meaning that it can reasonably be assigned. The implied power test is supposed to be objective, as is the "suspect classification" test if properly applied.[39] Lusky disapproves of such doctrines as "ordered liberty,"[40] "preferred position,"[41] and "fundamental interest"[42] as being wholly subjective and having whatever meaning the Court gives them.

Two points need to be made here. One is that the difference between tests Lusky favors and those he opposes is small. As argued earlier, the implied power test must draw much of its content from judicial practice, and hence is subject to interpretation and revision by the Court. Similarly, there is no litmus paper test for the suspectness of a classification. On the other side, tests Lusky criticizes are not as "subjective" as he thinks. Terms like "ordered liberty," "preferred position," and "fundamental interest" have acquired, through the cases, some content and rules for their use; modification of course is possible, but past decisions tend to constrain and guide future employment of these labels. There is, in particular, little distance in terms of "objectivity" between the suspect classification

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of the debate should include reference to Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954).

37. Pp. 163-66.

38. Pp. 4-6, 20-22. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

39. Pp. 266-67.

40. Pp. 105-07.

41. Pp. 110-12, 125.

42. Pp. 252, 264, 266.

and fundamental interest tests. It often has been suggested that for both it is difficult to articulate precise standards and that not unconnected scales or gradients of suspectness and fundamentality must be recognized.[43] The second point is that Lusky's desire for a discretion-limiting constitutional standard probably is unrealizable. Perhaps in areas of the law in which most possible combinations of fact can be anticipated rules could be framed that severely restrict judicial creativity. Yet this hardly seems possible in constitutional law. Because of the vagueness of human language and the many unpredictable fact situations to which constitutional rules must be applied, it seems unlikely that any test can be devised that will constrain judges as Lusky would wish.[44]

CONCLUSION

Let me briefly suggest in conclusion how a general inquiry into judicial review of the sort envisioned by Lusky[45] might better proceed. It would be helpful to begin by distinguishing two questions: (1) When and how far does our constitutional practice permit judges to develop or modify the content of the Constitution? (2) How likely is it that decisions made in conformity with this practice will command social acceptance? The first of these questions is concerned with constitutional doctrine or the internal character of the system. The second is an empirical question about the social effects of certain decisions. Lusky does not explicitly distinguish these questions and may appear to some to conflate them. If pressed, however, it seems plausible that he would regard these questions as different and answer them roughly as follows. First, the test of implied judicial power accurately states the proper limits of judicial change in our system. That test stems from *McCulloch v. Maryland*[46] and has now the same content, or nearly the same content, as it did then.

43. *See, e.g.*, Cox, *The Supreme Court, 1965 Term-Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966); *Developments in the Law - Equal Protection*, 82 HARV. L. REV. 1065, 1120-21 (1969); Note, *The Equal Protection Clause and Exclusionary Zoning after* Valtierra *and* Dandridge, 81 YALE L.J. 61, 71-72 (1972). *Cf.* Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

44. Lusky's linking of his thesis with Wechsler's might be questioned here. Wechsler's plea is essentially for principled decisionmaking, in which reasons are articulated that have potential application beyond the result in the case at bar. He does not seem to suppose that such neutral principles will be "objective" in the strong way Lusky has in mind.

45. There are, of course, many interesting questions about judicial review that do not fall within the scope of Lusky's inquiry.

46. 17 U.S. (4 Wheat.) 316 (1819).

Second, the implied power test is underwritten by utility. Hence decisions conformable to its limits will command the most social acceptance. Decisions traversing those limits are aberrant and ultimately likely to invite disaffection and chaos.

These answers seem to be mistaken in certain respects. More satisfactory answers, though they cannot be developed in detail here, might be sketched as follows. The former question needs to be approached on several levels. One first should provide some conceptual clarification of what is involved in developing or modifying the Constitution. Here it is useful to distinguish the related but not entirely congruent notions of judicial review, innovation, deviation from original understandings, and assuming a role as policy maker. At a second level, one should try to catalogue the ways in which decisions can go beyond merely applying what the constitutional text and its settled interpretations dictate. It is important to list, for example, the ways in which textual provisions can be narrowed or broadened, and the ways in which subordinate rules of constitutional law can (like the state action doctrine) be instituted or (like the "separate but equal" test[47]) discarded. One also should mention ways in which entirely new rules can be created, for example, the implication of new rights from the force exerted by rights already recognized as in *Griswold v. Connecticut*,[48] or perhaps the method of "structures and relationships" described by Professor Charles L. Black.[49] On the basis of the conceptual analysis and this catalogue, one might then try, at a third level, to formulate a more general statement of the extent of judicial development and modification permitted by our constitutional practice. Viewed in this light, Lusky's answer seems misconceived in several respects. One is that instead of surveying the modes of innovation our system permits in a dispassionate way, he immediately gets in the business of endorsing some innovations and repudiating others. The test of implied judicial power, insofar as it can be elucidated and applied in the conservative way Lusky supposes, does not in fact accurately describe the kinds of innovation our system presently allows. Although a critical appraisal of judge-made constitutional change is to be welcomed, it might better build on, rather than be mixed with,

47. *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954), which concluded that the separate but equal doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), has no place in public education.

48. 381 U.S. 479 (1965).

49. *See* BLACK, *supra* note 21.

a description of such change. Another difficulty is that no accurate test is likely to be static. Lusky appears to think that although revisions sometimes can be made in the Constitution, the implied power test itself can never change and develop. Yet if we view matters in historical perspective, it seems plain that some modes of innovation will be countenanced at one time and later not. Our constitutional practice can change, and in particular the rules and principles governing judicial innovation are fluid to a greater or lesser extent.

To answer the second question distinguished above, it is essential to understand that there is no necessary connection between a practice of judicial review (or decisions conformable to it) and utility. One reason for this is that the exact system of judicial review a country has may involve broad choices of political theory made without any special regard to usefulness. Doubtless there are limits; a given system of review may be so unsuited to the needs of a society that the system or the society may not survive. Yet even though there are these outer bounds, broad choices of political theory within them may not conform to utility. In particular, any form of judicial review that is designed in part to protect the civil rights of minorities may diverge at points from utility. A second reason is that even when utility is consciously aimed at, there is no guarantee that it will be achieved, or that if it is achieved at one point such a state of optimal equilibrium will persist because the system may not be able to change in step with social conditions generally. If these points are right, Lusky's answer to the second question seems mistaken. There is no reason why the implied power test, or any test of judicial review that accurately describes a system, will lead to the best results in the utilitarian sense. Moreover, there will be no essential link between permissible novelty and utility. A society may be ready for and accept less change, or more, than the constitutional practice of a system may be able to provide.