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Constitutional Interpretivism: Its Allure
And Impossibility†

JOHN HART ELY*

The central dispute in constitutional theory has gone under different names at different times, but today's terminology seems as helpful as any.1 Today we are likely to call the contending sides "interpretivism" and "noninterpretivism"—the former indicating that judges deciding constitutional issues should confine themselves to enforcing values or norms that are stated or very clearly implicit in the written Constitution, the latter indicating the contrary view that courts should go beyond that set of references and enforce values or norms that cannot be discovered within the four corners of the document.2 It would be a mistake to suggest, though detractors sometimes try, that there is any necessary correlation between an interpretivist approach to constitutional adjudication and political conservatism or even what is commonly called judicial self-restraint. An interpretivist approach by no means necessarily finds unconstitutional only those things the framers of the provision in question, if asked, would have listed as unconstitutional.3 Its point is

†Copyright 1978 by John Hart Ely. All rights reserved. A shorter version of the text of this article was delivered on February 7, 1978, by Professor Ely at the Indiana University School of Law as part of the Addison C. Harris lecture series. It is an adaptation of part of a book in progress on judicial review and representative government.


1As shall become clear soon enough, "activism" and "self-restraint" are categories that cut across interpretivism and noninterpretivism, virtually at right angles. "Strict constructionism" is a term that certainly might be used to designate something like interpretivism; unfortunately it has been used more often, perhaps most notably in recent years by President Nixon, to signal what is patently a quite different thing, a proclivity to reach constitutional judgments that will please political conservatives. The interpretivism-noninterpretivism dichotomy stirs a longstanding debate that pervades all of law, that between "positivism" and "natural law." Interpretivism is about the same thing as positivism, and natural law approaches are surely one form of noninterpretivism. But these older terms are just as well omitted here, since they have acquired baggage that can mislead. "Positivism" has often been characterized by its opponents as incorporating the opinion—obviously not a necessary part of constitutional interpretivism nor even possible in the thought of a civilized person—that positive law cannot be condemned as immoral. See L. STRAUSS, NATURAL RIGHT AND HISTORY (1953); L. FULLER, THE LAW IN QUEST OF ITSELF 18 (Beacon ed. 1966). But see Howe, The Positivism of Mr. Justice Holmes, 64 HARV. L. REV. 529, 544 (1951). "Natural law" has historically been identified with the view that there exists a higher moral law, likely writ by God, of universal and timeless validity. This obviously does not exhaust the possible noninterpretive approaches to the Constitution. The words therefore have some background relevance, but are better left out of the debate. Invocation of either would be something of a cheap shot.

2Grey, Do We Have An Unwritten Constitution?, 27 STAN. L. REV. 703 (1975). These specific terms may be new, but the issue has been with us throughout our history. See, e.g., T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS *164, 168 (2d ed. 1871); Calder v. Bull, 3 Dall. 386 (1798).

3Such an approach is possible, see R. BERGER, GOVERNMENT BY JUDICIARY (1977), but very unusual.
that the Constitution is a legal document to be interpreted like other legal
documents, in accord with its language and purpose. The language and
legislative history of our Constitution, however, seldom suggest an intent to
invalidate only a small set of historically understood practices. (If that had
been the point the practices could simply have been listed.) More often it
proceeds by briefly indicating certain fundamental principles whose general
purport is clear enough but whose specific implications for each age were
meant to be determined in contemporary context. What distinguishes inter-
pretivism from its opposite is its insistence that the work of the political bran-
ches is to be invalidated only in accord with an inference whose starting
point, whose underlying premise, is fairly discoverable in the Constitution.
That the complete inference will not be found there—because the situation is
not likely to have been foreseen there—is common ground.

Surely no one who watched the late Justice Hugo Black stand, almost
alone, against the variety of novel threats to freedom of expression the
legislators and executives of the 1940's and 1950's were able to devise could
suppose that a historically straitjacketed literalism was any part of his con-
stitutional philosophy. Yet Black is recognized, correctly, as the quintessential
interpretivist. There are those who have suggested that this interpretivism
came late in Black's life and is best understood as the conservatism of an old
man. But although it is true it was most dramatic in his 1965 dissent in
Griswold v. Connecticut, it was unmistakably there all along. For example,
Black's career-long battle to make the fourteenth amendment's due process
and privileges or immunities clauses mean not that state officials were
precluded from acting in any way a majority of the justices thought unciviliz-
ed, but rather to incorporate the Bill of Rights' prohibitions against federal
action, was obviously a battle for an interpretivist approach. There were
those who wanted those clauses to incorporate the Bill of Rights and outlaw
other (undefined) forms of uncivilized behavior as well, but Black made clear
from the beginning he was not among them: the clauses incorporated prin-
ciples expressed elsewhere in the Constitution and that was it. It happened,

4E.g., G. SCHUBERT, THE CONSTITUTIONAL POLITY 118-27 (1970); sources cited Ulmer, The
Longitudinal Behavior of Hugo Lafayette Black: Parabolic Support for Civil Liberties,


6Some things did happen to Black as he stayed too long on the bench. His ability to reason
by analogy, to sense the relevance of constitutionally stated principles in unfamiliar settings, did
atrophy somewhat. E.g., Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., joined by
Black, J., dissenting); Wyman v. James, 400 U.S. 309 (1971) (Black, J., joining in the opinion of
the Court); Katz v. United States, 389 U.S. 347, 364 (1967) (Black, J., dissenting). And the old
judge who had spent so many years widening and paving the avenues of legal redress displayed a
sense of betrayal that distorted analysis when someone would shun those avenues for the yellow
brick road of civil disobedience. E.g., Brown v. Louisiana, 383 U.S. 131, 167-68 (1966) (Black,
J., dissenting). But the interpretivism was there all along. E.g., Freund, Mr. Justice Black and
the Judicial Function, 14 U.C.L.A. L. REV. 467 (1967); Yarbrough, Justices Black and Douglas:

7See Adamson v. California, 332 U.S. 46 (1947); see Duncan v. Louisiana, 391 U.S. 145
(1968).
of course, that in enforcing the principles stated in the Constitution, Black was generally in the position of enforcing liberal principles, and there is every reason to suppose that suited him fine. But when his constitutional philosophy (interpretivism) and his political philosophy (liberalism) diverged, as they did in *Griswold*, "the Judge" went with his constitutional philosophy.

**THE ALLURE OF INTERPRETIVISM**

There are signs that interpretivism may presently be entering a period of comparative popularity.\(^8\) A couple of reasons for this seems apparent. The first is that 1973's controversial abortion decision, *Roe v. Wade*,\(^9\) was the clearest example of noninterpretivist "reasoning" on the part of the Court in four decades: it forced all of us who work in the area to think about which camp we fall into, with the result that a number of persons would today label themselves interpretivists who had not previously given the matter much notice. The second factor, which may seem paradoxical harnessed with the first, is that the Burger Court, *Roe* notwithstanding, is by and large a politically conservative Court. That means that observers who might have been content to let the Justices of previous Courts enforce their own values (or their rendition of society's) are now somewhat uneasy about doing so and are more likely to pursue an interpretivist line, casting their lot with the values of the framers.

Still another reason is a more personal one, that Justice Black, who died in 1971, is himself enjoying something of a renaissance. His softspoken charm was always apparent to those who were not his rivals, and that he stood where a person had to stand when it counted to do so has been apparent for some time. But there seems to be something new, a growing intellectual appreciation of Hugo Black. People are discovering what to the perceptive was obvious all along, that behind Black's "backward country fellow" philosophy, with its obviously overstated faith that the language of the Constitution would show the way, there lay a fully elaborated (though surely debatable) theory of the limits of legitimate judicial discretion and the hortatory use of principle. The afterglow of longtime antagonist Felix Frankfurter's pyrotechnics having faded, people can see Black in natural light and are discovering, to their amazing amazement, that he was only posing as a rustic.

Interpretivism is no mere passing fad, however; in fact the Court has always, when it was plausible, tended to talk an interpretivist line.\(^10\) And indeed it is possible to identify three interrelated substantive attractions of the


\(^{9}\)410 U.S. 113 (1973).

\(^{10}\)See, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 3-4 (1971); Grey, *supra* note 2, at 706 ("[I]f judges resort to bad interpretation in preference to honest exposition of deeply held and unwritten ideals, it must be because they perceive the latter mode of decision making to be of suspect legitimacy."). Cf. Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 55 B.U. L. REv. 765, 781 (1973) (suggesting the phenomenon has been particularly pronounced in recent years).
interpretivist approach relative to a noninterpretivist approach. The first is that it better fits our usual conceptions of what law is and the way it works. In interpreting a statute, in order to decide whether certain private behavior is authorized or whether (and this is closer to the constitutional review situation) it conflicts with another statute, a court will obviously limit itself to a determination of the purposes and prohibitions expressed by or implicit in its language. Were a judge to announce in such a situation that she was not content with those references and intended additionally to enforce, in the name of the statute in question, those fundamental values she believed America has always stood for, we would conclude that she was not doing her job, and might even consider a call to the lunacy commission.\(^{11}\)

The second problem with the noninterpretivist mode has to do with the sort of review to which, at least in its dominant form,\(^ {12}\) it is likely to lead (and has in fact led over time). A judge who thinks that courts are authorized by the Constitution to intervene only on the indicated occasions and from the indicated perspectives, is likely to intervene, when he does, with a vengeance. This surely was Justice Black's way: he felt he had been given a limited number of jobs to do and he made sure he did them. The felt mandate of the typical noninterpretivist, however, is not thus limited.

\[\text{[I]ts vague, open-ended, developmental quality qualifies it as a basis for broad judicial discretion in protecting society against the procedural or substantive excesses of the political branches. The courts "find" and apply higher law principles to promote a free, fair, and just society. [It] allows a court to take care of the textually unprovided-for case of unconstitutionality, to go beyond the "relatively" precise and therefore limited nature of the constitutional clauses dealing with free speech, freedom of religion, impairment of the obligation of contracts and the like.}^{13}\]

One might expect that a judge who thought he had this kind of general commission to review every act of government for its consistency with civilized

\(^{11}\)Of course the key question is whether the Constitution is different in this respect. That it is not seems rather clearly to have been the assumption underlying Chief Justice Marshall's opinion for the Court in Marbury v. Madison, 1 Cranch 137 (1803), which established the power of judicial review. Marshall's inference, which depends heavily on the assumption that constitutional review involves merely the traditional judicial function of comparing one legally prescribed mandate with another to see if they conflict, is one that obviously flows much more comfortably if one assumes an interpretivist approach to construing the Constitution. It is no accident that Alexander Bickel, surely the preeminent noninterpretivist constitutional theorist of our age, was also preeminent in his criticism of the logic of Marshall's opinion. See A. BICKEL, THE LEAST DANGEROUS BRANCH 1-14 (1962).


standards would end up, given the flagrancy of the contradiction of
democratic principles, reviewing nothing very seriously: the force of one's
principles often varies inversely with their range. 14 But in practice noninter-
pretivism does not always work out so predictably. For no matter how
restrained they may appear in theory, vague and untethered standards in-
evitably lend themselves to the virtually irresistible temptation to intervene
when one's political or moral sensitivities are sufficiently affronted. 15 This
criticism should not be overstressed, however, if only because no one is in a
position to cast the first stone. 16 There will inescapably be opportunity for the
influence of political predilection in any methodology, certainly including my
own, and certainly including interpretivism as well. There is always room to
disagree over the meaning of a principle expressed in the Constitution, and
one's opinions on such questions can hardly fail to be influenced
somewhat—though I hope we shall always judge judges in part by their
capacity to resist—by the degree of one's personal sympathy with the prin-
ciple expressed. But at least the interpretivist, in the language of the Constitu-
tion, has a relatively (though no one could claim it is more than relatively)
clear starting place. As Judge J. Skelly Wright has written:

No matter how imprecise in application to specific modern fact situations,
the constitutional guarantees do provide a direction, a goal, an ideal citizen-
government relationship. They rule out many alternative directions, goals,
and ideals. 17

The noninterpretivist mode rejects any such restriction on the set of starting
premises, and the result—though whether it is inevitably so is another ques-
tion—has been a history of review that is generally restrained, with occasional
energetic interludes whose episodicality suggests, if not the imposition of
unusually felt political preference, at least a reliance on sources so amorph-
ously defined and susceptible to unassessable application as to undercut the
values we usually associate with a rule of law. Justice Black put it this way:

Since Marbury v. Madison . . . was decided, the practice has been firmly
established, for better or worse, that courts can strike down legislative enact-
ments which violate the Constitution. This process, of course, involves inter-
pretation, and since words can have many meanings, interpretation obviously
may result in contraction or extension of the original purpose of a constitu-

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Linde, Due Process of Lawmaking, 55 NEB. L. REV. 197, 252 (1976) ("A court which sees its
function as weighing social and personal interests in reviewing laws under the fifth or the four-
teenth amendment will likely have the same view of its function under the first amendment. . . .")
15 Compare, e.g., Flemming v. Nestor, 363 U.S. 603 (1960) (Harlan, J., for the Court), with
17 Wright, Professor Bickel, The Scholarly Tradition, and the Supreme Court, 84 HARV. L.
REV. 769, 785 (1971).
tional provision, thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of "natural law" deemed to be above and undefined by the Constitution is another. "In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people."\textsuperscript{18}

This quotation bridges into the third (and most serious) general objection to the usual brand of noninterpretivism—that it is not simply untethered but undemocratic as well. It is true that the United States is not run town meeting style. (Few towns are either, for that matter). Most political decision authority is delegated to people who do not themselves have to stand for reelection. But those people work for, and are accountable to, people who do have to stand for reelection (and indeed sometimes seem to spend little of their time thinking of anything else). Judges, at least federal judges, on the other hand, while they obviously are not entirely oblivious to popular opinion, are neither elected nor reelected.

\[N\]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.\textsuperscript{19}

Of course courts make law all the time, and in doing so they presumably draw upon the standard sources of the noninterpretivist—society's "fundamental values" or whatever—but outside the area of constitutional adjudication, they do so in a so-called "common law" context, filling the gaps the legislature has left in the laws it has passed or, perhaps, taking charge of an entire area the legislature has left to judicial development. But there is obviously a critical difference between this common law function and constitutional interpretation. In common law contexts, the court's decisions are subject to overrule or alteration by ordinary statute. The court is filling in for the legislature, and if it has done so in a way the legislature does not like, it can soon be told and corrected. But when a court, speaking in the name of the Constitution, invalidates an act of the political branches it is by definition thwarting them, overruling their judgment, and in addition is doing so in a way that is not subject to "correction" by the ordinary lawmaking process.


\textsuperscript{19}A. BICKEL, supra note 11, at 19. This claim will be defended further in a subsequent chapter of the book of which this article is a part. See also, e.g., Choper, The Supreme Court and the Political Branches: Democratic Theory and Practice, 122 U. PA. L. REV. 810 (1974).
Thus the central function, and it is at the same time the central problem, of judicial review becomes apparent. A body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they would like. That may be desirable or it may not, depending on the principles employed. We will want to ask whether anything else is any better, but the usual brand of noninterpretivism, with its appeal to some notion to be found neither in the Constitution nor (obviously) in the judgment of the political branches, seems especially vulnerable, though here too we shall want to ask whether it is necessarily so, to a charge of inconsistency with democratic theory.

This, in America, is a charge that matters. We have as a society from the beginning, and now almost instinctively, accepted the notion that democracy is and has to be our form of government. Probably in part precisely because we are so accustomed to the assumption that this is the way it must be, democracy, though often praised, is seldom defended, and indeed it seems fair to say that the case for it cannot be stated in any airtight way. It has been justified as a system unusually calculated to minimize the likelihood of physical strife and in addition to encourage public awareness regarding public issues. But the former seems at least arguable factually and the latter seems to transpose means and ends. Part of the point, of course, is that two heads often are better than one, and assuming equal qualifications a majority of many is probably more likely to choose wisely than a majority of one or a few. But obviously this is not all that is going on: for one thing, we make no serious effort in qualifying electors to ensure the truth of the inference's necessary premise, that the electorate be comprised of persons whose individual chances of choosing wisely are better than even. Thus probably a more important connection is that between democracy and the philosophical tradition of utilitarianism, which in some rough and often unconscious form supplies the core apparatus in terms of which most issues, if not of personal morality and behavior then at least of public policy, are decided in our society.

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20See also, e.g., T. WELDON, THE VOCABULARY OF POLITICS 87 (1953).
21See F. HAYEK, THE CONSTITUTION OF LIBERTY 107-08 (1960); H. SIDGWICK, ELEMENTS OF POLITICS 615-16 (1929).
22It could probably be reshaped into a more meaningful point about providing to people of all classes a source of aspiration and pride.
24Utilitarianism was, of course, a philosophy devised by its originators principally for the realm of public decisions. See Williams, A Critique of Utilitarianism, in J. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST 135 (1973). Critics often fail in a rather conspicuous way, see id. at 136, to note this fact when taxing utilitarianism with the attribution of "negative responsibility," that is, with failing to draw an ethical distinction between those consequences one brings about by his own act and those he consciously fails to prevent. See id. at 97-99. I think the objection fails on its own terms even when directed at the realm of private behavior. But it surely has little, if indeed it has any, application to governmental policy choices.
In the pure form in which it was originally presented, designating as moral that course of action that will generate the greatest happiness of the greatest number of people, utilitarianism is certainly vulnerable to attack. Many, perhaps most, of us will feel so strongly about certain things that we will at some point be moved to qualify the utilitarian balance with a set of Thou Simply Shalt Not's called "rights," "side constraints" or perhaps something else. And even if that impulse to qualify utilitarianism is of arguable legitimacy, there is another that seems rather plainly not to be: inherent in utilitarianism is a problem of equity that simply cannot be ignored. An ethical system that was serious in demanding only the greatest happiness of the greatest number would have to count as moral a world in which 75% of the people systematically promoted their own happiness at the expense of the other 25% in circumstances where no one could say there was a relevant difference between the two classes. Now this is more than a little troubling, in fact if uncorrected it is fatal, and philosophers and societies have been forced, with varying degrees of success, to find mechanisms for correcting it.

Whether utilitarianism adjusted to take account of the costs of inequality still merits the name utilitarianism is an issue that has received attention elsewhere but will not receive any here. What is important to an attempt to understand the seemingly inexorable appeal of democracy in America is that whether we admit it or not—which is largely a function of whether our descriptive eye is distracted by the side constraints and distributional corrections or rather remains on the underlying system being corrected—we are all, at least as regards the beginnings of our analysis of proposed governmental policy, utilitarians. There may be, indeed there must be, further steps, but the formation of public policy, at least in this country, begins with the questions how many are helped, how many hurt, and by how much.


See, e.g., B. Williams, Morality 103 (1972).

See, e.g., Brock, Recent Work in Utilitarianism, 10 Am. Phil. Q. 241, 263-64 (1973).

The only requirement would be that the increase in happiness to the exploiters exceed (or equal) the decrease in the happiness of the exploited. To deny that this is possible would be obvious obscurantism: slavery, for example, probably increases the happiness of the masters at least as greatly as it decreases that of the slaves.

I shall be suggesting later in the book of which this is a part that the correction of such problems of inequitable distribution is what judicial review ought in large measure to be about. The call for side constraints, which is of course considerably more controversial even at the philosophical level, will not figure in the constitutional scheme I shall be suggesting, save only when the right involved is guaranteed by the positive law of the Constitution or is necessary to the successful functioning of the democratic process. Even assuming further side constraints on a utilitarian morality are appropriate, their content should be determined, I shall argue, by the democratic process rather than in accord with a philosophical system one or more commentators may find appealing.

E.g., Brock, supra note 27, at 265-66.
The way this connects with democracy is fairly obvious. It is possible to assert, I suppose, that the best way to find out what makes the most people happy is to appoint someone to make an estimate, but no one could really buy this idea. The more sensible way, quite obviously, is to let everyone register her own preference. There are many subjects on which I am prepared to yield to the expertise of others; the subject of what makes me happy is not among them. Thus democracy is a sort of applied utilitarianism—unfortunately possessing utilitarianism’s weaknesses as well as its strengths—an institutional way of determining the happiness of the greatest number. Indeed, the connection is still more sophisticated than this, in a way that is not customarily appreciated. By its usual reference to the greatest happiness of the greatest number, utilitarianism factors in intensities of preference: mere nose-counting is correctly assumed to be morally incomplete. But despite the bromide that democracy is blind to such intensities, it quite plainly is not. Those whose happiness is less markedly affected by a given outcome are obviously less likely to bother trying to persuade others how to vote or even for that matter to vote themselves. Moreover, as private citizens we seldom get a chance to vote directly on issues, typically voting instead for candidates for office. Of course candidates tell us (sometimes) how they stand on the various issues that have been identified as such, but more often than not we will be confronted with a choice among several candidates who all hold some positions with which we disagree: we have to buy a bundle, and we are bound not to like some of the ingredients.

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1 Cf. id. at 244-45:
[Narveson’s] point is to make utilitarianism neutral with regard to the question of non-moral value—to accept whatever people think has such value, or is good or desirable for its own sake—and to make utilitarianism only a theory of moral value, specifically that acts have moral value only to the extent that they are conducive to the production of non-moral value or utility. . . . Any alternative to this approach ultimately requires a substantive theory of value which asserts that some states of affairs are valuable for X whether or not they are in fact valued or preferred by X. See also, e.g., Kuflik, supra note 23, at 301-02.

2 Professor Dworkin asserts that it is appropriate to count in utilitarian calculations—at least those that result in the constraint of liberty (a class he earlier recognizes to encompass essentially all public decisions, R. Dworkin, Taking Rights Seriously 262 (1977))—only personal preferences (for one’s own enjoyment) and not external preferences (for the enjoyment of others). Id. at 234, 262. See also Kuflik, supra note 23, at 303. Why this should be so is not made to appear by argument, and indeed it seems wrong: there is nothing unworthy of moral recognition in getting one’s happiness from what one perceives as beneficial impacts on persons other than himself. (I suppose it is a form of double-counting, but it’s a justifiable form. If A’s immediate happiness makes both A and B happy, A’s immediate happiness should be counted both times). But however that may be, Dworkin admits that whatever significance the distinction may have at the level of moral philosophy, it is of limited practical significance: “democracy cannot discriminate, within the overall preferences imperfectly revealed by voting, distinct personal and external components, so as to provide a method for enforcing the former while ignoring the latter.” R. Dworkin, supra, at 276.


4 E.g., R. Dworkin, supra note 32, at 276; Brock, supra note 27, at 246.

Now obviously such choices are not made by somehow "counting" the total number of issues and computing a sort of batting average: that exercise would not even be intelligible. Rather, we put most weight on those issues about which we care most. Beyond that, at the point where laws are actually made, our various representatives obviously allocate their persuasive energies (and barter their votes) in accord with the intensity with which they (and their estimate of the intensity with which we) care about various issues. The reflection of intensity is surely far from perfect, money being perhaps the most obvious distorting element, but it remains true, the bromide notwithstanding, that representative democracy as practiced in America is a system that in several ways is programmed to register the intensities of preference that utilitarianism makes crucial.

But however helpful this connection may or may not be, the fact that is critical here is that throughout our history America has defined and designed its governmental system around the core concept of representative democracy. The very process of adopting the Constitution was designed to be, and in important respects it was, more democratic than any that had preceded it. The Declaration of Independence had not been ratified at all, and the Articles of Confederation had been ratified by the various state legislatures. The Constitution, however, was submitted for ratification to "the people themselves," actually to "popular ratifying conventions" elected in each state. A few spoilsports, such as Noah Webster, pointed out that this was not significantly more "democratic" than submitting the document to the state legislatures (since the conventions themselves would necessarily be representative bodies and much the same cast would likely be chosen as the people's representatives). But the symbolism was, and remains, important nonetheless. The document itself, in providing for congressional elections and prescribing a republican form of government for the states, expresses its clear commitment to a system of representative democracy at both the federal and state levels. Indeed, and this surely is remarkable, no other form of government was given even passing consideration. A passage from Federalist 39—and remember The Federalist was propaganda, designed to assure ratification—testifies eloquently to the day's assumed necessities of effective argument:

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Cf. R. Luce & H. Raiffa, Games and Decisions 36 (1967).


G. Wood, supra note 37, at 379.


The first question that offers itself is, whether the general form and aspect of the government be strictly republican? It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.42

And just what was this inevitable "republican" form? The passage that follows immediately makes clear it was what today might more likely be called a representative democracy.

[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it...43

It is also instructive that once the Constitution was ratified—and it is sometimes forgotten what a close thing that was44—virtually everyone in America accepted it immediately as the document controlling his destiny.45 Why should that be? Those who had opposed ratification certainly hadn't agreed to anything, hadn't entered into any contract.46 It's quite remarkable if you think about it, and the explanation has to be that for whatever reason they too accepted the legitimacy of the majority's verdict. The result of the passionately contested election of 1800, barely a decade into our constitutional republic, was also and for similar reasons accepted as binding by all, despite the apprehended (if never realized) "radical" threat to the powerful.47

Populist critics like to stress the Constitution's provisions for the election of Senators by the state legislatures and the election of the President by an

43Id. at 280-81.
44See, e.g., Henkin, Constitutional Fathers—Constitutional Sons, 60 Minn. L. Rev. 1113, 1143 (1977).
46See also J. Story, Commentaries on the Constitution §§ 327-30 (3d ed. 1858).
47See, e.g., R. Palmer, supra note 45, at 544. Of course we didn't live happily ever after. And though the Civil War was surely in part about slavery and in part about local control, it can also be said to have been in part about democracy, that is, about whether a national majority could control the conduct of a group that in national terms constituted a minority. The South's willingness to resist to the point of bloody rebellion proves what can hardly surprise, that there will be issues about which minorities can feel so strongly that they are unwilling to recognize the legitimacy of majority control. But to the extent it is fair to view the War's causes through this prism, it must be just as fair to focus on the final outcome and insist that the North's unwillingness to recognize the secession demonstrates, and this may be the more surprising, the strength of the majority's resolve that this nation remain controllable by majority will.
Electoral College. The former was never all that exciting, given that the legislatures themselves were elected, and in any event the seventeenth amendment has cured whatever lack of democracy there was in this, by providing for the direct election of Senators. The presidential electors also were originally selected by the state legislatures. As early as 1832, however, only South Carolina persisted in this practice, and since 1860 the electors have been directly elected by the people in all states. The very existence of the Electoral College, of course, creates the possibility that a President can be elected without a popular majority of plurality nationwide, and many would argue that is undemocratic. As of this writing, a constitutional amendment providing for the direct popular election of the President and Vice President is pending in Congress and has gathered the support of even such inconspicuously populist organizations as the American Bar Association.

There have also existed throughout our history severe limits on the extent of the franchise and thus on government by majority: one need only mention race and sex—without getting into the minutiae of the case presented by Charles Beard, which everyone now seems to agree was overstated—to put that point beyond dispute. But the development, again, and again it has been a constitutional development, has been continuously, even relentlessly, away from that state of affairs: as de Tocqueville observed of America in 1848, "[o]nce a people begins to interfere with the voting qualification, one can be sure that sooner or later it will abolish it altogether." He was as much a captive of his time's sense of what is natural as anyone, and thus was wrong about where he was—he thought he was seeing the end of the road, that we had achieved "universal suffrage"—but his point about the dynamics of the situation, his sense of our manifest destiny, was a good one. And the trend continues to the present day. Excluding the eighteenth and twenty-first amendments (the latter repealed the former), six of our last ten constitutional amendments have been concerned precisely with increasing popular control of our government, and five of those six (the exception being the aforementioned seventeenth) extended the franchise to persons who had previously been denied it.

48E.g., M. Parenti, Democracy for the Few 57 (2d ed. 1977).
49In fact the role the Senate was envisioned as playing evolved considerably during the very course of the Convention: the original concept, that the "upper House" would represent the propertied classes, came under early and understandable attack and was soon displaced by the now commonplace idea that the Senate represents the states while the House represents the people. See, e.g., J. Pole, supra note 40, at 192; Diamond, Democracy and the Federalist: A Reconsideration of the Framers' Intent, 53 AM. POLITICAL SCI. REV. 52 (1959).
52A. De Tocqueville, supra note 33, at 59. See also, e.g., A. Schlesinger, Jr., The Age of Jackson 14 (1945); H. Hyman, A More Perfect Union 4 (1973).
Our constitutional development over the past century has therefore substantially strengthened the original commitment to control by a majority of the governed. Neither has there existed among theorists or among Americans generally any serious challenge to the general notion of majoritarian control. "[R]ule by an aristocracy, even in modern dress, is not what Americans have ever wanted." Moral absolutists and moral relativists alike have embraced and defended democracy on their own terms—the former on the ground that it is a tenet of natural law, the latter as the most sensible institutional reaction to the realization that there is no moral certainty. Indeed, much of the history of the struggle between the two schools has been marked precisely by charges that the other side's philosophy is undemocratic. Thus the recurring embarrassment of the noninterpretivists: majoritarian democracy is, they know, the core of our entire system, and they hear in the charge that there is in their philosophy a fundamental inconsistency therewith something they are not quite sure they can deny.

All that belabors the obvious point: whatever the explanation, and granting the existence of qualifications, rule in accord with the consent of a majority of those governed is the core of the American governmental system. Just as obviously, however, that is not and cannot be the whole story. For just as utilitarianism will early and inevitably become ensnared in problems of equity in distribution, so will democracy. A majority with untrammeled power to set governmental policy is in a position to deal itself benefits at the expense of the remaining minority even when there is no relevant difference between the two groups. (As in "Let's us three take the property of [or tax extra heavily, or enslave] those two.") This too has been understood from the very beginning, and indeed the Constitution contains several different sorts of devices to combat it. The tricky task has been and remains that of devising a way or ways of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule: in law as in logical theory, anything can be inferred from a contradiction, and it will not do just to say "the majority rules but the majority does not rule." The problem for noninterpretivism, at least in its dominant form, has been convincingly to distinguish itself from just this sort of bald contradiction. There have been attempts to do so, but they have generally been halting and apologetic, with no one quite willing to accept anyone else's account of why democratic principles are not offended and indeed the same commentator often hopping from one account to another. An untrammeled majority is indeed a dangerous thing, but it will require a heroic inference to get from that realization to the conclusion that enforcement by unelected officials of an "unwritten constitution" is an appropriate response in a democratic republic.

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12R. DAHL, supra note 50, at 493.
14These attempts will be examined in detail in subsequent chapters of the book of which this lecture is a part.
Justice Black and the interpretivist school have an inference, one that
seems to find acceptance with friend and foe alike. Of course, they would
answer, the majority can tyrannize the minority, and that is precisely the
reason that in the Bill of Rights and elsewhere the Constitution designates
certain rights for protection. Of course side constraints on majority rule are
necessary, but as the framers wisely decided, it is saner and safer to define
and set them down in advance of particular controversies than to develop
them over time, in the context of the particular political problem and its like-
ly accompanying passion and paranoia. It is also, the argument continues,
more democratic, since the side constraints the interpretivist would enforce
have been imposed by the people themselves. The noninterpretivist would
have politically unresponsive judges select and define the values to be placed
beyond majority control, but the interpretivist takes his values from the Con-
stitution, which means, since the Constitution itself was submitted for and
received popular ratification, that they ultimately come from the people.
Thus the judges do not check the people, the Constitution does, which means
the people are ultimately checking themselves.

This argument's lineage stretches back to Alexander Hamilton's Federalist
78 and Chief Justice Marshall's opinion in Marbury v. Madison. And it seems
to enjoy virtually universal contemporary acceptance—not simply by those
whose views display an interpretivist cast, but also, grudgingly, by inter-
pretivism's most explicit critics. Thus Professor Thomas Grey, an articulate
spokesman for a noninterpretivist approach, has written:

The truth is that the view of constitutional adjudication [of] Mr. Justice
Black is one of great power and compelling simplicity . . . [Its] chief virtue .
. . is that it supports judicial review while answering the charge that the
practice is undemocratic. Under the pure interpretive model . . . when a
court strikes down a popular statute or practice as unconstitutional, it may
always reply to the resulting public outcry: "We didn't do it—you did." The
people have chosen the principle that the statute or practice violated, have
designated it as fundamental, and have written it down in the text of the
Constitution for the judges to interpret and apply.57

THE IMPOSSIBILITY OF INTERPRETIVISM

It may be tempting, but it won't work. In the first place, hoary lineage
and virtually universal acceptance notwithstanding, the argument just made
is a fake. The written Constitution is not the voice of the people; it is the
voice of the framers. Indeed, some worried about this at the time. Thus
Noah Webster (apparently the man did more than write a dictionary) opined

56E.g., Strong, supra note 8, at 114; Wright, supra note 17, at 788.
57Grey, supra note 2, at 705-06 (footnote omitted). See also, e.g., Heymann & Barzelay,
supra note 10, at 781; Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1173
that “the very attempt to make perpetual constitutions, is the assumption of a
gernt to control the opinions of future generations; and to legislate for those
over whom we have as little authority as we have over a nation in Asia.” And Jefferson wrote to Madison, “that the earth belongs in usufruct to the
living,’ that the dead have neither powers nor rights over it.” His suggestion
was that the Constitution expire naturally every 19 years. Madison and
others objected that this would be unworkable and undesirable—apparently
Jefferson was convinced, since he was President 19 years into the Republic
and didn’t suggest the convening of a convention under article V—and in
fact we chose quite the opposite course, making the Constitution difficult to
amend. I am certainly not saying this is a bad thing, but it does fatally
undercut the idea that in applying the Constitution—even the “written Con-
stitution” of the interpretivist—judges are simply applying the people’s will.
Apparent incompatibility with democratic theory is a problem that seems
unavoidably to confront interpretivist and noninterpretivist alike.

Interpretivism does retain the substantial virtue of fitting better our or-
dinary notion of how law works, though: if your job is to enforce the Con-
titution then it’s the Constitution you should be enforcing and not whatever
else may happen to strike you as a good idea at the time. Thus stated, the
conclusion possesses the unassailability of a truism—in enforcing the Constitu-
tion you should enforce the Constitution—and if acceptance of that claim
were all it took to make one an interpretivist, no sane person could be
anything else. But the debate over interpretivism is not an argument about
the truth of a tautology, for interpretivism involves a further claim, that “en-
forcing the Constitution” necessarily means proceeding from premises that are
explicit or clearly implicit in the document itself. It is with respect to this se-
cond, and meaningful, claim that interpretivism runs into trouble—trouble
precisely on its own terms, and so serious as to be dispositive. For the docu-
ment itself, the interpretivist’s Bible, contains several provisions whose invita-
tion to look beyond the four corners of the document—whose invitation, if
you will, to become a noninterpretivist—cannot be construed away.

Constitutional provisions exist on a spectrum ranging from the relatively
specific to the extremely open-textured. At one extreme—for example the re-
quirement that the President “have attained to the Age of thirty-five
years”—the language seems so clear that even a reference to purpose seems

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58G. WOOD, supra note 37, at 379.
595 THE WRITINGS OF THOMAS JEFFERSON 116, 121 (P. Ford ed. 1894). But see 4 id. at 439
(“I like much the general idea of framing a government which should go on of itself peaceably,
without needing continual recurrence to the state legislatures.”)
60E.g., THE FEDERALIST No. 50 (B. Wright ed. 1961) (Madison).
61In 1970 three-fourths of those polled by CBS said they would restrict the right of peaceful
assembly for protests against the government, and more than half came out against the right to
criticize the government by speech or publication, the privilege against self-incrimination, the
2 (March 20, 1970).
unnecessary. Other provisions, such as that requiring that the President be a "natural born Citizen," need a reference to historical usage so as to exclude certain alternative constructions—conceivably, here, a requirement of legitimacy or of non-Caesarian birth—but once that “dictionary function” is served, the provision becomes relatively easy to apply. Others, such as the first amendment's prohibition of congressional laws “abridging the freedom of speech,” seem to need more. For one thing, a phrase as terse as the others mentioned is here expected to govern a broader and more important range of problems. For another, and this may have something to do with the first, we somehow sense that a line of growth was intended, that the language here was not intended to be restricted to its 1791 meaning. This realization probably would not phase Justice Black or other interpretivists: the job of the person interpreting the provision, they would respond, is to identify the sorts of evils against which the provision was directed and to move against their contemporary counterparts. Obviously this will be difficult, but it will remain interpretivism—a determination of “the present scope and meaning of a decision that the nation, at an earlier time, articulated and entered into the constitutional text.”

Still other provisions, such as the eighth amendment's prohibition of “cruel and unusual punishments,” seem even more insistently to call for a reference to sources beyond the document itself and a “framers' dictionary.” It is possible to construe this prohibition as covering only those punishments that would have been regarded as “cruel and unusual” in 1791, but that is a construction that would grate against the apparent intendment of the language. The interpretivist can respond as he did to the first amendment, that even though it is true that the clause should not be restricted to its 1791 meaning, it should be restricted to the general categories of evils at which the provision was aimed. If you pursue that mode of interpretation with regard to the eighth amendment, however—and I actually think the first amendment case will come down to much the same thing—you'll find yourself, at worst, begging a lot of questions or, at best, attributing to the framers a theory that may be consistent with what they said but is hardly discoverable in their discussions or their dictionaries. But even admitting this, the disaster for the interpretivists may still be less than complete. The cruel and unusual punishment clause does invite the person interpreting it to freelance to a degree, but the freelancing remains within a limited compass. The subject is punishments, not the entire range of possible government action, and even in that limited area the delegation to the interpreter is far from entirely unguid-

62 Of course, this is an illusion. The point really is that the purpose is entirely clear from the language.
63 See W. SHAKESPEARE, MACBETH, act IV, scene I. (Actually, I suppose you've already seen it). Charles Black has been known to urge the view that “natural born” means something akin to “true blue” or “red blooded,” but then Black is a Texan.
ed: only those punishments that are in some way serious ("cruel") and susceptible to sporadic imposition ("unusual") are to be disallowed.

The eighth amendment does not mark the end of the spectrum, however. The fourteenth amendment—and I shall argue later that the ninth amendment is similar—contains provisions that are difficult to read responsibly as anything other than open and across-the-board invitations to import into the constitutional decision process considerations that will not be found in the amendment nor even, at least not in any obvious sense, elsewhere in the Constitution.

a. Due Process

The provision most often cited in this connection is the fourteenth amendment's due process clause, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law." This is the phrase to which the Court has tended to refer to "support" its sporadic ventures into across-the-board substantive review of legislative action. Its frequent invalidations of various sorts of worker protection provisions during the first third of this century cited the due process clause as the basis of the Court's review authority. (These cases are conventionally referred to under the head of Lochner v. New York,\(^6\) one of the earlier ones, and are now universally acknowledged to have been constitutionally improper—for obvious reasons by interpretivists, for somewhat less obvious ones by noninterpretivists.) The Court's 1973 invalidation of state antiabortion laws in Roe v. Wade\(^6\) was a little vague about the basis of its authority. It is widely labeled by commentators, however—understandably, given the similarity of its technique to that of Lochner—as a "substantive due process" decision. This substantive due process notion is widely accepted by commentators. Thus Archibald Cox, who rejects Roe on other grounds, is not troubled by the interpretivist critique that nothing in the Constitution seems to address itself even remotely to the question of abortion.

I find sufficient connection in the Due Process Clause . . . . The Court's persistent resort to notions of substantive due process for almost a century attests the strength of our natural law inheritance in constitutional adjudication, and I think it unwise as well as hopeless to resist it.\(^6\)

The notion that this view of the clause is virtually irresistible is not Cox's alone.\(^6\) Justice Frankfurter, who certainly seemed content in his noninterpretivism, sometimes claimed to be greatly troubled by the broad and untethered substantive review power he thought the due process clause gave him, but felt the mandate too clear to refuse.\(^6\)

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\(^6\)198 U.S. 45 (1905). See also, e.g., Coppage v. Kansas, 236 U.S. 1 (1915); Adkins v. Children's Hospital, 261 U.S. 525 (1923).

\(^6\)410 U.S. 113 (1973).


\(^6\)See also, e.g., Forrester, Are We Ready for Truth in Judging?, 65 A.B.A.J. 1212 (1977).

\(^6\)Compare Frankfurter, The Red Terror of Judicial Reform, 40 NEW REPUBLIC 110, 113 (1924) ("the due process clause ought to go") with Malinski v. New York, 324 U.S. 401, 414.
In fact this interpretation of the clause—as incorporating a general mandate to review the substance of legislative and other governmental action—was not only not inevitable, it was probably wrong. The fourteenth amendment's due process clause was taken from the virtually identical provision (save that the earlier one applied to the federal government) of the fifth amendment. There is general agreement that that earlier clause had been understood at the time of its inclusion solely to ensure lawful procedures.\textsuperscript{70} What recorded comment there was at the time of replication in the fourteenth amendment is devoid of any reference that gave the provision more than a procedural connotation.\textsuperscript{71} So far it all sounds quite straightforward, and in fact more than a few commentators have concluded it is crystal clear that the framers of the fourteenth amendment meant by their due process clause to reach only procedural questions. Thus Professor Stanley Morrison, in the course of what is otherwise a strident attack on Justice Black's views on the fourteenth amendment, agrees with him on one thing:

When he thus seeks to abolish substantive due process, he is on solid ground historically. If the clause is to be interpreted in accordance with the meaning it had to the framers and others in 1868, the doctrine cannot be justified. It is . . . a later execrescence derived from natural-law sources.\textsuperscript{72}

\textsuperscript{70} This much is admitted even by commentators who find elsewhere in the Constitution or its informing traditions authorization for textually untethered substantive review. \textit{See}, e.g., Kelly, \textit{The Fourteenth Amendment Reconsidered}, 54 Mich. L. Rev. 1049, 1052 (1956); Curtis, \textit{Review and Majority Rule}, in \textit{Supreme Court and Supreme Law} 177 (E. Cahn ed. 1954); Corwin, \textit{The Doctrine of Due Process of Law Before the Civil War}, 24 Harv. L. Rev. 366, 368, 372-73 (1911).

\textsuperscript{71} Actually, certain historical antecedents of the phrase suggest an additional and somewhat distinct meaning. To the extent its roots are in the French term \textit{process de ley}, see Dunham, \textit{Magna Carta and British Constitutionalism} in \textit{The Great Charter} 26 (1965), the phrase would seem to convey the requirement that serious injury be inflicted only in accord with (a process of) law, as opposed, presumably, to a process of anarchy or unbridled discretion. \textit{Cf.} E. Gore. \textit{Second Part of The Institutes of the Laws of England} 46, 50 (1671); Dartmouth College v. Woodward, 4 Wheat. 518, 581 (1819) (argument of Daniel Webster). At one point, indeed, Justice Black expressed a willingness to add this sort of requirement to his incorporationist interpretation:

\textit{For me the only correct meaning of \"due process of law\" is that our Government must proceed according to the \"law of the land\"—that is, according to written constitutional and statutory provisions as interpreted by court decisions. In re Winship, 397 U.S. 358, 382 (1970) (Black, J., dissenting). (It's impossible to believe he was serious about this, since it would make every question of state law a federal question.) The propriety of equating this \"law of the land\" concept with due process is far from clear. \textit{See}, \textit{e.g.}, Jurow, \textit{Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law}, 19 Am. J. Legal Hist. 265 (1975). In any event, this possible additional meaning is a process meaning—the question it poses is whether the action in question was taken in accord with a law—and does not remotely purport to hold up, or in particular to authorize courts to hold up, duly passed statutes to some higher standard of validity.

\textsuperscript{72} \textit{Frank & Munro, The Original Understanding of "Equal Protection of the Laws,"} 50 Colum. L. Rev. 131, 132 n.6 (1950). \textit{But cf.} note 143 infra.

\textsuperscript{73} \textit{Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation}, 2 Stan. L. Rev. 140, 166 (1949). \textit{See also}, \textit{e.g.}, R. Berger. supra note 3, Ch. 11;
Things are seldom so simple, however, particularly where the intent of the framers of the fourteenth amendment is concerned, and this is no exception. For despite the original due process clause's procedural intendment, a couple of pre-Civil War decisions had construed the concept more broadly, as precluding certain substantive outcomes. One was *Wynehamer v. People* (1856), in which the New York Court of Appeals invalidated a prohibition law under a state due process guarantee identical in wording to the fifth amendment's. More notorious was *Dred Scott v. Sandford*, decided a year later, in which the Supreme Court voided the Missouri Compromise, Chief Justice Taney delivering an "opinion of the court" (in whose theory only two of his brethren actually seem to have concurred) indicating in a passing reference that slaveholders had been denied due process. I am by no means suggesting that with these decisions the path of the law had been altered, that by the time of the fourteenth amendment due process had come generally to be understood as possessing a substantive component. Quite the contrary: *Wynehamer* and the *Dred Scott* reference were aberrations, neither precedent nor destined to become precedents themselves. Other courts on whom they were urged as precedents were in fact quite acid in the judgment they had misused the constitutional language by giving it a substantive reading. I am suggesting, though, that given these decisions—at least one of which the framers of the fourteenth amendment were certainly well aware

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13 N.Y. 378 (1856).  
160 U.S. (19 How.) 393 (1875).  
2Abolitionist rhetoric also sometimes mentioned due process in arguing the unconstitutionality or injustice of slavery. See generally J. tenBroeck, The Antislavery Origins of the Fourteenth Amendment (1951). On examination, however, and indeed tenBroeck himself is quite objective in representing the matter thus, the sources here turn out to be rather casual and only obliquely to the point. Due process generally was invoked only in the context of a quiverfull of arguments against slavery, see id. at 66; seldom if ever was it the main one, id. at 25-26, 96-101; and indeed it seems most often to have been invoked as a "same goes for you" sort of answer to the claim that freeing the slaves would "retroactively" deprive their owners of property without due process. Id. at 25. Thus "the abolitionist argument was rebuttal in character and altogether negative in function." Id. at 26. Indeed, the best known due process argument against slavery, that of Alvan Stewart, was one that gave the provision a strictly procedural meaning, focusing on the fact that the slaves had been placed in that status without a jury trial or other requisites of fair procedure. Id. at 44. Neither do the oft-relied-on Republican Platforms of 1856 and 1860—see Kelly, supra note 70, at 1055—use the concept in a clearly substantive way. See J. tenBroeck, supra, at 120-21 nn.5 & 6. See also id. at 119-20 (Free Soil Platforms of 1848 and 1852). This is not to say that due process was not often mentioned by these extreme abolitionists in an apparently substantive way—it was—but only that such invocations tended to be haphazard. Moreover, more recent scholarship has tended to minimize the contribution of such concededly exaggerated argumentation to the jurisprudence of the fourteenth amendment. See R. Cover, supra note 45, Ch.9.
of—it is impossible to exclude absolutely the possibility that some of them, had the question been put, would have allowed that the due process clause they were including would be given an occasional substantive interpretation.

To put the question thus, however, is to lose the forest in the trees. It would be a mistake—albeit an understandable one in the light of the excesses one witnesses at the other extreme—to dismiss "the intent of the framers" as entirely beside any relevant point. Something that was not ratified cannot be part of our Constitution, and there are times when, in order to know what was ratified, we need to know what was intended. (Unless we know whether "natural born" meant born to American parents on the one hand or born to married parents on the other, we do not know what the ratifiers thought they were ratifying and thus what we should recognize as the constitutional command.) But to state the matter thus is to begin to bring to the fore what invariably seems to get lost in excursions into the intent of the framers, namely that the most important datum bearing on what was intended is the constitutional language itself. This is especially true where—as is emphatically the case respecting the fourteenth amendment (understandably, given the cataclysm of the times)—the legislative history is in unusual disarray, but the validity of the point extends beyond. In the first place, and this is also true of statutes and for that matter of other sorts of group products, not everyone will feel called upon to place in the "legislative history" her precise understanding, assuming she has one, of the meaning of the provision for which she is voting or to rise to correct every interpretation that does not agree with hers. One of the reasons the debate culminates in a vote on an authoritative text is precisely to generate a record—of just what there was sufficient agreement on to gain majority consent. Beyond that, however, the

77Of course part of the point of the fourteenth amendment was to overrule Dred Scott's holding that blacks could not be citizens, but that doesn't tell us anything about its framers' views on the decision's invocation (as opposed to its application) of the concept of substantive due process. Thus Raoul Berger's dismissal of the relevance of Dred Scott on the ground it was "universally execrated by the abolitionists, and also decried by Lincoln," R. BERGER, supra note 3, at 204—seems somewhat brisk.


In 1871, a federal attorney prosecuting Ku Klux Klansmen in a South Carolina courtroom for violating Congress's civil and political rights statutes was struck suddenly by a contrast. "Gentlemen," he said to the judge and jury, "we have lived over a century in the last ten years."

79When proscriptive legislation is sought by certain individuals to achieve a broad, controversial end, but the ultimate language of the statute stops short of achieving that end, it must be presumed that the statute as enacted reflects the product of the various countervailing forces, and that the ultimate wording represents the strongest proscription to which a majority of the members of each of the ratifying bodies could be expected to assent.

Note, Hot Cargo Clauses: The Scope of Section 8(e), 71 YALE L.J. 158, 170 (1961).
A constitutional situation is special in a way that makes poring over the statements of members of Congress in an effort to pin down their intention doubly ill-advised. For Congress' role in the process of constitutional amendment is solely, to use the Constitution's word, one of "proposing" provisions to the states: to become law such a provision must be ratified by three quarters of the state legislatures. Now obviously there is no principled basis on which the intent of those voting to ratify can be counted less crucial in determining the "true meaning" of a constitutional provision than the intent of those in Congress who proposed it. That, however, gets to be so many different people in so many different circumstances that one cannot hope to gather a reliable picture of their intention from any perusal of the legislative history. (To complicate matters further, state ratification debates, assuming there are debates, often are not even recorded.) Thus the only reliable evidence of what "the ratifiers" thought they were ratifying is obviously the language of the provision they approved. The debates (or for that matter other contemporary sources) can serve the "dictionary function" of resolving ambiguities, as in the natural born citizen case, but that function fulfilled, the critical record of what was meant to be proposed and ratified is what was proposed and ratified.

Every member of [a constitutional] convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause. . . . And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words would most naturally and obviously convey. For as the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed. These proceedings therefore are less conclusive of the proper construction of the instrument than are legislative proceedings of the proper construction of a statute; since in the latter case it is the intent of the legislature we seek, while in the former we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives.80

Those words were written by Thomas Cooley over 100 years ago, but as today's self-consciously historical discussions of the fourteenth amendment continue to illustrate, their lesson has yet to be learned.

Let us then turn—surely we are long overdue—to the language of the due process clause. It is a bit embarrassing to suggest that a text is informative "when so many, for so long, have found it to be only evocative,"81 but there is

80 T. COOLEY, supra note 2, at *66-67 (footnote omitted).
81 Linde, supra note 14, at 237.
simply no blinking the fact that the word that follows "due" is "process." There is no evidence at all that "process" meant something different a century ago from what it does now—in fact, as I have indicated, the historical record runs somewhat the other way—and it should take more than two aberrational cases to convince us that those who ratified the fourteenth amendment had some eccentric definition in mind. Familiarity breeds inattention, and we apparently need periodic reminding that "substantive due process" is a contradiction in terms—sort of like "green pastel redness."

One might assume this doesn't matter, that it is revisionism for the sheer hell of it, since I have advertised that the fourteenth amendment does contain provisions—notably the privileges or immunities clause, to be considered presently—that contain the sort of invitation to general substantive oversight the due process clause turns out to lack. Why should we care whether such oversight is called "substantive due process" or something else? The question is a fair one, but it turns out it may matter, because of the negative feedback effect the notion of substantive due process seems to be having on the proper function of the due process clause, that of guaranteeing fair procedures. We noted that the scope and intensity of review are not independent variables, that one who thinks he has a mandate to review everything may respond by reviewing nothing very seriously. It also works the other way around: one who believes himself armed with an intensive engine of review may, just as understandably, seek ways of restricting the number of occasions on which that engine is activated. This may be what has been happening lately to the due process clause.

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8See also H. GRAHAM, EVERYMAN'S CONSTITUTION 446-47, 487 (1968) (noting, albeit for a different purpose, the general failure after ratification of framers and others to rely on a substantive reading of due process clause in legal contexts where such a reading would have helped their cause).

8The merest glance at the Table of Contents of the Harvard Law Review's review of the 1976 Term is calculated to upset the stomach of anyone prepared to heed the demands of language. Under "Due Process" one finds the following entries:

1. Protection of Family Interests
2. Public Funding of Abortions
3. Minors' Access to Contraceptives
4. Quasi in Rem Jurisdiction

The Supreme Court, 1976 Term, 91 HARV. L. REV. 1, 70 (1977). (Grandpa, how did that fourth one get there?) See also Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1, 43 (1977) ("The due process clause will surely continue to serve the kinds of purposes it has served in protecting a broad range of rights from access to the courts to a woman's control of her own body.")

8Cf. Levy, Editorial Note, in AMERICAN CONSTITUTIONAL LAW: HISTORICAL ESSAYS 157 (L. Levy ed. 1966); Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (Holmes, J., joined by Brandeis & Stone, J.J., dissenting) ("Of course the words 'due process of law,' if taken in their literal meaning, have no application to this case [but] it is too late to deny that they have been given a much more extended and artificial signification . . . .") See also Whitney v. California, 274 U.S 357, 373 (1927) (Brandeis, J., joined by Holmes, J., concurring); K. GRIFFITH, JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY 129 (1973).

8By the same token, "procedural due process" is redundant.
Until recently, the general outlines of the law of procedural due process were pretty clear and uncontroversial. The phrase "life, liberty or property" was essentially read as a unit and given an open-ended, functional interpretation, which meant that the government simply could not seriously hurt you without due process of law. What process was "due" varied, naturally enough, with context, in particular with how seriously you were being hurt and what procedures were feasible under the circumstances. But if you were seriously hurt by the state you were entitled to due process.

Over the past few years, however, the Court has changed all that, holding that henceforth, before it can be determined that you are entitled to "due process" at all (and thus necessarily before it can be decided what process is "due," you must show that what you have been deprived of amounts to a "liberty interest" or perhaps a "property interest." What has ensued has been a disaster, in both practical and theoretical terms. Not only has the number of occasions on which you are entitled to any procedural protection at all been steadily constricted, but the Court has made itself look quite silly in the process—drawing distinctions it is flattering to call attenuated and engaging in ill-disguised

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*Here as elsewhere primary stress should be laid on the constitutional language actually employed. No clear answer to the present question will be found there, however, principally because "liberty" is a term that can be used, as indeed it was used at the time the fourteenth amendment was proposed and ratified, both narrowly (to refer only to freedom from restraints on locomotion) and broadly (to mean freedom from virtually any sort of inhibition). Compare Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty and Property,"* 4 HARV. L. REV. 365 (1891) (narrow reading), with e.g., 2 J. STORY, supra note 72, § 1950.

*By the mid-1860's some Americans were accepting views of liberty derived from Adam Smith, Bentham and Mill as something more than the absence of restraint on an individual's physical freedom. Republicans asserted that liberty also involved civil rights; i.e., the absence of inequitable governmental interferences with private pursuits.*

H. HYMAN, supra note 52, at 447. Those seeking to minimize the range of the due process clauses are fond of stressing Blackstone's narrow definition of "liberty." E.g., Shattuck, supra, at 377; R. BERGER, supra note 5, at 270. What they don't mention is that his adjacent definition of "life" referred to "the right of personal security [which] consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." See Miller, supra note 78, at 7. Since the constitutional language (considered in light of its contemporary usage) does not generate a clear answer, responsible recourse must be to the obvious overall policy informing the due process clauses, that the government should not be able to injure you, at least not seriously, without employing fair procedures. At all events, the in-between position of the current Court (even assuming an informing principle could be identified) can find no support in the history.

*E.g., Bell v. Burson, 402 U.S. 535 (1971); Hannah v. Larche, 363 U.S. 420, 442 (1960); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). See also J. STORY, supra note 72, § 1945. Cf. Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue. . . .")

*See Board of Regents v. Roth, 408 U.S. 565 (1972); Perry v. Sinderman, 408 U.S. 595 (1972); Meachum v. Fano, 427 U.S. 215, 224-25 (1976).*

premature judgments on the merits of the case before it. (It turns out, you see, that whether it is a property interest is a function of whether you are entitled to it, which means the Court has to decide whether you are entitled to it before it can decide whether you get a hearing on the question whether you are entitled to it.90 Buy the premise and you buy the bit.) The line of decisions has been subjected to scathing academic condemnation, which suggests that sometime within the next thirty years we may be rid of it.

It is interesting to speculate on how it got started, though. As I indicated, the law of procedural due process was not in disarray; and the proposition that the government should be able to hurt you seriously without according you due process of law—which of course is where the Court is now—is hardly one that cries out for affirmation.91 I think at least part of the explanation lies, though it may be at an unconscious level, in the unfortunate resurrection of the substantive due process doctrine in the Roe case. So long as Lochner lay in disrepute, and substantive due process was therefore as good as dead—that is, nonexistent or reduced to an essentially meaningless requirement that the government behave "rationally"—there was little harm in proceeding on the premise that any serious hurt should count as a deprivation of life, liberty or property. That just meant people were typically entitled to fair procedures. But once "due process" is reinvested with serious substantive content, things get pretty scary and people begin to look for a way to narrow the scope of their authority. All of this might have suggested that the error was in resurrecting substantive due process; but instead it seems to have meant that due process generally, in both its improper (substantive) connotations and its proper (procedural) connotations, has been constricted.

Of course, even if the due process clause is restricted to its proper role of guaranteeing fair procedures, that does not make it unimportant. Even if it lacks authority to second-guess the substantive policy being pursued, the Court can still render the implementation of that policy difficult by making the procedural requirements comparatively stringent. What's more, its judg-

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90To have property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it.

He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 566, 577 (1972). Roth and Sinderman, properly considered, seem not simply decisions on the merits but indeed obligation of contracts decisions. Now that the obligation of contracts clause has been resurrected, United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), there may be hope such cases will find their way home and stop fouling up due process.

91The proposition that due process invariably requires a full-scale hearing, which Justice Stewart does give evidence of assuming in Roth and Sinderman, may sound nice and liberal on first hearing, but it doesn't take much reflection to realize it can lead only to a contraction of the set of occasions on which any kind of process will be required. Cf. Board of Regents v. Roth, 408 U.S. 566, 591 (1972) (Marshall, J., dissenting).

It may be argued that to provide procedural due process to all public employees or prospective employees would place an intolerable burden on the machinery of government . . . . The short answer to that argument is that it is not burdensome to give reasons when reasons exist.
ment is somewhat untethered: asking what process is due will get the Court into some questions to which the Constitution does not begin to provide answers. This bothered Justice Black, perhaps most conspicuously in his 1970 dissent in *In re Winship*, in which he refused to go along with the majority's holding that the Constitution required proof "beyond a reasonable doubt" in state criminal cases. The reasonable doubt standard does not appear anywhere in the Bill of Rights, so Justice Black, pursuing his "incorporation" theory, refused to read it into the fourteenth amendment.

The Bill of Rights, which in my view is made fully applicable to the States by the Fourteenth Amendment . . . does by express language provide for, among other things, a right to counsel in criminal trials, a right to indictment, and the right of a defendant to be informed of the nature of the charges against him. And in two places the Constitution provides for trial by jury, but nowhere in that document is there any statement that conviction of crime requires proof of guilt beyond a reasonable doubt. The Constitution thus goes into some detail to spell out what kind of trial a defendant charged with crime should have, and I believe the Court has no power to add to or subtract from the procedures set forth by the Founders. I realize that it is far easier to substitute individual judges' ideas of "fairness" for the fairness prescribed by the Constitution, but I shall not at any time surrender my belief that that document itself should be our guide, not our own concept of what is fair, decent, and right. . . . As I have said time and time again, I prefer to put my faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges.92

Indeed he had said it "time and time again," and it's a good speech, but somehow it rings less true in a procedural context. It is true that in deciding what process is due the Court will have to take into account various costs, principally in money and time, whose assessment the Constitution will not help us with. But that much is hardly unique. And the questions that are relevant here—how seriously the complainant is being hurt and how much it will cost to give him a full-scale hearing—are importantly different from the questions the Court makes relevant in "substantive due process" decisions like *Lochner* and *Roe*, namely how desirable or important the substantive policy the legislature has decided to follow is. Moreover, and here the parallel to the cruel and unusual punishment clause is extended, the decisions here are made in limited compass. The "bottom line" is what procedures are required to treat the complainant this way, not whether she can be treated this way at all: it is an important and difficult question, but a different one. Finally, what procedures are needed fairly to make what decisions are the sorts of questions lawyers and judges are good at. (Observe a lawyer on a committee with nonlawyers and see what role she ends up playing.) Thus the delegation, though it assuredly is that, is a limited and not very frightening one.

It is no surprise, therefore, that even Justice Black was moved to exercise it from time to time, holding that convictions by biased tribunals, under vague statutes, or based on "no evidence" or perjured testimony or other evidence known to be false violate due process, even though none of those defects is specifically mentioned anywhere in the Constitution.\(^9\) (He even once joined a dissenting opinion arguing that due process requires a reasonable doubt standard\(^9\)\(^4\)) Instead of carrying his speech on subjectivity, so convincing as to "substantive due process," over to the area of due process properly so called ("procedural due process,") he would have done well to stick with his earlier inclination, expressed in a note he wrote to Justice Murphy in 1947:

I have not attempted to tie procedural due process exclusively to the Bill of Rights. In fact there are other constitutional prohibitions relating to procedure which I think due process requires to be observed.\(^9\)

b. **Privileges or Immunities**

The fourteenth amendment's privileges or immunities clause—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"—seems on its face to convey the sort of review authority that has erroneously been attributed to the due process clause. Yet although it was probably the clause from which the framers of the fourteenth amendment expected most, it has to all intents and purposes been dead for 100 years. In the *Slaughter-House Cases*,\(^9\)\(^6\) decided in 1873, a majority of the Court, or at least this is the received reading,\(^9\) limited the clause to those rights that are otherwise guaranteed by the Constitution or clearly implicit in the citizen's relation to the federal government. But as Justice Field observed in dissent, and it really is not possible to deny:

If this inhibition . . . only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.\(^9\)
Needless to say, there is not a bit of legislative history that remotely supports the view that the privileges or immunities clause was intended to be meaningless. Yet *Slaughter-House*'s interpretation persists to the present day.

*Slaughter-House* was a strange case, at least it was a strange case to form the occasion for the Supreme Court's first interpretation of the reconstruction amendments—it involved a challenge brought by white plaintiffs, assailing as violative of every provision of the thirteenth and fourteenth amendments a butchers' monopoly established by Louisiana's reconstruction government—and the distorting effect of the situation is obvious. The complaining would-be butchers were forced to make extravagant claims about the amendments, since nothing else would serve them. Thus Justice Miller

and his four assenting Brothers saw only two alternatives: to restrict the Privileges or Immunities Clause to nearly nothing, or to interpret it as the self-executing source of a full panoply of legal rights (including business freedoms) to be enforced by the Court. The Court split five to four on this choice. No one spoke for a third view, probably for the understandable (if inadequate) reason that neither of the opposing sets of litigants would have been aided by it . . . 99

Successor Courts, correctly diagnosing a case of overreaction, have backed away, with a vengeance, from *Slaughter-House*'s comparably narrow interpretation of the equal protection clause, yet the Court has not moved an inch on the privileges or immunities clause.100

The reason has to be that the invitation apparently extended by the clause is frightening,101 so the question is in order whether there is any apparent middle ground between the chaos the *Slaughter-House* complainants were inviting and the tautology to which the Court seems to have ended up lashing itself. One possibility, which is not a terribly viable candidate for adoption but deserves some attention in light of the historical setting of the reconstruction amendments, is that the privileges or immunities clause (and for that matter the whole of the fourteenth amendment) should be construed entirely in the light of the amendment's overall animating purpose, the cause of equality for blacks.102 The phrase was taken from article IV, section 2 of the original Constitution, which provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This was an equality provision, intended to keep state laws from treating out-of-staters worse than their own citizens.103 Might it not be, then,

101See also Colgate v. Harvey, 296 U.S. 404, 445 (1935) (Stone, J., dissenting).
103See 3 M. Farrand, The Records of the Federal Convention of 1787, at 112 (1911); U.S. Arts. Confed. art. IV. See also 2 J. Story, *supra* note 72, § 1806. The provision has
that just as the article IV clause had been directed to equality between locals and out-of-staters, so the similar clause inserted in the fourteenth amendment was intended to ensure equality among locals? Precisely this interpretation was suggested by Justice Field in his *Slaughter-House* dissent:

What the clause in question did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States.104

The fourteenth amendment's privileges or immunities clause can surely be conceived as contributing to the goal of ensuring equality for blacks: one way of ensuring substantial equality is by designating a set of goods that no one can be denied. But that equality for blacks, or even equality more broadly conceived, is the only relevant purpose of the entire fourteenth amendment is a proposition much more difficult to defend. Abolitionist concerns had broadened over time—partly because of the natural kinship of the impulses, partly because of persecution of abolitionists—from a narrow focus on the rights of blacks to a broader occupation with the civil rights and liberties of everyone.105 The various clauses of the fourteenth amendment reflect that development. The due process clause addresses itself to procedural fairness. The equal protection clause is directly concerned with equality (and it is no small problem for the suggested interpretation of the privileges or immunities clause that it would render the equal protection clause superfluous.106) The privileges or immunities clause adds yet another dimension: it says rather plainly that there is a set of entitlements that all persons (or at least all citizens107) are to get and no state is to take away.108

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104 U.S. (16 Wall.) at 100-01.
106 Conceivably the equal protection clause might be restricted to the application, as opposed to the making, of laws, but the privileges or immunities clause is explicitly addressed to both.
107 But see pp. 427-28 infra.
108 Article IV, section 2 is hardly a model of clear drafting, but by entitling the "citizens of each State" to "all Privileges and Immunities of Citizens in the several States," it will bear an equality construction, to the effect that when a citizen of one state travels to another, he gets whatever privileges and immunities are enjoyed by the locals. The syntax of the privileges or immunities clause of the fourteenth amendment is plainly that of substantive entitlement.
Thus Justice Field did not stick with his equality thesis, but went on to rhapsodize about “natural and inalienable rights,” thereby attempting to give the clause a substantive content as well. This apparent schizophrenia is hardly censurable: before, during and after the framing of the reconstruction amendments notions of equality and substantive entitlement tended to merge, and understandably so. One can guarantee substantive rights directly (by pointing to them) or, fairly well, by an equality provision commanding that everyone generally get what the best off are getting. Similarly, one can guarantee equality either by thus commanding it, or, fairly well, by pointing to the things you think are important and saying everyone is to get them. The fourteenth amendment takes both approaches, but the slightest attention to language will indicate that it is the equal protection clause that follows the command of equality strategy, while the privileges or immunities clause proceeds by purporting to extend everyone a set of entitlements. To construe it as simply replicating the equal protection clause would be to lose significant differences of constitutional language in an oversimplistic conception of the amendment’s purpose.

The most serious attempt to give the privileges or immunities clause determinate independent content—the prevailing interpretation, of course, is that it is without any—was that of Justice Black, who finally settled on the view that it was that clause that incorporated the Bill of Rights and made it applicable to the states. Early in the debate Black was somewhat cagey about what provision it was that accomplished the incorporation: he preferred to say it was the fourteenth amendment “as a whole.” The reason for this may be that the privileges or immunities clause, unlike the due process and equal protection clauses, appears to limit its protection to United States citizens and the Justice wanted to protect noncitizens as well. Whether or not this explains Black’s behavior, the point has surely given pause to others. It seems to be agreed that no conscious intention to limit the protection of the clause to citizens appears in the historical records. Most commentators conclude, however, that the language is clear to that effect and thus one has no choice but to conclude that only citizens are protected. I certainly agree that we should favor clear language over apparent purpose (if for no reason other than that clear language is the best possible evidence of purpose); but when the language seems out of accord with what we are quite sure was the purs

10983 U.S. (16 Wall.) at 104-05.
110See also, e.g., Cong. Globe, 39th Cong., 1st Sess. 474-76, 1757 (1866) (remarks of Senator Trumbull).
113E.g., Kast, supra note 83, at 44. See also Wechsler, Equal Protection is a Double-Edged Sword, in ONE HUNDRED YEARS OF THE FOURTEENTH AMENDMENT 44-45 (J. Gerard ed. 1973); Freund, The Supreme Court and Fundamental Freedoms, in JUDICAL REVIEW AND THE SUPREME COURT 128-29 (L. Levy ed. 1967).
pose, we owe it to the framers and to ourselves at least to take a second look at the language. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” could mean that only citizens are protected in their privileges or immunities, but it doesn’t have to. It could just as easily mean there is a set of entitlements, the privileges and immunities of citizens of the United States, which states are not to deny to anyone. The reference to citizens may, in other words, define the class of rights rather than limit the class of beneficiaries. Since everyone seems to agree that such a construction would better reflect what we know of the purpose, and it is one the language will bear comfortably, it is hard to imagine why it should not be followed.

For whatever reason—possibly the fact that no other phrase could plausibly serve as the vehicle for incorporating the entire Bill of Rights—Black had settled, by the time of his 1968 concurrence in Duncan v. Louisiana, on the privileges or immunities clause as the incorporating provision. However, his historical argument for the proposition that the fourteenth amendment generally had been intended to make the Bill of Rights applicable to the states had been made in 1947, in a lengthy appendix to his dissent in Adamson v. California. For a time it was voguish to assert that Black’s argument had been decisively refuted by Professor Charles Fairman in

114See also Green, The Bill of Rights, the Fourteenth Amendment, and the Supreme Court, 46 MICH. L. REV. 869, 904 (1948).

115The received reading of the privileges or immunities clause, as limiting its protection to citizens, seems particularly difficult to reconcile with the widely accepted view that its companion equal protection clause is properly read to extend unusually strenuous protection to aliens. Surely one ought to think carefully about at least one of these positions. But cf., e.g., Karst, supra note 83, at 44.

116The due process clause surely can be seen as an apt vehicle for incorporating those provisions of the Bill of Rights that relate to “process.” The fact that there is an identical clause in the fifth amendment (save that it applies to the federal government) certainly seems troublesome to such a notion, but on historical reexamination it turns out to be only slightly so. For in 1855, in Murray’s Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1855), a unanimous Supreme Court had indicated very clearly—though of course the remark was unnecessary and in addition seems somewhat bizarre—that the fifth amendment’s due process clause incorporated the “process” commands of the fourth, fifth, sixth, seventh and eighth amendments (and had independent procedural content as well). It is of course a separate question how much notice was taken of this by the framers of the fourteenth amendment. See, however, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 118 (1873) (Bradley, J., dissenting) (referring to the fifth amendment’s due process clause as “including almost all the rest” of the Bill of Rights—presumably the process provisions). In light of that history, the insertion in the fourteenth amendment of an identical clause applicable to the states might have been calculated to apply those provisions to them. (Beyond that, of course, it is hardly bizarre to conclude that the process that is “due” from the states includes—though here as everywhere the inference it is all that is due is more tenuous—that process that had for a century been constitutionally required of the federal government.) It is, moreover, the “process” provisions of the Bill of Rights that have caused all the shouting, the incorporation of the first amendment having been accomplished without incident, and the second and third amendments, rightly or wrongly, having turned out to have little relevant content.


118332 U.S. 46, 92-123 (1947).
a critical article published two years later. It is not so voguish any more: people are coming to realize that this is an argument no one can win.

Black's argument relies heavily on the statements of the floor leaders, Congressman Bingham and Senator Howard, who between them wrote the whole of section 1 of the amendment. In these terms he can mount a powerful case. Howard's statements alone must give serious pause to anyone who would deny an intention to incorporate. It was he, acting as temporary co-chairman of the Joint Committee, who presented the fourteenth amendment to the Senate. Purporting to present "the views and the motives which influenced the committee" so far as he understood them, he stated:

Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. [Howard had just read from the opinion in Corfield v. Coryell, which we shall consider presently.] To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation.

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119Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN. L. REV. 5 (1949).
120See, e.g., Kelly, Clio and the Court: An Illicit Love Affair, 1965 SUP. CT. REV. 119, 132-34; Graham, supra note 112, at 19 n.80. Actually, Fairman's own verdict on Black's thesis does not seem to have been a good deal stronger than "not proven." The stronger claim that Ike had proved its contrary is one that has been added by more enthusiastic advocates. See, e.g., R. BERGER, supra note 3, at 137: 
But Black's history falls far short of the "conclusive demonstration" he thought it to be . . . . The contrary, it may fairly be said, was demonstrated in Charles Fairman's painstaking and scrupulous impeachment of Black's history . . . .
But see A. BICKEL, supra note 11, at 102-03 ("[W]hat we have is an assertion of an exact original intention, followed by its refutation. But the refutations disprove the assertion, they do not prove its opposite.")
The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.121

There is surely no ambiguity there, so Fairman takes the tack of arguing that statements like this are few and far between, that most of the framers and ratifiers of the fourteenth amendment gave no indication whatever of believing they were applying the commands of the Bill of Rights to the states.122 Black admits that is true, but argues that it is precisely to the statements of the floor leaders we should look to determine purposes, since that is where those who were voting would have sought it.

As I said, the legislative history argument is one neither side can win.123 It really should not be critical, however. What is most important here, as it has to be everywhere, is the actual language of the provision that was propos-


122Fairman also argues that even clear statements that the bill of rights was to be incorporated wouldn't have meant in the mid-19th Century what they would mean today, since "bill of rights" was then sometimes used, specifically by Congressman Bingham, to signal not the first eight or nine amendments but rather only the due process clause of the fifth amendment and, of all things, the obligation of contracts clause. Fairman, supra note 119, at 26. This does appear to have been the usage sometimes, though I think not most often. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866) (remarks of Congressman Bingham, referring to "the bill of rights under the articles of amendment to the Constitution" in the course of a criticism of Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), which had refused to apply what we would call the Bill of Rights to the states). See also Adamson v. California, 332 U.S. at 115 (1947) (Black, J., dissenting) (quoting 1871 statement by Bingham unequivocally indicating that the privileges and immunities indicated in the fourteenth amendment were those provided by the first eight amendments.) You will also have noticed that Howard's statement is clear to that effect.

Assume for the sake of argument, however, that Fairman is right that "bill of rights" often meant only the fifth amendment's due process clause and the obligation of contracts clause. But now factor in the additional datum that it was at least a sometime part of the rhetoric of abolitionism that the fifth amendment's due process clause already incorporated most of the rest of what we would call the Bill of Rights. The most recent scholarship tends to downplay the influence exerted on the jurisprudence of the fourteenth amendment of such seemingly eccentric pre-War constitutional views. This particular view, however, had been unequivocally adopted by the Supreme Court in 1855. Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1855); see also Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 118 (1873) (Bradley, J., dissenting). One who thinks that, of course, need incorporate only the fifth amendment's due process clause to incorporate most of the Bill of Rights.

It was also part of antislavery rhetoric that Barron v. Baltimore had been wrongly decided and was therefore a nullity. See sources cited in Fairman, supra, at 28-29, 118-20. (Again we must be careful not to attribute too much influence to such strange views, but it is at least worthy of note that this one appears to have been held by Bingham himself. See CONG. GLOBE, 39th Cong., 1st Sess. 2542-44 (1866).) In terms of the original understanding, Barron was almost certainly decided correctly. But if you were committed to the proposition that the Bill of Rights already applied to the States, your silence on the subject of whether the fourteenth amendment would apply the Bill of Rights to the states wouldn't mean much, would it?

123It is generally assumed that "[a]mong the broad interpretations of the 14th Amendment implicitly rejected by the Slaughter-House Cases was the position that all the Bill of Rights had been made applicable to the states as a result of the post-Civil War constitutional changes." G. GUNThER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 505 (9th ed. 1975). However, a
reading of the various opinions in that case suggests at least the possibility that all nine justices meant to take exactly that position. The most explicit statement to this effect surely appears in Justice Bradley’s dissent, Id. at 118-19, 83 U.S. (16 Wall.) at 118-19, but it seems he was not alone. The majority indicated that

lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws.

Id. at 79. The reference to rights that owe their existence to the Federal Constitution has to be tantalizing in the present context, and indeed in the course of the ensuing list the Court says, "[T]he right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution." Id. No other provision of the Bill of Rights is mentioned, but the import of this sentence seems unmistakable: if it's a right guaranteed elsewhere in the Constitution—if, in particular, it's a right previously guaranteed only against the federal government—then of course it belongs on the list of privileges and immunities protected against state denial by the fourteenth amendment. (That the introductory reference to rights that owe their existence to the Constitution was not simply a reference to rights the fourteenth amendment itself guarantees is underscored by the Court’s subsequent observation that another privilege, namely the privilege of attaining state citizenship, “is conferred,” obviously unlike the others, “by the very article under consideration.” Id. at 80.)

We have already seen Justice Field’s complaint (joined by the other three dissenters) that the majority’s was a trivial construction, that it should have gone further. “If this inhibition . . . only refers, as held by the majority . . . to such privileges and immunities as were before its adoption specifically designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment . . . .” Id. at 96. Taken at face value, this seems to imply an understanding that the majority had not meant to incorporate the Bill of Rights. We all know enough about dissents, though, to know we shouldn’t necessarily take it at face value. Field thought the plaintiffs challenging the monopoly should win; the incorporation of the Bill of Rights—which the majority’s reference to first amendment rights had at least strongly suggested—wouldn’t help the plaintiffs; from Field’s perspective, therefore, the majority’s construction was trivial. (Field’s characterization, of course, is technically accurate: even on the reading I am suggesting, the majority had included only those prerogatives that were obviously implicit in one’s citizenship or already “specifically designated in the Constitution.” But the rights mentioned had been “specifically designated” as good against only the federal government. Including them as privileges or immunities protected against state action by the fourteenth amendment was a far from trivial step.)

Thanks in part to Field’s trivializing characterization, the majority’s hint was soon forgot. But it does seem a relevant, though again far from compelling, piece of evidence respecting the original understanding. Early in the Court’s opinion Justice Miller had observed that “fortunately” the history of the framing and ratification of the reconstruction amendments “is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.” Id. at 68. As regards the issues on which the case turned, that was polished brass: the Court split 5-4, thereby suggesting something short of freshness of memory and freedom from doubt. But as regards a proposition all nine appear with varying degrees of clarity to have endorsed—that whatever else it did, the privileges or immunities clause at least applied to the states the constitutionally stated prohibitions that had previously applied only to the federal government—there is something in the point. Cf. Twining v. New Jersey, 211 U.S. 78, 98 (1909):

[T]he contention . . . must now be examined, that the . . . personal rights which are enumerated in . . . the Federal Bill of Rights . . . are among the privileges and immunities of citizens of the United States, which this clause of the Fourteenth Amendment protects against state action. This view has been, at different times, expressed by justices of this court . . . and was undoubtedly that entertained by some of those who framed the Amendment. It is, however, not profitable to examine the weighty arguments in its favor, for the question is no longer open in this court.

One argument against incorporation that was a favorite of Justice Frankfurter is the argument from practicality, which generally takes the form of noting that the Bill of Rights includes
shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" does seem an "eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States." But there is a point that seems equally strong on the other side, namely that if the fourteenth amendment's privileges or immunities clause had been meant to incorporate the entire Bill of Rights, that would include the fifth amendment's due process clause, and the fourteenth amendment's due process clause would have been superfluous. That is an observation that does great damage to the incorporation thesis in the strong form in which it was put by Justice Black, that the fourteenth amendment meant that "henceforth the Bill of Rights shall apply to the States." It does not, however, greatly damage what by now should have emerged as the more sensible formulation, that although neither the ratified language nor what is known of the intentions that generated it fairly compels the conclusion that the provisions of the Bill of Rights were to be counted among the privileges and immunities of citizens, there is at the same time nothing in that language or those intentions that should preclude that result.

To seek in historical materials relevant to the framing of the Constitution... specific answers to specific present problems is to ask the wrong questions. With adequate scholarship, the answer that must emerge in the vast majority of cases is no answer... It is not true that the Framers intended the Fourteenth Amendment to outlaw segregation or to make applicable to the states all restrictions on government that may be evolved under the Bill of Rights; but they did not foreclose such policies and may indeed have invited them.

There is another edge to this, and that is that nothing in the material that has been discussed supports Justice Black's limitation of the fourteenth amendment's privileges or immunities clause to the function of incorporating the Bill of Rights. There is some legislative history suggesting an intention to incorporate the Bill of Rights; there is none at all suggesting that was all the privileges or immunities clause was designed to do, and indeed Howard's speech, which is Black's strongest proof of incorporation, is quite explicitly against him on the limitation point. The words of the clause are an "eminently reasonable" way of applying the Bill of Rights to the states, but

provisions guaranteeing indictment by grand jury in cases involving "infamous crime," and jury trial in civil cases involving more than $20, and asserting that of course we could not impose such an "Eighteenth Century strait-jacket" on state court systems. It's a somewhat strange argument. Federal courts operate in precisely that "strait-jacket" and by and large they are more efficient than state courts. (Admittedly, given their respective jurisdictions, the civil jury provision would be more troublesome for state courts than it has proved for federal courts.) If the rights in question don't make sense—certainly $20 is an insanely low figure today and grand juries have become rubber stamps whose only apparent useful function is investigating public officials—the appropriate answer is surely to amend the Constitution and correct the nonsensicality for federal courts too. That's easier said than done, though.


A. Bickel, supra note 11, at 102-03.
much more reasonable words could have been found had that been the only content intended. Thus Black's argument for the limitation half of his position cannot rely on the text or its intended purpose, but must instead depend on his personal discomfort with the discretion the clause on its face gives judges. But once he rejects the counsel of text and historical purpose and turns to his own vision of what is right, he ceases to be an interpretivist and engages in his own brand of noninterpretivism.

So we return to where we started. The most plausible interpretation of the privileges or immunities clause is, as it must be, that suggested by its language—that it was a delegation to future constitutional decision makers to define and protect certain rights that the document neither lists, at least not-exhaustively, nor even in any remotely specific way gives direction for finding. This fits the language and it fits as well a significant chunk of legislative history we have not yet discussed. That is that in discussing the meaning of the phrase "privileges or immunities" the framers of the fourteenth amendment adverted repeatedly to an interpretation given its article IV counterpart by Justice Washington, sitting alone on circuit, in the 1823 case of *Corfield v. Coryell.* Rather than follow the standard interpretation, which held that the privileges and immunities clause of article IV was a general guarantee of equality between out-of-staters and locals, Washington apparently read it as containing substantive guarantees of a virtually infinite variety of "fundamental" rights to everyone, whether citizen of the state or not.

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole: the right of a citizen of one state to pass through, or to reside in, any other state for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions that are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental . . . .

126 F. Cas. 546 (C.C.E.D.Pa. 1823) (No. 3250). See, e.g., Slaughter-House Cases, 83 U.S. 16 Wall. 56, 97-98 (1873) (Field, J., dissenting); Fairman, supra note 119, at 12; Graham, supra note 112, at 12.

127 F. Cas. at 551-52 (emphasis added). Raoul Berger, arguing for an extremely narrow interpretation of the fourteenth amendment's privileges or immunities clause, repeatedly
This was the opinion of a single Justice; it was *dictum* (the complainant ended up losing in *Corfield*); and it almost certainly misread the original intent of the clause it was construing—all of which tempts one so inclined to dismiss its relevance. But that would be unfair. The fact that Washington was wrong about article IV suggests that he ought not be followed on article IV, but it cannot erase the significance, for a responsible interpretation of the fourteenth amendment, of the fact that that amendment’s framers repeatedly adverted to the *Corfield* discussion as the key to what they were about to write. Thus Washington may have been wrong about the clause he was interpreting, but it would seem he was right, almost by necessity, about the clause that would be written with an eye on his remarks.

Obviously, I am not suggesting the *Corfield* list should be some sort of guide: Washington indicated it was representative rather than exhaustive, and recall that Senator Howard’s allusion to it represented it as only part of the story. I bring it up only to underscore the conclusion, which should not need underscoring, that it is no mistake to take the clause at face value, as a delegation to future constitutional decision makers to protect rights that are not listed either in the fourteenth amendment or elsewhere in the document. Rather than using a restrictive enumeration of rights, as they had, for example, in the Civil Rights Act of 1866, the framers opted to protect “the privileges or immunities of United States citizens.”

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In fact, Howard was characterizes *Corfield*, which he agreed was widely noticed by that amendment’s framers, as having construed the article IV provision narrowly. E.g., R. Berger, *supra* note 3, at 22, 31, 38, 43, 103, 211. That, however, is a view of *Corfield* its language will not bear. See also Kelly, *supra* note 70, at 1059, 1072. Berger surely must be congratulated for some valiant attempts. He relies on Washington’s indication that he wasn’t prepared to include as privileges and immunities “all the rights” protected by state law. R. Berger, *supra*, at 32. He stresses the word “confining” that appears in the third line of the quotation, id. at 22, 31, apparently without noticing that in context what Washington says, in essence, is that he feels “no hesitation in confining” privileges and immunities to everything but the kitchen sink. And he deals with Washington’s obviously fatal reference, which I have italicized, to the right “to pursue and obtain happiness and safety” in two ways: (1) by noting that it followed references to life and liberty and inferring that it must therefore have been intended as a synonym for property, and (2) by noting that in the due process (sic) clause the framers had opted for the term “property” rather than the “pursuit of happiness and safety” language. Id. at 33.

In arguing that the specific conceptions of the framers should take precedence over the apparent thrust of the constitutional language, Raoul Berger notes that we would misunderstand—though not very seriously in this case, he might have added—Hamlet’s claim that he could tell a hawk from a handsaw we to stick with the contemporary meaning of “handsaw” rather than troubling to find out that in Shakespeare’s time it referred to a heron. R. Berger, *supra* note 3, at 370. That’s so, but although Berger himself apparently can tell a handsaw from a handsaw, the argument suggests that he can’t tell ambiguity from vagueness. Where a word or phrase might have been intended to convey either of two (or more) distinct meanings, a reference to the legislative debates, or other contemporary sources, is certainly in order to discern which of the meanings was intended. Hamlet’s case is that. It by no means follows, however—in fact I have trouble understanding why one would even connect the two thoughts—that a vague term, which does not stand for two or more distinct concepts but whose application to a number of marginal cases is problematic, should be limited to those instances that are known to have been specifically cited by its users. (An example of this might be limiting Hamlet’s claim, unhappily unrecorded, that he could distinguish “the species of birds of the air”
"frank to say that only the future could tell just what application the privileges and immunities provision might have."\textsuperscript{130}

The tradition of a broadly worded organic law not infrequently or lightly amended was well-established by 1866, and, despite the somewhat revolutionary fervor with which the Radicals were pressing their changes, it cannot be assumed that they or anyone else expected or wished the future role of the

to hawks and handsaws, since those are all he mentioned.) Quite the contrary: the choice of a vague or open-ended term should, in the absence of contrary evidence, be assumed to have been intentional.

In any event, the assumption that makes Berger's error even relevant at this stage, that the framers of the fourteenth amendment specifically conceptualized "privileges or immunities" exclusively in terms of the rights listed in the 1866 Civil Rights Act, is one that seems unjustified. Berger repeatedly quotes statements about the coverage of the Act as if they applied equally to the amendment. \textit{E.g.}, \textit{id.} at 27, 30, 33, 35, 36, 118-19, 165, 170-71, 175, 241. He does not do so inadvertently, but justifies it with the claim the coverage of the two was meant to be identical. \textit{E.g.}, \textit{id.} at 22-23, 111. But equivalence in coverage is not established either by the undeniable premise that the two "bore an extremely close relation" to one another, \textit{id.} at 23 n.10, quoting Alfred Kelly, or by the equally undeniable fact that part of the purpose of the amendment was to provide an impeccable constitutional basis for the Act. \textit{E.g.}, \textit{id.} at 149, 23 n.12. (The shorthand that the amendment "embodied" the Act is used by Berger in an accordion fashion. Introduced so as to mean that the amendment was intended to "remove doubt as to [the Act's] constitutionality and to place it beyond the power of a later Congress to repeal," \textit{id.} at 23, at other points it is invoked to suggest the idea of equivalence of coverage. \textit{E.g.}, \textit{id.} at 105, 108. This sort of elision is endemic to Berger's mode of interpretation. That Senator X said he was interested in protecting rights "such as" A, B and C ends up meaning he meant to protect only A, B and C, \textit{e.g.}, \textit{id.} at 29, 35, 103; that the Black Codes were a target of the amendment ends up meaning they are all it was intended to outlaw. \textit{E.g.}, \textit{id.} at 48, 175, 208-09.) In fact there were some actual statements of equivalence, but they were rare and generally couched in terms that made clear the speaker's understandable desire to minimize the potentially radical sweep of the constitutional language. Most important, however—here as elsewhere—is the fact that the two documents, even leaving aside the observation that one of them was a statute and the other a constitutional provision, say very different things. See also, \textit{e.g.}, Kelly, \textit{supra} note 70, at 1071; Bickel, \textit{The Original Understanding and the Segregation Decision}, 69 HARV. L. REV. 1 (1955).

Berger's claim that "privileges or immunities" was a term of art, with a specific shadow meaning the framers understood, is one of a family of such claims. (Incredibly, he makes the same claim for the phrase "natural right." Thus, he says, "'fundamental,' 'natural' rights had become words of received meaning," R. BERGER, \textit{supra}, at 35 (footnote omitted); "some Republicans referred to 'the natural rights of man' [footnote at this point omitted] but those rights had been specified in the Civil Rights Act . . . ." \textit{id.} at 102. See also \textit{id.} at 174, 211, 213.) We have examined Justice Black's claim that "privileges or immunities" was a term of art referring to the first eight or nine amendments. (Professor Crosskey agrees, adding that "[t]he clause seems about as clear as a clause could be." Crosskey, \textit{supra} note 72, at 5-6.) Yet a third view of this ilk is that of Professors tenBroek and Graham, that "privileges or immunities," like the other phrases employed in the amendment, was a term of art with roots in the abolitionist movement that at least gave the impression of conveying a rather specific message of racial equality. "Their antislavery, antirace-discrimination backgrounds people understood, or thought they understood; and the framers in turn believed that the people knew and understood what this language meant." Graham, \textit{supra} note 112, at 22. See also J. TENBROECK, \textit{supra} note 76, at 3. You'll not be surprised to learn that it turns out there was no general understanding that "privileges or immunities" meant this either. R. COVER, \textit{supra} note 45, Ch. 9. You'd think we'd have gotten the message by now, if only by witnessing so many "clearly understood" meanings running off in so many directions. "Privileges or immunities" had no generally understood shadow meaning of any sort: it simply wasn't a term of art.

\textsuperscript{130}Bickel, \textit{supra} note 129, at 61.
Thus there were few citations of specific purpose that went beyond the coverage of the Civil Rights Act. But there was at the same time "an awareness on the part of these framers that it was constitution they were writing, which led to a choice of language capable of growth."132

c. Equal Protection

The inescapable open-endedness is even clearer in the case of the equal protection clause: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." We know from its face—it had virtually no legal antecedents—that it was meant to forbid certain kinds of inequality and we know from its history that it was meant particularly to forbid certain kinds of inequality toward blacks.133 We also know, however—and would rightly presume it even if we did not—that the decision to use general language, not tied to race, was a conscious one.134

131Id. at 59.
132Id. at 63. Raoul Berger characterizes this view of the fourteenth amendment as "an elegant reformulation of conspiratorial purpose," R. BERGER, supra note 3, at 105, "playing a trick upon an unsuspecting people." Id. at 107. See also id. at 57, 112. That puts the matter upside down, however. Obtaining ratification of open-ended language in the expectation it will be given an open-ended interpretation is not playing a trick. Trickery would inhere in gaining ratification of facially specific language and then giving it a latitudinarian construction, or equally—and this is the methodology favored by Berger—gaining ratification of open-ended language and then forever limiting its reach to the particular recorded exemplifications of the Congress that proposed it to the states.

133See note 102 supra; Frank & Munro, supra note 71; Graham, supra note 112. Raoul Berger asserts that "[t]he key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia, that the Republicans, except for a minority of extremists, were swayed by the racism that gripped their constituents . . . ." R. BERGER, supra note 3, at 10. (These, of course, are the selfsame framers whose every conception Berger's methodology obligates him to defer to.) Perhaps the most insisted-upon implication of this "key" is found in Berger's repeated assertion that given their racism the fourteenth amendment's framers could not conceivably have intended to draft a provision capable of one day supporting the inference that blacks were entitled to vote. E.g., id. at 55-60, 91. Curiously lacking is any attempt whatever to account for the fact that the fifteenth amendment, explicitly granting blacks the vote, was proposed and ratified only two years later. (Recent studies indicate what can come as no surprise, that by and large the two amendments were supported by the same people. G. LINDEN, POLITICS OR PRINCIPLE: CONGRESSIONAL VOTING ON THE CIVIL WAR AMENDMENTS AND PRO-NEGRO MEASURES, 1838-69 (1976). Of course all that suggests the framers didn't think the fourteenth amendment had granted blacks the vote, and thereby helps Berger with respect to the specific issue I have mentioned, but it seems fatal, and on precisely the ground on which he chose to argue the point, to Berger's general claim of the dominance of "Negrophobia." ) There's racism in all of us, of course, and obviously there was racism in the Thirty-Ninth Congress—though recognizing racism in one's constituents and being racist oneself are concepts that needn't necessarily be equated. But cf. id. at 18. The recognition that there was racism in society doubtless was one reason the framers chose open-ended language capable of development over time. But cf. note 132 supra. In any event the claim that race prejudice is "the key" to understanding the fourteenth amendment is one that borders on perversity: it is roughly akin to a claim that censorship is the key to understanding the first amendment.

134See Bickel, supra note 129, at 44-45, 60.
Obviously all unequal treatment by the state cannot be prohibited. Legislation characteristically classifies, distributing certain benefits to, or requiring certain behavior of, some but not others. What's more, such classification typically proceeds on the basis of generalizations that are known to be imperfect. We all order our lives on the basis of such generalizations: without them life would be impossible. Thus a storekeeper may not accept checks drawn on out-of-town banks, even though she knows most of them are good, just as an airline may not hire overweight pilots, though it knows most of them will never suffer heart attacks. And so the legislature may allow optometrists but not opticians to replace eyeglass lenses even though it is aware that many opticians are entirely capable of doing so. Thus unless all legislation that classifies, which is to say virtually all legislation, is to fall, the baseline equal protection requirement must be close to the one that the Court has in fact developed, the so-called "rational basis" test. The meaning of those words is not as clear as we sometimes pretend, but the meaning of the test that is important at the moment is that counterexamples, even a large number of counterexamples, do not void a classification so long as a reasonable person could find sufficient correlation between the evil combatted and the trait used as the basis of classification.

That cannot be the whole story, however. In particular, the core case, that of racial discrimination, cannot adequately be handled by a rational basis test. As Professor Cox has observed, "Honest men not only could, but many do, conclude after serious study that the academic progress of children is greater when the races are segregated." Indeed, apartheid generally is a rational means of avoiding racial strife, and indeed one might rationally distribute jobs on the basis of color—giving what we generally think of as the better ones to whites—given the statistical reality that blacks by and large are not as well educated in our society as whites. Something stronger than the usual rational basis test must be invoked, and in fact has been invoked, if racial classifications are to be held unconstitutional.

That really puts it to us. We know it was the central point of the equal protection clause to eliminate most racial classifications; we know the decision to cover nonracial classifications as well was quite conscious; but we also know that the sort of test that is needed to void racial classifications—one that is intolerant of a significant incidence of counterexample—would if honestly applied end up voiding most legislation. So we need at least two standards, maybe more. The constitutional text does not give us a clue as to

135 See also F. HAYEK, supra note 21, at 209 (1960); 1 A. KAHN, THE ECONOMICS OF REGULATION 189-90 (1970).
136 See also 1 R. VON IHERING, DER GEIST DAS ROMISCHE RECHT 51-56 (2d ed. 1883), quoted in translation, Tribe, Structural Due Process, 10 HARV. C.R.-C.L. L. REV. 269, 283-84 n.43 (1975).
138 A. Cox, supra note 67, at 60.
what they might be and again—and here the conclusion is utterly in-
escapable, lacking even any possibility like Justice Miller's or Justice Black's
"solutions" to privileges or immunities—we are left with a provision that must
be given content but cannot derive it from anything within the four corners
of the document or the known intent of the framers.

One might be tempted to conclude that this is an observation of limited
clout, rather akin to my earlier observation that the cruel and unusual
punishment clause seems to call for some reference to outside sources. (I
suspect some implicit assumption along these lines is why the equal protection
clause never drove Justice Black into the frenzies the privileges or immunities
clause and the ninth amendment did.) The idea would be that just as the
eighth amendment deals only with punishments, so the equal protection
clause deals only with discriminations among classes of persons. Some freelan-
cing is inevitable, but it too is in limited compass, "only" on the subject of
equality. The problem with that viewpoint is that any case, indeed any
challenge, can be put in an equal protection framework by competent
counsel. If you wish to challenge the fact that you're not getting good X
(or are getting deprivation Y) it is a virtual certainty that you will be able to
identify someone who is getting good X (or who is not getting deprivation Y).
Further, though the argument does not need this step, the odds are
good—though there obviously can be differences here—that the reasons ad-
duced for giving X to the other person but not to you are much the same as
would be produced if you simply, without reference to the other person,
challenged the fact that you were not getting X. This adds up to something
important, that it does not matter greatly whether one accepts my revisionist
reading of the privileges or immunities clause. Because the limitation to cases
involving differential treatment turns out to be no important limitation at all,
the equal protection clause has to amount to what I have claimed the
privileges or immunities clause amounts to, a general mandate to evaluate the
substantive validity of governmental choices. And the content of the equal
protection clause—the answer to the question of which inequalities are
tolerable under what circumstances—plainly will not be found anywhere in
the document or the recorded remarks of its writers.

d. "Equal Protection" and the Federal Government

The equal protection clause does not apply to the federal government.
Nonetheless, in Bolling v. Sharpe, striking down segregated schooling in the
District of Columbia the same day as Brown v. Board of Education, the
Court held, in essence, that the due process clause of the fifth amendment in-
corporates the equal protection clause of the fourteenth amendment. This

See also Perry, Constitutional "Fairness": Notes on Equal Protection and Due Process, 63

437 U.S. 497 (1954). The Burger Court has recently taken to indicating that the "equal
protection" mandate of the fifth amendment is weaker than that of the fourteenth amendment.
is obvious gibberish syntactically and historically, and was explained by Chief Justice Warren in terms of an unwillingness to hold the states to a higher constitutional standard than the federal government. "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."¹⁴¹

But unthinkable in what sense? Surely not in terms of the historical intent: the members of the reconstruction Congress might well have trusted themselves and their successors in a way they did not trust the existing and future legislatures of southern states. They knew how to bind their successors when they wanted to: the fifteenth amendment provides that the right to vote shall not be denied or abridged "by the United States or by any State" on account of race. The evidence of the document is thus strong that the decision not to bind Congress by the equal protection clause was at least conscious. In an oft-quoted phrase (though I suppose he only said it once), Justice Holmes announced, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."¹⁴² Holmes had been wounded at Antietam.¹⁴³

Unthinkable in 1954, then? This one is closer, though Judge Linde has argued that Congress would have had no choice but to bring the District into line with Brown: "With serious congressional work on civil rights legislation having been foreclosed for years only by southern filibusters, the ultimate outcome could not have been seriously in doubt."¹⁴⁴ Maybe, maybe, but such an optimistic account surely devalues the costs of the likely delay and the likely ways that delay would have been achieved, not to mention what those two together would have cost in terms of state compliance. I therefore confess, if that be the word, I would have strained sorely to side with the Chief Justice had the language of the fifth amendment been able to bear his construction.

It is hard to see how it can, however. What's more, the fact that "due

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¹⁴¹ 547 U.S. 497, 500 (1954).
¹⁴² O. HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920).
¹⁴³ In his general state of confusion, Congressman Bingham appeared at least initially to think an equal protection concept was part of the fifth amendment's due process clause. See CONG. GLOBE, 35th Cong., 2d Sess. 883-84 (1859); CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (1866). That he came during the debates to recognize his error, or at least to recognize that his understanding was eccentric, is suggested by the fact that in redrafting the fourteenth amendment he added an equal protection clause to the due process clause that had appeared in his first draft.
¹⁴⁴ Linde, supra note 64, at 234.
process," read responsibly, means due process\(^1\) is something we may be able to shrug off in the context of the fourteenth amendment which contains other phrases that do mean what “due process” has wrongly been read to mean. In the fifth amendment, however, the due process clause stands alone. Hope for responsible application of an equal protection concept to the federal government must therefore lie in that old constitutional jester, the ninth amendment, and particularly in the possibility that we will be able responsibly to conclude not only that it too amounts to a mandate for general and textually-unbounded substantive review but also that an equal protection function is appropriately assigned to such an open-ended provision.

e. The Ninth Amendment

The ninth amendment, which does apply to the federal government, provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Occasionally a commentator will express a willingness to read it for what it seems to say, but this has been, and remains, a distinctly minority impulse. In sophisticated legal circles mentioning the ninth amendment is certain to get a laugh. (As in “What are you planning to rely on to support that argument, Hiram, the ninth amendment?” It’s sort of like a standup comic’s saying “mother-in-law,” “Brooklyn” or “Billy Carter.”) The joke is somewhat elusive. It is true that read for what it says the ninth amendment seems open-textured enough to support almost anything that one might wish to argue, and that can get pretty scary.\(^2\) I’ve indicated that it scares me; but that is equally true of the “substantive due process” concept, which is generally accepted, albeit with some misgivings, in the selfsame sophisticated circles. That puts the world exactly upside down, however, for whereas the due process clause speaks only of process, the ninth amendment refers to unenumerated rights.

The received account of the ninth amendment, which Justice Black once went so far as to say “every student of history knows,”\(^3\) goes like this. There was fear that the inclusion of a Bill of Rights in the Constitution would be taken to imply that federal power was not in fact limited to the authorities enumerated in article I, section 8, that instead it extended all the way up to the edge of the rights stated in the first eight amendments. (As in “Obviously the federal government has authority to do everything except abridge

\(^{1}\)Recall as well, if it matters, that the historical record of a purely procedural intendment for “due process” itself is much cleaner respecting the fifth amendment than it is respecting the fourteenth.


freedom of speech and so forth." The ninth amendment, the received version goes, was attached to the Bill of Rights simply to negate that inference, to reiterate that ours was to be a government of "few and defined powers."

Every student of history does not know this. It is true that there was fear, no matter how strained it may seem to a contemporary observer, that the addition of a Bill of Rights might be taken to imply the existence of substantive powers beyond those stated in the body of the Constitution. It is also true that the alleviation of this fear was one reason Madison gave for attaching the ninth amendment to the Bill of Rights. The conclusion that that was the only reason for its inclusion does not follow, however, and in fact seems wrong. The tenth amendment, which provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," was submitted and ratified at the same time, and it completely fulfills the function that is here being proferred as all the ninth amendment was about. It says—in language as clearly to the point as the language of the ninth amendment is not—that the addition of the Bill of Rights is not to be taken to have changed the fact that powers not delegated are not delegated. It does seem that a similar thought was part of what animated the ninth amendment, but if that were all that amendment had been calculated to say, it would have been completely redundant.

There is not much legislative history bearing on the ninth amendment, but what there is unsurprisingly confirms that one of the thoughts behind it was the thought that its terms convey. A letter Madison wrote to Jefferson in October 1788 (talk about your legislative history!) gave the reasons why the writer, though in favor of a Bill of Rights, had not yet pressed for the inclusion of one:

My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. . . . I have not viewed it in an important light—1. because I conceive that in a certain degree . . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience, in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power.148

When it came to his explanation of the ninth amendment on the floor of Congress the following June, however, the clarity of the letter to Jefferson—carefully separating the question of unenumerated powers from the question of unenumerated rights—gave way to some confusion:

It has been objected also against a bill of rights that, by enumerating particular exceptions to a grant of power, it would disparage those rights

148 WRITINGS OF JAMES MADISON 271 (Hunt ed. 1901-08).
which were not placed in that enumeration; and it might follow by implication, that those rights that were not placed in that enumeration, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights unto this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.\footnote{1}

Here the points are telescoped, and the possibility that unenumerated rights will be disparaged is seemingly made to do service as an intermediate premise in an argument that unenumerated powers will be implied, though at the very end of the first sentence it seems to flip again and the possibility that unenumerated powers will be inferred now seems threatening because of what that would mean to unenumerated rights. The confusion is understandable in context: a good deal of the debate over a Bill of Rights is marked by what we would today regard as a category mistake, a failure to recognize that rights and powers are not simply the absence of one another but rather that rights can cut across or "trump" powers.\footnote{5} What is important is that even here Madison, though he may have linked them in a way that seems unnatural today, made both of the points he had made more clearly earlier—that he wished to forestall both the implication of unexpressed powers and the disparagement of unenumerated rights. What is more important is that just as the tenth amendment clearly expresses the former point, the ninth amendment clearly expresses the latter. And it is, of course, that language on which the Congress and the state legislatures were asked to vote. Thus the ninth amendment speaks clearly of unenumerated rights and in addition there is evidence, though I would argue it is unnecessary, that its author understood what he had written.\footnote{51}

\footnote{1}ANNALS OF CONG. 439 (1789). (The clause referred to contained what is now the ninth amendment.) \textit{See also} J. STORY, \textit{Commentaries on the Constitution of the United States} § 1861 (1833); E. DUMBAULDT, supra note 147, at 208 (quoting originally submitted version of ninth amendment).

\footnote{5}As in "A law prohibiting the interstate shipment of books may be a regulation of commerce, but it violates the first amendment and thus must fail." This is not to say the proper relation between the two concepts was never apprehended. \textit{See}, e.g., \textit{The Federalist} No. 84, at 535 n.* (B. Wright ed. 1961) (Hamilton): "To show that there is a power in the Constitution by which the liberty of the press may be affected, recourse has been had to the power of taxation." Hamilton goes on to argue that the example is faulty because taxes on newspapers cannot violate freedom of the press (\textit{but see} Grosjean v. American Press Co., 297 U.S. 233 (1936)), but the structure of the discussion nonetheless demonstrates what can hardly come as a surprise, that the possibility of a governmental act's being supported by one of the enumerated powers and at the same time violating one of the enumerated rights is not one we have only recently become capable of contemplating. That is also demonstrated, of course, by the inclusion in the body of the original Constitution of the prohibitions against federal bills of attainder and ex post facto laws despite the obvious fact that no affirmative power to pass such offending laws had anywhere been granted in terms: the framers obviously realized that a regulation of interstate commerce could at the same time be an ex post facto law and therefore moved to ensure that the latter characterization could trump the former.

\footnote{51}All this encounters an argument first made by Alfred Kelly and recently repeated by Paul Brest: "if the Ninth Amendment were concerned primarily with safeguarding individual liberties,
That doesn't mean we're home free, though. For once the received federalism account has been discarded, a further choice comes into focus. For it still might be the case that the ninth amendment was intended to indicate not that there were other federal constitutional rights, but rather that the enumeration of certain rights in the first eight amendments was not to be taken to deny or disparage the existence of other sorts of rights—rights that do not rise to the constitutional, at least not to the federal constitutional, level. That is, it might have been intended to make clear that despite the Bill of Rights Congress could create further rights, or that state legislatures (or common law courts) could do so, or that a state could choose to do so in its own constitution. 

This is a possibility that is more plausible than the received federalism construction, if only because it is vastly more consistent with the amendment's one might expect to find similar provisions in some of the bills of rights of contemporary state constitutions; but the Ninth Amendment is unique." P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 708 (1975), relying on Kelly, supra note 120, at 154. The word "contemporary" makes the claim technically accurate: no such provision appears in any Eighteenth Century state bill of rights. But that interpretation, which is the only one that can preserve the claim's accuracy, makes the entire argument somewhat misleading, since there weren't many state bills of rights of any sort—or for that matter many states—back then. And when one examines the period when most state bills of rights in fact were drafted, namely the Nineteenth Century, one discovers a fact not mentioned by Kelly or BREST, that no fewer than 26 of them contained provisions indicating that the enumeration of certain rights was not to be taken to disparage others retained by the people, and indeed several of them were quite clear about distinguishing this caveat from another we have seen, namely that unenumerated powers are not to be inferred. (Alabama 1819; Arkansas 1836; California 1849; Colorado 1876; Florida 1885; Georgia 1865; Iowa 1846; Kansas 1855; Louisiana 1868; Maine 1819; Maryland 1851; Minnesota 1857; Mississippi 1868; Missouri 1875; Montana 1889; Nebraska 1866-67; Nevada 1864; New Jersey 1844; North Carolina 1868; Ohio 1851; Oregon 1857; Rhode Island 1842; South Carolina 1868; Virginia 1870; Washington 1889; Wyoming 1889. All will be found in the seven volumes of THE FEDERAL AND STATE CONSTITUTIONS (F. Thorpe ed. 1909). Those distinguishing the two caveats include the Kansas, Nebraska, North Carolina, Ohio and South Carolina constitutions mentioned.) Indeed, the presence of such "little ninth amendments" in state constitutions was so common that in 1911 Professor Corwin referred to "the usual caveat that enumeration of certain rights should not be construed to disparage other rights not so enumerated." Corwin, supra note 70, at 384 (emphasis added). I haven't the slightest doubt that many of the provisions, though there are a number of minor variations in language, were inspired by the ninth amendment: a good deal of copycatism is evident throughout the state constitutions. But that doesn't reduce their relevance a whit. The framers of the various state constitutions did not, for reasons that are entirely obvious, copy or paraphrase article I, section 8 or other provisions of the Federal Constitution that related to the bounds of federal power. But they did copy or paraphrase the ninth amendment.

It is therefore true that no Eighteenth Century state bill of rights included a provision analogous to the ninth amendment, and that merits mention. But the Nineteenth Century provisions do as well, in a way that tends not simply to neutralize Kelly and BREST's argument, to leave us in a position to ignore it, but indeed to turn it around. The fact that the constitution-makers in, say, Maine and Alabama in 1819 saw fit to include in their bills of rights provisions that were essentially identical to the ninth amendment is strong evidence, in fact it is virtually conclusive evidence, that they understood it to mean what it said and not simply to relate to the limits of federal power.

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114Pound, Introduction to B. PATTERSON, supra note 146, at iv, vi suggests this latter reading. Neither Dean Pound nor Professor Patterson notes the clear incompatibility of their respective views. (I suppose if you get the opportunity to have the Dean of the Harvard Law School write your introduction, you grab it.)
language. It seems pretty clear, however, that it too must be rejected. One thing is certain from the historical context: the ninth amendment was not designed to grant Congress an authority to create additional rights, to amend article I, section 8 by adding a general power to protect rights. That did not come, if it ever did, until section 5 of the fourteenth amendment was ratified 77 years later. (Nor is "others retained by the people" an apt way of saying "others Congress may create.") Thus unless the reference was to other, unstated federal constitutional rights, it must have been to other rights protected by state law—statutory, common or constitutional. That makes just as little sense, however. It is quite clear that the original framers intended the Bill of Rights to control only the actions of the federal government. It is just as clear, and was then too, that state law, even state constitutional law, is incompetent to do so and must therefore content itself with controlling the actions of the state government. We thus encounter an inference so silly it would not have merited rebuttal. What felt need could there possibly have been to rebut the inference that the Bill of Rights, controlling only federal action, had somehow preempted the efforts of the people of various states to control the actions of their state governments?

Apropos of the incorporation debate, Dean Wellington has argued that "[c]ontemporary technology, a population moving frequently across state lines, and the expanding role of the federal government in law enforcement have made America too much one country for considerations of federalism to sustain at a constitutional level" the idea that the states are subject to significantly less stringent restrictions than those the Bill of Rights imposes on the federal government. Maybe that is correct, but the argument is at

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153Our counterargument that might be tempting to a contemporary observer is that the placement of the ninth amendment, right after eight provisions setting out federal constitutional rights, indicates that it was designed to perform the same sort of function. This one won't work. The tenth amendment, submitted and ratified at the same time as the first nine, is obviously not a right-stating provision, and in fact two other "non-rights" provisions (controlling the number of Representatives and their compensation) were also submitted by Congress at the same time (they were the first two, what we know as the first amendment coming third) but were not ratified by the requisite number of states.

154Every first year law student learns in his study of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), that there is no such thing as federal common law. Most third year students learn that that is not quite true, that "common law" quite properly develops around the spare commands and authorizations of federal statutes. See, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). See also Monaghan, Foreword: Constitutional Common Law, 89 HARV. L. REV. 1 (1975). It is also not quite true in a sense more relevant here: there was in the air at the time the Constitution was drafted and ratified the notion that the common law in some sense controlled the legislature, that it was, as we would say it today, a species of constitutional law. But to pitch one's reading of the ninth amendment to that notion, and of course it was part of a welter of sources of constitutional law, is to accept the conclusion I am urging: that the ninth amendment meant that there were federal constitutional rights beyond those stated in the document.

155See also note 122 supra.

156The "need" to rebut the inference that the Bill of Rights meant that state legislatures and courts could no longer order relations among their citizens by the creation of nonconstitutional "rights" would have been, if anything, still more attenuated.

least as strong the other way around: in terms of respect for the judgments of federal courts and the success of enforcement efforts it does seem important that the states not be bound by a set of textually unstated constitutional rights that do not restrain the actions of the federal government. This, of course, is essentially the argument that prevailed in Bolling v. Sharpe, but with one critical difference: the ninth amendment, unlike the due process clause on which the Court attempted to balance its Bolling result, will bear the meaning tendered. In fact, the conclusion that the ninth amendment was intended to signal the existence of federal constitutional rights beyond those listed elsewhere in the document is the only conclusion its language can comfortably support.158

f. The Point of All This

The point of all this is this: you cannot be an interpretivist. Justice Black's "answer" to the privileges or immunities clause and the ninth amendment was essentially to ignore them.159 Usually more than willing to return to the original understanding when intervening precedent stood in his way, he displayed a curious contentment with the crabbed interpretations of his predecessors when it came to these two. Of course it really is not curious at all—he did not like the jurisprudential implications of those provisions.160

But Black most of all cannot behave this way. He urged us, correctly, to behave like lawyers rather than dictators or philosopher kings and thus to

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158I know, if only because this account of the ninth amendment is not the received one, that not everyone will agree. Those who do not should reserve their more creative constitutional thinking for problems involving review of the actions of state governments only, and limit their review of federal action to the Bill of Rights and other "explicit" prohibitions. That won't be insignificant: Justice Holmes was overly sanquine about the federal government, but he was right in his comparative judgment. States are a greater threat to our liberties. It is also conceivable—in fact it has been a common position—that one could accept the received version of the ninth amendment but hold that the fifth amendment's due process clause is a mandate for general and textually untethered substantive review. (That is to say, that the ninth amendment means not what it says but instead what the tenth amendment says, and the fifth amendment means not what it says but rather what the ninth amendment says.) Persist in that combination of views if you must—it makes no functional difference—but do so in the awareness that if this were a just world, you would be chained behind a half-ton pickup and dragged across the Baja.

159He seems to have gone along with the Court's active use of the equal protection clause up until the point it became impossible not to recognize that the power to review classifications is an authority as broad and powerful as straight-out can-they-do-it substantive review. Compare, e.g., Griffin v. Illinois, 351 U.S. 12 (1956) (Black, J., for the plurality), with Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (Black, J., dissenting).

160His Griswold dissent is classic to this effect:
I discuss the due process and Ninth Amendment arguments together because on analysis they turn out to be the same thing—merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive.

581 U.S. at 511.
heed the directions of the constitutional document. On candid analysis, though, the document turns out to contain provisions instructing us to look beyond the document. He did not like where these provisions led, but this was a man who spent his life railing against people who ignored the language and purpose of provisions because they did not like where they led. There is a difference between ignoring a provision (such as the first amendment) because you do not like its specific substantive implications and ignoring a provision (such as the ninth amendment) because you do not like its institutional implications, but it is hard to make it a difference that should count.

An interpretivist like Black has two possible answers remaining. The first, which I've never heard, would go something like this. Suppose there were in the Constitution one or more provisions providing for the protection of ghosts. Can there be any doubt, now that we no longer believe there is any such thing, that we would be behaving properly in ignoring the provisions? The "ghost" here is natural law, and the argument would be that because that is the source from which the open-ended clauses of the ninth and fourteenth amendments were expected to derive their content, we are justified, now that our society no longer believes in natural law, in ignoring the clauses altogether.

The argument is too slick. Although natural law thinking was current in both relevant eras, it was far from a universally accepted theme.161

Some of the intellectual stalwarts of rebellion, like James Otis, actually came to associate principles of natural law and natural equity with positive law—to assert that what is right is therefore law. But those giants who managed the awesome transition from revolutionaries to "constitutionaries"—men like Adams and Jefferson; Dickinson and Wilson; Jay, Madison, Hamilton, and, in a sense, Mason and Henry—were seldom, if ever, guilty of confusing law with natural right. These men, before 1776, used nature to take the measure of law and to judge their own obligations of obedience, but not as a source for rules of decision.162

Justice Iredell's articulate attack on natural law thinking in Calder v. Bull163 is well known; less well remembered is that Iredell had been a prominent voice for ratification. Persons of this ilk—needless to say they have their reconstruction counterparts—certainly didn't have natural law in mind when the Constitution's various open-ended delegations to the future were inserted and approved, which undoubtedly is one reason the Constitution at no point refers to, natural law. If it did, then we would have our ghosts case.164

161See, e.g., R. Cover, supra note 45, at 22-25; Corwin, The "Higher Law" Background of American Constitutional Law, 42 Harv. L. Rev. 365, 400-01 (1929). (Obviously Adams' use of the concept here was an advocate's use: "natural law" was commonly invoked thus, as one of a quiverfull of sources justifying the break from Britain.)
162R. Cover, supra note 45, at 27.
1633 U.S. (3 Dall.) 386, 398 (1798).
164Of course, even then another sort of answer would be possible, that constitutional decision makers should strive to approximate the concept of natural law in some contemporarily accep-
The second answer is that even granting that clauses like those under consideration establish constitutional rights, they do not readily lend themselves to principled judicial enforcement and should therefore be treated as if they were directed exclusively to the political branches. This suggestion is one that has been made—inter alia, and surprisingly, by Felix Frankfurter, who indicated in correspondence in the late 1950's that he wished the due process clause (his idea of an open-ended provision) had been so treated.\(^1\)

It would be the cheapest of shots to note that there is no legislative history specifically indicating an intention that the ninth amendment was to receive judicial enforcement. There was at the time of the original Constitution no legislative history indicating that any specific provision was to receive judicial enforcement: the ninth amendment was not singled out one way or the other.\(^6\) What is instructive, and it cuts the other way, is that the precursor decisions typically cited as "proof" that judicial review was intended—though they are too few and unclear really to amount to that—were often noninterpretivist decisions, drawing their mandates not from any documentary prohibition but rather from some principle derived externally, as from "natural justice," "common law" or perceived societal tradition.\(^6\) As far as the fourteenth amendment is concerned, it is true the (misdirected) anticipation seems to have been that it would receive its most meaningful enforcement by Congress (acting under section 5) rather than by the courts. It is also true that at the time of its ratification only two Acts of Congress had been declared unconstitutional by the Supreme Court (in *Marbury v. Madison* and *Dred Scott*). That does not mean the authority went unnoticed, however. *Dred Scott* itself drew heavy fire, and even prior to that time:

> [W]e may draw two conclusions concerning the criticism of the Supreme Court: first, the court was criticized quite as much for not declaring congressional acts unconstitutional as for doing so: second, it seems clear that both Federalist and Republican criticism during these early years was directed not so much at the possession of the power of the court to pass on the validity of acts of Congress as at the effect of its exercise in supporting or invalidating some particular party measure.\(^6\)

It is also highly relevant that a number of state statutes had been struck down in the first half of the nineteenth century. (The reconstruction amendments were, after all, principally directed at the states.) The Republican criticism of
Dred Scott (and of Barron v. Baltimore as well) continued throughout the drafting and ratification processes. Naturally this spilled over into a general distrust of the institution of judicial review, but in the debates the institution was assumed and the attack was limited to the specific offending instances. Surely there was nothing remotely resembling a consensus that the authority to review was generally to be curtailed: if anything, the consensus ran the other way. More importantly for present purposes, there was not even a hint—and I am not aware that anyone has suggested there was—that the fourteenth amendment was to be treated any differently in this respect from other provisions.

This, however, is a question on which history cannot have the last word, at least not the last affirmative word. If a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, responsible commentators would have to conclude, whatever the framers may have been assuming, that the courts should stay away from them. Given the transparent failure of the efforts allegedly in this direction he saw around him, Justice Black's instinct to decline the delegation was healthy. Whether those efforts can be improved upon is the critical question facing constitutional scholarship.

170See also H. GRAHAM, supra note 82, at 447-48.
171See also Strong, supra note 8, at 42-43.
172One taking the view under discussion would also have to face the question of which phrases are on which side of the line. As we have seen, the Constitution is not divided into two sets of provisions, precise and open-ended. What, for example, would the view in question make of the cruel and unusual punishment and just compensation clauses? Would they be judicially enforceable? One has to assume so. But although the compass of each is limited, each surely requires the injection of content not to be found in the document.