The Activist Legacy of the New Deal Court

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However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law, not the decisions of the Court.

Charles Warren**

The activist legacy of the New Deal Court was free-wheeling adjudication. It sprang from the Four Horsemen’s obdurate identification of their economic and social predilections with constitutional mandates, halting the Roosevelitan reform measures in their tracks, and bringing on the Court-Packing Plan. Although the Plan failed, it was followed by a shake-out resulting in the “reconstructed Court,” a Court that had learned from its predecessors how to manipulate the Constitution, albeit for a new set of goals. The transition was aptly described by Stanley Kutler, an ardent admirer of judicial activism:

From the early twentieth century through the late 1930s, academic and liberal commentators... criticized vigorously the abusive powers of the federal judiciary... consistently frustrating desirable social policies... [T]he judges had arrogated a policymaking function not conferred upon them by the Constitution... negat[ing] the basic principles of representative government... in favor of the interests of a privileged few.

... After 1937, most of the judiciary’s longtime critics suddenly found a new faith... The judges themselves pointed the way of the true faith as

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1. “The actions of the [pre-New Deal] Court were attacked as being those of men consciously or unconsciously biased in favour of capital against labour, and giving a blind allegiance to the economic doctrine of laisser-faire.” M. BELOFF, THE AMERICAN FEDERAL GOVERNMENT 56, 57 (1959). The Court “sent the whole edifice of government intervention toppling.” Id. at 58.
they rationalized a minimal judicial role for superintending economic legislation while championing civil rights and civil liberties to the maximum.3

Tactics that were anathema to the True Believers when employed by the earlier Court now gained an odor of sanctity because the Warren Court satisfied their aspirations,4 never mind that it "arrogated a policy making function not conferred upon it by the Constitution."5 "[W]hoever places emphasis upon the product rather than the process," wrote Sidney Hook, "upon an all-sanctifying end rather than upon the means of achieving it, is opening the doors of anarchy."6 The Court itself has repudiated its "use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise."7 But it continues to frustrate the will of the people when it considers their social choices unwise.7

What warrant does it have for reading "liberty" to serve its social predilections? Neither the fifth nor the fourteenth amendments draws a distinction between "liberty" and "property"; the Framers, Learned Hand remarked, would have regarded the current reading of the fifth amendment as "constitut[ing] severer restrictions as to Liberty than Property" as a "strange anomaly."8 "[T]here is no constitutional basis," he

4. Thus, Fred Rodell exulted that Chief Justice Warren "'brush[ed] off pedantic impediments to the results he felt were right,'" and that he was "'almost unique'" in his "'dependence on the present day results of separate schools."" Rodell, It Is the Earl Warren Court, N.Y. Times Magazine, Mar. 13, 1966, at 30. For similar activist remarks, see R. BERGER, GOVERNMENT BY JUDICIARY THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 286 n. 13 (1977).
5. S. HOOK, PHILOSOPHY AND PUBLIC POLICY 36 (1980).
7. Judge Learned Hand wrote that judges "'wrap up their veto [of legislation] in a protective veil of adjectives such as 'arbitrary,' . . . 'inherent,' 'fundamental,' or 'essential,' whose office usually . . . is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the[i]r decision[s].'" L. HAND, THE BILL OF RIGHTS 70 (1958). We need to remember that "'there still remains a distinction between a constitution which . . . provides that the law shall be whatever the supreme court thinks fit, and the actual constitution of the United States.'" H. HART, THE CONCEPT OF LAW 141 (1961).

Lest the reader consider that in focusing on due process I am beating a dead horse when present-day emphasis is on the equal protection clause, I would call attention to Herbert Packer's statement that "the new 'substantive equal protection' has under a different label permitted today's justices to impose their prejudices in much the same manner as the Four Horsemen once did."9 Packer, The Aim of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process," 44 S. CAL. L. REV. 490, 491-92 (1971). Philip Kurland likewise concluded that "'The new equal protection . . . is the old substantive due process.'" Forum: Equal Protection and the Burger Court, 2 HASTINGS CONST. L.Q. 645, 661 (1975) (remarks of Philip Kurland). For the narrow scope of equal protection as conceived by the framers, see infra text accompanying notes 178-82.
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averred, "for asserting a larger measure of judicial supervision over [liberty than property]." In fact, civil liberties did not loom large in the thinking of the Founders; they were more concerned with the interests of the collective society. It was property rather than civil liberties which they regarded as sacred. But the "reconstructed" Court, as will appear, was little impeded by the presuppositions and intentions of the Framers. Under the leadership of Chief Justice Warren, this judicial revolution resulted in "usurpation of general governmental powers on the pretext that its authority derives from the Fourteenth Amendment."

As the Court progressively realized the social aspirations of sundry academicians (which I share), they rose to new heights in its defense. So, Paul Brest challenged the assumption that judges are bound by the Constitution. Another activist knight-errant, Robert Cover, thrust aside "the...

8. L. HAND, supra note 7, at 50–51. "The great and chief end . . . of men," John Locke wrote, "[i]n putting themselves under government, is the preservation of their property . . . ." Quoted in J. RANDALL, THE MAKING OF THE MODERN MIND 342 (1940) (quoting J. LOCKE, II TREATISE ON CIVIL GOVERNMENT, ch. 2). For the Founders, property "was the basic liberty, because until a man was secure in his property . . . life and liberty could mean little." 1 P. SMITH, JOHN ADAMS 272 (1962). Hence they "warmly endorsed John Adams' deep-seated conviction that 'property is as sacred as the laws of God.' " Mason, The Burger Court in Historical Perspective, 47 N.Y. St. B.J. 87, 91 (1975). In the convention Governor Morris said, "Life and liberty were generally said to be of more value, than property. An accurate view of the matter would nevertheless prove that property was the main object of Society." 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 533 (1911). Madison also considered that "[t]he primary objects of civil society are the security of property and public safety." 1 M. FARRAND, supra, at 147. For similar sentiments of John Rutledge, Rufus King, and Pierce Butler, see 1 M. FARRAND, supra, at 534, 541, 542. "[T]he dichotomy between personal liberties and property rights is a false one . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972). John Hart Ely also rejects the differentiation of "economic rights" from "human rights." Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 938 (1973). They have been "essentially read as a unit." Ely, Constitutional Interpretivism: Its Allure and Impossibility, 53 IND. L.J. 399, 421 (1978).

9. For the Founders, "individual rights, even the basic civil liberties that we consider so crucial, possessed little of their modern theoretical relevance when set against the will of the peoples." G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC. 1776–1878, at 63 (1969). "In the Convention and later, states rights and not individual rights were the real worry." A. MASON, THE STATES RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION 75 (1964). Those who insisted on a Bill of Rights, as Cecelia Kenyon noted, "were primarily preoccupied with the failure of the Constitution to lay down the precious and venerable common-law rules of criminal procedure." Kenyon, Men of Little Faith: The Anti-Federalists on the Nature of Representative Government, XII WM. & MARY Q., 3d series, 3, 19 (1955). Even today, "[f]or most men, to be deprived . . . . of private property would be a far greater and more deeply felt loss . . . . than to be deprived of the right to speak freely." M. OAKESHOTT, RATIONALISM IN POLITICS 44 (1962).

10. Alfred Kelly stated that the Warren Court was determined "to carry through a constitutional equalitarian revolution." Kelly, Clio and the Court: An Illicit Love Affair, 1965 SUP. CR. REV. 119, 159.


Constitution’s self-evident meaning” in favor of an “ideology” framed by a non-elected, life-tenured, virtually unaccountable bench. The Constitution, he asserted, is of no moment because “we” have decided to “entrust” judges with forming an “ideology” by which legislative action can be measured and, it may be added, the Framers’ choices supplanted. Cover, of course, did not explain where “we, the people” had spoken, whether in constitutional text, conventions or referenda. A few drastically summarized case studies will enable us to measure the effects of this revolution, described by an activist admirer, Louis Lusky, as an “assertion of the power to revise the Constitution, bypassing the cumbersome amendment procedure prescribed by article V,” and as a “repudiation of the limits on judicial review that are implicit in the orthodox doctrine of Marbury v. Madison,” and in fact are explicit in the constitutional history.

Preliminarily, it needs to be recalled that application of the Bill of Rights to the states is without constitutional foundation. Chief Justice Marshall pointed out in Barron v. Baltimore that the Bill applied only to the federal government, as the legislative history plainly confirms. Justice Black’s theory that the Bill of Rights was “incorporated” in the fourteenth amendment was vigorously rejected by the Court. But it accomplished piecemeal incorporation under what has come to be known as “selective incorporation.” In what remains the most searching study, Louis Henkin wrote: “Selective incorporation finds no support in the language of the [fourteenth] amendment, or in the history of its adoption,” and it is truly “more difficult to justify than Justice Black’s position that

16. For citations see R. Berger, Death Penalties: The Supreme Court’s Obstacle Course 13-14 (1982).
18. Speaking for the Court in Bartkus v. Illinois, 359 U.S. 121, 124 (1959), Justice Frankfurter stated:

We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such. The relevant historical materials have been canvassed by this Court and by legal scholars. These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States.
The Bill of Rights was wholly incorporated.”19 Judge Henry Friendly, one of our ablest jurists, wrote, “it appears undisputed that the selective incorporation theory has [no historical support].”20 Thus, the Court’s invocation of this or the other provision of the Bill of Rights constitutes the threshold usurpation. Activists shrug this off under what appears to be a doctrine of judicial squatter sovereignty—usurpation is legitimated by long-continued repetition.

I. CASE STUDIES: JUDICIAL REVISION OF THE CONSTITUTION

A. Bridges v. California

The watershed case was Bridges v. California,21 a five-to-four decision, in which Justice Frankfurter dissented, joined by Chief Justice Stone and Justices Roberts and Byrnes. Bridges, a labor leader, had virtually threatened to call a strike if a then-pending decision was enforced. In a companion case, the Los Angeles Times editorially advised the judge that he would “make a serious mistake” to grant probation rather than a severe sentence to certain labor “gorillas.” Both were summarily held in contempt of court for these out-of-court utterances. Reversing, 150 years after adoption of the Bill of Rights, Justice Black discovered that the long-recognized summary power of courts over contemptuous publications was curtailed by the first amendment and then by the fourteenth. Liberals, myself included, heartily detested the strike-breaking use of the contempt power. But the fact remains that this power was deeply rooted in the common law and our own practice for 150 years. My study of the history of the first amendment convinced me that it was not designed to cut down summary contempts.22

In barest outline, the first amendment provides that “Congress shall make no law.”23 Neither the amendment nor its history refers to a ban on

20. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 CALIF. L. REV. 929, 934, 935 (1965). To my mind, rejection of incorporation en masse entails rejection of piecemeal incorporation. The whole includes the part. The verbal justifications are most unsatisfying. See R. BERGER, supra note 16, at 16–18. Paul Bator observed, “the way we arrived at incorporation was intellectually shoddy. It was just announced, as though it were a coup d’etat; suddenly we had incorporation.” Bator, Some Thoughts on Applied Federalism, 6 HARV. J.L. & PUB. POL’Y 51, 58 (Special Issue, 1982).
23. “Insofar as the semantics of the eighteenth and early nineteenth centuries are concerned, the word ‘laws’ did not include decisions but was limited to legislative enactments.” Teton, The Story of Swift v. Tyson, 35 ILL. L. REV. 519, 537 (1941).
the courts. By the Judiciary Act of 1789 the First Congress, an authoritative interpreter of the Constitution,24 conferred upon the courts power to punish "contempts,"25 a technical term, the meaning of which courts sought in English law and practice. Blackstone, regarded by the colonists as the oracle of the common law, stated that "liberty of the press . . . consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published."26 In the Pennsylvania Ratification Convention James Wilson, a leading member of the Philadelphia Convention, said, "what is meant by the liberty of the press is, that there should be no antecedent restraint upon it."27 Thomas McKean, Chief Justice of the Supreme Court of Pennsylvania, who vigorously advocated adoption of the Constitution in the Pennsylvania Ratification Convention, declared in Respublica v. Oswald, an attachment for contemptuous publication: "Could not this be done in England? Certainly it could . . . [T]here is nothing in the constitution of this state, respecting the liberty of the press, that has not been authorized by the constitution of that kingdom for near a century past."28 Shortly thereafter Chancellor Kent employed the summary power in People v. Freer.29 Chief Justice Hughes referred in Near v. Minnesota to the "conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions,"30 as Justice Holmes earlier stated in Patterson v. Colorado.31 The cases upholding the summary power are legion.32 The fourteenth amendment, as Justice Black observed, did not go beyond the first.33 But in Bridges, Justice Black, in my judgment, simply molded history to rationalize a result with which I sympathize but nonetheless is extra-constitutional.

24. In this first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs long acquiesced in fixes the construction to be given its provisions.

Hampton & Co. v. United States, 276 U.S. 394, 412 (1928) (quoting Myers v. United States., 272 U.S. 52 (1926)).


26. 4 W. BLACKSTONE. COMMENTARIES ON THE LAWS OF ENGLAND 151 (1765–1769).

27. J. McMaster & F. Stone, Pennsylvania and the Federal Constitution 308 (1888). All "that the earlier sages of the Revolution had in view" was to erect "barriers against any previous restraints upon publication." 1 J. Kent, Commentaries on American Law 627 (7th ed. 1851).

28. 1 Dall. 319, 322 (Pa. 1788).

29. 1 Cai. R. 518 (N.Y. 1804).


31. 205 U.S. 454, 462–63 (1907) (citing Respublica v. Oswald, 1 Dall. 319 (Pa. 1788)).

32. For citations, see Berger, supra note 22, at 620 n.129.

33. Bridges v. California, 314 U.S. 252, 268 (1941); see Berger, supra note 22, at 625 n.165.
B. The Reapportionment Cases

What Warren regarded as the jewel in his crown, the reapportionment decision, proceeded in the teeth of what Justice Harlan justly described as the framers' "irrefutable and unrefuted" exclusion of suffrage from the fourteenth amendment. In a nutshell, Justice Brennan observed that seventeen of nineteen Northern States had rejected black suffrage between 1865 and 1868. Consequently, Roscoe Conkling, a member of the Joint Committee on Reconstruction of both Houses, stated it would be "futile to ask three quarters of the States to do . . . the very thing which most of them have already refused to do." Another member of that Committee, Senator Jacob Howard, said "three fourths of the States of this Union could not be induced to vote to grant the right of suffrage." The chairman of the Committee, Senator William Fessenden, said of a suffrage proposal that "there [is not] the slightest probability that it will be adopted by the States." The unanimous report of the Committee doubted that "the States would consent to surrender a power they had always exercised, and to which they were attached," and therefore thought it best to "leave the whole question with the people of each State." That such was the vastly preponderant opinion is confirmed by a remarkable fact. During the pendency of ratification, radical opposition to the readmission of Tennessee because its constitution excluded Negro suffrage was voted down in the House 125-to-12. Senator Charles Sumner's parallel proposal was rejected 34-to-4. The fifteenth amendment was later adopted, its framers stated, to fill the gap left by the failure of the fourteenth to ban discriminatory exclusion from suffrage. His own

34. G. WHITE, EARL WARREN: A PUBLIC LIFE 238 (1982). Paul Bator stressed the need for "rooting the language of the Fourteenth Amendment within some limits of historical purpose—that is, of trying to understand the language in the context of the legal culture of its framers and the purposes they were trying to achieve." Bator, Some Thoughts on Applied Federalism, 6 HARV. J. PUB. POL. 53, 54 (1982).
35. See infra text accompanying note 43.
38. Id. at 2766.
39. Id. at 704.
41. For details, see Berger, supra note 4, at 56, 59–60, 79.
42. For citations, see Berger, The Fourteenth Amendment: Light From the Fifteenth, 74 NW. U.L. REV. 311, 321–23 (1979). A Court contemporary with the fifteenth amendment declared that before adoption of that amendment a state could "exclude citizens of the United States from voting on account of race . . . . [T]he Amendment has invested citizens of the United States with a new constitutional right." United States v. Reese, 92 U.S. 214, 217–18 (1876).
masterly collection of the historical facts led Justice Harlan to conclude that the argument for reapportionment flew "in the face of irrefutable and still unanswered history to the contrary."

My independent study of the history richly confirmed Harlan. Gerald Gunther wrote that "most constitutional lawyers agree" that "the ‘one person-one vote’ ruling . . . lacks all historical justification." Summing up, Robert Bork stated: "The principle of one man, one vote . . . runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula." Warren’s worshipful biographer and former law clerk commented:

Warren had based his purported usurpation of legislative prerogatives on an interpretation of the Constitution that was neither faithful to its literal text nor consistent with the context in which it had been framed. He had substituted homilies such as "[c]itizens, not history or economic interests, cast votes" for doctrinal analysis.

The history Warren dismissed was the framers’ determination to exclude suffrage from the fourteenth amendment, thereby reversing the choice they made. As G. Edward White further stated, "Baker v. Carr found a judicial power to review the political judgments of legislators where none had previously existed."

C. The Desegregation Decision: Brown v. Board of Education

Little less convincing is the case for exclusion of segregation from the fourteenth amendment. Richard Kluger, author of a laudatory history of Brown v. Board of Education, asked: "Could it be reasonably claimed that segregation had been outlawed by the Fourteenth when the yet more basic emblem of citizenship—the ballot—had been withheld from the Negro under that amendment?" The temper of the times is disclosed by Senator James Harlan’s remarks when desegregation of the District of Columbia schools was under discussion in April, 1860:

I know there is an objection to the association of colored children with white children in the same schools. This prejudice exists in my own State [Iowa].

47. G. White, supra note 34, at 239.
48. Id. at 357.
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It would be impossible to carry a proposition in Iowa to educate the few colored children that now live in that State in the same schoolhouses with the white children.\textsuperscript{50}

To have upended segregated schools, Charles Fairman considers, “would have exposed the [Civil Rights] bill to active opposition in the North.”\textsuperscript{51} Cognizant of such sentiments, James Wilson, Chairman of the House Judiciary Committee, assured the House that the terms of the Civil Rights Bill, which it was the purpose of the fourteenth amendment to incorporate, did not mean that the children of “all citizens” shall attend the same schools.\textsuperscript{52} The framers’ pervasive assumption, recorded in the debates, was that black children would attend separate schools,\textsuperscript{53} if only, as Alexander Bickel explained, because “It was preposterous to worry about unsegregated schools, for example, when hardly a beginning had been made at educating Negroes at all and when obviously special efforts, suitable only for Negroes, would have to be made.”\textsuperscript{54} As late as 1875, Senator Sumner, who had pressed increasingly for mixed schools, could not persuade the Senate, prepared to accept equal accommodations in inns and transportation, to include schools. Senator Sargent of California urged that the common school proposal would reinforce “a prejudice powerful, permeating every part of the country, and existing more or less in every man’s mind.”\textsuperscript{55} A similar statement was made in the House by Barbour Lewis of Tennessee.\textsuperscript{56} More and more activist commentators agree that the framers of the fourteenth amendment excluded segregation.\textsuperscript{57} Consequently the desegregation decision represents a square

\textsuperscript{50} CONG. GLOBE, 36th Cong., 1st Sess. 1680 (1860).


\textsuperscript{52} CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866). A number of contemporaneous constructions of the fourteenth amendment by northern courts are to the same effect. \textit{See infra} Appendix.

\textsuperscript{53} Berger, \textit{supra} note 4, at 125–27.

\textsuperscript{54} R. KLUGER, \textit{SIMPLE JUSTICE} 654 (1976).

\textsuperscript{55} \textit{See RECONSTRUCTION AMENDS., supra} note 40, at 705. In 1883 the New York court, passing on an 1864 statute providing for separate schools for blacks, stated, “The attempt to enforce social intimacy and intercourse between the races, by legal enactments, would probably tend only to embitter the prejudices . . . which exist between them.” \textit{People ex rel. King v. Gallagher}, 93 N.Y. 438, 448 (1883).

\textsuperscript{56} \textit{RECONSTRUCTION AMENDS., supra} note 40, at 726.

\textsuperscript{57} Nathaniel Nathanson wrote about my demonstration that the fourteenth amendment “would not require school desegregation or negro suffrage. These are not surprising historical conclusions. The
reversal of the will of the framers. Warren's biographer concludes that "when one divorces Warren's opinions from their ethical premises, they evaporate. . . . [T]hey are individual examples of [Warren's own] beliefs leading to judgments." 58

Let it be assumed that segregation necessitated a breakout from constitutional limits; the trouble is, as Hamilton presciently noted in The Federalist, that "every breach of the fundamental laws, though dictated by necessity . . . forms a precedent for other breaches where the same plea of necessity does not exist at all." 59 What "necessity," what evil condemned by many, required the Court to cut down the hallowed twelve-man jury, to saddle the States with the duty immediately to support out-of-state indigent migrants, to curtail death penalties? Of these in turn.

D. Williams v. Florida: The Twelve-Man Jury

The twelve-man jury, Coke wrote, was "very ancient." 60 Usage, Matthew Bacon's Abridgment stated, called for a "petit jury of twelve, and can be neither more nor less," as Chief Justice Matthew Hale had earlier declared. 61 Trial by jury, this "most transcendent privilege," Blackstone observed, required a jury of twelve. 62 The South Carolina Constitution provided, for example, that "trial by jury, as heretofore used . . . shall be forever inviolably preserved. 63 In Holmes v. Walton, a statute providing for a six-man jury was held contrary to the 1776 New Jersey Constitution...
which preserved the "inestimable right of trial by jury." 64 In the Virginia Ratification Convention, Governor Edmund Randolph stated: "There is no suspicion that less than twelve jurors will be thought sufficient." 65

The Court itself held in *Patton v. United States* that it "is not open to question . . . that the jury should consist of twelve men, neither more nor less." 66

All this was thrown into the discard by *Williams v. Florida* 67 as "a historical accident, unrelated to the great purposes which gave rise to the jury in the first place," dismissing "superstitious insights into the significance of '12.' " 68 "Superstitions" cherished by the hard-headed Chief Justice Coke and which for 600 years have been embodied in law and practice are not so easily dismissed. As the Court held per Justice Holmes: "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ." 69 The idiosyncratic nature of the six-man decision is pointed up by the subsequent *Burch v. Louisiana*, rejecting a five-man jury, though ruefully admitting that "the line between six members and five was not altogether easy to justify." 70 The line drawn at "twelve" for 600 years needed no justification. The governing criterion was voiced anew by Chief Justice Burger in the recent legislative chaplain case: "Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." 71

64. The case, not officially reported, is discussed in C. HAINES. THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 92–95 (1932).

65. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 467 (J. Elliot ed. 1881)). Julius Goebel adverted to "popular sensitivity regarding any tampering with the 'inestimable' right of jury trial," and concluded that "[a]ny suggestion that the jury system as then entrenched might be amended in any detail was beyond tolerance." 1 J. GOEBEL. HISTORY OF THE SUPREME COURT OF THE UNITED STATES 141, 493 (1971).

66. 281 U.S. 276, 288 (1930); see also Thompson v. Utah, 170 U.S. 343, 350 (1898) ("the words 'trial by jury' were placed in the Constitution . . . with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument.").


68. Id. at 88, 89–90. On the other hand, Justice Holmes said, "A common-law judge could not say, 'I think the doctrine of consideration a bit of historical nonsense and shall not enforce it . . . .'") Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).


70. 441 U.S. 130, 137 (1979). One is reminded of the chant in George Orwell's *Animal Farm* 38 (1946): "FOUR LEGS GOOD, TWO LEGS BAD."

unimpeachable test the twelve-man jury, death penalties, and out-of-state indigent decisions, cannot stand up. Rather, they illustrate that constitutional decisions are a product of the Justices' "gut" reactions.72

E. Shapiro v. Thompson: Migrant Indigents' Right To Support

Resting on the "right to travel," Shapiro v. Thompson73 struck down state requirements of one year of residence before an indigent migrant would be eligible for "welfare" aid. An advocate of the unrestricted right to travel, Zechariah Chafee, wrote, "[T]here is a queer uncertainty about what clause in the Constitution establishes this right" to travel.74 Justice Harlan stamped it a "nebulous judicial construct";75 and the Shapiro majority noted that the "right finds no explicit mention in the Constitution," but found "no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision," content that it "has been firmly established"—by the Court.76 But such self-serving statements do not dispense with the necessity of finding constitutional footing for curtailment of long-settled states' rights. Assuming the existence of a "right to travel," it is a manifest non sequitur to insist that it entitles a migrant to immediate support at the terminus.77

For 600 years the law and practice were to the contrary. reaching back to pre-Elizabethan custom and law, picked up by colonial enactments and, at the time of Shapiro, expressed in the statutes of forty or more States.78 As Margaret Rosenheim, an admirer of Shapiro, wrote, the "'duralon residence requirement' had 'seemed to be permanent'; derived from the Elizabethan Poor Law, it 'had been part of the states' poor relief laws from the beginning.'"79 English and colonial communities excluded pauper-strangers from support in order to reduce the burden of relief. In providing for the "'privileges and immunities' to be extended to residents of sister States, Article IV of the Articles of Confederation

72. Justice Douglas disclosed that "the 'gut' reactions, of a judge at the level of constitutional adjudications, dealing with the vagaries of due process... was the main ingredient of his decision." W. DOUGLAS, THE COURT YEARS, 1939-1975, at 8 (1980); see also supra note 7.
74. Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 188 (1956).
78. Id. at 854-66.
79. Id. at 855.
declared that the “people of each State shall have free ingress and regress to and from any other state . . . paupers . . . excepted.’”80 Just as the “privileges or immunities” of the fourteenth amendment were “intended [to be] the same” as those of Article IV,81 so the latter carried all the “limitations” of the predecessor Articles of Confederation phrase.82 So there is good reason to conclude that the exclusion of paupers has constitutional sanction.

Very early the constitutional validity of state law reflecting these practices was recognized by the Court in Mayor of New York v. Miln.83 Although Justice Story dissented, he “admitted” that the States “have a right to pass poor laws, and laws to prevent the introduction of paupers,”84 all being in agreement as to the right to exclude paupers.85 As Justice Story remarked in a similar case, “such long acquiescence in it, such contemporaneous expositions of it, and such extensive and uniform recognition [and embodiment in State law of it] . . . would . . . entitle the question to be considered at rest.”86 Were the issue doubtful, the welfare of indigent migrants should be balanced against the burden upon local taxpayers of supporting them. The recent deluge of 100,000 Cubans has overtaxed the capacity of Miami to provide needed services and support.87 For 600 years English, colonial, and state law protected

80. Id. at 862.
82. “[T]he text of article 4, § 2, of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations . . . .” United States v. Wheeler, 254 U.S. 281, 294 (1920).
83. 36 U.S. (11 Pet.) 102 (1837).
84. Id. at 156 (Story, J., dissenting).
85. See also Railroad Co. v. Husen, 95 U.S. 465, 470-71 (1877); The Passenger Cases, 48 U.S. (7 How.) 283, 406 (1849).
86. Prigg v. Pennsylvania, supra note 69; for similar utterances, see Berger, supra note 77, at 859 n.48. Contemporaneously with the adoption of the fourteenth amendment. Chief Justice Thomas Cooley, with Justice Story a preeminent commentator of the Constitution, wrote:

A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. . . . [A] court or legislature which should allow a change in public sentiment to influence it in giving construction to a written constitution a construction not warranted by the intention of the founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail.

T. COOLEY, supra note 69, at 67 (emphasis added). So taken for granted was the “original understanding” rule, that another contemporary court could say without troubling to cite cases that “[o]ne of the cardinal rules of construction is, that courts shall give effect to the intent of the framers of the instrument.” Cory v. Carter, 48 Ind. 327, 342 (1874).

87. John V. Lindsay, former Mayor of New York, wrote that the federal government must relieve states and local governments of the fiscal burdens that are brought to their doorsteps by the migrating poor. . . . Urban areas, which have become the repositories of the poorest of the
ratepayers from support of indigent migrants. When the Court outlawed such laws in 1969, it disregarded established criteria of constitutionality.

F. The Death Penalty Cases

A final example of unwarranted manipulation of constitutional terms is furnished by the Court’s intrusion into the field of death penalties. Hamilton had assured the Ratifiers in Federalist No. 17 that “there is one transcendent advantage belonging to the province of the State governments... the ordinary administration of criminal and civil justice.”\(^8\) Nevertheless the Court, under cover of “selective incorporation,” has held that a death penalty for rape\(^9\) or for a murderer’s accomplice violates the “cruel and unusual punishments” clause of the eighth amendment.\(^9\) And under that banner it has required unprecedented “standards” for jury sentencing that have enabled it to overturn convictions of undoubted murderers.\(^9\) For 300 years, from 1689 when the English Bill of Rights first employed the phrase, until 1972 when the Court belatedly discovered that it curtailed the right to punish by death, such penalties had been employed without let or hindrance. Before that discovery, Hugo Bedau, an impassioned opponent of death penalties, stated. “No death sentence had ever been voided as a violation of due process, equal protection” or “cruel and unusual punishment.”\(^9\) “Until fifteen years ago,” he wrote, “save for a few mavericks, no one gave any credence to the possibility of ending the death penalty by judicial interpretation of constitutional law... Save for a few eccentrics and visionaries,” he remarked, the death penalty was “taken for granted by all men... as a bulwark of the social structure.”\(^9\) To borrow from the Court’s 1983 “legislative chaplain” decision, a practice that “has continued without interruption ever since [the earliest] session of Congress”\(^9\) cannot be

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8. THE FEDERALIST No. 17 at 103 (Mod. Lib. ed. 1941). He repeated in the New York Ratification Convention. “the states have certain independent powers, in which their laws are supreme: for example, in making and executing laws concerning the punishment of certain crimes, such as murder, theft, etc., the states cannot be controlled.” 2 ELLIOT, supra note 65, at 362.
13. Id. at 118, 120.
14. Marsh v. Chambers, 103 S. Ct. 3330, 3334 (1983). Commenting on a construction by the First Congress, confirmed by a practice of 40 years, Madison stated. “No novel construction, however ingeniously devised... can withstand the weight of such authorities, or the unbroken current of so prolonged and universal a practice.” 4 ELLIOT, supra note 65, at 602.
deemed a "cruel and unusual punishment." That particular Congress had drafted the eighth amendment, and it enacted a statute which made murder, robbery, and other offenses punishable by death; and to safeguard the penalty it prohibited resort to "benefit of clergy" as an exemption from capital punishment.95 Further evidence that the Framers did not intend to bar death penalties is furnished by the face of the Constitution, what another "opponent of death penalties," Sanford Levinson, considers a "devastating" fact: "[B]oth the Fifth and Fourteenth Amendments specifically acknowledge the possibility of a death penalty. They require only that due process of law be followed before a person can be deprived of life." And he reluctantly concedes that "Berger easily shows that the various framers did not regard infliction of death as cruel or unusual."96

Fourteen months before the split Court in Furman v. Georgia97 demanded "standards" for the guidance of juries, it declared in McGautha v. California: "we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."98

That conclusion, I found, is confirmed by the historical materials;99 to cite only the summation by Chief Justice Thomas Cooley, who said of an attempt

to surround the jury with arbitrary rules as to the weight they shall allow the evidence [which is at the heart of the Court-imposed "standards"] . . . no such arbitrary rules are admissible . . . [T]he jury must be left to weigh the evidence by their own tests. They cannot properly be furnished for this purpose with balances which leave them no discretion.100

"Cruel and unusual punishment" left this discretion untouched, for it applied only to the nature of the punishment, not to the process whereby it was decreed. The "untrammeled discretion" enjoyed for centuries by the jury was an "attribute" of the "trial by jury"101 secured by the

95. Act of April 30, 1790, ch. 9, 1 Stat. 115, 119. This exemption was first afforded to the clergy and then to such of the laity as could read. M. RADIN, ANGLO-AMERICAN LEGAL HISTORY 230-31 (1936). See Hampton Co. v. United States, supra note 24.
97. 408 U.S. 238 (1972).
100. People v. Garbutt, 17 MICH. L. REV. 9, 27-28 (1868). The Founders placed their faith in juries, not in judges. R. BERGER, supra note 91, at 133-34. As said by Herbert Storing, "the jury trial provided the people's safeguard at the bottom, administrative level." 1 H. STORING, THE COMPLETE ANTI-FEDERALIST 19 (1981) (quoting the Federal Farmer: "by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful control in the judicial department").
101. For assurances by John Marshall, Edmund Randolph, and Edmund Pendleton that "trial by
Constitution and therefore protected from judicial control.\textsuperscript{102} It follows that the "standards" requirement—which has resulted in a wilderness of confusion\textsuperscript{103} and a death row log-jam—is "unconstitutional."\textsuperscript{104}

In revising the meaning that "cruel and unusual" had for the Framers, the Court followed in the footsteps 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."\textsuperscript{105} Be it assumed that death penalties are a savage survival, the Court is not empowered to cram its morals down the throats of the American people. They were not deprived by the Constitution of the right to make their own moral choices. Jealously rationing power, circumscribing it at every step, the Framers resorted to familiar common law terms to prick out those limits. If the Court is free to substitute its own meaning for the established content of the constitutional terms, it obliterates those limits and substitutes its own predilections.\textsuperscript{106} In turning its back on the practice that obtained at the adoption of the Constitution and persisted for another 181 years, the Court assumed power to amend the Constitution, a power that was reserved to the people.

II. ACTIVIST JUSTIFICATIONS OF JUDICIAL REVISIONISM

Activist writings, Mark Tushnet observes, are "plainly designed to

\textsuperscript{102} Trial by jury is mentioned several times in the Constitution; judicial review not at all. In the Convention, Elbridge Gerry "urged the necessity of Juries to guard [against] corrupt Judges." 2 M. FARRAND, supra note 8, at 587. Insistence on "standards" for jury verdicts runs counter to Wilson's praise in the Pennsylvania Ratification Convention of "another advantage annexed to the trial by jury; the jurors may indeed return a mistaken, or ill founded verdict, but their errors cannot be systematical." J. McMaster & F. Stone, supra note 27, at 404. See H. STORING, supra note 100. The Founders had in mind jury control of judges, not judicial control of juries.

\textsuperscript{103} R. BERGER, supra note 91, at 139–52.

\textsuperscript{104} In Erie Ry. v. Tompkins, 304 U.S. 64, 79 (1938), the Court, per Justice Brandeis, quoting Justice Holmes, branded the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) an "unconstitutional assumption of powers by the Courts of the United States which no lapse of time . . . should make us hesitate to correct."

\textsuperscript{105} 1 C. BRINTON, J. CHRISTOPHER & R. WOLFF, A HISTORY OF CIVILIZATION 115 (1960). From "their experiences under the Protectorate, Englishmen learned that . . . the claims of self-appointed saints to know by divine inspiration what the good life should be and to have the right to impose their notions on the ungodly could be as great a threat as the divine right of kings." Auden, Introduction to S. SMITH, SELECTED WRITINGS at xvi (W. Auden ed. 1956).

\textsuperscript{106} See infra text accompanying note 126; and cf. Hampton & Co. v. United States, 276 U.S. 394 (1928), quoted supra note 24.
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protect the legacy of the Warren Court," and to that end activists are busily spinning theories whose only merit is novelty.

A. The "Original Intention"

Activist attacks on the original intention rule are a very recent phenomenon, inspired by the need to protect the desegregation and reapportionment decisions which demonstrably are contrary to the framers' intention. Typical is Paul Brest:

[M]any scholars and judges reject Berger's major premise, that constitutional interpretation should depend chiefly on the intent of those who framed and adopted a provision. . . . Whatever the framers' expectations may have been, broad constitutional guarantees require the Court to discern, articulate and apply values that are widely and deeply held by our society . . . .

"Widely and deeply held" cannot be said of the school prayer, abortion, and death penalty decisions. And among the judges who do not share Brest's view was his beloved mentor, Justice Harlan: "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 . . . ." In truth, activists seek to jettison a doctrine of which Jacobus tenBroek, a critic of the rule, said "[the Court] has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument. . . ."


108. Brest adjures academy "simply to acknowledge that most of our writings [about judicial review] are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good." Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Scholarship, 90 YALE L.J. 1063, 1109 (1981). See also his rejection of the rationalizations of "seven representative scholars," id. at 1067-89.


110. So Harlan is identified in Brest's dedication of his casebook, P. BREST, supra note 109, at 1329.


1. Common Law Terms

It will be illuminating first to discuss the Framers’ cognate employment of common law terms. The Founders resorted to a written constitution the more clearly to limit delegated power, to establish a “fixed” constitution alterable only by amendment. A key means for accomplishment of that purpose was their use of common law terms of established and familiar meaning. Doubtless, the Framers were aware of the long-settled rule of construction expressed in Matthew Bacon’s Abridgment: “If a statute makes use of a Word the meaning of which is well known at the Common Law, the Word shall be understood in the same sense it was understood at the Common Law.” Chief Justice Marshall applied the rule in Gibbons v. Ogden, stating that if a word was understood in a certain sense “when the Constitution was framed . . . the convention must have used it in that sense,” and it is that sense that is to be given judicial effect. A procession of judges followed in his path. And in 1925 the Court explained:

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention . . . were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary . . . [W]hen they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

Examples of such terms are bills of attainder, ex post facto, habeas corpus, and trial by jury. To express all that was implicated in “trial by

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113. P. KURLAND, WATERGATE AND THE CONSTITUTION 7 (1983). Justice William Paterson, a leading Framer, declared, “The constitution is certain and fixed . . . and can be revoked or altered only by the authority that made it.” Van Horne v. Dorrance, 28 F. Cas. 1012, 1014 (1795) (No. 16,857). Chief Justice Marshall, who had been a proponent of judicial review in the Virginia Ratification Convention, declared that a written constitution was designed to define and limit power, and asked, “To what purpose are powers limited . . . if those limits may, at any time, be passed by those intended to be restrained.” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

Justice Story emphasized that:

the government of the United States is one of limited and enumerated powers; and that a departure from the true import and sense of its powers is protanto the establishment of a new constitution. It is doing for the people, what they have not chosen to do for themselves. It is usurping the functions of a legislator.

114. For a detailed discussion, see R. BERGER, supra note 91, at 59–76.

115. 4 M. BACON, supra note 61, at (1), (4).

116. 22 U.S. (9 Wheat.) 1, 190 (1824); see also Thompson v. Utah, 170 U.S. 343, 350 (1898).


jury,” for example, would have required prolix detail unsuited to a “compact draft.” Hence, when anxious delegates inquired whether they would have the prized right to challenge jurors, they were assured that it was an “attribute” of trial by jury.119 So rooted was the presupposition that English law would apply that the First Congress prohibited resort to “benefit of clergy” as an exemption from capital punishment.120 Consequently, as Justice Story stated in 1820, the common law “definitions are necessarily included, as much as if they stood in the text of the act.”121

Activists counter that over the years words change their meaning.122 But it does not follow that we may saddle the Framers with our meaning.123 Even Humpty Dumpty did not carry it so far as to insist that when Alice “used” a word he could dictate what she meant. The beau ideal of activists, Chief Justice Warren, said, “[t]he provisions of the Constitution” are “the rules of government.”124 By changing the meaning of the words in which they were framed the Court changes the rules, thereby reducing written limits on power to ropes of sand. Chief Justice Taney perceived that “[i]f in this Court we are at liberty to give old words new meanings . . . there is no power which may not, by this mode of construction, be conferred on the general government and denied to the States.”125 That constitutional terms must mean what they meant to the

120. See supra note 95.
123. In his casebook, Brest wrote:
Suppose that the Constitution provided that some acts were to be performed “bi-weekly.” At the time of the framing of the Constitution, this meant only “once every two weeks”; but modern dictionaries, bowing to pervasive misuse, now report “twice a week” (i.e., semi-weekly) as an acceptable definition. To construe the provision now to mean “semi-weekly” would certainly be a change of meaning (and an improper one at that).

P. BREST, supra note 109, at 146 n.38. That has been the accepted view:
The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now . . . . “Any other rule of construction would abrogate the judicial character of this court, and make it a mere reflex of the popular opinions or passion of the day.”

South Carolina v. United States, 199 U.S. 437, 448, 449 (1905). Activists seek to bend the Court to their own passions, see supra note 108, often at war with those of the people.
125. The Passenger Cases, 48 U.S. (7 How.) 283, 478 (1849) (Taney, C.J. dissenting). Madison stated, if “the sense in which the Constitution was accepted and ratified by the nation . . . be not the guide in expounding it, there can be no security . . . for a faithful exercise of its powers.” 9 J. MADISON, WRITINGS 191 (G. Hunt ed. 1900–1910).
Framers was categorically stated by the Court. With Willard Hurst, I would underscore that “[i]f the idea of a document of superior legal authority”—the “fixed Constitution” dear to the Framers—“is to have meaning, terms which have a precise, history-filled content to those who draft and adopt the document [or to which they attach a clear meaning] must be held to that precise meaning.”

2. The Framers’ Intention

For Hurst, the terms to which the Framers attached clear meaning were no more alterable than common law words of established meaning. Common sense demands no less. Why should words which are defined by external common law practice weigh more heavily than those clearly explained by the draftsmen themselves? Respect for their intention goes back to medieval days, as the Court noted, saying “the books are full of authorities to the effect that the intention of the lawmaking power will prevail, even against the letter of the statute. . . . ‘The intention of the lawmaker is the law.’” That was the established rule at the framing of the Constitution. In a treatise known to colonists, Thomas Rutherforth assimilated the interpretation of statutes to that of contracts and wills, and stated that “[t]he end, which interpreters aim at, is to find out what was the intention of the writer to clear up the meaning of his words.” On the heels of the Convention, Justice James Wilson, second only to Madison as an architect of the Constitution, said, “[t]he first and governing maxim in the interpretation of a statute is, to discover the meaning of those, who made it.” The reason was made clear by Justice Story.


128. It needs emphasis that I did not treat ambiguous legislative history but confined myself to the framers’ unmistakable intention to exclude suffrage and segregation from the ambit of the fourteenth amendment.


130. T. RUTHERFORTH, INSTITUTES OF NATURAL LAW 307 (1754–1756). Rutherforth’s INSTITUTES, said Justice Story, “contain a very lucid exposition of the general rules of interpretation.” 1 STORY, supra note 113, § 403 n.1, at 285. Justice Robert Yates of the New York Supreme Court and a delegate to the Convention, wrote under the pseudonym “‘Brutus’” that the Constitution is to be explained “according to the rules laid down for construing a law.” C. KENYON, THE ANTIFEDERALISTS 337 (1966).

Recognition of the writer’s intention is the very essence of communication. As Walter Benn Michaels observes, “no one treats sounds or marks as words unless he or she thinks of them as speech acts expressing the intentions of some agent. No one would even try to interpret the Constitution if everyone thought it had been put together by a tribe of monkeys with quills.” Michaels, Book Review, 61 Tex. L. Rev. 765, 774 (1982) (footnote omitted).

asking how a federal statute is to be interpreted. "Are the rules of the common law to furnish the proper guide, or is every court and department to give it any interpretation it may please, according to its own arbitrary will?"132 The Founders preferred rules, in the words of Chancellor Kent, to "a dangerous discretion ... to roam at large in the trackless field of [the judges'] own imagination."133

In a "blinding" flash of insight, Judge John Gibbons of the Third Circuit Court of Appeals134 rejected the application "to constitutional history of the inadequate tools of statutory interpretation."135 Are judges to enjoy greater discretion in seeking the will of the Framers than they do in the case of mere legislators? Why indeed should we be willing to effectuate the will of a testator and deny effect to the unmistakable intention of the Framers? Gibbons overlooked that the common law proceeds by analogy, from wills to statutes, from statutes to constitutions. Since the common law knew no written constitutions, judges had to turn, as did Marshall, to rules pertaining to "other legal documents."136 Edward Corwin observed that our early judges adapted "the numerous [common law] rules for construction of written instruments ... to the business of constitutional construction."137 Julius Goebel likewise noted that the Founders were accustomed to "resort to the accepted rules of statutory interpretation to settle course, the purpose of written instruments is to express some intention or state of mind of those who write them, and it is desirable to make that purpose effectual ... ." O. HOLMES, COLLECTED LEGAL PAPERS 206 (1920).

132. 1 J. STORY, supra note 113, § 158 n.2, at 112.
133. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 373 (9th ed. 1858).
134. Gibbons charged me with discerning the original intention "with blinding clarity in the stygian darkness of the records of the 39th Congress." Gibbons, Book Review, 31 RUTGERS L. REV. 839, 840 (1978). This about the "irrefutable" exclusion of suffrage from the fourteenth amendment!
135. Id. at 847. President Washington, however, appealed to the original understanding in maintaining that a treaty did not require consent of the House. Washington said that in the Journal of the Convention it appeared "that no Treaty should be binding on the United States which was not ratified by a law," and that the proposition was explicitly rejected." 3 M. FARRAND, supra note 8, at 371. Although Madison considered that the meaning of the Constitution was to be sought in the records of the Ratification Convention rather than in those of the Federal Convention, id. at 518, he nevertheless turned to the understanding of the Framers, id. at 458, 464, 473, 534.

 activists attack the "original intention" because it thwarts their free-wheeling interpretations. Paul Bator remarks on "the total triumph of a kind of reductionist legal realism, that leads people to believe that you are entitled to put anything you want in the Constitution." Bator, supra note 20, at 53.

the intent and meaning of constitutional provisions." Other commentators concur. Gibbons' ill-considered foray can draw comfort from the reigning idol of jurisprudences, Ronald Dworkin, who flatly asserts that "there is no such thing as the intention of the Framers waiting to be discovered." He is refuted by what Justice Harlan justly described as the "irrefutable and... unanswered" evidence for the framers' exclusion of suffrage from the fourteenth amendment. The pervasive hostility to Negro suffrage is strikingly exemplified by the 112-to-12 and 34-to-4 votes in the House and Senate, rejecting attempts to compel Tennessee to embody Negro suffrage in its Constitution. Here are indubitable "intentions."

Weighing the alternatives, Mark Tushnet observed that the interpretivist view that "we are indeed better off being bound by the dead hand of the past than being subjected to the whims of willful judges trying to make the Constitution live...[is] 'fairly powerful.'" Feeble are the arguments to the contrary. As said by Justice Harlan, "[w]hen the Court disregards the express intent and understanding of the Framers [as with segregation and suffrage], it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which is its highest duty to protect." Activists may flatter themselves that they have buried the "intention" doctrine, but the corpse sprang to life in the Court's recent legislative chaplain case: "Clearly the men who wrote the First Amendment religion clause did not view paid legislative chaplains and opening prayers as a violation of that amendment."

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141. Supra text accompanying note 43.
142. Supra text accompanying note 41.
143. Tushnet, supra, note 136, at 787. The theory, interpretivism, that the Court is not empowered to revise the Constitution, says Thomas Grey, a devout activist, is "of great power and compelling simplicity...deeply rooted in our history and...in our formal constitutional law...the theory upon which judicial review was founded in Marbury v. Madison." Grey, Do We Have an Unwritten Constitution? 27 STAN. L. Rev. 703, 705 (1975).
B. General Language

Activists rely heavily on the "general" terms employed in the Constitution as an "invitation" to judicial legislation. The argument will be considered first in the 1787 setting and then in the 1866 setting of the fourteenth amendment.

1. 1787

Amongst the "circumstantial evidence that the framers authorized interpreters of the Constitution to make value judgments that are not necessarily analogous to the framers' own particular value judgments," Gary Leedes points to Carl Friedrich's statement that in the eighteenth century norms were considered "the more important and valuable, the more general they were."\(^{146}\) Yet Samuel Adams wrote that "[v]ague and uncertain laws, and more especially constitutions, are the very instruments of slavery."\(^{147}\) One of the Framers, Rufus King, told the Massachusetts Convention that the Federal Convention sought "to use those expressions that were . . . least equivocal in their meaning . . . . We believe that the powers are clearly defined, the expressions as free from ambiguity as the Convention could form them . . . ."\(^{148}\) Understandably, Madison wrote that "it exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant & cautious definition of federal powers, should have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions & definitions elaborated by them."\(^{149}\) Men do not use words to defeat their purpose.\(^{150}\)

Nevertheless, John Hart Ely regards the ninth amendment as an open-ended provision, "intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution."\(^{151}\) "[R]ead for what it says," he avers, "the Ninth Amendment seems open-textured enough to support almost anything one might wish to argue, and that thought can get pretty scary."\(^{152}\) An "open-ended" grant that scares Ely across the gap of 200 years can hardly be laid at the door of the Founders, to many of whom the federal courts were suspect.\(^{153}\)

The ninth amendment provides, "[t]he enumeration in the


\(^{147}\) 3 S. ADAMS, WRITINGS 262 (H. Cushing ed. 1904).

\(^{148}\) 3 M. FARRAND, supra note 8, at 268.

\(^{149}\) Id. at 488.


\(^{151}\) J. ELY, DEMOCRACY AND DISTRUST 38 (1980).

\(^{152}\) Id. at 34.

Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Madison made clear that the retained rights were not "assigned" to the federal government, emphasizing that they constitute an area in which the "[g]overnment ought not to act." Ely himself observes, "[o]ne thing we know to a certainty from the historical context is that the Ninth Amendment was not designed to grant Congress authority to create additional rights, to amend Article I, Section 8 by adding a general power to protect rights," pointing out that the phrase "others retained by the people" is not "an apt way of saying 'others Congress may create.'" What Congress may not "create" also lies outside the judicial province. Madison left no doubt that the "great object" of a Bill of Rights was to "limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act or to act only in a particular mode." It perverts meaning to read the retention of unenumerated rights as a grant of "open-ended" power.

2. 1866

Instead of meeting the undeniable exclusion of suffrage, for example, activists rely on the generality of the fourteenth amendment's language. Thus Gary Leedes considers that "[t]he loose language of the fourteenth amendment . . . was a standing invitation for innovative interpretation." So too, Ely asserts that its framers issued "open and across-the-board invitations to import into the constitutional decision process considerations that will not be found in the amendment nor [sic] even . . . elsewhere in the Constitution." For him the "Privileges or Immunities"
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clause is "inscrutable," and the "Equal Protection" clause no more forthcoming. He is aware, moreover, that "vague and untethered standards inevitably lend themselves to the virtually irresistible temptation to intervene when one's political or moral sensitivities are sufficiently affronted." His attribution to the framers of an intention to issue such an invitation to the Court is at war with his recognition that the Dred Scott (and fugitive slave cases) had "spilled over into a general distrust of the institution of judicial review." In truth, the framers bitterly resented the Court's intrusion into "settlement of political questions which," said John Bingham, "it has no more right to decide for the American people than has the Court of St. Petersburg." In consequence, they confided enforcement of the amendment to Congress, not the Court; section 5 provides "Congress shall have power to enforce . . . ." This is incompatible with a free rein to read judicial predilections into the amendment. Now to examine the several clauses.

a. Due Process

Leedes' reference to the "loose language" of the amendment is paralleled by others who label the due process clause, for instance, as "vague." To the extent that it is "vague," it is because the Court has made it so. On the eve of the Convention, Hamilton stated that "[t]he words, 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice." Charles Alexander, Painting Without the Numbers: Noninterpretive Judicial Review, 8 U. DAYTON L. REV. 447 (1983).

159. J. ELY, supra note 151, at 98.
160. Ely, supra note 158, at 403.
161. Id. at 448.
162. 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 462 (1971).
163. P. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 19 (2d. ed. 1961): "phrases like 'due process of law' [are] . . . of 'convenient vagueness.' ".
164. 4 THE PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett & J. Cooke eds. 1962). Two English scholars who presumably are familiar with English legal institutions are in accord with Hamilton. Lord Beloff wrote, due process of law "was transformed from an apparently procedural limitation into one of substance . . . from a statement that some things should be done only in a particular way [judicial proceedings] to a statement that some things could not be done at all even by legislation." M. BELOFF, supra note 1, at 48. Denis Brogan referred to the "astonishingly wide meaning given to 'due process of law,' " which "has come to mean anything that a majority of the Court has found contrary to its sense of natural justice and enlightened reason." D. BROGAN, THE CRISIS OF AMERICAN FEDERALISM 32 (1944) (footnotes omitted). For a study of English antecedents see Berger, "Law of the Land" Reconsidered, 74 NW. U.L. REV. 1 (1979). In a classic work, Charles G. Haines wrote that due process of law "referred in England to a method of procedure in criminal trials," and that when the term was "inserted in the American state constitutions it was accepted with the usual English significance" and "chiefly used as a protection to individuals against summary and arbitrary
Curtis, an admirer of the Court’s transformation of due process, wrote that the meaning of the fifth amendment’s due process of law “was as fixed and definite as the common law could make a phrase. . . . It meant a procedural process.”165 In the fourteenth amendment the words were “used in the same sense and with no greater extent.”166 as the legislative history confirms. Ely found no references that gave the fourteenth’s clause “more than a procedural connotation.”167 The framers did not view “due process” as a “vague” term but one of fixed and narrow meaning.168

b. Privileges or Immunities

The words “privileges and immunities” are first met in article IV of the Articles of Confederation: “the people of the different states . . . shall be entitled to all privileges and immunities of free citizens in the several states,” specifying “all the privileges of trade or commerce.”169 For the Founders, the enumerated “privileges of trade or commerce” qualified the general words “privileges and immunities.”170 The latter words were picked up by article IV of the Constitution, and very early the courts of Maryland and Massachusetts construed them in terms of trade and commerce.171 The words came into the fourteenth amendment via the Civil Rights Bill of 1866, which referred to “civil rights and immunities.”172 After reading from the cases, Senator Lyman Trumbull, chairman of the Senate Judiciary Committee, stated that “[t]he great fundamental rights

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165. Curtis, Review and Majority Rule, in SUPREME COURT AND SUPREME LAW 170, 177 (E. Cahn ed. 1954). “When the Fifth Amendment was added to the Constitution in 1792, no one . . . had ever suggested that the term ’due process of law’ had any other than its anciently established and self-evident meaning of correct procedure . . . .” E. CORWIN. THE TWILIGHT OF THE SUPREME COURT 95 (1934). The “modern doctrine of due process of law . . . could never have been laid down except in defiance of history.” Id. at 118–19.


168. James Garfield, a framer of the fourteenth amendment, explained in 1871 that due process of law meant “an impartial trial according to the law of the land.” CONG. GLOBE. 42d Cong.. 1st Sess. 152–53 (1871).


170. Madison wrote:

[F]or what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars.


172. Section 1 of the bill is set out in CONG. GLOBE. 39th Cong., 1st Sess. 474 (1866).
set forth in this bill [are] the right to acquire property, the right to . . . make contracts, and to inherit and dispose of property," the very rights the Black Codes denied. Even so, John Bingham, draftsman of the amendment, protested that "civil rights and immunities" was "oppressive" and so broad as to encroach on the province of the states. So the phrase was deleted in order to obviate a "construction going beyond the specific rights named in the section," a "latitudinarian construction not intended." In substituting the narrower word "privileges" for "rights" in the amendment, Bingham hardly embraced the "latitudinarian construction" he had denounced. Justice Bradley declared in 1870 that "the first section of the bill covers the same ground as the fourteenth amendment." That ground, the Supreme Court stated, was narrow.

By virtue of judicial construction, recognized by the framers, the words "privileges and immunities" had become words of art. Judge William Lawrence, regarded by his congressional fellows as a scholarly lawyer, observed that "the courts have by construction limited the words 'all privileges' to mean only 'some privileges.' " On the basis of much thinner evidence, the Court, per Justice Harlan, declared, "we should not assume that Congress . . . used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation."

173. Id. at 475.
176. Id. at 1366, 1367.
177. Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). Justice Harlan pointed out that in the Joint Committee on Reconstruction, Bingham was "successful in replacing § 1 of Owen's proposal, which read: 'No discrimination . . . as to the civil rights' with the . . . 'abridge the privileges or immunities of citizens' " avowedly borrowed from article IV. Oregon v. Mitchell, 400 U.S. 112, 172 (1970).
179. The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights. . . . [T]he Senate bill did contain a general provision forbidding "discrimination in civil rights or immunities," preceding the specific enumeration of rights. . . . Objections were raised in the legislative debates to the breadth of the rights of social equality that might be encompassed by a prohibition so general. . . . [A]n amendment was accepted [in the House] striking the phrase from the bill.
181. Yates v. United States, 354 U.S. 298, 391 (1957). Chief Justice Taney stated, "The members of the Convention unquestionably used the words they inserted in the Constitution in the same sense in which they used them in their debates." The Passenger Cases, 48 U.S. (7 How.) 283, 477
c. **Equal Protection of the Laws**

Unlike its companion clauses, "equal protection of the laws" had no antecedents. In such a case, Senator Charles Sumner counselled the framers that if the meaning of the Constitution is "in any place open to doubt, or if words are used which seem to have no fixed significance, we cannot err if we turn to the framers." Such were the views of his fellows in the Reconstruction Congress, summarized by a "unanimous Senate Judiciary Report, signed by Senators who had voted for the Thirteenth, Fourteenth and Fifteenth Amendments," the subject being the fourteenth:

A construction which should give the phrase . . . a meaning different 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. . . This is the rule of interpretation adopted by all commentators on the Constitution, and in all judicial expositions of that instrument. Mark that the Report considered the Framers' intention as weighty as the text, and, as Chief Justice Marshall had laid down, the meaning the words had for the Framers was to be given effect. That meaning is scarcely open to doubt; emphatically it was not expressive of uncircumscribed, boundless equality. Time and again the Framers had rejected proposals to ban all discrimination. Throughout the debates on the Civil Rights Bill—which proceeded on a parallel track with the amendment, which it was an object of the amendment to incorporate and shield from repeal, and which without dissent was regarded as identical with the amendment—the framers associated equal protection with the narrow group of rights the bill enumerated. One example must suffice: Samuel Shellsbarger of Ohio said, "whatever rights as to each of the enumerated civil (not political) matters the States may confer upon one race . . . shall be held by all races in equality . . . It [the bill] secures equality of protection in those enumerated civil rights." If two acts are in pari materia, the Court held, "it will be presumed that if the same word be used in both, (1849) (Taney, J., dissenting). See also Marshall, *supra* text accompanying note 116, and Thompson v. Utah, 170 U.S. 343, 350 (1898).

185. See *supra* note 116 and accompanying text.
187. *Id.* at 22–23; see also Justice Bradley, *supra* text accompanying note 178.
and a special meaning were given to it in the first act, that it was intended that it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention." 189 The repeated rejection of proposals to bar all discrimination forecloses a "contrary intention." It strains credulity to impute to Bingham, draftsman of the amendment, the "oppressive" breadth he had condemned in the bill.

Activists turn their back on such facts and instead descant on the framers' choice of "general" words in place of the enumerated rights of the bill. This recalls Henry Hart's scathing comment that William Crosskey "is a devotee of that technique of interpretation which reaches its apogee of persuasiveness in the triumphant question, 'If that's what they meant, why didn't they say so?'" 190 Enumeration, as Bickel noted, would conduce to the prolixity of a code. 191 Moreover, the framers could rely on the rule that the words they used would be construed as they understood them. 192 The issue was summed up in 1974 by Robert Bork:

The words are general but surely that would not permit us to escape the framers' intent if it were clear. If the legislative history revealed a consensus about segregation in schooling . . . . I do not see how the Court could escape the choices revealed and substitute its own, even though the words are general and conditions have changed. 193

Judge Learned Hand said of the desegregation decision, "'I have never been able to understand on what basis it does or can rest except as a coup de main.'" 194 The soundness of such views is attested by a remarkable fact: in an early version of the amendment, provision was made for both "'the same political rights and privileges; and . . . equal protection in the enjoyment of life, liberty, and property,'" testimony that "equal protection" was not deemed to comprehend "political rights and privi-

190. Hart, Book Review, 67 HARV. L. REV. 1456, 1462 (1954). Justice Holmes held that when a legislature "has intimated its will, however indirectly, that will should be recognized and obeyed... [I]t is not an adequate discharge of duty for courts to say 'We see what you are driving at, but you have not said it.' " Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908), quoted supra text accompanying note 18. 191. Supra text accompanying note 116; The Passenger Cases, 48 U.S. (How.) 283, 477 (1849) (Taney, C. J., dissenting) (quoted supra note 181).
When the latter words were deleted, at the instance of John Bingham, its draftsman, leaving "equal protection" standing alone, the latter patently did not include the elided "political privileges." Now to insist that "equal protection" includes what unmistakably was excluded, namely suffrage and segregation, is, in the words of Justice Story, to commit "a fraud" upon the people.

Yet another formidable hurdle confronts the "general" words school—the tenth amendment: "The powers not delegated to the United States . . . are reserved to the States respectively, or to the people." These rights are not to be curtailed under cover of "vague," "inscrutable" words, allegedly justifying judicial intrusion into what was the established province of the States, e.g., suffrage. As Roscoe Conkling, a member of the Joint Committee on Reconstruction of both Houses, stated, "[t]he proposition to prohibit States from denying civil or political rights to any class of persons, encounters a great objection on the threshold. It trenches upon the principle of existing local sovereignty" and "meddles with a right reserved to the States." An intention, said Chief Justice Marshall, "to establish a principle never before recognized, should be expressed in plain and explicit terms." That requirement was applied to the fourteenth amendment by Justice Miller, who refused to "embrace a construction" of the amendment that would subject the states' local concerns to "the control of Congress . . . in the absence of language which expresses such a purpose too clearly to admit of doubt." In short, an intention to diminish rights reserved by the tenth amendment must be clearly expressed.

Michael Perry considers, however, that reliance on the tenth amendment is historically unsound, since as Justice Brennan indicated in dissent:

The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state

197. "If the Constitution was ratified under the belief sedulously propagated, that such protection was offered, would it not now be a fraud upon the whole people to give it a different construction." 2 J. Story, supra note 113, § 1084.
200. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78 (1872). Justice Frankfurter said this case "has the authority that comes from contemporaneous knowledge of the purposes of the Fourteenth Amendment." Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 467 (1947) (Frankfurter, J., concurring).
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governments as it had been established by the Constitution before the amendment ... 201

A truism is a proposition that “is so obviously true as not to require discussion.” 202 Brennan failed to take into account that the tenth was adopted to put the obvious beyond peradventure; he overlooked that Justice Stone, from whom he borrowed the quotation, went on to say that its purpose was “to allay fears that the new national government might seek to exercise powers not granted.” 203 In Alpheus Thomas Mason’s more graphic terms, the opposition “had conjured up the image of a national colossus, destined to swallow up or destroy the defenseless states. To quiet these fears, Madison proposed the Tenth Amendment.” 204 The reservation, the Court stated, was “made absolutely certain by the Tenth Amendment” to forestall federal exercise of “powers which had not been granted.” 205 Consequently, reliance on the tenth as a shield against federal encroachments is strengthened rather than weakened by the fact that the Founders took the precaution to put into express terms what had rested on assurances and implications. 206

C. Open-Ended Terms

Alexander Bickel conceived a subtle variant of the “general” words and “change of meaning” theories: the Framers meant to leave posterity free to read into the amendment the suffrage and desegregation they had excluded. This escaped rejection of the Framers’ intention by attributing to them a theretofore undreamed of intention, an intention that has no factual foundation. As clerk to Justice Frankfurter, Bickel had informed him that “it is impossible to conclude that the 39th Congress intended that segregation be abolished, impossible also to conclude that they foresaw it might be, under the language they were adopting.” 207 What they did not foresee they did not authorize.

In a memorandum for his files, Justice Frankfurter, who had concluded that “in all likelihood, the framers of the amendment had not intended to

207. R. KLUGER, supra note 9, at 654.
outlaw segregation,”208 asserted that constitutional terms must accommodate “changes in men’s feelings,”209 so that equal protection could mean one thing in 1868 and the very opposite in 1954. Writing after his clerkship, Bickel framed a tentative hypothesis: might not “equal protection” be read to exhibit receptiveness “to ‘latitudinarian’ construction?” Bickel concluded that “[n]o one made the point with regard to this particular clause.”210 Noting that Republicans drew back from a “formula-dangerously vulnerable to attacks pandering to the prejudices of the people [which they themselves shared],”211 he speculated that the framers might have resorted to language which they could “defend against damaging alarms raised by the opposition, but which at the same time was sufficiently elastic to permit reasonable future advances?”212 More bluntly, Bickel hypothesized that the framers concealed the future objectives they dared not avow lest the whole enterprise be imperilled. There is not a shred of evidence that the framers employed double-talk to hoodwink the ratifiers. If they did, there was no ratification, because “If the material facts be either suppressed or unknown, the ratification is treated as invalid.”213

Attribution of such intentions to the framers overlooks that as late as 1875, a Reconstruction Congress, at last ready to bar discrimination in hotels and transportation facilities, rejected mixed schools because they would excite prejudice.214 No one mentioned that allegedly concealed authorization in the “open-ended” language. To postulate that in such an atmosphere of ingrown prejudice the 1866 framers tucked away in the amendment an authorization to do in futuro what they themselves could not stomach in the present is sheer fantasy. Bickel’s followers overlook

208. Id. 598.
211. Senator John Sherman of Ohio said in the Senate in 1862. “We do not like negroes. We do not disguise our dislike.” C. Woodward, supra note 51. George Julian, a radical from neighboring Indiana, told the House in 1866. “the real trouble is that we hate the Negro.” CONG GLOBE. 39th Cong., 1st Sess. 257 (1866).
212. Bickel, supra note 54, at 61.
214. Senator Aaron Sargent of California said, the common school proposal would reinforce “a prejudice powerful, permeating every part of the country.” 3 CONG REC 4172 (1874). For similar remarks in the House by Barbour Lewis of Tennessee, see 3 CONG REC 998 (1875), and William Phelps of New Jersey. id. at 1002.
that in 1970 Bickel wrote, "[t]he Framers of the Fourteenth Amendment explicitly rejected the option of an open-ended grant of power to Congress freely to meddle with conditions within the states, so as to render them equal in accordance with Congress's own notions."215 This denial of "open-ended" authority to future Congresses is at odds with its incorporation in the amendment. Congress well knew that its successors also could enact amendments, as the fifteenth speedily proved. Proof, not speculation, is required that the framers departed from the article V path and authorized posterity to interpret their determination to exclude suffrage and segregation as authority to reverse this exclusion. It remains to be said that a candid activist, seeking to clear away the underbrush of "theories," wrote that Berger "devastated the notion that the framers of the fourteenth amendment . . . intended it to be 'open-ended.'"216

D. The Constitution Must Grow

The "truly difficult question," Michael Perry considers, is "whether the original understanding of important power limiting provisions like the first and fourteenth amendments—the plainly narrow original understandings—ought, as a matter of constitutional theory, to be deemed the only legitimate sources of norms for constitutional adjudication." And he cites Gerald Lynch's argument for "institutional growth beyond the original understanding."217 This bland rhetoric masks a plea for judicial power to erase constitutional limits. Very early Justice Marshall declared that a written Constitution was designed to limit power and asked: "To what purpose are powers limited . . . if these limits may, in any time be passed by those intended to be restrained?"218 Later he specifically disclaimed a judicial right to change the instrument.219 The notion that a Constitution so limited could be made to "grow" by the judiciary is refuted by the evidence, which here can only be summarized: (1) The Founders' belief in a fixed Constitution of unchanging meaning, alterable only by the people through the process of amendment; (2) the avowedly inferior place of the judiciary in the federal scheme, deriving from suspicion of the innovative judicial review by judges who theretofore had been regarded with "aversion;" (3) the Founders' profound distrust of judicial discretion; (4) their attachment to the separation of powers and their insistence that

courts should not engage in policymaking but rather act solely as interpreters, not makers, of the law; (5) Hamilton, foremost advocate of judicial review, iterated that there "is no liberty, if the power of judging be not separated from the legislative and executive powers." That he did not mean to authorize the judiciary to take over legislative functions is demonstrated by his statement that courts may not "on pretense of a repugnancy . . . substitute their own pleasure for the constitutional intentions of the legislature." James Iredell, himself a powerful advocate of judicial review, put the matter unequivocally: within their constitutional boundaries legislatures are not controllable by the courts. And Hamilton assured the Ratifiers that judges could be impeached for deliberate usurpations on the authority of the legislature; and (6) The Founders' jealous attachment of states' rights and suspicion of federal courts, evidenced by the First Congress' grant of exclusive "arising under" jurisdiction to the state courts, is incompatible with the theory that courts could make the Constitution grow at the cost of the states' reserved rights.220

The foregoing greatly telescoped review of activist arguments should persuade that they are merely a facade concocted, as Leonard Levy observed, "to rationalize a growing satisfaction with judicial review among liberal intellectuals and scholars,"221 a satisfaction growing out of the Court's gratification of desires the people would not satisfy.222 The contra-activist doctrine—interpretivism, to borrow from Raymond Aron. "justifies itself by the falseness of the beliefs that oppose it."223

E. The Role of The Court

No activist has cited a constitutional provision that authorizes the Court to revise the Constitution, in Justice Black's scornful phrase, to keep it "in tune with the times."224 Such an authorization, Perry justly observes.

220. For detailed discussion and citations, see Berger, Michael Perry's Functional Justification for Judicial Activism, 8 U. DAYTON L. REV 465, 523-27 (1983).

221. JUDICIAL REVIEW AND THE SUPREME COURT 24 (L. Levy ed., 1967). Mark Tushnet notes that activists are "eager to superimpose a facade of rationality on the Court's decisions." Tushnet, Truth. Justice and the American Way: An Interpretation of Public Scholarship in the Seventies, 57 TEx. L. REV 1307, 1325 (1979). Federalism implies "a legally immutable constitution," A. DICEY, INTRODUCTION TO THE STUDY OF THE CONSTITUTION 142 (7th ed., 1903), as is confirmed by the article V provision that "no state . . . shall be deprived of its equal suffrage in the Senate."

222. See Bishop, infra text accompanying note 255.

223. Aron, Pensees, N.Y. Times, October 23, 1983 at E-19, col. 1. Interpretivism, unlike activism, was not recently fabricated to rationalize the Court's illegitimate decisions, but as activist Thomas Grey wrote it is "deeply rooted in our history and in our shared principles of political legitimacy. It has equally deep roots in our formal constitutional law . . . ." Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703, 705 (1975). Grey recognizes that the opposing view is more difficult to justify. Id. at 708.

"would have been a remarkable delegation for politicians to grant an
institution like the Supreme Court, given the electorates’ longstanding com-
mitment to policymaking . . . by those accountable unlike the Court, to
the electorate." 225 It would also have been an unexplained departure from
the long judicial tradition excluding judges from lawmaking. Samuel
Thorne tells us that Bracton wrote his treatise in 1250 because there had
been found judges "who decide cases according to their own will rather
than by the authority of the laws." 226 Hundreds of years later Francis
Bacon counselled judges "to remember that their office is to interpret the
law, and not to make it." 227 Just before our Revolution, Blackstone con-
demned "arbitrary judges" whose decisions are "regulated only by their
own opinions, and not by any fundamental principles of law" which
"judges are bound to observe." 228

Recognition of those bounds is evidenced by the statement of Justice
James Wilson in his 1791 Philadelphia Lectures: the judge "will remem-
ber, that his duty and his business is, not to make the law, but to interpret
and apply it." 229 Policymaking was emphatically considered out of judi-
cial bounds as is evidenced by the Framers’ rejection of the Justices’ par-
ticipation in a Council of Revision. It had been proposed that they should
assist the President in exercising the veto power on the ground that
"[I]laws may be . . . unwise, may be dangerous . . . and yet not be so
unconstitutional as to justify the Judges in refusing to give them ef-
fect." 230 But Elbridge Gerry objected: "It was quite foreign from the
nature of ye office to make them judges of the policy of public mea-
sures." 231 Nathaniel Gorhum said judges "are not to be presumed to pos-
sess any peculiar knowledge of . . . public measures;" 232 and John

225. M. PERRY, supra note 201, at 20. Perry considers that the principle of electorally account-
able policymaking is "axiomatic; it is judicial review, not that principle, that requires justification."
Id. at 9.
227. J. DRINKER, LEGAL ETHICS 327 (1953).
228. 1 W. BLACKSTONE, supra note 26, at 269. Chief Justice Mansfield stated, "Whatever
doubts I may have in my own breast with respect to the policy and expediency of this law . . . I am
bound to see it executed according to its meaning." Pray v. Edie, 99 E.R. 1113, 1114 (1786).
229. 2 JAMES WILSON, WORKS 302 (R. McCloskey ed. 1967). That was often repeated by the
Court: "It is the province of a court to expound the law, not to make it." Luther v. Borden, 48 U.S.
(7 How.) 1, 41 (1849) (Taney, C.J.); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874)
("Our province is to decide what the law is, not to declare what it should be") (Waite, C.J.). In
Houston v. Moore, U.S. (5 Wheat.) 1, 48 (1820), Justice Story emphasized, "[W]e are not at liberty
to add one jot of power to the national government beyond what the people have granted by the
constitution . . . ."
230. 2 M. FARRAND, supra note 8, at 73.
231. 1 M. FARRAND, supra note 8, at 97–98.
232. 2 M. FARRAND, supra note 8, at 73.
Dickinson stated that judges “ought not to be legislators.” 233 As Edward Corwin concluded, “The first important step in the clarification of the Convention’s ideas with reference to the doctrine of judicial review is marked, therefore, by its rejection of the Council of Revision idea on the basis of the principle . . . ’[T]hat the power of making ought to be kept distinct from that of expounding the law.’” 234 A leading activist, Charles Black, confirms that for the colonists, “The function of the judge was thus placed in sharpest antithesis to that of the legislator,” who alone was concerned “with what the law ought to be.” 235

Two other factors fed into this dichotomy. The Founders had a “profound fear of judicial independence and discretion,” 236 given colorful utterance by Chief Justice Hutchinson of Massachusetts: “the Judge should never be the Legislator: Because, then the Will of the Judge would be the Law: and this tends to a State of Slavery.” 237 Such sentiments were inspired by some sorry English history, epitomized by Lord Camden: “The discretion of a judge is the law of tyrants . . . In the best of times it is often caprice . . . in the worst, it is every vice, folly and passion, to which human nature is liable.” 238 Then there was the fact that colonial judges, often unsympathetic to expanding democratarianism, were saddled on the colonists by the Crown, so that Justice James Wilson did not find it surprising in 1791 that judges “were objects of aversion and distrust.” 239 To give the last word on policy to judges, therefore, would not only have been a “remarkable delegation,” it would have required a repudiation of established and cherished tradition. Instead, as Hamilton assured the Ratifiers, judicial authority was confined to “certain cases particularly specified. The expression of those cases marks the precise limits beyond which the federal courts cannot extend their jurisdiction . . . .” 240 Concretely, jurisdiction of cases “arising under” the Constitution implicitly excludes cases that do not “arise” thereunder, for instance, cases in which the Court has fashioned rights not conferred by

233. I M. FARRAND, supra note 8, at 108.
236. Wood, supra note 9, at 298.
237. Horwitz, The Emergence of an Instrumental Conception of American Law, 1780-1820, in PERSPECTIVES IN AMERICAN HISTORY 287, 292 (1971). Hutchinson echoed Montesquieu, the oracle of the Founders, who had written that if the judges were to be the Legislators, “the life and liberty of the subject would be exposed to arbitrary control.” de Montesquieu, The Spirit of the Laws, in 38 GREAT BOOKS OF THE WESTERN WORLD 70 (R. Hutchins ed. 1952).
240. THE FEDERALIST NO. 83 at 541 (Mod. Lib. ed. 1941) (emphasis added).
the Constitution, thereby taking over powers reserved to the States. Similarly, the article V provision for amendment by the people according to prescribed procedure precludes amendment by the Court. Even the legislature, darling of the Founders—in contrast to the judiciary which, Hamilton assured the Ratifiers, “was next to nothing”—cannot change the Constitution, for as Madison said, “it would be a novel & dangerous doctrine that a Legislature could change the constitution under which it held its existence.” Its attempt to do so was rejected in Marbury v. Madison: Congress is not empowered to enlarge the jurisdiction of the Court: “[N]o organ of the government may alter [the Constitution’s] terms.”

The traditional rule was reiterated by Chief Justice Taney: “It is the province of the court to expound the law, and not to make it,” as Chief Justice Waite later reaffirmed. Robert Bork pointedly commented: “The Supreme Court regularly insists that its results do not spring from the mere will of the Justices in the majority but are supported, indeed compelled, by a proper understanding of the Constitution . . . . Value choices are attributed to the Founding Fathers, not to the Court.”

Even Chief Justice Warren piously intoned that “[t]he provisions of the Constitution . . . are vital, living principles that authorize and limit governmental power . . . . They are the rules of government.” The activists’ extravagant rationalizations on its behalf have never been voiced by the Court. In a similar context, Bork wrote, “It should give theorists of the open-ended Constitution pause . . . that not even the most activist courts have ever grounded their claims for legitimacy” on such

241. For citations see Berger, Insulation of Judicial Usurpation: A Comment on Lawrence Sager’s “Court-Stripping” Polemic, 44 OHIO ST. L.J. 611, 615 n.44 (1983).

242. Article V was the “mode preferred by the convention” for alterations. THE FEDERALIST NO. 43 at 286 (Mod. Lib. ed. 1941). James Wilson noted that the parallel Pennsylvania Constitution “cannot be amended by any other mode than that which it directs. . . .” 2 ELLIOT, supra note 65, at 457. In the Massachusetts Ratification Convention, Jarvis observed that article V furnishes “an adequate provision for all the purposes of political reformation.” Id. at 116. That Article, Richard Law said in Connecticut, “provides a remedy for whatever defects [the Constitution] may have.” Id. at 200. “It is not the function of courts or legislative bodies . . . to alter the method [for change] which the Constitution has fixed.” Hawke v. Smith, 253 U.S. 221, 227 (1920); see also supra note 155.

243. THE FEDERALIST NO. 78 at 504 (Mod. Lib. ed. 1941) (quoting Montesquieu).

244. Lusky, supra note 14, at 406.


246. See supra note 228.

arguments.\textsuperscript{249} I cannot improve on Brest’s plea to academe “simply to acknowledge that most of our writings [about judicial review] are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the court to adopt our various notions of the public good.”\textsuperscript{250}

III. CONCLUSION

The argument for judicial activism—resort to extra-constitutional values—is fundamentally flawed: it is counter-majoritarian, hence, as Perry observed, “the recurring embarrassment of the noninterpretivists: majoritarian democracy is, they know, the core of our entire system . . . .”\textsuperscript{251} Earlier academe was deeply imbued with faith in majorities, but as Arthur Sutherland explained with admirable candor, a “change of political theory developed” deriving from “Hitler’s popularity among the German people, public support of the Un-American Activities Committee and the McCarthy hearings” and the like. “[V]otaries of unreviewed majoritarianism” suddenly realized that “unrestricted majorities could be as tyrannical as wicked oligarchs . . . We could not say in plain terms that occasionally we have to select wise and able people and give them the constitutional function of countering the democratic process . . . .”\textsuperscript{252} Again a gift from the omnipresent “we”!\textsuperscript{253} But as Myres McDougal wrote some years ago, “Government by a self-designated elite—like that of benevolent despotism of Plato’s philosopher kings—may be a good form of government for some peoples, but it is not the American way.”\textsuperscript{254}

No intellectual can but from time to time be disappointed by the vox populi, but as Winston Churchill remarked, the alternatives to democracy are even worse. Activism, it needs to be underscored, must be understood as a flight from democratic self-government. As Joseph Bishop wrote, “those who favor abortion, busing . . . and oppose capital punishment . . . have no faith whatever in the wisdom or will of the great majority of the

\begin{itemize}
\item \textsuperscript{250} Brest, supra note 108, at 1109.
\item \textsuperscript{251} M. Perry, supra note 201, at 125 (quoting J. Ely, \textit{Democracy and Distrust: A Theory of Judicial Review}).
\item \textsuperscript{253} See Cover, supra text accompanying note 13.
\item \textsuperscript{254} McDougal & Lans, \textit{Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy}, 54 YALE L.J. 181, 578 (1945).
\end{itemize}
people, who are opposed to them.” Hence, their appeal to the courts. Because the course of Demos is at times mistaken, even woefully wrong, it does not follow that the Court is empowered to save the people from themselves. A seminal constitutional scholar, James Bradley Thayer, considered that the Court “cannot rightly attempt to protect the people, by undertaking a function not its own.” A judge, wrote Cardozo, “is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness.” In saltier terms, Holmes said, “if my country wants to go to hell, I am here to help it.” With Lincoln, I cling to faith in the ultimate good sense of the people; I cannot subscribe to the theory that America needs a savior in the shape of nine—ofttimes only five—Platonic Guardians.

The “very notion of the rule of law,” Tushnet rightly states, is “at issue.” “[W]e generally agree,” said Philip Kurland, that “we are all to be governed by the same preestablished rules and not by the whim of those charged with executing those rules . . . . [F]rom the beginning [the Court] assumed the role . . . of keeper of the rule of law as embodied in the Constitution.” Governance by whim is freshly illustrated by the Court’s recent legislative chaplain decision. “Clearly,” Chief Justice Burger stated, “the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.” By parity of reasoning, the Court’s resort to the “cruel and unusual punishments” clause for its strictures on death penalties is untenable. From 1689 when the English employed the phrase in their Bill of

255. Bishop, What is a Liberal—Who is a Conservative?, 62 COMMENTARY 47 (1976). Richard Kluger, an admiring chronicler of Brown v. Board of Education, noted that “the whole issue of segregation came to the courts because the other parts of government, and certainly our private society, were unwilling to face it,” quoted in M. Perry, supra note 201, at 211 n.91. Jefferson wrote Madison on December 20, 1783, “it is my principle that the will of the majority should always prevail.” Mason, supra note 9, at 169. It is not, wrote Dean Charles E. Clark. “a sound and practical theory... suited to an independent people, to hold that control and direction of its future should be committed to an aloof judicial tribunal.” E. CORWIN, THE TWILIGHT OF THE SUPREME COURT (1934).

256. J. THAYER, JOHN MARSHALL 109 (1901).


259. Tushnet, supra note 107, at 811.


261. See Tushnet, supra text accompanying note 143.

262. Marsh v. Chambers, 103 S. Ct. at 3334.
Rights, through 1789 when it was incorporated in the Eighth Amendment, through 1976 when the Court first discovered that death penalties violated the phrase, such penalties, with not a single exception, were not deemed to be within ‘‘cruel and unusual punishments.’’\textsuperscript{263} Nevertheless the Court overturned the centuries-old practice but now exalts the identical 200-year old chaplain practice on the very grounds which dictated hands off death penalties.

Who are the demigods to whom activists would turn over our governance? For the most part they are political accidents, as was Chief Justice Warren himself, ranging, with a few exceptions, from mediocre to competent,\textsuperscript{264} who, a perfervid activist states, have not been prepared ‘‘for the task of constitutional interpretation.’’ He states that few have ‘‘broad-gauged approach and knowledge’’ essential ‘‘to search for and identify the values that should be sought in constitutional adjudication.’’\textsuperscript{265} Another activist, Owen Fiss, explains that judges ‘‘are lawyers, but in terms of personal characteristics they are no different from successful businessmen or politicians. Their capacity to make a special contribution to our social life derives not from any personal knowledge, but from the definition of the office in which they find themselves and through which they exercise power.’’\textsuperscript{266} Elevation to the Bench thus resembles the medieval anointment with Holy Oil that clothed the emperor with ‘‘a mandate from heaven.’’ ‘‘Time has proved,’’ wrote then-Solicitor General Robert H. Jackson, that the Court’s ‘‘judgment was wrong on the most outstanding issues upon which it has chosen to challenge the popular branches.’’\textsuperscript{267} Terrance Sandalow, an activist, wrote that the developments of 200 years have ‘‘strength[ened] belief in the wisdom of the framers’ intentions,’’\textsuperscript{268} whereas already, even to the eyes of his admiring biographer, Chief Justice Warren’s choices ‘‘appear less as ordained principles of justice and more as vulnerable policy judgments,’’\textsuperscript{269} judgments the Constitution left to the people’s elected legislative representatives, or to the people themselves.

Let it be assumed that the morals of a high-minded Court are superior to those of the commonality;\textsuperscript{270} it is nevertheless not authorized to cram

\textsuperscript{263} Supra text accompanying notes 92–100.
\textsuperscript{264} For citations see Berger, supra note 220, at 480–81.
\textsuperscript{266} Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 12 (1979) (emphasis added).
\textsuperscript{267} R. Jackson, The Struggle for Judicial Supremacy 37 (1941). For academicians’ concurrence, see Berger, supra note 4, at 331 n.66.
\textsuperscript{269} G. White, supra note 34, at 349.
\textsuperscript{270} The philosopher Thomas Nagel observes that ‘‘a radical division of opinion’’ (e.g. about
them down the throats of the people, as is the case with death penalties, school prayer and the like. When the Court does for the people "what they have not chosen to do for themselves," Justice Story declared, "[i]t is usurping the function of a legislator,"271 and as Justice Harlan underscored, "it has violated the constitutional structure which it is its highest duty to protect."272 And it has sanctified the deplorable example of the pre-1937 Court, an endorsement activists may yet have cause to regret. They have forgotten Cardozo's wise caution: the judges' "individual sense of justice . . . might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law."273

An excellent homily, encapsulating the points I have been making, was recently delivered by the court in an opinion by Chief Justice Burger. True, it is addressed to Congress' use of the legislative veto, but its principles apply equally to the Court itself: the Framers divided the government "into three defined categories . . . to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." The "carefully defined limits on the power of each branch must not be eroded." And he emphasized, "we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."274 Physician, heal thyself.275

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271. 1 J. STORY, supra note 113, at § 426.
275. In 1934 Edward Corwin adjured the Court "to give over attempting to supervise national legislative policies on the basis of a super-constitution which, in the name of the Constitution, repeals and destroys that historic document." E. CORWIN, supra note 245, at 182. That admonition may be underscored today, particularly as regards the Court's invasion of rights to control local concerns which the tenth amendment reserves to the States.
APPENDIX

Contemporary Constructions of the Fourteenth Amendment Respecting Segregating

Contemporary constructions carry great weight. Justice William Johnson considered it a "presumption that the contemporaries of the constitution have claims to our deference . . . because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people, when it was adopted by them." 276

Most of the post-Civil War decisions cite Roberts v. City of Boston, decided in 1849 by the Massachusetts Court, 277 per Chief Justice Lemuel Shaw, a preeminent state court judge. The case was argued by Charles Sumner on behalf of a black child who had been excluded from a neighborhood school for whites. He urged that under the Massachusetts constitution all persons "are equal before the law" 278 and that the separate schools denied equality. The School Committee had concluded that the good of both classes would be best promoted, by maintaining the separate primary schools for colored and for white children; and the Court held that the rule was "founded on just grounds of reason and experience." 279

Following suit, the Ohio Supreme Court stated in 1850: "As a matter of policy it is unquestionably better that the white and colored youth should be placed in separate schools . . . ." 280 When the fourteenth amendment was invoked in 1871, the Ohio Court declared that "Equality of rights does not involve the necessity of educating white and colored persons in the same school . . . ." 281 In 1872 the Nevada Supreme Court held that separate schools do not offend the fourteenth amendment, 282 and so it was held by the California court in 1874, passing on an act of 1870. 283 In 1874, the Indiana court held that the Constitution does not empower Congress "to exercise a general or special supervision over the states on the subject of education." 284

The earlier cases were cited by Judge William B. Woods, soon to be

277. 59 Mass. (5 Cushing) 198 (1849).
278. Id. at 201.
279. Id. at 209–10.
281. State ex rel. Gaines v. McCann, 21 Oh. St. 198, 211 (1871).
284. Cory v. Carter, 48 Ind. 327, 359 (1874) (separate schools are not a denial of equal privileges).
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elevated to the Supreme Court, in an 1878 federal circuit court case in Louisiana, holding that separate schools for blacks did not constitute a denial of "equal protection."285 Passing on a New York statute of 1864, the New York court noted in 1883 that separate schools obtain generally in the States of the Union, and do not offend equal protection.286 And citing Roberts v. Boston, the court stated: "The attempt to enforce social intimacy and intercourse between the races, by legal enactment, would probably tend only to embitter the prejudices . . . which exists between them . . . ."287

"Separate but equal" has become an opprobrious epithet in our time, but the key to the meaning the fourteenth amendment held for the framers is furnished by the contemporaneous constructions, which confirm the legislative history. "The criterion of constitutionality," said Justice Holmes, "is not whether we believe the law to be for the public good."288

287. Id. at 448.