BOOK REVIEW

Bruce Ackerman on Interpretation: A Critique

Raoul Berger

The too familiar vice of the present age is to obtrude as manifest truths, mere fancies, born of conjecture and superficial reasoning, altogether unsupported by the testimony of sense.

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Bruce Ackerman's We the People1 has been hailed by Sanford Levinson as "[t]he most important project now underway in the entire field of constitutional theory."2 Ackerman tells us that it has been his "principal preoccupation" during the 1980s.3 Throughout those years he "steadfastly tried to reserve every morning for uninterrupted reading and writing,"4 setting out on a voyage "[t]o discover the Constitution"5—theretofore presumably terra incognita.6 The mountain labored and brought forth, according to Levinson: "a complex process of 'publian politics' where 'We the People' became authorized to change the Constitution without even invoking the procedures

2. Sanford Levinson, Dust Jacket to id.
3. Ackerman, supra note 1, at ix.
4. Id.
5. Id. at 3.
laid out in Article V." To nullify Article V calls for more than the lucubrations of a closet philosopher. Ackerman's "discovery" masks the fact that the Court, not the people, changed the Constitution, and thus it merely rationalizes judicial revisionism. At no time, wrote Leonard Levy, "have the American people passed judgment, pro or con, on the merits of judicial review over Congress [let alone judicial alteration of the Consti-

7. Levinson, supra note 2. Hobbes wrote, "The authority of writers, without the authority of the commonwealth, maketh not their opinions law." THOMAS HOBBES, LEVIATHAN 146 (1943). Judge Easterbrook observes that behind Ackerman's argument "is the belief that Something Big happened in 1933-53: an unwritten amendment to the Constitution incorporating the New Deal and authorizing a great enlargement of federal power. I confess to doubting the equivalence of written and unwritten amendments to the Constitution . . . . If the document no longer binds us in some respects, why does it govern in others?" Frank H. Easterbrook, Levels of Generality in Constitutional Interpretation: Abstraction and Authority, 59 U. CHI. L. REV. 349, 368 (1992).

Suzanna Sherry states of Ackerman's theory (that the people revised Article V) that his "historical evidence completely fails to demonstrate this." Suzanna Sherry, The Ghost of Liberalism Past, 105 HARV. L. REV. 918, 928 (1992) (book review). She criticizes his "exclusion of the massive historical evidence from the Philadelphia Convention, the ratifying conventions," etc., and states that his "decision to ignore it makes for poor history indeed." Id. at 924.

8. Sandalow justly finds it "doubtful that the People made, or can be shown to have made, the decisions he attributes to them." Sandalow, supra note 6, at 329. Under Ackerman's theory, says Sandalow, "responsibility for determining the shape and direction of constitutional law does not rest with the People . . . . but with the Justices." Id. at 331. Ackerman's "contention that the Court is merely pursuing a course set by the People seems implausible." Id. "[I]n Ackerman's 'dualist democracy' it is the Justices, not the People, who make the crucial constitutional decisions." Id. at 335. In short, the Court "has emerged as a major policymaking institution, exercising power that the framers would not have recognized as being 'of a Judiciary Nature.'" Id. at 310 (citation omitted).

9. Such judicial revisionism "cannot be accounted for by the mechanisms of change provided by the Constitution"—i.e., the amendment process of Article V. Id. at 310. To do Sandalow justice, he considers that these departures "are now so deeply embedded in our 'working constitution' that it may seem quixotic to raise questions about their legitimacy." Id. at 312. By such reasoning, larceny may be legitimated if repeated often enough.

But in McPherson v. Blacker, 146 U.S. 1, 36 (1892), the Court rejected the notion that the Constitution may be "amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made." And in Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938), the Court speaking by Justice Brandeis, who quoted Justice Holmes, branded Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."

Finally, both Sandalow and Ackerman "emphasize that the absence of a satisfactory theory—one that recognizes and justifies the realities of constitutional change [by the Court]—has a corrosive effect on the commitment to constitutionalism." Sandalow, supra note 6, at 312.
Consent freely given, by referendum, by legislation, or by amendment is simply not the same as failure to abolish or impair."10 There is no provision for amendment by inertia.

Activist justifications of the Court's "exercise of the amending power"11 are nothing new.12 What is new is Ackerman's argument that this was done at the behest of the people.13 Nowhere, of course, has the Court intimated that it was carrying out the mandate of the people in spite of the Constitution.14 Hamilton cautioned that "[u]ntil the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves . . . and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act."15 But times have changed. The late Robert Cover of Yale thrust aside "the self-evident meaning of the Constitution" because "we" have decided to "entrust" judges [where?] with framing an "ideology" whereby legislation may be measured,16 and, it may

12. There is a sea of "defenses" of judicial revisionism. For citations, see Raoul Berger, New Theories of "Interpretation": The Activist Flight from the Constitution, 47 OHIO ST. L.J. 1, 2 n.8 (1986). For example, Levy declared that the "Court is and must be for all practical purposes a 'continuous constitutional convention' in the sense that it must keep updating the original charter by reinterpretation." LEONARD W. LEVY, AGAINST THE LAW 23, 29-30 (1974). Justice Black, however, derided "rhapsodical strains about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes . . . . The Constitution makers knew the need for change and provided for it" by the amendment process of Article V. Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting).
13. In a penetrating review of Ackerman's opus, Stephen Presser notes Ackerman's claims that "[c]onstitutional change flows from the people and not the court, even when the change is accomplished by such decisions as Brown, Miranda and Roe" and that the "Warren and Burger courts were working out the details of a change in rights that essentially had been ordered by the people themselves." Stephen Presser, Locking in Liberalism, CHI. TRIB., Oct. 6, 1991, § 14, at 5. For another adverse review, see Sherry, supra note 7.
14. To the contrary, in a letter to President Roosevelt, Professor Frankfurter indicated that the Court repeatedly told the people that when it spoke, "it is not they who speak but the Constitution." Letter from Felix Frankfurter to Franklin Roosevelt (Feb. 18, 1937), in ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 383 (Max Freedman ed., 1967).
be added, the Framers' choices jettisoned.

Ackerman attributes this momentous change to the people themselves. Consider Brown v. Board of Education, which worked a revolution—the overthrow of segregation. "[O]nly a mobilized mass movement," writes Ackerman, "might encourage progressive Democrats and Republicans to overcome massive Southern resistance to new civil rights legislation. At the time Brown was argued and reargued... such a mass movement did not exist." In other words, Brown "did not come at [a] moment[] when a mobilized citizenry was demanding a fundamental change in our fundamental law." The "real significance" of Brown et al., Ackerman opines, "lie[s] elsewhere, in the Court's courage in confronting modern Americans with a moral and political agenda that calls upon them to heed the voices of their better selves." Brown therefore presented the people with a virtually irreversible fait accompli rather than a response to popular demand. It came to achieve "retroactive

Deal "began to build new constitutional foundations for activist national government." ACKERMAN, supra note 1, at 49. "The Constitution... is an evolving historical practice, constituted by generations of Americans as they mobilized." Id. at 34. On the other hand, Justice Story, a fervent nationalist, wrote that the Constitution "is to have a fixed, uniform, permanent construction[,]... not dependent upon the passions or parties of particular times, but the same yesterday, [today], and [forever]." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 426, at 410 (1st ed. 1833).


18. ACKERMAN, supra note 1, at 135. Benjamin Hooks, Executive Director of the NAACP said, "I don't think America was ready to end segregation[,] I don't think it has ever been ready to extend full equality." Peter Applebome, Rights Movement in Struggle for an Image as Well as a Bill, N.Y. TIMES, April 3, 1991, at A1.

19. ACKERMAN, supra note 1, at 133.

20. Id. Sidney Hook decried those "who know what the basic human needs... should be, who know not only what these needs are but what they require better than those who have them or should have them." SIDNEY HOOK, PHILOSOPHY AND PUBLIC POLICY 28 (1980). "It is arrogant," he adds, to assume that "some self-selected elite can better determine what the best interests of other citizens are than those citizens themselves." Id. at 29. Lord Annan, then Vice-Chancellor of the University of London, rejected the theory that governments can identify what people would really want were they enlightened... and understood fully what was needed to promote a good, just and satisfying society. For if it is true that this can be identified then surely the state is justified in ignoring what ordinary people say they desire or detest.

NOEL ANNAN, INTRODUCTION TO ISAIAH BERLIN, PERSONAL IMPRESSIONS at xiii, xvii (1981). Compare Justice Brennan's insistence that death penalties are contrary to "human dignity" despite his recognition that the people remain attached to them. Raoul Berger, Justice Brennan vs. the Constitution, 29 B.C. L. REV. 787, 796-98 (1988).
canonization," Ackerman states, by virtue of the "Civil Rights Acts of 1964 and 1968 and the Voting Rights Act of 1965." But these acts premised that Brown was rooted in the Constitution, whereas Ackerman himself recognizes that Brown's constitutional authority is dubious. Hence he is driven to assert that Brown possesses "the kind of numinous legal authority that is . . . uniquely associated with legal documents that express the considered judgments of We the People." The people, however, justifiably assumed that when the Court outlawed segregation its decision was mandated by the Constitution rather than by Warren's personal predilections. Subsequent legislation could not legitimate the Court's disregard of Article V's provisions for amendment of the Constitution. Neither the ringing admonitions of Washington, Hamilton,

21. ACKERMAN, supra note 1, at 137.
22. Ackerman notes that Herbert Wechsler, a "leading legal scholar," "could not find a principled way to justify Brown." Id. at 144. "Even Brown's defenders had to move far beyond Warren's feeble effort to justify the ways of the Court to thoughtful lawyers." Id. For a collection of the historical data which demonstrate that the Framers excluded segregation from the ambit of the Fourteenth Amendment, see RAOUl BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 117-33 (1977). Michael Perry listed examples of "commentary generally accepting Berger's history" and some "generally effective rebuttals by Berger to criticisms of his history." Michael J. Perry, Interpretivism, Freedom of Expression, and Equal Protection, 42 OHIO ST. L.J. 261, 285 n.100 (1981). Perry concluded that the Framers did not intend to prohibit segregated schooling or to enjoin laws establishing racial segregation. MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 91-92 (1982).

For citations accepting my historical findings, see Raoul Berger, Lawyering vs. Philosophizing: Facts or Fancies, 9 U. DAYTON L. REV. 171, 174 n.25 (1984). Although Sanford Levinson approves of the Brown result, he acknowledges that it "cannot plausibly be thought to derive in its entirety from the unamended Constitution itself, and judicial supremacy in the absence of such derivation does continue to exhibit overtones of Platonic guardianship." Sanford Levinson, The Turn Toward Functionalism in Constitutional Theory, 8 U. DAYTON L. REV. 567, 578 (1983). Mark Tushnet observed that the legislative history "leads one to conclude that school segregation is not unconstitutional," that were we to ask the Framers "whether the amendment outlawed segregation in public schools, they would answer No.'" Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781, 800 (1983); see also LEARNED HAND, THE BILL OF RIGHTS 55 (1968).
24. See supra note 14 and accompanying text.
25. In his Farewell Address, Washington warned the people to correct the Con-
and Madison\textsuperscript{27} to honor the process for change. Article V lays down, nor the Supreme Court’s “[i]t is not the function of courts or legislative bodies . . . to alter the method [for change] which the Constitution has fixed,”\textsuperscript{28} count for anything with Ackerman.\textsuperscript{29} On the other hand, Justice Harlan declared, “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 was committed, and it has violated the constitutional structure which is its highest duty to protect.”\textsuperscript{30}

Despite his emphasis on the need “to discover meaning in our constitutional history,”\textsuperscript{31} when it comes to specifics Ackerman turns his back on constitutional history.\textsuperscript{32} This is abundantly apparent from his treatment of “privileges or immunities” and the scope of the Fourteenth Amendment. My purposes are to vindicate contested truth and demonstrate that any indictment concerning a lack of “basic reliability” is to be laid at his door, not mine. In weighing a work heralded as the “most important project now underway in the field of constitutional theory,” “basic reliability” is of the essence.

My \textit{Government by Judiciary} (1977),\textsuperscript{33} which marshalled the evidence against judicial transformation of the Fourteenth

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27. In the First Congress, Madison said, “sovereignty of the people” means “the people can change the Constitution if they please; but while the Constitution exists, they must conform themselves to its dictates.” 1 \textit{Annals of Cong.} 739 (Joseph Gales ed., 1789) (running head “History of Congress”).

28. Hawke v. Smith, 253 U.S. 221, 227 (1920); \textit{see also supra} note 16. Chief Justice Marshall stated that if the Constitution is not “unchangeable by ordinary means . . . then written constitutions are absurd attempts on the part of the people, to limit a power, in its own nature illimitable.” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).


31. \textit{Ackerman, supra} note 1, at 36. “History for the activist is a protean instrument, useful for legitimating a predetermined result.” \textit{Leonard W. Levy, Judgments: Essays in American Constitutional History} 78 (1972).

32. \textit{See infra} note 76.

\end{footnotes}
Amendment, prompted Ackerman at this late date to attack my "bad history," expatiating at length:

By "bad," I mean really bad. One example should be enough to encourage you to treat Berger's use of sources with extreme caution. Given Berger's premises, Justice Washington's famous opinion in Cofield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No.3230) is a matter of great importance. As Berger recognizes, Washington's definition of "privileges and immunities" was quoted repeatedly by partisans to define the meaning of the Fourteenth Amendment. It is therefore understandable that Berger wishes to establish that Washington's opinion is consistent with his own view of the amendment as a superstatute, constitutionalizing only a fixed list of rights previously enacted in the Civil Rights Act. Unfortunately, Berger achieves this end by selective quotation and italicization so egregious that it shakes confidence in his basic reliability. . . . Berger conceals from the reader by the simple expedient of replacing Washington's words with ellipses . . . .

. . . I am concerned with Berger's basic ethics as an historian . . . .

I am also troubled by Berger's use of italics to suggest that Washington is emphasizing the limited character of his construction of "privileges and immunities"—when in the excised portion of the text he explicitly endorses a more expansive interpretation. This kind of shoddy work on a source as crucial as Corfield is inexcusable.

[Even by the standards of lawyers' history, [Berger's Government by Judiciary] seems exceptionally tendentious in its treatment of the sources.]

So my use of italics, and of ellipses to avoid overlong quotations, becomes at Ackerman's hands something sinister, "inex-
cusable.” This charge of concealment is deflated by my quotation of the entire passage, without ellipsis, in *The Fourteenth Amendment and the Bill of Rights*,36 thus countering an implication of sinister suppression. In any event, it is shoddy scholarship to convert what might be regarded as a mere difference of opinion respecting an item of evidence into an “excision,” a “concealment” designed to mislead the reader, betraying a lack of “basic ethics as an historian.” This recalls a contemptible Communist tactic: it does not suffice to refute an opponent,37 he must be forever discredited.

*Corfield v. Coryell* is but one of thousands of facts detailed in my book.38 It bears solely on “privileges and immunities,” and it is but one fragment in a mosaic composed of many pieces of evidence which prove its limited compass. What need was there for me to misrepresent this one fragment when the rest of the evidence sustains my conclusion as to the scope of “privileges and immunities”—evidence which Ackerman resolutely disregards? Here are the facts.

I. “PRIVILEGES AND IMMUNITIES”

The words “privileges and immunities” are first met in Article IV of the Articles of Confederation: “the people of the
different states . . . shall be entitled to all privileges and immunities of free citizens in the several states,” specifying “all the privileges of trade and commerce.”\textsuperscript{39} For the Founders, the enumerated “privileges of trade and commerce” qualified the general words “privileges and immunities.”\textsuperscript{40} The latter were picked up by Article IV of the Constitution. Chief Justice White stated that they were intended to perpetuate the “limitation of the Articles of Confederation.”\textsuperscript{41} White repeated Justice Miller’s statement in the \textit{Slaughter-House Cases} that “[t]here can be but little question that . . . the privileges and immunities intended are the same in each.”\textsuperscript{42} From the beginning the Maryland and Massachusetts courts construed Article IV in terms of trade and commerce.\textsuperscript{43}

The words “privileges and immunities” came into the Fourteenth Amendment by way of the Civil Rights Bill of 1866, which referred to “civil rights or immunities.”\textsuperscript{44} In explaining

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  \item \textsuperscript{39} ARTICLES OF CONFEDERATION art. IV (1777), \textit{reprinted in Documents of American History} 111 (Henry S. Commager ed., 7th ed. 1963).
  \item \textsuperscript{40} In \textit{The Federalist}, Madison asked, “For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power?” \textit{The Federalist} No. 41, at 269 (James Madison) (Modern Library 1937).
  \item \textsuperscript{41} United States v. Wheeler, 254 U.S. 281, 294 (1920) (emphasis added).
  \item \textsuperscript{42} 254 U.S. at 296 (quoting \textit{Slaughter-House Cases}, 83 U.S. (16 Wall.) 36 (1872)).

In the 39th Congress, Martin Thayer said of the Civil Rights Bill of 1866: “[W]hen those civil rights which are first referred to in general terms in the bill are subsequently enumerated, that enumeration precludes any possibility that the general words which have been used can be extended beyond the particulars which have been enumerated.” \textit{The Reconstruction Amendments' Debates} 169 (Alfred Avins ed., 1967) [hereinafter Debates].

\item \textsuperscript{43} Hague v. CIO, 307 U.S. 496, 511 (1939), explains that Article IV “prevents a State from discriminating against citizens of other States in favor of its own.”

\item \textsuperscript{44} CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866).
those words to the Senate, Senator Lyman Trumbull, chairman of the Senate Judiciary Committee, not only read from \textit{Corfield v. Coryell}, but also from the cases from Maryland (per Samuel Chase, soon to be elevated to the U.S. Supreme Court) and Massachusetts. Chase declared that the words were to be given a "limited operation." It is an index of Washington's "expansive interpretation" in \textit{Corfield}—and of that interpretation's "great abstraction and sweep"—that he held the words did not confer on an out-of-state citizen the privilege of dredging for oysters in New Jersey waters! But Washington experienced no difficulty in concluding that a sojourner would have the right to vote. Disavowing this, Trumbull stated that Washington "goes further than the bill under consideration." Certainly Trumbull did not read \textit{Corfield} broadly; he stated that it enumerates "the very rights that are set forth in \textit{[the first section of the] bill}," and he explained that "[t]he great fundamental rights set forth" in the bill are "the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property."

Four years after \textit{Corfield}, in 1827, Chief Justice Parker declared on behalf of the Massachusetts court that the "privileges and immunities" clause confers a "right to sue and be sued," that citizens who move to a second State "cannot enjoy the right of suffrage [contradicting Washington]" but "may take

46. \textit{3 H. & McH.} at 554. Chase was 30 years closer to the Founders than Justice Washington.
47. \textit{ACKERMAN}, supra note 1, at 335-36 n.21.
49. \textit{Id.} (emphasis added). Martin Thayer said, the "section goes on to define with greater particularity the civil rights and immunities which are to be protected by the bill." \textit{Id.} at 169; see also Thayer's comments, supra note 40.

Speaking on behalf of four dissenters in the \textit{Slaughter-House Cases}, Justice Field said that \textit{Corfield} was "cited by Senator Trumbull with the observation that it enumerated the very rights . . . set forth in the first section of the act, . . . that these were the great fundamental rights set forth in the act." 83 U.S. (16 Wall.) 36, 98 (1872) (Field, J., dissenting). William Windom of Minnesota said that the \textit{Civil Rights Bill} affords blacks "an equal right, nothing more . . . to make and enforce contracts [etc.]. . . . It merely provides safeguards to shield them from wrong and outrage, and to protect them in the enjoyment of . . . the right to exist." \textit{CONG. GLOBE}, 39th Cong., 1st Sess. 1159 (1866); see also the \textit{Civil Rights Cases}, 109 U.S. 3, 22, 24, 25 (1883). William Lawrence said in the 39th Congress that the \textit{Bill} provides "that as to certain enumerated civil rights" what "may be enjoyed by any shall be shared by all citizens in each State." \textit{CONG. GLOBE}, 39th Cong. 1st Sess. 1832 (1866).
and hold real estate. If Corfield be read broadly, it was patently without influence on the contemporary Massachusetts court. Ackerman would attribute to an 1823 opinion the power to expand an 1866 enactment that its spokesman, after quoting from Corfield, said enumerated the "very rights" mentioned in the bill, something Georgia v. Rachel described as "a limited category of rights." Serious scholarship requires cognizance of "discrepant" evidence. No allusion to the foregoing facts appears in the Ackerman indictment.

Turn now to the particulars of Ackerman’s diatribe, beginning with his objection to my “use of italics” in quoting from Corfield: “We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental . . . .” Ackerman complains that this suggests that “Washington is emphasizing the limited character of his construction of privileges and immunities”—when in the excised portion of the text he explicitly endorses a more expansive interpretation. An author’s italicization reflects his judgment of what is significant. Minimally, the italicized “confined” conflicts with Washington’s allegedly “expansive interpretation.”

Consider the “excised portion.” After enumerating the rights of property, contracts—and the “elective franchise” rejected by Trumbull—Washington said,

These, and many others which might be mentioned [Ackerman’s italics], are, strictly speaking privileges and immunities and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) “the better to secure and perpetuate mutual friendship and intercourse among the

51. 384 U.S. 780, 791 (1966). In a decision contemporary with the Amendment, the Court declared, “[T]he Amendment did not add to the privileges and immunities of a citizen.” Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171 (1874). In the Civil Rights Cases, 109 U.S. 3, 22 (1883), Justice Bradley, a contemporary of the Civil Rights Bill of 1866, declared that it undertook to secure “the same right to make and enforce contracts, to sue, be parties, . . . and to inherit, purchase . . . property as is enjoyed by white citizens. . . . Congress did not assume . . . to adjust what may be called the social rights of men . . . .” See also infra note 98.
53. BERGER, supra note 33, at 31 (quoting Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230)).
54. ACKERMAN, supra note 1, at 335-36 n.21.
people of the different states of the Union. But we cannot accede to the proposition . . . that . . . the citizens of the several states are permitted to participate in all [emphasis not in original] the rights which belong exclusively to the citizens of any other particular state.55

Not only is there an internal contradiction between “confined” to “fundamental rights” and “many others,” but rejection of “all” local rights undermines an “expansive interpretation.” Then too, Washington’s reference to the “corresponding” Article IV of the Articles of Confederation, which was limited to “trade and commerce,” is at war with the “expansive” content which Ackerman espies. It was altogether reasonable to infer from these facts that Corfield may not be read to expand the “fundamental rights” enumerated by Trumbull.56

II. THE SCOPE OF THE FOURTEENTH AMENDMENT

Let me turn to another major example of Ackerman’s indifference to unpalatable facts. On Berger’s view, he states,

the Fourteenth Amendment . . . had a very narrow aim: to constitutionalize the rules contained in a single statute, the Civil Rights Act of 1866, that the Reconstruction Congress had enacted into law a few months earlier. Unfortunately for Berger, the text of the amendment does not even mention this act; nor does it . . . affirmatively state, in relatively clear and operational terms, the rules that it wishes to constitutionalize.57

My “belief” that “the People enacted a superstatute [his jargon] that changed the Constitution only in the precise ways enumerated in the Civil Rights Act of 1866,”58 he dismisses as “false

55. Id. at 335 n.21 (quoting Corfield, 6 F. Cas. at 552) (Ackerman’s brackets omitted).
56. Of Ackerman, one may say what Julius Goebel wrote of William Crosskey: “Coming to his task with a new axe to grind [he] has seemingly forsworn all canons of objectivity to make himself a grindstone to suit his purposes.” Julius Goebel, Jr., Book Review, 54 COLUM. L. REV. 450, 451 (1954). Robert Jastrow observed that “when our beliefs are in conflict with the evidence,” “[w]e become irritated.” Robert Jastrow, Have the Astronomers Found God?, N.Y. TIMES, June 25, 1978, § 6 (Magazine) at 18, 19. Richard Kay wrote that the desegregation and reapportionment decisions “have now become almost second nature to a generation of lawyers and scholars. Thus, it is hardly surprising that the casting of a fundamental doubt on such basic assumptions should produce shock, dismay, and sometimes anger.” Richard S. Kay, Book Review, 10 CONN. L. REV. 801 (1978).
57. ACKERMAN, supra note 1, at 91.
58. Id. at 92. Ackerman charges that I have “trivialized Time Two [the Recon-
to the historical character of Republican Reconstruction.®

Ackerman ignores what Chief Justice Marshall called "the most sacred rule of interpretation," resort to the "intention."® Summarizing the common law in 1736, Matthew Bacon stated, "Everything which is within the Intention of the Makers of a Statute is, although it be not within the Letter thereof, as much within the statute as that which is within the Letter."® The Framers of the Fourteenth Amendment made clear that we were to be guided by their intention.

Senator Charles Sumner, arch-protagonist of all-out antidiscrimination, 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."® His view was shared by confreres in the 39th Congress. In 1871, John Farnsworth said of the Amendment, "Let us see what was understood to be its meaning at the time of its adoption by Congress . . . ."® James Garfield, later the martyred president, rejected an interpretation that went "far beyond the intent and meaning of those who framed and those who amended the Constitution."® 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 construing the Constitution we are compelled to give it
such interpretation as will secure the result which was intended to be accomplished by those who framed it and the people who adopted it.

... A construction which should give the phrase... a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution... This is the rule of interpretation adopted by all commentators on the Constitution, and in all judicial expositions of that instrument.

Now for some uncontroverted proof that the framers deemed the Bill and section one of the Fourteenth Amendment to be identical. George Latham stated that “the ‘civil rights bill,’ which is now a law, ... covers exactly the same ground as this amendment.” 66 Martin Thayer said, “[I]t is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law...” 67 An early activist, Howard Jay Graham, wrote that “[v]irtually every speaker in the debates on the Fourteenth Amendments [sic]—Republicans and Democrats alike—said or agreed that the Amendment was designed to embody or incorporate the Civil Rights Act.” 68 Horace Flack, a broad constructionist of the Amendment wrote, “[N]early all said that it was but an incorporation of the Civil Rights Bill... [T]here was no controversy or misunderstanding as to its purpose and meaning.” 69 More recently Charles Fairman wrote, “Over and over in this debate [on the Amendment] the correspondence between Section I of the Amendment and the Civil Rights Act is noted. The provisions of the one are treated as though they were essentially identical with those of the other.” 70 And Justice Bradley, a contemporary of the Amendment, declared that “the first section of the bill covers the same ground as the fourteenth amendment.” 71

65. Id. at 571.
66. CONG. GLOBE, 39th Cong., 1st Sess. 2883 (1866).
67. DEBATES, supra note 40, at 213.
68. HOWARD J. GRAHAM, EVERYMAN’S CONSTITUTION 291 n.73 (1968).
70. Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN. L. REV. 5, 44 (1949).
On the ratification trail in August 1866, Senator Trumbull "clearly and unhesitatingly declared [section one of the Amendment] to be 'a reiteration of the rights as set forth in the Civil Rights Bill."" Indiana Senator Lane "affirmed Trumbull's statement concerning the first section," and Senator Sherman of Ohio endorsed those views in a speech on September 29, 1866. Senator Poland of Maine spoke to the same effect in November 1866. In sum, Joseph James concluded, "statements of congressmen before their constituents definitely identify the provisions of the first section of the amendment with those of the Civil Rights Bill." Ackerman's neglect to comment on this history, spread before him in my writings, speaks volumes.

"For correctives" to my "exceptionally tendentious...treatment of the sources" he cites Jacobus tenBroek, William Nelson, and Michael Curtis, without noting my painstaking critiques of tenBroek and Nelson, or Forrest McDonald's judgment that my refutation of Curtis is "utterly devastating." So too, he ignores Henry Monaghan's statement that "Berger's uncomfortable and unfashionable analysis is an important one. It will not do, as some have already done, to brush it aside in a peremptory manner." Sanford Levinson wrote, "[I]t is naive to pretend that...we can so easily shed the view..."
of the Constitution, and its limits, articulated by Berger." 82 My *Government by Judiciary* won praise from Willard Hurst, 83 Philip Kurland, 84 Forrest McDonald, 85 and C. Vann Woodward, 86 scholars of higher stature than Curtis and Nelson. 87 What sort of scholarship is it that prefers the testimony of a tyro like Curtis to that of renowned scholars? 88

Ackerman charges that I have "trivialized [the Reconstruction era] by characterizing its constitutional amendments as superstatutes." 89 "Superstatutes" is his characterization, not mine. Let me set forth still other historical facts that demonstrate the framers' narrow aim. Late in the discussion of the Amendment, Senator James Patterson, who voted for it, declared, "[I] am opposed to any law discriminating against [blacks] in the security and protection of life, liberty, person, property, and the proceeds of their labor . . . . Beyond this I am not prepared to go." 90 Such remarks arose from the "commitment to traditional state-federal relations," 91 so that Alfred

83. "This is a major piece of work, and a very illuminating one." Willard Hurst, *Dust Jacket* to BERGER, *supra* note 33.
85. Forrest McDonald regards *Government by Judiciary* as "indispensable," "definitive," "prodigious research," and comments that my "work was herculean, brilliant, and irrefutable." McDonald, *supra* note 80, at 29-31.
86. "Raoul Berger's *Government by Judiciary* raises scores of fascinating questions that no one in the field can afford to ignore." C. Vann Woodward, *Dust Jacket* to BERGER, *supra* note 33. Jacobus tenBroek, an early neo-abolitionist, wrote that the principal spokesmen and theorists of the abolitionist movement, Lysander Spooner and Joel Tiffany, regarded "privileges and immunities" as a right to "full and ample protection in the enjoyment of [the blacks'] personal security, personal liberty, and private property, . . . protection against . . . oppression . . . [and] against lawless violence." TENBROEK, *supra* note 43, at 110. Those like William Nelson, who invoke abolitionist theorizing for reading their social aspirations into the Fourteenth Amendment, go beyond their leading spokesmen. See Berger, *supra* note 79.
87. Such neophytes are transformed by the activists into "authorities" on the adage "any stick to beat a dog."
88. Writing to Justice Holmes, Harold Laski considered it a just criticism that a writer "has no sense of the proportionate value of his authorities." Letter from Harold J. Laski to Justice Oliver Wendell Holmes (Jan. 6, 1934), in 2 HOLMES-LASKI LETTERS 1463 (Mark D. Howe ed., 1953). Philip Kurland wrote, "Berger's touchstone has been the text of the Constitution in light of the history of its origins. It is this stance that has made him anathema to so many of our sitting professors of constitutional law and political science." Kurland, *supra* note 84, at i.
89. ACKERMAN, *supra* note 1, at 91.
90. CONG. GLOBE, 39th Cong., 1st Sess. 2699 (1866).
91. Alfred H. Kelly, *Comment on Harold M. Hyman's Paper*, in NEW FRONTIERS
Kelly—who helped the NAACP prepare the desegregation case—stated, “the radical Negro reform program could be only a very limited one.”92 Justice Harlan justly described as “irrefutable and still unanswered”93 the evidence that suffrage, the quintessential right, was excluded from the ambit of the amendment.94 Time and again proposals to bar all forms of discrimination were rejected.95

Then there is a remarkable incident on which no activist, Ackerman included, has seen fit to comment. John Bingham, draftsman of the Amendment, vehemently objected to the “oppressive” words “civil rights” in the Civil Rights Bill because they would reach racial discrimination “in any of the civil rights of the citizen,” and would “reform the whole civil and

92. Kelly, supra note 91, at 55 (emphasis added).
94. Senator Sumner regarded suffrage as “the only sufficient guarantee,” without which the Fourteenth Amendment was inadequate to protect the blacks in anything. CONG. GLOBE, 39th Cong., 1st Sess. 685 (1866); see also CONG. GLOBE, 40th Cong., 3d Sess. 1008 (1869). Justices Stone, Brandeis, and Cardozo, dissenting in Colgate v. Harvey, 296 U.S. 404, 443 (1935), rested on solid ground when they stated that the Fourteenth Amendment “created no new privileges and immunities of United States citizenship.”

Section 2 of the Fourteenth Amendment provides that if suffrage is denied on account of race, the State’s representation in the House of Representatives shall be proportionately reduced. Senator Fessenden, Chairman of the Joint Committee on Reconstruction, explained that the Amendment “leaves the power where it is; but tells them [the States] most distinctly, if you exercise that power wrongfully, such and such consequences will follow.” DEBATES, supra note 40, at 143. Senator Howard observed, “[T]he States retain the power . . . of regulating the right of suffrage in the States . . . . [T]he theory of this whole amendment is, to leave the power of regulating the suffrage with the people or Legislatures of the States, and not to assume to regulate it . . . .” Id. at 237. John Bingham stated, “The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.” Id. at 217. The Joint Committee commended Section 2 because it “would leave the whole question with the people of each State.” Id. at 94.
95. BERGER, supra note 33, at 163-64.
criminal code of every State government.\textsuperscript{96} His expostulation led to the deletion of "civil rights or immunities." James Wilson, chairman of the House Judiciary Committee, explained that this deletion was accomplished in order to afford no ground "for a latitudinarian construction not intended," and to bar any construction going "beyond the specific rights named in the section."\textsuperscript{97} Why, I call upon Ackerman to explain, did Bingham, after vigorously protesting against the "oppressive" scope of "civil rights" in the Bill, switch to that very breadth in the "privileges or immunities" of the Amendment? It is more reasonable to conclude that "privileges and immunities" had become words of art having limited meaning.\textsuperscript{98} On this score, lastly, the two leaders, Thaddeus Stevens and Senator Fessenden, confessed that the Amendment had fallen short of their hopes. Stevens settled for less notwithstanding his hope that the people "would have so remodeled all 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{99}

Fessenden also recognized that "we cannot put into the Constitution, owing to existing prejudices and existing institu-

\textsuperscript{96} \textsc{Debates, supra} note 40, at 186, 188 (emphasis added).
\textsuperscript{98} After reading the judicial constructions to the Senate, Trumbull noted, "this being the construction as settled by judicial decisions." \textsc{Debates, supra} note 40, at 122. And William Lawrence "concede[d] that the courts have by construction limited the words 'all privileges' to mean only 'some privileges.'" \textit{Id.} at 207. In a similar context the Supreme Court said, "[W]e should not assume that Congress... used the words... in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation." \textsc{Yates v. United States}, 354 \textsc{U.S.} 298, 319 (1957) (emphasis added); see also \textsc{United States v. Burr}, 25 \textsc{F. Cas.} 55, 159 (C.C.D. Va. 1807) (No. 14,693) (Marshall, C.J.).

Bingham himself concurred in a limited meaning. On January 30, 1871, he submitted a Report of the House Judiciary Committee reciting that the privileges or immunities of the Fourteenth Amendment refer to none "other than those privileges and immunities embraced in the original text of the Constitution, article 4, section 2. The fourteenth amendment... did not add to the privileges or immunities before mentioned... ." \textsc{Debates, supra} note 40, at 466; see also \textsc{supra} note 51.
\textsuperscript{99} \textsc{Debates, supra} note 40, at 237.
tions [racism and states' rights], an entire exclusion of all class distinctions." Ackerman's total disregard of the facts herein detailed is far more incompatible with scholarly integrity than my italicization and use of ellipses.

This does not exhaust Ackerman's disregard of historical facts, his straining after "fancy theor[ies]" which confessedly have no appeal to "lawyer or judge," and which pepper his pages. To compare them with the facts would be to pad this article with cumulative evidence that would weary the reader. Instead I have followed his example: "One example should be enough to encourage you to treat Berger's use of sources with extreme caution." He seized on a solitary evidentiary detail for a reading that is countered by all of the other facts. I have rebutted his sweeping allegations by marshalling incontrovertible evidence on two central issues: (1) the scope of "privileges and immunities" and (2) the identity of the Civil Rights Act and the Fourteenth Amendment.

Why do I dwell on the importance of constitutional history? Justice Horace Gray, himself no mean historian, considered that "all questions of constitutional construction" were "largely . . . historical question[s]." That follows from considerations of enduring importance. Ours is a government founded on the consent of the governed. "The people," declared James Iredell, one of the ablest of the Founders, "have chosen to be governed under such and such principles. They have not chosen to be governed, or promised to submit, upon any other . . . ." Any light upon the scope of their consent, what they sought to accomplish, is therefore of utmost importance. Gripped by fear of the greedy expansiveness of power, the Framers steered by a basic principle to crib and confine all delegated power.

101. Ackerman, supra note 1, at 17.
102. Id. at 334 n.21.
103. Sparf v. United States, 156 U.S. 51, 169 (1895) (Gray, J., dissenting). After commenting on Gray's dissent, Mark DeWolfe Howe observed, "There can be no question but that he made important contributions to knowledge of the legal past in a number of his judicial opinions." Mark D. Howe, Justice Oliver Wendell Holmes: The Proving Years 1870-1882, at 116 (1963). Gray "was quite properly conceived to be a legal historian of exceptional competence." Id.
104. 2 George J. McRae, Life and Correspondence of James Iredell 146 (1949).
105. Bernard Bailyn tells us that the colonists interminably dwelt on power's "endlessly propulsive tendency to expand itself beyond legitimate boundaries." Bernard Bailyn, The Ideological Origins of the American Revolution 56 (1967); see also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).
Words were employed to keep the delegates from "mischief," Jefferson declared, by the "chains of the Constitution." Hence a written Constitution is subverted by a theory that frees the justices to jettison the meaning attached by the Framers to their words in favor of the justices' own.

In a review of my Government by Judiciary in the London Times, Max—now Lord—Beloff, an Oxford emeritus and long-time student of American constitutionalism, wrote, "The quite extraordinary contortions that have gone into proving the contrary make sad reading for those impressed by the high quality of American legal-historical scholarship." Ackerman has added an even more extraordinary chapter to such "scholarship."

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106. 4 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON ADOPTION OF THE FEDERAL CONSTITUTION 440 (1836).