

Summer 1991

# Observations on Raoul Berger's "Original Intent and Boris Bittker"

Boris I. Bittker  
*Yale Law School*

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Constitutional Law Commons](#)

## Recommended Citation

Bittker, Boris I. (1991) "Observations on Raoul Berger's "Original Intent and Boris Bittker"," *Indiana Law Journal*: Vol. 66 : Iss. 3 , Article 4.

Available at: <http://www.repository.law.indiana.edu/ilj/vol66/iss3/4>

This Colloquy is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

# Observations on Raoul Berger's "Original Intent and Boris Bittker"

BORIS I. BITTKER\*

## UNITED STATES COURT OF APPEALS SPECIAL PANEL FOR THE MANAGEMENT OF CONSTITUTIONAL CASES INVOKING THE "JURISPRUDENCE OF ORIGINAL INTENT"

Blessed with hindsight gained in the early days of the twenty-first century, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*<sup>1</sup> recounted the victory of the Jurisprudence of Original Intent over its multifarious "living Constitution" rivals in the interpretation of the Constitution, a victory exemplified by the three unexpected decisions described there in detail and summarized below.<sup>2</sup> This apotheosis of Original Intent not only drove skeptics and agnostics into their intellectual bomb shelters, but also touched off an avalanche of litigation in which a host of assiduous lawyers charged that countless conventional principles of constitutional law flagrantly violated the intent of the framers.<sup>3</sup> Although the specific complaints were as varied as the entire corpus of constitutional law, all of these cases raised a "hitherto unasked"<sup>4</sup> question of law: What counts as evidence of the Original Intent of the framers? In the interest of efficient judicial housekeeping, this Special Panel of the United States Court of Appeals was created in 1998 to address that threshold issue, as well as a similarly fundamental issue, viz., what principles should determine whether earlier constitutional decisions, if found inconsistent with the intent of the framers, should be reversed, qualified or preserved?

Mr. Berger's article, *Original Intent and Boris Bittker*,<sup>5</sup> (of which we take judicial notice) is an important contribution to our inquiry, though four preliminary matters must be cleared up before we get to the merits of the author's views.

First, Mr. Berger suggests that the Bittker article eliciting his reply can be analogized to the remarks of an ancient priest speaking from a cave

---

\* Sterling Professor of Law Emeritus, Yale University.

1. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CALIF. L. REV. 235 (1989).

2. See *infra* text accompanying notes 17-19.

3. Here, as elsewhere, "framers" denotes not merely the delegates to the Philadelphia Convention of 1787, but also—indeed, more especially—the delegates to the state ratifying conventions and the voters who selected them.

4. Berger, *Original Intent and Boris Bittker*, 66 IND. L.J. 723, 723 (1991) [hereinafter Berger, *Original Intent*].

5. *Id.*

through the lips of an oracle.<sup>6</sup> Not so. Smacking of a once fashionable vogue for deconstruction, the analogy plays fast and loose with the author's original intent; it is, therefore, unfaithful to Mr. Berger's true self. To be sure, Mr. Berger has more reason than most to recognize the faltering voice of a once young priest,<sup>7</sup> but let us avoid frolics and detours; they are games that two can play. For example, some might say that Mr. Berger's scholarly career was not dictated by his inner voice, but rather by the Delphic Oracle, who led him to perform two latter day Labors of Hercules: Decapitating the Hydra-Headed Monster of Judicial Activism and Cleansing the Aegean Stables of their accumulations of non-interpretivist toxic waste. There would have been a third Labor—Retrieving the Golden Apples of the Hesperidian Garden of Original Intent (located, as every schoolchild knows, in the fabled Fortunate Isles)—were that task not impossible, at least at this point in time, since devotees of the Jurisprudence of Original Intent have been too busy trashing wormy judicial apples to identify any unblemished ones.<sup>8</sup> To be sure, Mr. Berger agrees that the three decisions summarized below<sup>9</sup> are authoritative applications of the Jurisprudence of Original Intent, but they have not yet been certified by other intentionalists; it would, therefore, be premature to describe them as Golden Apples, delicious though they may be. Indeed, one sometimes wonders if any court has ever decided a noteworthy constitutional case qualifying for entry into the Original Intent Hall of Fame, save perhaps for *Marbury v. Madison*.<sup>10</sup> It is an irony of constitutional scholarship that Mr. Berger, author of the most comprehensive and searching defense of judicial review, has found so little to admire in the exercise of this power.<sup>11</sup>

Second, in his interpretation of the Constitution, Mr. Berger firmly rejects appeals to the Declaration of Independence; it was, he tells us, the manifesto of "rebels and revolutionaries," while the Constitution was produced by "[m]en of substance."<sup>12</sup> Thus, true believers in the Jurisprudence of Original Intent acknowledge the vast gap between 1776 and 1787; attempts to bridge it are the subversive machinations of "activists on the search for wider charters of judicial revisory power ."<sup>13</sup> This accusation will not be examined here, since Professors Jaffa and Berns, who profess originalism

6. *Id.*

7. See Berger & Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 COLUM. L. REV. 398 (1947).

8. Dissenting opinions don't count; they are, at best, mere crab apples.

9. See *infra* text accompanying notes 17-19.

10. 5 U.S. (1 Cranch) 137 (1803).

11. See R. BERGER, CONGRESS V. THE SUPREME COURT (1969) [hereinafter R. BERGER, CONGRESS].

12. Berger, *Original Intent*, *supra* note 4, at 732. For additional discussion of the relevance of the Declaration of Independence, see THE FRAMING AND RATIFICATION OF THE CONSTITUTION 54-68 (L. Levy & D. Mahoney eds. 1987); Bittker, *supra* note 1, at 256-58.

13. Berger, *Original Intent*, *supra* note 4, at 732.

but teach that 1776 was the *causa causans* of 1787,<sup>14</sup> can appeal their excommunication to a more suitable forum. We hasten to add, however, that if and when it becomes necessary, we will decide whether to search for the original intent of the signers of the Declaration of Independence and of the Americans from whom they derived their collective title, "We . . . the Representatives of the United States of America, in General Congress, Assembled . . ." <sup>15</sup> For the time being, this threshold task can be postponed.

Third, although our assignment will in time require us to examine the interpretative principles that the framers intended to be applied in construing the Constitution, we set this issue aside for the moment and accept *arguendo* Mr. Berger's twin contentions: that the framers intended their intent to bind future courts, and that we are bound by their intent to bind us to their intent.<sup>16</sup>

Fourth, Mr. Berger endorses the conclusions, and evidently the rationales as well, of the following three cases,<sup>17</sup> which elicited the Original Intent litigation that brought this judicial panel into being:

(1) *The Interstate Monopoly Case*, holding the Sherman Anti-Trust Law unconstitutional, because the authority of Congress under the commerce clause of the Constitution, construed in the light of the original intent of the framers, is limited to the removal of state-imposed barriers on interstate and foreign commerce and hence does not empower Congress to restrain the commercial activities of private entrepreneurs. As was immediately predicted by the legal community, the reasoning of this momentous decision called into question—nay, irrevocably destroyed—the constitutional viability of virtually all federal statutes regulating private enterprise, whether enacted before, during or after the New Deal.

(2) *The Alaska Toxics Case*, holding that Alaska could prohibit toxic chemicals from being shipped anywhere within the state, even though the shipper held a federal license authorizing their transportation, because the framers intended to preserve the inherent police powers of the states (including absolute control over their highways) against any federal regulation. This decision presaged the end of the Interstate Commerce Commission's authority over railroads and commercial motor vehicles and threatened federal control of the airspace above the territorial boundaries of the fifty states of the union, even when confined to the control of interstate air traffic.

14. For their allegedly heretical tracts, see Bittker, *supra* note 1, at 256 n.68; Jaffa, *The Closing of the Conservative Mind*, NAT'L REV., July 9, 1990, at 40.

15. The Declaration of Independence para. 2 (U.S. 1776).

16. For a related issue which is not argued by Mr. Berger but which is arguably an ineluctable result of his argument—that the framers intended to bind us to the Law of Unintended Consequences—see *infra* text accompanying note 86.

17. For more extended discussion of these cases, see Bittker, *supra* note 1, at 240-55.

(3) *The Corporate Due Process Case*, holding that the due process clause of the fifth amendment was intended by the framers to protect only natural persons, leaving corporations with no constitutional right to procedural due process in administrative or judicial proceedings. So startling was this indubitably correct application of the Jurisprudence of Original Intent that Congress promptly established a Re-education and Indoctrination Camp for all federal judges with pre-1998 commissions. The need for this educational program was driven home by *American Trucking Associations v. Smith*,<sup>18</sup> decided more than a year after *The Corporate Due Process Case* was reported by the *California Law Review*, holding that a corporation not only could invoke the due process clause but was entitled thereunder to *substantive* due process.<sup>19</sup>

We treat so much of Mr. Berger's article endorsing these decisions as tantamount to a brief amicus curiae, and, envisioning no possible dissent from votaries of the Jurisprudence of Original Intent, we hereby designate these three cases as Historic Monuments to the Original Intent of the Framers. Anyone who, with actual or constructive knowledge of this designation, hereafter questions their status will be subjected to an amercement, to be affeered in an appropriate amount, in accordance with what, we are confident, would have been the intent of the framers had they foreseen the possibility of such contumacious temerity.

We turn now to the merits of Mr. Berger's principal claims.

### A. *Evidence of the Original Intent of the Framers*

#### 1. The Philadelphia Convention's Official Records

When questioning the propriety of using the 1787 Philadelphia Convention's official records as authoritative evidence of the intent of the framers, we noted:

- (1) that the proceedings were conducted under a secrecy rule;<sup>20</sup>
- (2) that this rule was renewed when the Convention adjourned;<sup>21</sup>
- (3) that before adjournment, James Wilson, described by Mr. Berger as "second only to Madison as architect of the Constitution,"<sup>22</sup> announced that he had originally favored destroying the Convention's journals but had come to prefer a proposal to deposit them in the custody of its president, "subject to the order of Congress, if ever formed under the Constitution";<sup>23</sup> and

---

18. 110 S. Ct. 2323 (1990).

19. *Id.*

20. See Bittker, *supra* note 1, at 259.

21. *Id.* at 260.

22. Berger, *Original Intent*, *supra* note 4, at 733.

23. Bittker, *supra* note 1, at 260 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 648 (M. Farrand ed. 1911)).

(4) that the papers, after "the loose scraps were burned," were delivered to George Washington, who deposited them with the State Department, where they remained until collated by John Quincy Adams and published pursuant to a joint congressional resolution of 1818.<sup>24</sup>

This suppression of the Convention's documents entailed, as we noted,

a quadruple concealment: (1) from the states, which had chosen the delegates to the Philadelphia Convention; (2) from Congress, to which the draft Constitution was submitted and which had sole responsibility for forwarding it to the state ratifying conventions; (3) from "We the People," who were to choose the delegates to the ratifying conventions; and (4) from the ratifiers.<sup>25</sup>

Given the not uncommon view that if the Convention's records "had come to light at the time of the ratification debates, the Constitution would never have passed,"<sup>26</sup> we expressed doubt about the propriety of using the suppressed documents to interpret the Constitution in judicial proceedings once the perceived threat to ratification had evaporated.<sup>27</sup>

Mr. Berger responds that "[o]ne need not approve of such non-disclosure and yet be loathe to label it 'dishonorable.'"<sup>28</sup> This response misses the point: the issue is not whether nondisclosure was improper in itself, nor whether it was made so by the later publication of the records, but rather whether the records can be properly used as evidence of the intent of persons—the ratifiers and the voters who selected them—from whom the records had been deliberately withheld, lest they arouse qualms or doubts.

We find only two comments directed to this issue in Mr. Berger's submission. First, James Wilson observed in the Convention that he favored preservation of the records over destruction so that, if need be, "false suggestions" could be contradicted.<sup>29</sup> If the records had in fact been disclosed during the ratification debates to refute any such "false suggestions," one might plausibly argue that the wavering ratifiers had accepted or endorsed the documentary rebuttal, but in actuality, no such disclosure occurred. Mr. Berger does not offer any evidence, nor does he even claim, that Wilson wanted to preserve the Convention records to refute "false suggestions" that might be advanced in judicial proceedings *after ratification*, still less, that any ratifiers thought that their "original intent" was embodied in or could be teased out of documents that they had never seen, and indeed, that they may not have even known to exist. If any argument in this troubled area is self-refuting, it is the notion that Wilson's sixteen word comment on the final day of the Philadelphia Convention, recorded by

---

24. *Id.*

25. *Id.* at 261 (footnote omitted).

26. *Id.*

27. *Id.* at 261-62.

28. Berger, *Original Intent*, *supra* note 4, at 734.

29. *Id.* at 733.

Madison but not publicly disclosed until half a century later, can serve to force the undisclosed Convention records down the throats of the ratifiers to be posthumously disgorged as proof of *their* "original intent."<sup>30</sup>

Second, Mr. Berger rejects the suggestion—inspired by Justice Story's *Commentaries on the Constitution of the United States*<sup>31</sup>—that it might be "a fraud upon the whole people" to give the Constitution a construction based on documents that were not disclosed to the ratifiers and their constituents.<sup>32</sup> Invoking "the rule in private law,"<sup>33</sup> Mr. Berger distinguishes between nondisclosure and affirmative misrepresentations, quoting a leading treatise on tort law to the effect that "[i]t has commonly been stated as a general rule, particularly in the older cases, that the action [for deceit] will not lie for . . . tacit non-disclosure."<sup>34</sup> Assuming *arguendo* that the private law of deceit is illuminating in this context, it should be remembered that we are not concerned with a suit for damages brought by "We the People" against the estates of the Philadelphia delegates, but with judicial reliance on documents to explain the votes of persons from whom the documents were withheld.

If we were sure that Mr. Berger's defense of the Philadelphia Convention records as valid evidence of the framers' original intent was the best that could be mustered, we would be inclined to grant summary judgment against him on this issue, but perhaps someone else can make a better purse from this particular sow's ear.

## 2. Madison's Notes

In applying the Jurisprudence of Original Intent, what weight should we accord to Madison's notes on the Philadelphia Convention? First, one cannot help but feel uneasy about the accuracy of a document that may record as little as ten percent of the debates in Philadelphia. Mr. Berger is confident that "a high-minded, richly informed scribe may be trusted to

30. This presupposes, of course, that there is anything in the official records that a devotee of originalism would *want* to impute from the Philadelphia delegates to the ratifiers. If one accepts Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 33 (1986) (the journal of the Convention "reveals little about the delegates' intent"), there was little to be imputed.

31. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (4th ed. 1873).

32. Berger, *Original Intent*, *supra* note 4, at 734-35 (footnote omitted). See Bittker, *supra* note 1, at 262, for the suggestion.

33. Berger, *Original Intent*, *supra* note 4, at 735.

34. *Id.* (quoting W PROSSER & W KEETON, THE LAW OF TORTS 737 (5th ed. 1984) (footnotes omitted)). Berger refrains from quoting the next few sentences of this text—perhaps invoking on behalf of the framers the principle *de mortuis nil nisi bonum*—which ascribes the "older rule" to "the dubious business ethics of the bargaining transactions with which deceit was at first concerned," W PROSSER & W KEETON, *supra*, at 737, for example, keeping one's mouth shut when selling a termite-ridden house to a buyer who can't translate "caveat emptor" into English.

separate the wheat from the chaff,"<sup>35</sup> a judgment that Mr. Berger—similarly high-minded and richly informed—buttresses by testifying that his own comparison of Madison's notes with the notes of other contemporaneous participant-observers shows that they "are in substantial accord" on several points.<sup>36</sup>

Still, doubts remain. Hutson, one of two experts cited by Mr. Berger, asserts only that his comparison of Madison's notes with the fragmentary accounts of other delegates establishes "a rough approximation"<sup>37</sup> between them, a lukewarm testimonial that is watered down by his reference to the "difficulty in using [Madison's notes] to discover the delegates' intentions" because they "omit much of what happened in Philadelphia."<sup>38</sup> The other expert called upon by Berger concedes that a "very real possibility exists that Madison consistently and accurately caught the gist of the debates," but concludes that this is "an extremely shaky and incomplete foundation, . . . an uncertain basis for resolving questions of constitutional law in real cases . . . ."<sup>39</sup> Perhaps, as Mr. Berger argues, "incomplete recording . . . does not impeach the veracity of what *was* recorded,"<sup>40</sup> but the deficiency assuredly deprives the recorded remarks of their context, and what one wants in so grave an undertaking as interpreting the Constitution is not isolated truths, but the *whole* truth.

It is doubtful, therefore, that Mr. Berger offers enough on the question of accuracy to defeat a motion for summary judgment against his position. Even if his showing suffices, he must go on to prove the *relevance* of Madison's notes, and on this point, he must defeat a formidable adversary: Madison himself, the chief architect of the Constitution.<sup>41</sup> After all, it was he who said that "[a]s a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the [Philadelphia] Convention can have no authoritative character" and that the Convention's document "was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State [ratifying] Conventions."<sup>42</sup> If the intent of the ratifiers counts, as Mr. Berger acknowledges, how can a document that was not unveiled for public examination until half a century after their work was done, and then only pursuant to an agreement with Madison's widow and Congress, be taken as authoritative or even as relevant and

35. Berger, *Original Intent*, *supra* note 4, at 735.

36. *Id.* at 736.

37. Hutson, *supra* note 30, at 33.

38. *Id.* at 35.

39. L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 288 (1988).

40. Berger, *Original Intent*, *supra* note 4, at 735 (emphasis in original).

41. For Mr. Berger, is this another self-imposed Labor of Hercules?

42. Bittker, *supra* note 1, at 264 (footnote omitted) (quoting 5 ANNALS OF CONG. 776 (1796)).



material? For fifty years, the Supreme Court got along without Madison's notes. After disclosure, should they have been treated as newly discovered evidence, paving the way for reconsideration of the constitutional issues decided by the courts between 1787 and 1840?

The fact that some of the more than sixteen hundred ratifiers occasionally listened to the remarks of some of the Philadelphia delegates who sat with them, though cited as important by Berger, proves little; none of the speakers, save Madison himself, had access to the notes, even as an aide-mémoire. Moreover, even if one were to impute to the ratifiers at a particular state convention the observations in the notes rather than merely the remarks of the speakers on these specific occasions—a long leap—that would hardly warrant imputing knowledge of and agreement with these portions of the notes to the delegates in earlier, or even later, ratifying conventions. Still less do these instances when delegate-ratifiers invoked their Philadelphia memories suggest that Madison's notes embody or reflect the intent of the ratifiers on other issues.

### 3. Ratifying Conventions

Madison's emphasis on the "voice of the people, speaking through the several State [ratifying] Conventions" presaged Story's powerful argument in his *Commentaries on the Constitution of the United States*<sup>43</sup> against using interpretative aids that were not open and available to all:

The Constitution was adopted by the people of the United States, and it was submitted to the whole upon a just survey of its provisions as they stood in the text itself. In different States and in different conventions, different and very opposite objections are known to have prevailed, and might well be presumed to prevail. Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies, to remove local objections, or to win local favor. And there can be no certainty, either that the different State conventions in ratifying the Constitution gave the same uniform interpretation to its language, or that even in a single State convention the same reasoning prevailed with a majority, much less with the whole of the supporters of it. The known diversity of construction of different parts of it, as well as of the mass of its powers in the different State conventions, the total silence upon many objections which have since been started, and the strong reliance upon others which have since been universally abandoned, add weight to these suggestions. Nothing but the text itself was adopted by the people.<sup>44</sup>

Even if all constitutional litigation had been put on hold for two centuries until *The Documentary History of the Ratification of the Constitution*,<sup>45</sup>

---

43. 1 J. STORY, *supra* note 31.

44. *Id.* § 406, at 299-300.

45. THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (J. Kaminski & G. Saladino eds. 1976).

launched in the 1950s, was completed, the courts still would not have the raw material for a reliable analysis of the intent of the ratifiers.<sup>46</sup> From a few scattered remarks in two ratifying conventions, Mr. Berger seeks to derive a consensus of the ratifiers at the first nine (or is it all thirteen?) conventions on the analogy of “[p]resent-day polls of one thousand individuals [that] often astonishingly forecast the views of millions of Americans.”<sup>47</sup> Poll-takers, of course, build on random samples and, even so, often go wrong. Mr. Berger, by contrast, proposes to extrapolate from a group of ratifiers with two important characteristics that are inconsistent with a random sample: They sought the floor and spoke at their state conventions, and their comments coincide, in Mr. Berger’s view, with statements made at other conventions.

In any event,<sup>8</sup> no one knows better than Mr. Berger that there is no evidence that the ratifiers at their own state conventions were in the habit of consulting the records, such as they were, of other conventions as a guide to the meaning of the document that they were called upon to accept or reject. Mr. Berger, in our opinion, has not dispelled the skepticism exuded by the rhetorical questions as set out in Story’s *Commentaries*; such questions are made even more troublesome by the gradual emergence, after 1833, of additional fragmentary accounts of the early ratification debates:

How are we to know what was thought of particular clauses of the Constitution at the time of its adoption? In many cases, no printed debates give any account of any construction; and where any is given different persons held different doctrines. Whose is to prevail? Besides, of all the State [ratifying] conventions, the debates of five only are preserved, and these very imperfectly. What is to be done as to the other eight States? What is to be done as to the eleven new States, which have come into the Union under constructions which have been established against what some persons may deem the meaning of the framers of it? . . . Are we to be governed by the opinions of a few, now dead, who have left them on record? Or by those of a few now living, simply because they were actors in those days (constituting not one in a thousand of those who were called to deliberate upon the Constitution, and not one in ten thousand of those who were in favor of or against it, among the people)? Or are we to be governed by the opinion of those who constituted a majority of those who were called to act on that occasion, either as framers of or voters upon the Constitution? If by the latter, in what manner can we know those opinions? Are we to be governed by the sense of a majority of a particular State, or of all the United States? If so, how are we to ascertain what that sense was? Is the sense of the Constitution to be ascertained, not by its own text, but by the “*probable meaning*” to be gathered by conjectures from scattered documents, from private papers,

---

46. See generally L. LEVY, *supra* note 39.

47. Berger, *Original Intent*, *supra* note 4, at 741.

from the table-talk of some statesman, or the jealous exaggerations of others?<sup>48</sup>

#### 4. The Federalist Papers

In asserting that the intent of the ratifiers can be derived from *The Federalist Papers* despite the opinion of historians that they had little influence, Mr. Berger somehow takes comfort in his conclusion that “[i]t is questionable whether the case for limited influence of *The Federalist* has been nailed down.”<sup>49</sup> For want of a nail, however, an intellectual kingdom may be lost. It is, after all, Mr. Berger’s odd version of the common law’s fiction of “transferred intent”<sup>50</sup> (viz., that the intent of the authors of *The Federalist Papers* must be imputed to ratifiers who left no record manifesting dissent) that must be “nailed down.” It is, therefore, curious that Mr. Berger finds his hypothesis vindicated by a scholarly study, concluding that there is “no way of determining just how effective Publius [the nom de plume adopted by the authors of *The Federalist Papers*] was as a weapon of the forces favoring ratification.”<sup>51</sup> Indeed, there is worse to come. The same scholar goes on to say, in words that would dash the hopes of anyone less persevering than Mr. Berger, that “[i]t seems clear . . . that Publius did not reach an audience of any significant size in 1787-88” and that *The Federalist Papers* “were not found in the newspapers of any state where there was unanimous or near unanimous approval of the Constitution, and only the first score or so appeared in the journals of those states where the Constitution did excite a storm of controversy”<sup>52</sup>

In addition to this geographical obstacle to acceptance of *The Federalist Papers* as a source of information about the ratifiers’ intent, there is the chronological obstacle described in our earlier opinion,<sup>53</sup> that is, *The Federalist Papers* and the ratifying conventions were trains moving on parallel tracks but on different timetables. As a result, more than half of the eighty-five numbers of *The Federalist Papers* were not published until after five of the nine states required by article VII for ratification had completed their work and adjourned. Mr. Berger responds to this inconvenient fact of life with a concession and a warning: He concedes that the “assurances of [*The Federalist Paper*] Number 83” cannot be properly imputed to the eight states that ratified before Number 83 rolled off the presses<sup>54</sup>—a self-evident

48. 1 J. STORY, *supra* note 31, § 407, at 300-01 n.1 (emphasis in original).

49. Berger, *Original Intent*, *supra* note 4, at 743-44.

50. See generally W. PROSSER & W. KEETON, *supra* note 34, at 37-39.

51. Crane, *Publius in the Provinces: Where was The Federalist Reprinted Outside New York City?*, 21 WM. & MARY Q. 589, 589 (3d ser. 1964).

52. *Id.* at 591.

53. Bittker, *supra* note 1, at 272-73.

54. Berger, *Original Intent*, *supra* note 4, at 745.

proposition that, of course, applies *mutatis mutandis* to many other numbers of *The Federalist Papers* and other states—and he warns “activists” that if they denigrate the influence of *The Federalist Papers*, they will lose “what is considered the prime defense of judicial review.”<sup>55</sup> Mr. Berger’s desire to protect these unnamed “activists” against a self-inflicted wound does credit to his generosity, but for better or for worse, this court must pursue truth, come what may. The “transferred intent” case, we conclude, has not yet been “nailed down.”

We, of course, do not quarrel with Mr. Berger’s conclusion that *The Federalist Papers* “remain important because they constitute a valuable explanation of the thinking in *Philadelphia*.”<sup>56</sup> So they are, and so are a host of other pamphlets, editorials, memoirs, commentaries, letters and speeches. The Jurisprudence of Original Intent, however, requires more evidence of what *the ratifiers* intended when they breathed life into the document submitted to them which, until then, was only “the draft of a plan . . . a dead letter.”<sup>57</sup> The case for finding *their* intent in *The Federalist Papers* has not been proved, and the Crane study quoted above<sup>58</sup> leads us to conclude that it never will be, unless a yet unknown Schleimann of archival research succeeds where others have failed.

## 5. Intent of the Voters

Finally, we turn to Mr. Berger’s comments on the intent of the voters who elected the ratifiers and especially to the problem of resurrecting the intent of the voters who formally instructed their delegates to vote for or against ratification. Noting that “[t]here were hundreds, perhaps thousands, of local elections for which there are probably no extant records”<sup>59</sup> and that it is impossible to “winnow the chaff from . . . ‘the pamphlets, newspaper reports, speeches, and letters that bombarded the voters,’”<sup>60</sup> Mr. Berger proposes a “simpler approach”<sup>61</sup> to recovering the intent of the

55. *Id.* In his analysis of judicial review, which devotes only a few pages to *The Federalist Papers*, Mr. Berger quotes with approval Corwin’s conclusion that the “classical version of the doctrine of judicial review in the Federalist, No. 78, improves upon the statement of [earlier defenses] but adds nothing essential to them.” R. BERGER, CONGRESS, *supra* note 11, at 97 (quoting Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 526-27 (1925)). Thus, even if judicial activists were deprived of this buttress for judicial review, they would, no doubt—like the devil quoting scripture—shamelessly build their subversive shanties on the rest of Mr. Berger’s 389-page work.

56. Berger, *Original Intent*, *supra* note 4, at 745 (emphasis added).

57. Bittker, *supra* note 1, at 264.

58. Crane, *supra* note 51.

59. Berger, *Original Intent*, *supra* note 4, at 742.

60. *Id.* (quoting Bittker, *supra* note 1, at 269).

61. *Id.*

voters: Since ratifiers who were pledged to vote one way or the other were agents of their constituents, we need only impute the intent of these delegates to their principals back home.<sup>62</sup> Since, as explained earlier, the intent of the delegates is to be derived, under Mr. Berger's theory, from the intent of the authors of *The Federalist Papers* or from the intent of the Philadelphia framers as recorded in the convention's records or in Madison's notes, we have arrived full circle. The original intent of the voters can be found in either of two sets of documents: (1) the Convention records and Madison's notes that were closed to both the ratifiers and their constituents, and (2) from other documents such as *The Federalist Papers* that were known at best to only a fraction of the ratifiers and to an even smaller fraction of the voters.

Mr. Berger's "simpler approach" leads him to this: "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."<sup>63</sup> The issue, however, is not whether the Constitution was properly ratified, but how we are to determine the original intent of the voters who selected delegates to the ratifying conventions. By linking inference to inference, Mr. Berger may have produced more than a rope of sand, but we doubt that it can haul the Jurisprudence of Original Intent through turbulent seas. Must we conclude that the astonishing judicial victory of Original Intent over its rivals, chronicled in the article to which Mr. Berger has replied, owes more to the faith that produces miracles than to deductive reasoning?

### B. *Stare Decisis*

In our earlier opinion, we called attention to "the conventional theory that stare decisis rarely, if ever, protects earlier constitutional decisions from reexamination."<sup>64</sup> This is a principle that Mr. Berger, with his characteristic scholarly diligence, strengthens by quoting Francis Lieber, "the high priest of hermeneutics,"<sup>65</sup> who wrote that whatever "is wrong in the beginning cannot become right in the course of time."<sup>66</sup> We went on, however, to recognize the pressures to preserve some long-entrenched or popular decisions even though they flout the framers' original intent, and we then asked: "If we are to eschew judicial lawmaking, a prime objective of the Jurisprudence of Original Intent, can we properly employ an inherently subjective

---

62. *Id.*

63. *Id.*

64. Bittker, *supra* note 1, at 274.

65. Berger, *Original Intent*, *supra* note 4, at 747

66. *Id.* (quoting F. LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 209-10 (3d ed. 1880)).

and entirely discretionary doctrine [that is, stare decisis] in deciding whether to preserve or overrule erroneous constitutional decisions?"<sup>67</sup>

The issue, needless to say, is not confined to a handful of so-called Warren Court decisions. Important though they are, they are merely the tip of the Iceberg of Non-Interpretivism. As Judge Bork has reminded us,<sup>68</sup> the threat of judicial activism can be found as early as Justice Chase's opinion in *Calder v. Bull*,<sup>69</sup> decided in 1798. While the future Chief Justice Warren was still in law school, his constitutional law course was undoubtedly awash with cases violating the original intent of the framers, but these were nevertheless viewed as the sources of fundamental constitutional principles. The *Legal Tender Cases* of 1870 and the pre-twentieth century decisions applying the Interstate Commerce and Sherman Anti-Trust Laws are only two examples.<sup>70</sup> Nor did the original intent of the framers receive full faith and credit when the Warren Court gave way to the Burger Court and it to the Rehnquist Court. Within a few months after Judge Bork described *Roe v. Wade*<sup>71</sup> as "the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century,"<sup>72</sup> it acquired a rival: the right-to-die case.<sup>73</sup> To be sure, the majority opinion written by Chief Justice Rehnquist did not unequivocally endorse "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment"<sup>74</sup> but instead hedged by saying that the principle "may be inferred from our prior decisions[,]"<sup>75</sup> but our constitutional history is replete with tent flaps nudged aside by the noses of camels. Thus, Justice Scalia was not crying wolf when he said that "[t]o raise up a constitutional right here we would have to create out of nothing (for it exists neither in text nor tradition) some constitutional principle whereby, although the State may insist that an individual come in out of the cold and eat food, it may not insist that he take medicine . . ."<sup>76</sup> In short, our constitutional history is proof positive that "wide is the gate, and broad is the way, that leadeth to destruction, and many there be which go in thereat."<sup>77</sup>

67. Bittker, *supra* note 1, at 278.

68. R. BORK, *THE TEMPTING OF AMERICA* 19-20 (1990).

69. 3 U.S. (3 Dall.) 386, 387-89 (1798).

70. See *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, (1870); *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); see also Bittker, *supra* note 1, at 240-42 (discussing *The Interstate Monopoly Case* in more detail).

71. 410 U.S. 113 (1973).

72. R. BORK, *supra* note 68, at 116. There are those—quibblers can be found everywhere—who think the palm should have been awarded to *Griswold v. Connecticut*, 381 U.S. 479 (1965), since *Roe v. Wade*, as Bork perceptively recognizes, "became possible only because *Griswold* had created a new right by sleight of hand." R. BORK, *supra* note 68, at 169.

73. *Cruzan v. Missouri Dep't of Health*, 110 S. Ct. 2841 (1990).

74. *Id.* at 2851.

75. *Id.*

76. *Id.* at 2863 (Scalia, J., concurring).

77. *Matthew 7:13* (King James).

While Mr. Berger's head tells him that every violator of the Jurisprudence of Original Intent should be shot on sight, his heart tells him—and through him, us—to exercise mercy if this draconic penalty would trigger “massive destabilization . . . [that] would threaten the functioning of the federal government.”<sup>78</sup> This is a surprising concession, given Mr. Berger's oft-repeated assertion that perceived deficiencies in the Constitution as originally intended should be cured by amendments under article V, especially because, as we noted in our earlier opinion,<sup>79</sup> an erroneous constitutional decision that has indeed become indispensable to the orderly functioning of our society will almost certainly be promptly restored by a constitutional amendment if its illegitimate judicial prop is removed. Thus, we can have our cake and eat it too.

Be that as it may, Mr. Berger provides a sample inventory of the cases that, in his view, could be overruled without undue damage to the status quo.<sup>80</sup> So far as it appears, the only decision inconsistent with the Jurisprudence of Original Intent that he would unequivocally nominate for preservation is *Brown v Board of Education*.<sup>81</sup> Thus, the best that Mr. Berger offers the *Legal Tender Cases*, which most if not all other devotees of the Jurisprudence of Original Intent would probably describe as illegitimate in origin but sanctified by usage, is that “[p]ossibly 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.”<sup>82</sup> Since Mr. Berger is not a candidate for appointment to the federal judiciary, it would perhaps improperly invade his privacy to inquire about the fate, in his constitutional universe, of *Griswold v. Connecticut* and *Roe v. Wade*.

Mr. Berger's suggestion that a decision overruling the *Legal Tender Cases* might include a *temporary* “cushion” may imply that the offending doctrine should be eradicated root and branch if the Court's patience runs out before the amendment has been ratified. This suggestion reminds us that in dealing with erroneous constitutional decisions, the courts are not confined to a check list with two boxes marked “overrule” and “preserve.” There is instead a spectrum of choices,<sup>83</sup> whose breadth can be illustrated with a single example—preserving the erroneous decision but confining it to its

78. Berger, *Original Intent*, *supra* note 4, at 748 (quoting Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 750 (1988) (footnote omitted)).

79. Bittker, *supra* note 1, at 278.

80. Berger, *Original Intent*, *supra* note 4, at 750-53.

81. 347 U.S. 483 (1954). For Mr. Berger's discussion, see Berger, *Original Intent*, *supra* note 4, at 747-48.

82. Berger, *Original Intent*, *supra* note 4, at 749.

83. Bittker, *supra* note 1, at 278-80. For other possible compromises between the unqualified overruling of illegitimate decisions and their unqualified preservation, see Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 944-51 (1988), which came to our attention only recently.

“facts”<sup>84</sup>—which invites, indeed requires, judicial micromanagement of the affected area of commercial, political or personal life. Recognizing that “[n]o one has a ‘principled theory [of stare decisis] to offer,’”<sup>85</sup> we expressed in our earlier opinion the fear that the employment of such an “inherently subjective and entirely discretionary doctrine in deciding whether to preserve or overrule erroneous constitutional decisions”<sup>86</sup> would plunge us into judicial lawmaking, pure and simple. Mr. Berger, alas, gives us no shield against that peril of perils, perhaps because it is an unavoidable by-product of the Jurisprudence of Original Intent. We find cold comfort in the conclusion that the framers’ intent to bind us to their intent included the intent to bind us to the painfully disillusioning Law of Unintended Consequences.

---

84. For difficulties in applying this ostensibly simple version of stare decisis, see Bittker, *supra* note 1, at 279.

85. *Id.* at 278 n.148 (quoting Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422 (1988)).

86. *Id.* at 278.



