An Anatomy of False Analysis: Original Intent

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Paul Brest's "The Intentions of the Adopters Are in the Eyes of the Beholder" is replete with bare assertions untainted by historical facts. Brest is a perfervid activist who earlier opined that "whatever the Framers' expectations may have been, broad constitutional guarantees require the Court to discern, articulate, and apply values that are widely and deeply held by our society." Thereby he imputed to the Founders the employment of guarantees to defeat their own "expectations!" More boldly, he challenged the assumption that "judges and other public officials were bound by the text or original understanding of the Constitution." However, Chief Justice Marshall asked, "Why does a judge swear to discharge his duties agreeably to the Constitution . . . if that Constitution

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2. Thus he labelled me a "racist" because I concluded that desegregation ran counter to the intention of the framers of the Fourteenth Amendment. Brest, infra note 3, at 10. An array of commentators, including Brest himself, infra text accompanying note 23, agree that segregation was left in place, infra note 22.

3. Paul Brest, Berger v. Brown, N.Y. TIMES, Dec. 11, 1977, at 10, 44. Do the Court's death penalty decisions, for example, reflect "widely" held views of our society? Learned Hand wrote, "[the judge] has no right to divinations of public opinion which run counter to its last formal expressions." LEARNED HAND, THE SPIRIT OF LIBERTY 14 (Irving Dilliard ed., 1952).

4. "One portion of a statute should not be construed to annul or destroy what has clearly been granted by another." Peck v. Jenness, 48 U.S. (17 How.) 612, 623 (1849). So too, Judge Cardozo stated, "No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy." United States v. Yellow Cab Co., 340 U.S. 543, 554 (1951) (citations omitted). Similarly, once the "expectations" of the Framers are recognized, they cannot be defeated by the Framers' "guarantees."

forms no rule for his government? He declared that ours is a government of limited powers, and that those limits were "committed to writing" so that they may not "be passed by those intended to be restrained." Brest also challenged the "authority of the Constitution" because it "derives from the consent of its adopters"; but they are "dead and gone" and "their consent cannot bind succeeding generations." Judges are creatures of the Constitution and may exercise only such powers as it confers. If it is not binding on the judges, who have sworn to support it, whence do they derive their power? And why are we bound by their decisions?

Brest answers, adopting a suggestion of Owen Fiss, that the "legitimacy" of the courts "depends not on the consent . . . of the people, but rather on their special competence, on the special contribution they make to the quality of our social life," and which, apparently, the judges themselves are to determine. The special "competence" of judges to solve the staggering social and economic problems that confront our society is, to say the least, debatable. Fiss advances a remarkable justification:

[judges] are lawyers, but in terms of personal characteristics they are no different from successful businessmen or politicians. Their capacity to make a special contribution to our social life derives not from any personal traits or knowledge . . . but from the definition of the office in which they find themselves and through which they exercise power. Thus one becomes competent upon taking office! But a seasoned judge, Clifford Wallace, observed, "I do not believe that one gains added wisdom or a keener perception of social value merely by becoming a judge." Speaking by Justice Jackson,

7. Id. at 176.
8. Brest II, supra note 5, at 225. Compare Herbert J. Storing's refusal to "adopt the current cant that the fundamental law is shapeless stuff to be formed at will by future generations." 1 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 3 (1981).
the Court disclaimed power based upon its "competence": "Nor
does our duty to apply the Bill of Rights to assertions of official
authority depend upon our possession of marked competence in
the field. . . . But we act in those matters not by authority of
our competence but by force of our commissions."12 Brest
acknowledges that the judiciary has assumed a major role in
protecting "individual rights and decision making through
democratic processes."13

Because the great bulk of constitutional litigation currently
arises under the Fourteenth Amendment, I shall focus on the
framers' indubitable intention to exclude suffrage from its
scope. Let us test Brest's unqualified assertion that original
intention resides only in the eyes of the beholder. Section two
of the Amendment provides that if suffrage is denied on
account of race, the state's representation in the House of
Representatives shall be proportionately reduced.14 Senator
William Fessenden, chairman of the Joint Committee on
Reconstruction, stated that this "leaves the power where it is
but tells [the States] most distinctly, if you exercise the power
wrongfully, such and such consequences will follow."15 Senator
Jacob Howard, to whom it fell to explain the Amendment
because of Fessenden's illness, said, "the theory of this whole
amendment is, to leave the power of regulating . . . suffrage
with the States, and not to assume to regulate it by any clause
of the Constitution."16 So too, the Report of the Joint
Committee, which drafted the Amendment, stated, "It was
doubtful . . . whether the States would consent to surrender a
power they had always exercised, and to which they were
attached."17 In consequence, the Committee recommended
section two because it "would leave the whole question with the

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Moorings, 50 GEO. WASH. L. REV. 1, 6 (1981).
13. Brest II, supra note 5, at 226. Ely notices the "distrust of the self-serving
motives of those in power." JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF
ruling power in the State is but a feeble proof of its legality." Stockdale v.
15. THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY
AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH
AMENDMENTS 143 (Alfred Avins ed., 1967) [hereinafter Avins].
16. Id. at 237.
17. Id. at 94.
people of each State." Other facts could be set forth; Justice Harlan concluded that the evidence is "irrefutable and still unanswered"; numerous commentators, among them activists, agree that suffrage was excluded from the Amendment. Indeed, Brest grudgingly conceded that "the adopters of the equal protection clause probably intended it not to encompass voting discrimination at all."

It is no less clear that segregation was left in place, as many commentators agree. Brest acknowledges that "the

18. Id.
21. Brest I, supra note 5, at 234 n.115. As Justice Harlan observed, "general statements . . . that the Amendment was designed to achieve equality . . . do not weaken the force of the statements specifically addressed to the suffrage question." Oregon v. Mitchell, 400 U.S. 112, 186 n.54 (1970) (Harlan, J., concurring in part and dissenting in part) (emphasis added). Frankfurter vigorously condemned the Court's intrusion into regulation of suffrage by its reapportionment decisions: "Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme." Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).
nation was not ready to eliminate ['school segregation'] in the 1860's.\textsuperscript{23} Brest would dismiss the historical proof as an attempt to bring "supposed new insights into the adopters' intention,"\textsuperscript{24} when the fact is that the historical evidence speaks for itself. In light of the facts, Brest's unqualified "The Intentions of the Adopters Are in the Eyes of the Beholder" is a canard.

The interpretive issue is misstated by Brest: "The text, rather than the adopters' subjective states of mind, is the primary guide to the purpose of a provision."\textsuperscript{25} "Subjective relates to something within the mind, objective to something without."\textsuperscript{26} Once a writer expresses his intention, it exists independently of his "state of mind." A statement is itself a fact.\textsuperscript{27} Brest's quotation of Justice Frankfurter is in accord with this analysis: "the legislative aim is evinced in the language of the statute, as read in the light of other external manifestations of purpose..... We are not concerned with anything subjective. We do not delve into the mind of legislators, or their draftsmen, or committee members."\textsuperscript{28} Nor do originalists engage in psychoanalysis; they rely on objective facts—statements. So too, Brest would have it that originalists ask: "How would the adopters of the Fourteenth Amendment..."\textsuperscript{29}

\textsuperscript{23} Brest, supra note 3, at 10, 11. "Negroes were barred from public schools of the North, and still widely regarded as 'racially inferior' and 'incapable of education.' Even comparatively enlightened leaders then accepted segregation in schools." GRAHAM, supra note 22, at 290 n.70.

\textsuperscript{24} Brest I, supra note 1, at 17.

\textsuperscript{25} \textit{Id.} (emphasis added).

\textsuperscript{26} \textsc{Funk & Wagnalls, Desk Standard Dictionary} (1944) (emphasis added).


\textsuperscript{28} Brest I, supra note 1, at 19 (emphasis added).
have decided . . . Brown v. Board of Education."29 Such guessing is far from originalist thinking; instead, they found that the framers left segregation to State control, as Brest recognizes,30 and therefore conclude that Brown overturned this purpose.

To discredit what Brest denominates "strict construction"—"focusing on the adopters' specific intention"—he invokes Home Building & Loan Ass'n v. Blaisdell,31 where the majority "upheld a mortgage moratorium during the depression."32 A mortgagee claimed that the Minnesota statute of 1933, which provided that foreclosures could be postponed until May 1935, constituted an impairment of its contract. Brest recounts that the dissenters—"the so-called four horsemen who did battle against the New Deal"—would "have struck down the law . . . under the banner of strict construction."33 This is what Edmund Wilson called "the 'bedfellow' line of argument, which relies on producing the illusion of having put you irremediably in the wrong by associating you with some odious person who holds . . . a similar opinion."34 "Guilt by association" is well enough in the mouth of a demagogue, but it is unworthy of one who pretends to scholarship. For as the philosopher Sidney Hook observed, "what makes a thing true is not who says it, but the evidence for it."35

In Blaisdell, Chief Justice Hughes disposed of the "impairment of contracts" clause on two grounds. The first is Marshall's alleged statement that "[w]ithout impairing the obligation of the contract, the remedy may certainly be modified."36 This, however, is at odds with Marshall's actual statements in Sturges: "Any law which releases a part of this obligation, must, in the literal sense of the word, impair it . . . The principle [the Framers] intended to establish [was] the inviolability of contracts. This principle was to be protected in

29. Id. at 18.
30. See supra text accompanying note 23.
32. Brest I, supra note 1, at 17-18.
33. Id. at 18.
35. SIDNEY HOOK, PHILOSOPHY AND PUBLIC POLICY 121 (1980).
36. Blaisdell, 290 U.S. at 430 (citing Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 200 (1819)).
whatsoever form it might be assailed.” In a recent survey in *The Constitution in the Supreme Court*, David Currie observed that “debt extensions in economic crises had been among the specific evils the [contract] clause was designed to prevent, and the Court had repeatedly struck them down” for “nearly a century.” Hughes’ rationalization, wrote Richard Epstein, “contains some of the most misguided thinking on Constitutional interpretation imaginable.”

Hughes’ second ground was that the Court is not bound by the Founders’ conception of the meaning of the clause, citing Marshall’s “memorable warning”: “We must never forget that it is a Constitution we are expounding—a Constitution intended . . . to be adapted to the various crises of human affairs.” That selfsame Constitution provides for change by the people through amendment, not change by the courts. *McCulloch* merely voiced a plea for some “choice of means” to execute an existing power, not to alter its meaning. It had immediately come under attack, and Marshall leapt to the defense saying, “It does not contain the most distant allusion to any extension by construction of the powers of congress.” And he specifically declared that judicial review “cannot be the assertion of a right to change that instrument,” a reaffirmation of *Marbury v. Madison’s* invalidation of Congress’ attempt to alter the original jurisdiction of the Supreme Court.

40. Blaisdell, 290 U.S. at 443 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819) (emphasis omitted)).
43. Id. at 209 (emphasis added).
44. 5 U.S. (1 Cranch) 137 (1803). Ever ready to replace factual analysis with a glittering phrase, Brest quotes a remark of Paul Freund: “We ought not to read
Brest contends that during its 200-year history the focus of constitutional interpretation has been on "text rather than intentions."\(^{45}\) Yet Chief Justice Marshall wrote that he could cite from the common law "the most complete evidence that the intention is the most sacred rule of interpretation."\(^{46}\) Noticeably absent from Brest's article is any reference to the 400-year common law history to which Marshall referred.\(^{47}\)

Jefferson Powell, an activist critic of original intention, noted that the American "victors viewed the 'revolution of 1800' [the election of Jefferson] as the people's endorsement of the approach to Constitutional interpretation embodied" in the doctrine of "original intent."\(^{48}\) "By the outbreak of the Civil War," he concluded, "intentionalism in the modern sense reigned supreme."\(^{49}\) A few citations to confirmatory evidence should suffice. In 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 the Court has always resorted in construing the Constitution."\(^{50}\) That practice was in harmony with the pronouncements of Jefferson and Madison. In his inaugural address, Jefferson pledged to administer the Constitution "according to the safe and honest meaning contemplated by the plain understanding of the people at the time of its adoption—a meaning to be found in the explanations of those who advocated ... it."\(^{51}\) Madison wrote

\(^{45}\) Brest I, supra note 1, at 21. The Article V provision for amendment forfends that dread prospect. And Freund to the contrary notwithstanding, Justice Story declared that the Constitution should have "a fixed, uniform, permanent construction... not dependent upon the passions or parties of particular times, but the same yesterday, to-day and forever." 1 JOSPEH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 426 (5th ed. 1905).

\(^{46}\) Marshall's Defense, supra note 42, at 167.


\(^{49}\) Id. at 947.

\(^{50}\) Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838).

\(^{51}\) 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446 (2d ed. 1836) (emphasis omitted).
that if "the sense in which the Constitution was accepted and ratified by the nation ... be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers."52

Inasmuch as the great bulk of constitutional litigation nowadays arises under the Fourteenth Amendment, it needs to be noted that in the 39th Congress a proponent of the Amendment, Senator Charles Sumner, stated: "Every Constitution embodies the principles of its Framers. It is a transcript of their minds. If its meaning in any place is open to doubt ... we cannot err if we turn to the Framers."53 To this may be added a unanimous January 1872 Report of the Senate Judiciary Committee, signed by senators who had voted for the Thirteenth, Fourteenth and Fifteenth Amendments, respecting a plea for a statutory grant of women's suffrage:

In construing the Constitution we are compelled to give it such interpretation as will secure the result intended to be accomplished by those who framed it and the people who adopted it. ... A construction which would give the phrase a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution.54

Justice Holmes wrote, "Of course, the purpose of written instruments is to express some intention or state of mind of those who write them, and it is desirable to make that purpose effectual."55 Brest himself acknowledges, "it seems strange to imagine that the adopters of a provision could intend that others might apply it differently than they would."56

Nevertheless Brest attributes to the British legal philosopher H.L.A. Hart the view that "adopters may intend to

52. 9 JAMES MADISON, THE WRITINGS OF JAMES MADISON: 1819-1836, at 191 (Gaillard Hunt ed., 1910).
53. CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866).
56. Brest I, supra note 1, at 19.
delegate discretion to subsequent decisionmakers" to override the clear legislative intent. Where was that intention expressed? Under American doctrines, legislative power may not be transferred to the judiciary. Minimally such a delegation calls for clear evidence that such was the draftsmen's intention, particularly because the Founders had a "profound fear" of judicial discretion, of the "judges' imposition of their personal views" under the guise of interpretation. Of course, words in a legal document "are simply delegations to others . . . [to apply] them to particular things or occasions." Thus "transportation" envisioned by oxcart may later comprehend carriage by a plane. This exemplifies the application of a principle and is not to be confused with its abrogation, e.g., substitution of "one person-one vote" for the irrefutable exclusion of suffrage from the Fourteenth Amendment.

In any event, the framers, as we have noted, meant original intention to govern. Brest argues, however, that "a choice must be made," and that the adopters "cannot determine the choice." But judges may not substitute their choice for that of the Framers; to do so is to rewrite the Constitution. Even a flaming activist, Judge J. Skelly Wright, wrote that the Framers have already made the choices, and judges' "value choices are to be made only within the parameters" of those choices. Writing in 1939, Jacobus tenBroek said 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."
Here the law coincides with common sense. Who better knows what he means than the writer?—certainly not the reader. John Selden, a preeminent seventeenth century scholar, stated that "a Man's Writing has but one true Sense, which is that which the Author meant when he writ it."65 His illustrious precursors, Thomas Hobbes and John Locke, were of the same opinion.66 After a hiatus, the House of Lords declared in 1992 per Lord Browne-Wilkinson that "we are much more likely to find the intention of Parliament [in its proceedings] than anywhere else."67

It is open to Brest to differ with the centuries-old practice, but it is misleading to treat it as a recent heresy, a rejection of "well-established precedents under the guise of returning to the original understanding."68 Of the same nature is Brest's assertion that originalists "would have the Court reject the long-standing series of decisions holding that the Bill of Rights applies to the states through the Fourteenth Amendment."69 The incorporation of the Bill of Rights in the Fourteenth Amendment was "discovered" in 1947 by Justice Black dissenting in Adamson v. California.70 For 135 years, Justices Harlan and Stewart reminded the Court, every member agreed that the Founders exempted the states from the Bill of Rights.71 This, Louis Henkin observed, was "the consistent, often reaffirmed, and almost unanimous jurisprudence of the Court."72 What is it that renders the decisions of the last 40

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65. JOHN SELDEN, TABLE-TALK: BEING THE DISCOURSES OF JOHN SELDEN, ESQ. 10 (2d ed. 1696).

66. THOMAS HOBBES, LEVIATHAN *18: "The judge is to be guided by the final causes, for which the law was made . . . the knowledge of which final causes is in the legislature." Locke stated,

when a man speaks to another, it is . . . [to] make known his ideas to the hearer. That then which words are the marks of are the ideas of the speaker . . . this 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 204-06 (Raymond Wilburn ed., 1942).


68. Brest I, supra note 1, at 23 (emphasis added).

69. Id. (emphasis added).

70. 332 U.S. 46, 80-90 (1947) (Black, J., dissenting).


years sacrosanct whereas the Warren Court toppled those of the prior 135 years like dominoes? Brest, who evinces no compunction in jettisoning the basic principle of our democratic system—government by consent of the governed—is aghast that the Warren Court decisions should be questioned. Why must we be bound by the “dead hand” of Earl Warren? Activist theology, to borrow from Mark Tushnet, is “plainly designed to protect the legacy of the Warren Court.”

To bolster his contention that it is “obviously impossible to describe [the] specific intentions” of the “multitudes of people” engaged in the “drafting and ratifying of the Constitution,” Brest again invokes Frankfurter, who avoided speaking of “legislative intent.” But Frankfurter read a statute “in the light of other external manifestations of purpose.” Originalists would agree that “[w]e are not concerned with . . . delving into the mind of legislators or their draftsmen, or committee members.” But Justice Frankfurter stated, “It has never been questioned in this Court that committee reports, as well as statements by those in charge of a bill or of a report, are authoritative elucidations of the scope of a measure.”

Our representative form of government postulates, moreover, that the people speak through the voice of their delegates. Obviously, a nation of many millions cannot act by a monster town-meeting. Lincoln considered that the Framers “fairly represented the opinion and sentiment of the whole nation at that time.” Jefferson found the meaning of the people in the explanations of those who advocated adoption of the


75. Brest I, supra note 1, at 19.

76. Id. (citing Felix Frankfurter, Some Reflections on the Reading of Statutes, 1947 COLUM. L. REV. 527, 558-39 (1947)).

77. Id.


Constitution. Of the 1866 period, Morton Keller found that "most congressional Republicans were aware of (and shared) their constituents' hostility to black suffrage." Chief Justice Thomas Cooley, a contemporary of the Fourteenth Amendment, wrote that "we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives." Brest's argument is a rehash of that made by ten Broek in 1939. Unmoved thereby, the courts have continued to cite legislative history.

In the same vein, Brest urges that what was adopted "is not a set of intentions but a set of words." In 1787 the Anti-Federalists played on the fears aroused by the text of the Constitution; to allay such fears the Federalists represented that those terms were more restricted than was painted. Thus it was not merely the text that was adopted, but the text as explained by its proponents. Now to repudiate those representations is, as Justice Story declared in similar context, to commit a "fraud upon the whole American people."

Arguing for broad judicial discretion in construing "imprecise" terms, Brest cites Justice Frankfurter's statement, "Great concepts like ... 'due process of law' ... were purposely left to gather meaning from experience." History is to the

80. Supra text accompanying note 51.
82. THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS 102 (7th ed. 1903).
83. Brest I, supra note 1, at 20.
84. Hamilton met Brutus' gloomy prognostications with the assertion that "the judiciary is next to nothing." THE FEDERALIST No. 78, at 504 (Alexander Hamilton) (Mod. Lib. ed. 1937).
85. "If the Constitution was ratified under the belief sedulously cultivated on all sides that such protection was afforded, would it not now be a fraud upon the whole people to give it a different construction to its powers ... ?" 2 Story, supra note 44, at § 1084.
86. Brest I, supra note 1, at 21. An apostle of judicial self-restraint, Frankfurter yet "played a pivotal role" in the overthrow of segregated schools, JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 85 (1975), notwithstanding that his law clerk, Alexander Bickel, who at his request had studied the debates of the 39th Congress, advised him that "it is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible
contrary. On the eve of the Convention, Hamilton declared, "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature." It is the legislature, not the courts, to whom was confided "the whole domain of social and economic fact." Charles Curtis, whom Brest eulogizes, wrote that the meaning of the Fifth Amendment's Due Process Clause "was as fixed and definite as the common law could make a phrase. . . . It meant a procedural process." And he asked, "But who made it a large generality? Not they [the Founders]. We [the Court] did." Frankfurter himself once shared that view, writing in 1925 that the contents of the Due Process Clauses "are derived from the disposition of the Justices." It is a long-established

also to conclude that they foresaw it might be, under the language they were adopting," RICHARD KLUlER, SIMPLE JUSTICE 654 (1976). In less pressurized circumstances, Frankfurter declared that "an amendment to the Constitution should be read in a sense most obvious to the common understanding at the time of its adoption." Adamson v. California, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring). Again, "very specific provisions" such as a prohibition against "bills of attainder" must be read as "defined by history." United States v. Lovett, 328 U.S. 303, 321 (1946). "Their meaning was so settled by history that definition was superfluous." Id. The meaning of "due process" was at least as firmly settled. Later he wrote, "Legal doctrines . . . derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve. To these they are bound as is a live tree to its roots." Reid v. Covert, 354 U.S. 1, 50 (1957) (Frankfurter, J., concurring). He acknowledged that the (alleged) "vagueness" of due process "readily lends itself to make of the Court a third chamber with drastic veto power." Felix Frankfurter, John Marshall and the Judicial Function, 69 HARV. L. REV. 217, 229 (1955). Earlier he had written that by means of the Due Process Clause the Supreme Court was "putting constitutional compulsion behind the private judgment of its members upon disputed and difficult questions of social policy." KURLAND, supra note 73, at xiv.


88. Brest I, supra note 1, at 21.

89. Charles Curtis, Review and Majority Rule, in THE SUPREME COURT AND SUPREME LAW 170, 177 (Edmund Cahn ed., 1954). Compare with this Frankfurter's statement that due process is of "convenient vagueness" so that the "Court is compelled to put meaning in the Constitution." FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 7 (1938). Justice Black more truly declared, "there is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 675-76 (1966) (Black, J., dissenting).

90. Curtis, supra note 89, at 177.

91. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS
canon that when the draftsmen employ common law terms, the common law "definitions," as Justice Story put it, "are necessarily included, as much as if they stood in the text." The words "due process," the Court stated, were used in the Fourteenth Amendment "in the same sense and with no greater extent" than in the Fifth Amendment. In sum, to borrow from Edward Corwin, "no one at the time of the framing and adoption of the Constitution had any idea that this clause did more than consecrate a method of procedure against accused persons, and the modern doctrine of due process of law . . . could never have been laid down except in defiance of history.

We should not leave so-called "general terms" without some reference to "equal protection of the law," first met in 1866. John Hart Ely considers the words "inscrutable." Brest

92. United States v. Smith, 18 U.S. (5 Wheat.) 153, 160 (1820). Chief Justice Marshall stated that if a word was understood in a certain sense "when the constitution was framed. . . . The Convention must have used the word in that sense . . . ." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824). This was the common law rule: "If a statute make use of a Word the Meaning of which is well known at the Common Law, such Word shall be taken in the same Sense it was understood at the Common Law." 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW "Statute" I(4) (1786). The Court noted that the lawyers in the Convention expressed their conclusions "in terms of the common law, confident that they could be shortly and easily understood." Ex parte Grossman, 267 U.S. 87, 109 (1925).

Brest's argument that "it simply cannot be assumed that the laymen in the convention used a "phrase in its technical sense," Brest I, supra note 1, at 27-29, "simply" betrays unfamiliarity with the settled practice.

Brest understands full well that the original meaning of constitutional terms is to be given effect:

[S]uppose that the Constitution provided that some acts were to be performed "biweekly." At the time of the framing of the Constitution, this meant only "once every two weeks"; but modern dictionaries . . . now report "twice a week." To construe the provision now to mean "semiweekly" would certainly be a change of meaning (and an improper one at that).

94. EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL HISTORY 118-19 (1934). In 1970 the Court recalled the "era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise.' . . . That era has long ago passed into history." Dandridge v. Williams, 397 U.S. 471, 484-85 (1970); see also Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).
95. JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 98 (1980). Wallace Mendelson regards the words as so broad as to be almost meaningless. Mendelson, supra note 20, at 451.
comments that "because of its indeterminacy, the clause does not offer much guidance even in resolving particular issues of discrimination based on race." To invalidate a statute under cover of an "indeterminate clause" is to subvert the Constitution. Federal supervision of state action, said Justice Brandeis on behalf of the Court, "is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States." Federal interference, "except as thus permitted, is an invasion of the authority of the State." Given the grudging, jealous surrender by the states of limited jurisdiction to the federal government, it should not lightly be assumed that the states have consented by an "indeterminate clause" to curtailment of the sovereignty they were at pains to reserve.

Of a certainty the Equal Protection Clause is not boundless, for the framers excluded suffrage and segregation; and they repeatedly rejected proposals to ban all discrimination. This is precisely the sort of situation in which Senator Sumner counselled resort to the framers' explanations. But that does not cross Brest's mind. For him, in interpreting a clause "as broad as the equal protection clause, one must posit a theory or principle for the clause." A page of history, however, is worth a volume of theorizing. The "starting point" in construction of a clause "as broad as the equal protection clause," he remarks, should be "our understanding of the adopters' purposes." He confines himself to speculation about the four classes to which the clause might apply. The framers, however, were preoccupied with protection of a particular class—the emancipated negroes; they were almost exclusively concerned

96. Brest II, supra note 5, at 232.
98. Erie, 304 U.S. at 79.
101. Supra text accompanying note 53.
102. Brest I, supra note 1, at 21 (emphasis added).
103. "History, to most authors of the Constitution, was more valuable than political theory—because it was more real." FORREST MCDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY 67 (1994).
104104. Brest I, supra note 1, at 21.
105. Id.
with the content of equal protection, with what rights were to be protected.

Let me encapsulate the facts. Northern outrage had been ignited by the Black Codes which, as Senator Henry Wilson put it, "practically make slaves of men we have declared to be free."\(^{106}\) In response, the Civil Rights Act of 1866 prohibited discrimination with respect to the right to own property, to contract, and to have access to the courts,\(^{107}\) rights designed to enable the liberated slaves to exist. After reviewing the legislative history the Court concluded in 1966 that the Act conferred a "limited category of rights."\(^{108}\) The Fourteenth Amendment, regarded without demur as "identical" with the Act, and designed to embody it and thus secure it against repeal,\(^{109}\) substituted for the negative ban of discrimination the positive equal protection. Their affinity was disclosed by the explanation of Samuel Shellabarger of Ohio that the Civil Rights Bill secures "equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races."\(^{110}\) Leonard Myers of Pennsylvania explained that the Amendment required that each state shall provide for "equal protection to life, liberty, and property, equal rights to sue and be sued, to inherit, make contracts, and give testimony,"\(^{111}\) virtually a reprise of Shellabarger's explanation. Both Shellabarger and Myers allied equal protection to an enumerated and "limited category" of rights.

While Senator James Patterson of New Hampshire was "opposed to any law discriminating against [blacks] in the security and protection of life, liberty, person, property, and the proceeds of their labor" he emphasized that "[b]eyond this I am not prepared to go."\(^{112}\) The reason is not far to seek. David

\(^{106}\) CONG. GLOBE, 39th Cong., 1st Sess. 39 (1866). Senator William Stewart stated that the Civil Rights Bill was designed "simply to remove the disabilities existing by laws tending to reduce the negro to a system of peonage." Avins, supra note 15, at 204.

\(^{107}\) Avins, supra note 15, at 121.


\(^{110}\) CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (emphasis added).

\(^{111}\) Avins, supra note 15, at 193.

\(^{112}\) CONG. GLOBE, 39th Cong., 1st Sess. 2699 (1866).
Donald, a Reconstruction historian, observed that the suggestion that "Negroes should be treated as equals to white men awoke some of the deepest and ugliest fears in the American mind."\textsuperscript{113} George Julian noted that "we hate the Negro," a sentiment voiced by others.\textsuperscript{114} Vann Woodward found that popular convictions were not prepared to sustain "a guarantee of equality."\textsuperscript{115} This was acknowledged by two leaders, Thaddeus Stevens and Senator William Fessenden. Towards the end of the debates, Stevens exclaimed that he had hoped that the people "would have so remodelled our institutions as to have freed them from every vestige of . . . inequality of rights . . . that no distinction would be tolerated. . . . This bright dream has vanished. . . . [W]e shall be obliged to be content with patching up the worst portions of the ancient edifice."\textsuperscript{116} So too, Fessenden recognized that "We cannot put into the Constitution, owing to existing prejudices and existing institutions [racism and States rights], an entire exclusion of all class distinctions."\textsuperscript{117} Whatever the scope of equal protection, the two "achievements" of the Warren Court—desegregation and suffrage—were excluded. No amount of theorizing can wipe out these facts.

Brest maintains, however, that "our traditions are quite resilient."\textsuperscript{118} But Justice Holmes said on behalf of the Court, "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."\textsuperscript{119} True it is that under the Warren-Brennan-Thurgood Marshall axis, tradition was made "resilient"—a euphemism for wholesale jettisoning of precedent and of judicial revision of the Constitution. It is no answer that Justice Harlan said that our Constitutional tradition is a "living" one.\textsuperscript{120} More closely in point is his reproach that "[w]hen the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the Constitutional structure which is its

\textsuperscript{113} David Donald, Charles Sumner and the Rights of Man 156-57 (1970).
\textsuperscript{114} Berger, supra note 99, at 13.
\textsuperscript{115} C. Vann Woodward, The Burden of Slavery 83 (1960).
\textsuperscript{116} Avins, supra note 15, at 237.
\textsuperscript{117} Cong. Globe, 39th Cong., 1st Sess. 705 (1866) (emphasis added).
\textsuperscript{118} Brest I, supra note 1, at 22.
\textsuperscript{120} Brest I, supra note 1, at 22.
There is a highest duty to protect.”

Today a fashionable analytical tool is “levels of generality,” in Brest’s words, “On what level of generality should an interpreter try to ascertain and apply the adopters’ intentions?” Robert Bork notes that a judge “can manipulate the levels of generality at which he states the Framers’ principles.” Some “principles,” e.g. the exclusion of suffrage from the Fourteenth Amendment, so clearly reflect the framers’ intention that to manipulate this incontrovertible exclusion would be subversive. Chief Justice Warren’s derivation of “one person-one vote” from the Fourteenth Amendment is not an instance of the manipulation of levels of generality, but rather exemplifies raw fiat.

“[A]bstractions,” wrote Jacques Barzun, “form a ladder which takes the climber into the clouds, where diagnostic differences disappear.” He adds that “at a high enough rung on the ladder of abstraction, disparate things become the same: a song and a spinning top are, after all, but two ways of setting air waves in motion.” Resorting to levels of generality is merely a device to escape from the bonds of the particulars. Concretely, Mark Tushnet asks, “why describe the concept of equality on a level of generality so high that it obliterates the specific intention to permit segregation?” More importantly, when a judge ascends to high levels of generality, Bork observes, “he creates a concept without limits,” thereby violating the Founders’ purpose to limit the delegated powers.

A prime duty of a scholar is to take account of discrepant evidence. Brest resolutely turns his back on facts which

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122. Brest I, supra note 1, at 18.
126. Id. at 65.
128. Bork, supra note 123, at x.
puncture his theorizing. He never really attempts to meet the case for the opposition. Is the "irrefutable and unanswered" exclusion of suffrage from the Fourteenth Amendment merely "In the Eyes of the Beholder?" Brest's neglect to meet such evidence exhibits a failure to live up to Thomas Huxley's standard for scientific inquiry: "[M]y colleagues have learned to respect nothing but evidence, and to believe that their highest duty lies in submitting to it, however it may jar against their inclinations." 131

131. HOMER W. SMITH, MAN AND HIS GODS 372 (1953) (citation omitted).