South Carolina Law Review

Volume 31 | Issue 2 Article 3

1980

The Scope of Judicial Review: A Continuing Dialogue

Raoul Berger
University of California at Berkeley

SOUTH CAROLINA LAW REVIEW

VOLUME 31 1980 NUMBER 2

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RAOUL BERGER*

I. INTRODUCTION

In marked contrast to the splenetic reception given by some academicians to my study of the fourteenth amendment,[1] Professor Randall Bridwell joins the select circle of those who seek to weigh my evidence dispassionately.[2] His analysis of deficient rationalizations for judicial activism sweeps aside some cluttering analytical debris and underscores the failure to "address the issue of majority rule" that is central to our democratic system.[3] With him I consider that activist argumentation is largely "a simple statement of desired results," and is "plagued by formidable problems."[4] His rejection, for example, of the view that

* Professor of Law, University of California at Berkeley, 1962-65; Charles Warren Senior Fellow in American Legal History, Harvard University, 1971-76. A.B. 1932, University of Cincinnati; J.D. 1935, Northwestern University; LL.M. 1938, Harvard University; LL.D. 1978, University of Michigan.

1. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977). *See, e.g.*, Brest, Book Review, N.Y. Times, Dec. 11, 1977, §6, at 10, col. 3; Miller, Book Review, Washington Post, Nov. 13, 1977, §E, at 5, col. 1; Murphy, Book Review, 87 YALE L.J. 1752 (1978).

2. Bridwell, Book Review, 1978 DUKE L.J. 907 [hereinafter cited as Bridwell I]; Bridwell, *The Federal Judiciary: America's Recently Liberated Minority*, 30 S.C.L. REV. 467 (1979) [hereinafter cited as Bridwell II]. *See, e.g.*, Kay, Book Review, 10 CONN. L. REV. 801 (1978); Kommers, Book Review, 40 THE REVIEW OF POLITICS 409 (1978); Perry, Book Review, 78 COLUM. L. REV. 685 (1978).

3. Bridwell II, *supra* note 2, at 474.

4. *Id.* at 472-73, 474. I agree that "a jargonized result-oriented dialogue" has "largely replaced the analytical device of separating principles from results." *Id.* at 473.

Among the arguments Bridwell rejects are: (1) those structured around the horrible results that allegedly will occur without expansive judicial review, *id.* at 473, overlooking that judicial review was not designed as a cure-all; (2) the argument that the Court became "a super-legislator because our democratic institutions have allegedly failed," *id.* at 472 n.12, and *see id.* at 475 n.20, as if *legislative* power is transferred to the Court when Congress fails to exercise it; and (3) demagogic appeals for "support of a majority of a relatively small, but possibly influential, component of the legal community—legal schol-

"unlimited minority vindication is . . . *the* fundamental axiom of constitutional law,"[5] seems to me markedly to advance analysis.

Nevertheless, in essence he concludes with "a plague on both your houses." Thus, he finds my approach also has "serious and obvious limitations,"[6] and places me at the other "extreme," ruled by a "preoccupation with rendering one component in the overall process of constitutional interpretation—such as the framers' intent—into a hypertechnical and possibly exclusive guide to constitutional law."[7] This results from a misapprehension of my very narrow focus. The core of my thesis is set forth at the very outset of my book: the framers of the fourteenth amendment *unmistakably intended to exclude* suffrage (and segregation) from its scope,[8] a view that Bridwell accepts.[9] Consequently, the "one person-one vote" (and desegregation) decisions represent a judicial rejection of the framers' choices, a judicial revision that squarely contradicts their intention. Bridwell recognizes that the claim of "power to ignore clearly expressed intent on a particular issue clearly seems to be harder to justify than all other claims for judicial authority";[10] that is the *only* claim I considered. He believes that "the Court cannot choose 'fundamental values' for the society,"[11] precisely my position. Had Bridwell dwelt on the materials which I collected in support of this position, he would have helped to clarify the most important aspect of the ongoing debate.

Instead he sought for broader theories than I espoused, thereby distracting attention from the arrogation that is "harder

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ars—around particular policies that emerge from current judicial decisions," *id.* at 474. *Compare id. with* Brest, *supra* note 1.

5. Bridwell II, *supra* note 2, at 477.

6. *Id.* at 481.

7. *Id.* at 476.

8. R. BERGER, *supra* note 1, at 7-8.

9. See note 21 and accompanying text *infra.*

10. Bridwell I, *supra* note 2, at 919. He also states that my "attempt to link judicial action to at least some limiting constitutional principle is more satisfying than the appeal to self-evident principles of 'justice' and 'equality' or the total result-orientation of some who simply wish to avoid the whole issue." *Id.* at 918.

11. *Id.* at 920 n.60. Defending the Warren Court, Judge J. Skelly Wright declared, "the most important value choices have already been made by the framers of the Constitution." Judicial "value choices . . . are to be made only within the parameters" of those choices. *Quoted in* R. BERGER, *supra* note 1, at 322. Instead of citing to the sources, I shall throughout cite to the pages of my book where they are cited or quoted, both in the interest of space conservation and of directing attention to confirmatory materials there set out.

to justify than all other claims for judicial authority."[12] It follows that a considerable number of Bridwell's objections to my study are beside the point because they arraign me for what I never attempted.[13] Nor did I overlook (what Bridwell regards as a "serious and obvious limitation") that "constitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open-textured";[14] instead I picked a point on that "spectrum," not one for which the legislative history "has serious shortcomings" or "*really* is not clear,"[15] but one for which Bridwell himself finds the record "clearly convincing."[16] In fact, I expressly disclaimed any purpose to deal with "the interpretation of amorphous constitutional provisions such as 'commerce,' which, unlike 'due process,' have no historical content."[17] Appealing to William Crosskey, Bridwell doubts whether "commerce" can be regarded as amorphous.[18] Be it so; any other example of an "amorphous" provision will equally fit my disclaimer. To take the other branch of his reservation, that "in many cases" resort to evidence of "intent" "has serious shortcomings," I expressly disclaimed consideration of the "weight to be accorded 'enigmatic' history."[19] Because *inconclusive* evidence of intention

12. Bridwell I, *supra* note 2, at 919.

13. Thus he is "troubled by [my] failure to develop fully a basic theory of constitutional interpretation which would support [my] general charges of judicial usurpation." *Id.* at 912. I made no "*general* charges of judicial usurpation," *id.* (emphasis added), but confined myself to several usurpations under the fourteenth amendment. My purpose required no screening of "the various methods by which the intent may be revealed," *id.* at 913-14 n.32, for that intent shines forth from the pages of the debates in the 39th Congress. Nor did I "assume that the *Constitution* has a limited meaning and is addressed to particular problems," Bridwell II, *supra* note 2, at 481 (emphasis added), but limited myself to the framers' exclusion of suffrage and segregation from, and non-incorporation of the Bill of Rights in, the fourteenth amendment, a far smaller focus. Neither did I assert that "the framers' intent is a . . . *generally* applicable method of keeping faith with the Constitution . . .," *id.*, but only that the *unmistakable* intention must govern, *see id.* at 468 n.2.

14. Bridwell II, *supra* note 2, at 481 (quoting Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 413 (1978)).

15. Bridwell II, *supra* note 2, at 481-82.

16. See text accompanying note 21 *infra*.

17. R. BERGER, *supra* note 1, at 284.

18. Bridwell I, *supra* note 2, at 914 n.36. Professor Ernest Brown, who was severely critical of Crosskey, pointed out that he substituted for the predominant usage—"exchange of merchandise"—the more comprehensive "general regulation of trade." Brown, Book Review, 67 HARV. L. REV. 1439, 1448, 1452 (1954). Even so read, "commerce" is still amorphous when compared with the historical procedural content of due process of law. See text accompanying notes 70-75 *infra*.

19. R. BERGER, *supra* note 1, at 284.

is an inadequate guide to the meaning of an enactment, it does not follow that effect should be denied to the readily ascertainable, *unmistakable* intention of the framers. Whatever "the limitations of express intention" in the former category, they cannot vindicate "the particular cases which Berger seeks to discredit," i.e., where the framers' intention to exclude suffrage and segregation is unmistakable.[20] My comments on such misunderstandings are offered in no captious spirit but rather to narrow the issues, dispel possible confusion, and to impel Bridwell to evaluate a number of important points on which he did not dwell.

On the threshold issue, Bridwell concludes that "[c]ertainly Berger convincingly argues [on the basis of numerous unequivocal statements by the framers] that the fourteenth amendment was crystal clear with regard to suffrage and segregation in public schools,"[21] a conclusion shared by a growing number of academicians, including activists.[22] Then too, given that the framers re-

20. Bridwell I, *supra* note 2, at 915. Bridwell therefore errs in charging me with "overgeneralizing the principles of interpretation [Berger] employs to attack the Warren Court's desegregation and reapportionment decisions . . . ." *Id.*

21. *Id.* at 913. For present purposes Bridwell's analysis of the weight to be accorded various types of legislative comments, *id.* n.32, is over-refined and redundant. For he concludes, "the negative statements on suffrage and segregation were made so often, by so many, and most often by congressional leaders charged with explaining the amendment," *id.* (to which may be added the unanimous report by the Joint Committee on Reconstruction), that *"on these two points alone . . .* Berger is correct," *id.* Moreover, the Supreme Court has held that "[t]he opinions of some members of the Senate, conflicting with the explicit statements of the meaning of the statutory language made by the Committee reports and members of the Committees on the floor . . . are not to be taken as persuasive of the Congressional purpose." United States v. Wrightwood Dairy Co., 315 U.S. 110, 125 (1942). In other words, the Court relies on reports and statements by members of the committee (which studied the legislative history of the fourteenth amendment).

Bridwell notices the argument that the understanding of the framers "did not carry over into the state ratification process." Bridwell I, *supra* note 2, at 913 n.32. The framers, however, were the delegates of the people and expressed their sentiments. Morton Keller noted that the "off-year elections of 1867," during which ratification of the amendment was debated, "made clear the popular hostility to black suffrage in the North." William Gillette observed that "[m]ost Congressmen apparently did not intend to risk drowning by swimming against the treacherous current of racial prejudice and opposition to Negro suffrage"; "white Americans resented and resisted" it; and "Negro voting in the North was out of the question." W. GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT, 25, 27, 32 (1969). Such facts repel an assumption that the ratifiers read suffrage into the amendment; the rational inference, rather, is that the framers spoke for the people. A reconstruction historian, Phillip Paludan, concluded that the fourteenth amendment "was presented to the people as leaving control of suffrage in State hands." *Quoted in* R. BERGER, *supra* note 1, at 155.

22. Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation,* 5 HASTINGS CONST. L.Q.

jected suffrage and desegregation, it is altogether unlikely that they meant to surrender traditional state control over their own criminal administration by allegedly embodying the Bill of Rights in the amendment. Even if the terms of the amendment be regarded as "general"—an assumption rebutted by the facts—the tenth amendment reservation to the states of all powers not delegated calls for a showing that so massive a transfer was contemplated,[23] a showing, Charles Fairman demonstrated in 1949, that cannot be made,[24] as my own study confirms.[25]

True it is that I only made "a damning case against a small number of particular decisons,"[26] but consider what these cases are. The desegregation and criminal administration cases have given rise to some of the most divisive issues that confront the nation.[27] As said by Professor Philip Kurland, "the usurpation by the judiciary of general governmental power on the pretext that its authority derives from the fourteenth amendment" presents "the most immediate constitutional crisis of our times."[28] Moreover, these few "particular decisions" probably constitute the largest source of the Court's business[29] and furnish the chief fulcrum for control of controversial policies which the framers left to the states. If, therefore, my analysis is valid, it serves as a plea to the jurisdiction which can remove such rancorous issues as busing, affirmative action, abortion, death penalties, control of state criminal law administration and the like from the federal courts. That seems to me of far greater practical importance than

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603, 606-07 (1978); Lusky, *"Government by Judiciary": What Price Legitimacy*, 6 HASTINGS CONST. L.Q. 403, 406 (1979); Beloff, Book Review, London Times, April 7, 1978, Higher Educ. Supp., at II; Nathanson, Book Review, 56 TEXAS L. REV. 579, 581 (1978).

23. In Pierson v. Ray, 386 U.S. 547, 554-55 (1967), the Court declined to read "any person" to include judges in the absence of a specific provision abolishing their common-law immunity.

24. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

25. R. BERGER, *supra* note 1, at 134-56. *See also* Alfange, *supra* note 22, at 607; Perry, *supra* note 2, at 687-88.

26. Bridwell I, *supra* note 2, at 914 n.32.

27. In Columbus Bd. of Ed. v. Penick, 99 S. Ct. 2941, 2990 (1979), Justice Powell, dissenting, adverted to the "resentment against judicial coercion" occasioned by the Court's busing decrees. William Brashler recently wrote that the "schism between white and black America is still painfully present, and appears all but irreparable . . . ." N.Y. Times, Dec. 3, 1978, §6 (Magazine), at 34, 36.

28. Letter from Philip Kurland to Harvard University Press (August 15, 1977).

29. Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 229 (1955).

to come forth with a unified field theory of judicial review and constitutional interpretation. Better to deal, as is the common-law tradition, with the particular situation presented by the fourteenth amendment, as to which plentiful clear evidence exists, and to clarify the issues thereby presented, leaving broader generalizing to the future and to others.

At the outset it needs to be emphasized that advocacy of judicial activism is a product of the very recent past, representing an attempt to rationalize judicial effectuation of the aspirations of an intellectual elite.[30] As one activist, Professor Alfred Kelly, complacently observed, the Warren Court "was determined to carry through a constitutional egalitarian revolution."[31] A fellow activist, Professor Louis Lusky, forthrightly stated that the Court has "a new and grander conception of its own place in the governmental scheme," resting on "two basic shifts in its approach to constitutional adjudication": "assertion of power to *revise* the Constitution, *bypassing* the cumbersome amendment procedure prescribed by Article V," and "repudiation of the limits on judicial review that are implicit in the doctrine of *Marbury v. Madison.*"[32] With Hamilton, I hold that "an agent cannot new model his own commission,"[33] a matter to which I shall return. The transition to the "new and grander conception" is thus described by another Warren enthusiast—Professor Stanley Kutler: "through the late 1930s, academic and liberal commentators . . . criticized vigorously the abusive power of the federal judiciary . . . [for] frustrating desirable social policies . . . [for] *arrogat[ing] a policymaking function* not conferred upon them by the Constitution."[34] It was after 1937, he continues, that "most of the judiciary's longtime critics suddenly found a *new faith* . . . [they] matched a new libertarianism that promoted 'preferred freedoms' . . . with an activist judiciary to protect those values."[35] What Bridwell describes as my "interesting minority posi-

30. See text accompanying note 168 *infra.*

31. Kelly, *Clio and the Court: An Illicit Love Affair,* 1965 SUP. CT. REV. 119, 158.

32. Lusky, *supra* note 22, at 406 (emphasis added).

33. A. HAMILTON, *Letters of Camillus,* in 6 ALEXANDER HAMILTON, WORKS 166 (H. Lodge ed. 1904). Madison stated in the convention that "it would be a novel & dangerous doctrine that a Legislature could change the constitution under which it held its existence." 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 92-93 (1913). *See also* note 143 *infra.*

34. Kutler, *Raoul Berger's Fourteenth: A History or Ahistorical,* 6 HASTINGS CONST. L.Q. 511, 512 (1979) (emphasis added).

35. *Id.* (emphasis added).

tion"[36] is therefore far more deeply-rooted than the currently fashionable activism. It is derived, in the words of Professor Thomas Grey, from a long tradition "of great power and compelling simplicity . . . deeply rooted in our history and in our shared principles of political legitimacy. It has equally deep roots in our formal constitutional law . . . ."[37]

Before passing on to more general considerations, I shall discuss two particulars. As I wrote earlier, one cannot speak of minority rights *en gros*;[38] the Constitution did not create, to borrow Bridwell's words, a "roving judicial commission to protect minorities against majorities in all cases."[39] "[W]ithin the State itself," Gouverneur Morris, a defender of the propertied minority, said in the Convention, "a majority must rule, whatever may be the mischief done among themselves."[40] The 1787 Constitution largely defined a *structure* of government, delineating its powers; such individual rights as it granted dealt with security of property, commerce, and contracts. Broader individual rights are first found in the subsequent Bill of Rights, designed to protect *all* of the people against a remote and suspect federal government, in great part to secure established criminal procedures in federal prosecutions.[41] The matter has been well summarized by Professor Louis Henkin:

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36. Bridwell II, *supra* note 2, at 480. Bridwell correctly notes that "the academic community has clearly leaned toward a form of utilitarian policy analysis generally favoring judicial activism." *Id.* at 474.

37. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975). "All questions of constitutional construction," Justice Horace Gray stated, are "largely a historical question." Sparf v. United States, 156 U.S. 51, 169 (1895) (dissenting opinion). Jacobus tenBroek acknowledged that 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 . . . ." tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction*, 27 CALIF. L. REV. 399, 399 (1939).

38. Berger, *The Fourteenth Amendment: The Framers' Design*, 30 S.C.L. REV. 495, 501 (1979).

39. Bridwell II, *supra* note 2, at 475.

40. Berger, *supra* note 38, at 501 (quoting 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 439 (1911)). "[R]ule in accord with the consent of a majority of the governed is the core of the American governmental system." Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 411 (1978).

41. *See* Berger, *supra* note 38, at 502. In "the minds of most Whigs in 1776 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 people." G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 63 (1969). Wood adds, "[i]t was conceivable to protect the common law liberties of the people against their rulers, but hardly against the people themselves." *Id.*

> [I]n largest part the Constitution is not a charter of liberties but a blueprint for a federal system of government. . . . The original Constitution contained a few express limitations and prohibitions on the national government, most of them (in Art. I, sec. 9) to protect state interests (rather than individual freedom). . . . There are some safeguards for individual rights in the original Constitution, for example provisions for requiring a jury trial in criminal cases (Art. III, sec. 2), and prescribing requirements for conviction for treason (Art. III, sec. 3). The principal limitations in favor of the individual are in the Bill of Rights . . . and those imposed on the States in . . . the Thirteenth, Fourteenth, and Fifteenth Amendments.[42]

The majority, Bridwell justly concludes, did not "destroy themselves by forever disabling them from taking a position contrary to any minority interest."[43] In short, minority rights must be derived from some provision of the Constitution, and I shall hereinafter show that the fourteenth amendment did not create a charter of unlimited minority rights.

Bridwell also punctures activist insistence that canons of statutory construction are inapplicable to constitutional interpretation: the argument amounts "to no more than a syllogistic assertion that the Constitution is more important than mere statutes . . . ."[44] Why, he asks, should a document " 'intended to endure for ages to come' "[45] be "less circumscribed by the meaning that its drafters seriously meant to give it than a statute"[46] that is "ephemeral."[47] And he further recalls Justice Story's approach to "principled and defensible extrapolations from the text by applying some definite and uniform technique

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42. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 3 (1972).

43. Bridwell II, *supra* note 2, at 476. *See also id.* at 475. *Compare* Bridwell's statement in the text *with* the statement of Dr. Kenneth B. Clark, a prominent black social scientist: "There are some problems in human relations that shouldn't be left to referendum . . . ." N.Y. Times, Oct. 20, 1979, at 25, col. 1. In other words, the will of the people does not count. Justice Stone cautioned against the danger that "the constitutional device for the protection of minorities from oppressive majority action may be made the means by which the majority is subjected to the tyranny of the minority." *Quoted in* A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 331 (1956). Speaking of Reynolds v. Sims, 377 U.S. 533 (1964), Alexander Bickel said, "Even the majority itself, the Court held, cannot deprive itself of the right to rule as a majority." A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 110 (1970).

44. Bridwell II, *supra* note 2, at 477 n.28.

45. *Id.* (quoting Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation,* 5 HASTINGS CONST. L.Q. 603, 609 (1978)).

46. Bridwell II, *supra* note 2, at 477 n.28.

47. *Id.* (quoting Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation,* 5 HASTINGS CONST. L.Q. 603, 609 (1978).

of construction."[48] Otherwise, as his friend Chancellor Kent wrote, "the courts would be left to a dangerous discretion to roam at large in the trackless field of their own imaginations."[49] And since Hamilton laid down in Federalist No. 78 that judges "should be bound down by strict rules and precedents," where, asks Professor Harry W. Jones, "were the American courts to look to find them, other than in the corpus of English common law doctrine,"[50] which included the rules of documentary interpretation. To be sure, Jones also stated that "it was by no means self-evident in 1789 that judges should use the same techniques in the construction of constitutional provisions as in the interpretation of ordinary statutory and decisional sources."[51] But he added, "[b]eing common lawyers to the core, early Justices and judges simply took it for granted, as did the lawyers appearing before them, that the distinctive *method* of the common law, the institution of precedent [and of rules of construction], was to be used in carrying out the challenging new assignment."[52] Professors Edward Corwin and Julius Goebel found that the founders early turned to the rules of statutory construction for guidance to constitutional interpretation.[53] The attempt to discredit this usage is a product of recent activist efforts to defend judicial action in contravention of the framers' unmistakable intention. No "hypertechnical" rules of construction are needed to condemn this practice.

II. Some Constitutional History

In order to make this a self-contained article it is necessary briefly to recapitulate some constitutional history. We are admonished by a number of early state constitutions, including the John Adams Massachusetts Constitution of 1780, that "[a] frequent recurrence to the fundamental principles of the constitution . . . [is] absolutely necessary to preserve the advantages of

48. Bridwell II, *supra* note 2, at 468 n.1.

49. *Quoted in* R. Berger, *supra note 1,* at 308 n.34. Story extolled the common law because it "controls the arbitrary discretion of judges, and puts the case beyond the reach of temporary feelings and prejudices." J. McClellan, Joseph Story and the American Constitution 98 (1971).

50. H. Jones, *The Common Law in the United States: English Themes and American Variations,* in Political Separation and Legal Continuity 91, 101-02 (H. Jones ed. 1976).

51. Bridwell I, *supra* note 2, at 915 n.37 (quoting H. Jones, *The Common Law in the United States: English Themes and American Variations,* in Political Separation and Legal Continuity 134 (H. Jones ed. 1976)).

52. H. Jones, *supra* note 50, at 134.

53. 1 J. Goebel, History of the Supreme Court of the United States 128 (1971); Corwin, *The "Higher Law" Background of American Constitutional Law,* 42 Harv. L. Rev. 149, 370-71 (1928). *See also* 1 J. Story, Commentaries on the Constitution of the United States, §§ 400 n.2, 403 n.1 (M. Bigelow ed. 1905).

liberty and to maintain a free government. . . . The people . . . have a right to require of their lawgivers and magistrates an exact and constant observance of them."[54] Among such "fundamental principles" was that of a "fixed Constitution," arising from the founders' dread of the "endlessly propulsive tendency [of power] to expand itself beyond legitimate boundaries" to the detriment of liberty or right.[55] In the words of Professor Philip Kurland,

> The concept of the written constitution is that it defines the authority of government and its limits, that government is the creature of the constitution and cannot do what it does not authorize and must not do what it forbids. *A priori,* such a constitution could have only a fixed and unchanging meaning, if it were to fulfill its function. For changed conditions, the instrument itself made provision for amendment which, in accordance with the concept of a written constitution, was expected to be the only form of change. . . .[56]

Another potent factor was the founders' "profound" fear of judicial discretion,[57] forcefully expressed in 1767 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."[58] The 1780 Massachusetts Constitution explicitly provided that the "judiciary should never exercise legislative power so that this may be a government of laws and not of men."[59] Still another limiting factor was the fra-

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54. *Quoted in* R. BERGER, *supra* note 1, at 287. Such provisions evidence what Willard Hurst considers to be "a very basic principle of our constitutionalism . . . a distrust of official power." *Quoted in id.* at 287-88.

55. B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 56-57 (1967).

56. P. KURLAND, WATERGATE AND THE CONSTITUTION 7 (1978). For an early expression to that effect see R. BERGER, *supra* note 1, at 290-91. Robert Cover, a perfervid activist, wrote that for the founders a constitution represented the will of the people "that would determine explicit . . . allocations of power and its corresponding limits." *Quoted in id.*, *supra* note 1, at 252. One of the influential framers, Justice William Paterson, declared that "[t]he Constitution is certain and fixed; it contains the permanent will of the people and can be revoked or altered only by the authority that made it." Van Horne v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (1795). *See also* note 33 *supra.* Justice Field declared for a unanimous Court: "When once it is established that Congress possesses the power to pass an act, our province ends with its construction . . . ." Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889) (The Chinese Exclusion Case).

57. G. WOOD, *supra* note 41, at 298. H. JONES, *supra* note 50, at 103 (also refers to "the prevailing distrust of judicial discretion").

58. *Quoted in* R. BERGER, *supra* note 1, at 307.

59. MASS. CONST. of 1780, art. XXX, *reprinted in* 1 B. POORE, FEDERAL AND STATE CONSTITUTIONS AND COLONIAL CHARTERS 960 (1877).

mers' rejection of judicial participation in legislative policymaking, because as Elbridge Gerry explained, "[i]t was *quite foreign* from the nature of ye office to make them *judges of the policy* of public measures . . . ."[60] This view was given powerful expression in an early, landmark assertion of the power of judicial review, *Kamper v. Hawkins*.[61] Judge Henry stated,

> The judiciary, from the nature of the office . . . could never be designed to determine upon the equity, necessity or usefulness of a law; that would amount to an express interfering with the legislative branch . . . [N]ot being immediately chosen by the

60. *Quoted in* R. BERGER, supra note 1, at 301. Bridwell regards a "serious problem" Berger's

> reliance upon interpretations of American constitutional and legal history that are actually inconsistent with his basic thesis. For example, Berger asserts that "the Framers excluded the judiciary from policymaking . . . ." Yet he uncritically accepts a theory . . . that . . . judges in the early nineteenth century employed an "instrumental" style of decisionmaking pursuant to which they consciously formulated policy.

Bridwell I, *supra* note 2, at 916-17 (footnotes omitted). Be it assumed, as Bridwell maintains, that non-instrumentalism prevailed in "private law activity in the federal courts" during the early nineteenth century, that view, he states, "would strengthen Berger's case for limitations on judicial power . . . ." *Id.* at 918. Although his excursus on "instrumentalism" is therefore gratuitous, because it does not change the result, it reveals several analytical flaws. First, what *judges* did in the early 1800s cannot alter what the *framers* said in 1787 when they excluded judicial participation in policymaking on the Council of Revision. Second, instrumentalism took place in the frame of private-law cases such as torts; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), did not reverse legislative policy, it held an act unconstitutional because it contravened an express constitutional provision. It is one thing to exercise the traditional policymaking power in torts that the legislature could overrule, and another to overturn legislative policy, a departure from the English practice not sanctioned by the early state cases.

Bridwell further charges me with inconsistency in pointing to "Story's opinion in *Swift v. Tyson* as an example of impermissible lawmaking which the Court finally corrected in 1938." Bridwell I, *supra* note 2, at 917 (footnotes omitted). To show that the passage of time does not legitimate a decision, I cited the fact that *Swift* was overruled by Erie Ry. Co. v. Tompkins, 304 U.S. 64 (1938). R. BERGER, *supra* note 1, at 297 n.56. Swift v. Tyson, 42 U.S. (16 Pet.) 1 (1842), presents too complex an issue to dismiss offhandedly as "an example of impermissible judicial lawmaking," Bridwell I, *supra* note 2, at 917, and nothing was further from my mind. This citation hardly supports the conclusion that if "Story was acting incorrectly" we must question Berger's charges "that the Warren Court was really acting in a novel or revolutionary manner by 'initiating policy.'" *Id.* Still less tenable is Bridwell's statement that I have "failed to demonstrate that the process employed by [the Warren Court] deviated from earlier conceptions of judicial authority." *Id.* at 918. Even one sympathetic to the Warren Court, Professor Archibald Cox, recognizes that "where the older activist decisions merely blocked legislative initiatives, the decisions of the 1950's and 1960's forced changes in the established legal order." *Quoted in* R. BERGER, *supra* note 1, at 428. The earlier Court, in a word, acted as a nay-sayer, not as an initiator of policy. *See id.* at 305.

61. 3 Va. (1 Va. Cas.) 20 (1793).

> people, nor being accountable to them, . . . they do not, and ought not, to represent the people in framing or repealing any law.[62]

Such expressions, both before and after the adoption of the Constitution, testify to the limited scope of judicial review as conceived by the founders,[63] so that Hamilton was constrained to assure the ratifiers that of the three departments, the "judiciary was next to nothing."[64] A little-noted cluster of Hamilton's pronouncements confirms the narrow scope of judicial review.[65] Activists point to nothing in the history of the fourteenth amendment that indicates a departure from these views. To the contrary, the framers had a deep-seated distrust of the courts, kindled by the *Fugitive Slave*[66] and *Dred Scott*[67] cases, that found expression in the section 5 provision for enforcement of the

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62. *Id.* at 47. Judge Tyler stated, "our constitution was made . . . for ages to come, subject only to such alterations as the people may please to make." *Id.* at 65. For similar comments by an early commentator and distinguished lawyer, Peter Du Ponceau, see Bridwell II, *supra* note 2, at 469-70 n.7.

None of the pre-1787 state cases encroached on legislative policymaking. *See* Berger, *"Law of the Land" Reconsidered,* 74 NW. U.L. REV. 1, 13-17 (1979).

63. Bridwell observes that "some scholars have noted the incoherence of the debates on judicial authority." Bridwell I, *supra* note 2, at 915-16. True it is that some—Judge Learned Hand, Archibald Cox and Leonard Levy—regard the evidence that the framers had judicial review in contemplation as inconclusive. For Cox and Levy, see R. BERGER, *supra* note 1, at 355 & n.16; for Hand, see R. BERGER, CONGRESS V. THE SUPREME COURT 6 n.23 (1969). But that view undermines the legitimacy of judicial review altogether, for the Constitution makes no specific provision for it. My own studies led me to conclude with Edward Corwin that "on no other feature of the Constitution with reference to which there has been any considerable debate is the view of the Convention itself better attested." *Id.* at 105 (quoting E. CORWIN, DOCTRINE OF JUDICIAL REVIEW 12-13 (1941)). The dissenters were very greatly outnumbered. R. BERGER, *supra* note 63, at 110. On the *scope* of judicial review, I know of nothing that runs counter to Hamilton's assurances, *see* note 65 *infra,* or to the convention's rejection of judicial participation in policymaking.

64. *Quoted in* THE FEDERALIST No. 78 (A. Hamilton) at 504 n.* (Mod. Lib. ed. 1941).

65. These expressions include: (1) "The judiciary . . . can take no active resolution whatever. It may be truly said to have neither FORCE nor WILL, but merely judgment," *id.* at 504, *i.e.,* it cannot initiate policy; (2) there "is no liberty if the power of judging be not separated from the legislative and executive powers," *quoted in id.* at 504 n.†; (3) the courts may not "on the pretense of a repugnancy . . . substitute their own pleasure to the constitutional intentions of the legislature," *i.e.,* they may not intrude *within* the boundaries of legislative power, *id.* at 507; (4) "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . . ," *id.* at 510; and (5) in No. 81, he assured the ratifiers that judges could be impeached for "deliberate usurpations on the authority of the legislature," *id.* No. 81 at 527.

66. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). *See* R. BERGER, *supra* note 1, at 222.

67. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). *See* R. BERGER, *supra* note 1, at 222.

amendment by Congress, *not* the courts, as the Court emphasized in 1879.[68] Instead the activists posit that the framers employed allegedly "general," "open-textured" terms[69] in order to overrule their unmistakable intention to exclude suffrage and segregation from the scope of the amendment. That remarkable claim is contradicted by the facts; it is part of the activist scramble to rationalize decisions that realize their aspirations.

III. THE TERMS ARE NOT "GENERAL"

A. Due Process of Law

On the eve of the Constitutional Convention, in 1787, Hamilton stated that the words "due process" of law "are only applicable to . . . proceedings of the courts of justice," *i.e.*, are *procedural,* and "can never be referred to an act of the legislature,"[70] *i.e.*, are never *substantive.* He accurately summarized 400 years of English and colonial history. Charles Curtis, an ardent proponent of judicial "adaptation" of the Constitution, stated that when the founders put due process "into the Fifth Amendment, its meaning was as fixed and definite as the common law could make a phrase . . . . It meant a procedural process . . . ."[71] Professor John Hart Ely agrees; he located no reference that gave the "identical" clause in the fourteenth "more than a procedural connotation."[72] All the references to due process in the 39th Congress, and in subsequent Reconstruction Congresses, I found, were in procedural terms, without the faintest suggestion of a grant to the courts of power to displace congressional policy or substantive decisions.[73] Instead, by section 5 the framers re-

68. *See Ex Parte* Virginia, 100 U.S. 339 (1879). *See also,* R. BERGER, *supra* note 1, at 221.

69. Thus Professor Lawrence Tribe posits that "the Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices," L. TRIBE, AMERICAN CONSTITUTIONAL LAW iii (1978); but Professor Michael Perry wonders "whose intentions and deliberations he is referring to," Perry, *supra* note 2, at 695. For an extended comment on similar theorizing by Ely, see Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277 (1978).

70. *Quoted in* R. BERGER, *supra* note 1, at 194.

71. *Quoted in* R. BERGER, *supra* note 1, at 200. *See generally* Berger, *"Law of the Land" Reconsidered,* 74 NW. U.L. REV. 1 (1979).

72. Berger, *supra* note 69, at 288 (quoting Ely, *Constitutional Interpretivism: Its Allure and Impossibility,* 53 IND. L.J. 399, 416 (1978)).

73. R. BERGER, *supra* note 1, at 193-214. *See also* Berger, *The Fourteenth Amendment: Light from the Fifteenth,* 74 NW. U.L. REV. 311, 334-35 (1979). An activist, Professor Wallace Mendelson concluded that due process "long since became a term of art," that

served power to enforce the amendment to Congress. Not until the Court sought in the 1890's to save the nation from "socialism" was due process given a "substantive" content,[74] a practice now admittedly discredited.[75] In short, "due process of law" was not a "general" word of uncertain meaning but had a fixed historical content. Consequently, no authority to revise the Constitution or to contravene the intention of the framers is to be found in the words "due process of law."

B. "Privileges or Immunities"

"Privileges or Immunities," an activist critic of my views, Professor Walter Murphy, stated, were "amply demonstrated" by me to be "words of art."[76] Their history is not as incisively etched as that of due process, but nevertheless it is distinctly traceable. The term "privileges and immunities" had been employed in Article IV of the Articles of Confederation where it was associated with the "privileges of trade and commerce,"[77] and was then incorporated in Article IV of the Constitution. Two "principal spokesmen" and theorists of the Abolition movement, Lysander Spooner and Joel Tiffany (who would therefore be likely to take a broad view of the terms), stated that "privileges and immunities" meant that a citizen has a right "to full and ample protection in the enjoyment of his personal security, personal liberty, and private property . . . protection against oppression . . . against lawless violence."[78] Earlier, the courts had stressed the limited scope of the words in a number of cases,[79] and when Senator Lyman Trumbull, chairman of the Judiciary Committee and sponsor of the Civil Rights Bill of 1866 (which was then embodied

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it meant in the fourteenth amendment what it meant in the fifth, and merely incorporated "the traditional meaning," namely, "a fair hearing—nothing more." Mendelson, *Raoul Berger's Fourteenth—Abuse by Contraction vs. Abuse by Expansion*, 6 HASTINGS CONST. L.Q. 437 (1979).

74. R. BERGER, *supra* note 1, at 3, 269; R. MCCLOSKEY, THE AMERICAN SUPREME COURT 129-38 (1960); Linde, *Due Process of Law Making*, 55 NEB. L. REV. 197, 238 (1976).

75. R. BERGER, *supra* note 1, at 258 n.39.

76. Murphy, *supra* note 1, at 1759. Murphy states "[t]hat some members of the 39th Congress so stated he amply demonstrates." *Id.* He cites no evidence to the contrary, and I found none. That the framers regarded the terms as having historical content is set forth in R. BERGER, *supra* note 1, at 20-51.

77. It afforded out-of-state citizens "all the privileges of trade and commerce." H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 111 (7th ed. 1963).

78. *Quoted in* R. BERGER, *supra* note 1, at 22.

79. *See* Berger, *supra* note 69, at 292-93.

in and said to be "identical" with the fourteenth amendment), explained the even broader terms of the bill, "civil *rights* and immunities," he referred to those cases, saying that the "rights of citizens" are the "great fundamental rights set forth in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights that are set forth in this bill,"[80] as the text of the bill corroborates.[81]

Bridwell contents himself with the comment that this clause is viewed by "Berger as having a clear historically determined content," and refers to "Ely's criticism of Berger's methods of construing the amendment's history and determining the framers' intent."[82] Why are my historical "methods" unexceptionable with respect to the "exclusion" of suffrage and segregation and suddenly vulnerable when I demonstrate that "privileges or immunities" was not designed to override such exclusion? Moreover, where Bridwell finds the exclusion of suffrage "crystal clear,"[83] Ely obliquely differs, briskly dismissing "Berger's repeated assertion that given their racism the fourteenth amendment's framers could not conceivably have intended to draft a provision capable one day of supporting the inference that blacks were entitled to vote."[84] Ely relies on adoption of the fifteenth amendment two years later to prove the contrary,[85] thereby casting doubt on his competency to evaluate the Reconstruction historical materials. For the fifteenth amendment does not testify to the ebb of racism but to shifting political exigencies that made the Negro vote important. Writing of the "fight for ratification" of the fifteenth amendment, William Gillette stated, "public opinion strongly opposed Negro rights, and the state legislators who outraged this consensus would commit political suicide."[86]

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80. *Id.* at 294 (*quoting* CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866)).

81. *See* R. BERGER, *supra* note 1, at 24. That bill and amendment were deemed to be "identical" is shown. *Id.* at 22-23. On this score there was no dissent.

82. Bridwell II, *supra* note 2, at 477 n.28.

83. Bridwell I, *supra* note 2, at 913.

84. Berger, *supra* note 69, at 282 (quoting Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 436 n.133 (1978)).

85. Berger, *supra* note 69 at 306-07 (citing Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 436 n.133 (1978)).

86. W. GILLETTE, *supra* note 21, at 80. *See also id.* at 25, 27, 32-33. It is generally overlooked that ratification of the fourteenth amendment was made a condition of readmission to the Union, that in "June, 1868, Arkansas, North Carolina, South Carolina,

That amendment was motivated, said Gillette, by political, rather than by humanitarian considerations,[87] as my own search confirms.[88]

There is no need to repeat the wealth of *evidence* on which my view of the meaning of "privileges or immunities" is based, or again to refute Ely.[89] Let it suffice that Justice Field (and three other justices, including Justice Bradley), upon whose dissent in *Slaughter-House Cases*[90] Ely heavily relies, stated, and the record bears Field out, that *Corfield v. Coryell*[91] "was cited by Senator Trumbull with the observation that it enumerated the very rights belonging to a citizen of the United States set forth in the 1st section of the act. . . ."[92] And to repeat, it is uncontroverted that Act and amendment were regarded by the framers as "identical."[93] I suggest to Professor Bridwell that his reliance on Ely is misplaced.

C. *Equal Protection of the Laws*

The words "equal protection of the law" were new to constitutional phraseology, having no history comparable to that of due process. These words, an activist, Professor Wallace Mendelson, noted are so broad as to be almost meaningless.[94] Another activ-

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Georgia, Louisiana, Alabama, and Florida were readmitted to the Union," and it was these states "that made possible the ratification of the Fourteenth as well as the Fifteenth Amendment." A. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 51 (1978). "Ratification of the Fifteenth as well as of the Fourteenth Amendment was made a condition of readmission to the Union for Georgia, Texas, Virginia and Mississippi. Without the required ratifications of these states, the Fifteenth Amendment would have failed . . . ." *Id.* at 58. More bluntly stated, Northern opposition was circumvented by a compulsory Southern vote. Presumably it was this that led Kenneth Stampp to write that neither the fourteenth nor fifteenth amendments "could have been adopted under any other circumstances, or at any other time, before or since . . . ." *Id.* at 55 (quoting Stampp, *The Tragic Legend of Reconstruction,* in RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS 11-12 (K. Stampp and L. Litwack eds. 1968)).

87. W. GILLETTE, *supra* note 21, at 146. For Republican control of both North and South, the Negro vote was now thought to be important. *See* Berger, *supra* note 69, at 307-08.

88. W. GILLETTE, *supra* note 21, at 146.

89. See note 69 *supra.*

90. 83 U.S. (16 Wall.) 36 (1872).

91. 6 F. Cas. (No. 3230) 546 (C.C.E.D. Pa. 1823).

92. 83 U.S. (16 Wall.) at 98. (Field, J., dissenting). *See also* Berger, *supra* note 69, at 294.

93. Berger, *supra* note 69, at 295.

94. Mendelson, *supra* note 73, at 451.

ist, Professor J.R. Pole, wrote: "The pursuit of equality was the pursuit of an illusion, because equality was a complex concept and not a simple or single goal."[95] Given words of such uncertain meaning, this is precisely the place to apply the advice of Senator Charles Sumner to the 39th Congress: "If its meaning in any place is open to doubt, or if words are used which seem to have no fixed signification, we cannot err if we turn to the framers . . . ."[96] These views, we have good reason to believe, were shared by his contemporaries. In 1872, "a unanimous Senate Judiciary Report, signed by senators who had voted for the Thirteenth, Fourteenth, and Fifteenth Amendments in Congress,"[97] declared:

> In construing the Constitution we are compelled to give it such an interpretation as will secure the result which was intended to be accomplished by those who framed it and the people who adopted it . . . . A construction which should give the phrase . . . a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution in any other particular.[98]

For the framers, "equal protection" had a narrow meaning, being associated throughout with the few rights set forth in the Civil Rights Act. As said by Samuel Shellabarger of Ohio, "[i]t secures . . . equality of protection in those enumerated civil rights . . . ."[99] There were similar utterances by others.[100] The Civil Rights Act and the amendment were in *pari materia,* dealing with the same subject, and indeed being enacted at the same session while proceeding on parallel tracks. Hence, the meaning given to "equal protection" in the Act is to be given those words in the amendment.[101] Moreover, attempts to abolish *all* distinctions

95. Kurland, Book Review, 88 YALE L.J. 898, 901 (1979) (quoting J. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 292 (1978)).

96. *Quoted in* R. BERGER, *supra* note 1, at 372.

97. *Preface* to A. AVINS, THE RECONSTRUCTION AMENDMENTS DEBATES at 2 (1967).

98. S. REP. No. 21, 42d Cong., 2d Sess. 2 (1872), *reprinted in* A. AVINS, *supra* note 97, at 571.

99. R. BERGER, *supra* note 1, at 169-70.

100. Leonard Myers of Pennsylvania said that the change "from slavery to freedom" required that "each State shall provide for equality before the law, equal protection to life, liberty and property, equal right to sue and be sued, to inherit, make contracts, and give testimony," rights theretofore denied to Blacks and enumerated in the Civil Rights Act of 1866. A. AVINS, *supra* note 97, at 193.

101. Reiche v. Smythe, 80 U.S. (13 Wall.) 162, 165 (1872).

were repeatedly defeated,[102] because, as the chairman of the Joint Committee, Senator William Fessenden, explained, "[w]e cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions."[103]

In sum, the foregoing demonstrates that "due process" and "privileges or immunities" were words of fixed or ascertainable meaning, and that "equal protection" was associated by the framers with narrow objectives, a better guide than a meaning so broad as to be meaningless, and that conduces to unfettered discretion.

IV. The Open-Ended Theory

The "open-ended" theory, fathered by Alexander Bickel, is a variant of the "general" terms theory; as restated by Bridwell, the terms of the fourteenth amendment allegedly "provided a legitimate vehicle for change by the Court in later times."[104] This theory, Bridwell notes, "found favor with the Court and commentators," amounting "to a powerful school of apologists," few of whom "escape Berger's barbs."[105] From this one might deduce that Bridwell is sympathetic to the theory, but in fact, he is ambivalent. Commenting on Ely's version of the "open-ended" theory—an "invitation to import into the constitutional decision process considerations that will not be found in the amendment nor even . . . elsewhere in the Constitution"[106]—Bridwell remarks that Ely "seems to proceed from an impression from a facial evaluation of the document about the vagueness or 'open-textured' quality of particular constitutional amendments . . . to relate his own plausible but personal reaction to the language of the Constitution."[107] The historical demonstration that the terms of the amendment were not "general" renders Ely's "personal

102. R. Berger, *supra* note 1, at 163-64.

103. *Quoted in id.* at 99.

104. Bridwell I, *supra* note 2, at 911.

105. *Id.* at 912 n.31. One of those "apologists," Alfred Kelly, tacitly recanted. R. Berger, *supra* note 1, at 242. An eminent British political scientist, Professor Max Beloff commented on this "powerful school": "The quite extraordinary contortions that have gone into proving the contrary [to my view] make sad reading for those impressed by the high quality of American legal-historical scholarship." Beloff, *supra* note 22, at II.

106. Berger, *supra* note 69, at 277 (quoting Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 Ind. L.J. 399, 415 (1978)).

107. Bridwell II, *supra* note 2, at 481-82 n.42.

reaction" implausible. For men do not employ words to defeat their purpose; and it is this that led Justice Holmes to hold that "it is not an adequate discharge of duty for courts to say: 'We see what you are driving at, but you have not said it.' "[108]

Since activists regard the "open-textured" terms as supporting "whatever interpretation the judiciary makes of them"[109]—a charter for untethered judicial discretion[110]—I may be indulged for summarizing the materials considered by Professor Michael Perry to constitute a "devastating" refutation.[111] As Justice Frankfurter's clerk, Bickel's research led him to write, "[i]t 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."[112] But when he revised his memorandum for publication after his mentor's participation in the desegregation decision he asked, "[w]hat if any thought was given to the long range effect of the amendment in the future?" And he ventured the tentative hypothesis: could resort to "equal protection of the laws" "have failed to leave the implication that the new phrase, while it did not necessarily, and certainly not expressly, carry greater coverage than the old, was nevertheless roomier, more receptive to the 'latitudinarian' construction?"[113] "It remains true," he wrote, "that an explicit provision going further than the Civil Rights Act would not have carried in the 39th Congress."[114] And he noted that the Republicans drew back from a "formulation dangerously vulnerable to attacks pandering to the prejudice of the people."[115] But, he speculated, "may it not be that the Moderates and Radi-

108. R. BERGER, *supra* note 1, at 369 (quoting Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908)).

109. Bridwell II, *supra* note 2, at 477.

110. Ely is uneasy about "untethered standards." *See* Berger, *supra* note 69, at 278-79.

111. See text accompanying note 158 *infra.*

112. *Quoted in* R. BERGER, *supra* note 1, at 100 (emphasis added).

113. *Quoted in id.* at 101-02. While Bickel noted that the "new phrase" originally had two parts: "the *same political* rights and privileges *and* . . . equal protection in the enjoyment of life, liberty, and property," Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1, 31 (1955) (emphasis added), he overlooked that this conjunction attested that "political," and *a fortiori* unmentioned, rights, were not contained in "equal protection." When the "political rights" phrase was deleted, the deletion blocked a "roomier, more . . . 'latitudinarian' construction" that would comprehend what had been excluded.

114. *Quoted in* R. BERGER, *supra* note 1, at 104.

115. *Quoted in id.*

cals reached a compromise permitting them to go to the country with language which they could, where necessary, defend against damaging alarms raised by the opposition but which at the same time was sufficiently elastic to permit reasonable future advances?"[116] Baldly stated, Bickel's hypothesis is that the alleged compromisors concealed the future objectives they dared not avow lest the whole enterprise be imperiled. And failing disclosure there could be no ratification.[117] These facts also cut the ground from under Ely's "invitation" analysis.

Nevertheless Bridwell regards Ely's observations as suggesting "some accommodation of practical limitations on judicial decisional techniques in constitutional law on the one hand, and our philosophical preferences on the other,"[118] quoting Ely:

> If a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, responsible commentators would have to conclude, whatever the framers may have been assuming, that the courts should stay away from them.[119]

According to Bridwell, Ely "rejects unfettered judicial discretion to formulate antimajoritarian principles out of some prevalent judicial philosophy . . . ."[120] Yet his "invitation" theory premises that the framers invested the judiciary with precisely such discretion. But this "invitation" is so "frightening"[121] that Ely proposes to develop limiting principles. What frightens him at the distance of 100 years must even more have deterred the framers, acutely distrustful of the courts,[122] and little minded to invite them to override their determination to exclude suffrage and segregation.[123]

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116. *Quoted in id.*

117. *Id.* at 155 n.93.

118. Bridwell II, *supra* note 2, at 482.

119. *Id.* at 482-83 (quoting Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 448 (1978)).

120. Bridwell II, *supra* note 2, at 475 n.21. *Cf. id.* at 468 n.3.

121. Ely observes that "[t]he invitation apparently extended by the clause is frightening." *Id.* at 477 n.28 (quoting Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 425 (1978)).

122. R. BERGER, *supra* note 1, at 222; Berger, *supra* note 73, at 350-51.

123. "Judicial abolition of segregation under the banner of the fourteenth amendment" cannot therefore "be explained by way of determinist philosophy as the continued unfolding of events compatible with the previously stated—though imperfect and incom-

The "real question" therefore is not as Bridwell phrases it, "whether or not this 'principled' approach can be developed," but whether (1) the framers conferred such "frightening" unfettered discretion on the courts, and (2) if they did, how influential can limiting "principles" developed by academe be when the Court feels free to disregard even the unmistakable intention of the framers.

An "important consideration," Bridwell tells us, is "the significance of changes in the meaning of words or phrases . . . ."[124] Although he indicates that the "problems of constitutional interpretation" are not soluble "by a purely semantic analysis," he also remarks, "[i]t is certainly possible that the framers' intent was in fact compatible with these semantic insights and recognized the need for evolving *applications* of the language of the Constitution."[125] I have no problem with "application of the principle to other, different fact situations";[126] for me the question is whether the *principle* itself can be changed because the words employed by the framers to express *their* intention have changed.[127] For example, it would be "improper," said Paul Brest, an ardent activist, to construe a term such as "bi-weekly," which in 1787 meant "only 'once every two weeks,'" to mean "semi-weekly," because it has come to mean "twice a week" in our

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plete—attempts to promote some general objective." Bridwell II, *supra* note 2, at 478. For no "general" objective can overcome the specific, unmistakable will of the framers to exclude segregation. It is not clear to me that Bridwell shares this "determinist philosophy," but he neglects to assess my demonstration that the express intention to exclude suffrage and segregation was not overridden by the allegedly "general," "open-ended" terms.

He correctly remarks that "[t]he alleged ongoing power to judicially revise previous majoritarian expression in light of current ones [busing] seems inconsistent with identifying the Constitution as a source of constitutional protection for minorities." *Id.* at 475. And he justly observes, those earlier affirmations must "to *some* extent [be] immune from overt judicial revision if the protection is to be meaningful, lest today's perceived majority bent on discrimination find support in a court willing to overlook express constitutional guarantees created in the past. The dead hand of Earl Warren may be as easily thrust aside as that of Rufus Peckham." *Id.* at 476 (emphasis added).

124. Bridwell I, *supra* note 2, at 916.

125. Bridwell II, *supra* note 2, at 478 n.28 (emphasis added).

126. Bridwell I, *supra* note 2, at 914 n.36.

127. Bridwell taxes me with "failing to distinguish between principles contained in the Constitution and examples of contemporary understanding as to the application of those principles as evidence of the intention of the framers . . . ." *Id.* When the framers excluded suffrage and segregation they limited the "principle" of "equal protection"; it could not be "applied" thereto. A "principle" may be explicitly limited, or by the unmistakable intention of the framers that it be so limited.

time.[128] Adherents of the "change of meaning" would endow the Court with power to revise the Constitution by pouring its own new "meaning" into its terms, as it did in creating the doctrine of substantive due process in defiance of its well-established procedural meaning. A generation attached to a "fixed" Constitution, and in Jefferson's words, intent on binding down their delegates "from mischief by the chains of the Constitution,"[129] was little likely to entertain a "semantic" theory that would dissolve those chains. Before the dawn of "semantics," Madison wrote, "[w]hat a metamorphosis would be produced in the code of the law if all its ancient phraseology were to be taken in its modern sense."[130] And he insisted that 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."[131] Jefferson was of the same mind.[132] No contrary expression in the contemporary literature came to my attention, and activists have cited none. The view that constitutional interpretation can turn on changed meaning of words was rejected by a unanimous Senate Judiciary Report in 1872, signed by senators who had voted for the fourteenth amendment: "A change in the popular use of any word employed in the Constitution cannot retroact upon the Constitution, either to enlarge or limit its provisions."[133] On the contrary view, popular usage, oblivious to constitutional implications, would unwittingly amend the Constitution in spite of the formal procedure required by Article V. Justice Holmes declared that "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 effective."[134] Even Humpty Dumpty claimed no more than to give the words *he* used such meaning as he chose. Learned discourse about the "meaning of meaning"[135] beclouds the issue: may the Court displace the framers' choices by changing the meaning of the terms they used to express them.

128. *Quoted in* R. BERGER, *supra* note 1, at 370-71 n.38.
129. *Quoted in id.* at 252.
130. *Quoted in* 3 M. FARRAND, *supra* note 33, at 464.
131. *Quoted in* R. BERGER, *supra* note 1, at 3.
132. *Id.* at 366.
133. S. REP. NO. 21, *supra* note 98, at 3, *reprinted in* A. AVINS, *supra* note 97, at 572.
134. O. HOLMES, COLLECTED LEGAL PAPERS 206 (1920).
135. *See* R. BERGER, *supra* note 1, at 369.

V. COMPETING PHILOSOPHIES?

Bridwell's translation of the problem—and he is not alone in this—into one of opposing philosophical theories with which he would have us grapple[136] darkens counsel. Willard Hurst pierced to the heart of the matter in 1954: "the real issue is who is to make the policy choices in the twentieth century: judges or the combination of legislature and electorate that makes constitutional amendments."[137] Where was the Court authorized to supplant the value choices of the framers (e.g., suffrage) with its own?

To be sure, one may have "philosophical preferences for limited government,"[138] or may prefer, as anarchists do, no government at all, or a judicial oligarchy to an elective democratic system based on majoritarian rule. It is open to academe "philosophically" to reject a system, as does Sanford Levinson, that enables a majority to "tyrannize" over a minority,[139] or, as does Arthur S. Miller, to refuse to be governed by the dead hand of the past.[140] But we are not writing on a clean slate, free to make such choices *ab initio.* They were made by the founders and ratified by the people.[141] It is not for academicians to repudiate those choices; only the people may do so by the machinery for amendment Article V provides. Given that suffrage was unmistakably excluded from the scope of the fourteenth amendment, it is not a matter of philosophical choice to endow the Court with power to overturn that determination.[142] The Court is a creature of the Constitution and has only such power as it confers,[143] and it lies beyond the power of academe to confer more.

The "primary question," unless we speak in terms of an amendment, is therefore not as Professor Michael Perry suggests, "What sort of 'democratic' society do *we* want? What sort of relationship *should* exist between the processes of majoritarian

136. *See* Bridwell II, *supra* note 2, at 472, 483.

137. *Quoted in* R. BERGER, *supra* note 1, at 315.

138. Bridwell II, *supra* note 2, at 482.

139. Berger, *The Constitution and the Rule of Law,* 1 W. NEW ENGLAND L. REV. 261 (1978).

140. Miller, *supra* note 1.

141. *See* Berger, *supra* note 69, at 281.

142. Justice Harlan stated, "[w]hen, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process." Reynolds v. Sims, 377 U.S. 533, 625 (1964).

143. "Congress and the President, like the courts, possess no power not derived from the Constitution." *Ex parte* Quirin, 317 U.S. 1, 25 (1942).

policymaking and the judiciary. . . ."[144] Of course, "the precise character of our societal commitment is [not] an immutable given . . . ."[145] What is at issue, however, is whether that commitment can be changed by the Court rather than the people. My attachment to the Constitution, let me add, has no tinge of "religious reverence";[146] I am committed to it because it is the "voice of the people" and, as in the case of suffrage, incontrovertibly expressed *their* sentiments. My credo is that of Charles McIlwain: "The two fundamental correlative elements of constitutionalism for which all lovers of liberty must yet fight are the legal limits of arbitrary power and a complete responsibility of the government to the governed."[147] That credo led me to condemn the excesses of Richard Nixon, and I cannot condone those of Earl Warren because their purpose was benign.[148] "Constitutionalism" is therefore more than a strand of "political philosophy";[149] it epitomizes adherence to the "fixed" Constitution adopted by the people, setting up a government on majoritarian principles and carefully limiting the power they delegated. Secretary Harris, be it noted, does not repudiate the Constitution; she appeals to it for vindication of virtually unlimited minority rights.[150]

The opposing positions are thus summarized by Bridwell:

> Does the Constitution guarantee to us the supposed benefits flowing from unlimited experimentation by some supreme policymaking arm of the central government . . . or contrawise, does it protect us from exactly this form of experiment by insuring a permanent severance of legislative, discretionary policy formulation on the one hand and judicial authority on the other.[151]

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144. Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1214 (1978) (emphasis added) (citation omitted).

145. *Id.*

146. Bridwell II, *supra* note 2, at 481. It was because they were bulwarks against oppression that, in the words of Chief Justice Marshall, "written constitutions have been viewed with so much reverence." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

147. C. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 146 (rev. ed. 1947).

148. Leonard Levy observed, "result-oriented jurisprudence . . . [is a] judicial monstrosity that gains nothing when the Court reaches a just result merely because of its identification with underdog litigants." *Quoted in* R. BERGER, *supra* note 1, at 343.

149. Bridwell II, *supra* note 2, at 469 n.4.

150. Harris, *Address to the Fellows of the American Bar Foundation*, 30 S.C.L. REV. 485 *passim* (1979).

151. Bridwell II, *supra* note 2, at 482.

The clear answer given by constitutional history is that the judiciary was separated from the legislative and excluded from policymaking. The "realist" touchstone noted by Bridwell is whether "we gain or lose from the policy initiatives of a 'frankly experimental' judiciary."[152] Judicial power cannot be enlarged by invoking cost-benefit considerations which the Court itself is to weigh and thus confer power on itself to set the framers' choices aside. Nor is it to be doubted that the framers had no stomach for a "frankly experimental judiciary" and, as Justice Iredell, James Bradley Thayer and Judge Learned Hand declared, limited its role to *policing* constitutional boundaries,[153] as Chief Justice Marshall exemplified in *Marbury v. Madison.*[154]

Because this issue of the *scope* of judicial power is basic to constitutional law, it will profit us to examine it further in the frame of Professor Michael Perry's parallel exposition. As opposed to those who cling to the constitutional text and its history, Perry observes that the "functionalist" test is whether the expanded judicial role is "salutary."[155] "Properly refined," he writes, "the question is whether majoritarian policymaking shall be restrained not only by the constitutional text, but also by the Court's countervailing policymaking."[156] The functionalists, he notes, claim that "the Framers intentionally committed the American constitutional system to a degree of judicial policymaking," relying in particular on the employment of Bickel's "open-ended" terms "so that posterity might in effect rewrite the document to accommodate ever-arising and ever-new exigencies."[157] Despite his continuing attachment to expansive judicial review, on grounds hereinafter considered, Perry has since written that Berger has "devastated the notion that the framers of the fourteenth amendment—a major aspect of the constitutional text—intended it to be 'open-ended.'"[158] And he considers that

152. *Id.*

153. R. BERGER, *supra* note 1, at 249-50 & n.3, 305 & n.26. Justice Iredell stated, "[t]he power of the legislatures is limited" by the several constitutions. "*Beyond* [those] limitations . . . their acts are void, because they are not warranted by the authority given. But *within* them . . . the Legislatures only exercise a discretion expressly confided to them by the constitution." Ware v. Hylton, 3 U.S. (3 Dall.) 199, 266 (1796) (emphasis added).

154. 5 U.S. (1 Cranch) 137 (1803).

155. Perry, *supra* note 144, at 1205.

156. *Id.* at 1213.

157. *Id.* at 1211. *See* note 69 *supra.*

158. Perry, *supra* note 2, at 695.

"[t]he judicial practice of striking down governmental action on the basis of expansive 'modern' readings of the constitutional text . . . finds no warrant in the known intentions of the Founding Fathers."[159] This leaves us with what Perry states is "[t]he truly fundamental problem posed by expansive [judicial] review, and by substantive due process in particular, . . . that of *authority*":[160] where is the judiciary authorized to displace majoritarian policymaking?

Perry proffers an answer. While recognizing the founders' restrictive view of judicial review, Perry observes: "In time, however, judicial review came to serve other, more complex functions in American government."[161] It did not do so, however, by virtue of a fresh constitutional grant, but by a series of arrogations. Perry himself rejects the argument that "over time the people have consented to and thereby legitimized expansive judicial review . . . . What one person interprets as consent, particularly when that consent is silent, another may see as forbearance or simply lethargy."[162] Worse, approval by silence circumvents the Article V provision for amendment, supplanting it by amendment by inertia—and in the absence of disclosure that the Court is exercising powers not granted.[163] There can be no ratification where there is no disclosure. It needs no more than Hamilton's statement to collapse the argument: "Until the people have, by some solemn and authoritative act annulled or changed the established form, it is binding . . . and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act."[164] Hamilton also

159. Perry, *supra* note 144, at 1212. *See* note 65 *supra*.

160. Perry, *supra* note 144, at 1231 (emphasis added).

161. *Id.* at 1215.

162. *Id.* at 1212-13. For example, "[c]ongressional inaction cannot always, or usually, be deemed consent" to presidential action. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 102 (1972).

163. I therefore dissent from Bridwell's allusion to "the historical fact of popular approval of judicial action." Bridwell I, *supra* note 2, at 908 n.3. Nor would I rest on a "theory of consent" in terms of "social contract" or on any other theory, but rather would more simply say, as did James Iredell, one of the foremost founders: "The people have chosen to be governed under such and such principles. They have not chosen to be governed or promised to submit upon any other." *Quoted in* R. BERGER, *supra* note 1, at 295-96. Bridwell adverts to "the almost universally accepted importance of consent as a prerequisite to valid and binding rules of constitutional (or other) laws—because of the primacy of democratic theory in our constitutional scheme." Bridwell II, *supra* note 2, at 468 n.1. This is a good enough guide to steer by.

164. *Quoted in* R. BERGER, *supra* note 1, at 316. Another framer, Elbridge Gerry, also

undercuts the other branch of Perry's argument, that "in time" "another function [the ethical function] . . . was to give voice to, even to shape, the professed widely-shared ideals and sensibilities of society."[165] At no time was such power conferred by the people. The desegregation decision was hardly a response to the "widely shared ideals" of society; in fact, the Court shrank from telling the people, as Justice Jackson urged, that we are making "new law for a new day."[166] The realities were more clearly perceived by Professor Archibald Cox. By the 1950s, he wrote, the legislative process

> [had become] resistant to libertarian, humanitarian, and egalitarian impulses . . . [I]n the new era these impulses were not shared so strongly and widely as to realize themselves through legislation. They came to be felt after the early 1950s by a majority of the Supreme Court Justices, perhaps by the fate which put one man upon the Court rather than another [a Warren for a Vinson], perhaps because the impulses were more strongly felt in the world of the highly educated,[167]

who at last carried the day. The persistent, widespread resistance to busing further testifies that the Court is not even now realizing "widely shared ideals." And though Ely shares Perry's activism, he convincingly demonstrates that judges are not "best equipped to make moral judgments," that in a search for "social ideals"

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regarded the amendment process as exclusive. *See id.* at 317-18. *See also* T.I.M.E. v. United States, 359 U.S. 464 (1959).

Activists protest that the amendment process is "cumbersome," R. BERGER, *supra* note 1, at 315-16, as if that serves as an unwritten dispensation to disregard what the Court itself has indicated is the sole machinery for change, Hawke v. Smith, 253 U.S. 221, 227 (1920). As Bridwell observes, the "cumbersome" argument cuts both ways: it is an "equally good argument *against* unrestrained judicial rule-making at the constitutional level because we will be hard pressed to gain relief from their decisions." Bridwell II, *supra* note 2, at 472 n.12. In other words, if it is too "cumbersome" to ask the people to alter constitutional provisions, it is too "cumbersome" to require reversal of judicial usurpation by amendment to restore the will of the people.

165. Perry, *supra* note 144, at 1216.

166. *Quoted in* R. BERGER, *supra* note 1, at 130. *Cf.* note 27 *supra.*

167. *Quoted in* R. BERGER, *supra* note 1, at 313. This is euphemistically described by Secretary Harris as "[t]he fact that major social conflicts can be resolved by the legal process is a crucial accomplishment for this nation." Harris, *supra* note 150, at 492. They are not "resolved," but remain a subject of public controversy, *e.g.,* busing. *See* note 27 *supra.* Professor Joseph W. Bishop wrote: "Those who favor abortion, busing . . . have no faith whatever in the wisdom or will of the great majority of the people, who are opposed to them. They are doing everything possible to have those problems resolved by a small minority in the courts . . . ." *Quoted in* R. BERGER, *supra* note 1, at 314 n.6.

what the judge is "really . . . discovering . . . are his own values."[168]

In focusing on the central question of authority, Perry goes to the heart of the debate. But his answer does not root judicial authority to divine "social ideals" in either the constitutional text or its history. As Judge Learned Hand said, the judge "has no right to divinations of public opinion which run counter to its last formal expressions."[169] That the Founders did not authorize the judiciary to act as soothsayers who would divine the "social ideals" of their generation and set aside the peoples' "last formal expression" is attested by their rejection of judicial participation in policymaking, by their profound distrust of judicial discretion, and by their express provision for amendment by the people, a process Elbridge Gerry and Alexander Hamilton declared to be exclusive.

If one accepts the Constitution it is hardly arguable "philosophically" that the Court may change an explicit *textual* provision, *e.g.*, change the two-year term in the House of Representatives into a four-year term. No more may it amend the clear intention to exclude suffrage, for under age-old canons of construction the clear intention is as good as written into the text,[170] and is equally to be honored. At least as regards the unmistakable intention to exclude suffrage and segregation, the issue is not one of "philosophical" choices but one of *power*: where was the Court empowered to override that intention?

Finally, because the "New Faith" of the activists has taken on an air of immutable dogma, I would recall to them the words of the Supreme Court, per Chief Justice Fuller in 1892:

> [W]e can perceive no reason for holding that the power confided to the States by the Constitution has ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created. Still less can we recognize the doctrine, that because the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising

168. Berger, *supra* note 69, at 311-12 (quoting Ely, *Foreward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 16 (1978)).

169. L. HAND, THE SPIRIT OF LIBERTY 14 (1952).

170. Hawaii v. Mankichi, 190 U.S. 197 (1903); Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908) (Holmes, J.). See text accompanying note 108 *supra* (quoting Holmes' opinion in *Johnson*).

> in their time, it may therefore be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made.[171]

In terms of the current debate, it is one thing to *apply* amorphous terms to conditions not foreseen by the framers and something else again judicially to change a *principle, e.g.*, "equal protection," plainly limited by the framers, without the sanction of an amendment. Powers reserved to the states are not obliterated because they have not been exercised to satisfy current aspirations.

171. McPherson v. Blacker, 146 U.S. 1, 36 (1892).