Original Intent and Boris Bittker

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INTRODUCTION

A late entrant in the original intent debate, Professor Boris Bittker brings formidable skills and a disarmingly urbane style and wit to bear on the issue.1 His probing analysis and hitherto unasked questions wrung from my lips, “Oh, to be 75 again.” Since his article is studded with citations to my works, I feel constrained to gird up my aged loins and break a lance with him. In great part he casts his argument in the form of imaginary dialogues and fictional judicial decisions. On the analogy of ancient priests who spoke from a cave through the lips of oracles, I shall assume that it is Bittker, not his puppets, who speaks.

By way of illustrating the absurdity of resort to the original intent, Bittker summons the Antitrust Act. Generally the Act is considered to rest on the commerce clause power, but he recalls that “a primary task of the Philadelphia Convention of 1787 was to eliminate obstructions to interstate commerce that states imposed upon each other,” and that the original intent was to limit the interstate power to the “mischief it was meant to remedy.”2 This is a paraphrase of some of my remarks in a chapter which emphasized that the interstate power was not designed to encroach on a state’s purely internal affairs.3 Bittker reasons that to apply the mischief-remedy principle “might metastasize from the state’s highways to the heavens above . . .

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2. Id. at 240. Bittker notes that “Senator Sherman expressed doubts about the constitutionality” of the Act, saying, “It is very clear there is no such power unless it is derived from the power of levying taxes; that it is a power which must be exercised by each State for itself.” Id. at 241 n.25. “[A]s recently as 1874 the Supreme Court recognized that the federal power to reach into the states to regulate railroads was problematic.” Id. at 248. And, Bittker calls attention to “Congress’ reliance on its power to establish military and postal roads as a basis for regulating railroads (thus sidestepping doubts about its authority under the commerce clause).” Id. at 248 n.49.

He cites me for “concern about free passage of goods, not of people, prompted the commerce clause.” Id. at 249 n.51. I wrote, “As Zechariah Chafee noted, ‘Though much was said about barriers at State lines against goods, nobody spoke about persons,’ presumably because the Framers assumed such barriers had been razed by Article IV.” R. BERGER, FEDERALISM: THE FOUNDERS’ DESIGN 125-26 (1987) [hereinafter R. BERGER, FEDERALISM].

3. R. BERGER, FEDERALISM, supra note 2, at 120-57.
balkanize the nation's already dangerous skies." There is no need to read the legislative history so narrowly, particularly in light of related comments. The line between federal and state jurisprudence was cogently drawn by James Wilson:

Whatever object of government is confined in its operation and effect, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.5

"Wherever an object occurs," he said, "to the direction of which no state is competent, the management of it must, of necessity, belong to the United States."6 Here is the rationale of the federal power to make war, negotiate treaties or regulate foreign commerce.7 Thirteen states could not separately make war, negotiate treaties or regulate foreign commerce. Nor can fifty states regulate a flight from Boston to Los Angeles.8

True, this particular instance did not occur to the framers. But they foresaw that the nation would expand westward. Air transportation across the continent falls within the rationale of federal jurisdiction: only the federal government can regulate it. Assuming that the foregoing analysis is questionable, the situation is not irreparable. In a similar context, Madison stated, "[h]ad the power of making treaties . . . been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the Constitution."9

Activists ring the changes on the consequences of renouncing the benefits of even more recent legislation,10 but they never weigh them against the consequences of ratifying the role of the Court as a "continuing constitutional convention,"11 constantly engaged in revising the Constitution, a role

4. Bittker, supra note 1, at 249.
5. R. BERGER, FEDERALISM, supra note 2, at 71.
6. Id.
7. THE FEDERALIST No. 45, at 303 (J. Madison) (Mod. Lib. ed. 1941). He was anticipated by Roger Sherman in the Federal Convention. 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 133 (1911).
8. Bittker, supra note 1, at 249. I express no opinion as to the constitutionality of the Antitrust Act.
9. 2 ANNALS OF CONG. 1900-01 (1791).
11. Leonard Levy considers that the Court "has no alternative" to behaving like a "continuous constitutional convention." L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 351 (1988). Edward Corwin observed that Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), "virtually ratifies Jeremiah Black's argument for Milligan, that 'a violation of law on the pretence of saving such a government as ours is not self-preservation, but suicide.'" E. CORWIN, TWILIGHT OF THE SUPREME COURT 134 (1934) (quoting Ex parte Milligan, 71 U.S. (4
that is without the slightest warrant in the text and history of the Constitution. To make the Court the ultimate arbiter of national policy seems to me a far graver consequence than to overturn "desirable" unauthorized legislation. Further, rejection of original intent saps the very foundation of judicial review itself. Nowhere does the Constitution explicitly authorize the courts to overturn federal or state legislation. Is it preferable to regard judicial review as a naked arrogation rather than resort to the original intent that shows it was contemplated by the framers and ratifiers? Unlike his activist colleagues, Bittker, as will appear, faces up to such issues.

Before grappling with Bittker's microscopic division of analysis—he proceeds on the adage "divide and conquer"—let me set out a couple of concrete examples of clear, unassailable original intent, following the common law tradition of proceeding from the particular rather than from some overarching generalization.

There was remarkable unanimity in the Federal Convention, The Federalist and the ratification conventions that the Senate was to participate in making treaties, not merely to rubber-stamp them after they had been made by the President. As late as August 6, the Convention's Committee on Detail draft provided that "the Senate...shall have power to make treaties." During the debate Madison observed that the Senate "represented the States alone," and consequently, "the President should be an agent in Treaties." As the
Convention drew to a close, the Committee of Eleven proposed on September 4 that the "President by and with the advice and consent of the Senate, shall have power to make treaties." Rufus King observed that "as the Executive was here joined in the business, there was a check on the Senate which did not exist in [the prior] Congress." In *The Federalist Number 38* Madison wrote that the Constitution "empowers the Senate, with the concurrence of the Executive, to make treaties." Clear-cut confirmation is furnished by Hamilton in *The Federalist Number 75*:

> [T]he vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the legislative body in the office of making them.

It must indeed be clear to a demonstration that the joint possession of the power in question, by the President and Senate, would afford a greater prospect of security, than the separate possession of it by either of them.

Such expression likewise was voiced in several ratification conventions. Hamilton explained in New York that "[t]hey, together with the President, are to manage all our concerns with foreign nations." And Chancellor Livingston said that the members of the Senate "are to form treaties with foreign nations." In Pennsylvania, James Wilson stated, "nor is there any doubt but the Senate and President possess the power of making (treaties)." In North Carolina, Samuel Spencer said that the members of the Senate "are, in effect, to form treaties." Surely this history illustrates the "homogenous intent" Bittker suggested it was impossible to distill. To ignore this history is to insulate presidential claims to a monopoly on foreign relations, a "consequence," I hazard, that Bittker would find unpalatable.

Consider an even plainer example of original intent, the exclusion of suffrage from the reach of the fourteenth amendment, which in recent years has become a lesser Constitution. Senator Jacob Howard, to whom it fell to explain the amendment, said:

> We know very well that the States retain the power, which they have always possessed, of regulating the right of suffrage in the States. It is the theory of the Constitution itself. That right has never been taken from them and the theory of this whole Amendment is, to leave

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17. *Id.* at 495.
18. *Id.* at 540.
22. *Id.* at 506.
24. *See Bittker, supra* note 1, at 267.
the power of regulating the suffrage with the people or Legislatures of
the States, and not to assume to regulate it by any clause of the
Constitution.\textsuperscript{25}

Howard is confirmed by the Report of the Joint Committee on Reconstruc-
tion (of both Houses) which drafted the amendment: "It was doubtful . . .
whether the States would consent to surrender a power they had always
exercised, and to which they were attached." Consequently, it commended
section two because it "would leave the whole question with the people of
each State."\textsuperscript{26} Justly did Justice Harlan consider this as irrefutable and
unanswered evidence of the framers’ exclusion of suffrage from the four-
teenth amendment.\textsuperscript{27} Nevertheless, the Court decided that the Constitution
required reapportionment\textsuperscript{28} in the face of the incontrovertible evidence that
suffrage was excluded from the federal jurisdiction. One may applaud the
"result"\textsuperscript{29} and yet deplore the judicial assumption of power to revise the
Constitution.

I. ORIGINAL INTENT

It is not enough to advert to the originalists’ "central tenet [that] .
'the intention of the lawmaker is the law, rising above even the text.'"\textsuperscript{30}
For that tenet is not only rooted in six hundred years of Anglo-American
law; but as the Supreme Court noted, it was also invoked in medieval days
for a surgeon's bloodletting in the streets of Bologna.\textsuperscript{31} Chief Justice
Marshall stated that it was the "most sacred rule of interpretation."\textsuperscript{32} The
doctrine, wrote Thomas Grey, himself an activist, is "deeply rooted in our
history and in our shared principles of political legitimacy. It has equally
deep roots in our formal Constitutional law."\textsuperscript{33} Because Bittker calls atten-
tion to Jefferson Powell's "recent analysis of the interpretative principles

\textsuperscript{26.} Id. at 94.
\textsuperscript{29.} But see W. ELLIOTT, THE RISE OF A GUARDIAN DEMOCRACY (1974). Writing of the one
man-one vote decision, Vannevar Bush, a brilliant scientist and engineer, said of those who
support the decision

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

\textsuperscript{30.} Bittker, supra note 1, at 242 (quoting R. BERGER, FEDERALISM, supra note 2, at 15-
16).
\textsuperscript{31.} Hawaii v. Mankichi, 190 U.S. 197, 212 (1903).
\textsuperscript{33.} Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703, 705 (1975).
accepted by the framers at the time of the Philadelphia Convention,"\(^{34}\)
wherein Powell, the veriest tyro,\(^{35}\) read original intent out of the common
law, I may be indulged for a very brief summary of some proof to the
contrary.

Powell acknowledged that the "central concept—the goal—of common
law interpretation was indeed what the common lawyers called 'intention,'\(^{36}\)
but he proffers a "curious" theory\(^{37}\) that basically "intention" was "a
product of the interpretive process rather than something locked into the
text by [the] author."\(^{38}\) Thus despite their constant differentiation between
"words" and "intent," between the "maker's intent" and his "words,"
the common lawyer, according to Powell, excluded the actual intent and
looked for it only in the words, when it would have been far simpler merely
to inquire what the words "meant." For such "meaning," Justice Holmes
said, "we ask, not what this man meant, but what those words would mean
in the mouth of the normal speaker."\(^{39}\)

The common law resort to actual intent clearly speaks against Powell. A
few highlights will suffice.

(1) Chief Justice Frowycke, a fifteenth century sage, recounted that in
1285 the judges asked the "statute makers whether the warrantie with assettz
shulde be a barre" in the Statute of Westminster and "they answered that
it shulde."\(^{40}\)

(2) "And so," Frowycke continued, "in our dayes, have those that were
the penners & devisors of statutes bene the grettest lighte for exposicion of
statutes."\(^{41}\)

(3) In the Magdalen College Case Chief Justice Coke stated that "in Acts
of Parliament which are to be construed according to the intent and meaning

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34. Bittker, supra note 1, at 264 (emphasis added); see Powell, The Modern Misunder-
standing of Original Intent, 54 U. CHI. L. REV. 1513, 1534 (1987) [hereinafter Powell,
Misunderstanding]; Berger, "Original Intention" in Historical Perspective, 54 GEO. WASH. L.
REV 296, 334 (1986); Berger, The Founders' Views—According to Jefferson Powell, 67 TEX.
L. REV 1033 (1989) [hereinafter Berger, Founders' Views].

35. Powell was but three years out of law school when he published The Original
Understanding of Original Intent, 98 HARV. L. REV 885 (1985) [hereinafter Powell, Original
Understanding]. He labelled my Federalism: The Founders' Design as an "attempt to write
history," exhibiting "insensitivity to the evidence," Powell, Misunderstanding, supra note 34,
at 1515 n.10, "seriously misleading," id. at 1521, a "distorted portrait of the founders'
views," id. at 1544, and the like, see id. at 1519, 1524. It is therefore not a little remarkable
that Bittker should give credence to Powell after saying, "For the leading scholarly
support for a revival of dual federalism, see R. BERGER, FEDERALISM[.]" Bittker, supra note
1, at 244 n.30.

36. Powell, Misunderstanding, supra note 34, at 1533.
37. Id. at 1534.
38. Powell, Original Understanding, supra note 35, at 899.
39. O.W HOLMES, COLLECTED LEGAL PAPERS 204 (1920).
40. A DISCOURSE UPON THE EXPOSICION & UNDERSTANDINGE OF STATUTES 151 (S. THORNE
ed. 1942) [hereinafter A DISCOURSE].
41. Id. at 151-52.
of the makers of them, the original intent and meaning is to be observed . . ."42

(4) Lord Chancellor Hatton, writing circa 1587-1591, said "when the intent is proved that must be followed . . . but whonever there is departure from the words to the intent, that must be well proved that there is such meaning."43 Necessarily proof had to be drawn from evidence of the maker's extrinsic intent.

(5) A leading legal historian, Samuel Thorne, concluded that "actual intent . . . is controlling from Hengham's day to that of Lord Nottingham (1678)."44

The common law understanding of interpretation and intent was epitomized by John Selden's remark: "[A] mans wryting has but one true sense; which is that which the Author meant when he writ [sic] it."45 That is the essence of communication; a speaker must be permitted to explain what he means. The reader may not saddle the writer with the reader's meaning. To hold the contrary is to maintain, as Judge Frank Easterbrook remarked, "it is the readers rather than the writers who matter."46 All of Powell's indefatigable dredging could not raise one common law "precedent" that can withstand scrutiny.47

The deep-rooted doctrine of contemporaneous construction reinforces reference to actual intent. As long ago as the fifteenth century, Chief Justice Frowycke stated that if the legislators "have not gyven anie declaracion of theire myndes," then those "muste persuade us that were mooste neerest the statute."48 Justice William Johnson explained that contemporaries of

44. A DISCOURSE, supra note 40, at 60 n.126.
45. J. SEDLEN, TABLE TALK OF JOHN SEDLEN 12-13 (F Pollack ed. 1927). In Leviathan Hobbes wrote, "not the Letter but that which is according to the intention of the Legislator, is the Law." Quoted in G. McDowell, EQUITY AND THE CONSTITUTION 28 (1982). James Wilson wrote that the law is to be explained "according to the intention of those who made it." 2 J. WILSON, WORKS 479 (R. McCloskey ed. 1967).
47. Powell relies on (1) a 1790 treatise on contract holding that one party to a contract may not plead that he understood a term in a special undisclosed sense, to the detriment of the other party. Understandably the treatise stated that the law "is not concerned with any one’s 'internal sentiments' but only with their 'external expression.'" Powell, Original Understanding, supra note 35, at 895-96; Berger, Founders' Views, supra note 34, at 1060. (2) Selden said that "the Judge speaks of the King's Proclamation, this is the Intention of the King, not that the King had declared his Intention any other way to the Judge." J. SEDLEN, supra note 45, at 44. Powell interprets this as determining "the intention of the King solely on the basis of the words." Powell, Original Understanding, supra note 35, at 895. There was no alternative given that the King had given no declaration of his intention. For more complete discussion of these "precedents," see Berger, Founders' Views, supra note 34, at 1059-60.
the Constitution "had the best opportunities of informing themselves of the understanding of the framers ... and of the sense put upon it by the people when it was adopted by them." It is unreasonable to defer to "the understanding of the framers," received second hand, while rejecting their own explanation of their intent.

The same result is dictated by the related rule, going back to Heydon's Case (1584): the judge must seek "the mischief the framers were seeking to alleviate." That mischief was collected from extrinsic circumstances. Why is such collection entitled to more respect than the framers' own clear explanation of what they sought to accomplish? A cognate, long-established rule is that when the drafters employed common law terms (e.g., habeas corpus), the common law "definitions," as Justice Story stated, "are necessarily included, as much as if they stood in the text." Resort to the common law elucidation of the framers' words should rise no higher than their own explanations of what their words mean.

Thus far I have shown that the common law rule of interpretation "accepted" by the framers was resort to the drafters' explanations of what their words meant. Now I shall show by Powell's own words that judicial interpretation confined to the text was antipathetic to the founders. He notes that English Puritans attacked "the elaborate interpretative techniques of the common law [that] served only to justify judges' imposition of their personal views," reasoning that "the judiciary could undermine the legislative prerogatives of the people's representatives by engaging in the corruptive process of interpreting legislative texts," and fearing that the written law could "be twisted by means of judicial construction." He also notes that "a cultural suspicion of 'interpretation' [was] widespread in eighteenth century America," and that the Puritan fear of "twisted construction" had travelled to America. This was allied to a "profound fear" of judicial construction, so that Hamilton was constrained to reassure the ratifiers in The Federalist Number 78 that of the three branches the judiciary is "next to nothing." The framers, therefore, would have welcomed an approach that would confine judicial discretion by resort to the clearly discernible intent of the drafters, the rule prevailing in England. This, not Powell's "curious" theory, is what the framers "accepted," and what the people desired. Powell recognizes that the Republican victors viewed the "revolution

52. Powell, Original Understanding, supra note 35, at 891-92.
53. Id.
55. The Federalist No. 78, supra note 7, at 504.
of 1800” as the people’s endorsement of their “search for the Constitution’s underlying and original ‘intent.’”56

With this background in mind, let us examine Bittker’s argument. He notes that “[l]awyers routinely invoke ‘legislative intent,’” but limit themselves to “the legislative committee reports.” Though these reports are “written by a legislative bureaucracy” and may “embody only a fictional intent, it is a fiction that Congress intends the courts to act on.”57 The 1866 Report of the Joint Committee on Reconstruction of both houses was drafted before the days of legislative bureaucracy and stands on higher ground. Then too, the Court has taken a broader view than the tax lawyers, looking to statements by “members of the Committee on the floor of the Senate and the House,” and to expositions on the floor of Congress “by those in charge of or sponsoring the legislation.”58 The earlier mentioned 1866 Howard statement on suffrage was made by a member of the Reconstruction Committee.59 Statements by Madison, who was the chief architect of the Constitution, and its advocate in The Federalist and the Virginia Ratification Convention, should stand on the same footing as the sponsors of modern tax legislation. Bittker, however, considers that “the situation is totally different” with respect to the framers’ intent. “No single source dominates”; judges must look to the debates in the Convention, The Federalist, and the ratifying conventions.60 But suppose that the records of all three are in accord, as we have seen with respect to foreign relations, or two out of three, what then?

Edward Corwin found that records regarding judicial review are no less convincing than the records on foreign relations:

That the members of the Convention of 1787 thought the Constitution secured to courts in the United States the right to pass on the validity of acts of Congress under it cannot be reasonably doubted. Confining ourselves simply to the available evidence that is strictly contemporaneous with the framing and ratifying of the Constitution we find the following members of the Convention that framed the Constitution definitely asserting that this would be the case: Gerry and King of Massachusetts, Wilson and Gouverneur Morris of Pennsylvania, Martin of Maryland, Randolph, Madison, and Mason of Virginia, Dickinson of Delaware, Yates and Hamilton of New York, Rutledge and Charles Pinckney of South Carolina, Davie and Williamson of North Carolina, Sherman and Ellsworth of Connecticut. True these are only seventeen names out of a possible fifty-five, but let it be considered whose names

56. Powell, Original Understanding, supra note 35, at 934, 927.
57. Bittker, supra note 1, at 249-50.
59. See supra text accompanying note 25.
60. Bittker, supra note 1, at 250.
they are. They designate fully three-fourths of the leaders of the Con-
vention[.]  

Of course, in many cases the records do not speak so clearly, but that does not justify disregarding evidence that does.  

A "rapidly growing wing of the Jurisprudence of Original Intent school of thought," Bittker observes, "has looked to the Declaration of Inde-
pendence." For instance, Henry Jaffa insists that "the principles of the
Constitution are to be found in the Declaration of Independence." To
import the Declaration into the Constitution is to ignore their totally
different provenance. The Declaration was a product of rebels and revolu-
tionaries; when the Constitution was adopted twelve years later, it was no
small part of a recoil from the "excesses" of popularly elected legislatures.
Men of substance felt threatened and, in the words of John Dickinson,
sought to protect "the worthy against the licentious." By the time the
Convention was convened, wrote Samuel Eliot Morison and Henry Steele
Commager, "the democratic movement was in abeyance, and a ‘thermidor-
ian reaction’ in full swing. . . Hence the Federal Constitution put a stopper
on those levelling and confiscatory demands of democracy[.]" Appeals to
the Declaration of Independence are not so much attributable to originalists
as to activists on the search for wider charters of judicial revisory power,
very much like their appeals to the ninth amendment.

At the conclusion of this miscellany, Bittker propounds two questions:
(1) "what types of evidence can properly support judicial conclusions about
the original intent of the framers,” and (2) “what principles should deter-
mine whether earlier decisions, if now found inconsistent with the intent of
the framers, should be reversed, qualified, or preserved.” Of these in turn.

II. EVIDENCE ESTABLISHING ORIGINAL INTENT

Preliminarily Bittker opines that the records “almost never establish
whether the speaker’s views were accepted or endorsed by his colleagues or
whether persons voting for him had their own or independent (and possibly

62. For other examples that speak clearly, see supra text accompanying notes 25-27, and
63. Bittker, supra note 1, at 256.
64. Quoted in G. Wood, supra note 54, at 475.
During the Reconstruction period, Senator Charles Sumner insisted that “the Constitution
must be interpreted by the Declaration,” but found no favor with the Senate. R. BERGER,
66. "Charles Black, for example, has led the way in reading the ninth amendment as a
possible charter for the positive entitlements of the welfare state." Levinson, CONSTITUTIONAL
67. Bittker, supra note 1, at 258.
inconsistent) reasons for reaching the same result." Bittker's question invites speculation about the motivation of those who did not speak. Those who spoke were the leaders, as Corwin noted, and their speech is not to be dismissed because their followers chose not to raise their voices.

A. The Philadelphia Convention's Official Records

Bittker asks, "does the fact that two delegates to the Convention (and perhaps their colleagues) contemplated destruction of the Convention's official records conflict with the courts' use of these records as evidence of the meaning of the Constitution?" He notes that Wilson, second only to Madison as architect of the Constitution, urged that they be deposited "'in the custody of the President'" of the Convention, on the ground that "'as false suggestions may be propagated it should not be made impossible to contradict them.'" (Note Wilson's desire that the records serve as evidence of the Constitution's meaning.) "With only one dissent, the delegates then adopted a motion to deposit the journals and other papers of the Convention with its president, George Washington." That was done, thereby washing out the views of the "two delegates."

The Journal was deposited with Washington "subject to the order of Congress, if ever formed," leading Bittker to ask whether the framers would have "vested Congress with discretion to unveil the documents" had they intended to sanction their use as evidence of intent. Wilson, as we have seen, looked to the Journal to illuminate the meaning of the Constitution, and no one spoke to the contrary. Then too, the congressional permission in 1818 to publish suggests that contemporaries regarded delayed publication merely as a matter of convenience, rather than a rejection of Wilson's view. Bittker also suggests that release at congressional discretion "would constitute a de facto method of amending the Constitution." It is refreshing to find an activist sympathizer advocate compliance "with the formal amendment procedure prescribed by article V." It is precisely that failure to follow article V procedure that is at the heart of the originalist opposition to judicial revision of the Constitution. Does the exercise of "discretion" under the article III provision for "such inferior Courts as the Congress may from time to time order and establish" constitute an "amendment of

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68. Id.
69. See supra text accompanying note 61.
70. Bittker, supra note 1, at 260.
71. Id.
72. Id.
73. Id. at 261.
74. Id. at 260.
75. Id. at 261.
76. Id.
the Constitution?" Clearly "release" at "the order of Congress" no more amends the document than does the exercise of judicial discretion. The grant of a discretionary power is a part of the instrument; exercise of the power does not "amend" it.

Noting the view that "if [the record of the Convention] had come to light at the time of the ratification debates, the Constitution would never have passed[.]", Bittker asks whether courts may "rely on documents that were deliberately withheld from the ratifiers lest [in Rufus King's words] 'a bad use would be made of them by those who would wish to prevent the adoption of the Constitution.'" If non-disclosure contaminates the "documents," why does it not equally undermine the adoption? "Can we presume," Bittker asks, "that framers dishonorably intended to sanction the use of the suppressed documents once the perceived threat to ratification was foiled?" In the Convention, the Federalists had voted down proposals to forbid federal interference with internal state matters, "underestimat[ing] the attachment of citizens to their states[.]" When they emerged from the Convention and (I wrote) "were exposed to the sharp winds of public opinion, they reversed course." In an ideal world they would have confessed that they had urged the opposite view in the Convention, but that would have exposed them to charges of inconsistency, an embarrassment that public figures usually avoid, especially in a heated campaign. According to then Professor Felix Frankfurter, the Court's continuing revision of the Constitution has never been disclosed to the people. Does that itself invalidate its decisions? One need not approve of such non-disclosure and yet be loathe to label it "dishonorable."

Bittker also invokes my statement respecting "the failure to disclose a Convention decision to the people," that "there can be no ratification without disclosure," joining it to my citation to Justice Story's statement

77. Id. (quoting G. Wills, CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT 157 (1984)).
78. Id. (quoting 2 M. FARRAND, supra note 7, at 648). Despite his criticism of reliance on one man's statement without showing that his view was shared by his colleagues, Bittker invokes King without making such a showing.
79. Bittker, supra note 1, at 261.
81. Bittker, supra note 1, at 262 n.91 (quoting R. BERGER, FEDERALISM, supra note 2, at 68).
82. As he stated:

People have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is they who speak and not the Constitution. And I verily believe that that is what the country needs most to understand.

that to repudiate representations made to the people would be "a fraud." Nondisclosure of the Convention records, he argues, is equally a fraud. That is not the rule in private law. Speaking of "mere silence, or a passive failure to disclose facts," Prosser and Keeton state that "[i]t has commonly been stated as a general rule, particularly in the older cases, that the action will not lie for such tacit non-disclosure." Failure to disclose the eight to three decision to reject national corporations, which I addressed, is not to be equated with nondisclosure of random individual utterances, to which Bittker himself attaches no weight. So too, representations made to ratifiers in order to capture votes indicate active misrepresentation rather than mere nondisclosure. No element of representations to induce votes is presented by nondisclosure of the Convention records. Bittker's insistence that fraud is fraud, "whether accomplished by an affirmative representation or by deliberate nondisclosure" is not well taken.

B. Madison's Notes

Madison, Bittker recounts, transcribed no more than ten percent of an average hour's proceeding, and his notes are therefore "not a verbatim record of the debates." Surely a high-minded, richly informed scribe may be trusted to separate the wheat from the chaff. James Hutson, upon whom Bittker relies, stated, "In taking notes at the Convention, Madison had the good sense not to try to do too much." Bittker observes that the delegates regarded Madison "as a semi-official reporter of their proceedings" and presumably accepted the limitations of an amateur. Let incomplete recording be assumed, that does not impeach the veracity of what was recorded. Conflicting views are unsparingly set forth. Leonard Levy, who also is critical of the Notes, recognizes that "the very real possibility exists that Madison consistently and accurately caught the gist of the debates." While speakers, Bittker comments, are apt to be critical of reports of their remarks, they consider that "reports of their colleagues' speeches were more faithful to the originals." Then too, in many instances speakers gave Madison their speeches. My own research confirmed, for example, that on the issue of judicial participation in the presidential veto, the notes of Madison,

83. Bittker, supra note 1, at 262 & n.93.
85. Bittker, supra note 1, at 262.
86. Id. at 263.
88. Bittker, supra note 1, at 265 (quoting 1 M. FARRAND, supra note 7, at xvi).
89. L. LEVY, supra note 11, at 288.
90. Bittker, supra note 1, at 263.
Yates, King and Pierce are in substantial accord. So too, Madison’s account of the Convention’s rejection of federal corporations, which he had proposed, was corroborated by McHenry’s notes, and by Abraham Baldwin, who was present and later reminded Justice Wilson, a participant in the debate, that the Convention had rejected the power to create corporations; Wilson agreed. James Hutson, upon whom Bittker relies, stated that if Madison’s “notes . . . are compared to the fragmentary records of debates left by other delegates . . . a rough approximation between the different accounts is evident—demonstrating that Madison was not inventing dialogue, but was trying to capture what was said.”

Did the framers intend their debates to be used in interpreting the Constitution? Bittker answers with Madison’s statement that when the Constitution came from the framers “it was nothing more than the draft of a plan, nothing but a dead letter” until it was ratified. Hence, Madison preferred the voice of the ratifiers to that of the framers. Nevertheless, he regarded the framers’ debates as “presumptive evidence of the general understanding at the time of the language used,” and he quite frequently cited to the framers. In The Federalist Number 40 he wrote, “It may be collected from [the Convention’s] proceedings, that they were deeply and unanimously impressed with the crisis . . .” He wrote in 1826 to Andrew Stevenson that the true sense of the Constitution only can be found “in the proceedings of the Convention, the contemporary expositions [The Federalist], and, above all, in the ratifying conventions of the States.”

Writing to Edward Livingston in 1824, he recalled that the authority to make canals “had been repeatedly proposed in the convention, and negatived.” In 1830 he wrote to Andrew Stevenson, “the terms in question were not suspected in the Convention . . . of any such meaning,” adding

92. 1 M. Farrand, supra note 7, at 97-98 (Madison); id. at 105 (Yates); id. at 108 (King); id. at 109 (Butler); see also 2 M. Farrand, supra note 7, at 72 (the confirming vote in the Journal respecting participation in the veto). Compare the general agreement of Yates, King and Pierce respecting the creation of one Executive and the nature of his veto. 1 M. Farrand, supra note 7, at 105-10.
93. 2 M. Farrand, supra note 7, at 615-16.
94. Id. at 620.
95. 3 M. Farrand, supra note 7, at 375-76.
96. Hutson, supra note 87, at 33.
97. Bittker, supra note 1, at 264 (quoting 5 Annals of Cong. 776 (1796)).
99. The Federalist No. 40, supra note 7, at 256.
100. 3 Letters and Other Writings of James Madison 522 (1865) [hereinafter Madison’s Letters].
101. Id. at 435.
that they were viewed in the contrary sense "throughout the recorded proceedings of the Convention."102

Other framers cited to the Convention proceedings, among them George Washington, president of the Convention, cited to its Journal;103 Abraham Baldwin, Charles Pinckney and Caleb Strong referred to discussions in the Convention.104 Frequently the ratifiers called upon the framers in their midst to explain a provision of the Constitution.105 Thus, in the Virginia Convention, Monroe called upon Madison "who had been in the federal Convention . . . [to] give information respecting the clause concerning elections."106 And Randolph observed that ex post facto laws "relate solely to criminal cases [for] . . . it was so interpreted in the Convention."107 Wilson, it will be recalled, insisted on preservation of the records of the Convention for future contradiction of false interpretations.108

If, Bittker continues, "Madison had thought that his notes could unlock any of the Constitution's interpretative riddles, would he have treated them as his private property, secreting them for his lifetime, and thus enabling his widow to release them for this compelling public purpose only when and if Congress was prepared to pay the price?"109 The imputation that Madison "secreted" the notes in order to exact a "price" is refuted by Madison's own explanations. He leaned to "letting the publication be a posthumous one" because, he later explained, "as no personal or party

102. 4 MADISON'S LETTERS, supra note 100, at 128, 137. Of Madison, Justice Story wrote: Venerable, as he now is, from age and character, and absolved from all those political connections which may influence the judgment and mislead the mind, he speaks from his retirement in a voice which cannot be disregarded, when it instructs us by its profound reasoning, or admonishes us of our dangers by its searching appeals.


104. 3 M. FARRAND, supra note 7, at 369-70, 375-76 (Baldwin); id. at 249-50 (Pinckney); id. at 247 (Strong). So too, in the Virginia Ratification Convention Madison referred to the views of the framers, 3 J. ELLIOT, supra note 21, at 537, 619, as did Edmund Randolph, id. at 599, and George Mason, id. at 604.

105. 2 J. ELLIOT, supra note 21, at 272-73 (Lansing and Hamilton in New York); 3 J. ELLIOT, supra note 21, at 332-33, 368-69 (Henry in Virginia); id. at 291-92 (Grayson in Virginia); id. at 366 (Monroe in Virginia); id. at 477 (Randolph in Virginia); id. at 522, 604 (Mason in Virginia); 4 J. ELLIOT, supra note 21, at 27, 100, 139, 144 (Spaight in North Carolina); id. at 31, 42-43, 103 (Davie in North Carolina); id. at 255-57, 260, 264-65 (Charles Pinckney and C.C. Pinckney in South Carolina); 3 M. FARRAND, supra note 7, at 144 (Wilson in Pennsylvania).

106. 3 J. ELLIOT, supra note 21, at 366. Among the delegates to the Ratification Convention, Bittker notes, were "some of the 55 Philadelphian framers, and their influence may well have been proportionately greater than their number." Bittker, supra note 1, at 266 n.110 (citation omitted). The fact that the framer-delegates were often asked about the views expressed in the Convention removes this from conjecture.

107. 3 J. ELLIOT, supra note 21, at 477.

108. 2 M. FARRAND, supra note 7, at 648.

views can then be imputed, they will be read with less of personal or party
feelings, and consequently, with whatever profit, may be promised by
them—tacit recognition that they might serve as evidence of intent. Throughout, he avoided making the Notes a shuttlecock of political con-
troversy.

C. The Ratifying Conventions

"[H]ow should we distinguish," asks Bittker, "between corporate inter-
pretations of the Constitution, which commanded the assent of a significant
or controlling fraction of the delegates, and personal opinions, which were
regarded by the rest of the delegates as idiosyncratic utterances?" That
individual utterances were regarded by the rest as "idiosyncratic" cannot
rest on bare assertion but must be proved. In the course of my own studies,
I can recall but one such instance; referring to Hamilton, Dr. William
Johnson stated in the Convention, "One Gentleman alone (Col. Hamilton)
. boldly and decisively contended for an abolition of the State Gov-
emmen[ts]." Consider in contrast the remarkable unanimity of indi-
vidual utterances respecting judicial review In the Virginia Convention,
Marshall (it is generally forgotten) asked, "To what quarter will you look
for protection from an infringement on the Constitution, if you will not
give the power to the judiciary?" His remarks are in accord with those
of George Nicholas, George Mason, Edmund Randolph, Edmund Pendleton,
James Madison, and even of Patrick Henry and William Grayson, who
opposed the Constitution.114 Are such "individual" remarks to be excluded
because they did not come to a vote, i.e., a "corporate interpretation?"
Bittker would not "take all opinions supporting the ratification as equally
competent evidence of the intent of the ratifiers," knowing that members
"often vote in favor of measures even if they do not share . . . the reasons
stated by their more vocal colleagues[.]" In effect this would confer a
veto power on the silent. Are we to reject the testimony of Madison, who
was the chief architect of the Constitution, who endeavored in The Federalist
to set forth what the Convention had in mind, because the silent voters

110. 3 M. FARRAND, supra note 7, at 448, 475.
111. Bittker, supra note 1, at 266.
112. 1 M. FARRAND, supra note 7, at 355.
113. 3 J. ELLIOT, supra note 21, at 553-54.
114. R. BERGER, supra note 13, at 15 (Nicholas), id. at 139 (Mason); id. at 138 (Randolph);
id. at 202 (Pendleton); id. at 139 (Madison); id. at 137 (Henry); id. at 141 (Grayson); see also
supra text accompanying note 61 (Corwin).
115. Bittker, supra note 1, at 267. Bittker cites my reference to "the uncertainty of inferences
drawn from a record of naked votes." Id. at 267 n.112 (emphasis added). Votes accompanied
by statements of Madison et al. are not "naked."
may not have shared his reasons?" The established practice of giving great weight in construing statutes to statements by those "sponsoring" legislation or by members of the committee goes the other way. Be it remembered that the Constitution was under fire in the ratification conventions, and the explanations to reassure opponents are not to be robbed of effect because some chose to remain silent.

Bittker invokes an 1845 opinion of the Supreme Court wherein, construing a statute, the Court said: "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used." On the other hand, the Court stated in 1838 that construction must necessarily depend on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions... in the several states to which this Court has always resorted in construing the constitution.

The conflict between the two cases has long been resolved in favor of the latter. Although Max Radin wrote in 1930 that the "intention of the legislature is undiscoverable in any real sense," Bittker notes that "tax lawyers routinely invoke 'legislative intent.'" The Court declared that "when aid to construction of the meaning of words, as used in the statute, isavailable, there certainly can be no 'rule of law' which forbids its use."

Now for some particulars.

Delaware was the first state to ratify the Constitution; but there are no surviving records of its proceedings; nor is there evidence that such records were kept. "Is the intent of the Delaware ratifiers less sacrosanct for being..."

116. This would accord greater weight to silence than to expressions by followers. The Court stated in United States v. Wrightwood Dairv Co., 315 U.S. 110, 125 (1942): "The opinions of some members of the Senate conflicting with the explicit statements of the meaning of the statutory language made by members of the Committees are not to be taken as persuasive of the Congressional purpose."

117. See supra text accompanying note 58.

118. Bittker, supra note 1, at 267 (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845)).


120. The Court, wrote Jacobus tenBroek, "has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument." tenBroek, Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction, 27 Calif. L. Rev. 399, 399 (1939).

121. Bittker, supra note 1, at 267 n.114 (quoting Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 870 (1930)).

122. Bittker, supra note 1, at 249. Bittker comments that "the same may be true of judges," and quotes a dissenting judge: "It has been said, with more than a grain of truth, that judges in tax cases these days tend to consult the statute only when the legislative history is ambiguous." Id. at 250 n.53 (quoting Focht v. Commissioner, 68 T.C. 223, 244 (1977) (Hall, J., dissenting)).

either temporarily or permanently lost?” asks Bittker. This recalls Lewis Carroll’s Cheshire Cat that “vanished quite slowly . ending with the grin, which remained some time after the rest of it had gone.” A nonexistent thing cannot be “sacrosanct,” that is, “secure from violation or encroachment.”

Bittker also asks, did “Delaware’s ratifiers implicitly agree[] to accept as their own, retroactively, whatever intent might be manifested at [later] conventions[?]” Such questions demonstrate acuteness worthy of a schoolman. The issue, however, is not whether “the intent of the last ratifiers to act always trumps the intent of those who acted earlier” for there is no record of a prior Delaware intent. The issue, rather, is whether, in the absence of such records, it is reasonable to assume that those who spoke later represent a consensus.

That more clearly emerges from Bittker’s other question. By article VII, nine states suffice to establish the Constitution. Should we not, Bittker asks, treat subsequent ratification by the four “laggard states,” including New York and Virginia, without whom, he says, “the United States . . . would have been unthinkable[]” as incapable of altering “the ‘intent’ manifested at the conventions of the first nine states to act?” No “intent” of one state can “alter” the intent of another. On some issues there were voices in the first nine states that anticipated New York and Virginia. Oliver Ellsworth, a framer, spoke in the Connecticut Convention in favor of judicial review, as did Samuel Adams in Massachusetts and Thomas McKean in Pennsylvania. The fact that such sentiments were re-echoed in New York and Virginia bespeaks consensus, not “alteration” of prior expressions of intent. A similar consensus existed with regard to preservation of state autonomy with respect to internal affairs. The remarks of Pendleton and Corbin in Virginia, and of Hamilton in New York, had been anticipated by Wilson in Pennsylvania, Bowdoin in Massachusetts and Ellsworth in Connecticut. Their remarks reflected a widely shared opinion, for as Chief

124. Bittker, supra note 1, at 268.
125. L. Carroll, ALICE’S ADVENTURES IN WONDERLAND, ch. 6.
127 Bittker, supra note 1, at 268.
128. Id. at 269 (emphasis in original).
129. Id. at 268.
130. 2 J. Elliot, supra note 21, at 196 (Ellsworth); id. at 131 (Adams); J. McMaster & F Stone, PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 766 (1888) (McKean).
131. J. McMaster & F Stone, supra note 130, at 265, 390 (Wilson); 2 J. Elliot, supra note 21, at 129 (Bowdoin); id. at 195 (Ellsworth); G. Wood, supra note 54, at 529 (Pendleton);
3 J. Elliot, supra note 21, at 107 (Corbin).

Hamilton’s remark in the New York Convention, “That two supreme powers cannot act together, is false,” 2 J. Elliot, supra note 21, at 355-56, is to be read with his Federalist Number 9: the Constitution “leaves in their [the states’] possession certain exclusive and very important portions of sovereign power.” The Federalist No. 9, supra note 7, at 52.

Such materials answer Bittker’s question whether “the intent manifested by the members of
Justice Marshall, who had been a delegate to the Virginia Convention, declared, "No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass." And he recognized the "immense mass of legislation . . . not surrendered to the general government "]" It is a mistake to demand a count of noses on such issues. Madison frequently referred to the Ratifying Conventions without drawing the line between the nine and "laggard" states.

Anticipating Bittker, Story argued that only the records of five states were available, and it may not be assumed that they speak for the others. Present-day polls of one thousand individuals often astonishingly forecast the views of millions of Americans. Are not five of eleven states more worthy of trust? It is altogether reasonable to assume that the concurrence of five bellwether states reflects the sentiments of the adjoining states. On the issue of Senate participation in making treaties, for instance, New York echoed the sentiments of Wilson in Pennsylvania. Because Virginia ratified, after nine states did, does not deprive spokesmen like Madison and Edmund Randolph, who introduced and explained the Virginia Plan in the Convention, of weight. Their plan had heavily influenced the federal Convention, and it is not to be assumed offhand that when they spoke in Virginia they no longer reflected the prevailing opinion.

D. The Election of the Ratifiers

Turning to the "intent of the People who elected the ratifiers," Bittker recounts that some delegates pledged "to vote for or against ratification,"

a particular deliberative assembly . was shared by delegates to other later assemblies." Bittker, supra note 1, at 259. "At the nation's inception," Bittker writes, "there was such widespread agreement that each state had exclusive authority over the roads within its boundaries that Congress did not venture to build or repair even postal roads without state consent, despite its explicit constitutional power 'To Establish Post Offices and Post Roads.'" Id. at 247 n.43 (emphasis in original) (quoting U.S. CONST. art. I, § 8, cl. 7).


134. Lord Max Beloff, a perceptive student of American constitutional history, wrote, "In an age when government’s functions were very limited, and among a people who were convinced that those closest to the matters to be dealt with best knew what ought to be done, the internal power of the state governments . was unlikely to be impinged upon by the constitution-makers." M. BELOFF, THE AMERICAN FEDERAL GOVERNMENT 15 (1959).

135. 1 J. STORY, supra note 102, § 407, at 311.

136. Story himself recognized that "[c]ontemporary construction is properly resorted to in proportion to the uniformity and universality of that construction[,]" Id. The fact that the "five" states were in general agreement on a number of important issues bespeaks such "uniformity." Such a construction is not vitiated by the silence of other states. Certainly Madison was uninfluenced by such silence. He referred to "the debates which have been published" of other states, 3 J. ELIOT, supra note 21, at 619. So too did Patrick Henry, id. at 592, and Benjamin Harrison, id. at 628.

137. See supra text accompanying notes 21-22.
some "were formally instructed by their constituents," and asks should the people's intent "be considered in ascertaining the original intent." Like Bittker, I consider that we cannot winnow the chaff from "[t]he raw material before us [that] includes some of the pamphlets, newspaper reports, speeches, and letters that bombarded the voters." Nor is recovery of the people's intent from the election of the delegates less daunting. There were hundreds, perhaps thousands, of local elections for which there are probably no extant records. A simpler approach is at hand: Bittker remarks that the "ears [of some of the delegates] were in effect closed to argument during the ensuing ratification debate[,]" and that "no matter how eloquent their remarks at the later state convention," they "were merely agents for the voters who chose them." On this reasoning the voice of the delegates was but the voice of the people; their intent that of the people. Such was patently the case in North Carolina where at the very outset the delegates, invoking the will of their constituents, were with difficulty persuaded to listen to Federalist arguments, and in the upshot rejected ratification altogether. On the assumption that the delegates carried out their pledges and instructions, we are entitled to interpret the rather narrowly divided votes as recording the voice of the people. Those who were for ratification prevailed, and under our majority rule doctrine, their vote reflected the intent of the people.

E. The Federalist Papers

Against my view that explanations of the Constitution were "representations" made to sway votes, Bittker counters that they were merely "arguments." Now the people "were sharply aligned in two parties for or against" the Constitution, and The Federalist Papers were designed to allay fears and persuade voters. The label "argument" is not determinative if the function is to persuade. In a similar context, Justice Story asked, "If the Constitution was ratified under the belief, sedulously propagated that such protection was afforded, would it not now be fraud upon the

138. Bittker, supra note 1, at 269 (emphasis added).
139. Id.
140. Id. (emphasis in original). These remarks are fortified by the rule that an official is presumed to perform his duty. Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979).
141. Chief Justice Thomas Cooley wrote that "we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives." T. COOLEY, CONSTITUTIONAL LIMITATIONS 102 (7th ed. 1903).
142. Bittker, supra note 1, at 271.
144. Hamilton said at the outset that they were meant to "give a satisfactory answer to all the objections[.]" THE FEDERALIST No. 1, supra note 7, at 6-7. The agenda of the Federalists was "to a large degree set by the criticisms levelled against the Constitution by its opponents." Zuckert, The Federalist at 200—What's It to Us, 7 CONST. COMM. 97, 106 (1989).
whole people to give a different construction to its powers?” 145 What is “belief sedulously propagated” but argument? Viewed as political propaganda, as the noted British historiographer, Sir Herbert Butterfield, wrote, it “does at least presume an audience—perhaps a ‘public opinion’—which is judged to be susceptible to the kind of arguments and considerations set before it.” 146 Bittker also asks for proof that The Federalist “came to the attention of a significant number of ratifiers.” 147 That is not the test of a representation. The publisher of a newspaper who directs an assurance to a large class of readers may not demand proof from one suitor that it was read by the class. Read or not by the class, he read it as a representation. 148 And it is late in the day to call for proof that “the representation induced some previously opposed or undecided ratifiers to vote in favor of ratification [.]” 149 This is to require the testimony of men long dead. Madison, who frequently cited to the ratifiers, asked for no such proof. The starting point, in the words of Garry Wills, is that “a massive effort of persuasion was incumbent” on proponents of the Constitution. 150 There was no need to persuade those who already favored ratification. 151 Persuasion was directed precisely at those who were “opposed or undecided”; and the fact that ratification carried testifies that the persuasion was effective.

Bittker calls attention to Clinton Rossiter’s statement that “The Federalist worked only a small influence upon the course of events during the struggle over ratification.” Its “chief usefulness,” Rossiter continues, “was as a kind of debater’s handbook in Virginia and New York. Copies of the collected edition were rushed to Richmond at Hamilton’s direction and used gratefully by advocates of the Constitution in the climactic debate over ratification.” 152 So both Hamilton and the Virginia advocates did not think that it exercised “only a small influence.” It is questionable whether the

145. 2 J. STORY, supra note 102, § 1084, at 29 (emphasis added).
147. Bittker, supra note 1, at 271.
148. See also infra text accompanying notes 152, 156-57.
149. Bittker, supra note 1, at 271; see supra text accompanying note 146 (Butterfield).
151. “The essays were not found in the newspapers of any state where there was unanimous or near unanimous approval of the Constitution ” Crane, PUBLIUS IN THE PROVINCES: WHERE WAS THE FEDERALIST REPRINTED OUTSIDE NEW YORK CITY?, 21 WM. & MARY Q. 589, 591 (1964).
152. Bittker, supra note 1, at 271-72 (quoting THE FEDERALIST PAPERS at xi (C. Rossiter ed. 1961)). Bittker notes a recent view that the impact of The Federalist “on New York’s reception of the Constitution was negligible.” Bittker, supra note 1, at 272 (quoting Kaminski, NEW YORK: THE RELUCTANT PILAR, in THE RELUCTANT PILAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION 71-72 (S. Schechter ed. 1985)). Hamilton repeated many of the arguments in the New York Convention, and a “decisive factor” was Hamilton’s “amazing performances of argumentation.” Earle, INTRODUCTION TO THE FEDERALIST, supra note 7, at x n.2.
case for limited influence of The Federalist has been nailed down. Certainly Rossiter's "research assistant," Elaine Crane, did not so conclude: "there is no way of determining just how effective Publius was as a weapon of the forces favoring ratification."153 Her short piece represents the most detailed attempt to measure "the extent of Publius's audience[.]"154 She found that "sixteen newspapers—four each in Massachusetts, New York, and Virginia, two in Pennsylvania, and one each in New Hampshire and Rhode Island—" reprinted some of The Federalist, running from an extract, through one number, to eighteen.155 As Edward Meade Earle observed, "These articles speedily attracted attention far beyond the borders of the State of New York, for they obviously were the work of a master politician."156 Elaine Crane remarks, "It is also important to note that New York newspapers [which printed all but eight of the 85 numbers] did circulate throughout the states, and it is not unlikely that Federalist leaders, whether in Boston or Richmond, took their cues from Publius as he made his way up and down the eastern seaboard."

In fact, there was a concerted effort to spread Federalist materials. Tench Coxe of Pennsylvania "coordinated the efforts at ratification, establishing a network of communications with federalists everywhere."158 Thus, Wilson's "widely circulated defense of the Constitution" in Pennsylvania, "became, in effect, the "official" Federalist interpretation of the Constitution[.]"159 "[U]sually," wrote Herbert Storing, the Federalists "conceded the historical and legal priority of the states[,]" observing that "it is striking how widely the Federalists adopted the view of the Union as a coming together of sovereign states."160 Are we to attribute such unanimity (earlier I instanced similar unanimity with respect to foreign relations and judicial review) to spontaneous generation, not the result of a well-orchestrated

153. Crane, supra note 151, at 589.
154. Id.
155. Id. at 590.
156. Earle, supra note 152, at x. Archibald Stuart wrote to Madison, "Publius is in general estimation, his greatness is acknowledged universally[.]" 5 WRITINGS OF JAMES MADISON, supra note 98, at 54 n.2, 89 n.2.
157 Crane, supra note 151, at 591.
158. G. Wills, supra note 150, at viii.
159. Bittker, supra note 1, at 262 n.91 (quoting 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 26 (M. Jensen ed. 1976)). In the Virginia Ratification Convention, Patrick Henry referred to the ratification proceedings in Pennsylvania and Massachusetts. 3 J. ELLIOT, supra note 21, at 592. Benjamin Harrison stated that in Massachusetts the delegates were "by the address and artifice of the federalists, prevailed upon to ratify [the Constitution]." Id. at 628.
campaign? If so, such expressions represent the authentic voice of the people so that we need look no further.

Then there is the problem of chronology—the last of The Federalist Papers was issued shortly after ratification by South Carolina, the eighth state to act. Can the assurances of Number 83 which came afterward, Bittker asks, "be properly imputed to the early birds." They cannot. Consider, however, that Number 83 was published as one of a group, starting with Number 78, devoted to judicial review. Given that there is no express authorization for judicial overturn of legislation—such worthies as Judge Learned Hand and Archibald Cox doubt the legitimacy of judicial review—sweep away Number 78 and out goes what is considered the prime defense of judicial review. That should hardly commend itself to activists, who seek to expand rather than abolish judicial review.

Whether or not The Federalist Papers may be regarded as representations to all the ratifiers, they remain important because they constitute a valuable explanation of the thinking in Philadelphia. Jefferson regarded The Federalist as "evidence of the general opinion of those who framed" the Constitution. Certainly Hamilton's articles did not reflect his own opinions, for in the closing days of the Convention, he commended adoption notwithstanding that his own views were "remote from the plan" of the Convention. Edward Corwin concluded that "[i]t cannot be reasonably doubted that Hamilton was here [on the issue of judicial review], as at other points, endeavoring to reproduce the matured conclusions of the Convention itself." That view is shared by Garry Wills. The Federalist was the "classic contemporary exposition" of the Constitution, following on the very heels of the Convention. Contemporaries of the Constitution, Justice William Johnson observed, "had the best opportunities of informing themselves of the understanding of the framers." Who knew understanding better than Madison, the chief architect of the Constitution, who had taken copious notes of the debates?

Not for nothing did Clinton Rossiter regard The Federalist among the three "sacred writings of American political history." When Hamilton sent a copy to Washington, he replied:

161. Bittker, supra note 1, at 273.
162. R. Berger, supra note 13, at 5-6 (Hand); A. Cox, The Role of the Supreme Court in American Government 16 (1976).
164. 2 M. Farrand, supra note 7, at 645.
165. E. Corwin, supra note 61, at 44.
166. G. Wills, supra note 150.
167. Earle, supra note 152, at x.
168. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 290 (1827). In the fifteenth century, Chief Justice Frowycke stated that if the legislators "have not gyven ame declaracion of theire myndes, then [those] muste persuade us that were mooste neerest the statute." A Discourse, supra note 40, at 152.
169. Bittker, supra note 1, at 270 (quoting The Federalist Papers at vii (C. Rossiter ed. 1961)).
I have read every performance which has been printed on one side and the other of the great question lately agitated. I have seen no other so well calculated (in my judgment) to produce conviction on an unbiased Mind. That Work will merit the Notice of Posterity[.]\textsuperscript{170}

Chief Justice Marshall wrote that \textit{The Federalist} was written “to detect the numerous misrepresentations of the Constitution; to refute the arguments of its opponents . . . [T]he FEDERALIST will be read and admired when the controversy in which that valuable treatise on government originated, shall no longer be remembered.”\textsuperscript{171} Marshall, be it remembered, was a delegate to the Virginia Ratification Convention, and Washington was the presiding officer of the federal Convention. Neither would have lent his name to an unreliable explanation of the Constitution, one that did not represent the understanding of the framers and ratifiers.

“Iconoclasm” holds no terrors for me, nor would I reproach one who refused to be “overawed” by the “sacredness” of \textit{The Federalist}.\textsuperscript{172} Whether \textit{The Federalist} made “representations” to all of the ratifiers may be debatable, but a work which commanded the uncurbed admiration of Marshall and Washington patently exercised a potent influence on the minds of men from the very beginning.\textsuperscript{173}

\textbf{F. “Were the ‘Framers’ Individuals or States?”}

Confusion is engendered by Bittker’s subsidiary question: “Was, then, the Constitution \textit{framed} by the ratifying states rather than by their nominees?”\textsuperscript{174} The ratifying states did not “frame” the Constitution; they adopted the draft submitted by the framers as explained to them. True it is that “the states determined the number and method of selecting the ratifiers.”\textsuperscript{175} A state, however, is a conceptual construct that speaks only by its “nominees.” It was the “individuals” selected by the states who ratified the Constitution on their behalf. Indeed, Bittker recognizes that the “states acted” through the “individuals.”\textsuperscript{176} The delegates alone could express their concerns about the scope of the constitutional text they were being asked to approve on behalf of the states. To rule out the “individuals” is to leave the states voiceless.

Bittker suggests—with tongue in cheek, I trust—that “if there were one hundred delegates at State A’s ratification convention but only eleven at

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171. 5 J. MARSHALL, \textit{LIFE OF WASHINGTON} 131-32 (1807).
172. Bittker, \textit{supra} note 1, at 270.
173. \textit{See supra} text accompanying note 156.
175. \textit{Id.} at 273 (emphasis in original).
176. \textit{Id.} at 274.
\end{flushright}
State B's" we should "accord no more weight to the intent of all A's delegates than to the intent of State B's eleven delegates[,]" and adds "should we count corporate, not individual, noses?" In the Federal Convention, the votes were taken by the states, without regard to the number of delegates that represented a state. Why should a different measure be used for the intent of its "nominees"? It would be strange to measure the influence of a state by the number of delegates it sent to the Convention. There, a proposal had to persuade by its good sense, not by how many fellow delegates accompanied the speaker. If we are to look for the "intent" of a state, ineluctably we must seek for it in the voices of the "individuals" it delegated to act on its behalf, unless the state vote settles the issue.

III. THE ROLE OF STARE DECISIS

What should be the criteria for overruling prior unconstitutional decisions, Bittker asks. In considering this question we should separate legal from pragmatic considerations. On the legal issue, Francis Lieber, the high priest of hermeneutics, wrote, "that which is wrong in the beginning cannot become right in the course of time." Strange," wrote Sir Frederick Pollock to Justice Holmes, "that a proved series of blunders should be more sacred than one." Usurpation is not legitimated by repetition. Faced in Erie Railroad Co. v. Tompkins with overruling Swift v. Tyson, around which a century of expectations had gathered, Justice Brandeis did not pause to break the issue into Bittker's components. Instead, he quoted Justice Holmes, who had branded Swift as "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." Bittker likewise does not favor "systematically perpetuating earlier decisions that . . . were devoid of constitutional legitimacy."

Convinced (by my study fourteen years ago of the history of the fourteenth amendment) that Brown v. Board of Education, which condemned segregated schools, was without constitutional warrant, I yet concluded, "It would . . . be utterly unrealistic and probably impossible to undo the past

177. Id.
178. Id. at 278-80.
179. F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS 209-10 (3d ed. 1880).
180. 1 HOLMES-POLLOCK LETTERS 239 (M. Howe ed. 1946). Lord Justice Denman stated, "the mere statement and re-statement of a doctrine cannot make it law, unless it can be traced to some competent authority." O'Connell v. Regina, 8 Eng. Rep. 1061, 1143 (1844).
182. Bittker, supra note 1, at 276.
in the face of the expectations that the segregation decisions, for example, have aroused in our black citizenry . . . But to accept thus far accomplished ends is not to condone the continued employment of the unlawful means."

A few years later I wrote, "But while decisions can be overruled, past events are not so easily undone. Like poured concrete, they have hardened, so that overruling decisions cannot restore the status quo ante." The past, Chief Justice Marshall wrote, "cannot be recalled by the most absolute power." But, I continued, "The practical difficulty of a rollback cannot excuse the continuation, the ever-expanding resort to such unconstitutional practices. 'Go and sin no more' does not signify the acceptance of illegitimate acts, but counsels, rather, do not continue to apply unconstitutional doctrine in ever-expanding fashion." Concretely, Bittker and I agree that "'blacks cannot be forced back into a ghetto," but I would halt "'court-administered schools and prisons, affirmative action, busing, and the like.'" The passage of years has not shaken my confidence that these views represent sound sense.

Bittker rightly points out that there is "no evidence that the framers intended this result[,]" i.e., an "entirely discretionary doctrine in deciding whether to preserve or overrule erroneous constitutional decisions [.]" On ruthlessly logical grounds one may conclude "all or nothing." Nevertheless, I am prepared to let Brown stand under Henry Monaghan's test: overturn would trigger "massive destabilization . [that] would threaten the functioning of the federal government." Does repudiation of the Legal Tender...
Cases pose similar hazards? At issue was the constitutional authority for issuance of paper money. The youthful Holmes encapsulated the difficulty—the power to coin money implies metallic coin and does not extend to paper money. He "could not see how a limited power which is expressly given . . . can be enlarged as an incident to some other express power." Possibly an overruling decision might be so cushioned as to sustain the further use of paper money until an amendment to authorize its use can be prepared and adopted. Whether or not overturn of the Legal Tender Cases may in terms of consequences be analogized to Brown is a matter of judgment on which I have no opinion.

The inclusion of corporations in the due process clause of the fourteenth amendment affords a similar example; it took place in 1886. The language of the clause is identical with that of the fifth amendment. Bittker convincingly demonstrates that the fifth's "person" was applicable only to man. Willard Hurst, the foremost historian of the "American law's adjustment to the business corporation" observed that the fourteenth's protection of "person" was "extended by fresh lawmaker." And he rejected the "conspiracy theory" of the fourteenth amendment . . . which asserted that wily lawyers smuggled corporations into the fourteenth amendment's due process clause[]" My own study of the history of the amendment uncovered no hint that the framers were concerned with anything other than actual persons. In our time Justice Black, taking no account of possible "massive destabilization," called on the Court to read corporations out of the fourteenth amendment on the ground that "the people were not told" that they were "granting new and revolutionary rights to corporations." Whatever consequences might follow should be weighed against

Constitution which he swore to support and defend, not the gloss which his predecessors may have put upon it." Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949). And Justice Frankfurter stated that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Graves v. O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

192. 79 U.S. (12 Wall.) 457 (1870).

193. See 6 C. FaIRMAN, History of the Supreme Court of the United States 715 (1971) (quoting 4 Am. L. Rev. 768 (letter by Holmes, J., to the editor)).

In the campaign for adoption of the Constitution, Judge Edmund Pendleton stated in the Virginia Ratification Convention, "Paper money and tender laws may be passed . . . in opposition to the federal principle, and restrictions of this Constitution." 3 J. Eliot, supra note 21, at 549.

194. For example, Linkletter v. Walker, 381 U.S. 618, 628-29 (1965), held that decisonal retroactivity was not a categorical imperative. See Berger, Retroactive Administrative Decisions, 115 U. Pa. L. Rev. 371 (1967).

195. Bittker, supra note 1, at 254 n.65.

196. Id. at 253.

197. Id. at 254, 255 n.66.

the integrity of the Constitution and the unconstitutional revision of the instrument by the judiciary.

But I do not share Monaghan’s view that reapportionment is “‘far too deeply embedded in the constitutional order to admit of reassessment.’”\textsuperscript{199} The reapportionment doctrine was born in \textit{Baker v. Carr}\textsuperscript{200} in 1962; it is only twenty-nine years old. Yet, Philip Kurland observed, “The list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional casebook.”\textsuperscript{201} Why is a twenty-nine year-old “precedent” more sacrosanct than decisions that were 100 years old or older, and therefore nearer to the thinking of the drafters of the instrument? It is not as if reapportionment was the inescapable answer, as the split of the Court in \textit{Baker v. Carr} attests. Ward Elliott persuasively demonstrated on practical grounds that the reapportionment decisions were not really necessary.\textsuperscript{202}

Hamilton presciently cautioned that “every breach of the fundamental laws, though dictated by necessity . . . forms a precedent for other breaches where the same plea of necessity does not exist at all.”\textsuperscript{203} Let me muster a few such cases.

\textbf{A. The Six-Person Jury Case}

A twelve-person jury is deeply rooted in Anglo-American history; seven early state constitutions expressly provided for a jury of twelve.\textsuperscript{204} It was unceremoniously discarded by \textit{Williams v. Florida}\textsuperscript{205} as “unrelated to the great purposes which gave rise to the jury in the first place.”\textsuperscript{206} Speaking by Justice Holmes, the Court said, “If a thing has been practised for two hundred years by common consent, it will take a strong case for the

\begin{footnotes}
\item[199] Bittker, \textit{supra} note 1, at 277 n.146 (quoting Monaghan, \textit{Taking Supreme Court Opinions Seriously}, 39 Md. L. Rev. 1, 7 (1979)).
\item[200] 369 U.S. 186 (1962). Archibald Cox instances the reapportionment cases as a “dramatic” example of “reading into the generalities of the Due Process and Equal Protection Clauses notions of wise and fundamental policy which are not even faintly suggested in the words of the Constitution, and which lack substantial support in other conventional sources of law.” A. Cox, \textit{supra} note 162, at 100.
\item[201] P. Kurland, Politics, the Constitution and the Warren Court 90-91 (1970).
\item[202] W. Elliott, \textit{supra} note 29. Philip Kurland wrote that “reapportionment of the state and local legislatures was not among the more pressing problems in post-World War II America.” P. Kurland, \textit{supra} note 201, at 83.
\item[203] The Federalist No. 25, \textit{supra} note 7, at 158. Compare Judge Frank Easterbrook’s queries: “Will the Republic fall apart if some states use capital punishment and others do not? If some states permit abortion and others prohibit the practice?” Easterbrook, \textit{Approaches to Judicial Review}, in \textit{The Blessings of Liberty} 145, 156 (1989).
\item[204] R. Berger, \textit{supra} note 65, at 269 n.63.
\item[205] 399 U.S. 78 (1970).
\item[206] Id. at 89-90 (footnote omitted).
\end{footnotes}
Fourteenth Amendment to affect it." Return to the twelve-man jury would not cause a "massive dislocation."

B. Migrant Indigents' Right to Support

Resting on the "right to travel," Shapiro v. Thompson struck down a state requirement of one year of residence before an indigent migrant could be eligible for "welfare" aid. Zechariah Chafee wrote, "there is a queer uncertainty about what clause in the Constitution establishes this right" to travel. Justice Harlan stamped it as a "nebulous judicial construct" and the Shapiro majority itself observed that the "right finds no explicit mention in the Constitution," but found "no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision," content that it "has been firmly established"—by the Court. Be it assumed that a "right to travel" exists, it is a manifest non-sequitur to insist that it entitles a migrant to immediate support at the terminus. For six hundred years local communities limited poor relief to their own residents; the practice, reaching back to pre-Elizabethan times, was picked up by colonial enactments and, at the time of Shapiro, expressed in the statutes of forty or more states. Denial of support to migrants at the terminus would not cause a "massive destabilization."

C. The Death Penalty Cases

For centuries the power to pronounce on life or death in capital cases was committed to the untrammeled discretion of the jury. Nothing in the "cruel and unusual punishment" clause touched this discretion. Intrusion into the domain of capital punishment has been rested on the "cruel and unusual" clause, but the fifth amendment contemplated deprivation of life after a due process trial. Only in 1972 did Furman v. Georgia, decided by a divided Court, upset the centuries-old practice; but the backlash led the Court to confine itself to cases of rape and accomplices to murder. The number of convictions for murder that would be sustained, were these cases reversed, would not cause a "massive destabilization."

209. Z. Chafee, Three Human Rights in the Constitution 188 (1956).
211. Shapiro, 394 U.S. at 630 (footnote omitted).
D. The Commerce Clause

Invasion of state control of internal matters under the cloak of interstate commerce is a tale of steadily increasing federal encroachment. The commerce clause refers to “commerce with foreign nations and among the several States.” Elsewhere I have shown that by “among” the founders understood “between” the States. Hamilton’s reference to “commerce with other nations and between the States” is illustrative. One of the most glaring intrusions into the state domain took place in 1942 in Wickard v. Filburn. A federal act applied federal regulation “to production [of wheat] not intended in any part for commerce but wholly for consumption on the farm,” apparently because such consumption constituted about 20% of production nationwide. Bearing in mind that the founders were assured that the delegated powers would not extend to agriculture, it is altogether improbable that they meant to grant power to regulate a farmer’s production for his own consumption, even though that wheat, in conjunction with that of farmers in other states, might “overhang the market.” A key consideration in examining the commerce power is the stubborn determination of the states to retain control of their internal affairs. Bittker notes Chief Justice Marshall’s reference to “[t]he acknowledged power of a State to regulate its police.” This power encompassed the ‘immense mass of legislation . not surrendered to the general government[].’

The narrow compass of the interstate power is underscored by Justice Story’s statement that “commerce” does not comprehend any commerce, which is purely internal, between man and man in a single State, or between different parts of the same State, and not extending to, or affecting other States. It is not an apt phrase to indicate the mere interior traffic of a single State. The completely

218. THE FEDERALIST No. 23, supra note 7, at 142.
220. Id. at 118 (emphasis added).
221. Hamilton wrote in THE FEDERALIST No. 17, supra note 7, at 102, “the supervision of agriculture which [is] proper to be provided for by local legislation, can never be [a] desirable care[] of a general jurisdiction.”
222. Bittker, supra note 1, at 245 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 203, 208 (1824)). Hamilton told the New York Convention that “were the laws of the Union to new-model the internal police in any State,” that would be objectionable. 2 J. ELLIOTT, supra note 21, at 267-68. Judge Pendleton assured the Virginia Convention that the Constitution “does not intermeddle with the local, particular affairs of the State.” 3 J. ELLIOTT, supra note 21, at 40.
internal commerce of a State may be properly considered as reserved to the State itself.\textsuperscript{223}

Even more egregious is the recent \textit{Garcia v. San Antonio Metropolitan Transit Authority},\textsuperscript{224} which decided by a five to four vote that municipal mass transit is governed by federal minimum wages and hours standards. By the logic of \textit{Garcia}, one who rides by subway in New York City from 72nd to 42nd Street travels in interstate commerce! State control of the janitors of its schools and hospitals is incontrovertibly local, as is transportation of people solely within town confines. Neither of these can be considered to be in the stream of commerce.\textsuperscript{225} Reversal of \textit{Wickard} and \textit{Garcia} should not generate shock waves of "massive destabilization."\textsuperscript{226}

The above cases, I may add, by no means exhaust the list.

It has been suggested that upholding the "small" decisions that flout the framers' intent would maintain "public faith in the judiciary."\textsuperscript{227} The choice is not between threatening the "public faith" and "continued adherence to a rule unjustified in reason." It is not "reason" that is at stake, but whether judicial revision of the Constitution may be concealed from the people.\textsuperscript{228}

"Faith" in the Court that rests on such concealment is a precarious and unworthy base for continued exercise of usurped power. Lest I be charged

\textsuperscript{223} 2 J. Story, \textit{supra} note 102, § 1065, at 8. In discussing the early hesitance of the Court to intrude into the domain of land transportation, \textit{see supra} note 2, Bittker referred to the distinction drawn by the Court respecting transportation on the "navigable waters." Bittker, \textit{supra} note 1, at 247-49. Earlier I wrote, "What Founder conceived that transportation from Boston to Plymouth, Massachusetts by wagon train was in \textit{intra}-state commerce, whereas it became \textit{inter}-state commerce if transportation was by coastwise vessel?" R. Berger, \textit{Federalism, supra} note 2, at 135 (footnote omitted). I was therefore heartened to find Story's statement that the commerce power extends "to the regulation of navigation, and to the coasting trade and fisheries, within, as well as without any State, wherever it is connected with the commerce or intercourse with any other State, or with foreign nations." 2 J. Story, \textit{supra} note 102, § 1075, at 20 (emphasis added).

\textsuperscript{224} 469 U.S. 528 (1985).

\textsuperscript{225} Bittker notes that "the all but exclusive domestic concern of the Founders was exactions by States from their neighbors." Bittker, \textit{supra} note 1, at 241 (quoting R. Berger, \textit{Federalism, supra} note 2, at 128). Judge Henry Friendly wrote, "Under principles coming down from Heydon's Case [76 Eng. Rep. 637 (1584)], a court faced with the task of construction must endeavor to appreciate the mischief the framers were seeking to alleviate." Friendly, \textit{supra} note 50, at 943. At the outset of the Convention, Edmund Randolph observed that "the general object was to provide a cure for the evils under which the U.S. laboured." 1 M. Farrand, \textit{supra} note 7, at 51.

\textsuperscript{226} Dissenting in \textit{Garcia}, then Justice Rehnquist was "confident" that the minority view will "in time again command the support of a majority of this Court." \textit{Garcia}, 469 U.S. at 580.

\textsuperscript{227} Bittker, \textit{supra} note 1, at 279. Those "small" decisions recall Hamilton's comment in \textit{The Federalist No. 25, supra} note 7, at 158: "every breach of the fundamental laws, though dictated by necessity forms a precedent for other breaches where the same plea of necessity does not exist at all."

\textsuperscript{228} \textit{See supra} note 82. Solicitor General Robert Jackson wrote, "This political role of the Court has been obscure to laymen—even to most lawyers." R. Jackson, \textit{The Struggle for Judicial Supremacy} xi (1941).
with sterile historicism, let me avouch Washington’s Farewell Address. As presiding officer of the convention, he knew at first hand the values the framers sought to conserve:

If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield. 229

CONCLUSION

Bittker has made us think about aspects of originalism which hitherto have escaped attention. For that our thanks. If this Article has not dealt satisfactorily with his questions, the task may be undertaken by younger scholars. For it is the essence of a good question that it will not down.

Originalism is not a product of the unthinking; original intent has been applied over the centuries by a long line of judges. It represents a distillation of experience that is not lightly to be dismissed. Not for nothing did Chief Justice Marshall regard it as the “most sacred rule of interpretation.” 230

What is the alternative? Effective criticism must suggest one. Justice Scalia remarked that “surely there must be general agreement not only that judges reject one exegetical approach (originalism), but that they adopt another.” 231 Nonoriginalists, however, cannot unite on a single alternative but struggle in a welter of theories. A leading activist, Michael Perry, urged his fellows “to get on with the business of elaborating a defensible nonoriginalist conception of constitutional text/interpretation and judicial role.” 232

Another activist theorist, Paul Brest, considers that “no defensible criteria exist” whereby to assess “value-oriented constitutional adjudication.” 233 “[I]t is hard,” remarks Justice Scalia, “to discern any emerging consensus among the nonoriginalists as to what this [substitute] might be.” 234 In the upshot, nonoriginalism delivers judgment to the untrammeled discretion of the judge, the “main danger” being that “the judges will mistake their own predilections for the law.” 235

229. Farewell Address, 35 Writings of George Washington, supra note 170, at 229.
234. Scalia, supra note 231, at 855.
235. Id. at 863.
It is a great merit of originalism, as Thomas Grey wrote, that it is a "simple" concept. "It establishes," wrote Justice Scalia, "a historical criterion that is conceptually quite separate from the preferences of the judge himself."326 Therefore, it can help to curb judicial revision of the Constitution. It was the sober Justice Harlan who admonished:

When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.237

236. Id. at 864. This was well understood by the founders. During the debate on ratification of the Constitution, the Federal Farmer referred to the spirit and true meaning of the constitution, as collected from what must appear to have been the intentions of the people when they made it. I will not suppose it intended to lodge an arbitrary power or discretion in judges, to decide as their conscience, their opinions, their caprice, or their politics might dictate.

