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# Original Intent: Bittker v. Berger

Raoul Berger

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## I. INTRODUCTION

Professor Boris Bittker fires another salvo of satiric wit and fancy against reliance on the records of the Federal Convention, *The Federalist*, and the records of the Ratifying Conventions.[1] If he is correct, we may consign the 1787 records to the dustbin. But they are not to be laughed out of court. As early as 1838, the Supreme Court stated 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 this Court has always resorted in construing the constitution."[2] An early activist, Jacobus tenBroek, wrote in 1939 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 who formulated the instrument."[3]

## II. THE FOURTEENTH AMENDMENT

Inquiry, however, should not halt at 1787. Nowadays the

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1. Boris I. Bittker, *Observations on Raoul Berger's Original Intent and Boris Bittker*, 66 IND. L.J. 757 (1991). Throughout his article, Professor Bittker dignifies me by identifying me as Mr. Berger. In the interest of concision, I shall not follow suit. Besides, Bittker stands in no need of bolstering his reputation by my addressing him as "Professor." Rather, his attainments shed luster on the title.

2. Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838). Some compilations of the 1787 records were published well before 1831. THE JOURNAL OF THE FEDERAL CONVENTION was published in 1819; Justice Robert Yates' NOTES in 1821; and Jonathan Elliot's DEBATES in 1830. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at xiv & xi-xii (Max Farrand ed., 1911) [hereinafter RECORDS]. I would hazard the guess that some of the state convention records were published earlier.

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

Fourteenth Amendment has become a mini-constitution, according to Justice Frankfurter probably the largest source of the Court's business.[4] The most controversial and startling modern decisions—desegregation, one-man-one-vote, application of the Bill of Rights to the States—have invoked its sanction.[5] Its records are not subject to Bittker's criticisms; they are a verbatim transcript of the framers' day-by-day proceedings. And the salient elements were brought home to the people in a vigorous ratification campaign. Then too the question whether the framers intended posterity to resort to the records of their proceedings can be confidently answered.

Senator Charles Sumner, arch-protagonist of a broad construction of the amendment, said that if the meaning of the Constitution "in any place is open to doubt, or if words are used which seem to have no fixed signification [e.g., equal protection], we cannot err if we turn to the framers; and their authority increases in proportion to the evidence which they have left on the question."[6] This was the approach of confreres who sat with him in the thirty-ninth Congress. In 1871, John Farnsworth of Illinois said of the amendment, "Let us see what was understood to be its meaning at the time of its adoption by Congress . . . ."[7] James Garfield rejected an interpretation that went "far beyond the intent and meaning of those who framed and those who amended the Constitution."[8] These sentiments found powerful confirmation in 1872 by a unanimous Senate Judiciary Committee Report, signed by Senators who had voted for the Thirteenth, Fourteenth, and Fifteenth Amendments in Congress:

> 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 . . . .
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> . . . .
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> A construction which should give the phrase . . . a

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

5. Walter Berns noted that "the growth of judicial power is related to—or even limited to" the Fourteenth Amendment. Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 50.

6. CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866).

7. ALFRED AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES 506 (1967).

8. *Id.* at 528.

> 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 . . . . A change in the popular use of any word employed in the Constitution cannot retroact upon the Constitution, either to enlarge or limit its provisions.[9]

Bittker's rejection of the 1787 records leaves untouched the bulk of present day litigation under the Fourteenth Amendment. There the records are unimpeachable, available, and according to the framers themselves, they should be our guide.

## III. USE DOES NOT SANCTIFY USURPATION

Bittker comfortably observes that the case books are "awash with cases violating the original intent of the framers, but these were nevertheless viewed as the sources of fundamental . . . principles."[10] Chief Justice John Marshall, on the other hand, considered that "the *intention* is the most sacred rule of interpretation."[11] This principle is anchored in 600 years of Anglo-American practice. And as late as 1939, discovery of the framers' intention remained the rule.[12] For Bittker, however, cases "illegitimate in origin [are] sanctified by usage . . . ."[13] But judicial usurpation is no more "sanctified by usage" than larceny is legitimated by repetition across the years. The view that it is too late to effectuate the unmistakable intention of the framers is tantamount to a claim that long-standing usurpation confers title. But squatter sovereignty does not run against the people.[14] Shall the Court's arrogation

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9. *Id.* at 571-72.

10. Bittker, *supra* note 1, at 769.

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

12. *See* tenBroek, *supra* note 3, at 399.

13. Bittker, *supra* note 1, at 770.

14. "[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). Chief Justice Thomas Cooley wrote, "Acquiescence for no length of time can legalize a clear usurpation of power . . . ." THOMAS M. COOLEY, A TREATISE ON

of power to revise the Constitution be validated because it has persisted? The answer was given by *Erie Railroad Co. v. Tompkins*, where the Court, by Justice Brandeis, quoting Justice Holmes, branded the century-old *Swift v. Tyson* "an unconstitutional assumption of power by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[15] My view of the plethora of "cases violating the original intent of the framers" is that of Justice Harlan: "When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power is committed, and it has violated the constitutional structure which it is its highest duty to protect."[16] Notably absent from Bittker's discussion is any criticism of the Court's more flagrant revisions of the Constitution.[17]

To clear the ground, Bittker launches an inquiry into certain preliminary matters, remarking that "it is an irony of constitutional scholarship, that Mr. Berger, author of the most comprehensive and searching defense of judicial review, has found so little to admire in the exercise of this power."[18] In 1969, I dwelt on the *legitimacy* of judicial review, emphasizing that it was conceived to police the constitutional boundaries. At the end, I sketched the present-day issue—the *scope* of the power, saying that it "poses too large an issue for casual comment at the tail of an historical study."[19] Even so, I ventured, "It would be arbitrary to invoke history for the

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THE CONSTITUTIONAL LIMITATIONS 106 (Victor H. Lane ed., 7th ed. 1903).

15. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 533 (1928)). No less a revisionist than Justice Thurgood Marshall echoed this statement in *Puerto Rico v. Branstad*, 483 U.S. 219, 229 (1987): "Long continuation of decisional law or administrative practice incompatible with the requirements of the Constitution cannot overcome our responsibility to enforce those requirements."

16. Oregon v. Mitchell, 400 U.S. 112, 203 (1970) (Harlan, J., concurring in part and dissenting in part).

17. Chief Justice John Marshall said, "[T]his supreme and irresistible power to make or unmake [the Constitution], resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 389 (1821). This referred to the states, but no Founder would have exalted the judges above a state. See *infra* text accompanying notes 167-172, the subsequent discussion of the one-man-one-vote cases.

18. Bittker, *supra* note 1, at 758.

19. RAOUL BERGER, CONGRESS V. THE SUPREME COURT 338 (1969).

establishment of the power and to repudiate it when the scope of the power is questioned."[20] Where is the "irony" in this?

Bittker impugns my view that the Declaration of Independence was "the manifesto of 'rebels and revolutionaries' while the Constitution was produced by 'men of substance.' "[21] By the time the Convention was convened, wrote Samuel Eliot Morison and Henry Steele Commager, "the democratic movement was in abeyance, and a 'thermidorean reaction' in full swing . . . . Hence, the Federal Constitution put a stopper on those levelling and confiscatory demands of democracy."[22] That is the conventional view;[23] if I erred it was in goodly company.

## IV. MY "ENDORSEMENT" OF BITTKER'S THREE IMAGINARY CASES EXPLAINED

Bittker attributes to me "endorsement" of three imaginary cases;[24] accuracy will be served by precise delineation of my "endorsement."

### *A. The Interstate Monopoly Case*

One of the ghosts raised by Bittker was application of original intent to the Sherman Antitrust Act.[25] He himself noted that "Senator Sherman expressed doubts about the constitutionality" of the Act, saying, "It is very clear there is no such power unless it is derived from the power of levying taxes; that it is a power which must be exercised by each State for itself . . . ."[26] Bittker also recalls that the Philadelphia Con-

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20. *Id.* at 346.

21. Bittker, *supra* note 1, at 758.

22. 1 SAMUEL E. MORISON ET AL., THE GROWTH OF THE AMERICAN REPUBLIC 300 (1942). This statement represents the conventional wisdom. The "Framers' conviction [was] that the democratic and egalitarian impulses fed by the rhetoric of the Declaration [of Independence] and unleashed by the Revolution had to be restrained." GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC xiii (1989). For further citations, see *id.* at xxxi-xxxii n.6.

23. Acknowledging that such is the conventional view, George Carey and Martin Diamond criticize it. CAREY, *supra* note 22, at xiii-xiv; Martin Diamond, *Democracy and* The Federalist*: A Reconsideration of the Framers' Intent*, 53 AM. POL. SCI. REV. 52 (1959). My studies lead me to adhere to the conventional wisdom.

24. Bittker, *supra* note 1, at 759.

25. *Id.*

26. Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent:*

vention sought "to eliminate obstructions to interstate commerce that states imposed upon each other," and that the original intent was to limit the interstate power to the "mischief it was meant to remedy."[27] My study of the commerce power led me to conclude that it was not designed to encroach on a State's purely internal affairs.[28] This was all that I "endorsed."

Dwelling on the "consequences" of effectuating the original intent, Bittker feared that it would "balkanize" the airways.[29] I dissented on the ground that air travel was squarely within the interstate power because fifty states cannot regulate a flight from Boston to Los Angeles, or indeed from New York to New Jersey.[30] Such cases, James Wilson pointed out, were within the national competence.[31] All this is far removed from Bittker's attribution to me the view that the Antitrust Act "does not empower Congress to restrain the commercial activities of private entrepreneurs."[32] Whether or not it does turns on whether the activities are in interstate or foreign commerce.

### *B. The Alaska Toxics Case*

The Alaska Toxics Case held "that Alaska could prohibit toxic chemicals from being shipped anywhere within the state . . . because the framers intended to preserve the inherent police powers of the states (including absolute control over their highways) against any federal regulation."[33] *Alaska* has

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*The Record of the Recent Past*, 77 CAL. L. REV. 235, 241 n.25 (1989) (quoting 19 CONG. REC. 7513 (1888)).

27. *Id.* at 240.

28. RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 120-51 (1987).

29. Bittker, *supra* note 26, at 249.

30. Raoul Berger, *Original Intent and Boris Bittker*, 66 IND. L.J. 723, 724 (1991).

31. BERGER, *supra* note 28, at 71.

32. Bittker, *supra* note 1, at 759.

33. *Id.* Bittker comments, "This decision presaged the end of the Interstate Commerce Commission's authority over railroads . . . ." *Id.* But it was Bittker who stated, "[A]s recently as 1874 . . . the Supreme Court recognized that federal power to reach into the states to regulate railroads was problematic . . . ." Bittker, *supra* note 26, at 248. And he called attention to "Congress' reliance on its power to establish military and postal roads as a basis for regulating railroads (thus sidestepping doubts about its authority under the commerce clause) . . . ." *Id.* at 248 n.49 (citation omitted). He also adverted to the "widespread agreement that each state had exclusive authority over the roads within its boundaries," observing that "the commerce clause excludes control over turnpikes." *Id.* at 247 n.43.

two aspects: (a) if toxic materials are shipped from Arizona to Alaska for transshipment to Asia, the shipment is in the stream of foreign commerce and, therefore, is not subject to Alaska's interference. (b) If, however, the shipment ends for burial in Alaska, a federal license must yield to a State's control over its internal affairs. The Constitution, moreover, empowers the federal government to exercise "[a]uthority over all Places Purchased *by the consent* of the Legislature of the State . . . for Erection of Forts . . . and other needful Buildings . . . ."[34] How much more is such consent required for the burial of out-of-state toxic materials within its domain?

Respect for a State's sovereignty over its territory is underlined by the State's "police power." Bittker noted Chief Justice Marshall's reference to "[t]he acknowledged power of a State to regulate its police," i.e. its "internal policy."[35] Forrest McDonald justly concluded that "the states retained the police powers exclusively."[36]

So, Judge Edmund Pendleton assured the Virginia Ratifiers that the Constitution "does not intermeddle with the local, particular affairs of the states."[37] William Davie, who had been a delegate to the Philadelphia Convention, stated in the North Carolina Ratification Convention that "[t]here is not one instance of a power given to the United States, whereby the internal policy or administration of the State is affected."[38] As I noted earlier, the Supreme Court repeatedly declared that the police power "is exclusively in the States."[39] No amendment, it stated in *Barbier v. Connolly*, "was designed to interfere with" a State's "police power."[40]

What Bittker may regard as my "endorsement" of *Alaska* consists of footnote quotations of his own statements.[41] But nowhere did *I* suggest that the States had "absolute control over their highways against *any* federal regulation."[42] To the contrary, I recognize that shipment of toxic materials from

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34. U.S. CONST. art. I, § 8, cl. 17 (emphasis added).
35. Bittker, *supra* note 26, at 245 & n.32.
36. FORREST MCDONALD, NOVUS ORDO SECLORUM 288 (1985).
37. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 40 (Jonathan Elliot ed., 1901) [hereinafter ELLIOT].
38. 4 *id.* at 160.
39. BERGER, *supra* note 28, at 141-43.
40. 113 U.S. 27, 31 (1885).
41. *See supra* notes 31, 33.
42. Bittker, *supra* note 1, at 759 (emphasis added).

Arizona *through* California to Alaska constitutes interstate commerce that may be regulated by the federal government,[43] and if the shipment continues to foreign parts, it is in foreign commerce and therefore exempt from state interference. The "problematic" aspect would be federal insistence on burying toxic materials within a State without its consent. To dwell on such matters is not to engage in "Retrieving the Golden apples of the Hesperidean Garden."[44]

### *C. The Corporate Due Process Case*

The Corporate Due Process Case held "that the due process clause of the Fifth Amendment was intended by the framers to protect only natural persons, leaving corporations with no constitutional right to procedural due process in administrative or judicial proceedings."[45] My "endorsement" of this case consisted of a reference to Bittker's convincing demonstration that the framers "originally intended . . . to limit the Fifth Amendment's guarantee of due process to natural persons,"[46] and to his citation of Willard Hurst's "conclusion that the courts brought corporations into the protected class by 'fresh lawmaking.'"[47] So much I would endorse. Bittker remarks that "[s]o startling was this indubitably correct application of . . . [o]riginal Intent [by his imaginary court] that Congress promptly established a Re-education and Indoctrination Camp for all federal judges with pre-1998 commissions."[48] What he treats with levity was regarded by Justice Black with deadly earnest. Giving no thought to "consequences," he urged "the Court to read corporations out of the Fourteenth Amendment

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43. In *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), a ship that was operating only in the State of Michigan was held to be engaged in commerce between the states because it was carrying goods to or from other states. This is far removed from Bittker's alarm that "the inherent police powers of the states (including absolute control over their highways) against *any* federal regulation . . . presaged the end of the Interstate Commerce Commission's authority over railroads . . . and threatened federal control of the airspace above . . . the fifty states of the union, even when confined to the control of interstate air traffic." Bittker, *supra* note 1, at 759 (emphasis added). I had pointed out that fifty states cannot "regulate a flight from Boston to Los Angeles." Berger, *supra* note 30, at 724.

44. Bittker, *supra* note 1, at 758.

45. *Id.* at 760.

46. Berger, *supra* note 30, at 725 n.12 (quoting Bittker, *supra* note 26, at 251).

47. *Id.* (citing Bittker, *supra* note 26, at 255 n.66).

48. Bittker, *supra* note 1, at 760.

on the ground that 'the people were not told' that they were 'granting new and revolutionary rights to corporations.' "[49] I suggested that whatever consequences might follow should be weighed against "ratifying the role of the Court as a 'continuing constitutional convention,' constantly engaged in revising the Constitution," a role reserved to the people by the provision for amendment.[50] Bowing to "consequences"[51] must invite fresh constitutional incursions that, if continued, will also be, in Bittker's words, "sanctified by usage."[52]

## V. EVIDENCE OF THE ORIGINAL INTENT OF THE FRAMERS

### *A. The Philadelphia Convention's Official Records*

Roughly speaking, Bittker concludes that because the Journals of the Convention were not published until 1818, they are vitiated by "concealment," e.g., fraudulent non-disclosure.[53] Had the records of the Convention, he states, "'come to light at the time of the ratification debates, the Constitution would never have passed.'"[54] He proves too much. Without disclosure there can be no ratification.[55] "If non-disclosure contaminates the 'documents,'" I earlier asked, "why does it not equally undermine the adoption" of the Constitution?[56] Bittker saith not.

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49. Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 86 (1938) (Black, J., dissenting).

50. Berger, *supra* note 30, at 724 (quoting LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 351 (1988)).

51. The "argument from consequences is not itself an entirely satisfying resolution of so basic a question of constitutional theory as the propriety of noninterpretive review." Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 847 (1978). Learned Hand remarked that the "kernel of the matter" is "the choice between what will be gained and what will be lost." LEARNED HAND, THE SPIRIT OF LIBERTY, PAPERS AND ADDRESSES 161 (I. Dilliard ed., 3d ed. 1974).

Whether a decision flouts the intention of the Framers poses one question; a separate question is whether the consequences of correcting the infraction are too costly. Suppose that an issue of first impression, unencumbered by the cost of correcting an unconstitutional decision were presented: Is the Framers' intention to be ignored because in some other case recurring to it is too costly?

52. Bittker, *supra* note 1, at 770.

53. *Id.* at 761.

54. Bittker, *supra* note 26, at 261 (quoting GARRY WILLS, CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT 157 (1984)).

55. Bennecke v. Ins. Co., 105 U.S. 355, 360 (1881); Owings v. Hull, 34 U.S. (9 Pet.) 607, 628 (1835).

56. Berger, *supra* note 30, at 734. After commenting on the facts of "non-disclosure," I made a collateral point: "According to then Professor Felix

Of the same order is his resort to Justice Story for the proposition that to construe the Constitution on the basis of "documents that were not disclosed to the ratifiers and their constituents" might be "'a fraud upon the whole people.'"[57] Fraudulent concealment, said Lord Mansfield, will render a contract "void in favour of the party misled by his ignorance of the thing concealed."[58] So shattering a "consequence"—a void Constitution, to employ Bittker's own test—must counsel us to stop, look and listen.

Respecting "fraud," I cited Prosser and Keeton's statement that "'[i]t has commonly been stated as a general rule, *particularly in the older cases*, that the action will not lie for such tacit nondisclosure.'"[59] Bittker taxes me with omission of their ascription of the "'older rule' to 'the dubious business ethics of the bargaining transactions with which deceit was first concerned . . . .'"[60] My omission was due to my assumption that he agrees that eighteenth century transactions are to be governed by eighteenth century rules, not by those of 1991. Instead, he condemns the "older rule," inveighing against "keeping one's mouth shut when selling a termite-ridden house to a buyer who cannot translate 'caveat emptor' into English."[61] For centuries, however, caveat emptor was the rule;

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Frankfurter, the Court's continuing revision of the Constitution has never been disclosed to the people. Does that itself invalidate its decisions? One need not approve of . . . non-disclosure and yet be loathe to label it 'dishonorable.'" *Id.* Seizing upon the last sentence, Bittker taxes me with "miss[ing] the point," the issue being "whether the records can be properly used as evidence of the intent" of the ratifiers. Bittker, *supra* note 1, at 761. I first met that issue, and then commented on his "dishonorable" label to show that his argument was overblown. Berger, *supra* note 30, at 735.

57. Bittker, *supra* note 1, at 762 (quoting Berger, *supra* note 30, at 734-35 (footnote omitted)).

58. Carter v. Boehm, 97 Eng. Rep. 1162, 1164 (K.B. 1766). Fraud "avoids a contract *ab initio*." 1 BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 1306 (Francis Rawle ed., 8th ed. 3d rev. 1984). A transaction is governed by the rules in force at its inception. The modern view is that if a person is induced to "do something which he would not otherwise have done," the defrauded person may regard his act as "voidable." 12 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1488, at 332 (Walter H.E. Jaeger ed., 3d ed. 1970). That affords the "defrauded" American people the option of moving to set the Constitution aside!

59. Berger, *supra* note 30, at 735 (emphasis added) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106, at 737 (5th ed. 1984) (footnotes omitted)).

60. Bittker, *supra* note 1, at 762 n.34 (quoting KEETON, *supra* note 59, at 737 (footnotes omitted)).

61. *Id.*

we may not invalidate an eighteenth century transaction because the rule has been discarded by the twentieth.

The distinction between nondisclosure and affirmative misrepresentation is rejected by Bittker on the ground that "judicial reliance on documents to explain the votes of persons from whom the documents were withheld" is not to be analogized to a "suit for damages."[62] More than a bare assertion is required to prove that a different rule prevails in nondisclosure to voters. Wherever found, nondisclosure is nondisclosure, though the standard of proof and the penalty may vary with the case.

If our discourse is to be scored on points, I too must join in the "frolics and detours" which Bittker would have us "avoid."[63] For example, he would depreciate my citation to James Wilson by saying, "Wilson, *described by Mr. Berger* as 'second only to Madison as an architect of the Constitution,'"[64] as if I was inflating the reputation of my witness. But Robert McCloskey, editor of Wilson's *Writings*, stated that "his contribution to the deliberations of the Federal Convention was second only to Madison's."[65] So too, I observed that Wilson urged that the Convention Journals be preserved so that "as false suggestions may be propagated it would not be made impossible to contradict them."[66] Bittker demands proof that Wilson contemplated that "'false suggestions' . . . might be advanced in judicial proceedings *after ratification* . . . ."[67] Wilson's words connote future application without limitation; the burden is on Bittker to show that they mean *less* than they plainly import.[68]

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62. *Id.* at 762.

63. *Id.* at 758.

64. *Id.* at 760 (emphasis added) (quoting Berger, *supra* note 30, at 733).

65. 1 WORKS OF JAMES WILSON 2 (Robert McCloskey ed., 1967). For a laudatory appraisal of Wilson's contributions to the nascent nation, see Ralph Rossum, *James Wilson and the "Pyramid of Government": The Federal Republic*, 6 POL. SCI. REVIEWER 113 (1976).

66. Berger, *supra* note 30, at 733 (quoting 2 RECORDS, *supra* note 2, at 648).

67. Bittker, *supra* note 1, at 761 (emphasis omitted). Charles Lofgren cites the historical materials which demonstrate the Framers' expectation that the Ratifiers' intent would be consulted. Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77, 113 (1988).

68. *Cf.* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816): "[W]here a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context expressly or by necessary implication."

The facts surrounding "non-disclosure" of the Journals are very scanty. Rufus King thought that they should be "destroyed . . . or deposited in the custody of the President" because if published "a bad use would be made of them by those who would wish to prevent the adoption of the Constitution."[69] Wilson, on the other hand, urged that they be preserved to "contradict" future "false suggestions."[70] Accordingly the Journals were deposited with Washington, "subject to the order of Congress . . . ."[71]

On these facts Bittker asks, "Can we presume that the framers dishonorably intended to sanction use of the suppressed documents once the perceived threat to ratification was foiled?"[72] Washington was hardly the man to participate in a sinister concealment. Why too should King's deposit to "prevent bad use" outweigh Wilson's deposit to contradict future "false suggestions"? Nor should "Wilson's sixteen word comment" be luridly described as serving "to force the undisclosed Convention records down the throats of the *ratifiers* to be posthumously disgorged as proof of *their* 'original intent.'"[73] Of course, I did not cite Wilson's statement in the Philadelphia Convention as proof of the *Ratifiers'* intent. Far from being "forced" down their throats, the Framers' proceedings, as will appear, were frequently cited in the Ratification Conventions.

### *B. Madison's Notes*

Bittker is "uneasy about the *accuracy* of a document that may record as little as ten percent of the debates in Philadelphia."[74] The fact that recording may be incomplete does not necessarily impeach the accuracy of what was recorded. James Hutson[75] considers that Madison's Notes are "a faithful account of what he recorded at the Convention in 1787 . . . ."[76]

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69. 2 RECORDS, *supra* note 2, at 648 (footnote omitted).

70. *Id.*; *see also infra* note 76.

71. 2 RECORDS, *supra* note 2, at 648. In 1819 Congress ordered their publication. When John Quincy Adams asked Madison in 1817 whether publication would have "a useful tendency," Madison considered Adams better qualified to decide. This is scarcely evidence of a conspiracy of silence. 3 *id.* at 423-24.

72. Bittker, *supra* note 26, at 261.

73. Bittker, *supra* note 1, at 761-62 (first emphasis added).

74. *Id.* at 762 (emphasis added).

75. Bittker also cites Hutson. *Id.* at 762 n.30. In the Virginia Convention, John Marshall said in another context, "Because it does not contain all, does it contain nothing?" 3 ELLIOT, *supra* note 37, at 560.

76. James H. Hutson, *The Creation of the Constitution: The Integrity of the*

Since, as Hutson recounts, Madison obtained copies of set speeches from the speakers, it seems clear he was "trying to capture what was said."[77] Conflicting views, even rejection of his own proposals, are unsparingly set forth. Bittker too easily glides over my own confirmation of Madison's accuracy. On the issue of judicial participation in the Council of Revision to assist in the President's veto, I found the notes of Madison, Yates, King, and Pierce are in accord.[78] So too, Madison's account of the Convention's rejection of federal charters of incorporation, which he himself had proposed,[79] was corroborated by McHenry's notes,[80] and by Abraham Baldwin who was present and later reminded Justice Wilson, a participant in the debate, that the power to create corporations had been rejected. Wilson agreed.[81] In testing the wholesomeness of wheat in a silo, inspectors are content to rely on samplings.[82]

But Bittker maintains that the incomplete recording "deprives the recorded remarks of their context" and hence of "the whole truth."[83] By that criterion, history may be consigned to the scrap heap. Rarely, if ever, can "the whole truth" be recovered.[84] Historians do not discard the believable because of the unknowable. Madison's confreres, doubtless aware that he was an amateur scribe, nonetheless regarded him, Bittker notes, "as a semi-official reporter of their proceedings."[85] That exhibits

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*Documentary Record*, 65 TEX. L. REV. 1, 32 (1986). Madison recounted that he had determined "to preserve, as far as [he] could, an exact account of what might pass in the Convention," to gratify "future curiosity by an authentic exhibition of the objects, the opinions and the reasonings, from which the new government was to receive its peculiar character and organization." Madison was not "unaware of the value of such a contribution to the fund of materials for the history of a Constitution on which would be staked the happiness of a people." 3 ELLIOT, *supra* note 37, at 22.

77. Hutson, *supra* note 76, at 33.

78. 1 RECORDS, *supra* note 2, at 97-98 (Madison); *id.* at 105 (Yates); *id.* at 108 (King); *id.* at 109 (Pierce). *See also* 2 *id.* at 72 (recording the confirming vote respecting participation in the veto).

79. 2 *id.* at 615-16.

80. 2 *id.* at 620.

81. 3 *id.* at 375-76.

82. Learned Hand observed that "life is made up of a series of judgments on insufficient data, and if we waited to run down all our doubts, it would flow past us." HAND, *supra* note 51, at 137.

83. Bittker, *supra* note 1, at 763 (emphasis omitted).

84. Thucydides wrote, "At such a distance of time [the historian] must make up his mind to be satisfied with conclusions resting upon the clearest evidence which can be had." DANIEL J. BOORSTIN, THE DISCOVERERS 565 (1983).

85. Bittker, *supra* note 26, at 265 (quoting 1 RECORDS, *supra* note 2, at xvi).

trust that he would, as I remarked, "separate the wheat from the chaff."[86] And Hutson observed that "Madison had the good sense not to try to do too much."[87] For Bittker, nevertheless, "doubts remain."[88] His exacting call for the "whole truth" recalls Anatole France's delightful satire on the army's frameup of Captain Dreyfus. According to France, the general was proudly displaying a growing mountain of proof of Dreyfus' guilt. The Minister of Defense commented, "Very good, very good! but I am afraid that this business may lose its beautiful simplicity. Proof! of course it is good to have some proofs, but perhaps it is better to have none at all."[89]

Jefferson's evaluation of Madison's notes, to which he had been given access, was not that of Bittker. Responding, in deep old age, to John Adams' lament that the records of the Founding were being lost, Jefferson wrote that there existed in manuscript a group of historical records, "the ablest work of this kind ever yet executed, of the debates of the Constitutional convention of Philadelphia in 1787. The whole of everything said and done there was taken down by Mr. Madison with a labor and exactness beyond comprehension."[90] Adams replied, "Mr. Madison's Notes of the Convention of 1787 or 1788 are consistent with his indefatigable Character . . . . I shall never see them; but I hope posterity will."[91] Jefferson was too realistic to demand of Madison a complete transcript of every utterance. His "whole" was less exacting than Bittker's.

Bittker also asserts that Madison's Notes are irrelevant because Madison himself said that the draft of the Constitution was "nothing but a dead letter, until life and vitality were breathed into it" by the Ratifiers.[92] Uttered in the midst of the stormy 1796 debate on the Jay Treaty, this statement illustrates how judgment is swayed by political strife, as Madison was well aware.[93] Although he preferred the Ratifiers' views,

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86. Berger, *supra* note 30, at 735.
87. Hutson, *supra* note 76, at 31.
88. Bittker, *supra* note 1, at 763.
89. ANATOLE FRANCE, PENGUIN ISLAND 193-94 (Mod. Lib. ed. 1909).
90. 2 THE ADAMS-JEFFERSON LETTERS, THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 453 (Lester J. Cappon ed., 1959) [hereinafter ADAMS-JEFFERSON LETTERS]; *see also* ANNE H. BURLEIGH, JOHN ADAMS 388 (1969).
91. ADAMS-JEFFERSON LETTERS, *supra* note 90, at 455.
92. Bittker, *supra* note 1, at 763 (quoting 5 ANNALS OF CONG. 776 (1796)).
93. For example, Madison chose posthumous publication of his notes because

he later commended those of the Framers as well, and those statements carry greater weight because, as Justice Story observed, "venerable, as he now is, from age and character, and absolved from all those political connections which may influence judgment and influence the mind, he speaks from his retirement in a voice which may not be disregarded . . . ."[94] Thus, Madison wrote to Andrew Stevenson on March 25, 1826, that "a key to the sense of the Constitution, where alone the true one can be found" is "in the proceedings of the Convention, the contemporary expositions, and above all in the ratifying Conventions of the States."[95] While he deferred to the Ratifiers' "authoritative" exposition, he yet regarded the Framers' debates as "presumptive evidence of the general understanding at the time of the language used."[96]

One may regard the Ratifiers as more authoritative spokesmen where their views conflict with those of the Framers. But what principal—so we may regard the Ratifiers as direct representatives of the people[97]—being given a document prepared by his agent[98] would consider his agent's explanation "irrelevant"? Common sense tells us that he would welcome his agent's elucidation of the complicated document. In fact, as I pointed out in my response,

> Frequently the ratifiers called upon the Framers in their midst to explain a provision of the Constitution. Thus, in the Virginia Convention, Monroe called upon Madison "who had been in the Federal Convention . . . [to] give information respecting the clause concerning elections." And Randolph observed that ex post facto laws relate solely to criminal cases for . . . it was so interpreted in the Convention.[99]

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"no personal or party views [could] then be imputed . . . ." 3 RECORDS, *supra* note 2, at 475.

94. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 396, at 299 (5th ed. 1905).

95. 3 RECORDS, *supra* note 2, at 474. For similar expressions, see letters to Thomas Ritchie, dated December 18, 1825 and to Joseph Cabell, dated March 24, 1827. 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 506, 520-21, 571 (1865).

96. Letter from Madison to M.L. Hurlburt (May 1830), *in* 9 WRITINGS OF JAMES MADISON 372 (Gaillard Hunt ed., 1910).

97. *See infra* text accompanying note 153.

98. It may be argued that in acting beyond their instructions to "revise" the Articles of Confederation, the Framers exceeded their mandate. But in submitting the Constitution for adoption, the Continental Congress ratified the arrogation, i.e., it adopted it as its own and made valid what might have been questionable.

99. Berger, *supra* note 30, at 737 (footnotes omitted). For other citations to the

For Bittker this "proves little; none of the speakers, save Madison himself, had access to the notes, even as an aide-memoire."[100] The Ratifiers, however, were not so exacting. Then, too, since when are attendants at a meeting disqualified from reciting their version of what they beheld because they had no access to the notes of the recording secretary?

### *C. Ratifying Conventions*

Bittker relies almost entirely on two large block quotations from Justice Story to discredit resort to the records of the Ratifying Conventions.[101] One of those constituted an attack on Jefferson's two canons of construction.[102] On this score, Story is to be taken with a grain of salt. Jefferson Powell, an opponent of original intent cited by Bittker,[103] recounted that according to the consensus, Story was "an opponent of 'democracy' intent on frustrating the result of the political process" by "the creation of a body of 'anti-majoritarian' constitutional law . . . ."[104] Story's *Commentaries*, Powell observed, "were not simply the product of an academic's tranquil reflections"[105]; they "were a massive self-vindication . . . as well as an indictment of the man [Jefferson], whom Story personally despised."[106] Typical is his rejection of *The Federalist*: "[A]re Mr. Hamilton, Mr. Madison and Mr. Jay, the expounders in the Federalist to be followed? Or are others of a different opinion to guide us?"[107] But he himself prefers *The Federalist*, for once he leaves Jefferson, the *Commentaries* are studded with citations to *The Federalist*. Story's emphasis that it was the "text"

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Philadelphia Convention, see 3 ELLIOT, *supra* note 37, at 537, 621 (Madison); *id.* at 599 (Randolph); *id.* at 604 (Mason). In *The Federalist No.* 83, Hamilton noted that obstacles encountered in establishing trial by jury in civil cases in the federal constitution, "we are authoritavely informed, prevented the insertion of a provision on this head in the plan of the convention." THE FEDERALIST NO. 83, at 565 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

100. Bittker, *supra* note 1, at 764.
101. *Id.* at 764-66.
102. STORY, *supra* note 94, at 310.
103. Bittker, *supra* note 26, at 264 & nn.101, 103.
104. H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1287 (1985).
105. *Id.* at 1291.
106. *Id.* at 1300 n.103.
107. STORY, *supra* note 94, at 311.

that was ratified[108]—though it was the text *as explained* to questioning Ratifiers—is understandable. Very often the text, e.g., "equal protection," allows a judge untrammelled freedom, so he may well prefer *no* evidence to some evidence of intention that confutes his personal predilections.

Let us more closely examine Story's fusillade. Jefferson's first canon was, "The capital and leading object of the Constitution, was to leave with the states all authorities which respected their own citizens only, and to transfer to the United States those which respected the citizens of foreign or other States."[109] In the former case, construction should lean "in favor of the States if possible to be so construed."[110] That canon is a common sense deduction from the States' jealous insistence on preserving the sovereignty they had retained after their grudging delegations to the federal government for essential national purposes.[111] Even those who feared States Rights claims recognized their potency. "State attachments, and State importance," cried Governeur Morris, "have been the bane of

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108. *See* Bittker, *supra* note 1, at 764.

109. STORY, *supra* note 94, at 310 n.1.

110. *Id.*

111. In *The Federalist No.* 41 at 255, (Mod. Lib. ed. 1937), Madison stated that federal "general powers are limited" and "the States in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction." In the Convention Wilson said:

> Federal liberty is to States, what civil liberty is to private individuals. And States are not more unwilling to purchase it, by the necessary concession of their political sovereignty, than the savage is to purchase Civil liberty by the surrender of the personal sovereignty, which he enjoys in a State of nature.

1 RECORDS, *supra* note 2, at 166.

It was Story, not Jefferson, who misread the Framers' design. In the Convention Roger Sherman stated, "The objects of the Union . . . were few: 1. defense agst. foreign danger. 2. agst. internal disputes & resort to force. 3. Treaties with foreign nations. 4. Regulating commerce . . . . All other matters civil and criminal would be much better in the hands of the States." 1 *id.* at 133.

Echoing Sherman, Madison stated in *The Federalist*: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce . . . ." THE FEDERALIST NO. 45, at 328 (James Madison) (Benjamin F. Wright ed., 1961).

James Wilson said, "Whenever an object occurs, to the direction of which no state is competent [e.g., war], the management of it must, of necessity, belong to the United States . . . ." 1 THE WORKS OF JAMES WILSON 558 (James D. Andrews ed., 1896). For a detailed discussion, see BERGER, *supra* note 28, at 48-76.

this Country."[112] Midway in the Convention Washington wrote, "[I]ndependent sovereignty is so ardently contended for . . . the local views of each State . . . will not yield to a more enlarged scale of politics."[113] In consequence, Hamilton noted that "the states have certain independent powers in which their laws are supreme; for example, in making and executing laws concerning the punishment of certain crimes such as murder . . . the states cannot be controlled."[114] Hence when a general phrase such as "cruel and unusual punishment" is involved to regulate punishment by the State, it palpably invades the "exclusive" province of the State. Jefferson, therefore, quite soundly urged that the interpretive presumption is "in favor of the States . . . ."[115] Chief Justice Marshall made the same point in different rhetoric when he could not apply the Bill of Rights to the States absent "plain and intelligible language" exhibiting an intention to do so.[116] Story's make-weight arguments do not overbalance the deep-rooted attachment of the States to their own sovereignty. Then too, he blew both hot and cold. In *Martin v. Hunter's Lessee*, he stated, "this exposition of the Constitution . . . was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies . . . both in and out of the state conventions."[117] As with *The Federalist*, he refers to the Ratifying Conventions when it suits his purpose.

Story also ruled out the Ratification records because in different States "different and very opposite objections" prevailed.[118] Of course, if the evidence is conflicting, the records

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112. 1 RECORDS, *supra* note 2, at 530.

113. 3 *id.* at 51. For additional citations see BERGER, *supra* note 28, at 50 n.8. Herbert Storing wrote, "In the main the objects of the Union are described in terms like those of Roger Sherman—'The great end of the federal government is to protect the several states in their enjoyment of those rights ['the civil and domestic rights of the people'] against foreign invasion.' " Herbert Storing, *The "Other" Federalist Papers: A Preliminary Sketch*, 6 POL. SCI. REVIEWER 215, 224 (1976).

114. 2 ELLIOT, *supra* note 37, at 362.

115. STORY, *supra* note 94, at 310. Rejecting the application of the Bill of Rights to the States, Chief Justice Marshall declared that a take-over of State functions required "plain and intelligible language." Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833). In Belmont Bridge v. Wheeling Bridge, 138 U.S. 287, 292-93 (1891), the Court declared that "[a]n alleged surrender . . . of a power of government . . . must be shown by clear and unequivocal language . . . . [I]t cannot be inferred . . . from any doubtful or uncertain expressions."

116. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

117. 14 U.S. (1 Wheat.) 304, 351 (1816).

118. Bittker, *supra* note 1, at 764 (quoting STORY, *supra* note 94, § 406, at

can furnish no guidance. But what of the momentous subjects on which there was considerable unanimity, e.g., States Rights, judicial review, the participation of the Senate in making treaties? To begin with treaty-making, and putting to one side the corroborative remarks in the Federal Convention and *The Federalist*, Hamilton explained in the New York Convention that the Senate "together with the President are to manage all our concerns with foreign nations."[119] In Pennsylvania, James Wilson stated that there was no "doubt [that] the Senate and President possess the power of making" treaties.[120] In North Carolina, Samuel Spence said that the Senate is "in effect to form treaties."[121] There were no contrary expressions.

The evidence for judicial review is even more voluminous. In Virginia, Marshall was joined by George Nicholas, George Mason, Edmund Randolph, Madison, and even by that bitter opponent of adoption, Patrick Henry.[122] Judicial review was also contemplated by Oliver Ellsworth in Connecticut, and James Wilson in Pennsylvania.[123] Are these to be ignored because of ambiguities with respect to other matters? The Constitution makes no express provision for judicial review. Are we better off with no evidence that it was contemplated, with a glaring arrogation of judicial power?

Story stresses the fact that records of only five States are available—Pennsylvania, Massachusetts, Virginia, New York and South Carolina.[124] These were bellwether States, representing a fine sampling. It is reasonable to assume that their concurrence on various subjects reflected the sentiments of the adjoining States, particularly because they were anticipated in important particulars by remarks in the Federal Convention and *The Federalist*.

To my remark that "[p]resent day polls of one thousand individuals often astonishingly forecast the views of millions of

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299-300).

119. 2 ELLIOT, *supra* note 37, at 306.

120. 2 *id.* at 506.

121. 4 *id.* at 116.

122. BERGER, *supra* note 19; *id.* at 140 (Marshall); *id.* at 138-39 (Nicholas); *id.* at 139 (Mason); *id.* at 138 (Randolph); *id.* at 202 (Pendleton); *id.* at 139 (Madison); *id.* at 137-38 (Henry).

123. *Id.* at 124 (Ellsworth); *id.* at 127 (Wilson).

124. Bittker, *supra* note 1, at 765 (quoting STORY, *supra* note 94, § 407, at 300-01 n.1). Although North Carolina voted against adoption, proponents of the Constitution made a very full record.

Americans,"[125] Bittker interposes two objections. First, poll-takers "often go wrong."[126] But so do eminent economists without being totally discredited. Second, he argues that unlike polls resting on "random sampling," speakers at the Conventions "sought the floor."[127] This is to prefer the sampling of anonymous, uninfluential figures, to the studied remarks of leaders such as Madison and Wilson. That they "spoke in their States" does not vitiate the "poll"; so does every person polled. If their views, moreover, coincide with those expressed in other Conventions, the result resembles a national poll. Bittker objects that there is no evidence that the ratifiers "were in the habit of consulting the records . . . of other conventions as a guide . . . ."[128] Persons polled today are not advised of statements by others. If similar views were independently expressed without such "consultation," they are the more credible as exhibiting an unorchestrated popular consensus. On this score, finally, Madison's repeated commendations of the ratification records were unclouded by Bittker's qualms. Who was the better situated to judge their reliability?

### *D. The Federalist Papers*

My discussion of *The Federalist* will be two-pronged: (1) its influence in the ratification campaign of 1787-1788; and (2) its present value as an index to the Framers' intention. Bittker attributes to me an "odd version of the common law's fiction of 'transferred intent' (viz., that the intent of the authors of *The Federalist Papers* must be imputed to [the] ratifiers)."[129] That is his imputation, not mine. George Carey recently wrote that Publius, nom de plume of the authors of *The Federalist*, was "obliged to acknowledge and refute the principal objections posed by critics of the new system"[130] to "allay fears and per-

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125. Berger, *supra* note 30, at 741.
126. Bittker, *supra* note 1, at 765.
127. *Id.*
128. *Id.* Bittker demands too much—namely, a "habit." In the Virginia Convention, Patrick Henry referred to the ratification proceedings in Pennsylvania and Massachusetts. 3 ELLIOT, *supra* note 37, at 592. As will hereafter become apparent, the Federalists established networks of communications. *See infra* note 136 and accompanying text.
129. Bittker, *supra* note 1, at 766.
130. CAREY, *supra* note 22, at xii.

suade voters."[131] Such representations, I observed, may not be repudiated. That hardly amounts to "imputing" Publius' "intent" to the ratifiers.

Next Bittker argues that *The Federalist* excited little contemporary interest.[132] Its influence in the key States of Virginia and New York is reflected in Clinton Rossiter's statement that there it was regarded "as a kind of debater's handbook . . . ."[133] Nor is Bittker's quotation from Elaine Crane[134] to be taken as a flat rejection of Publius' influence, because she also stated that "it is not unlikely that Federalist leaders, whether in Boston or Richmond, took their cues from Publius as he made his way up and down the eastern seaboard."[135] Consider that Tench Coxe of Pennsylvania "coordinated the efforts at ratification, establishing a network of communications with federalists everywhere."[136] And Wilson's "widely circulated" defense of the Constitution became "in effect, the 'official' Federalist interpretation of the Constitution . . . ."[137] It would be passing strange had this "coordinated" campaign neglected to use the telling arguments of *The Federalist*. At worst, Elaine Crane concluded that "there is no way of determining just how effective Publius was as a weapon of the forces favoring ratification."[138]

Bittker argues that the influence of *The Federalist* was vitiated by "chronological obstacle[s]" because "more than half of the eighty-five numbers of *The Federalist* were not published

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131. *Id.* For other citations, see Berger, *supra* note 30, at 742 n.144.

132. Bittker, *supra* note 1, at 766.

133. Bittker, *supra* note 26, at 272 ("Copies of the collected edition were rushed to Richmond at Hamilton's direction . . . .") (citing Clinton Rossiter, *Introduction* to THE FEDERALIST PAPERS at xi (Clinton Rossiter ed., 1961)).

134. "[I]t seems clear . . . that Publius did not reach an audience of any significant size in 1787-88." Bittker, *supra* note 1, at 766 (quoting Elaine Crane, *Publius in the Provinces: Where Was* The Federalist *Reprinted Outside New York City?*, 21 WM. & MARY Q. 589, 591 (3d ser. 1964).

135. Crane, *supra* note 134, at 591.

136. Garry Wills, *Introduction* to THE FEDERALIST PAPERS BY ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY at viii (1982) [hereinafter Wills, FEDERALIST PAPERS].

137. 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 26 (Merrill Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY]. "Federalist stalwarts," wrote James Hutson, "sent prepublication excerpts from Lloyd's [Pennsylvania] *Debates* to partisans in other states to furnish Federalist orators arguments for ratification"—federalist campaign literature. Hutson, *supra* note 76, at 23.

138. Crane, *supra* note 134, at 589.

until after five of the nine states required by article VII for ratification had completed their work and adjourned."[139] In response, I commented that this argument undercuts the very legitimacy of judicial review, which in considerable part depends on No. 78.[140] With Olympian detachment, Bittker replies that "for better or for worse [we] must pursue truth come what may."[141] By the same token, perish the "consequences" of recurring to the "irrefutable" Framers' intention to exclude suffrage from the Fourteenth Amendment, cost what it may to reverse the one-man-one-vote decisions.[142]

But let me join in the pursuit of "truth." Jefferson regarded *The Federalist* as "evidence of the general opinion of those who framed" the Constitution,[143] a view later shared by Edward Corwin, who said, "It cannot be reasonably doubted that Hamilton was here, as at other points, endeavoring to reproduce the matured conclusions of the Convention itself."[144] With "exceptions here and there," wrote George Carey, *The Federalist* "reveal[s] the intentions and motives of the Founding Fathers."[145] Washington, who presided over the Federal Convention, wrote, "I have read every performance which has been printed on one side and the other of the great question lately agitated . . . and I have seen no other so well calculated (in my judgment) to produce conviction on an unbiased Mind . . . . [*The Federalist*] will merit the Notice of Posterity."[146] Chief Justice Marshall, who had been a delegate to the Virginia Ratification Convention, likewise observed that "[*The Federalist*]

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139. Bittker, *supra* note 1, at 766.

140. Berger, *supra* note 30, at 745.

141. Bittker, *supra* note 1, at 767.

142. It testifies to Bittker's witty resourcefulness that, after quoting Corwin's view that No. 78 adds nothing to the earlier defenses of judicial review, Bittker states, "Thus, even if judicial activists were deprived of this buttress for judicial review, they would . . . build their subversive shanties on the rest of Mr. Berger's 389-page work." *Id.* at 767 n.55. In short, if No. 78 fails, there are always the records of the Federal and Ratification Conventions, a marvelous fall-back for those who decry the use of *The Federalist*.

143. CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 52, 227 (1964).

144. EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 44 (1914). Urging the delegates to sign the Constitution, Hamilton said, "No man's ideas were more remote from the plan than [mine] were known to be . . . ." 2 RECORDS, *supra* note 2, at 645-46.

145. CAREY, *supra* note 22, at xii.

146. 30 WRITINGS OF GEORGE WASHINGTON 66 (John C. Fitzpatrick ed., 1939) (footnote omitted).

will be read and admired when the controversy in which that valuable treatise on government originated, shall be no longer remembered."[147] Justly did Clinton Rossiter regard it among the three "sacred writings of American political history."[148]

All of this notwithstanding, the importance of *The Federalist* is downgraded by Bittker: "So they are, and so are a host of other pamphlets, editorials, memoirs, commentaries, letters and speeches."[149] How can the explanations of Madison and Hamilton, presumably privy to the Framers' views, be compared to run-of-the-mill letters or editorials?[150] Washington preferred *The Federalist*. Let me underscore: I have never urged that *The Federalist* evinces "what the *ratifiers* intended . . . ."[151] Whatever the breadth of its distribution, it remains a telling confirmation of the *Framers'* intent, as Bittker obliquely recognizes.[152]

### *E. Intent of the Voters*

From Bittker's statement that delegates at the "state conventions . . . were merely agents for the voters who chose them,"[153] I deduced that "the voice of the delegates was but the voice of the people" who chose them.[154] No evidence has

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147. JOHN MARSHALL, 5 THE LIFE OF GEORGE WASHINGTON 132 (1807). For additional citations see CAREY, *supra* note 22, at xxx-xxxi n.3. "Jefferson believed that . . . *The Federalist* was in part necessary to combat what he perceived as the growing tendency to transform the Constitution by interpretation. His fellow Virginian James Madison agreed." MCDOWELL, THE COMPLEX BALANCE OF THE FEDERALIST, IN THE PUBLIC INTEREST, 135 (1986).

148. Rossiter, *supra* note 133, at vii.

149. Bittker, *supra* note 1, at 767.

150. "There is nothing in the Anti-federalist writings comparable to the range and depth of the Federalist." Storing, *supra* note 113, at 215.

Chief Justice Marshall stated:

> The opinion of [*The Federalist*] has always been as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed.

Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 418 (1821).

151. Bittker, *supra* note 1, at 767.

152. *Id.* at 767-68; *see supra* note 142.

153. Bittker, *supra* note 26, at 269.

154. Berger, *supra* note 30, at 742. Madison referred to the "voice of the people, speaking through the several State conventions." 5 ANNALS OF CONG. 776 (1796). A pervasive federalist view, Herbert Storing wrote, was that "[i]n a properly arranged

been produced to the contrary.[155] Bittker concludes, however, that I "have arrived full circle" in my supposed argument that "the intent of the *delegates* [Ratifiers] is to be derived . . . from the intent of the authors of [*The Federalist*] or from the intent of the Philadelphia framers as recorded in the [federal] convention's records or in Madison's notes . . . ."[156] That was not my argument. The "intent of the delegates" is to be sought in records of the Ratification Conventions which they attended. To urge that representations may not be repudiated, and that *we* may look to the Framers' recorded explanations of the complex document which they framed, is not equivalent to reading those explanations into the minds of the "voters." The "voters" delegated the task of ratifying the Constitution to their State Conventions, and their records constitute a trustworthy guide to interpretation.

## VI. STARE DECISIS

Under the head of stare decisis Bittker treats the "consequences" of overruling erroneous constitutional decisions.[157] Consider *Brown v. Board of Education*.[158] My historical research convinced me that segregation had been excluded from the Fourteenth Amendment, a conclusion that has been accepted by a number of activists.[159] Recognizing that it would be

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system, the representatives *are* the people. 'The distinction between the powers of the *people* and of their *Representatives* in the Legislature is as unsound in *theory*, as it proves pernicious in *practice*.' " Storing, *supra* note 113, at 227 (quoting Noah Webster, *America*, DAILY ADVERTISER (N.Y.) (Dec. 31, 1787)). Chief Justice Thomas Cooley wrote, "[W]e are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives." COOLEY, *supra* note 14, at 102.

155. Bittker would shed doubt on "the rather narrowly divided votes as recording the voice of the people." Bittker, *supra* note 1, at 768. No matter how thin the majority, it carries the day; witness the 5 to 4 votes of the Supreme Court. If anything, the "narrowly decided vote" underscores the importance of the explanations that were made to the Doubting Thomases by the Federalists. As Garry Wills notes, the Federalists labored under a massive burden of persuasion. Wills, *supra* note 136, at viii. And in 1839, John Quincy Adams said that the Constitution "had been extorted from the grinding necessity of a reluctant nation." JAMES MCCLELLAN, LIBERTY, ORDER, & JUSTICE 181 (1989).

156. Bittker, *supra* note 1, at 768.

157. *Id.* at 768-71.

158. 347 U.S. 483 (1954).

159. For citations, see Raoul Berger, *The Activist Legacy of the New Deal Court*, 59 WASH. L. REV. 751, 759-60 n.57 (1984). As the present article was being written, Benjamin L. Hooks, executive director of the N.A.A.C.P., stated that he doesn't

impossible to undo the past, that events, like poured concrete, had hardened, and that the *status quo ante* could not be restored merely by overruling a past decision, I suggested, "Go and sin no more."[160] This leads Bittker to assert that I believe that "every violator of the Jurisprudence of Original Intent should be shot on sight," but "to exercise mercy if this draconic penalty would trigger 'massive destabilization,' "[161] words I borrowed from Henry Monaghan.[162] Bittker objects that this is an "inherently subjective and entirely discretionary doctrine" that "would plunge us into judicial law making, pure and simple."[163] Mark that *non-action*, leaving the original usurpation in place, is objectionable "law making," whereas revising the Constitution, actual law making on a grand scale, elicits not a murmur from Bittker. Given the current political climate, a decision to avoid a "massive destabilization" is hardly an objectionable "subjective" judgment presenting "a spectrum of choices."[164] If this appraisal is faulty, I cannot be taxed with inexcusable failure where "[n]o one has a principled theory [of stare decisis] to offer."[165]

Let us move from searching for the mote in Berger's eye to the beam in Bittker's. He makes no mention of the most glaring departure from the Fourteenth Amendment, the one-man-one-vote decisions in the teeth of the incontrovertible exclusion of suffrage from the Amendment. Section 2 provides that if suffrage is denied on account of race, the State's representation in the House of Representatives shall be proportionately reduced.[166] Senator William Fessenden, chairman of the Joint Committee on Reconstruction, explained that this "leaves the power where it is; but tells them [the states] most distinctly, if you exercise the power wrongfully, such and such consequences

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"think . . . America was ready to end segregation . . . [or] extend full equality." Peter Applebome, *Rights Movement in Struggle for an Image As Well As a Bill*, N.Y. TIMES, Apr. 3, 1991, at A1, A18.

160. BERGER, *supra* note 28, at 412-13; *see* Berger, *supra* note 30, at 747-48.

161. Bittker, *supra* note 1, at 770. Bittker's exuberant wit has led him into a contradiction; to "shoot on sight" is to leave no time for mercy.

162. Berger, *supra* 30, at 748 (quoting Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 750 (1988) (footnote omitted)).

163. Bittker, *supra* note 1, at 771.

164. *Id.* at 770.

165. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422 (1988).

166. U.S. CONST., amend. xiv, § 2.

will follow."[167] Senator Jacob 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 States, and not to assume to regulate it by any clause of the Constitution . . . .[168]

Howard is confirmed by the Report of the Joint Committee, which drafted the Amendment: "It was doubtful . . . whether the States would . . . surrender a power they had always exercised, and to which they were attached."[169] Consequently the Committee commended Section 2 because it "would leave the whole question with the people of each State . . . ."[170] After his own masterly survey of the historical facts, Justice Harlan concluded that the argument for reapportionment was "unequivocally refuted by history and by consistent theory and practice from the time of the adoption of the Fourteenth Amendment until today."[171] Unquestionably, the framers mirrored the wishes of the people.[172]

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167. AVINS, *supra* note 7, at 143.
168. *Id.* at 237.
169. *Id.* at 94.
170. *Id.*
171. Reynolds v. Sims, 377 U.S. 533, 615 (1964) (Harlan, J., dissenting). Louis Lusky observed that Harlan's demonstration is "irrefutable and unrefuted." Louis Lusky, *Government by Judiciary: What Price Legitimacy?*, 6 HASTINGS CONST. L.Q. 403, 406 (1979). Thomas Grey concluded that "[i]f the values implicit in the equal protection clause are limited only to those that its framers intended at the time of enactment," then "participation in the electoral process could not stand." Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 712 (1975). Gerald Gunther wrote that "most constitutional lawyers agree . . . that . . . the 'one-person-one-vote' ruling lacks all historical justification." Gerald Gunther, *Too Much a Battle With Straw Men?*, WALL ST. J., Nov. 25, 1977, at 4 (reviewing BERGER, *supra* note 160); *see also* ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 100 (1976); G. EDWARD WHITE, EARL WARREN, A PUBLIC LIFE 357 (1982).
172. "[M]ost congressional Republicans were aware of (and shared) their constituents' hostility to black suffrage." MORTON KELLER, AFFAIRS OF STATE 67 (1977). William Gillette noted the "treacherous current of racial prejudice and opposition to Negro suffrage." WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 25 (1965). "Negro voting in the North . . . was out of the question." *Id.* at 32. *See also* William Van Alstyne, *The Fourteenth Amendment, the Right to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 69-70 (cited in RAOUL BERGER, GOVERN-

The reapportionment decisions, initiated in 1962,[173] therefore represent an unmistakable judicial revision of the Constitution. In an extended study, Ward Elliott showed that these decisions were not necessary.[174] Are they, though "illegitimate in origin[,] . . . sanctified by usage?"[175] Compare with these twenty-nine-year-old decisions, to borrow from Bittker, the "pressure to preserve [the] long-entrenched"[176] judicial reliance on the 200-year-old *Federalist*, the 150-year-old publication of Madison's notes, and the 165-year-old publication of the State Ratification records. By Bittker's reasoning, such reliance is even more "sanctified by usage." Bittker's accounting seems to have only a debit side of the ledger—the "consequences" of repudiating unconstitutional decisions; it contains no credit side—the cost of countenancing undeniable judicial arrogations of power to act as a continuing constitutional convention.[177] As Hamilton said, "[A]n agent cannot new model his commission";[178] judges were not empowered to rewrite the Constitution; they are sworn to "support" it.

## VII. CONCLUSION

What alternative to "originalism" does Bittker propose? His failure to do so mirrors other critics of originalism. A critic of his acumen should come up with an alternative. After canvassing the many theories that seek to justify judicial revisionism, Justice Scalia concluded that it is a grave defect of the nonoriginalists that they have been unable to agree upon an alternative theory.[179] You can't beat somethin' with nuthin'.

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MENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 55-56 (1977)).

173. Baker v. Carr, 269 U.S. 186 (1962).

174. WARD E.Y. ELLIOTT, THE RISE OF GUARDIAN DEMOCRACY (1974).

175. *See supra* text accompanying note 13.

176. Bittker, *supra* note 1, at 768.

177. "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies . . . ." Ferguson v. Skrupa, 372 U.S. 726, 730 (1963). Hamilton wrote that "every breach of the fundamental laws, though dictated by necessity . . . forms a precedent for other breaches where the same plea of necessity does not exist at all . . . ." THE FEDERALIST NO. 25 at 213 (Alexander Hamilton) (Benjamin F. Wright ed., 1961). In this Madison and Hamilton were agreed: every usurpation of power "is a germ of unnecessary and multiplied repetition." THE FEDERALIST NO. 41 at 262 (James Madison) (Benjamin F. Wright ed., 1961).

178. 6 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 166 (Henry Cabot Lodge ed., 1904) (letters of Camillus).

179. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849,

To leave judges free "to roam at large in the trackless fields of their own imaginations" is far more dangerous.[180] It delivers the destiny of the American people, contrary to the Framers' design, to the untrammeled discretion of the judges who are unelected, unaccountable, and virtually irremovable.

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862-63 (1989).

180. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 373 (9th ed. 1858).