Constitutional Interpretation and Activist Fantasies

Raoul Berger
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BY RAOUl BERGER*

The great tragedy of Science—the slaying of a beautiful hypothesis by an ugly fact.

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INTRODUCTION

Activist “scholarship” increasingly is divorced from historical fact. A leading activist theorist, Paul Brest, pleaded with his fellows “simply to acknowledge that most of our writings are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions for the public good.”2 “Advocacy scholarship” is a contradiction in terms; scholarship is disinterested, propaganda is not.3 These reflections are stirred by recent articles by Professors Erwin Chemerinsky4 and David A. J. Richards.5

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1 OXFORD DICTIONARY OF QUOTATIONS 269 (3d ed. 1979).
3 See infra note 226 (quoting Learned Hand).
I. ERWIN CHEMERINSKY

Chemerinsky unabashedly engages in "advocacy scholarship." He applauds the "constitutional changes" wrought by the modern Court but deplores its many "wrong turns and missed opportunities..." and urges it to carry out the "promise" of the Fourteenth Amendment. He opens with the Privileges or Immunities Clause. One may agree that the Slaughter-House Cases unduly restricted the clause to "privileges and immunities of citizens of the United States." which may indeed be regarded as meager in scope. The evidence is that the Framers meant

6 Chemerinsky, supra note 4, at 1143. Yet, Justice Harlan declared that the Court's reapportionment interpretations were "made in the face of irrefutable and still unanswered history to the contrary." Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

Section 2 of the Fourteenth Amendment provides that State representation in the House shall be cut in proportion to disfranchisement on racial grounds. Senator Jacob Howard explained: "The theory of this whole Amendment is, to leave the power of regulating the suffrage with the people or Legislatures of the States, and not to assume to regulate it by any clause of the Constitution..." ALFRED AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES 237 (1967). The Report of the Joint Committee on Reconstruction, which drafted the Amendment, stated,

"It was doubtful...whether the States would consent to surrender a power they had always exercised, and to which they were attached...[and therefore commended Section 2 because it]...would leave the whole question with the people of each State."

Id. at 94. The one man-one vote decisions therefore represent a blatant reversal of the framers' will. For additional citations, see RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 64-68 (1977) (discussing the intent to leave suffrage under state control).


8 Chemerinsky, supra note 4, at 1144.

9 83 U.S. (16 Wall.) 36 (1872).

10 Id. at 78, 79.

11 Chemerinsky, supra note 4, at 1146. Chemerinsky considers that Slaughter-House "ruled in favor of...wealthy economic interests." Id. at 1155 (citations omitted). Why then did Justice Field, who had ties to great railroad interests, dissent?

Justice Miller was hardly to be blamed, because there was some confusion among the framers. Originally "privileges and immunities," derived from Article IV, referred to rights a citizen of one State might enjoy in another. See infra notes 16-24 and accompanying text. Senator Howard dwelt on "privileges and immunities of citizens of the United States." AVINS, supra note 6, at 219. The confusion was compounded by John Bingham, who stated:

The amendment [in earlier draft] is exactly in the language of the Constitution [i.e. Article IV]; that is to say, it secures to the citizens of each of the States all the privileges and immunities of citizens of the several States. ... It is to
to protect some privileges and immunities of State citizens derived from Article IV and limited to trade and commerce, not, however, the all but boundless cornucopia envisioned by activists. For that broad view, Chemerinsky relies on a statement in Corfield v. Coryell that was quoted by Senator Jacob Howard in the thirty-ninth Congress and on Bruce Ackerman's "powerful criticism of Berger's historical account." This criticism, more splenetic than "powerful," shatters on the historical facts.

A. Privileges or Immunities

The words "privileges and immunities" first appear in Article IV of the Articles of Confederation, which specified "all the privileges of trade and commerce." The words were adopted in Article IV of the Constitution which, according to Chief Justice White, was intended "to perpetuate [the] limitations" of the earlier Article IV. White repeated Justice Miller's statement from the Slaughter-House Cases that "there can be little question that... the privileges and immunities intended are the same in each."

"Privileges or immunities" came into the Fourteenth Amendment by way of the Civil Rights Bill of 1866, which referred to "civil rights or immunities." In explaining those terms, Senator Lyman Trumbull, chairman of the Senate Judiciary Committee, not only read from Corfield v. Coryell, but also from the Maryland (per Samuel Chase, soon to be

secure to the citizen of each State all the privileges and immunities of citizens of the United States in the several States.

Id. at 160 (emphasis added). Article IV provided for enjoyment of certain privileges of the host State, not an alloy of "all the privileges of citizens of the several States."

See infra notes 16-23 and accompanying text.

6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230). Chemerinsky, supra note 4, at 1145 (quoting Corfield, 6 F. Cas. at 551).

Id. at 1145.

Id. at 1146 n.7. Ackerman seized upon an ellipsis in one of thousands of quotations, to which he attributed sinister "concealment." That canard was exploded by my subsequent publication of the entire quotation. Such was the sum and substance of Ackerman's "powerful attack." In a forthcoming article in the Brigham Young University Law Review, Raoul Berger, Bruce Ackerman on Interpretation: A Critique, 1992 B.Y.U. L. REV. 1035. I pay my respects to Ackerman's "scholarship."


Id. at 296.

AVINS, supra note 6, at 104.

6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).
elevated to the Supreme Court) and Massachusetts (per Chief Justice Parker) cases. Early on, the Maryland and Massachusetts courts had construed Article IV in terms of trade and commerce. Chase declared, as did Parker, that the words were to be given a "limited operation." Activists ignore the Maryland and Massachusetts cases and build entirely on Corfield. Trumbull, however, did not read Corfield broadly, stating that it "enumerates the very rights" set forth in the Bill and explaining that "the great fundamental rights set forth" in the Bill are "the right to acquire property, the rights to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property."

Chemerinsky would attribute to the 1823 Corfield case the power to expand the 1866 Bill whose spokesman, after quoting from Corfield, said enumerated the "very rights" listed in the Bill, rights that Georgia v. Rachel described as "a limited category of rights." In his Slaughter-House dissent, Justice Field noted the derivation of privileges or immunities from Article IV and stated that "Congress has given its interpretation of those terms in the Civil Rights Act." Neither Ackerman nor Chemerinsky allude to the foregoing facts. Serious scholarship requires cognizance of such discrepant evidence.

A word as to Senator Howard's remarks—Due to the sudden illness of Chairman Fessenden, it fell to Howard to act as spokesman for the Joint Committee on Reconstruction. Howard stated: "I can only promise to present to the Senate ... the views and motives which influenced that..."

21 AVINS, supra note 6, at 121, 122.
23 Campbell, 3 H. & McH. at 554; Abbott, 23 Mass. (6 Pick) at 91.
24 The court in Corfield stated: "[W]e cannot accede to the proposition ... that ... the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state. ..." Corfield, 6 F. Cas. at 552 (emphasis added).
25 AVINS, supra note 6, at 122 (emphasis added).
26 Id. (emphasis added).
27 Id. In the House, Rep. Shellabarger quoted Chancellor Kent's reading of Corfield: "[Fundamental rights] are the rights of protection of life, liberty, and to acquire and enjoy property, and to pay no higher imposition than other citizens, and to pass through or reside in the State at pleasure, and to enjoy the elective franchise. ..." Id. at 248. After reading from Corfield, Senator Trumbull immediately emphasized that the Civil Rights Bill did not provide for suffrage. Id. at 122.
29 Id. at 791.
committee, so far as I understand those views and motives . . ."31 According to Benjamin Kendrick, editor of the Journal of the Committee, Howard was "one of the most . . . reckless of the radicals,"32 who had "served consistently in the vanguard of the extreme Negrophiles."33 In this he was far removed from the conservative and moderate Republicans who prevailed.34 Leonard Levy, who views the Court's revisory efforts sympathetically, stated that "there is no reason to believe that Bingham and Howard expressed the views of the majority of Congress."35

A telling illustration of the "limited" scope of "privileges or immunities" was furnished by John Bingham, an activist mainstay. Despite repeated assurances that the Civil Rights Bill was limited to the specifically enumerated rights, Bingham vehemently protested:

[C]ivil Rights . . . include and embrace every right that pertains to the citizen . . . [it would] strike down . . . every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen . . . [it would] reform the whole civil and criminal code of every State government.36

Consequently, as James Wilson, chairman of the House Judiciary Committee explained, the phrase "civil rights and immunities" was deleted in order to remove "the difficulty growing out of any other construction beyond the specific rights named in the section, . . . leav[ing] the bill with the rights specified in the section."37 The House approved the deletion of the "oppressive" words. No activist has attempted to explain why Bingham, after strenuously protesting against the oppressive invasion by "civil rights" of the States' domain, embraced in the lesser "privileges" of the Amendment the very over-broad regime he had rejected in the Bill. In truth, the framers regarded "privileges or immunities" as words of art having a circumscribed meaning. After reading to the Senate from the cases, Trumbull remarked: "[T]his being the construction as settled by judicial decisions. . . ."38

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31 AVINS, supra note 6, at 218-19.
33 Id.
34 See infra text accompanying notes 174-175.
35 LEONARD LEVY, JUDGMENTS: ESSAYS ON CONSTITUTIONAL HISTORY 77 (1972).
36 AVINS, supra note 6, at 186, 188 (emphasis added); Justice Black understood Bingham to object because the Bill "would actually strip the States of power to govern." Adamson v. California, 332 U.S. 46, 100 (1947).
37 AVINS, supra note 6, at 191 (emphasis added).
38 Id. at 122.
Judge William Lawrence acknowledged in the House "that the courts have by construction limited the words 'all privileges' to mean only 'some privileges.'" Although the Supreme Court noticed this Bingham incident in *Georgia v. Rachel,* it is ignored by activists.

That is likewise the fate of other striking evidence. On January 20, 1871, Bingham submitted a Report of the House Committee on the Judiciary, from which he did not dissent, reciting that the

[Privileges or Immunities Clause of the Fourteenth Amendment] does not, in the opinion of the committee, refer to privileges and immunities . . . other than those privileges and immunities embraced in the original text of the Constitution, article 4, section 2. The fourteenth amendment, it is believed, *did not add* to the privileges or immunities before mentioned. . . .

The Supreme Court likewise declared that the clause did not add to those privileges or immunities provided by Article IV. What manner of scholarship is it that ignores such weighty evidence?

**B. State Action Required**

A "second major error," Chemerinsky asserts, was the Court's restriction of the Fourteenth Amendment "to government action." Noting that the amendment "prohibits a 'state' from denying equal

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39 Id. at 207 (emphasis added). In a similar case the Supreme Court stated: "[W]e should not assume that Congress . . . used the words . . . in their ordinary dictionary meaning when they had already been construed as terms of art carrying a special and limited connotation." *Yates v. United States,* 354 U.S. 298, 319 (1957). Walter Murphy, a critic of my views, concedes that "privileges or immunities" had "become words of art" as Berger "amply demonstrates." Walter Murphy, *Book Review,* 87 YALE L.J. 1752, 1758-59 (1978).


41 AVINS, *supra* note 6, at 466 (emphasis added). This was made plain by Shellabarger in the thirty-ninth Congress: The Civil Rights Bill "neither confers nor defines nor regulates any right whatever. Its whole effect is not to confer or regulate rights, but to require that whatever of these *enumerated* rights and obligations are imposed by State laws shall be for and upon all citizens alike. . . ." *Id.* at 188 (emphasis added). Speaking to privileges or immunities of the Fourteenth Amendment, Hotchkiss said that it "is precisely like the present Constitution; it confers no additional powers." *Id.* at 160. So too, James Wilson stated: "We are establishing no new right . . . It is not the object of this bill to establish new rights . . . ." *Id.* at 163.

42 Maxwell v. Dow, 176 U.S. 581, 596 (1900).

43 Chemerinsky, *supra* note 4, at 1147.
he argues that "states might deny equality ... by inaction in the face of private wrongs." Yet, "deny" is defined in terms of positive action, so it is equally arguable that the framers contemplated action by the State. That was plainly what the framers of the antecedent Civil Rights Act had in mind. When Representative Loan asked why the Bill is limited "to those who act under color of law," James Wilson replied, "We are not making a general criminal code for the States." Shellabarger explained that "the violations of citizens' rights, which are reached and punished by this bill, are those that are inflicted under 'color of law'... The bill does not reach mere private wrongs, but only those done under color of State authority ..." Senator Trumbull also indicated that the bill was aimed at officials acting under color of law, and Judge Lawrence said that it applied "if an officer shall intentionally deprive a citizen of a right." Raymond spoke to the same effect.

The Civil Rights Act is immediately relevant because the Fourteenth Amendment was designed to incorporate the Act into the Constitution so as to remove doubts as to its constitutionality and to place it beyond the power of a subsequent Congress to repeal. An ardent advocate of an abolitionist reading of the Fourteenth Amendment, Howard Jay Graham, stated that "virtually every speaker in the debates on the Fourteenth Amendments—Republicans and Democrats alike—said, or agreed that the Amendment was designed to embody, or incorporate the Civil Rights Act." Were the "identity" less clear, laws in pari materia, dealing with the same subject matter, must be construed with reference to each other. If any debater maintained that the Amendment applied to private wrongs, it escaped my attention. With good reason, therefore, has the rule

44 Id.
45 Id.
46 Avins, supra note 6, at 165.
47 Id. at 189.
48 Id. at 198.
49 Id. at 209.
50 Id. at 215.
52 Howard J. Graham, Everyman's Constitution 291 n.73 (1968). For instance, George Latham stated that the Act "covers exactly the same ground as this Amendment." Avins, supra note 6, at 223. See also Horace E. Flack, The Adoption of the Fourteenth Amendment 81 (1908) ("nearly all said that [the Fourteenth Amendment] was but an incorporation of the Civil Rights Bill").
53 See infra note 88 and accompanying text.
that the Amendment "applies almost exclusively to government actions" remained firm. It is Chemerinsky, not the Court, that is in error.

C. Separate but Equal

Chemerinsky regards *Plessy v. Ferguson* as "the greatest tragedy" in the Court's interpretation of the Fourteenth Amendment, the cost of which "in untapped human potential is incalculable." In view of current activist infatuation with literary parallels, it may be recalled that Gustave Flaubert considered that "personal sympathy, genuine emotion, twitching nerves and tear-filled eyes only impair the sharpness of the artist's vision." Even more, the historian said C. Vann Woodward, "has a special obligation to sobriety and fidelity to the record."

It will not do to test the aims of the framers by Chemerinsky's emotions. Racism, it needs to be borne in mind, "ran deep in the North," and "the suggestion that Negroes should be treated as equal to white men woke some of the deepest and ugliest fears in the American mind." Republicans took account of race prejudice as an inescapable fact: Julian referred to the "proverbial hatred" of Negroes; Senator Lane referred to the "almost ineradicable prejudice;" and Wilson

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54 Chemerinsky, supra note 4, at 1148.
55 163 U.S. 537 (1896).
56 Chemerinsky, supra note 4, at 1148.
57 Id.
59 C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 87 (1960). "To get at its truth [of our system of morality], it is useful to omit the emotion and ask ourselves what those generalizations are and how far they are confirmed by fact accurately ascertained." OLIVER W. HOLMES, JR., COLLECTED LEGAL PAPERS 306 (1920). The black historian, John Hope Franklin, observed that "historical work, with its established standards for evaluation of evidence, must not be 'polluted by passion'; we must not simply turn the past into a mirror of our own present-day concerns." Drew Faust, *Unpolluted by Passion*, N.Y. TIMES, June 3, 1990, § 7, at 13 (book review). Frederick M. Grimm praised David Hume because his "writing of history ... [was] exempt from prejudice and from passion." 2 HISTORIANS AT WORK 225 (Peter Gay & Victor Wexler eds., 1972) (quoting Frederick Melchior Grimm in his Correspondence littéraire in March, 1793). Finally, Diderot endorsed the view: "Fear the deluded man of good will; he is on good terms with his own conscience, he desires the good, and everyone trusts him .... But unfortunately he is mistaken as to the means of procuring it for us." P.N.A. FURBANK, DIDEROT 321 (1992).
61 Id. at 157.
63 Id. at 739.
referred to the "iron-cased prejudice" against blacks. Separate but equal was rooted in a harsh reality, noted by Alexander Bickel: "It was preposterous to worry about unsegregated schools . . . 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."

In fact, Plessy merely reiterated what a series of courts had been holding for fifty years, beginning with the oft-cited decision of Chief Justice Lemuel Shaw in Roberts v. City of Boston. When the Fourteenth Amendment was invoked in 1871, the Ohio court in State ex rel. Gaines v. McCann declared that "equality of rights does not involve the necessity of educating white and colored persons in the same school." Other cases followed in Nevada, California, and Indiana. In 1878, a federal circuit court held that separate schools for blacks did not constitute a denial of "equal protection," as did the New York court in 1883. Thus, Plessy had behind it a row of precedents which rested solidly on the framers' exclusion of segregation from the Amendment.

On the "prior concrete historical understanding," states activist David Richards, "Plessy would be right." In explaining the Civil Rights Bill to the House, Wilson stated that it did not require that all "children shall attend the same schools." Congress "ha[d] permitted segregated schools in the District of Columbia from 1864 onward," and Senator Charles Sumner vainly fought "to abolish Negro segregated schools in the District of Columbia." A congress which refused to abolish segregation in its own bailiwick was hardly likely to insist on abolition by the states. There is yet other evidence that desegregation was not intended by the Fourteenth Amendment, and these findings have been widely accept-

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64 Id. at 2948.
65 RICHARD KLUGER, SIMPLE JUSTICE 654 (1976).
67 State ex rel. Gaines v. McCann, 21 Ohio St. 198, 211 (1871).
68 State ex rel. Stoutmeyer v. Duffy, 7 Nev. 342, 348 (1872).
69 Ward v. Flood, 48 Cal. 36 (1874).
70 Cory v. Carter, 48 Ind. 327, 359 (1874).
71 Bertonnequ v. Board of Directors of City Schools, 3 F. Cas. 294 (C.C.D. La. 1878) (No. 1,361).
72 People ex rel. King v. Gallagher, 93 N.Y. 438, 449 (1883).
73 Richards, supra note 5, at 1188.
74 AVINS, supra note 6, at 163.
75 KLUGER, supra note 65, at 635.
77 BERGER, supra note 51, at 117-33.
ed.\textsuperscript{78} Not that I would uphold segregation, but a historian’s duty is to face up to the facts unflinchingly.\textsuperscript{79} Chemerinsky’s aspirations may justify a sociological reappraisal, but they may not alter the limited aims of the framers.\textsuperscript{80} Even his fellow activist Richards recognizes that most Republicans did not regard segregation “as inconsistent with equal protection.”\textsuperscript{81} For centuries the rule has been that an Act is to be construed in light of the “mischief” it was designed to remedy.\textsuperscript{82} By the Black Codes the South, in the words of Senator Henry Wilson, sought “to make slaves of men whom we have made free.”\textsuperscript{83} Senator William Stewart stated that the Civil Rights Bill was meant to prevent such “peonage . . . . It strikes at that; nothing else. . . . That is the whole scope of the law.”\textsuperscript{84}

The Civil Rights Bill, it will be recalled, was limited to discrimination respecting enumerated, specific rights: the right to own property, to contract, and to have access to the courts.\textsuperscript{85} Without dissent the framers regarded the Fourteenth Amendment as identical with the Bill.\textsuperscript{86} Throughout, the framers associated “equal protection” with the limited rights that the Bill enumerated. Thus, Shellabarger said, “[W]hatever 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 secures . . . equality of protection in those enumerated civil rights. . . .”\textsuperscript{87} The Amendment rephrased the Bill’s negative prohibition of discrimination by positive equal protection. If two acts are in pari


\textsuperscript{79} Although the great mathematician and astronomer Johannes Kepler indulged in fantastic speculations, he “was always stubbornly faithful to the facts. His anguish at finding some wild and beautiful idea was not confirmed by observation was . . . sometimes very considerable, but he never hesitated to abandon it.” J.W.N. Sullivan, The Limits of Science 131 (1949).

\textsuperscript{80} See STORY, infra note 122 and accompanying text.

\textsuperscript{81} Richards, supra note 5, at 1188.


\textsuperscript{83} AVINS, supra note 6, at 138.

\textsuperscript{84} Id. at 204 (emphasis added).

\textsuperscript{85} See supra note 27 and accompanying text.

\textsuperscript{86} See supra notes 51-52 and accompanying text.

\textsuperscript{87} AVINS, supra note 6, at 188 (emphasis added). The enumerated rights, said Shellabarger, are “necessary as means to the constitutional end, to wit, the protection of the rights of person and property of a citizen.” Id.
“it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act.”

Leonard Myers commented that the Amendment requires each State to provide for “equal protection to life, liberty, and property, equal right to sue and be sued, to inherit, make contracts, and give testimony,” thus identifying the Amendment with the Bill.

That equal protection did not mean equality in all things is evidenced by the exclusion of suffrage from the Amendment and the repeated rejection of proposals to bar all discrimination. In sum, as Henry Monaghan observed, the majority of Americans of that period “could logically believe that emancipation required that the freed man possess certain rights to personal security and property. Simultaneously, they could favor rank discrimination against blacks in political and social matters.” One may sympathize with Chemerinsky’s repudiation of such “rank discrimination”–as I do–and still insist that rejection of the Framers’ choices in favor of our own requires an amendment, for which judicial revision of the Constitution is no substitute.

Chemerinsky would have the Court “act as a tremendously positive vehicle for social change, as in Brown v. Board of Education.” That is not its function. Under the Constitution social change was confided to the legislature. Cognizant of the separation of powers, Chief Justice

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88 Reiche v. Smythe, 80 U.S. (13 Wall.) 162, 165 (1872); United States v. Freeman, 44 U.S. (3 How.) 556, 564-65 (1845). In Yates the Court stated “we should not assume that Congress . . . used the words . . . in their ordinary dictionary meaning when they had already been construed as terms of art carrying a special and limited connotation”. Yates v. United States, 354 U.S. 298, 319 (1957).

89 See supra note 6.

90 AVINS, supra note 6.

91 BERGER, supra note 51, at 163-64.


93 Chemerinsky, supra note 4, at 1155.

94 Francis Bacon counselled judges “to remember that their office is jus dicere not jus dare; to interpret the law, and not to make law, or give law.” HENRY S. DRINKER, LEGAL ETHICS 327 (1953). John Dickinson stated at the Convention that “the Judges must interpret the Laws, they ought not to be legislators.” 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 108 (1911). Justice Wilson, a leading participant in the Convention, cautioned in his 1791 lectures that the judge “will remember, that his duty and his business is, not to make the law, but to interpret and apply it.” 2 THE WORKS OF JAMES WILSON 502 (Robert G. McCloskey ed., 1967). Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1875): “Our province is to decide what the law is, not to declare what it should be.” Luther v. Borden, 48 U.S. (7 How.) 1, 41 (1849).
Marshall declared that "[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law."  Interpretation does not authorize revision; construction of the Constitution, Marshall wrote, "cannot be the assertion of a right to change that instrument." Judicial law making also subverts the federal allocation of powers whereunder the States are to be shielded from federal exercise of ungranted power, as the Tenth Amendment hammered home. Speaking on behalf of the Court, Justice Brandeis emphasized that the Constitution "preserves the autonomy and independence of the States—indeed in their legislative and independence in their judicial departments" and that federal supervision of their action "is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and to that extent, a denial of its independence."

It remains to be said that social change by judicial fiat has its shortcomings. Commenting on Lochner v. New York, Chemerinsky remarks that "[i]n human terms, countless people were hurt—many were maimed or died—because for decades the government was denied the ability to adopt protective laws." So too, he notes that "segregated schools remain in most American cities," in large part because of the "white flight" from the cities, with its attendant social costs. And racism, in fact, has been exacerbated by busing and "affirmative action."

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97 "Those powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.
99 Erie R. Co., 304 U.S. at 79.
100 198 U.S. 45 (1905).
101 Chemerinsky, supra note 4, at 1150.
102 Id. at 1149.
103 Tom Wicker, a liberal columnist, stated, "[t]he attitudes between the races, the fear and animosity that exist today, are greater than, let us say, at the time of the Brown case, the famous school desegregation decision in 1954. . . . [M]y own feeling is that racial animosities and fears in New York City are far greater than anything I ever knew growing up in the segregated South." Opinions Considered: A Talk with Tom Wicker, N.Y. TIMES, January 5, 1992, § 4, at 4.
D. The Due Process Clause

Chemerinsky posits that "the Due Process Clause has two different uses, termed respectively 'substantive' and 'procedural' due process" and notes that "substantive" due process was discredited by misapplication during the Lochner period, "a mistake with very serious consequenc-
es," which led the Court "to disavow any judicial review of economic regulations and legislation." Apparently he deplores this "tarring of substantive due process." In truth, "substantive due process" was a judicial construct without historical foundation. On the eve of the Convention, Alexander 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; they can never be referred to as act of the legislature." History abundantly confirms that due process applied only to judicial proceedings. When the Framers put due process into the Fifth Amendment, said Charles Curtis, an ardent proponent of judicial activism, "its meaning was as fixed and definite as the common law could make a phrase . . . . It meant a procedural process, which could be readily ascertained from almost any law book." Due process, it has been said, requires fair judicial procedure, not good statutes.

Due process did not change color when embodied in the Fourteenth Amendment. The Court stated in Hurtado v. California that the words were "used in the same sense and with no greater extent" than in

104 Chemerinsky, supra note 4, at 1149.
105 Id. at 1151.
106 Id. at 1150.
107 Id. at 1151.
108 In Ferguson v. Skrupa, 372 U.S. 726 (1963), the Court referred to "our abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise . . . . We refuse to sit as a 'super legislature to weigh the wisdom of legislation.'" Id. at 731 (footnotes omitted). But the Court's abnegation did not extend to supervision of "civil liberties." Judge Learned Hand justly stated: "[T]here is no constitutional basis for asserting a larger measure of judicial supervision over [liberty] than over [property]." LEARNED HAND, THE BILL OF RIGHTS 50, 51 (1958). Instead, both are conjoined in the self-same due process clause.
112 110 U.S. 516 (1884).
the Fifth Amendment, as the legislative history confirms. When Chemerinsky asserts that "the Due Process Clause seems to define how government must act when it deprives people of their rights," he expands the clause beyond its historical boundaries. He laments that the Court's more recent "positivistic approach" has led to "underutilized procedural due process," with never a glimmering of the fact that, according to Justice Story, when the draftsmen employed common law terms, the common law "definitions are necessarily included, as much as if they stood in the text of the Act."

Chemerinsky is the exemplar par excellence of what his fellow activist, Paul Brest, described as "advocacy scholarship," writing "amicus briefs" for a favorite cause. He brings a "wish list" to constitutional interpretation and bends the Constitution to fit his goal, on the assumption that the end justifies the means. When the Court satisfies his wish it is lauded; when it disappoints him it is tragically mistaken. Although aware that at times the Court has inflicted untold pain, he is ready to confide in its discretion—provided that it satisfies his desires. Lord Camden, himself a noted judge, stated: "The discretion of a Judge is the law of tyrants . . . . In the best of times it is often-times caprice: in the worst, it is every vice, folly, and passion to which human nature is liable." Justice Story cautioned us to walk a safer path, one that is true to the very concept of a written Constitution.

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113 Id. at 535.
114 BERGER, supra note 51, at 201-08. In the Reconstruction Congress, Judge William Lawrence quoted Hamilton's definition when discussing the constitutional protections for property. AVINS, supra note 6, at 479. Another member of that Congress, James Garfield, defined due process as "an impartial trial according to the laws of the land." ADAMSON v. CALIFORNIA, 332 U.S. 46, 111 (1947) (BLACK, J., dissenting).
115 Chemerinsky, supra note 4, at 1152 (emphasis added).
116 Id. at 1153.
117 United States v. Smith, 18 U.S. (5 Wheat.) 153, 160 (1820). "If a statute, makes use of a word the meaning of which is well known at common law, the words shall be understood in the same sense it was understood at the common law." 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 647 (3d ed. 1768).
118 See supra note 2 and accompanying text.
119 Chemerinsky, supra note 4, at 1143.
120 7 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 55, note at 57 (1810) (quoting the case of HINDSON v. KERSEY).
121 "The concept of the written constitution is that it defines the authority of the government and its limits, that government is the creature of the constitution and cannot do what it does not authorize. . . . A priori, such a constitution could have only a fixed and unchanging meaning, if it were to fulfill its function." PHILIP KURLAND, WATERGATE AND THE CONSTITUTION 7 (1978).
he wrote, "is to have a fixed, uniform, permanent construction ... not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and forever." This is vastly to be preferred to "decisions [that] are a product of the ideology of the Justices, ... [t]he outcome [being] all a matter of who is on the Court, what they believe, and how they are influenced by current events."

The present "conservative" Court fills Chemerinsky with gloomy forebodings about our future, overlooking that shifting political alignments lead to a changing of the guard. For many jurisprudents, Earl Warren was something less than divinely inspired, and the name of the game is that "Two Can Play." Although I am a political "liberal," I pray that the Court will look more closely to the Constitution than did Warren, Brennan, et al., who remodeled the Constitution in tune with Chemerinsky's desires.

II. DAVID A. J. RICHARDS

Richards' paean to radical, abolitionist, antebellum theory builds on a number of untenable assumptions—for example, "[r]ights-based political theory gave a natural and plausible substantive basis for [the legitimacy of the Constitution]" and "the Civil War was justified ... to protect human rights." Without pausing to catalog other, similar propositions, let us consider these.

A. Rights-Based Theory

The "legitimacy" of the Constitution rests on its ratification and adoption by the people, acting through their States, whereby they consented to be governed by its terms. It will not do to read back
into the minds of the Founders our current preoccupation with individual rights, for they were concerned with the rights of the community rather than the individual. For them, "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." The Founders were concerned with erecting a structure of government that would diffuse and limit delegated power, not with fortifying individual rights. "It was conceivable," wrote Gordon Wood, "to protect the common law liberties of the people against their rulers, but hardly against the people themselves." In the unamended Constitution the word "rights" appears but once, in the Article I, Section 8 provision respecting inventions and copyrights. The subsequent Bill of Rights largely responded to British excesses—free speech, no quartering of soldiers, no unreasonable searches and seizures, a right to bear arms, and sundry procedural requirements to insure fair criminal proceedings. Individual rights were peculiarly the concern of the States, as Judge Edmund Pendleton underscored in the Virginia Ratification Convention: "[O]ur dearest rights—life, liberty and property, as Virginians are still in the hands of our state legislatures."

have not chosen to be governed, or promised to submit upon any other.” 2 G.J. McRae, Life and Correspondence of James Iredell 146 (1857-58).

129 "We should be imposing upon the past a creature of our own imagining. ... We must learn, not from modern theorists, but from contemporaries of the events we are studying. ..." H.G. Richardson & G.O. Sayles, Parliaments and Great Councils in Medieval England-I, 77 L.Q. Rev. 213, 224 (1961).


132 Wood, supra note 130, at 63.

133 3 Jonathan Elliot, Debates in the Several State Conventions on the Adoption of the Constitution 301 (1836). John Bingham, draftsman of the Fourteenth
Activists habitually overlook or downgrade the attachment of both the Framers of 1787 and those of 1866 to state autonomy.\footnote{See supra note 99 and accompanying text; see infra notes 194-96 and accompanying text.}

The Civil War, Richards asserts, was "justified ... to protect human rights and to forge constitutional forms more adequate to this ultimate moral vision of legitimate government."\footnote{Richards, supra note 5, at 1199.} If by this is meant "justified" by the antislavery forces, they stood alone. In his essay on Abraham Lincoln, James Russell Lowell noted that the war was not "avowedly for the extinction of slavery, but a war rather for the preservation of our national power and greatness, in which the emancipation of the negro has been forced upon us by circumstances and accepted as a necessity."\footnote{See supra note 99 and accompanying text; see infra notes 194-96 and accompanying text.} Lincoln was no doctrinaire; in his Cooper Union Address on February 27, 1860, he stated: "Wrong as we think slavery is, we can yet afford to let it alone where it is, because that is due to the necessity arising from its actual presence in the nation."\footnote{Cooper Union Address (Feb. 27, 1860) in 9 ANNALS OF AMERICA 158, 169 (1968).} And in his First Inaugural Address on March 4, 1861, Lincoln declared: "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so."\footnote{Abraham Lincoln’s First Inaugural Address (March 4, 1861) in 1 CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 125 (1939).} When a delegation of Negro leaders called upon him at the White House, he told them:

There is an unwillingness on the part of our people, harsh as it may be, for you free colored people to remain with us .... [E]ven when you

Amendment, stated: "[T]he care of the property, the liberty, and the life of the citizen ... is in the States, and not in the Federal Government. I have sought to effect no change in that respect." AVINS, supra note 6, at 187.


Alfred Kazin observed that Lincoln was "unwilling to alienate a public opinion that everywhere in the North was implacably, savagely opposed to giving slaves and even free blacks any freedom of movement or civic rights." Alfred Kazin, A Forever Amazing Writer, N.Y. TIMES, Dec. 10, 1989, § 7, at 3 (book review).
Nor did the Reconstruction Amendments spring from the abolitionists' moral vision. The Fourteenth Amendment was triggered by the Black Codes whereby the South sought in the aftermath of the Thirteenth Amendment "to make slaves of men whom we have made free."$^{140}$ The North had not fought a bloody war only to deliver the freed men to the mercies of the South.

Richards maintains, however, "that the Reconstruction Amendments were an outgrowth . . . . [of abolitionist theorizing] of the antebellum period."$^{141}$ He notes that such theorizing "can be divided into at least three antagonistic schools of thought—radical disunionism, moderate anti-slavery and radical anti-slavery—"$^{142}$ but no historian as yet has identified "the one among them that crucially shaped the terms of the Reconstruction Amendments."$^{143}$ It cannot therefore be assumed that any one of the three schools influenced the framers. To fill the gap, he proposes to proceed by "meta-interpretive questions about constitutional interpretation."$^{144}$ Instead of a "meta" inquiry, for lawyers are not metaphysicians, let us proceed in lawyerly fashion.

Richards' "meta" inquiry leads him to prefer the "radical anti-slavery" school led by Lysander Spooner and Joel Tiffany,$^{145}$ of whom Robert

$^{139}$ C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 81 (1960). For a while there was a movement to colonize the blacks elsewhere.

$^{140}$ AVINS, supra note 6, at 138 (quoting Senator Henry Wilson); see also RAOUl BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 23-24 (1989).

$^{141}$ Richards, supra note 5, at 1187.

$^{142}$ Id.

$^{143}$ Id. Malcolm Cowley, an acute critic, believed that, "obscurity was merely a cloak for slipshod thinking." HANS BAK, MALCOLM COWLEY: THE FORMATIVE YEARS 194 (1993).

$^{144}$ Richards, supra note 5, at 1188. William James considered that Agassiz's "genius lay not in abstract reasoning, which he despised, but in a comprehensive massing and organization of facts." 1 RALPH BARTON PERRY, THE THOUGHT AND CHARACTER OF WILLIAM JAMES 209 (1935). Augustine Birrell observed that "[t]he historian who loads his frail craft with that perilous and shifting freight, philosophy, adds immensely to the dangers of his voyage across the ocean of Time." AUGUSTINE BIRREll, RES JUDICATAE 82 (1892). Max Born, the noted physicist, regarded as an "important discovery" that "words mean nothing unless applied in a definite system of ideas for a definite problem where they can be made significant for that problem." MAX BORN, MY LIFE: RECOLLECTIONS OF A NOBEL LAUREATE 53 (1975).

$^{145}$ Richards, supra note 5, at 1193, 1196.
Cover, himself an activist, said they were a “handful of relatively unimportant antislavery thinkers.” Even so, their merit may commend them. But faith in their constitutional analysis is speedily vitiated by Tiffany’s insistence that “slavery was unconstitutional.” Article I, Section 2, Clause 3 of the Constitution distinguishes between “free Persons” and “other Persons”; Article I, Section 9, Clause 1 protects the “Migration or Importation” of such “persons”; and Article IV, Section 2, Clause 3 refers to “Person[s] held to Service or Labour”—the Framers sedulously avoided the word “slave.” Lincoln justly considered that the Constitution protected slavery in the States that had it. How then did the “radical anti-slavery” theorists interpret the Constitution “to forbid slavery?” Lysander Spooner, “the most theoretically profound advocate of this position,” advocated that the above-quoted provisions “were to be interpreted not to recognize slavery on the theory that any interpretation should be accorded the words, no matter how textually strained, that did not recognize slavery.” He denied “any weight to the constitutional text or history in conflict with the claims of rights-based political theory.” “[H]istory was to be disowned altogether.” To call this “interpretation” is to do violence to the word. With such unbounded “interpretive” freedom,

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148 “[S]hall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons.” U.S. CONST. art. I, § 2, cl. 3 (amended by U.S. CONST. amend. XIV, § 2).
149 “The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person. U.S. CONST. art. I, § 9, cl. 1.
150 “No person held to Service or Labor in one State . . . .” U.S. CONST. art. IV, § 2, cl. 3.
151 The framers of the Articles of Confederation “had been ashamed to use the terms ‘Slaves.’” 1 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 561 (1911).
152 In his debates with Douglas, Lincoln said, “[W]e have no right to disturb slavery in the States where it exists.” H. M. HYNDMAN, FURTHER REMINISCENCES 334 (1912).
153 Richards, supra note 5, at 1193.
154 Id. (emphasis added).
155 Id.
156 Id. (emphasis added).
157 Huxley stated that “the end cannot justify the means, for the simple and obvious reason that the means employed determine the nature of the ends produced.” ALDOUS
one could prove that the moon is made of green cheese. That such theorizing should commend itself to Richards as the product of a "profound advocate" indicates his conviction that the result is the thing, rather than the means.

B. Abolitionist Influence

The Reconstruction Amendments, Richards maintains, "were an outgrowth of the abolitionist political and constitutional theory of the antebellum period." For this he avouches an array of commentators, of whom more anon, rather than historical facts. The Spooner-Tiffany theorizing should make us skeptical about their impact on the Framers. Among the first to discover the charms of abolitionist theology was Howard Jay Graham; he described it as "incoate," "rankly, frankly heretical" and "extremely heterodox." That the hard-headed lawyers who sat in the thirty-ninth Congress would discard their orthodox views for such heresies requires a great leap of the imagination.

The fact is that abolitionist speeches during the drive to abolish slavery did not reflect postwar sentiment in the North. Racism, as we have seen, "ran deep in the North," and as Henry Monaghan noted, many Americans "opposed slavery and racial equality with equal intensity," as may be gleaned from Lincoln's remarks. Then too,

HUXLEY, ENDS AND MEANS 10 (1937).

The "means whereby we try to achieve something are at least as important as the end we wish to attain. Indeed, they are even more important. For the means employed inevitably determine the nature of the result achieved; whereas, however good the end aimed at may be, its goodness is powerless to counteract the effect of the bad means we use to reach it."

Id. at 59-60. "In rallying to the French Army Captain [Alfred Dreyfus], Zola was fighting for a principle . . . 'that in a decent, democratic society, good ends cannot be used to excuse bad means, if only because it is those who employ the means who decide which ends are good.'" Alden Whitman, Books: The Zola Muni Didn't Play, N.Y. TIMES, Nov. 2, 1977, at C23 (book review).

158 Richards, supra note 5, at 1187.
160 GRAHAM, supra note 52, at 543.
161 Id. at 242.
162 Id. at 237.
163 See supra notes 60-64 and accompanying text.
165 See supra note 138 and accompanying text.
abolitionist campaigning had aroused hostility; long afterwards the aged Justice Holmes, a Civil War veteran, wrote that he had come "to loathe . . . the Abolitionists conviction that anyone who did not agree with them was a knave or a fool."

During the war years, wrote C. Vann Woodward, "[t]he great majority of citizens in the North still abhorred any association with abolitionists." Senator William Fessenden, chairman of the Joint Committee on Reconstruction, held the "extreme radicals" in "abhorrence." Senator Edmund Cowan ridiculed the notion that the "antipathy that never sleeps, that never dies, that is inborn, down at the very foundation of our natures" was to "be swept away by half a dozen debates and the reading of half a dozen reports from certain abolition societies."

The radical abolitionist leaders in Congress were detested. Thaddeus Stevens, the "Scourge of the South" was openly hated by many Radical Republicans. In the Joint Committee, his measures "were more voted against than voted for." His Senate counterpart, Charles Sumner, was "distrusted" when not "detested." Senator Lyman Trumbull, chairman of the Senate Judiciary Committee, scathingly commented in 1870: "It has been over the idiosyncracies, over the unreasonable propositions of . . . [Sumner] that freedom has been proclaimed and established."

In truth, a Republican conservative-moderate coalition, as Michael L. Benedict has shown, "enacted their program with the sullen acquiescence

167 WOODWARD, supra note 59, at 73.
168 KENDRICK, supra note 32, at 257.
169 CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866).
170 Id. It is difficult for our generation to appreciate the feelings of the men of 1866. William R. Brock wrote: "A belief in racial equality was an abolitionist invention," "to the great majority of men in the mid-19th century it seemed to be condemned both by experience and by science." WILLIAM R. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION 285, 286 (1963). Consider the reaction of the generous-hearted Thackeray on his first visit to the United States and sight of blacks in 1853: "Sambo is not my man & my brother; the very aspect of his face is grotesque & inferior I can't help seeing & owning this; at the same time of course denying any white man's right to hold his fellow-creature in bondage." GORDON N. RAY, THACKERAY: THE AGE OF WISDOM 1847-1863, 216 (1958).
172 Id. at 268.
173 DONALD, supra note 60, at 248.
of some radicals and over the open opposition of many." Benedict's study is confirmed by the defeat 125-12 in the House and 34-4 in the Senate of radical insistence that Tennessee provide for black suffrage—considered by Sumner to be the only adequate guarantee for protection of blacks—as a condition for readmission to the Union. It is such votes, not what abolitionists had said outside Congress in the prewar years, that illuminate the intention of the framers.

Richards takes no notice of the foregoing facts, but relies on a two-inch array of "authorities." Take Michael Kent Curtis, a small-town practitioner until activists elevated him into an "authority;" my critique of his book, wrote Forrest McDonald, is utterly "devastating." His thesis that the Fourteenth Amendment incorporates the Bill of Rights runs counter to the views of such renowned scholars as Charles Fairman, Louis Henkin, Judge Henry Friendly, Solicitor General Erwin Griswold, and the Supreme Court itself. Sir Herbert Butterfield, an eminent historiographer, wrote that a scholar must take account of discrepant evidence; but Richards does not as much as say "But see." Similarly, my refutation of William Nelson's views about the impact of

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175 Id. at 210; see also DONALD, supra note 60, at 51-52, 61. Senator John Sherman told a Cincinnati audience in September, 1866, during the ratification campaign: "They talk about radicals; why we defeated every radical proposition in it." JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 167 (1965).

176 CONG. GLOBE, 39th Cong., 1st Sess. 3980 (1866).

177 Id. at 4000.

178 Id. at 3980, 4000.

179 Id. at 685.

180 Richards, supra note 5, at 1187 n.1.

181 Forrest McDonald, How the Fourteenth Amendment Repealed the Constitution, CHRONICLES, 29, 31 (Oct. 1989).

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


186 In 1959 Justice Frankfurter stated on behalf of the Court: "The relevant historical materials . . . demonstrate conclusively that Congress . . . 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." Bartkus v. Illinois, 359 U.S. 121, 124 (1959).

abolitionism on the Fourteenth Amendment\textsuperscript{188} goes unmentioned. Richards cites no less than four of Robert Kaczorowski's publications; although an activist sympathizer, Michael Zuckert, opines that "Kaczorowski's version of context does not easily cohere with much of the evidence he himself presents."\textsuperscript{189} I should have serious doubts about the judgment of one who undertakes to assay the Fourteenth Amendment and, according to Zuckert, "neglects altogether the congressional debates on the amendment."\textsuperscript{190} This is to stage Hamlet without the Dane. Then there is the citation to Harold Hyman. Hyman, however, wrote that "Negrophobia tended to hold even the sparse Reconstruction institutions that the nation created to low throttle"\textsuperscript{191} and that "[a] heavy phalanx of Republican politicos . . . were states rights nationalists, suspicious of any new functional path the nation travelled."\textsuperscript{192} Hyman also noted Republican unwillingness "to travel then any road more rugged than . . . [the] route that left the states masters of their fates."\textsuperscript{193} These are views I elaborated. Patently Richards collects authorities without weighing their arguments.

Because Northern attachment to states rights goes unnoticed by activists, a few words may be in order.\textsuperscript{194} Horace Flack stated in a pioneer study that "[t]he Radical leaders were as aware as any one of the attachment of a great majority of the people to the doctrine of States


\textsuperscript{190} Id. at 153.


Alfred Kelly wrote of "the limitation imposed by the essentially federal character of the American constitutional system, which at last made it impossible to set up a comprehensive and unlimited program for the integration of the negro into the southern social order." Alfred H. Kelly, Comment on Harold M. Hyman's Paper, in New Frontiers of the American Reconstruction 55 (Harold M. Hyman ed., 1966) (emphasis added).

\textsuperscript{192} HYMAN, supra note 191, at 304.

\textsuperscript{193} Id. at 470.

\textsuperscript{194} For extended discussion, see BERGER, supra note 51, at 54-64.
Let one illustration suffice: at the outset, Roscoe Conkling, a member of the Joint Committee on Reconstruction, stated: "The 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." This it was, along with racism, that made constitutional remediation so "sparse." Activists' neglect of such factors, their reliance rather on icons of their own creation demonstrates Paul Brest's charge that they are engaged in "advocacy scholarship," "amicus briefs" for their own predilections.

C. Brown v. Board of Education

Richards cites my *Government by Judiciary* as "a notable example of an approach under which *Brown* is wrongly decided." It is "notable" only because *Brown* has become an off-limits sacred cow. Judge Richard Posner observed that "[n]o Constitutional theory that implies that *Brown* ... was decided incorrectly will receive a fair hearing nowadays, though on a consistent application of originalism it was decided incorrectly." My studies constrained me to conclude that the framers of the Fourteenth Amendment meant to leave segregation untouched, and that view has won pretty wide acceptance. Hence, Chief Justice Warren's summary dismissal of the legislative history as "inconclusive" is simply wrong. Richards, however, rejects a "simplistic tracking of a prior concrete historical understanding—indeed, on such a view *Plessy* would be right and *Brown* wrong." What is "simplistic" about honoring the "concrete
historical understanding," the framers' own explanation of their aims? For
six hundred years of Anglo-American history the search for the original
intention has been a tenet of the common law. Richards, however,
prefers his "enriched understanding of our interpretive responsibilities to
trivializ[ing] our interpretation of the Reconstruction Amendments [by] some fictive search for the concrete exemplars." It is not an
"interpretive responsibilit[y]" to repudiate the "concrete historical
understanding." And my own four-year "search" was "real," not "fictive";
it found such assurances as that of James Wilson who, explaining "civil
rights and immunities," stated that they did not mean that all "children
shall attend the same schools."

Why do originalists attach so much importance to the "concrete historical understanding"? John Selden, a seventeenth century sage, stated:
"[A] Man's Writing has but one true [Sense], which is that which the
Author meant when he writ it." The alternative, preferred by activists,
is the reader's explanation of what the writer intended rather than that of
the writer himself. An activist icon, Jefferson Powell, wrote that "[t]he
[Republican] victors viewed the 'revolution of 1800' as the people's
endorsement" of "a search for the Constitution's underlying and
original 'intent.'" Little wonder that Chief Justice Marshall considered
"intention" to be the "most sacred rule of interpretation." It was the
rule advocated by the arch-radical Senator Charles Sumner in the debates
of the Reconstruction Congress and expressed in unmistakable terms
by the Senate Judiciary Committee in a unanimous Report signed by
Senators who had voted for the Thirteenth, Fourteenth and Fifteenth
Amendments in Congress:

hater of abstractions and metaphysical politics." Obiter Dicta, 2d Series 190 (1901).

204 See, e.g., Raoul Berger, "Original Intention" in Historical Perspective, 54 Geo.
Wash. L. Rev. 296 (1986); Raoul Berger, The Founders' Views—According to Jefferson

205 Richards, supra note 5, at 1201. For the product of a real, not fictive, search, see
supra note 6.

206 Avins, supra note 6, at 163.

207 John Selden, Table Talk: Being the Discourses of John Selden, Esq. 10
(2d ed. 1696).

208 H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L.

209 Id. at 927.

210 John Marshall's Defense of McCulloch v. Maryland 167 (Gerald Gunther

211 "Every Constitution embodies the principles of its framers. It is a transcript of their
minds. If its meaning in any place is open to doubt . . . we cannot err if we turn to the
framers; and their authority increases in proportion to the evidence which they have left
In construing the Constitution we are compelled to give it such 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. This is the rule of interpretation adopted by all commentators on the Constitution, and in all judicial expositions of that instrument. . . .

Notwithstanding the foregoing facts, Richards maintains that, "[i]n light of the text and background of the Reconstruction Amendments, it would be, a fortiori, illegitimate today . . . [to] appeal to the concrete intentions of the founders." What "background of the Reconstruction Amendments" stands higher than the framers' admonition to respect their "concrete intentions"? Richards also insists that Brown "was interpretively correct" on the basis of "the meaning of human rights in contemporary circumstances." He has proved himself a worthy disciple of Lysander Spooner, adopting the counsel that "any interpretation should be accorded the words, no matter how strained" to achieve the desired goal. But let us have no more mumbo-jumbo about "interpretive responsibility," and let him candidly acknowledge his desire to have the judiciary rewrite the Constitution in line with his desires.

It is an historical axiom that we should not [impose] upon the past a creature of our own imagining." This is the more important when the people in "the past" formally adopted a document upon the basis of

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212 AVINS, supra note 6, at 571.
213 Richards, supra note 5, at 1202. On the other hand, Charles Black, discussing the meaning of "high Crimes and Misdemeanors" during the impeachment investigation of President Richard Nixon, noted some remarks of the Framers and stated: "[T]he men present were representative of their time, and their understanding, at the moment when the crucial language was under closest examination, tells us a great deal about its meaning." CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 28-29 (1974).
214 Richards, supra note 5, at 1203.
215 Id. at 1203 (emphasis added). Richards substitutes wishful thinking for unpalatable facts. "'I don't think America was ready to end segregation'; . . . 'I don't think it has ever been ready to extend full equality,'" said Mr. Benjamin L. Hooks, executive director of the N.A.A.C.P. Peter Applebome, Rights Movement in Struggle for an Image as Well as a Bill, N.Y. TIMES, Apr. 3, 1991, at A1, A18 (book review).
216 Richards, supra note 5, at 1193.
217 Richardson & Sayles, supra note 129, at 224.
representations made to them. Repudiation of such representations, said Justice Story, is a “fraud” upon the people. If “contemporary circumstances” call for change, the means are amendment under Article V, not revision of the Constitution by the judiciary. It is not for judges, noted Marshall, to “change” the instrument.

CONCLUSION

Time was when activists extolled the Court as “keeper of the national conscience.” With the changing of the guard, it appears that it was the activists’ own conscience that they cherished, not that of the nation. It needs no more than the invective of Dean Guido Calabresi of Yale to make the point: “I despise the current Supreme Court and find its aggressive, willful statist behavior disgusting.” Compare with this Anthony Lewis’ panegyric: “The 15 years since [Warren] became Chief Justice have been years of legal revolution. In that time the Supreme Court has brought about more social change than most Congresses and most Presidents.” The reason, Lewis explains, is that “there were outrages in American life...no other arm of the government was doing anything about them.” Congress’ inaction, however, does not transfer legislative power to the Court. If such inaction be “mischievous,” to borrow from Justice Story,

the power of redressing the evil lies with the people by an exercise of the power of amendment. If they do not choose to apply the remedy, it may fairly be presumed, that the mischief is less than what would arise from a further extension of the power; or that it is the least of two evils.

218 “If the Constitution was ratified under the belief, sedulously propagated on all sides, that such protection was afforded, would it not be a fraud upon the whole people to give a different construction to its powers?” STORY, supra note 122, § 1084, at 33.
219 See supra note 96 and accompanying text.
222 Anthony Lewis, A Man Born to Act, Not to Muse, in THE SUPREME COURT UNDER EARL WARREN 151 (Leonard W. Levy ed., 1972); see also BERGER, supra note 51, at 283 n.1.
223 LEWIS, supra note 220, at 159.
224 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES
By way of a parting word, let me remind Professor Chemerinsky that "[a] social scientist who permits political or social sympathies to minimize indications tending toward unwelcome conclusions impairs the integrity of his science" and damages confidence in his judgment. For Professor Richards' philosophizing, let me commend the words of Francis Bacon:

As for the philosophers, they make imaginary laws for imaginary commonwealths; and their discourses are as the stars, which give little light because they are so high. For the lawyers, they write according to the states where they live, what is received law and not what ought to be the law.

An activist more candid than most, Thomas Grey, considers the question whether the Court may "enforce principles of liberty and justice...[when they are]...not to be found within the four corners" of the Constitution as "perhaps the most fundamental question we can ask about our fundamental law." For me it is the most fundamental question, because any judicial arrogation of undelegated power invades the right of the people to control their own destiny.

§ 426, at 325 (5th ed. 1905).


225 Learned Hand stated:
You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt. I am satisfied that a scholar who tries to combine these parts sells his birthright for a mess of pottage.


228 Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975).

229 Id.

230 The Court "has demanded a number of changes which do not command majoritarian support." Louis Lusky, By What Right? 277 (1975).