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A Response to D.A.J. Richards’ Defense of Freewheeling Constitutional Adjudication

RAOUL BERGER*

We must take off this vail and colour of words, which make a shew of being something, and in truth are nothing. Chief Justice Vaughan (1671)**

In the six years that have elapsed since publication of my Government by Judiciary,1 “replying” to Raoul Berger, an activist remarks, has become “a cottage industry.”2 Survival under an incessant barrage suggests that my thesis has abiding merit.3 Now comes a lawyer-philosopher, Professor D.A.J. Richards, who removes analysis from the cottage to the empyrean of philosophy.4 But it is a newly-tailored philosophy which merely cloaks his own predilections. As was said of his patron saint, Ronald Dworkin, the account of human rights Dworkin offers turns out to be little more than a convoluted ideology supporting precisely those reactions to current policy issues that a conventional liberal academician is likely to have.

* A.B., University of Cincinnati, 1932; J.D., Northwestern University, 1935; L.L.M., Harvard University, 1938; L.L.D., University of Michigan, 1978.
3. Eric Foner, commenting on the ongoing attacks on Stanley Elkins’ SLAVERY (1959), wrote, “[i]n the writing of history, refutation . . . is often the sincerest form of flattery. Mr. Elkins’ thesis, for example, remains important precisely because a generation of scholars has directed its energies to overturning it.” Foner, The Slaveholder as Factory Owner (Book Review), N.Y. Times, May 23, 1982, § 11, at 11, 27.
One might expect, however, that he would not so cavalierly dress up his own opinions as "natural rights" or call the culture-bound process by which he arrives at them "Philosophy." 5

Not the least singular aspect of Richards' approach is the almost total absence of reference to long-standing case law or established canons of interpretation which run counter to his theorizing. Instead he offers a melange of anthropology and like social sciences, couched in murky rhetoric that illustrates a fellow activist's plaint: "Constitutional scholars have, of late, talked mainly to each other; the time has come for us to look outside ourselves to the audience of judges, lawyers, legislators and the public," 6 to the vast bulk of whom, like to Chief Justice Marshall, "abstract theorizing was never congenial." 7 Richards found that the argument of my 430-page book could "be easily summarized." 8 Would that I could say as much for his 26-page article. Let one example of his fogginess suffice: as a preliminary to the task of constitutional interpretation, he says

consider the interpretation of walking down the street. Our interpretation of this action rests on a form of holistic, viz. nonreductive explanation in which such factors as the person's rationality, beliefs, desires, capacities, and the like appear as mutually interdependent variables. 9

That is enough to inhibit a person from taking another step. Of such writing we may say with Stephen Jay Gould, "difficult, convoluted writing may simply be fuzzy, not deep. . . . The essence . . . can still be stated with every day words." 10

But Richards is not at home with everyday words. Thus he repeatedly charges me with being a "strict constructionist," 11 a position from which I am poles

6. Lupu, Constitutional Theory and the Search for a Workable Premise, 8 U. DAYTON L. REV. 579, 580 (1983). Jacques Barzun observed that "[i]f from love of abstracting new conceptual terms are substituted for common ones, it often happens that the power of words to direct thought approaches zero." BARZUN, supra note 3, at 60.
7. F. FRANKFURTER, THE COMMERCE CLAUSE 15 (1937). Our legal system derives from the English who did not start with a principle from which to derive particulars, but decided rather on a case-to-case basis, extracting principles from those decisions. Henry James wrote of the Englishman that "hair-splitting is the occupation he most despises. There is always a little of the Dr. Johnson in him, and Dr. Johnson would have had woefully little patience with that tendency to weigh moonbeams." James, Hawthorne, in THE SHOCK OF RECOGNITION 465 (E. Wilson ed. 1955).
8. Richards, supra note 4, at 1372.
9. Id. at 1375. As was said of a passage by Clifford Geertz, one of Richards' authorities, see id. at 1377 n.24, "[i]t makes us work very hard for a modest intellectual yield . . . . Such recondite language and baroque construction force us to read the passage over and over before we can tease any meaning out of it." Robinson, Book Review, N.Y. Times, Sept. 25, 1983, at 11, 35.
10. Derman, Book Review, BOSTON REV., Aug. 1983, at 37. William James was "impatient with the awful abstract rigmarole in which our philosophers obscure the truth," "regarded the failure to write intelligibly a fundamental flaw in any vision," and considered Hegel was "beset with a perverse preference for the use of technical and logical jargon." BARZUN, supra note 3, at 125, 133, 137.
11. Richards, supra note 4, at 1378-79.
removed. A "strict construction is one which limits the application of the provision . . . to cases clearly described by the words used. It is called, also, literal." It is the activists, however, who seek to give the words of the fourteenth amendment "literal" construction—"equal" means equal, never mind that the Framers incontrovertibly intended to exclude suffrage from the amendment. With the Supreme Court, reflecting a centuries-old practice, I have ever maintained that the text must yield to the unmistakable intention of the Draftsmen, and therefore concluded that in reversing the Framers' exclusion of suffrage in the "one man-one vote" cases the Court flouted the will of the framers. Nowhere is the Court authorized to reverse their determination. That view is poles removed from "strict construction."

14. "A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law," Hawaii v. Mankichi, 190 U.S. 197, 212 (1903). Judge Learned Hand stated that the "manifest" legislative purpose "overrides even the explicit words used." Cawley v. United States, 272 F.2d 443, 445 (2d Cir. 1959).
15. For documentation, see R. Berger, supra note 1, at 30-31, 52-68. Justice Harlan reminded the Court that its reapportionment decisions were "made in the face of irrefutable and still unanswered history to the contrary." Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring). Activist Louis Lusky refers to Harlan's "irrefutable and unrefted demonstration to that effect." Lusky, supra note 13, at 406. See also Abraham, supra note 13, at 467-68; Mendelson, Raoul Berger's Fourteenth Amendment—Abuse by Contradiction vs. Abuse by Expansion, 6 Hastings Const. L.Q. 437, 453 (1979); Nathanson, supra note 13, at 581. Gerald Gunther wrote,

[the ultimate justification for the Reynolds ruling is hard, if not impossible, to set forth in constitutionally legitimate terms. It rests, rather, on the view that courts are authorized to step in when injustices exist and other institutions fail to act. That is a dangerous—and I think illegitimate—prescription for judicial action. Gunther, Some Reflections on the Judicial Role: Distinctions, Roots and Prospects, 1979 Wash. U.L.Q. 817, 825. Robert Bork wrote, "[t]he principle of one man, one vote . . . runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula." Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 17, 18 (1971).]

Compare with such materials Richards' statement that "focusing on the application at the time of adoption may constitutionalize one among several historically competing views of application." Richards, supra note 4, at 1389-90 (emphasis added). Except for a handful of radicals, opposition to Negro suffrage was overwhelming. John Bingham, a quondam radical, led the fight to admit Tennessee notwithstanding its Constitution made no provision for Negro suffrage. His opponents were defeated in the House by 125 to 12, in the Senate by 34 to 4. For details, see R. Berger, supra note 1, at 59-60, 79.
Richards has no sympathy with democratic self-government. To make room for his philosophy he attacks such a fundamental presupposition as popular sovereignty, which he acknowledges "has long enjoyed a central place in intuitive moral conceptions of constitutional legitimacy." Because the Court declined to hold death penalties unconstitutional per se, Richards asserts that it was a "serious constitutional misjudgment" on the part of the majority (of seven) to suppose that judgment "turned on popular sentiment or some kind of judicial divination about conventional morality." That, he considers, is an abdication of their duty "to exercise their own independent consciences," not "in obedience to the fictive denotations of the Founders or the imagined demands of public opinion." The "imagined demands of public opinion" exemplifies the unreliability of Richards' pronunciamentos. In the wake of the unprecedented Furman v. Georgia there was a stunning backlash, "a virtual stampede of State reenactments" of death penalties by thirty-five states. Justices Stewart, Powell and Stevens handsomely acknowledged that this had "undercut the assumption on which Furman rested": "[I]t is now evident that a large proportion of American society continues to regard [such penalties] as . . . appropriate and necessary criminal sanction[s]." For Richards this derives from "populist retributivism, itself compounded of fear and ignorance." And he would not have the Court "track the retributive thirst of the American public." So populist retributivism is not "imagined." In fact, he has not sorted out his ideas; he cites Dworkin's statement that "interpretative questions ultimately appeal to morality of the political community," and charges that "Berger ignores the ways in which the moral growth of the community must inevitably shape the elaboration of the abstract normative intentions of . . . the eighth and fourteenth amendments." Thus Richards appeals to the morality of the community but condemns its specific manifestation—adherence to death penalties, and asks the Court to transform the "conventional morality." In fact he prefers his own aspirations to those of the people and the Court and urges the Court to effectuate them.

16. Richards, supra note 4, at 1384.
17. Id. at 1397; see also infra text accompanying note 139.
18. Richards, supra note 4, at 1397 (emphasis added).
21. Gregg v. Georgia, 428 U.S. 153, 179 (1976). See also infra note 63. Nevertheless Richards criticizes me for questioning "the legitimacy of the judiciary finding that a form of punishment that the Founders regarded as valid is no longer consistent with the eighth or fourteenth amendments because the moral values of the people today reject it." Richards, supra note 4, at 1394. Where did the American people reject death penalties?
22. Richards, supra note 4, at 1398.
23. Id. at 1397.
24. Id. at 1378 n.26.
25. Id. at 1388-89.
26. He calls for a judicial "transformation of American conventional morality in the ethically required way that [his] constitutional principle demands." Id. at 1398.
27. See infra text accompanying note 139. He is critical of my rejection of Brown v. Board of Educ., 347 U.S. 489 (1954) and its progeny "whose political morality [Berger] esteems not-
Popular Sovereignty

Berger, Richards recounts, views popular sovereignty "as the basic postulate of constitutional democracy" so that judicial wandering "outside the scope of what the people intended betrays the governing rationale of constitutional government—that the people should rule." According to this view, "the people, the fount of political legitimacy, imposed constitutional limits on the state," using language as they understood it "at the time it was drafted and approved." This, Richards asserts, "derives from an . . . indefensible positivistic conception of popular sovereignty," posing the problem, "how there can be any legal limits on the sovereign." That may baffle a philosopher but presents no problem to an historian. The Founders did not regard the state as sovereign; "if sovereignty had to reside somewhere in the state—and the best political science of the eighteenth century said it did—then many Americans concluded that it must reside only in the people-at-large." John Adams referred to the prevalent idea in the Continental Congress—the people were the "Source of all Authority and Original of all Power." James Wilson pointed out that "all Government originates from the People," a "[m]axim widely accepted by almost every one." "It is a [m]axim," proclaimed the Massachusetts General Court in January 1776, 'that, in every Government, there must exist, Somewhere, a Supreme, Sovereign, absolute and uncontrollable Power; But this power resides, always in the body of the People.' Gordon Wood comments that this was no "vague abstraction of political science" but had "gained a verity in American hands" not imagined by European radicals. James Wilson explained to the Pennsylvania Ratification Convention that "in all governments . . . there must be a power established from which there is no appeal, and which is therefore called absolute, supreme and uncontrollable. The only question,' . . . 'is where that power is lodged?' . . . The supreme power, [he answered] . . . 'resides in the PEOPLE, as the fountain of government.' . . . '[T]hey can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper.' Unless the people were considered as vitally sovereign, declared Wilson

withstanding their constitutional illegitimacy," Richards, supra note 4, at 1373, oblivious to the need for suppressing personal predilections in dispassionate scholarly inquiry. As long ago as 1942, I refused to make my predilections the test of constitutionality, Berger, Constructive Contempt: A Post-Mortem, 9 U. Chi. L. Rev. 602 (1942), whereas my philosopher-critic manifestly is the slave of his predilections.

28. Richards, supra note 4, at 1372-73.
29. Id. at 1383 (emphasis added). "Indefensible" is a characteristic Richardsian exaggeration, and to say the least, is unphilosophical.
31. Id. at 329.
32. Id. at 330.
33. Id. at 363. For similar sentiments in North Carolina, see id. at 364. By 1788 this was seen by Noah Webster to be "a fundamental maxim of American politics . . . the sovereign power resides in the people." Id. at 377.
34. Id. at 362.
we shall never be able to understand the principle on which this system was constructed.

Judicial review was not designed to rise above this power; it "only supposes," said Hamilton, that "the power of the people is superior" to that of the judiciary and the legislature.

The historical answer to the jurisprudential difficulty "in explaining how there can be any legal limits on the sovereign" is thrust aside by Richards because it

fictionalizes a kind of sovereign who imposes limits on the state, but is itself illimitable, namely, the people, or popular sovereignty. But, as the more perceptive positivists have always recognized, such a reading of the facts of American constitutional government is strained indeed, a far cry from the European centralized bureaucracy and British parliamentary supremacy which positivist theories have more naturally explained.

This richly exemplifies how delusory is a philosophy not rooted in the facts. The supremacy of Parliament had first been rejected in favor of the colonists' own assemblies, and then they withheld that supremacy from their own legislatures. As James Iredell pointed out, the Founders rejected the conventional British "theory of the necessity of the legislature being absolute in all cases." In so doing they did not reject the concept of sovereignty, they merely relocated it, concluding that "it must reside only in the people-at-large." To label this "a futile and disfiguring search for or invention of a fictionalized sovereign" is to prefer fantasy to fact. If popular sovereignty was a fiction, the Founders acted on it, and as Charles Evans Hughes said in a similar case, "it matters not whether they were accurate in their understanding of the Great Charter, for the point is what the colonists thought it meant." Nor does it dispose of "popular sovereignty" to label it an "invention"; so too was judicial review itself. The Framers set out to fashion a novel system of self-government, and "invention" was the order of the day.

35. Id. at 530; see id., 344-89 (emphasis added).
37. Richards, supra note 4, at 1383.
39. Id. at 462. Apparently Richards believes that interpretivists consider the Founders as "sovereign" for he refers to "Founders or some other sovereign," and then concludes that "in conflicts between judicial convention and the Founders' intent it is the former, not the latter, which should govern." Richards, supra note 4, at 1384. The logic of his deduction is not clear to me. The Framers' intent is given weight under the age-old rule that such intention prevails even over the letter. See supra note 14. Weight attaches to what the Framers did because they were delegates of the people, who then ratified the Constitution produced by the Framers. In short, "the legal supremacy of the Constitution," text and original understanding, "is due to its being the ordinance of the sovereign will of the people." E. CORWIN, THE TWILIGHT OF THE SUPREME COURT 106-07 (1934). See also Berger, Lawyering v. Philosophizing: Facts or Fancies, 9 U. DAYTON L. REV. 171 (1984) at text accompanying notes 142-54.
40. Wood, supra note 30, at 382.
41. Richards, supra note 4, at 1384.
42. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 186 (1928).
43. Madison stated that the Founders "reared the fabrics of government which have no model
Richards' invocation of Madison's *Federalist No. 10* against a "purely populist interpretation of popular sovereignty" does not advance his cause. By his own testimony, commentary on Madison’s argument is "widely diverging in perspective." Madison was there concerned with protecting the minority’s superior "faculties of acquiring property" from an "overbearing majority," i.e. the rich from the poor. To this end he sought to diffuse the majority’s power by spreading the electors over a larger geographical area, counting on different sectional interests to dilute the majority's power. According to Richards, Madison included other values than populism in his interpretation of popular sovereignty, one of which was "equal liberty of religious conscience," which "restrain the untrammeled pursuit of the popular will." But that value was placed beyond the reach of the populace by the first amendment, an exception to the reserved rights of the people. Nor do "federalism, separation of powers, judicial supremacy" read against populism. Federalism was a response to the fierce attachment of the people to their local governments; the separation of powers was designed to curb delegated powers by diffusion of powers and checks and balances; and judicial "supremacy" was no child of the Framers. When Madison addresses the issue of sovereignty he reads against Richards. He sought to have the Constitution ratified not by the state legislatures, but "by the supreme authority of the people themselves." Toward the end of the Convention he said, "[t]he people were in fact, the fountain of all power . . . . They could alter Constitutions as they pleased." That power of alteration alone undermines a claim for "absolute" authority on behalf of any delegate of the people.

Richards next argues that it is difficult to determine who is the sovereign. "If understood as the historical persons who approved the original Constitution, why should they bind a later generation removed in time?" The short on the face of the globe." They did not halt for the discovery of "precedents." *The Federalist No. 14*, at 85 (J. Madison) (Mod. Lib. ed. 1937).

44. Richards, *supra* note 4, at 1385.
45. *Id.* at n.57.
47. *Id.* at 59-61.
49. *Id.*
50. *See infra* text accompanying notes 266-72.
52. 2 M. Farrand, *supra* note 51, at 476.
53. Richards, *supra* note 4, at 1384; why "should a contemporary generation be bound in this way to the will of a generation long dead?" *Id.* at 1385. Mark Tushnet acknowledges that the interpretivist view—"we are indeed better off being bound by the dead hand of the past than being subjected to the whims of willful judges trying to make the Constitution live"—is "fairly powerful." Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 787 (1983). For an extended discussion of why the Constitution continues to be authoritative, see Berger, *supra* note 39, at 188-90 nn.120-35.

Gary Leedes notes public demand that the courts' decisions be based on principles "genuinely attributable to the Constitution;" "the problem with judge-made law is the fear (and sometimes the reality) of unfettered discretion, which enables courts to impose unacceptable values on the
answer is that they don't. Article V enables this generation to remove the constitutional bonds. The "real issue," to which Richards turns a blind eye, was underscored by Willard Hurst thirty years ago: "[W]ho is to make the policy choices in the twentieth century: judges or the combination of legislature and electorate that makes constitutional amendments." Richards is welcome to prefer "the whims of willful judges," but I challenge him to produce a single expression by the people, in convention, constitutional text, historical records or referenda, where they have preferred those "whims" to their written Constitution. The people, Hans Linde observed, prefer the Constitution to the Justices.

Next Richards said if the sovereign is "understood as some current generation, how do we know who they are or what they approve when most of them do not understand, let alone reflectively approve constitutional institutions." This reveals his thinly veiled contempt for democratic government. Because the current generation is uninformed he would turn its destiny over to judges who, of course, are to enforce his aspirations. The philosopher, Sidney Hook, denounces those "who know what the basic human needs should be, who know not only what these needs are but what they require better than those who have them or should have them." As to "who they are and what they approve," that can be ascertained by submitting the issue to the people by referenda, amendment or convention whereby they will tell "what they approve." "Who they are" is the majority who express their preference, or their legislative representatives who either have spoken or declined to act. The rule of the majority, however uncongenial to Richards, was, as Gordon Wood notes, "the consuming majoritarian character of Revolutionary thought."

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54. Hurst, Discussion, in SUPREME COURT AND SUPREME LAW 75 (E. Cahn ed. 1954) (emphasis added).

55. Tushnet, supra note 53. See infra text accompanying notes 266-76.

56. See Leedes, supra note 53. Chief Justice Marshall considered the Constitution to be "a solemn act of the people themselves . . . made to be preserved, and no organ of government may alter its terms." E. Corwin, supra note 39, at 110.

57. The "whole enterprise of constitutional law rests, after all, on the premise that the nation cares about its Constitution, not about its courts." Linde, Judges, Critics and the Realist Tradition, 82 YALE L.J. 227, 256 (1972).

58. Richards, supra note 4, at 1384.

59. S. Hook, PHILOSOPHY AND PUBLIC POLICY 28 (1980). "It is arrogant," he adds, to assume that "some self-selected elites can better determine what the best interests of other citizens are than those citizens themselves." Id. at 29. Were that true, Noel Annan, Vice Chancellor of the University of London, stated, "then surely the state is justified in ignoring what ordinary people say they desire or detest." ISAIAH BERLIN, PERSONAL IMPRESSIONS xvii (1981).

60. G. Wood, supra note 30, at 64 n.40. "Within the States," said Gouverneur Morris, "a majority must rule, whatever the mischief done among themselves." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 439 (1937). Majority rule was built into the Constitution. Charles Pinckney had proposed "making a majority of the Houses, when constituted, capable of deciding in all, except a few cases, where a larger number may be thought necessary." 3 M. FARRAND, supra, at 106, 110. The latter exception found expression in several provisions for a two-thirds
In place of the "disfiguring . . . fictionalized sovereign," Richards proposes as the "ultimate value of popular sovereignty" an "idealized moral conception of persons as free, rational and equal." In his dream world he posits that such persons "would be concerned with limiting . . . severe criminal sanctions." In the real world, however, the people are not at all concerned with limiting "severe criminal sanctions," but insist rather on capital punishment. Nor does he view the commonality in the real world as "rational," but as swayed by "fear and ignorance." Nevertheless he dreams of a system "in which the equality and liberty of persons are guaranteed and maintained," and later transmutes it into "a principle of equal liberty." I would not deprive him of his dreams, but caution him against identifying them with constitutional law.

Certainly his yearning for "equality" was not shared either by the Founders or by the Framers of the fourteenth amendment. To begin with, in 1776 "individual rights, even the basic civil liberties that we consider so crucial, possessed little of their modern theoretical relevance when set against the will of the people." The Founders were more concerned with the rights of the states, of the collective society than those of individuals. It was conceivable, Wood observes, "to protect the common law liberties of the people against their rulers, but hardly against . . . themselves." When the Founders came to spell out individual rights in the Bill of Rights, the list was meager indeed: four amendments are concerned with criminal proceedings, the others safeguard free speech, religious freedom, the right to bear arms, and quartering of soldiers in private houses.

Equality of condition as distinguished from equality of opportunity, Madison came to believe, "was a chimera." Because "the Federalists were fearful...
that republican equality was becoming ‘that perfect equality which deadens the motives of industry’ . . . they were obsessed with the need to insure that the proper amount of inequality and natural distinction be recognized.'’

Madison affirmed that “there will be particularly the distinction of rich and poor,” and cautioned against the “future danger” of a “leveling spirit.””

“Perfect equality” in men’s “possessions” was not for him. Hamilton agreed that “nothing like an equality of property existed; that an inequality would exist as long as liberty existed.”

A people who countenanced slavery could make only a slight obeisance to equality.

The scene did not materially shift in the Reconstruction era. A leading abolitionist theorist, John Bingham, who was to be the draftsman of the fourteenth amendment, said in 1859:

Nobody proposes or dreams of political equality any more than of physical or mental equality. It is as impossible for men to establish equality in these respects as it is for “the Ethiopian to change his skin.”

In the 39th Congress, he led the movement to admit Tennessee despite the absence of a provision for Negro suffrage in its Constitution, saying, “we are all for equal and exact justice . . . [but] justice for all is not to be secured in a day.”

Time and again, proposals to bar ALL discriminations were rejected.” Thaddeus Stevens, leader of the radicals who sought equality for the blacks, concluded that the “amendment falls far short of my wishes” but “it is all that can be obtained in the present state of public opinion . . . I . . . leave it to be perfected by better men in better times.”

Finally, the chairman of the Joint Committee on Reconstruction, Senator William Fessenden, stated, “we cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions.”

All of which demonstrates that for the Framers “equal” did

72. Id. at 495. John Adams also believed in the inevitability of such distinctions. Id. at 572.
73. I M. FARRAND, supra note 51, at 422-23.
74. Id. at 424.
75. CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859). The “equality” Bingham envisioned “contemplated that no man shall be wrongfully deprived of the fruit of his toil any more than of his life.” CONG. GLOBE APP., 34th Cong., 3d Sess. 140 (1857). A black academician, Derrick Bell, points out that “few abolitionists were interested in offering blacks the equality they touted so highly.” Bell, Book Review, 76 COLUM. L. REV. 350, 358 (1976).
76. CONG. GLOBE, 39th Cong., 1st Sess. 3979 (1866).
77. For citations see R. BERGER, supra note 1, at 163-64.
79. CONG. GLOBE, 39th Cong., 1st Sess. 705 (1866).
80. “One is driven by the evidence,” C. Vann Woodward states, to conclude that “popular convictions were not prepared to sustain” a “guarantee of equality.” C. WOODWARD, THE BURDEN OF SOUTHERN HISTORY 83 (1960). Early in the session, Senator John B. Henderson of Missouri stated, “a bold declaration of man’s equality cannot be carried.” CONG. GLOBE APP., 39th Cong., 1st Sess. 119 (1866). In light of the foregoing it is not a little remarkable that Robert A. Burt should posit that “equality is a bedrock substantive principle of democratic theory and, insofar as the majority is free to disregard the wishes of members of the losing minority and thereby
not mean across-the-board equality. Nor does Richards' "idealized" world correspond to the real world in 1954 when it would have been impossible to obtain an amendment to outlaw segregation, nor with the fact that racism is on the increase. That is a deplorable reflection on American society, but it does not empower the Court to supply what the people would withhold. As Stevens stated, the imperfections of the fourteenth amendment are "to be perfected by better men in better times"—by way of an amendment.

To extract from such "general" clauses the proposition that they "derived their force and meaning from a larger political and moral culture which perceived the human rights embodied in these clauses as grounded in inviolable and enduring principles of justice," is to substitute a dream world for harsh reality. Justice Bradley, who was close in time to the enactment of the fourteenth amendment and better appreciated the aims of its Framers, declared that the 1866 Civil Rights Act, which "covers the same ground as the Fourteenth Amendment," sought to secure

those fundamental rights which are the essence of civil freedom, namely: the same right to make and enforce contracts, to sue . . . to inherit, purchase . . . property, as is enjoyed by white citizens. . . . Congress did not assume . . . to adjust what may be called the social rights of men . . . but only to declare and vindicate those fundamental rights . . .

Richards proves that rhetoric is no substitute for fact.

"CRUEL AND UNUSUAL PUNISHMENTS" AND DEATH PENALTIES

Before examining Richards' theory of interpretation it will be fruitful to

"but majority rule is intrinsically at odds with the egalitarian principle." Burt, Constitutional Law and the Teaching of Parables, 93 Yale L.J. 455 (1984). Certainly neither the Founders nor the 1866 Framers entertained such an "egalitarian principle." G. Edward White notes that the Constitution "was 'sold' largely on the rhetoric of majoritarianism." White, Judicial Activism and the Identity of the Legal Profession, 67 Judicature 246, 250 (1983). And John Hart Ely observed that "rule in accord with the consent of a majority of the governed is the core of the American governmental system"; our "constitutional development over the past century has . . . substantially strengthened the original control by a majority of the governed." ELY, DEMOCRACY AND DISTRUST 7 (1980).

81. Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 237 (1980). Edmond Cahn wrote, "as a practical matter it would have been impossible to secure adoption of a constitutional amendment to abolish 'separate but equal.'" Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 156 (1955).

82. In the Fall of 1975, Derrick Bell stated, "[t]oday opposition to desegregation is, if anything, greater than in 1954." Bell, The Burden of Brown on Black: History Based on Operation of a Landmark Decision, 7 N.C. Cent. L.J. 25, 26 (1975). Chester Finn wrote, the issue of racial discrimination "has been fanned into the most protracted, rancorous and divisive blaze of the post-war era." Finn, Book Review, Commentary, Apr. 1976, at 78.

83. Richards, supra note 4, at 1382. Compare the statement of James Wilson, Chairman of the House Judiciary Committee, "I fear that comprehensive statesmanship which cares for posterity as well as itself will not leave its impress upon the measure we are now considering." Cong. Globe, 39th Cong., 1st Sess., 2947 (1866).

84. Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter House Co., 15 F. Cas. 649, 655 (C.C.D. La. 1870) (No. 8, 408).

85. The Civil Rights Cases, 109 U.S. 3, 22 (1883); see supra text accompanying notes 75-80.
consider his treatment of a concrete example, the eighth amendment's "cruel and unusual punishments" clause. The terms first appeared in the English Bill of Rights of 1689. Many crimes continued to be punished by death in England and the colonies before and after 1789, when our Bill of Rights incorporated the terms in the eighth amendment. Not one case had condemned such penalties prior to 1976. A zealous crusader for the abolition of death penalties, Hugo Bedau, wrote in 1968 that death penalties

are not unconstitutional under the Eighth Amendment because however cruel and unusual they may now be, they are not more "cruel" and not more "unusual" than were those that prevailed in England and the colonies two or three hundred years ago. An unbroken line of interpreters has held that it was the original understanding and intent of the framers of the Eighth Amendment . . . to proscribe as "cruel and unusual" only such modes of execution as compound the simple infliction of death with added cruelties . . . .

In 1977 Bedau also wrote, "[u]ntil fifteen years ago, save for a few mavericks, no one gave any credence to the possibility of ending the death penalty by judicial interpretation of constitutional law." "Save for a few eccentrics and visionaries," he remarked, the death penalty was "taken for granted by all men . . . as a bulwark of social order." To borrow from the Court's 1983 legislative chaplain case, "a practice . . . that has continued without interruption since the earliest session of Congress," cannot be deemed a "cruel and unusual punishment." That First Congress, which drafted the eighth amendment and therefore knew best whether it banned death penalties, enacted the Act of April, 1790, making murder, robbery and the like punishable by death, and to safeguard the penalty it prohibited resort to "benefit of clergy" as an exemption from capital punishment. Incontrovertible evidence that the framers did not intend "cruel and unusual punishments" to bar death penalties is furnished by the face of the Constitution. Sanford Levinson, an opponent of death penalties, considers it a "devastating fact" that "both the Fifth and Fourteenth Amendments specifically acknowledge the possibility of a death penalty. They require only that due process be followed before a person be deprived of his life." This Richards dismisses because "[i]f the imposition

86. 3 ENCYCLOPEDIA BRITTANNICA 578 (14th ed. 1930).
89. Id. at 12.
90. Marsh v. Chambers, 103 S. Ct. 3330, 3334 (1983). Justice Story remarked in a similar case, "such acquiescence in it, such contemporary construction of it, and such extensive and uniform recognition of it . . . would . . . entitle the question to be considered at rest." Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 621 (1842).
91. Ch. 9, 1 Stat. 115, 139. "This court has repeatedly laid down the principle that a contemporary legislative exposition of the Constitution when the Founders of our Government and framers of the Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions." Hampton & Co. v. United States, 276 U.S. 394, 412 (1928).
of a death penalty cannot satisfy the demanding requirements of the eighth amendment, a fortiori it can no longer be regarded as consistent with due process."

Patently the Founders saw no inconsistency when they provided that death penalties were inflictable after a fair trial, the sole requirement of due process.

The undeniable evidence that both in 1789 and in 1866 due process was purely procedural is kissed off by Richards as what “[Berger] supposes to be the clear language of the fifth amendment.” Like the Four Horsemen, Richards transforms procedural due process in the courts into a test of legislation, the substantive due process the Court has disavowed. He asserts that “fundamental principles of due process of law require that both courts and legislatures pursue constitutionally reasonable purposes in rationally reasonable ways.” That assertion runs counter to Hamilton’s summary of 400 years of law on the eve of the Convention:

The words “due process” have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of the legislature.

In the fourteenth amendment, said the Supreme Court, the words were “used in the same sense and to no greater extent” than in the fifth amendment. But for a few “aberrational cases the prevalent judicial usage was procedural.” When asked what he meant by due process, the draftsman of the fourteenth, John Bingham, replied, “the courts have settled that long ago, and the gentlemen can go and read their decisions.” William Lawrence, the legal scholar of the 39th Congress, quoted the Hamilton definition in 1871; and his fellow framer, James Garfield, stated in 1871 that the due process clause of the fourteenth amendment “is copied from” the fifth, differing in that it applied to the states. He defined it as “an impartial

93. Richards, supra note 4, at 1390 n.73.
94. Id. (emphasis added).
96. Richards, supra note 4, at 1379 (emphasis added).
98. Hurtado v. California, 110 U.S. 516, 535 (1884). Charles Curtis, an admirer of judicial adaptation of the Constitution, said that when the Framers put due process “into the Fifth Amendment, its meaning was as fixed and definite as the common law would make a phrase. . . . It meant a procedural due process.” Curtis, Review and Majority Rule, in SUPREME COURT AND SUPREME LAW 170, 177 (E. Cahn ed. 1954).
100. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).
101. CONG. GLOBE, 41st Cong., 3d Sess. 1245 (1871).
trial according to the laws of the land.”

Nowhere in the Reconstruction debates did I encounter a contrary definition; instead the debaters treated due process as procedural.

Richards also argues that “[i]f ‘bill of attainder’ is not specific enough to confine interpretation, it is hard to see how . . . ‘cruel and unusual punishments’ could possibly be.”

“But Attainder” were words that, Justice Frankfurter wrote, “were defined by history. Their meaning was so settled by history that definition was superfluous.” A bill of attainder was a legislative decree of death; without death there was no attainder.

Lesser legislative punishments were known as “bills of pains and penalties”; the line between the two was firmly drawn at common law. True, that line has been obliterated by the Court, but we may not justify a fresh judicial usurpation by appeal to a prior arrogation. Our task, as the Founders counselled, is to hark back to first principles.

Richards urges us to focus “on the more abstract intentions” that the “cruel and unusual punishments” clause expresses “namely, . . . prohibitions on unnecessary harshness in criminal sanctions”—ignoring the undeniable fact that the infliction of death penalties in England and America for 300 years evidenced a judgment that they are not unnecessarily harsh. The Court’s repeatedly applied canon that a construction by the First Congress buttressed by long acquiescence fixes the meaning of the clause is of no moment for Richards. Instead he extracts the inference that its meaning “should not be bound to Founders’ applications, but should be construed as embodying abstract principles of justice.”

By “applications” Richards presumably refers to the specific purposes the Framers had in mind: “An Absorption in Founders application may also radically misrepresent the kind of value and institution

102. CONG. GLOBE APP., 42nd Cong., 1st Sess. 153 (1871).
103. Ely also remarks that the debates are “devoid of any reference that gives the provision more than a procedural connotation.” J. ELY, supra note 20, at 15.
104. Richards, supra note 4, at 1381.
107. Justice Frankfurter observed, “[t]he punishment imposed by the most dreaded bill of attainer was of course death; lesser punishments were imposed by similar bills more technically called bills of pains and penalties.” Lovett, 328 U.S. at 323-24.
108. The Massachusetts Constitution of 1780 declared that “[a] frequent recurrence to the fundamental principles of the constitution . . . is absolutely necessary to preserve the advantages of liberty and to maintain a free government. . . . The people . . . have a right to require of their law givers and magistrates an exact and constant observance of them . . . .” PART THE FIRST, ARTICLE XVIII, 1 BEN PEORE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS 959 (1877). For citations to similar provisions in other early state constitutions see Berger, supra note 1, at 287 n.18.
109. Richards, supra note 4, at 1380.
110. See supra notes 90-91.
111. Richards, supra note 4, at 1380.
they were contemplating. The point becomes obvious, as Berger concedes, when technological changes produce situations that the framers could not have contemplated, e.g., electronic surveillance.\textsuperscript{112} Apparently Richards is unable to grasp the distinction between application of a principle to analogous facts and reversal of the principle. For example, the Draftsmen of the “search and seizure” provision purported to guarantee the right of the people to be secure in their houses and persons. Today planting an electronic eavesdropping device comes within this central purpose: “[S]ecurity of one’s privacy against arbitrary intrusion by the police.”\textsuperscript{113} That security can be invaded by a break-in to conduct a search or by planting an electronic device to eavesdrop, just as commerce remains “commerce” whether transportation be by oxcart or by airplane.\textsuperscript{114} The case is quite different, however, when the Draftsmen rejected a given “application,” for instance, refused to ban all discriminations by the fourteenth amendment.\textsuperscript{115} To justify an expansion of the goals they refused to embrace is not merely to reach out to an unforeseen “application” but to reverse the Framers’ determination, as when the Court replaced the Framers’ incontestable exclusion of suffrage from the fourteenth amendment with the “one man-one vote” principle.\textsuperscript{116} This was repudiation, not “application” of the prior principle denying blacks the vote.\textsuperscript{117} And that unjust denial severely limited the Framers’ embodiment of “abstract principles of justice.”

For support of such transmutations Richards relies on “the language used [which is confined by the unvarying 300 year interpretation], historical context [cruel and unusual punishments and death penalties lived side by side for 300 years], the tradition of judicial elaboration [prior to 1976 no court had questioned the constitutionality of death penalties].”\textsuperscript{118}

112. \textit{Id.} at 1387. “While the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet new and difficult conditions . . . .” Euclid \textit{v. Ambler Realty Co.}, 272 U.S. 365, 387 (1926).
114. As John Hart Ely observed, the Constitution may be applied to new situations involving “the sorts of evils the framers meant to combat and . . . their twentieth century counterparts.” Ely, \textit{The Wages of Crying Wolf: A Comment on Roe v. Wade}, 82 \textit{Yale L.J.} 920, 929 (1973).
115. R. BERGER, supra note 1, at 163-64.
116. \textit{Supra} note 15. Robert Bork observed, “the principle of one man, one vote . . . runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula.” Bork, \textit{Neutral Principles and Some First Amendment Problems}, 47 \textit{Ind. L.J.} 1, 18 (1971). Gerald Gunther wrote that “most constitutional lawyers agree that the “one person-one vote lacks all historical justification.” Gunther, \textit{Too Much A Battle With Strawmen}, Wall St. J., Nov. 25, 1977, at 4, col. 1.
117. Throughout Richards fails to consider whether overturn of the governing principle, e.g., exclusion of suffrage, was an “application” of that principle. Instead he goes on to say that “[d]iscretionary capital punishment . . . is a wholly different institution . . . than the mandatory capital punishment contemplated by the Founders.” Richards, \textit{supra} note 4, at 1388. But “discretionary capital punishment” was ever a jury prerogative, as when it refused to find the accused guilty under its discretion to convict or not. R. BERGER, \textit{DEATH PENALTIES: THE SUPREME COURT’S OBSTACLE COURSE} 133-38 (1982). Over the years juries reacted unfavorably to the harshness of mandatory death sentences, and finally legislatures granted juries the discretion which they had been exercising in fact. McGautha \textit{v. California}, 402 U.S. 183, 199 (1971).
118. Richards, \textit{supra} note 4, at 1380.
"abstract" language of the clause, he argues that it does not use "expressions that would confine meaning to some class of historic objects" such as "could perhaps be plausibly made regarding an 'impartial jury' on the basis of the language used, the relatively high degree of specificity that the concept of an impartial jury had acquired at the time of Founders, and the relatively low degree of generalization that the subject matter of the phrase permits."\(^{119}\)

One who has witnessed the countless variety of challenges to the impartiality of prospective jurors will not conclude that "impartial jury" has a "higher degree of specificity" than the bald, single fact that for 300 years murder punishable by death was not a cruel and unusual punishment.

Repeatedly Richards charges me with "grave" "historical distortion in the use of sources," omission of the "source" of a "larger historical inquiry," and inability "to deal with historical evidence in a dispassionate way."\(^{120}\) His, for instance, is an unfavorable comparison with John McManners' "broad survey of changing attitudes to death in various contexts . . . in eighteenth century France," which "demonstrates the emergence of a distinctive modern sensibility regarding death and dying," expressed in "reformist skepticism about the . . . use of the death penalty . . . . This skepticism is likely to have affected the American Enlightenment and constitutionalism through the writings of Beccaria. . . . Though these arguments did not lead them to question penalties as such, the arguments did suggest real moral concerns with the death penalty."\(^{121}\) How little such "moral concerns" moved the Founders is disclosed by the First Congress' imposition of death penalties by the Act of 1790. This Richards labels as "Berger's narrow focus on the simple fact that the death penalty was approved."\(^{122}\) Presumably such facts led Richards to say, "Berger's use of history is extremely confined and narrow."\(^{123}\) If Richards is to qualify as an expert on constitutional construction, I suggest he would be well advised to exclude considerations that confessedly did not influence the Draftsmen and "narrowly" to focus on what they said and did.

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119. Id.
120. Id. at 1390 & n.73. One who makes such charges should be beyond reproach. Consider his statement that Berger "claims that the judicial divinations are often wrong, that the proper institution to render changes in moral values is the legislature . . . ." Id. at 1394 (emphasis added). Unlike Richards, I eschew bare assertion. Instead I cited then-Solicitor General Robert H. Jackson: "time has proved that [the Court's] judgment was wrong in most of the outstanding issues upon which it has chosen to challenge the popular branches." R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY x, 37 (1941). For citations to academicians see BERGER, supra note 1, at 331 n.66. John Hart Ely wrote that "the theory that the legislature does not truly speak for the people's values, but the Court does, is ludicrous." J. ELY, supra note 20, at 68. A distinterested, fair-minded scholar would not lead his readers to believe that Berger is without support.

For his historical materials Richards cites to "Brief for Petitioner" in a murder appeal, Richards, supra note 4, at 1394 n.96, blissfully unaware that "lawyers history" is heavily discounted. Tushnet, supra note 53, at 793; Kelly, Clio and the Court: An Illicit Love Affair, 1965 SUP. CT. REV. 119, 155-56.

121. Richards, supra note 4, at 1390-91 (emphasis added).
122. Id. at 1391 (emphasis added).
123. Id. at 1389.
He prefers to reason, however, that the "extensive use of the death penalty during the eighteenth century was tolerated because death was so common." Now that "life becomes more securely valued [the victim's too] . . . the death penalty should be morally more questionable." Again, "theological conceptions of Hell . . . undoubtedly shaped conceptions of justice in punishment . . . In the modern secular age . . . conceptions of retributive justice in punishment, which require the death penalty, appear parochially religious." Accordingly, he concludes that "such shifts in religious, metaphysical and other beliefs" indicate that "the Founders' denotations should not apply counterfactually." But the overwhelming fact is that the people, like the Founders, cling to death penalties, as Richards acknowledges in deprecating "populist retribution, compounded of fear and ignorance." Yet Richards accuses me of "ignor[ing] the ways in the moral growth of the community must inevitably shape construction of the eighth amendment," when in truth he seeks a judicial "transformation of American conventional morality in the ethically required way that [his newly concocted] constitutional principle demands." "A striking example" of Berger's alleged "tendentiousness" is his dismissal of what seems to be clear and relevant evidence that the language of "cruel and unusual punishments" was understood by the Founders possibly to someday invalidate punishments conventionally supposed legitimate in 1791, namely Livermore's objection: "it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off, but are we in future to be prevented from inflicting these punishments because they are cruel?"

From this solitary statement by an opponent of the clause Richards extracts the understanding of the Founders. But they were unmoved by Livermore's fears that the clause would prevent hanging for by the Act of 1790 they provided death penalties. Nor could Livermore's statement overcome the Framers' endorsement of death penalties embodied in the fifth amendment. Then too, they chose terms of settled meaning that could not be curtailed by Livermore's solitary utterance. Doubtless the Framers were aware of the long-settled rule of construction expressed in Bacon's Abridgment: "If a statute makes use of a word the meaning of which is well known at common law,

124. Id. at 1392 (emphasis added).
125. Id. at 1392-93.
126. Id. at 1393 (emphasis added).
127. Id. at 1398.
128. Id. at 1388-89 (emphasis added).
129. Id. at 1398.
130. Id. at 1390 n.73.
131. Remarks "made in the course of the legislative debates or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight. . . . This is especially so with regard to statements of legislative opponents who 'in their zeal to defeat a bill understandably tend to overstate its reach.'" Ernst & Ernst v. Hochfelder, 425 U.S. 185, 204 n.24 (1976). "An unsuccessful minority cannot put words into the mouths of the majority." Mastro Plastics Corp. v. Labor Bd., 350 U.S. 270, 288 (1956).
the word shall be understood in the same sense it was understood at the Common Law." Chief Justice Marshall applied the rule in Gibbons v. Ogden, stating that if a word was understood in a certain sense "when the Constitution was framed . . . the Convention must have used it in that sense," a presumption "which is to be given judicial effect." When the Framers employed common law terms the common law "definitions," Justice Story stated, "are necessarily included as much as if they stood in the text of the Constitution." In sum, Marshall's presumption and the measures the Framers adopted after Livermore's objection override it. My reliance on such time-honored canons and the rule that the Framers' intention rather than the text is the law, marks me, according to Richards, as "a partisan advocate of a theory of legal interpretation which is . . . almost certainly indefensible."

A third example of my inadequacy is that I "miss the point" of the Titus Oates case, its "true significance" being that since the "imposition of the death penalty in modern times is ineradicably used as an instrument of freakish terror against subjugated groups to enforce a status hierarchy [this is 'dispassionate']?, it must be condemned on egalitarian grounds." Richards' reading of Oates is condemned out of his own mouth:

Titus Oates was a minister of the Church of England [and therefore not a member of "subjugated groups"] whose prejured testimony about a Catholic plot to assassinate the king led to the execution of 15 Catholics for treason. In 1685, Oates was convicted of perjury and sentenced to a fine, life imprisonment, whipping, pillorying four times a year, and defrocking. The House of Lords rejected Oates' petition to be released from the judgment; the dissenting members emphasized that defrocking by a temporal court was "unusual" because it was the function of an ecclesiastical court, and that punishments of life imprisonment and whipping were without precedent for the crime of perjury.

What is "egalitarian" about arguing lack of secular jurisdiction and of

132. 4 M. BACON, A NEW ABRIDGMENT OF THE LAWS OF ENGLAND, "Statute" (1), (4) (3d ed. 1768).
133. 22 U.S. (9 Wheat.) 1, 90 (1824); Thompson v. Utah, 170 U.S. 343, 350 (1898) ("the words 'trial by jury' were placed in the Constitution . . . with reference to the meaning affixed to them in the law as it was in this country and England at the adoption of that instrument.").
135. Richards, supra note 4, at 1390 n.73. Richards himself recognizes that "people make wills and contracts . . . and we interpret their action, in part, in terms of the legal principles that their conduct reflects or flouts." Id. at 1376. One such rule is to effectuate the intention of the draftsmen, see supra note 14, which the Court has "uninterruptedly" applied to interpretation of the Constitution. tenBroek, Use by the Supreme Court of Extrinsic Aids in Constituional Construction: The Intent Theory of Constitutional Construction, 27 CALIF. L. REV. 399 (1939). Another rule is to give effect to a contemporaneous construction long respected. See supra notes 90-91. A third rule is the presumption that common law terms are to have their common law meaning, see supra text accompanying notes 132-34. As Richards acknowledges, "the social conventions called law are embodied in . . . a written Constitution whose major terms are generally known." Richards, supra note 4, at 1377.
136. Richards, supra note 4, at 1392.
137. Id. at n.85.
precedent—perjury was not even a statutory crime at the time. With the dissent before them [Richards prefers dissents] the Lords held in effect that whipping, pillorying, etc. were not within the “cruel and unusual punishments” clause.

In truth, Richards’ insistence that death penalties are banned by the “cruel and unusual punishments” clause merely cloaks his own personal opposition to such penalties. He is unhappy with the Court’s refusal to accept the dissenters’ view: “The deep question is whether the Court has gone far enough, whether Justices Marshall and Brennan are not correct in questioning the very constitutional permissibility of the death penalty.” Their view “expresses the demand that populist retributivism—itself compounded of fear and ignorance and much stereotypical contempt—constrain itself by constitutional demand that criminals, even vicious ones, are to be treated as persons.” Thus Richards confesses that the people as well as the Court are not with him; and he calls upon the Court for “a transformation of American conventional morality.” There is no need here to repeat my demonstration that the Brennan-Marshall dissents are the veriest wishful thinking.

Richards’ “constitutional demand” is based on “the central place” that dignity “enjoys in the jurisprudence of the eighth and fourteenth amendments.” Bare assertion cannot take the place of proof. The earliest reference by the Court to “the dignity of man” that I found occurs in Trop v. Dulles where the issue was whether an American guilty of wartime desertion could be deprived of his citizenship. Wartime desertion was from 1776

138. R. BERGER, DEATH PENALTIES: THE SUPREME COURT’S OBSTACLE COURSE 37-38 (1982). Richards builds heavily on Oates, referring to “the concerns giving rise to the eighth amendment (Titus Oates).” Richards, supra note 4, at 1397. Now the 1689 Bill of Rights preceded the debates on the Oates case, BERGER, supra, at 39; and if the Founders referred to Oates in their 1789 debates, it escaped my attention. Again, Richards is betrayed by his off-the-cuff style; invoking Oates a third time for “abstract intentions implicit in the salient history of the relevant clauses (for example, the Titus Oates affair.” Richards, supra, at 1395. Presumably he finds in Oates an “abstract intention” to outlaw death penalties, a subject totally unrelated to the case—a truly “freakish” reading. Anthony Granucci, who first looked to the Oates case for light on the meaning of “cruel and unusual,” concluded that “in the context of the Oates case ‘cruel and unusual’ seems to have meant mere punishment unauthorized by statute and not within the jurisdiction of the court to impose.” Granucci, Nor Cruel and Unusual Punishments Inflicted, 57 CALIF. L. REV. 839, 859 (1969).

139. Richards, supra note 4, at 1394.

140. Id. at 1398 (emphasis added). “There seems to be an instinctive feeling in most ordinary men that a person who has done an injury to others should be punished for it. . . . Without a sense of retribution we may lose our sense of wrong.” A.L. GOODHART, ENGLISH LAW AND THE MORAL LAW 92-93 (1953). Justices Stewart, Powell and Stevens, the plurality in Gregg v. Georgia, 428 U.S. 153, 183 (1976) stated, “[I]n part, capital punishment is an expression of society’s moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential to an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.”

141. Richards, supra note 4, at 1398.

142. R. BERGER, supra note 138, at 30, 47 n.86, 119, 126, 130 n.74 & 132-34.

143. Richards, supra note 4, at 1398.

on punishable by death, and forfeiture of citizenship is not a greater af-
fro overall "dignity" than the death penalty. But Chief Justice Warren, never
hobbled by the demands of logic, expressly accepted the death penalty because
it "had been employed throughout our history" and was still "widely
accepted." He concluded, however, that "the basic concept underlying the
eighth amendment is nothing less than the dignity of man," drawing on
his imagination not jurisprudence, and held that the forfeiture penalty violated
that dignity and was invalid. But Blackstone had written that some punishments
"fix a lasting stigma on the offender, by slitting his nostrils or branding .
. . ." other punishments "consist principally in their ignominy . . . such as
whipping . . . the pillory." Lord Camden referred to "loss of ears, whipp-
ing or any other disgrace." So disgrace and ignominy, not respect for dignity,
were prime ingredients of punishment and widely used in the colonies.

To discredit the "original understanding," Richards argues that it "would
require the Court today to uphold all punishments acceptable in 1791, in-
cluding presumably, branding the forehead, splitting noses and cropping
ears." Were the people to demand such punishments from their represen-
tatives the Constitution would interpose no obstacle. The Court is not author-
ized to exclude from the Constitution what offends its morals, still less those
of Richards. Richards yearns to be the moral censor of the people whereas
I believe with Justice Holmes that they have the right to govern themselves
even when their ways are not mine. When, therefore, Justices Stewart, Powell
and Stevens concluded in Gregg v. Georgia that the eighth amendment demands
not only that "a challenged punishment be acceptable to contemporary
society," but also that it "comports with the basic concept of human dignity
at the core of the amendment," they spoke without historical basis and
were contradicted by the degrading punishments—pillorying, whipping,
ducking—that were extant in the colonies at the adoption of the Constitution.

Even Justice Field, though revolted by such punishments, acknowledged that
they were constitutional. They were not abandoned at the behest of the

145. Id. at 125 (Frankfurter, J., dissenting, joined by Burton, Clark and Harlan JJ.).
147. Id. at 100. Richards summarily dismisses "allegiance to Founders' denotations . . . as
a shallow and empty constitutional ideal," a canon to which the Court has subscribed for almost
200 years! Instead he prizes "dignity as a value that endures," i.e., an undoubtedly murderer
"should be treated as a person, not as criminal outcasts beyond the pale of human concerns." Rich-
ards, supra note 4, at 1398. For a powerful critique of such thinking see van den Haag,
148. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 377 (1765-1769).
150. Richards, supra note 4, at 1394.
151. The "Court always had disavowed the right to intrude its judgment upon questions of
152. Holmes said to John W. Davis, "If my country wants to go to hell, I am here to help
153. Gregg, 428 U.S. at 182.
154. For citations see R. BERGER, supra note 138, at 118 n.29.
courts but by legislatures in response to public sentiment. The Justices drew their “basic concept” from “the evolving standards that mark the progress of a maturing society,” that is, “cruel and unusual punishments” may “acquire meaning as public opinion becomes enlightened by humane justice.”

But public adherence to death penalties demonstrated that that day had not yet arrived. Moreover, the Justices engaged in circular reasoning: the desires of “contemporary society” must yield to a “basic concept” that is drawn from “public opinion.”

Richards also locates “respect for human dignity” in the fourteenth amendment, in “the larger historical and cultural contexts that clarify the abstract ideals of equal respect for human dignity which the fourteenth amendment decisively introduces into the substantive values of American constitutional law,” and which I allegedly “ignore.” So far as “constitutional law” is grounded in the Constitution and its history, I could not “ignore” what it does not contain. Unlike Richards, I daresay, I read every page of the 1866 debates more than once and did not find that the Framers were moved by the “larger historical and cultural contexts” to proceed from “respect for human dignity.” To the contrary, refusal of the ballot, the quintessential right, preservation of segregation, repeated rejection of a ban on all discrimination, all underscore the limited purpose of the Framers—to thwart the South’s attempt to return the emancipated blacks to serfdom and to assure them the right to “exist” by providing for no discrimination in the making of contracts, the owning of property and access to the courts for the protection of those rights. It was not until 1875 that Congress attempted to supply equal access to inns and transportation, not to schools, an effort aborted by the Court in the Civil Rights Cases.

158. Richards asserts that capital punishment is so lacking in “marginal deterrence,” that it “violates basic constitutional principles.” Richards, supra note 4, at 1396. What “basic constitutional principles” does it violate? No constitutional principle that capital punishment must act as a deterrent came across my ken. The people, as 300 years of history confirms, were left free to impose death penalties; if they chose to act out of “populist retributivism” they were not required to find that death acted as a “deterrent.”
159. Richards, supra note 4, at 1389 (emphasis added). Richards is not given to understatement.
160. Senator Charles Sumner considered the right to vote “the Great Guarantee; and the only sufficient Guarantee.” CONG. GLOBE, 39th Cong., 1st Sess. 685 (1866). He continued to insist on suffrage because “if the Fourteenth Amendment is inadequate to protect persons in their ... right to vote, it is inadequate to protect them in anything.” CONG. GLOBE, 40th Cong., 3d Sess. 1008 (1869).
162. William Lawrence stated, “[I]t is idle to say that a citizen shall have a right to life, yet to deny him the right to labor, whereby alone he can live” and to “deny him the right to make a contract to secure the privileges and rewards of labor.” CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866). See also Justice Bradley, supra text accompanying note 85.
164. 109 U.S. 3 (1882).
Richards should really leave off bare assertion and supply the facts that prove the Framers "decisively introduced" a principle of "equal respect for human dignity," that "dignity has the central place that it enjoys in the jurisprudence of the eighth and fourteenth amendments." What "jurisprudence" prior to the Court's reversal of the long course of history and adjudication in the 1970s? For one not deeply committed to abolition of death penalties it is not easy to perceive wherein one who murders another "person" is deprived of "dignity" by being subject to a like loss of life. Poor deluded people. Like Robespierre, Richards would maintain that if they "would not be free and virtuous voluntarily, then he would force them to be free and cram virtue down their throats." But thinkers of greater stature rebuff efforts of a self-appointed elite to determine what is best for the people.

Richards charges, "[c]ertainly no argument in [Berger's] Death Penalties even addresses the arguments of principle made in Supreme Court decisions limiting the scope and application of the death penalty." The reader need only consult the forty pages of painstaking analysis I devote to the decisions to find the charge false. For example, Justice Powell's citation of a fledgling lawyer for the proposition that "[t]he principle of disproportionality is deeply rooted in English constitutional law," is refuted by my analysis of the sources. Considering that as late as 1813 Lord Ellenborough objected to repeal of the death penalty for the theft of a few shillings, Powell's "deeply rooted" disproportionality verges on travesty. As usual Richards does not pause to examine my detailed documentation but parrots "a principle of proportionality with two requirements: first, a rough correspondence between severity of wrongs and gradations among punishments; and second, substantive upper limits on forms of sanction in general (prohibiting torture as inconsistent with respect for dignity) and in particular (prohibiting severe sanctions for trivial wrongs)." Hanging for theft of a few shillings refutes correspondence bet-

165. Richards, supra note 4, at 1398. Another example of verbal sleight-of-hand is Richards' statement, "[s]uch judgments are neither elitist nor antidemocratic, for they express no disrespect or contempt for human dignity or equality." Id. The test of "democratic" is to give effect to what the people desire, not to what an "elite" of illuminati consider they ought to desire. See supra note 59.

166. Florida's death row, Robert Sherrill reports, "is populated with scores of fellows who, if anyone deserves to die, certainly seem to: mass murderers, murderers who kill habitually, who killed for fun, who killed for hire, murderers who raped and tortured women, who raped and tortured children." Sherrill, Death Row on Trial, N.Y. Times Mag., Nov. 13, 1983, at 80.

167. C. BRINTON, J. CHRISTOPHER & R. WOLFF, A HISTORY OF CIVILIZATION 115 (1955). From "their experience under the Protectorate, Englishmen learned... [that] the claims of self-appointed saints to know by divine inspiration what the good life should be and to have the right to impose their notions on the ungodly could be as great a threat as the divine right of kings." S. SMITH, SELECTED WRITINGS xvi (W.H. Auden ed. 1956).

168. See supra notes 59, 167.

169. Richards, supra note 4, at 1394.


171. Id. at 35, 40-41.


173. Richards, supra note 4, at 1395.
ween the "severity of wrongs and gradation among punishments." Torture was not abandoned so much because of concern for the murderer's "dignity"—being carted through the London streets to Newgate and publicly hanged was a denial of "dignity"—as by a retreat from needless cruelty. A bar to "torture" requires no new principle; that was banned by the "cruel and unusual punishments" clause.

To bolster his historiographical disquisition, Richards appeals to an historian, Harold Hyman, "not bound by an interpretive theory like Berger," but who "supplements attention to the debates with detailed and clarifying analyses of the political and social history of the Reconstruction." Hyman in no wise questions my central conclusion that the Framers excluded Negro suffrage from the fourteenth amendment. Instead he stated that

[ne]grophobia tended to hold even the sparse Reconstruction institutions that the nations created at low throttle, and played a part in Reconstruction's incompleteness."

Whatever the tenor of his "social history," it cannot diminish the force of unequivocal statements in Congress by those who enacted the legislation. It is those statements that are regarded as expressing the intention of the Draftsmen, and if Hyman is to the contrary, he would overturn a long-established canon of construction.

In an "unpublished manuscript," Richards tells us, Hyman "insists that the fourteenth amendment must be understood in the context of the egalitarian purposes of the thirteenth amendment and the larger moral aspirations of the abolitionist movement." Unquestionably some appealed to the thirteenth amendment for constitutional authority to enact the Civil Rights Act of 1866, which banned discrimination respecting the right to contract, own property and access to the courts. But there was vigorous opposition, and the fourteenth amendment was adopted to supply what the majority considered the thirteenth did not. So, Roscoe Conkling declared that "[e]mancipation vital-
izes only natural rights, not political rights." And most Republicans held that natural rights did not include the right to vote. Senator Henry Wilson, a Massachusetts Radical, said that the thirteenth amendment "was never understood by any man in the Senate or House to confer upon Congress the right to proscribe or regulate suffrage . . . . If it had been supposed that it gave that power the amendment would never have passed Congress, never have received the sanction of the States." Senator Edmund Cowan, a Pennsylvania Republican, stated that the thirteenth amendment was understood merely "to liberate the slave from his master." Hyman himself wrote that "George Ticknor Curtis typified a large stream of conservative constitutionalism in his argument that the thirteenth amendment diminished state's powers not one whit beyond abolition." I would not hobble Hyman with a call for consistency, but at least he should be called upon to explain his change of position.

What of Hyman's "larger moral aspirations of the abolitionist movement?" C. Vann Woodward noted that during the war years "the great majority of citizens in the North still abhorred any association with abolitionists," hardly fertile soil for sowing abolitionist ideology. Senator Cowan ridiculed the notion that the "antipathy that never sleeps, that never dies, that is inborn, down at the very foundation of our natures," is "to be swept away by a half-dozen debates and the reading of half a dozen reports from certain abolitionist societies." Let it be assumed that the radicals in Congress carried the abolitionist flag. But Hyman's disciple, M.L. Benedict, concluded that "the nonradicals had enacted their program with the sullen acquiescence of some radicals and over the opposition of many." David Donald explains that "moderates had to check extreme Radical proposals or be defeated in the districts they represented." An early and ardent proponent of judicial activism, Howard Jay Graham, acknowledged that "the early antislavery usages and racial-humanitarian expansion and coverage before the Civil War had been forgotten and eclipsed during Reconstruction." Such statements are amply confirmed by the debates on the fourteenth amendment. It will therefore

180. Id. at 1255.
181. Id. at 499.
184. Cong. Globe, 39th Cong., 1st Sess. 343 (1866). George Julian, an Indiana radical, lamented that "the real trouble is we hate the Negroes." Id. at 257. For citations to other such statements, see R. Berger, supra note 1, at 13.
185. M. BENEDICT, A COMPROMISE OF PRINCIPLE 210 (1975). Senator John Sherman boasted in Cincinnati in September 1866, while the amendment was up for ratification, "we defeated every radical proposition in it." J. James, The Framing of the Fourteenth Amendment 167 (1965).
be instructive to learn how Hyman shows that abolitionist thinking influenced the Framers beyond the narrow confines of the Civil Rights Act of 1866, which was deemed to be "identical" with the fourteenth amendment.\footnote{188}

Such are the materials whereby Richards would demonstrate that my "use of history is extremely confined and narrow," to charge me with "histrorigraphical distortion in the use of sources."\footnote{189} Allied to imperviousness to undeniable facts is Richards' own persistent distortions. Thus in referring to the theory of constitutional interpretivism espoused by Michael Perry and Berger, he says it is "used also by other recent constitutional theorists" and "highly controversial,"\footnote{190} implying that interpretivism is a new-fangled theory. But as another activist, Thomas Grey, wrote, the "interpretivist" view is "deeply rooted in our history and in our shared principles of political legitimacy. It has equally deep roots in our formal constitutional law."\footnote{191} Two of its leading components, effectuation of the Framers' intention and of the meaning of the common law terms they employed, stretch back to the very beginnings of the nation. Only since academicians have attempted to erect a facade of rationality for the decisions of the Warren Court\footnote{192} has "interpretivism" become "highly controversial."\footnote{193} Again, Richards misleadingly attributes to me the constitutional test of what the Framers "would have included or excluded."\footnote{194} Prophecy is not for me; instead I supplied massive documentation for what the Framers did exclude, e.g., they excluded suffrage and segregation in 1866; they excluded death penalties from "cruel and unusual punishments" in 1789, as is attested by the Act of 1790. To transmute such facts into Berger's "assimilation of legal interpretation to the explana-
tion of the subjective purposes of the Founders or legislators" is utterly to misrepresent my reliance on what the Framers said and how they voted, not on speculation as to their mental states. Sweet is a philosopher's use of history.

**INTERPRETATION AND THE ROLE OF THE COURT**

Richards' discourse on interpretation is a verbal masquerade, garbed in what George Orwell called "doublespeak." Legal interpretation, he asserts, "is embedded in larger moral and political ideals of just and good government," by which he must mean his own ideals. For he reproaches the seven-member majority of the Court for rejecting the minority's insistence on abolition of the death penalty, and the people for ignorant "retributivism." Why should we prefer his ideals of "just and good government" to those expressed by the Framers in the Constitution, which have served us well for 200 years in a world swept by revolution? His goal, which he calls "metainterpretation" is "to assess which approach to legal interpretation most naturally advances the beliefs . . . of the legal community in a coherent and sensible way." Does he refer to current illuminati who would rationalize judicial revision of the Constitution, or to the Anglo-American "legal community" who over a period of 800 years developed a "coherent and sensible way" of interpretation? If, as he states, "interpretative questions ultimately appeal to morality of political community," he has failed to explain the death penalty, school prayer and like decisions to which the community is plainly hostile.

Richards cannot bring himself boldly, like Paul Brest, to challenge "the assumption that judges are bound by the Constitution," to state forthrightly that the people are unfit to govern themselves and therefore the nine, oft-

195. Id. at 1379 (emphasis added). It is Richards who inquires what the Founders would have done in modern circumstances. See infra text accompanying note 211.
196. See supra introductory epigraph.
197. Richards, supra note 4, at 1379-80.
198. Id. at 1377-78.
200. Justice Story asked how a statute is "to be interpreted? Are the rules of the common law to furnish the proper guide, or is every court and department to give it any interpretation it may please, according to its own arbitrary will?" *J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 155 n.2 (5th ed. 1905). His contemporary, Chancellor Kent, warned against leaving courts "to a dangerous discretion to roam at large in the trackless fields of their own imaginations." J. KENT, *COMMENTARIES ON AMERICAN LAW* 373 (9th ed. 1838). So too, Hamilton explained that "to avoid an arbitrary discretion in the courts, it is indispensable that they be bound down by strict rules which serve to define and point out their duty in every particular case." *THE FEDERALIST NO. 78*, at 510 (A. Hamilton) (Mod. Lib. ed. 1937).
201. Richards, supra note 4, at 1378 n.26.
202. Brest, supra note 81, at 224.
times five, Platonic Guardians must take over the task. Instead he prefers "the precious coinage of independent judicial elaboration of principle" to "the counterfeit coinage of obedience to Founders' application which may lack sense or reasonableness." Another activist, Mark Tushnet, however, acknowledges that the view, "we are indeed better off being bound by the dead hand of the past than being subject to the whims of willful judges trying to make the Constitution live," is "fairly powerful." What Richards calls the Founders' "applications," as we have seen, are in reality the limited delegations they made, principles rather than applications. This misnomer enables him to claim that "applications unimaginable earlier may become reasonable, and earlier applications may become unreasonable." If, as is undeniable, suffrage was excluded from the fourteenth amendment, the fact that exclusion of suffrage is now deemed unreasonable does not empower the Court to rewrite the amendment. Expansion of suffrage required a series of amendments.

Richards maintains that "it is not a reasonable construction of the abstract language employed to limit it forever to its historic denotations." This would, however, upend the centuries-old rule that the text must yield to the intention of the Draftsmen. Against this Richards cites Home Builders & Loan Association v. Blaisdell, which sustained a mortgage moratorium during the Depression. "Hard cases make bad law," said Holmes. Richards opines that the Founders would not have construed the contract clause to preclude relief in "modern circumstances." They were faced by precisely such circumstances—debtors' outrages for relief, and they adopted the contract clause

204. Richards, supra note 4, at 1388.
205. Tushnet, supra note 53, at 787.
206. Richards, supra note 4, at 1381.
207. Id. For Richards, "the language of the clauses ("cruel and unusual punishments," "equal protection of the law") is itself abstract." Id. at 1380. Nevertheless, 300 years of exclusion of death penalties from "cruel and unusual punishments" removes abstractness in that particular. See supra note 14. Nor can he render the "equal protection of the law" abstract in light of the framers' unmistakable intention to bar across-the-board equality and confine themselves to shielding a narrow category of rights. See supra text accompanying notes 75-80.

Richards' resort to "abstract" poses another difficulty. "In general . . . abstract connotes apatness from reality and often lack of specific application to actual things." WEBSTER'S NEW DICTIONARY OF SYNONYMS 8 (1968). Consequently it cannot cut down the rights reserved to the states by the tenth amendment, e.g., administration of local criminal law. For such diminution a clear intention is needed. Slaughter House Cases, 83 U.S. (16 Wall.) 36, 78 (1872); see also Pierson v. Ray, 386 U.S. 547, 554-55 (1967).
208. See supra note 14.
209. 290 U.S. 398 (1934); Richards, supra note 4, at 1381. A liberal is uncomfortable to find himself in the company of the dissenting Four Horsemen, but as Sidney Hook wrote, "[w]hat makes a thing true is not who says it, but the evidence for it." S. Hook, PHILOSOPHY AND PUBLIC POLICY 12 (1980).
211. Richards, supra note 4, at 1381.
to protect creditors against impairment.\textsuperscript{212} Of such reasoning that "if the Founding Fathers had grown up in the twentieth century, and had all our experiences, and perceived the problem from our vantage point, they would decide the case the way [we would decide it]," Justice Richard Neely wrote: "[T]hat is an interesting, but hardly reassuring approach to applying the mandate of a written constitutional document."\textsuperscript{213}

Be it assumed that the disastrous impact of the Depression on repayment of mortgages constrained the Court to breach constitutional bounds, the hanging of a fairly tried, undoubted murderer presents no such national emergency. Richards' citation of \textit{Blaisdell} confirms Hamilton's prescient caution in \textit{Federalist} No. 25: "[E]very breach of the fundamental laws, through dictated by necessity . . . forms a precedent for other breaches where the same necessity does not exist at all."\textsuperscript{214} From such unpromising materials Richards distils the proposition that we must not "impute an irrational or self-defeating purpose in the way that counterfactual application of constitutional language may demand, unless clear evidence so requires. In the case of the American Constitution ("a Constitution intended to endure for ages to come"), there is no such evidence."\textsuperscript{215} What "irrational or self-defeating purpose" is exhibited, for instance, by the Framers' exclusion of suffrage from the fourteenth amendment? The exclusion of suffrage for women survived into the twentieth century. What is "counterfactual" about the "clear evidence" that exclusion was "irrefutably" the Framers' purpose? Richards' statement that "there is no such evidence" is itself grossly "counterfactual"; he is betrayed by his penchant for overstatement.

\textsuperscript{212} In the convention, Madison referred to "the necessity of providing more effectively for the security of private rights. . . . Interference with these were evils which had more perhaps than anything else, produced this convention." M. FARRAND, \textit{ supra} note 51, at 133. The rights he would secure were those of creditors against debtors. Thus he adverted to "[a] rage . . . for an abolishing of debts . . . an improper and wicked project." \textit{The Federalist} No. 10, at 62 (J. Madison) (Mod. Lib. ed. 1937). Hamilton condemned "[l]aws in violation of private contracts," \textit{ id}. No. 7, at 40. Madison noted American weariness with "legislative interferences in cases affecting personal rights." \textit{The Federalist} No. 44, at 29 (J. Madison) (Mod. Lib. ed. 1937). \textit{See also supra} text accompanying note 46. "Above all," Martin Diamond observed, "the delegates agreed in fearing the tendency in many of the states to agrarian and debtors' measures that seemed to threaten the security of property." Diamond, \textit{What the Framers Meant by Federalism}, in \textit{A Nation of States} 24, 33 (R. Goldwin ed. 1963). The "constitution put a stopper on those leveling and confiscatory demands of democracy by making contracts sacred, by prohibiting paper money . . . ." S. MORISON & H. COMMAKER, \textit{The Growth of the American Republic} 300 (1950).

\textsuperscript{213} R. NEELY, \textit{How COURTS GOVERN AMERICA} 11 (1981). "One must be on his guard against recreating history by hindsight and attributing to the language of an early legal doctrine the implications which the evolution of experience has put into it." F. FRANKFURTER, \textit{The Commerce Clause Under MARSHALL, TANEY AND WAITE} 60 (1937). In other words, Professor Richards, do not seek cover for your current aspirations in the allegedly "abstract" language the Framers employed; admit that you would have the Court read your predilections into the terms they employed to limit their delegations. \textit{See} Brest, \textit{infra} text accompanying note 280.

\textsuperscript{214} \textit{The Federalist} No. 25, at 158 (A. Hamilton) (Mod. Lib. ed. 1937).

\textsuperscript{215} Richards, \textit{ supra} note 4, at 1381-82.
Let me call a few historical facts to Richards' attention. Fearful of power,216 the Founders resorted to a written Constitution in order to limit it.217 That posited, as Philip Kurland reminded us, that it was to have a "fixed and unchanging meaning," alterable only by amendment.218 The Constitution, to borrow from Jefferson, was meant to "bind down" our delegates "from mischief by the chains of the Constitution."219 Chief Justice Marshall, who spoke for judicial review in the Virginia Ratification Convention, declared that a written Constitution was designed to define and limit power, and asked, "to what purpose are powers limited . . . if those limits may, at any time be passed by those intended to be restrained."220 We "obediently" observe the Founders' limits221 on the power they delegated because of an abiding distrust of power. "No organ" of government, Marshall declared in Marbury v. Madison, may alter the Constitution; and in rising to the defense of McCulloch v. Maryland,222 from which Richards heedlessly incants "a Constitution intended to endure for ages to come,"223 Marshall categorically denied that courts were empowered to "change" the instrument.224 In turning his back on those limits in the interest of his personal morality, Richards goes counter to Justice Harlan:

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.225

It will be recalled that Richards rejects "the counterfeit of obedience to Founders' applications which may lack sense or reasonableness."226 Since the alleged "applications" really represent limits on the written delegations, the test cannot be their reasonableness in the eyes of Richards and his ilk. The

218. P. Kurland, Watergate and the Constitution 7 (1978). Justice William Paterson, a leading framer, declared "[t]he Constitution is certain and fixed . . . and can be revoked or altered only by the authority that made it." Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795).
219. 4 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 543 (2d ed. 1836).
220. See supra note 217.
221. See supra text accompanying note 204.
222. 17 U.S. (4 Wheat.) 316 (1819).
223. Richards, supra note 4, at 1381-82.
226. See supra note 204 and accompanying text.
Founders, in fact, distinguished constitutionality from "reasonableness"; James Wilson said in the Convention, "[l]aws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not so unconstitutional as to justify the judges in refusing to give them effect." Judicial elaboration of principle, on which Richards repeatedly descants, is one of his doublespeak terms. What elaboration of principle was involved in the 1970s' overthrow of the uninterrupted, judicially sanctioned employment of death penalties? No court prior thereto had questioned the constitutionality of death penalties. That reversal surely does not exemplify a "tradition of judicial elaboration," of "explicating the traditions of judicial elaboration of these constitutional values in case law over time.", The same may be said about the Court's very belated discovery that school prayers were outlawed by the first amendment, that migrant indigents were entitled to public support from the moment that they arrived at the terminus. Such judicial amendment, the Court itself said, lies beyond its power: the Constitution may not be "amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made."

Let me further document my charge that Richards engages in doublespeak. He proposes to justify "contemporary constitutional doctrine [Justice Douglas' "gut" reactions] by using more abstract principles that may unite 'original understanding' with later judicial elaborations . . . ." It is sheer sophistry to "unite" the "one man-one vote" decisions wherein the Court reversed the "original understanding" that suffrage was excluded from the fourteenth amendment with that exclusion. This is repudiation, not elaboration. Consider, too, Richards' "plausible inferences about the common sense applications of 'equal protection of the law' in 1868 may confuse abstract arguments of principle with historically contingent and shifting conceptions of application and thus lead to wrong judgments about the principle involved."

227. 2 M. FARRAND, supra note 51, at 73.
228. Richards, supra note 4, at 1380, 1388, 1397.
229. Id. at 1380, 1382. Richards refers again "to the traditions of judicial review which have construed constitutional language over time." Richards, supra note 4, at 1382. That tradition was also violated by the "one man-one vote" decisions, see supra note 15. When Richards would "hesitate to use" the Founders' intent to undercut the legitimacy of . . . (traditions of judicial review over time) unless there is strongest evidence of inconsistency and good reason to believe that one kind of data invokes the more authoritative purposes of the system," and concludes "there are no such weighty reasons," Richard, supra note 4, at 1382-83, he is refuted by the facts. The Framers' unmistakable exclusion of suffrage from the fourteenth amendment is "the more authoritative purpose" if we are to live under a Constitution rather than according to the whims of judges.
230. McPherson v. Blacker, 146 U.S. 1, 36 (1892); See also Hawke v. Smith, 253 U.S. 221, 227 (1920); "[I]t is not the function of the courts . . . to alter the method [for change] which the Constitution has fixed."
231. Justice Douglas recounted that "the 'gut' reaction of a judge at the level of constitutional adjudication . . . was the main ingredient of his decision." W. DOUGLAS, THE COURT YEARS 1939-1975 8 (1981).
232. Richards, supra note 4, at 1375.
233. Id. at 1389.
the 1866 Framers did not intend by “equal protection” to create an “abstract principle” of across-the-board equality is evidenced by their repeated rejection of a bar to all discrimination, buttressed by the testimony of the outstanding leaders, Senator William Fessenden and Thaddeus Stevens, and confirmed by the judgment of the contemporary, Justice Bradley. A sweeping “abstract principle” cannot be wrung from an unmistakably limited design. The notion that the Framers’ unequivocal intention to limit their reforms is merely an expression of “contingent and shifting conceptions” that are not binding on this generation merely seeks to lodge in the judges’ power to reverse the Framers’ determinations. No such power was conferred on the judges; it was exclusively reserved to the people.

Consider also Richards’ “the determinacy of the denotation of the ‘original understanding’ may become equivocal or ambiguous, even be utterly discounted, because the explanation provided by basic arguments of principle frame our interpretation in a more convincing and reasonable way.” No amount of theorizing can render the “irrefutable” exclusion of suffrage “equivocal or ambiguous” except to one determined to escape from the bonds of that exclusion. Richards lets the cat out of the bag in stating, “the appeal to Founders’ applications misconceives the proper role of the judiciary in the elaboration of the abstract intentions of relevant constitutional clauses precisely in ways that reinterpret Founders’ applications, and sometimes abandon them entirely.” To “abandon” an intention, abstract or not, is hardly to “elaborate” it. He ever prefers judges to the Founders, his real objective being to rationalize the Court’s assumption of power to amend the Constitution for purposes dear to him and to take over from the “ignorant” people their right to govern themselves.

234. Thus Samuel Shellabarger of Ohio assured the Framers that the Civil Rights Bill secures “equality of protection in those enumerated rights which the States may deem proper to confer upon any race.” Cong. Globe. 39th Cong., 1st Sess. 293 (1866); see R. Berger, supra note 1, at 169-71.

235. See supra text accompanying notes 75-79, 85. See also Bell, supra note 75.

236. In rejecting a distinction drawn by Ronald Dworkin, Mark Tushnet stated, he “can be required to produce evidence … that the framers knew that they were enacting provisions that embodied a moral content richer than their own moral conceptions. … The distinction relies on modern theories of law that, I am certain, were quite foreign indeed probably incomprehensible to the framers.” Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 791 (1983).

237. Richards, supra note 4, at 1387 (emphasis added).

238. Id. at 1396 (emphasis added).

239. See Richards, supra note 229. Richards says, “in conflicts between judicial convention and Founders’ intent it is the former, not the latter, which should govern,” Richards, supra note 4, at 1384, flying in the teeth of an abiding distrust of judicial discretion. Wood, supra note 30, at 299, 304. Hurst, Discussion in Supreme Court and Supreme Law 75 (E. Cahn ed. 1954): “A very basic principal of our constitutionalism … [is] a distrust of official power.” Richards’ view does not coincide with the Court’s professions. As Robert Bork pointed out, “value choices are attributed [by the Court] to the Founding Fathers, not to the Court.” Bork, supra note 15, at 4. And in a mouth-filling exhortation Richards opts “for the precious coinage of independent judicial elaboration of principle” against “the counterfeit of obedience to Founders’ applications which may lack sense or reasonableness.” Richards, supra note 4, at 1388.
Richards’ incantation of “abstract” intention or principle is merely another attempt to escape the bonds of the “original understanding” by lifting the level of abstraction, a device whereby one can arrive at any result one pleases. That is its very purpose. The process whereby one distils that larger “abstract intention” is described by Richards as “the Herculean excavation of background rights.” To illustrate he cites “Brandeis’ excavation of the right of privacy, as underlying various extant rights of property, tort, copyright, and unfair competition, thus resonating an independent right of tort and, eventually, constitutional law.” Richards leaps from crag to crag as nimbly as a mountain goat. To deduce a tort principle of privacy from tort and property law is one thing; to balloon it into a constitutional command is something else again. This is not “excavation” in the Constitution or its history, but a judicial construct out of thin air. “Privacy as an all encompassing constitutional right was not a part of the legal tradition inherited from England or the colonies . . . .” Nor did it faintly “resonate” in the several constitutional conventions. Philip Kurland justly stated that “the right of privacy” is no part of the Constitution; it evidences “deconstruction by label.”

We have seen the implausibility of Richards’ reliance on “the Titus Oates affair” to illustrate “abstract intentions implicit in the salient history” of
the "cruel and unusual punishments" clause.\footnote{247} His derivation of an abstract principle of free speech though not as far-fetched is also ahistorical. He notes that "Leonard Levy's classic study of the history of the free speech clause indicates that, as of 1791, the clause would have been applied to licensing as a condition of publication [i.e., prior restraint] but not to state prosecution for political criticism of the government after publication (seditious libel)."\footnote{248} Taking issue with Michael Perry's view that this original understanding denotes that the modern expansion of free speech is noninterpretive, i.e., importing extraconstitutional values, he remarks,

\begin{quotation}

perhaps,\footnote{249} in 1791, the common interpretation of the liberty of free speech would, following Milton's Areopagita, have focussed on licensing, not on seditious libel. But if one inquires into the basis or ground for Milton's objections, it might appear, on deeper examination of his argument here and in the related areas of religious liberty and anti-establishment religion, that the underlying principle is the guarantee of independent rational conscience, which would naturally express itself in a \textit{general prohibition} of state-imposed restrictions on speech content.\footnote{250}
\end{quotation}

Once more Richards overstates his case because remedies for libel remain available to individuals,\footnote{251} undermining his "general prohibition of state-imposed restrictions on speech content." And though libel against the government became the subject of acrimonious political debate between Federalists and Jeffersonians, the Alien and Sedition Act was signed by John Adams, no sinister Caesar, and was sustained by a number of contemporary courts.\footnote{252} It therefore constitutes a respectable judgment that libel against the government lay outside the prohibition of the First Amendment, and in fact, it represented contemporary thinking. Leonard Levy tells us that "the security of the state against libelous advocacy or attack was always regarded as outweighing any social interest in social expression, at least through the period of the adoption of the First Amendment."\footnote{253} The prevalent view was that individual rights were outweighed by the interests of the collective community. The eighteenth century colonists punished with "severe strictness any seditious libels against the representatives of the people in the colonial assemblies."\footnote{254} To discover in such thinking a "deeper" principle which ignores its limited goals is to "impose upon the past a creature of

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\footnote{247} See supra note 138 and text accompanying notes 136-38.
\footnote{248} Richards, supra note 4, at 1386.
\footnote{249} This "perhaps" characteristically suggests doubt where none exists. Blackstone stated, "[t]he liberty of the press . . . consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." 4 W. Blackstone, supra note 148, at 151-52 (quoted in Near v. Minnesota, 283 U.S. 697, 713 (1931)).
\footnote{250} Richards, supra note 4, at 1386-87 (emphasis added).
\footnote{251} Near v. Minnesota, 283 U.S. at 715.
\footnote{252} The Act's validity "was sustained by the lower federal courts and by three Supreme Court Justices sitting on circuit." Norman Dorsen, quoted by M. Perry, The Constitution, the Courts, and Human Rights 196 n.32 (1982).
\footnote{253} Quoted by id.
\footnote{254} G. Wood, supra note 30, at 63.
\end{footnotes}
our own imaginings,"255 Richards' besetting scholarly sin. If we are to repudiate the presuppositions of the Founders, let it be done candidly and openly, not by Richards' circumlocutious double speak.

Essentially Richards' "abstract" principles or intentions, like his other arguments, seek to set the constitutional terms adrift, cut off from the common law meaning they had at the adoption of the Constitution or the meaning given them by the Framers. Why this "Herculean" endeavor: to achieve his desire for abolition of death penalties though abolition was rejected by the Court.

CONCLUSION

Richards' socio-philosophical attempt to undergird judicial revision of the Constitution would jettison the Court's long settled canons of construction, e.g., effectuation of the Framers' intention, respect for contemporaneous constructions long acquiesced in and the like, and confer upon the Courts power withheld by the Framers. As such it is a blueprint for one man's dream house, but it bears small resemblance to the existing structure. Apparently he is unaware of the implications of the constitutional terms he employs. Consider:

The basic institutions of the American republic correspond to deep themes of democratic political theory: federalism with its complex structure of representation; the separation of powers with its controlling conception of the rule of law, judicial supremacy based on a charter of basic human rights.256

Federalism, to begin with, postulates the maintenance of state control over local, internal concerns. Madison assured the Ratifiers in the Federalist No. 39 that federal jurisdiction "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."257 In No. 45 he particularized: [F]ederal powers "will be exercised principally on external objects as war, peace, negotiation and foreign commerce . . . . The powers reserved to the several States will extend to all the objects which . . . concern . . . the internal order . . . of the State."258 Hamilton said of the supremacy clause in No. 33 that federal acts which "are invasions of the residuary powers of the smaller societies . . . will be merely acts of usurpation and will deserve to be treated as such."259 To make such assurances

255. Richardson & Sayles, Parliament and Great Councils in Medieval England, 77 L.Q. Rev. 213, 224 (1961). Justice James Iredell, one of the first Founders to spell out the case for judicial review, stated, "we are too apt, in estimating a law passed at a remote period, to combine in our consideration, all the subsequent events which have had an influence upon it, instead of confining ourselves (which we ought to do) to the existing circumstances at the time of its passing." Ware v. Hylton, 3 U.S. (Dall.) 199, 267 (1796). In "the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." Ex parte Bain, 121 U.S. 1, 12 (1887).

256. Richards, supra note 4, at 1378, 1385.


258. Id. at 303.

259. Id. at 202.
CONSTITUTIONAL ADJUDICATION

The Founders adopted the tenth amendment, which reserves to the states all power not delegated to the federal government.\(^{260}\) When the Court intrudes into state control of local criminal administration under color of “cruel and unusual punishments,” it violates the very federalism Richards extols.

The “separation of powers,” ostensibly respected by Richards, speaks against judicial intrusion into the legislative domain. Spelled out in the Massachusetts Constitution of 1780, it requires that “[t]he judicial shall never exercise the legislative and executive powers” to the end that “it may be a ‘government of laws and not of men.’”\(^{261}\) In the First Congress, Madison repeated that the “Judicial shall [never] exercise the powers vested in the Legislative or Executive Departments.”\(^{262}\) It is fashionable to defend judicial assumption of legislative functions on ground of legislative inaction, but as Gerald Gunther stated, “the view that the courts are authorized to step in when injustices exist and other institutions fail to act” is “illegitimate.”\(^{263}\) Indeed, the Court itself declared, “it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to . . . the judicial branch.”\(^{264}\) What may not be conveyed voluntarily cannot be taken by force majeure. It is open to Congress to abolish death penalties, but such law making is outside the judicial province.\(^{265}\)

“Judicial supremacy based on a charter of basic human rights” is another figment of Richards’ imagination. The judiciary, as Justice James Wilson explained, was regarded with “aversion and distrust,” a survival of British misrule.\(^{266}\) Judicial review was itself an innovation, viewed by many with suspicion, so that Hamilton was driven to assure the Ratifiers that of the three branches the judiciary “is next to nothing,”\(^{267}\) scarcely a medium of “supremacy.” In truth, the people put their trust in their elected representatives, not judges. “In a republican form of government,” Madison stated in Federalist No. 51, “the legislature necessarily predominates,”\(^{268}\) resulting

\(^{260}\) Alpheus Thomas Mason wrote, “opponents of ratification, without a bill of rights, had conjured up the image of a national colossus, destined to swallow up or destroy the defenseless states.” “To quiet those fears, Madison proposed the Tenth Amendment.” A. Mason, The Bill of Rights: An Almost Forgotten Appendage, in the Future of Our Liberties 40 (S. Halpern ed. 1982). The reservation, the Court stated, was “made absolutely certain by the Tenth Amendment.” Kansas v. Colorado, 206 U.S. 46, 89-90 (1907).

\(^{261}\) 1 BEN POORE, supra note 108, at 960.

\(^{262}\) 1 ANNALS OF CONGRESS 435-36 (2d ed. 1834) (print bearing running head “History of Congress.”).

\(^{263}\) Gunther, supra note 15.

\(^{264}\) Buckley v. Valeo, 424 U.S. 1, 121, 122 (1976) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952)).

\(^{265}\) For the Framers’ insistence that “the power of making ought to be kept distinct from that of expounding the laws,” see E. CORWIN, The Doctrine of Judicial Review 42 (1914). A leading activist, Charles Black, confirms that for the colonists, “[t]he function of the judge was thus placed in sharpest antithesis to that of the legislature,” who alone was concerned “with what the law ought to be.” C. Black, The People and the Court 160 (1960).

\(^{266}\) 1 THE WORKS OF JAMES WILSON 292 (R. McCloskey ed. 1967).

\(^{267}\) The Federalist No. 78, at 504 (A. Hamilton) (Mod. Lib. ed. 1937).

\(^{268}\) Id. at 338.
in what Justice Brandeis described as the deep-seated conviction of the American people that they "must look to representative assemblies for the protection of their liberties." Judicial review was conceived as a way of curbing action in excess of constitutional delegations, described by James Bradley Thayer and Learned Hand as "policing" constitutional boundaries, not of displacing legislative action within those bounds, still less of revising the Framers' unmistakable intention.

Richards' invocation of the "rule of law" as a controlling aspect of separation of powers also undercuts his reasoning. All Englishmen and colonials adhered to the rule of law as a basic principle. It postulates, Philip Kurland points out, that "we are all to be governed by the same pre-established rules and not by the whim of those charged with executing those rules." "Law" connotes a known rule that should be understood by those whose conduct it is meant to govern. That can hardly be said of an "abstract principle" that is the product of a philosopher's "Herculean excavation"—tailored to his own predilections. "The rule of law is in unsafe hands," said Solicitor General Robert H. Jackson, "when courts cease to function as courts and become organs for control of policy."

The social reforms desired by Richards must be made by the people, not the courts. But he knows that the "ignorant" people will not favor his

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272. Justice Iredell drew the line between legislative acts beyond constitutional limitations and those "within them." With respect to the latter, the legislatures "only exercise a discretion expressly confined to them . . . . It is a discretion no more controllable . . . by a Court . . . than a judicial determination is by them." Ware v. Hylton, 3 U.S. (3 Dall.) 199, 266 (1796). Great weight attaches to this view because Iredell was one of the earliest and foremost advocates of judicial review. Who should better know its limits?
273. Richards, supra note 4, at 1385.
275. Kurland, supra note 246, at 582.
276. R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 322 (1941). Chief Justice Marshall averred that "the judicial power is never exercised for giving effect to the will of the Judge; always for the purpose of giving effect to the will of the legislature." Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 866 (1824). Henry Monaghan wrote, any judicial enforcement of norms based on neither text nor structure against the contrary determination of the political process suffers from two closely intertwined defects. First, all such efforts reduce themselves to . . . the imposition of a judge's own value preferences on the political organs of government. Second, any such judicial conduct conflicts with the core constitutional settlement embodied in the Constitution and reinforced by its amendments—the constitutional scheme of representative government which assigns policy-making functions to the political organs of government. These objections seem to be insurmountable . . . . Monaghan, Professor Jones and the Constitution, 4 VT. L. REV. 87, 91 (1979).
277. The Constitution may not be "amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made," McPherson v. Blacker, 146 U.S. 1, 36 (1892); see also Hawke v. Smith, 253 U.S. 221, 227 (1920).
measures and therefore turns to the courts,\textsuperscript{278} which in recent years have been acting like the "knight errant" Cardozo deplored.\textsuperscript{279} His article beautifully illustrates Brest's adjuration to his activist brethren: "simply to acknowledge that most of our writings [about judicial review] are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good."\textsuperscript{280}

Reference to judicial "whims" has so frequently been made as to deserve some explication. Consider the recent Supreme Court decision sustaining Congress' employment of a chaplain, in terms that undermine Richards' theorizing. "Clearly," Chief Justice Burger said,

the men who wrote the First Amendment religion clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.\textsuperscript{281}

By that unexceptionable test the Court's resort to "cruel and unusual punishments" for its strictures against death penalties is indefensible. From 1689 when the English first employed "cruel and unusual punishments" in their Bill of Rights, through 1789 when the Founders picked up the phrase in the eighth amendment, to 1972 when the Court first discovered that the phrase limited administration of death penalties, such penalties, with not a single exception, were not deemed to be within the phrase. Nevertheless the Court overturned the centuries-old practice without a qualm, and now exalts the 200-year chaplain practice on grounds that should have led it to leave death penalties undisturbed. Such are the vagaries of a Court to whom Richards would confide our destinies—government by judicial "whim."

The thesis of this response was pithily expressed by the Supreme Court in the "legislative veto" case: the Framers divided the government

into three defined categories . . . to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted . . .

. . .

[To] maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.\textsuperscript{282}

\textsuperscript{278} Joseph Bishop wrote, "[t]hose who favor abortion, busing . . . and oppose capital punishment . . . obviously have no faith whatever in the wisdom and the will of the great majority of the people, who are opposed to them. They are doing everything possible to have these problems resolved . . . in the courts." Bishop, \textit{What is a Liberal—Who is a Conservative}, 62 \textit{Commentary}, Sept., 1976, at 47.

\textsuperscript{279} A judge "is not a knight errant, roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles." B. \textit{Cardozo}, \textit{The Nature of the Judicial Process} 141 (1921).

\textsuperscript{280} Brest, \textit{supra} note 193, at 1109.

\textsuperscript{281} Marsh v. Chambers, 103 S. Ct. 3330, 3334 (1983).

\textsuperscript{282} Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764, 2784, 2787 (1983) (emphasis added).
Although the Court, alas, has not lived by its own counsel, it has nonetheless uttered an unimpeachable truth. Reformers such as Richards need to recall Cardozo's caution that reliance on "the individual sense of justice... might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law." This is what the "rule of law" and the "separation of powers," that fall so easily from Richards' lips, mean. And I would remind him that judicial power can be malign as well as benign, as the laissez faire Court's ill-considered blockade for decades against badly needed socio-economic reforms attests.

283. B. CARDOZO, supra note 279, at 136. In his Farewell Address, Washington advised, 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 amendment in the way in which the Constitution designates. But let there be no change by usurpa-
tion; 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 belief which the use can at any time yield.

35 G. WASHINGTON, Writings 228-29 (J. Fitzpatrick ed. 1940).