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LAWRENCE CHURCH ON THE SCOPE OF JUDICIAL REVIEW AND ORIGINAL INTENTION

RAOUL BERGER*

The scope of judicial review and the influence of the original intention doctrine continue to excite debate. The controversy exploded in the hearings on the confirmation of Judge Robert Bork to a seat on the Supreme Court, and it has had repercussions on the subsequent hearings of Justice David Souter. For the Court has assumed an ever-expanding role in making the major policy decisions that the Constitution reserves to the people and their elected representatives. The continuing debate is therefore of great moment; ultimately the truth will emerge from these exchanges in the marketplace of ideas.

THE FOURTEENTH AMENDMENT

Prompted by my critique of William Nelson's *The Fourteenth Amendment*,¹ Professor Lawrence Church launched upon a survey of the role of the courts and the impact of original intention, matters I did not discuss.² In passing he indulged in a few remarks about my views of the Amendment. Since those remarks illustrate afresh the need to weigh evidence—a need that will color much of the subsequent discussion—they merit immediate consideration. Berger's "portrayal of history," Church asserts, "is not the only possible reading of history," instancing Nelson's "very different description of the past."³ There cannot be a "very different" reading, for example, of the exclusion of suffrage from the Fourteenth Amendment, the evidence for which, Justice Harlan truly declared, is "irrefutable and still unanswered."⁴ Nelson himself noted that Jacob Howard "declared unequivocally that section one did 'not

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1. Raoul Berger, *Fantasizing About the Fourteenth Amendment*, 1990 WIS. L. REV. 1043 (reviewing WILLIAM NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988)).

2. Lawrence Church, *History and the Constitutional Role of the Courts*, 1990 WIS. L. REV. 1071.

3. *Id.* at 1073, 1079.

4. *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment).

give [blacks] the right of voting.' ”⁵ Where is the very different reading on what was the centerpiece of my study? No activist, to my knowledge, has ventured to dispute the evidence that suffrage was excluded. So too, eminent scholars have accepted my demonstration that segregation was excluded from the Amendment;⁶ Michael Perry listed examples of “commentary generally accepting Berger’s history” and some “generally effective rebuttals by Berger to criticism of his history.”⁷ Moreover, merely to point to differences of opinion is to leave the reader adrift. Lawyers are accustomed to adjudication of conflicting views. When a critic adverts to an opposing view, he should undertake to evaluate the difference.

5. WILLIAM NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 129 (1988).

6. The evidence that segregation also was excluded from the Fourteenth Amendment is quite convincing. See, e.g., James Wilson’s statement, *infra* text accompanying note 9. Although he addressed the Civil Rights Bill of 1866, the Bill and Amendment were deemed to be “identical”; the Bill was incorporated in the Amendment to prevent repeal by a subsequent Congress. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 22-23 (1977).

Judge Robert Bork noted that *Brown v. Board of Education*, 347 U.S. 483 (1954), “was accepted by law professors as inconsistent with the original understanding.” ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 77 (1990). Nathaniel Nathanson observed that Alexander Bickel “conclusively” demonstrated that segregation was excluded from the Fourteenth Amendment, and that “Berger’s independent research and analysis confirms and adds weight to these conclusions.” Nathaniel Nathanson, Book Review, 56 TEX. L. REV. 579, 580-81 (1978); see also Dean Alfange, Jr., *On Judicial Policymaking and Constitutional Change: Another Look at the “Original Intent” Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603, 606-07 (1978) (book review) (recognizing Berger’s careful review of history); Randall Bridwell, Book Review, 1978 DUKE L.J. 907, 909-10, 912-13 (same); Donald Kommers, *Role of the Supreme Court*, 40 REV. POL. 409, 413 (1978) (book review) (same).

Judge Learned Hand wrote of *Brown*: “I have never been able to understand on what basis it does or can rest except as a *coup de main*.” LEARNED HAND, *THE BILL OF RIGHTS* 55 (1962).

7. Michael J. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 285 n.100 (1981). Another candid activist, Larry Alexander, wrote: “Berger has quite convincingly demonstrated that the bulk of modern judicial decisions under the fourteenth amendment cannot be justified by reference to what the drafters of that amendment believed the amendment would accomplish.” Larry Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 4 (1981).

Henry Abraham wrote that “[A]ny genuinely objective, factual and rigorous examination of the debates and history of the framing of the Fourteenth Amendment demonstrates that the authors and supporters of that provision specifically rejected its application to segregated schools and the franchise.” Henry Abraham, “*Equal Justice Under Law*” or “*Justice At Any Cost*”? *The Judicial Role Revisited: Reflections on GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT*, 6 HASTINGS CONST. L.Q. 467, 467 (1979) (book review). In a similar context Lord Beloff, an eminent Oxford emeritus, stated, “The quite extraordinary contortions that have gone into proving the contrary make sad reading for those impressed by the high quality of American legal historical scholarship.” Max Beloff, *Arbiters of America’s Destiny*, THE TIMES (London), Apr. 7, 1978 (Higher Educ. Supp. II), at II (book review).

Instead, Church seizes on a couple of minor factual details to show that the conflict is insoluble:

To some extent, the disagreement between Berger and Nelson is over the relative political stature of such men as Senators Sumner and Trumbull and the relative importance of newspapers as opposed to the correspondence and speeches of individual leaders. This is an argument that may never end.⁸

Not so.

To begin with, Church's "newspapers as opposed to the correspondence . . . of individual leaders," does not accurately reflect my views. I did not refer to correspondence *of* leaders but to letters *from* citizens *to* leaders. Such letters cannot overcome explanations in Congress by leaders to their fellow draftsmen. And I emphasized that a newspaper article could not balance an explanation in the halls of Congress by the chairman of the House Judiciary Committee, James Wilson, that the Civil Rights Bill of 1866 did not provide for unsegregated schools.⁹ Although Church modestly states that he is "not qualified to review" Berger's "portrayal of history,"¹⁰ so practiced and accomplished a lawyer would hardly maintain that a newspaper article would outweigh a statement to the contrary in Congress by a leader.

Similarly, the facts concerning Trumbull and Sumner are indisputable, are not a mere matter of their "stature" but go to the weight of their testimony, which can readily be evaluated. Sumner was a far-out Radical; his biographer, David Donald, recounts that "[m]ore and more Senators came to distrust, when they did not detest, him."¹¹ Senator Lyman Trumbull, chairman of the Senate Judiciary Committee and sponsor of the Civil Rights Bill of 1866, scathingly commented, "it has been over the idiosyncracies, over the unreasonable propositions, over the impractical measures of [Sumner] that freedom has been proclaimed and established."¹² Patently Sumner did not reflect Senate sentiment, and he carries no weight as a witness to the Drafters' intention. Trumbull, on

8. Church, *supra* note 2, at 1079.

9. Berger, *supra* note 1, at 1045.

10. Church, *supra* note 2, at 1073.

11. DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 248 (1970).

12. CONG. GLOBE, 41st Cong., 2d Sess 422 (1870) (statement of Sen. Trumbull), *quoted in* MICHAEL L. BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869, at 39 (1974). Senator William Fessenden, chairman of the Joint Committee on Reconstruction, gleefully repeated a tongue-lashing he gave Sumner on the Senate floor, whom he considered "by far the greatest fool of the lot." JOSEPH JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 74 (1956). Thaddeus Stevens, Radical leader in the House, excoriated Sumner for obstructing passage of the Amendment because it did not give Negroes the vote. FAWN BRODIE, THADDEUS STEVENS: SCOURGE OF THE SOUTH 269 (1966).

the other hand, played a leading role. The "specifics of Reconstruction policy were determined primarily by moderate Republican leaders such as Senators Lyman Trumbull and William P. Fessenden," who sought "to limit the degree to which the federal government interceded to protect the civil rights of the freedmen."¹³ Sumner and Trumbull simply are not to be weighed on the same scales as witnesses to the meaning of the Fourteenth Amendment.¹⁴ Such matters are not settled by reference to "a more favorable review" by another,¹⁵ which presumably did not weigh these particular facts; they call for an assessment of incontrovertible *facts*. If my inferences from those facts were wrong, it was incumbent on Church to point out why. He did not hesitate to draw larger inferences from a mass of political-science facts.

ORIGINAL INTENTION

Church observes that proponents of original intention may be result-oriented, invoking original intention because it coincides with their views on substantive issues.¹⁶ In fact, result-oriented argumentation is an *activist* characteristic. Paul Brest pleaded with his brethren "simply to acknowledge that most of our writings [about judicial review] are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good."¹⁷ Speaking for myself, I bring no social agenda to my studies. As long ago as 1942, I announced against the background of *Bridges v. California*,¹⁸ the result of which was in accord with my desires, that I liked it no more when the Court read my predilections into the Constitution than when the Four Horsemen read in theirs.¹⁹ From that credo I have never wavered. Although I am pro-choice on the abortion issue, and against prayer in the schools, I consider that the abortion and school prayers decisions are without constitutional warrant. Further, I have been labelled a "Neo-conservative,"²⁰ when in truth I am a life-long lib-

13. MORTON KELLER, *AFFAIRS OF STATE* 61-62 (1977). In truth, Benedict has shown, "the nonradicals had enacted their program over the sullen acquiescence of some radicals and over the open opposition of many." BENEDICT, *supra* note 12, at 210.

14. Harold Laski considered it just criticism that a writer "has no sense of the proportional value of his authorities." 2 HOLMES-LASKI LETTERS 1463 (Mark D. Howe ed., 1953).

15. Church, *supra* note 2, at 1080 n.24.

16. *Id.* at 1073.

17. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981).

18. 314 U.S. 252 (1941).

19. Raoul Berger, *Constructive Contempt: A Post-Mortem*, 9 U. CHI. L. REV. 602, 605 (1942).

20. Kermit Hall, *American Legal History as Science and Applied Politics*, 4 BENCHMARK

eral. It is the liberals, advocates of change and reform, who stand most in need of protection by a fixed constitution. For me the paramount consideration is the integrity of the Constitution, untainted by political or personal preferences.

Church's attempt to set forth the originalist position falls short. He views it as a sort of ancestor worship, "deference," "respect" for, "homage to the wisdom of the founders," "reverence for our past leaders."²¹ He reduces it to "scholastic arguments over the niceties of history."²² Very different is the case for originalism. First, as a matter of common sense, who but the writer can best explain what he means by his own words? Activists exalt the reader over the writer. Well aware of such considerations, John Selden, the preeminent seventeenth-century scholar, stated, "a mans wryting has but one true sense; which is that which the Author meant when he writ it."²³ John Locke was even more emphatic.²⁴ Nor do originalists try "to divine . . . what our forebears actually *thought*"; we are not psychoanalysts.²⁵ Instead we look to the Framers' *recorded explanations* of what they meant to accomplish.

Second, originalism has its roots in 600 years of Anglo-American practice, and as Justice Holmes remarked, "[i]f a thing has been practised for two hundred years . . . it will need a strong case" for a departure from the practice.²⁶ Here I can select only a few highlights across the

229, 235 (1990). J.M. Balkin noted that my earlier works, "which served to rebut the Nixon administration's views about executive privilege and impeachment" made "Berger the darling of liberal scholars." J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 913 (1988) (book review). He remarked that "All of this [was] changed" by my 1977 GOVERNMENT BY JUDICIARY, *supra* note 6, which met with "a host of attacks" from my liberal confreres, Balkin, *supra*, at 913, notwithstanding that I used precisely the same resort to original intention.

21. Church, *supra* note 2, at 1074-76.

22. *Id.* at 1086.

23. TABLE TALK OF JOHN SELDEN 12-13 (Sir Frederick Pollock ed., 1927).

24. When a man speaks to another, it is that he may be understood . . . [to] make known his ideas to the hearer. That, then which words are the marks of are the ideas of the speaker: nor can any one apply them as marks, . . . to anything else but the ideas that he himself hath: for this would be to make them signs of his own conceptions . . . and so in effect to have no signification at all . . .

....

[T]his is certain, their signification, in his use of them, is limited to his ideas, and they can be signs of nothing else.

JOHN LOCKE, AN ESSAY CONCERNING THE HUMAN UNDERSTANDING Bk. III, ch. II, §§ 2, 8, at 204, 206 (Raymond Wilburn ed., 1947).

25. Church, *supra* note 2, at 1079 (emphasis added).

26. *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). In the legislative chaplain case, *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court stated, a "practice [that] has continued without interruption ever since [the earliest] session of Congress" does not violate the First Amendment. *Id.* at 788.

centuries.

1. The fifteenth-century sage, Chief Justice Frowyck, recounted that the judges demanded of the "makers" of the Statute of Westminster (1285) what certain words meant and they "answered." "And so," he added, "in our dayes, have those that were the penners & devisors of statutes bene the grettest lighte for exposition of statutes."²⁷

2. The English historian S.B. Chrimes wrote that the "rule of reference to the intention of the legislators . . . was certainly established by the second half of the fifteenth century."²⁸

3. Lord Chancellor Hatton wrote circa 1587, "when the intent is proved, that must be followed . . . but whensoever there is a departure from words to the intent, that must be well proved that there was such a meaning."²⁹

4. In the *Magdalen College Case* (1615) Coke stated that "in Acts of Parliament which are to be construed according to the intent and meaning of the makers of them, the original intent and meaning is to be observed."³⁰

5. Such precedents were epitomized in Matthew Bacon's *Abridgment* (1736): "Everything which is within the Intention of the Makers of a statute is, although it is not written in the Letter thereof, as much within the Statute as that which is within the Letter."³¹

"It is the tradition of Coke's time," Julius Goebel observed, "that passes over to the American colonies, for it is upon the methods and constitutional views of Coke that the colonial lawyers were nurtured."³² Then too, the English Puritan's fear of the "judges' imposition of their personal views," of "twisted . . . judicial construction," according to a critic of original intention, travelled to America and influenced "the

27. A DISCOURSE UPON THE EXPOSITION & UNDERSTANDINGE OF STATUTES 151-52 (Samuel Thorne ed., 1942) [hereinafter DISCOURSE].

28. STANLEY B. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY 293 (1936).

29. CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES & ACTS OF PARLIAMENT: AND THE EXPOSITION THEREOF 14-15 (1677).

30. 11 Co. Rep. 66b, 73b, 77 Eng. Rep. 1235, 1245 (K.B. 1615).

31. 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 647-48 (3d ed. 1768).

32. Julius Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 563 (1938). "The 'founding fathers' owed their mental sustenance much more largely to seventeenth-century England than to the England with which they were themselves contemporary." EDWARD CORWIN, THE TWILIGHT OF THE SUPREME COURT 102 (1934). The American Constitution, J.H. Plumb wrote, "was designed to avoid the seeming corruption of the British Constitution in the 18th century." J.H. Plumb, *Notes From London: Inflation, frustration and tea*, N.Y. TIMES, June 10, 1973, § 6, at 20, 24; see JOHN CLIVE, MACAULAY: THE SHAPING OF THE HISTORIAN 124, 125 (1974).

American revolutionaries."³³ And he recounts that the Jeffersonian revolution of 1800 was regarded as the people's endorsement of their "search for the Constitution's underlying and original 'intent.'"³⁴ Not surprisingly, Chief Justice Marshall stated that he could "cite from [the common law] the most complete evidence that the *intention* is the most sacred rule of interpretation."³⁵ In 1838 the Supreme Court declared that construction

must necessarily depend on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states . . . to which the Court has always resorted in construing the constitution.³⁶

An early activist, 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 or of the people who adopted it."³⁷ In short, originalism, wrote Thomas Grey, an activist, "is deeply rooted in our history [and] in our formal constitutional law."³⁸

The deep-rooted doctrine of contemporaneous construction reinforces reference to the original intention. As long ago as the fifteenth century, Chief Justice Frowyck stated that if the legislators "have not gyven anie declaracion of their myndes, then . . . their authoritye muste persuade us that were mooste neerest the statute."³⁹ The reason, our Justice William Johnson explained, is that contemporaries of the Constitution "had the best opportunities of informing themselves of the understanding of the framers . . . and of the sense put upon it by the people when it was adopted by them."⁴⁰ It is unreasonable to defer to

33. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 891-92 (1985). The Puritans feared that the "advantages of a known and written law would be lost if the law's meaning could be twisted by means of judicial construction." *Id.* at 892.

34. *Id.* at 927.

35. JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland* 167 (Gerald Gunther ed., 1969).

36. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838).

37. Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CALIF. L. REV. 399, 399 (1939).

38. Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975).

39. DISCOURSE, *supra* note 27, at 152.

40. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 290 (1827) (Johnson, J., concurring). Chief Justice Marshall stated, "Great weight has always been attached, and very rightly attached, to contemporaneous exposition." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 417 (1821).

the "understanding of the framers" received at second hand, while rejecting their own explanations of their intention. The same result is dictated by a related rule going back to *Heydon's Case* (1586): the judge must seek "the mischief the framers were seeking to alleviate."⁴¹ That mischief was collected from extrinsic circumstances. Why are such data entitled to more respect than the Framers own explanation of what they sought to accomplish?

Finally, original intention serves as a constraint, a brake upon illimitable discretion, of which the Founders had "profound fear."⁴² Church notes that original intention would force judges "to adhere to standards beyond their definitional control."⁴³ He recognizes that if judges "are not bound by the intent of the founders . . . then there may be no limits at all to their power,"⁴⁴ that if they "are not limited by relatively fixed and precise standards, there is an obvious potential for arbitrary . . . exercise of power."⁴⁵ Then too, "our government," the Declaration of Independence declares, "is founded on the consent of the governed." The terms of that consent are spelled out in the Constitution. "The people," averred Justice James Iredell, one of the ablest Founders, "have chosen to be governed under such and such principles. They have not chosen to be governed, or promised to submit upon any other . . ."⁴⁶ When they adopted the Constitution and then the Fourteenth Amendment it was upon the basis of explanations made to them. To repudiate such representations would be a fraud upon the people.⁴⁷

41. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 943 (1965); see *Heydon's Case*, 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (1584).

42. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 298 (1969). In the early days of the Republic, Chancellor James Kent referred to a "dangerous discretion [of judges] to roam at large in the trackless fields of their own imaginations." 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 341 (Oliver W. Holmes, Jr. ed., 1873). Justice Story praised the many "rules . . . for the construction of statutes . . . to limit the discretion of judges." Joseph Story, *Law, Legislation and the Codes* (1831), reprinted in JAMES MCCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 362-63 (1971).

The discretion of judges, said Lord Camden, is "the law of tyrants In the best it is oftentimes caprice: In the worst it is every vice, folly, and passion, to which human nature is liable," quoted, of all things, by that archpriest of discretion, Justice Brennan, dissenting in *McGautha v. California*, 402 U.S. 183, 285 (1971) (Brennan, J., dissenting). Chief Judge Cardozo wrote, a judge "is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness." BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921).

43. Church, *supra* note 2, at 1088.

44. *Id.* at 1087-88.

45. *Id.* at 1076.

46. 2 GRIFFITH J. MCREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 146 (New York, D. Appleton & Co. 1857-1858).

47. Justice Story wrote, "If the constitution was ratified under the belief, sedulously propagated on all sides, that such protection was afforded, would it not now be a fraud upon the

What arguments does Church muster against these historical facts? He dwells on the difficulty of ascertaining the original intention, alluding to "differing interpretations of history,"⁴⁸ and stressing that "historical studies do not yield clear enough evidence of original intent to operate as a reliable restraint."⁴⁹ If the evidence is at times unclear or inconclusive it cannot serve, but that does not warrant discarding evidence that is clear. Let me recur to a crystal-clear instance of original intent—the indisputable exclusion of suffrage from the Fourteenth Amendment. Section 2 provides that if suffrage is denied on account of race, the state's representation in the House of Representatives shall be proportionally reduced. Senator Fessenden, Chairman of the Joint Committee on Reconstruction, explained that the Amendment "leaves the power where it is; but it tells them [the States] most distinctly, if you exercise that power wrongfully, such and such consequences will follow."⁵⁰ Senator Howard, to whom it fell to explain the Amendment because of Fessenden's illness, said:

We know very well that the States retain the power . . . of regulating the right of suffrage in the States That right has never been taken from them; . . . and 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 assume to regulate it by any clause of the Constitution of the United States.⁵¹

Howard is confirmed by the Report of the Joint Committee on Reconstruction, which drafted the Amendment: "It was doubtful . . . whether the States would consent to surrender a power they had always exercised, and to which they were attached." Consequently the Committee commended Section 2 because it "would leave the whole question with the people of each State."⁵² Such history may not be dismissed as "pedantic

whole people to give a different construction to its powers?" 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1084, at 33 (5th ed. 1905).

48. Church, *supra* note 2, at 1079. Activist Michael Moore considers that the difficulties of ascertainment of intention are only "problems of evidence, of verifying just what intentions a person has on a given occasion. The surmountability of these problems is shown by the law of crimes, torts, and contracts, where we presuppose the existence and discoverability of the real intentions of individuals all of the time." Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 350 (1985).

The problem posed by "legislative" intent as distinguished from that of a single person is discussed in Raoul Berger, *Original Intent and Boris Bittker*, 66 IND. L.J. 723, 730-32, 736-37, 739 (1991).

49. Church, *supra* note 2, at 1088.

50. ALFRED AVINS, *THE RECONSTRUCTION AMENDMENTS' DEBATES* 143 (1967).

51. *Id.* at 237.

52. *Id.* at 94. Notwithstanding, Church serenely contemplates "judicial support . . . in cases dealing with the 'quagmire' of political gerrymandering." Church, *supra* note 2, at 1103.

arguments over historical nuances," as "scholastic arguments over the niceties of history."⁵³ There are other examples of clear historical intent.⁵⁴ The possibility that it may at times be difficult to ascertain the original intention does not justify overruling it when it is clear beyond peradventure, as the Court did with its "one-man—one vote" decisions. Church also refers to "[t]he possibility that history is being cynically manipulated."⁵⁵ Texts too may be manipulated, witness the attempt to read a prohibition of death penalties into the "cruel and unusual punishments" clause of the Eighth Amendment.⁵⁶ Possible abuse of a doctrine does not impeach its value.⁵⁷

THE JUDICIAL ROLE

The world of today, Church accentuates, is vastly different from that of the Founders; he musters an array of facts to demonstrate that government itself has changed over the years and concludes that the courts should study "how to structure a democracy to best suit today's economic, social, demographic and political realities."⁵⁸ To be sure, the "capacity to adapt to changing substantive policy needs is . . . a basic goal";⁵⁹ but where does the Constitution make the courts the instrument of change? Judicial review is not even mentioned in the Constitution. Be it assumed that "the traditional role of the courts should now be reexamined in the light of changes,"⁶⁰ is it left to the courts to adjust their own powers?⁶¹ This, Church considers, "is too important a matter to leave to nostalgia or static historical interpretation."⁶² To remove the matter from nostalgia and statical considerations let us begin with some basics, cogently summarized by 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 au-

53. Church, *supra* note 2, at 1086, 1105.

54. Raoul Berger, *The Activist Legacy of the New Deal Court*, 59 WASH. L. REV. 751, 755-66 (1984).

55. Church, *supra* note 2, at 1080.

56. The Eighth Amendment cannot be read to nullify the Fifth's permission to deprive a person of life after a due process trial.

57. "It is always a doubtful course, to argue against the use of existence of a power, from the possibility of its abuse." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344 (1816).

58. Church, *supra* note 2, at 1103.

59. *Id.* at 1076.

60. *Id.* at 1098.

61. Hamilton stated that "an agent cannot new-model his own commission." 6 THE WORKS OF ALEXANDER HAMILTON 166 (Henry C. Lodge ed., 1904).

62. Church, *supra* note 2, at 1098.

thorize *A priori*, such a constitution could only have a fixed and unchanging meaning, if it were to fulfill its function.⁶³ 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.⁶⁴

Consider the established tradition as to the judicial function at the adoption of the Constitution. Francis Bacon had counselled judges "to remember that their office is to interpret the law, and not to make it."⁶⁵ In his 1791 Lectures, Justice James Wilson, a leading architect of the Constitution, stated that the judge "will remember that his duty and his business is, not to make the law, but to interpret and apply it."⁶⁶ That became the settled creed of the Supreme Court.⁶⁷ To step beyond this was to violate the separation of powers, for, as said by Chief Justice Marshall, "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law."⁶⁸

Let us more closely inquire into the Founders' design. With respect to "the basic constitutional doctrines of federalism and the separation of powers," Church observes, "the founders envisaged a more modest judicial role . . . than the position the federal courts have come to assume."⁶⁹ He recognizes that "the present position of the courts is not what the founders anticipated."⁷⁰ These "generally restrictive views of the founders" are not an "artificial limitation";⁷¹ they resulted from the Foun-

63. Justice Story wrote, the Constitution "is to have a fixed, uniform, permanent construction. It should be . . . not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever." 1 STORY, *supra* note 47, § 426, at 326. In *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (C.C. Pa. 1795), Justice William Paterson, who had been a leading Framer, stated, "[t]he Constitution is certain and fixed; it contains the permanent will of the people." *Id.* at 308; see *Hawke v. Smith*, 253 U.S. 221, 227 (1920); *South Carolina v. United States*, 199 U.S. 437, 448-49 (1905), *overruled on other grounds by New York v. United States*, 326 U.S. 572, 582 (1946).

64. PHILIP KURLAND, *WATERGATE AND THE CONSTITUTION* 7 (1978) (footnote added). In *McPherson v. Blacker*, 146 U.S. 1 (1892), the Court rejected the notion that the Constitution may be "amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made." *Id.* at 36.

65. 1 SELECTED WRITINGS OF FRANCIS BACON 138 (Mod. Lib. ed. 1937).

66. 2 JAMES WILSON, *WORKS* 502 (Robert G. McCloskey ed., 1967).

67. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874); *Luther v. Borden*, 48 U.S. (7 How.) 1, 41 (1849).

68. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). Church considers it "unfortunate that constitutional law casebooks tend to pay little attention to the topic of separation of powers." Church, *supra* note 2, at 1105 n.113.

69. Church, *supra* note 2, at 1081.

70. *Id.* at 1073.

71. *Id.* at 1105.

ders' jealous dread of the greedy expansiveness of power,⁷² hence their limited delegations. Church notes that "Democratic theory generally relegates courts to a lesser position than that enjoyed by the political branches," that courts "are less accountable than any other policymakers in government," so that in light of their life tenure the "judiciary is counter-majoritarian."⁷³ How did they get that way?

Church would answer that "[a] gradual process of constitutional change has, after all, been continuing for two hundred years."⁷⁴ More baldly, the Court has steadily been arrogating undelegated power. Because "evolutionary change has always been a feature of the common law system that predated the Constitution,"⁷⁵ it does not follow that judges are likewise free to remodel the Constitution. The premises are totally different. Parliament delegated to the courts the task of fashioning the law of torts, contracts, and the like; as Cardozo observed, the rules were "the creation of the courts, themselves, and [could] be abrogated by courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience."⁷⁶ *Statutes*, however, could not be set aside or revised by courts.⁷⁷ No delegation was made to our courts to revise the Constitution. Marshall stated that the judicial power "cannot be the assertion of a right to change that instrument."⁷⁸ And in

72. The Founders were unceasingly concerned with power's "endlessly propulsive tendency to expand itself beyond legitimate boundaries." BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 56 (1967).

73. Church, *supra* note 2, at 1087. In *THE FEDERALIST* No. 51 Hamilton (or Madison) observed that "In a republican government, the legislative authority necessarily predominates." *THE FEDERALIST* No. 51, at 338 (Alexander Hamilton or James Madison) (Mod. Lib. ed. 1937). And Hamilton assured the Ratifiers that of the three branches, the judiciary was "'next to nothing.'" *Id.*, No. 78, at 504 (Alexander Hamilton) (quoting 1 CHARLES MONTESQUIEU, *SPIRIT OF LAWS* 186 (n.d.)).

74. Church, *supra* note 2, at 1103. Thomas Rutherforth's explanation of why the legislative is superior to the executive is equally applicable to the judicial:

The legislative is the joynt understanding of the society directing what is proper to be done, and is therefore naturally superior to the executive, which is the joynt strength of the society exerting itself in taking care, that what is so directed shall be done.

2 THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 71 (Cambridge, J. Bentham 1756).

75. Church, *supra* note 2, at 1103 n.108.

76. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 136-37 (1924). But Cardozo regarded a *statute* as binding: A judge "may not substitute his own reading for one established by the legislature." BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 55 (1928).

77. Lord Ellesmere declared in *The Earl of Oxford's Case* that "our Books are, That the Acts and Statutes of Parliament ought to be revers'd by Parliament (only), and not otherwise." 1 Chan. Rep. 1, 12, 21 Eng. Rep. 485, 488 (1615). Chief Justice Thomas Cooley stated, "there can be no such steady and imperceptible change in their [constitutions'] rules as inheres in the principles of the common law." THOMAS COOLEY, *CONSTITUTIONAL LIMITATIONS* 88 (7th ed. 1903).

78. JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland*, *supra* note 35, at 209.

Marbury v. Madison he held that Congress could not "alter" the Constitution.⁷⁹ Church's "evolution" is simply bootstrap lifting, by which the Court conferred upon itself power that had been withheld. No passage of time can legitimate the arrogation;⁸⁰ nor does repetition legitimate usurpation. Squatter sovereignty does not run against the sovereign people.⁸¹

Since both the legislative and executive branches "have enlarged their capacity to exercise power far beyond what the founders contemplated," Church urges, "an alert, expansive judicial authority may be required to maintain an effective check on their power."⁸² This is indeed paradoxical. For he recognizes that the courts "have been a major player in the drama, contributing to the shift toward central power by sanctioning both an enormous expansion of the general authority of the other branches . . . and an extension of federal authority over the states."⁸³ Now to call upon the courts to restore the balance which they were a leading actor in upsetting, is like asking a looter to guard the store against break-ins.

JUDICIAL POLICY-MAKING

"[C]urrent policy needs," Church remarks, "differ from those of two centuries ago";⁸⁴ hence he would encourage the courts to "lay open claim to policy-making power."⁸⁵ The courts can only "claim" what they have been granted. It lies beyond their delegation to "constitutionalize" ungranted jurisdiction.⁸⁶ "Innovative constitutional interpretation"⁸⁷ is merely a euphemism for judicial revision of the Constitution. Church candidly notes that judicial review was meant "only to police constitutional boundaries; the courts were not expected to substitute their views of substantive policy for those of elected representatives or agency offi-

79. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

80. In *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the Court branded the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), "an unconstitutional assumption of powers . . . which no lapse of time or respectable array of opinion should make us hesitate to correct." *Erie*, 304 U.S. at 79 (opinion by Brandeis, J.) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

81. "[N]o one acquires a vested or protected right in violation of the Constitution by long use." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970). "Acquiescence for no length of time can legalize a clear usurpation of power." COOLEY, *supra* note 77, at 106.

82. Church, *supra* note 2, at 1091.

83. *Id.* at 1082. "The federal courts have expanded federal power over the States . . . not just by releasing the other branches from constitutional restraints." *Id.* at 1083.

84. *Id.* at 1075.

85. *Id.* at 1091.

86. *Id.* at 1104.

87. *Id.* at 1105.

cials.”⁸⁸ Striking confirmation is furnished by the legislative history. When Madison proposed that the Justices should participate with the President in vetoing legislation, he was rebuffed. Nathaniel Gorham saw no “advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures.”⁸⁹ And Elbridge Gerry, a vigorous advocate of judicial review, said, “It was quite foreign from the nature of ye. office to make them judges of the policy of public measures” and “It was making Statesmen of the Judges . . . It was making the Expositors of the Laws, the Legislators which ought never to be done.”⁹⁰ Church notices “the traditional understanding of democratic government that policy should be made by accountable representatives.”⁹¹ And he is not entirely happy with judicial policymaking, as appears from his discussion of *Missouri v. Jenkins*,⁹² where the lower federal courts “intervened to reform the public school system in Kansas City,” “force[d] very large tax increases,” “dictated the planning process for expenditure of the proceeds,” and in short “essentially took over the whole public policy process.”⁹³ *Jenkins*,

88. *Id.* at 1087. Referring to constitutional limitations on legislative power, Justice James Iredell declared,

Beyond these 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 . . . It is a discretion *no more controllable* . . . by a Court . . . than a judicial determination is by them . . .

Ware v. Hylton, 3 U.S. (3 Dall.) 199, 266 (1796).

The authority of nine unelected jurists to strike down laws would be unacceptable in a democratic polity, one that is supposed to be “a government of laws, not of men,” unless judicial review were believed to be guided by a faithful attempt to interpret the Constitution, the highest law of the land. Consequently, to support their opinions, the Justices will ignore or even willfully misrepresent the text and history of the Constitution, rather than admit they are revising it.

John Burleigh, *The Supreme Court vs. the Constitution*, PUB. INTEREST, Winter 1978, at 151, 151.

89. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73 (Max Farrand ed., 1911) [hereinafter RECORDS].

90. 1 *id.* at 97-98; 2 *id.* at 75. For an extended discussion of the exclusion of judges from policy making, see BERGER, *supra* note 6, at 300-11. Justice James Iredell stated, “These are considerations of policy, considerations of extreme magnitude, and certainly incompetent to the examination and decision of a Court of Justice.” *Ware*, 3 U.S. (3 Dall.) at 260. Earlier Judge Henry had spoken to the same effect in Virginia: “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 chosen immediately by the people nor being accountable to them . . . they do not, and ought not, to represent the people in framing or repealing any law.” *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 47 (1793). *Kamper* was a landmark judicial review case.

91. Church, *supra* note 2, at 1096.

92. 110 S. Ct. 1651 (1990).

93. Church, *supra* note 2, at 1100.

he said, "does not stand in isolation."⁹⁴ So much for the "valuable . . . practical policy guidance" of the courts.⁹⁵

Several arguments are advanced by Church in defense of judicial policymaking. Repeatedly he dwells on the gap left by legislative inaction in the face of serious need for remedial action, on "legislative failure to address issues of acknowledged importance."⁹⁶ His criticisms are well taken; at times Congressional inaction "can create an institutional crisis by producing a vacuum at the very center of the nation's policy-making apparatus."⁹⁷ Failure to act, however, does not cause Congress' power to descend on the shoulders of the judiciary. Congress may not abdicate its powers;⁹⁸ still less may the judiciary take them over.⁹⁹ Justice Story condemned "doing for the people, what they have not chosen to do for themselves."¹⁰⁰ Church observes that "[c]ombining the making and execution

94. *Id.* at 1101. Church underscores "whether an expenditure of the magnitude ordered by the lower courts is constitutionally acceptable . . . [T]he amount required to be spent grew to about \$400 million for one school district." *Id.* at 1100 n.97.

Church also notes the protracted litigation in *Lelsz v. Kavanagh*, where the issue was whether Texas should be compelled by the federal courts to as much as triple the amount of state funds spent on behalf of institutionalized mentally retarded persons, to an apparent amount of about \$90,000 per year, per patient. Carried over to the state's entire institutionalized retarded population, this could theoretically result in annual expenditures of some three-quarters of a billion dollars.

Id. at 1101 n.101; see 824 F.2d 372 (5th Cir. 1987). Faced by crippling demands for care for the homeless, AIDS patients, etc., the allocation of state funds seems to me preeminently one that the state assemblies should decide. Such local issues were left to the states by the Founders.

95. Church, *supra* note 2, at 1089.

96. *Id.* at 1099.

97. *Id.* at 1098.

98. In his *Notes on The State of Virginia* (1787), Jefferson wrote, "Our antient laws expressly declare, that those who are but delegates themselves shall not delegate to others powers which require judgment and integrity in their exercise." THOMAS JEFFERSON: WRITINGS 253 (Merrill D. Peterson ed., 1984). Respecting the legislative power, Michael Stone said in the First Congress, "Do you divest yourself of the power by not exercising it? Certainly not." 1 ANNALS OF CONG. 823 (J. Gales ed., 1834). "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested." *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935); see *Buckley v. Valeo*, 424 U.S. 1, 121, 122 (1976).

99. Church's reference to the Court's "willingness in recent years to take on a new, expanded, policy role," Church, *supra* note 2, at 1098, renders palatable the "willingness" of a trespasser.

100. 1 STORY, *supra* note 47, § 426, at 325. Justice Story also stated that if a constitutional restriction

be mischievous, 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.

Id. In this, he was anticipated by Madison: "Had the power of making treaties, for example,

of the law in a single branch violates the essence of the separation of powers doctrine."¹⁰¹ Combining the making and judging of law in the same body suffers from the same vice, as Massachusetts Chief Justice Hutchinson pungently stated in 1767: "*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."¹⁰²

Church, however, extols "the accumulated wisdom and competence of the nation's corps of judges" and the advantages of judicial training, procedure and problem solving.¹⁰³ "Competence" does not confer power. Justice Jackson declared, "[n]or does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs But we act in those matters not by authority of our competence but by force of our commissions."¹⁰⁴ As to the advantages of judicial procedure, Church notes that judges "have very limited resources, with little staff support . . . judges must do most of their own work."¹⁰⁵ This is no longer quite true; each Justice now has the assistance of four law clerks, so that, because of the deluge of cases, as Judge Richard Posner pointed out, a Justice is reduced to directing traffic to the particular clerks. Even if the clerk's draft of an opinion is only preliminary, editing, as Posner observes, is not equivalent to original study and drafting. Something is lost in the process.¹⁰⁶ Moreover, the Justices are cloistered in an ivory

been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the Constitution." 2 ANNALS OF CONG. 1900-01 (1791).

101. Church, *supra* note 2, at 1095.

102. MORTON H. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 5 (1977).

103. Church, *supra* note 2, at 1088.

104. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-40 (1943). Woodrow Wilson, who had some experience in government, said, "What I fear . . . is a government of experts. God forbid that in a democratic country we should resign the task and give the government over to experts." RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 209-10 (1963). An activist judge, J. Skelly Wright, stated, "Any argument for letting the experts decide . . . is an argument for paternalism and against democracy." J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 585 (1972), quoted in JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 134 (1980)).

105. Church, *supra* note 2, at 1089.

106. RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 102-11 (1985). Mark Tushnet referred to

the increasing heavy reliance of the Justices on law clerks for the drafting of substantial portions of their opinions. . . . I would be extremely surprised to discover that Chief Justice Rehnquist did much more than supervise—"edit" is the polite term—the work of his law clerks Justices of the Supreme Court should now be viewed as senior partners in little law firms, and it is the rare senior partner who puts pen to paper.

Mark Tushnet, *A Republican Chief Justice*, 88 MICH. L. REV. 1326, 1327 (1990).

tower, insulated from the affairs of men. In sharp contrast, Congress employs extensive staffs, sets up Committees with their own staffs, and has vastly superior facilities for investigation. "[B]ound by the restrictive formalities of litigation," Church remarks, "courts are effectively precluded from approaching the capacity of elected representatives to make policy by enacting legislation." "These limitations," he recognizes, "are severe."¹⁰⁷ Unlike the Justices, members of Congress periodically return to their constituencies to ascertain how the winds of change are blowing. It is they who are in tune with the times.

Then, too, one may be skeptical about the Court's ultimate wisdom in policy matters. Over the years the Court has made some egregious blunders, e.g., the disastrous *Dred Scott* decision¹⁰⁸ which paved the way to the Civil War. It invalidated a federal income tax,¹⁰⁹ only to be overruled by the Sixteenth Amendment. In our own time a backlash constrained it to retreat from its invalidation of death penalties.¹¹⁰ The record before 1937, wrote Henry Steele Commager, "reveals . . . that the Court has effectively intervened, again and again, to defeat Congressional attempts . . . to protect workingmen, to outlaw child labor, to assist hard-pressed farmers, and to democratize the tax system."¹¹¹ Shortly before he ascended to the Supreme Court, Solicitor General Robert H. Jackson wrote, "[T]ime has proved that [the Court's] judgment was wrong on the most outstanding issues upon which it has chosen to challenge the popular branches,"¹¹² a stricture confirmed by respected scholars.¹¹³

Church argues, however, that courts "have at most only a modest influence," that "the danger of aggrandizement by the courts is minimal," and that "rumors of incipient judicial hegemony are greatly exaggerated."¹¹⁴ The one man-one vote and desegregation cases scarcely represent a "modest influence."¹¹⁵ Church himself notes that the Supreme Court "has considerably expanded its reach to include review of

107. Church, *supra* note 2, at 1090.

108. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 426-27, 452 (1857).

109. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 583 (1895).

110. RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* 125-26 (1982).

111. Henry S. Commager, *Judicial Review and Democracy*, 19 VA. Q. 417, 428 (1943).

112. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* x (1941) (preface).

113. James M. Burns, *Dictatorship—Could It Happen Here?* in *HAS THE COURT TOO MUCH POWER?*, 234, 236 (Charles Roberts ed., 1974); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. LAW 279, 292-93 (1957).

114. Church, *supra* note 2, at 1089, 1090.

115. Edmund Cahn stated that "as a practical matter it would have been impossible to secure adoption of a constitutional amendment to abolish 'separate but equal.'" Edmund Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 156 (1955). See *supra* note 90.

state and local policies over a broad range of subjects, including criminal procedure, abortion, termination of life, religious displays, school prayer, health care, land use and education." This expansion, to which may be added supervision of prisons, care for retarded children and the like, he observes, "would almost certainly have astounded the founders."¹¹⁶ "[C]entralization of power," he notes, can lead to "political tyranny."¹¹⁷ And he concludes that "cause for alarm over the rise of judicial power may well be justified."¹¹⁸

FEDERALISM

By "federalism," Church comments, the Founders meant that "policy-making power should be decentralized by dividing it geographically among federal, state and local governments." He observes that "the founders were deeply committed to the principle that power should be shared with the states rather than monopolized at the federal level."¹¹⁹ "Shared" does small justice to the actualities. The states preceded the nation,¹²⁰ and they *surrendered* to the newly fashioned central government certain described powers while *retaining* the rest.¹²¹ In *The Federalist* No. 39 Madison stated that the jurisdiction of the proposed government "extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects."¹²² Federal jurisdiction, he explained in No. 45,

will be exercised principally on *external* objects, as war, peace, negotiation, and foreign commerce The powers *reserved* to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the *internal* order, improvement and prosperity of the state.¹²³

116. Church, *supra* note 2, at 1084.

117. *Id.* at 1084-85.

118. *Id.* at 1102.

119. *Id.* at 1082.

120. RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 21-47 (1987).

121. Hamilton said of the Constitution, "Here . . . the people surrender nothing; and as they retain everything, they have no need of particular reservations." *THE FEDERALIST*, *supra* note 73, No. 84, at 558 (Alexander Hamilton); see BERGER, *supra* note 120, at 53-54, 155.

122. *Id.*, No. 39, at 249 (James Madison).

123. *THE FEDERALIST*, *supra* note 73, No. 45, at 303 (James Madison) (emphasis added). In the Convention James Wilson stated that "the powers of peace, war, treaties, coinage and regulating of *commerce* ought to reside" in the general government. And he repeated that "War, commerce and Revenue were the great objects of the Genl. Government." 1 RECORDS, *supra* note 89, at 413; 2 *id.* at 275.

In this he echoed Roger Sherman's remark in the Constitutional Convention.¹²⁴ Each regime, Hamilton explained, would be supreme and have exclusive jurisdiction in its own sphere.¹²⁵ Church recognizes that the "federal courts have expanded federal power over the states."¹²⁶

The extent of these incursions is illuminated by *Garcia v. San*

124. Sherman stated:

The objects of the Union . . . were few. 1. defence agst. foreign danger. 2. agst. internal disputes & a resort to force. 3. Treaties with foreign nations 4 regulating foreign commerce, & drawing revenue from it. These & perhaps a few lesser objects alone rendered a Confederation of the States necessary. All other matters civil & criminal would be much better in the hands of the States.

1 RECORDS, *supra* note 89, at 133.

125. THE FEDERALIST, *supra* note 73, No. 32, at 194 (Alexander Hamilton). "The laws of the United States are supreme, as to all their proper, constitutional objects: the laws of the states are supreme in the same way." 2 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 336 (Washington 1836); *see also id.* at 362 ("The truth is, the states, and the United States, have distinct objects. They are both supreme. As to national objects, the latter is supreme; as to internal and domestic objects, the former."). Chief Justice Marshall stated, "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819).

Chancellor Kent wrote, "[T]he principal rights and duties which flow from our civil and domestic relations, fall within the control, and we might almost say the exclusive cognizance, of the state governments." 1 KENT, *supra* note 42, at 445, *quoted in* MARK HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882, at 30 (1963). Henry Adams considered that "[t]he doctrine of states' rights was in itself a sound and true doctrine; as a starting point of American history and constitutional law there is no other which will bear a moment's examination." HENRY ADAMS, JOHN RANDOLPH 273 (Boston, Houghton, Mifflin & Co. 1883).

126. Church, *supra* note 2, at 1083. Among the "benefits" of this "expansion" Church lists are "the absence of state and local barriers to trade and travel, a single currency . . . national constraints on state and location taxation of interstate commerce." *Id.* at 1085. These, however, were part of the original scheme. Article IV gave members of one state the right to travel to another state and do business there. U.S. CONST. art. IV. The power "to coin Money" and to punish counterfeiters provided for a single national currency. *Id.* art. I, § 8, cls. 5, 6. And the power to regulate interstate commerce derived from the need to halt exactions by one state from another. BERGER, *supra* note 120, at 125. Similarly, the need for "strong international trading" and "military presence," Church, *supra* note 2, at 1086, were provided for by the power to regulate foreign commerce and provide for an army and navy. U.S. CONST. art. I, § 8, cls. 3, 12, 13. They were not a judicial construct.

Church considers that the areas of "health, science and education" pose "national problems." Church, *supra* note 2, at 1086. They were not so regarded by the Founders. Madison's proposal to establish a national university was rejected. 2 RECORDS, *supra* note 89, at 616. In the Virginia Ratification Convention, Judge Edmund Pendleton assured the Ratifiers that "'Our dearest rights . . . are still in the hands of our state legislature.'" BERGER, *supra* note 120, at 56. In 1885, the Court declared that no Amendment "was designed to interfere with the power of the State . . . to prescribe regulations to promote the health . . . education . . . and good order of the people." *Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

Antonio Metropolitan Transit Authority,¹²⁷ which decided by a five to four vote that municipal mass transit is governed by federal minimum wages and hours standards. Under *Garcia* one who rides by subway in New York City from 42d Street to 72d Street is engaged in interstate commerce! Even worse, the Court abdicated its function as arbiter of opposing federal and state claims and left differences over the reach of interstate commerce to Congress, making it the judge of its own powers, the very department against which the states relied on the Court for protection.¹²⁸ Challenges to that course are not "scholastic arguments over the niceties of history,"¹²⁹ or "pedantic arguments over historical nuances."¹³⁰ They go to the very heart of our constitutional system. Without clear-cut assurances that the states' unsundered "residuary" rights would be "inviolable," the Constitution would have failed of adoption.¹³¹

Those who are result-oriented rejoice in the Court's midwifery to the corporate expansion of industry, railroads, and communications which all but erased state lines. Today, when Justice Brennan is being deified for his leadership in promoting a social revolution, it is not easy to prefer the integrity of the Constitution. But as Washington said in his Farewell Address,

If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.¹³²

Church urges, however, that the amendment process "is too cumbersome and erratic to serve as the sole vehicle for constitutional development."¹³³ But it is made the "sole vehicle" by Article V.¹³⁴ Since when is compliance with law excused because it is too onerous? "Cumbersomeness" affords no dispensation to the judiciary to ignore the Article V

127. 469 U.S. 528 (1985).

128. For a detailed discussion, see BERGER, *supra* note 120, at 164-77.

129. Church, *supra* note 2, at 1086.

130. *Id.* at 1105.

131. THE FEDERALIST, *supra* note 73, No. 39, at 249 (James Madison). Herbert Wechsler wrote, "Federalism was the means and price of formation of the Union." The Founders "preserved the states as separate sources of authority and organs of administration—a point on which they hardly had a choice." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954).

132. 35 THE WRITINGS OF GEORGE WASHINGTON 229 (John C. Fitzpatrick ed., 1940).

133. Church, *supra* note 2, at 1078.

134. U.S. CONST. art. V; see *supra* note 64 and accompanying text.

reservation of amendment to the people.¹³⁵ "An agent," said Hamilton, "cannot new-model his own commission."¹³⁶ The most benign purpose does not empower the Court to expand its delegated powers.

CONCLUSION

Church sees the question as "whether an expansion of judicial power will accomplish useful ends in the long run."¹³⁷ Assume that such expansion is desirable, that does not authorize the Court to enlarge its jurisdiction.¹³⁸ What expanded judicial power can mean is illustrated by Church's remark that the "tenth amendment may have little more than rhetorical value."¹³⁹ Thus the Court has reduced to a cipher the crowning Amendment of the Bill of Rights, which expressed the central concern of the states—a guarantee that the federal newcomer would not invade their sovereignty.¹⁴⁰ That judicial deletion of so prized an

135. Hamilton stated:

Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act.

THE FEDERALIST, *supra* note 73, No. 78, at 509 (Alexander Hamilton). In the First Congress, Elbridge Gerry, a Framers, stated, "The people have [directed a] particular mode of making amendments, which we are not at liberty to depart from." 1 ANNALS OF CONG. 503 (Gales & Seaton eds., 1836) (Print bearing running title "History of Congress"); *see supra* note 64.

Writing of the one person-one vote decision, Vannevar Bush, a noted scientist and engineer, stated that supporting that decision

on the basis of necessity, since the regular legislative process would not correct an obviously unfair situation . . . is saying in effect that the democratic system will not work, and that it must be supplemented by absolute power in the hands of a group of men independent of the public will. This is a hazardous concept. . . .

VANNEVAR BUSH, *PIECES OF THE ACTION* 17-18 (1970).

136. 6 THE WORKS OF ALEXANDER HAMILTON, *supra* note 61, at 166.

137. Church, *supra* note 2, at 1105.

138. Chief Justice Marshall declared, "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland*, *supra* note 35, at 190-91. "The criterion of constitutionality," said Justice Holmes, "is not whether we believe the law to be for the public good." *Adkins v. Childrens' Hosp.*, 261 U.S. 525, 570 (1923) (Holmes, J., dissenting), *overruled by West Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1937).

139. Church, *supra* note 2, at 1083. Justice Story observed that the Tenth Amendment "was framed for the purpose of quieting the excessive jealousies, which had been excited." 1 STORY, *supra* note 47, § 433, at 331-32. David Currie decried "the dangerous principle that constitutional provisions that did not suit contemporary needs need not be respected." David Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI. L. REV. 504, 553 (1987).

140. Justice Story said of the Tenth Amendment, "Its sole design is to exclude any interpretation, by which other powers should be assumed beyond those, which are granted." 1 STORY, *supra* note 47, § 1908, at 653. As late as 1975, the Court affirmed that "[t]he Amendment expressly declares the constitutional policy that Congress may not exercise power in a

Amendment should not so much as elicit an expression of shock testifies to the depth of the activist commitment to judicial revision of the Constitution.

It will be recalled that Philip Kurland explained that the very nature of a written constitution required that it be fixed and unalterable except as it provided. Early on this was the view of Justice Story: "[T]he policy of one age may ill suit the wishes, or the policy of another. The constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction."¹⁴¹ It is because activists cannot find footing in the Constitution for effectuation of their desires that they laud judicial "adaptation" of the Constitution to changing times.¹⁴² These are not "pedantic arguments over historical nuances."¹⁴³ Said Justice Harlan: "When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political processes to which the amending procedure was committed, and it has violated the constitutional structure which it is its highest duty to protect."¹⁴⁴ The departures of Justices William Brennan and Thurgood Marshall portend a new day,¹⁴⁵ and I anticipate that as the New Court proves less complaisant to activist demands, we shall hear squeals of anguish.¹⁴⁶ For them the Court will cease to be a Daniel-Come-to-Judgment. They will learn that the name of the game is "Two Can Play."

fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

141. STORY, *supra* note 47, § 426, at 326.

142. Justice Black dismissed "rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times . . . The Constitution makers knew the need for change and provided for it" by the amendment process. *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

143. Church, *supra* note 2, at 1105.

144. *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970) (Harlan, J., concurring in part and dissenting in part); see Guido Calabresi, *What Clarence Thomas Knows*, N.Y. TIMES, July 28, 1991, § 4, at 15.

145. Church considers that with Brennan's "replacement by Justice David Souter, there is a strong possibility that the Court will shift toward a relatively 'stricter,' more 'historical' interpretation of the United States Constitution and away from 'judicial legislation.'" Church, *supra* note 2, at 1071. That possibility has been enhanced by the resignation of Justice Thurgood Marshall.

146. Already Dean Guido Calabresi of the Yale Law School stated "I despise the current Supreme Court and find its . . . behavior disgusting." Calabresi, *supra* note 144, at 15. Earlier, for example, the "fresh raw wound" caused by the Court's retreat from its invalidation of death penalties set Charles Black to "wondering whether we liberals . . . may not be in part to blame for a . . . quite evident trend toward the point of view that reason doesn't matter much, and can be brushed aside, if only the result is thought desirable." BERGER, *supra* note 6, at 346. For a detailed discussion of this Address, see *id.* at 346-50; see also Charles Krauthammer, *Look Who's Discovered Judicial Restraint*, WASH. POST, July 19, 1991, § A, at 21 (Charles Krauthammer's satirical column on Lawrence Tribe's change of heart in opposing the nomination to the Supreme Court of Judge Clarence Thomas).

Just now activism is in the ascendant; opponents are branded as deviants from the "mainstream," a mainstream that is only about 45 years old, and that swept away 150 years of judicial landmarks while flouting the will of the Founders.¹⁴⁷ When it dawns on the people that judicial activism deprives them of self-government and vests it in an unelected, unaccountable, and virtually irremovable judiciary, the decisions of which profoundly affect their destiny, activism will atrophy.

147. "The list of opinions destroyed by the Warren Court," Philip Kurland observed, "reads like a table of contents from an old constitutional law casebook." PHILIP KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 90-91 (1970).

