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Raoul Berger
Member, Illinois and District of Columbia bars

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Government by Judiciary: John Hart Ely’s “Invitation”

RAOUL BERGER*

Professor John Hart Ely’s Constitutional Interpretivism: Its Allure and Impossibility1 solves the problem of government by judiciary quite simply: the framers of the Fourteenth Amendment issued an “open and across-the-board invitation to import into the constitutional decision process considerations that will not be found in the amendment nor even, at least in any obvious sense, elsewhere in the Constitution.”2 This but rephrases the current view, framed to rationalize the Warren Court’s revolution, that the “general” terms of the amendment were left open-ended to leave room for such discretion.3

By impossible “interpretivism” Ely refers to the belief that constitutional decisions should be derived from values “very clearly implicit in the written Constitution”; he labels as “non-interpretivism” the view that courts must range beyond those values to “norms that cannot be discovered within the four corners of the document.”4 But unlike most of his confreres, Ely insists that a constitutional decision must be rooted in the Constitution,5 though he does not explain how extra-constitutional factors can be so rooted. His “invitation” theory is also at odds with his rejection of natural law, justly considering that persons like James Iredell—“a prominent voice for ratification”—“certainly didn’t have natural law in mind when the Constitution’s various open-ended delegations to the future were inserted and approved. . . .”6 In fact, the Founders were committed to positive law,7 to a “fixed” constitution.8 In the interval before the Civil War Judges even more firmly repudiated

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2. Ely at 415. He also finds such an invitation in provisions antecedent to the Amendment. Id. at 414-15.
3. Justice Frankfurter, at text accompanying note 215 Infra. Alexander Bickel wrote, “It is not true that the Framers intended the Fourteenth Amendment to outlaw segregation. . . but they did not foreclose such policies and may indeed have invited them.” Ely at 432 (emphasis added). Thus, speculation hardens into dogma.
4. Ely at 399.
5. If a “[neutral principle] . . . lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.” Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 949 (1973).
6. Ely at 446. He more sharply dismisses natural law as “uselessly vague” in Ely, Foreword: On Discovering Fundamental Values, 92 HARV. L. REV. 5, 29 (1978); see also id. at 22-23.
7. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT, 251-52, 390-91, 394-96 (1977) [hereinafter cited as BERGER]. Throughout I shall cite to BERGER instead of the original source to conserve space, direct attention to confirmatory materials, and show that these materials were spread before Ely.
natural law. Having rejected natural law, which Dean Pound branded as "purely personal and arbitrary," it needs to be explained why the Framers issued a covert "invitation" to apply "untethered standards." Ely shrinks from such untethered judicial discretion, and intends hereafter to submit a "principled approach to enforcement of the Constitution's open-ended provisions," although he recognizes that these clauses "do not readily lend themselves to principled judicial enforcement." And he concludes that "If a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, responsible commentators would have to conclude, whatever the framers may have been assuming, that the courts should stay away from them." The Framers, however, had even less stomach than Ely for unfettered judicial discretion; of the three branches, Hamilton assured the Ratifiers, the judiciary "is next to nothing," not the "superlegislature" condemned by Brandeis and Holmes. Indeed, judicial trespasses on the legislative domain—policy making—would be, according to Hamilton, impeachable whereas breaches of Ely's principles would be confinable only by judicial self-restraint, which in the past has proved to impose no limits at all. One has only to recall the hubbub that greeted Herbert Wechsler's appeal for "neutral principles" to doubt whether those of Ely will be preferable to limits plainly discernible in the constitutional history.

By Ely's own testimony, the "non-interpretivist" theory must surmount some formidable obstacles. First, he notes, the "interpretivist" approach "better fits our usual conceptions of what law is and the way it works. In interpreting a statute, . . . a court will obviously limit itself to a determination of the purposes and prohibitions expressed by or implicit in its language." He considers that "the Constitution is [not] different in this respect," in reliance on Chief Justice Marshall's assumption in

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9BERGER at 254.
10Id. at 252.
11Text accompanying notes 27 & 29 infra.
12Ely at 402 n.12, 448.
13Id. at 447.
14Ely at 448.
15For the "profound fear of judicial . . . discretion," see G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 298, 304 (1969); see text accompanying note 96 infra.
16THE FEDERALIST No. 78, at 504. (Mod. Lib. ed. 1937).
18BERGER at 294-95.
19Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959). "Law professors," Ely has written, "do not agree on what results are 'good'. . . . Ely, supra note 5, at 944; and, as the Wechsler debate shows, agreement on Ely's guiding 'principles' is little more likely.
20Ely at 402. "Interpretivism," Ely opines, has another thing going for it, it retains "the substantial virtue of fitting better our ordinary notion of how law works . . . if your job is to enforce the Constitution then it's the Constitution you should be enforcing and not whatever else may happen to strike you as a good idea at the time." Id. at 413.
Marbury v. Madison that “constitutional review involves merely the traditional judicial function of comparing one legally prescribed mandate with another to see if they conflict...” That inference is buttressed by the fact that the Founders, as Julius Goebel wrote, were accustomed to “resort to the accepted rules of statutory interpretation to settle the meaning of constitutional provisions...” also explicitly invoked in the First Congress, which contained many Framers and Ratifiers. And Justice Story emphasized that such rules provide a “fixed standard” for interpretation of the Constitution. Indeed, Hamilton stated that “to avoid arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them,” evidence that his audience distrusted judicial discretion. Certainly it would be unreasonable to maintain that courts must give effect to the intention of the legislature but are free to disregard the clearly discernible choices of the sovereign people, as the Court has done with respect to suffrage and segregation. We are therefore justified in concluding that the Founders viewed the task of constitutional construction as subject to the same limits as that of statutory interpretation.

Second, Ely justly considers that “vague and untethered standards inevitably lend themselves to the virtually irresistible temptation to intervene when one’s political or moral sensibilities are sufficiently affronted.” This criticism, however, he discounts “if only because no one is in a position to cast the first stone,” which amounts to the remarkable proposition that scholars must shut their eyes to the truth because they have sinned against it in the past. I for one do not labor under that handicap, for as long ago as 1942 I refused to make my predilections the test of constitutionality, a tenet from which I have never wavered. It may be inferred that this tenet is not without its appeal to Ely, because he notes that rejections of implied restrictions inherent in “constitutional guarantees” on “the set of starting premises” conduct to “a reliance on sources so amorphously defined and susceptible to unassessable application as to undercut the values we usually associate with a rule of law.”

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21 Ely at 402 n.11.
22 J. Goebel, History of the Supreme Court of the United States 128 (1971).
25 Berger at 308.
26 “Were a judge to announce... that she [sic] intended additionally to enforce, in the name of the statute in question, those fundamental values she believed America has stood for, we would conclude that she was not doing her job, and might even consider a call to the lunacy commission.” Ely 402. For a similar approach to constitutional construction, see T. Cooley, at note 215 infra.
27 Ely at 403.
29 Ely at 403.
The “third (and most serious) general objection to the usual brand of noninterpretivism,” Ely states, is “that it is not simply untethered but undemocratic as well,” that is, “A body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they would like.”

This notwithstanding that “throughout our history America has defined and designed its governmental system around the core concept of representative democracy”; in Hamilton’s words, the powers of government are “derived ... from the great body of the people” to be “administered by persons holding their offices at pleasure,” not, that is to say, by unaccountable judges. Ely himself observed that “[r]ule by an aristocracy, even in modern dress, is not what Americans have ever wanted,” even, as Judge Learned Hand stated, when clothed in the robes of nine Platonic Guardians. As Ely notes, the “noninterpretivist would have politically unresponsive judges select and define the values to be placed beyond majority control, but the interpretivist takes his values from the Constitution, which means, since the Constitution itself was submitted for and received popular ratification, that they ultimately come from the people.” He acknowledges that this argument “stretches back” to Hamilton and Marshall, and “seems to enjoy virtually universal contemporary acceptance.” And he concludes that “An untrammeled majority is indeed a dangerous thing, but it will require a heroic inference to get from that realization to the conclusion that enforcement by unelected officials of an ‘unwritten constitution’ is an appropriate response in a democratic republic.”

Thus far, I would cry, “a Daniel come to judgment,” for that is the view set forth in my Government by Judiciary: The Transformation of the Fourteenth Amendment, albeit resting on historical proof rather than quasi-philosophical musing. Having set the cross-bar so high, how does Ely proceed to vault it, to draw the “heroic inference” and to undergird his conclusion that the opposing view is in fact “impossible”?

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29Ely at 404, 405.
30Id. at 408.
31Id. at 409.
32Id. at 411.
34Ely at 412. Thomas Grey wrote that the “interpretivist” view “is one of great power and compelling simplicity ... deeply rooted in our history and in our shared principles of political legitimacy. It has equally deep roots in our formal constitutional law....” Grey, Do We Have an Unwritten Constitution, 27 STAN. L. REV. 703, 705 (1975). He concedes that the contrary view “is more difficult to justify....” Id. at 708. Why, one asks, are the courts better able to discern and articulate basic national ideals than are the peoples' politically responsible representatives? Grey would face the confessedly difficult questions “non-interpretivism” poses by resort to “a natural rights constitutional theory”; “it was ... widely assumed that judges would enforce as constitutional restraints the unwritten natural rights as well,” id. at 716, a view rejected by Ely, and which, in my judgment runs counter to historical fact. Text Accompanying notes 6-10 & note 7 supra.
35Ely at 411.
To begin with, he labels the "ratification" argument a "fake. The written Constitution is not the voice of the people; it is the voice of the framers." Nevertheless, Ely does not consign the "voice of the framers" to limbo, for he observes, "there are times when, in order to know what was ratified, we need to know what was intended," i.e. adoption of the "voice of the framers" by ratification. In point of fact, the Framers submitted the Constitution to "the people" for ratification in order that the Constitution, in Madison's words, would be "established by the people themselves," by means, said Rufus King, of "a reference to the authority of the people expressly delegated to [State] Conventions." Ely notes that ratification was "a close thing"; within a few weeks after the Constitution was made public, the people were sharply aligned in two parties for or against it. Ely himself observes that "once the Constitution was ratified . . . virtually everyone in American accepted it immediately as the document controlling his destiny," i.e. as the authentic "voice of the people."

To demonstrate that the Constitution does not represent the voice of the people, Ely first invokes Noah Webster's statement that "the very attempt to make perpetual constitutions, is the assumption of a right to control the opinions of future generations." But Webster was outside the mainstream; the Founders were attached to a "fixed Constitution." As Philip Kurland explains,

The concept of the written constitution is that it defines the authority of government and its limits, that government is the creature of the constitution and cannot do what it does not authorize and must not do what it forbids. A priori, such a constitution could have only a fixed and unchanging meaning, if it was to fulfill its function. For changed conditions, the instrument itself made provision for amendment which, in accordance with the concept of a written constitution, was expected to be the only form of change. This attachment to a "fixed constitution" is well-attested. When Ely argues that by "making the Constitution difficult to amend" the Framers "fatally undercut" the idea that judges are "simply applying

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"Ely at 412.
"Id. at 418.
"2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 93 (rev. ed. 1911); see also id. at 88-94.
"Id. at 92.
"Ely at 409.
"Ely at 409.
"Id. at 412-13.
"Samuel Adams cited with approval Vattel's "the constitution of the state ought to be fixed." 2 S. ADAMS, WRITINGS 325 (H.A.Cushing ed. 1906). See also the letter from the Massachusetts House to the Earl of Shelbourne, January, 1768, H.S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 65 (7th ed. 1963); BERGER at 291.
the people’s will,” he overlooks that the amendment provision was regarded as “a totally new contribution to politics,” leaving in the people “the power of altering and amending” the Constitution. That provision was ratified by the people, being advised that it would be difficult to amend. And that very difficulty serves to protect minorities against a tyrannical majority—specified rights are untouchable except by amendment. Would amendment sub rosa by unelected judges better represent the will of the people? Elbridge Gerry, one of the Framers, stated in the First Congress that “The people have directed a particular mode of making amendments, which we are not at liberty to depart from.” The fact that the mode is cumbersome does not empower the judges to dispense with it and amend the Constitution themselves.

Next Ely instances Jefferson’s letter to Madison, stating that “the earth belongs in usufruct to the living,’ that the dead have neither powers nor rights over it.” For this reason, presumably, Jefferson suggested “that the Constitution expire naturally every 19 years.” But he anticipated that the people would frame a new Constitution, not that it would be replaced by a judicial oligarchy. For he wrote, “let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.” And he emphasized that it was to be administered “according to the safe and honest meaning contemplated by the plain understanding of the people at the time of its adoption—a meaning to be found in the explanations of those who advocated ... it,” testimony that he viewed the Constitution as the “voice of the people” and that they understood it.

Before examining Ely’s “heroic inference” whereby he leaps over the hurdles he has set up—the “invitation” upon which he bases the “impossibility of interpretivism”—it will be instructive to consider the “invitation” against the background of the historical proof that the Framers excluded suffrage from the ambit of the Fourteenth Amendment, an issue that Ely “briskly” dismisses as “Berger’s repeated assertion that given their racism the fourteenth amendment’s framers could not conceivably have intended to draft a provision capable one day of supporting the inference that blacks were entitled to vote.” Now I did not rely on

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48Ely at 413.
50Patrick Henry argued in the Virginia Ratification Convention that “four of the smallest states ... may obstruct the most salutary ... amendments.” 3 J. ELLIOT, DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 49 (1836). But the prevailing view was expressed by James Iredell: the Constitution “can be altered with as much regularity, and as little confusion, as by act of Assembly; not indeed, quite so easily, which would be extremely impolitic.” 4 id. at 177.
51BERGER at 252.
52Id. at 366-67.
53I owe “briskly” and similar pejoratives to Ely. See note 103 infra.
54Ely at 436 n.133.
that racism (except as background motivation) but on voluminous
evidence drawn from the record that is confirmed by Ely’s acknow-
ledgment that adoption of the Fifteenth Amendment “suggests the
framers didn’t think the fourteenth amendment had granted blacks the
vote. . . .”67

Let us look at the record, if only to illuminate Ely’s summary way with
historical facts. Justice Brennan observed that “17 or 19” Northern
States had rejected black suffrage in 1865-1868.68 Understandably,
Roscoe Conkling, a member of the Joint Committee on Reconstruction of
both Houses, which drafted the Fourteenth Amendment, stated:
The northern states, most of them, do not permit negroes to
vote. Some of them repeatedly and lately pronounced against
it. . . . [W]ould it not be futile to ask three-quarters of the
States to do for themselves and others, by ratifying such an
amendment, the very thing most of them have already refused
to do in their own cases.69

Another member of the Committee, Senator Jacob Howard, who
explained the Amendment to the Senate, said that “three-fourths of the
States ... could not be induced to grant the right of suffrage, even in any
degree or under any restriction, to the colored race.”60 Senator William
Fessenden, Chairman of the Joint Committee, said of a suffrage proposal
that there is not “the slightest possibility that it will be adopted by the
States. . . .”61 The Report of the Joint Committee doubted that “the
States would consent to surrender a power they had exercised, and to
which they were attached,” and therefore it was thought best to “leave
the whole question with the people of each State.”62 On this score the
legislative history is by no means “in unusual disarray.”63 Nathaniel
Nathanson, an adherent of “non-interpretivism,” observed that Justice
Harlan (the Younger) “quite convincingly demonstrated” that the Four-
teenth Amendment “would not require . . . negro suffrage,” and that
“Berger’s independent research and analysis confirms and adds weight
to those conclusions.”64 Max Beloff, former Oxford professor and now
head of one of the “red-brick” English universities, who is 3000 miles
removed from distorting political considerations, referred to my “incon-

67Ibid.
68Id. at 90.
69Id. at 58-59.
70Id. at 56.
71Id. at 59.
72Id. at 84.
73Ely at 418. Justice Harlan declared, “The history of the Fourteenth Amendment with
respect to suffrage qualifications is remarkably free of the problems which bedevil most at-
ttempts to find a reliable guide to present decision in the pages of the past. Instead, there is
virtually unanimous agreement, clearly and repeatedly expressed, that §1 of the Amend-
ment did not reach discriminatory voter disqualifications.” Oregon v. Mitchell, 400 U.S.
trovertible” conclusion to this effect. And Gerald Gunther wrote that “most constitutional lawyers agree” with Harlan’s conclusion that Chief Justice Warren’s “one person-one vote” lacked all historical justification. Against this background, Ely’s cavalier dismissal of the issue is astonishing.

Robert Bork, former Solicitor General, summed it up in 1974:

The words are general but surely that would not permit us to escape the framers’ intent if it were clear. If the legislative history revealed a consensus about segregation in schools... I do not see how the Court could escape the choices revealed and substitute its own, even though the words are general and conditions have changed.

Men do not use words, issue an “invitation”, to defeat their purposes. Then too, as Ely notes, Dred Scott (and the fugitive slave decisions) had “spilled over into a general distrust of the institution of judicial review,” expressed in the studied grant of §5: “The Congress shall have power” to enforce the amendment, which led the Court to declare in 1879, “It is not said that the judicial power” shall enforce; “It is the power of Congress which has been enlarged.” To read into the Amendment an “invitation” to the “distrusted” judiciary to override the Framers’ unmistakable intention to exclude suffrage verges on the “incredible.” Such an invitation also is at war with the Fifteenth Amendment whereby the Framers signalled that there existed no other power to remedy the deficiency. Consequently, I was led to conclude with Justice Harlan that “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. . . .”

Such considerations receive short shrift from Ely: “what invariably

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67Nathanson, supra note 64, at 560-81, wrote that Bickel “conclusively demonstrated” that the fourteenth amendment “would not require school desegregation.” See Wilson, at text accompanying note 167 infra; BERGER at 117-33.

68BERGER at 214. Earlier Ely was critical of the theory that “the Constitution speaks in the vaguest and most general terms; [that] the most its clauses can provide are ‘more or less suitable pegs on which judicial policy choices are hung.’ ” Ely, supra note 5, at 945.

69Ely at 448.

70BERGER at 221. Ely at 447, states that “it is true the (misdirected) anticipation seems to have been that [the Amendment] would receive its most meaningful enforcement by Congress (acting under section 5) rather than by the courts.” This understates the case. See BERGER at 221-29.

71Another of Ely’s pejoratives. See text accompanying note 140 infra.

72BERGER at 330.
seems to get lost in excursions into the intent of the framers" is that "the most important datum bearing on what is intended is the constitutional language itself." But unlike some of his "non-interpretivist" brethren, Ely does not altogether discard the intention of the Framers; "there are times when, in order to know what was ratified, we need to know what was intended." And he acknowledges that "when the language seems out of accord with what we are quite sure was the purpose, we owe it to the framers and to ourselves at least to take a second look at the language." If Ely has a lingering yearning to exalt text over intention, he would jettison centuries-old canons of construction. From the blood-letting case of Bologna onward, as the Supreme Court held, "the books are full of authorities to the effect that the intention of the lawmaking power will prevail even against the letter of a statute." Charles Sumner stated in the midst of his vain struggle to enlarge the privileges the framers of the Fourteenth Amendment grudgingly conferred, that a Constitution is a "transcript of [the framers'] minds. If its meaning in any place is open to doubt, or if words are used which seem to have no fixed signification, we cannot err of we turn to the framers...." That such was the contemporary view was confirmed on January 25, 1872, when a unanimous Senate Judiciary Committee report, signed by senators who had voted for the 13th, 14th, and 15th amendments in Congress, declared, "In construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended to be accomplished by those who framed it, and the people who adopted it."

In the absence of contrary utterances, we may conclude that those who drafted the Amendment considered that the Framers' intention would govern, at least if uncontradicted by the people in the ratifying conventions.

Against this Ely invokes an extensive quotation from Thomas Cooley, the gist of which is that "the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or

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3Ely at 418. And he states, "the only reliable evidence of what 'the ratifiers' thought they were ratifying is obviously the language of what they approved." Jefferson, on the other hand, said, the "meaning [is] to be found in the explanations of those who advocated... It [the Constitution]." See text accompanying note 54 supra. Ely would repudiate the representations that the amendment did not embrace suffrage. To instance only two examples: the Joint Committee Report that so stated "was printed and distributed by the thousands" as a campaign document. A. AVINS, THE RECONSTRUCTION AMENDMENTS DEBATES at vi (1967). In Ohio, Congressman Schenck denied "a concealed purpose" to confer Negro suffrage. BERGER at 115. See also text accompanying notes 58-62 supra.

4Ely at 418.

5Ely at 427-28.

6BERGER at 162 n.23. M. BACON, A NEW ABRIDGMENT OF THE LAWS OF ENGLAND (1768) states, "A thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers." Id., Statute (II)(5). See also text accompanying notes 161-62 infra.

7BERGER at 372.

8AVINS, supra note 73, at 2, 571. For a similar utterance at about the same time by Judge Thomas Cooley, see note 214 infra.
abstruse meaning in the words employed, but rather that they have
accepted them in the sense most obvious to the common understanding.

There was no occasion to look for a "dark and abstruse meaning"
because the people had been given to understand that suffrage was ex-
cluded from the Amendment. Recall that suffrage, as Justice Brennan re-
counted, "was rejected by the voters in 17 or 19 popular referenda held on
the subject between 1865 and 1868. Moreover, Republicans suffered
some severe election setbacks in 1867 on account of their support of
Negro suffrage...."90 "[N]o man can doubt...," said Senator John
Sherman, that "there was a strong and powerful prejudice... among all
classes of citizens against extending the right of suffrage to negroes."91
It would have been a "dark and abstruse meaning" to read the bland
terms of the Amendment as authorizing something the people so
emphatically opposed. During the election campaign of 1866, Congress-
man Schenck of Ohio repudiated a "concealed purpose" to confer
Negro suffrage.92 The Fourteenth Amendment, Philip Paludan's recent
historical study states, "was presented to the people as leaving control of
suffrage in state hands, as representing no change in previous constitu-
tional conditions...."93 Justice Harlan's comments on the Ratification
proceedings confirm that the people were not told that the terms of the
Amendment had a "dark and obscure meaning" which overrides this
plainly recorded distaste for suffrage and the representations that the
Amendment left suffrage untouched.94 Harry Flack, who searched the
newspapers of the period quite thoroughly,95 concluded that "had the
people been informed of what was intended by the Amendment [the
gospel according to Ely], they would have rejected it."96

One other factor needs to be taken into account before we turn to Ely's
discussion of the three clauses of the Fourteenth Amendment. Since he
finds an "invitation to look beyond the four corners of the document" in
provisions antecedent to the Amendment,97 it needs to be asked how does

90Ely at 419.
91Id. at 90.
92Id. at 59 n.31.
93Id. at 115.
94Id. at 155. I would not suggest that racism was the only factor. There was likewise a
deep attachment to State sovereignty which, Paludan repeatedly emphasizes, was "the
most potent institutional obstacle to the Negroes' hope for protected liberty." Id. See also
id. at 60-64.
95Harlan stated, "In all the other States I have examined, were the materials are suffi-
ciently full for the understanding of a supporter of the Amendment to appear, his
understanding has been that enfranchisement would not result." Oregon v. Mitchell, 400
and campaign speeches, see id. at 198-99. Harlan summarized: "Among the leading con-
gressional figures who stated in campaign speeches that the Amendment did not prohibit
racial voting qualifications were Senators Howe, Lane, Sherman, Sumner, and Trumbull,
and Congressmen Bingham, Delano, Schenck and Stevens." Id. at 199.
97BERGER at 153 n.82.
98Ely at 413.
it fit with the limited role assigned to the judiciary by the Framers. They only contemplated that the courts would police the constitutional boundaries to insure, for example, that the legislature would not "overleap" its bounds. Emphatically, they did not conceive that the judiciary would take over the making of legislative policy within those bounds. Judicial review was itself an innovation, resting on the debatable Dr. Bonham's Case and a few scattered post-1776 State cases which in several instances had raised a storm, so that Hamilton was driven to assure the Ratifiers that of the three departments "the judiciary is next to nothing." On Ely's theory this nonentity is empowered by his "invitation" to act as a "superlegislature."

The "invitation" is repelled by yet other evidence. It had been proposed to make the Justices members of a Council of Revision that would assist the President in exercising the veto power, on the ground that "Laws...may be dangerous... and yet be not so unconstitutional as to justify the Judges in refusing to give them effect." But Elbridge Gerry objected, "It was quite foreign from the nature of ye office to make them judges of the policy of public measures...." Nathaniel Gorham likewise considered that judges "are not to be presumed to possess any peculiar knowledge of the mere policy of public measures." Rufus King chimed in that judges "ought not to be legislators," and John Dickinson cautioned that judges "became by degrees the law-givers." Judicial participation in legislative policy-making was therefore rejected, reflecting John Adams' 1780 Massachusetts Constitution, which expressly ordained that the judiciary should never exercise legislative power so that this may be a "government of laws and not of men," an explicit formulation of the separation of powers. Then there is the fact noticed by Morton Horwitz that "fear of judicial discretion had long been part of colonial political rhetoric," notably expressed by Chief Justice Hutchinson of Massachusetts in 1767: "the Judge should never be the Legislator: Because then the Will of the Judge would be the Law: and this tends to a State of Slavery." The last thing the Founders had in mind was to open

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8 For citations see BERGER at 302, 304-05, 309, 311. In Ware v. Hylton, 3 U.S. (3 Dall.) 199, 266 (1796), Justice James Iredell, who had made one of the most persuasive arguments prior to the Convention for judicial review, stated, "The power of the Legislatures is limited" by the several constitutions. Beyond those limitations, I have no doubt, their acts are void, because they are not warranted by the authority given. But within them, I think, they are in all cases obligatory... because in such cases the Legislature only exercise a discretion expressly confided to them by the Constitution." (Emphasis added).


10 For discussion of these cases and their aftermath, see R. BERGER, CONGRESS v. THE SUPREME COURT 36-43 (1969).

11 Note 15 supra.

Note 16 supra.

12 BERGER at 300-02.

13 Id. at 250 n.5 & 290.

14 Id. at 306-07. Quoting Montesquieu, Charles McIlwain stated, were the judiciary joined with the legislative, the life and liberty of the subject would be exposed to arbitrary
the door to such discretion by use of "general words," for as Samuel Adams wrote in 1776, "Vague and uncertain words, and more especially Constitutions, are the very instruments of slavery."98 Such facts are at war with a theory that the Framers issued an "invitation" to make law and policy. Because amorphous provisions may leave room for "interstitial" legislation97 it does not follow that "due process" for example, which indubitably has an historical, limited content, may be read as an invitation to substitute judicial for legislative policy-making, as did the Court in fashioning the now discredited doctrine of substantive economic due process.

The Due Process Clause

Ely recognizes that the view that the due process clause incorporates "a general mandate to review the substance of legislative and other governmental action . . . was probably wrong,"99 and that it is now "universally acknowledged to have been constitutionally improper."99 "There is general agreement" that the Fifth Amendment clause "had been understood . . . to ensure lawful procedures," and Ely located no reference that gave the "identical" Fourteenth Amendment clause "more than a procedural connotation."100 But he finds that the issue is not "crystal clear" because of references to substantive due process in two pre-Civil War cases, Wynehamer v. People (1856) and Dred Scott v. Sanford (1857).101 These, however, he correctly concluded, "were aberrations, neither preceded nor destined to become precedents themselves."102 Nevertheless he states, "it is impossible to exclude absolutely the possibility that some [of the Framers] would have allowed that the due process clause . . . would be given an occasional substantive interpretation."103 What some of the Framers might have thought and which finds no expression in the debates can shed no light on the meaning of the clause.104 Against this approach is the fact that (1) all references in the

control; for the judge would then be the legislator . . . The national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour.

C. McILWAIN THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY 322-23 (1910).

983 S. ADAMS, WRITINGS 262 (H. Cushing ed. 1904), quoted in R. MOTT, DUE PROCESS 138 n.54 (1926). This is the obverse of Adams' attachment to a "fixed" Constitution, note 47 supra.

99Southern Pacific Ry. v. Jensen, 244 U.S. 205,221 (1916), per Holmes, J.: "A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it." (Dissenting opinion.)

100Ely at 416.

101Id. at 415.

102Id. at 416; see also BERGER at 193-214.

103Ely at 416-17.

104Id. at 417.

105Id. at 418.

106Ely himself states, "it should take more than two aberrational cases to convince us that those who ratified the fourteenth amendment had some eccentric definition in mind."
debates had a procedural connotation; the Framers’ “distrust” of the judiciary was hardly conducive to a grant of power to override Congress; and (3) what “some” Framers may or may not have thought must yield to the rule laid down by Chief Justice Marshall: “an opinion which is . . . to establish a principle never before recognized, should be expressed in plain and specific terms.”

“So long as Lochner [v. New York] lay in disrepute,” Ely observes, “substantive due process was . . . as good as dead.” And he deplores “the unfortunate resurrection” of the doctrine in Roe v. Wade, the abortion case. But libertarians claim that “liberty” stands on higher ground than “property”; and the Court rested the Roe right of privacy “on the concept of personal liberty.” Ely, however, rightly rejects the distinction of “economic rights” from “human rights.” “Life, liberty, and property” are on a par in the due process clause, and Ely notes that they have been “essentially read as a unit.” Expressing 400 years of English
and colonial history, Alexander Hamilton stated on the eve of the Convention that ‘The words ‘due process’... can never be referred to an act of the legislature,’” that they apply “only” to proceedings in the courts,\footnote{Ely at 424.} a statement that stands uncontradicted in the several Conventions and in the 1866 debates.\footnote{Ely at 426; \textit{Berger} at 169-76, 209-14.} It must follow that \textit{legislation} respecting “liberty” no more falls within the scope of due process than does that relating to “property” or abortion.

\textbf{The Privileges or Immunities Clause}

The “privileges or immunities” clause, Ely correctly notes, “was probably the clause from which the framers of the fourteenth amendment expected most,”\footnote{Ely at 421, n.86.} indeed, as I have shown, it was the central \textit{substantive} clause.\footnote{\textit{Berger} at 194.} The due process clause, excluded by Ely from his “invitation” to make substantive law, was meant to assure access to the courts for enforcement of the substantive rights and “procedural fairness,” and the equal protection clause was designed to prevent discrimination with respect to those rights.\footnote{Ely at 421, n.86.} But the privileges or immunities clause was aborted by the \textit{Slaughter-House Cases}; and Ely justly observes that “there is not a bit of legislative history that remotely supports the view that the privileges or immunities clause was intended to be meaningless,”\footnote{Ely at 425.} the effect attributed by the four dissenters to the decision. In fact there is abundant, convincing evidence that the Framers added United States citizenship (on which the \textit{Cases} turn) to that of a State in order to insure that blacks would enjoy the rights embraced by “privileges or immunities,” that is, the “fundamental rights enumerated
in the Civil Rights Act.'\textsuperscript{120} It is never too late to repudiate egregious error in construction of the Constitution, and the Court would be well advised to give effect to the Framers' intention by reversing the 5 to 4 \textit{Slaughter-House} decision.\textsuperscript{121}

Ely, however, ranges far beyond the intention of the Framers in delineating the rights conferred by the privileges or immunities clause. But he confesses that "it is no small problem for the suggested interpretation of the privileges or immunities clause that it would render the equal protection clause superfluous."\textsuperscript{122} What Ely designates as "no small problem" is in fact an insurmountable one. It is an established rule of construction that the draftsmen "are presumed to have used no superfluous words," that a contrary construction is to be rejected;\textsuperscript{123} the way to do this is to confine each clause to its proper scope.

As Ely notices, "the phrase was taken from article IV, section 2 of the original Constitution," and that in turn was derived from article IV of the Articles of Confederation.\textsuperscript{124} The object of the latter was to secure "mutual friendship and intercourse among the people of the different states," and to that end the free inhabitants . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State. . . .\textsuperscript{125} Ours is the duty of reading this language as would the Framers; for them a general provision such as "entitled to all privileges and immunities" was limited by the subsequent enumeration. This was stated in crystal-clear terms by Madison\textsuperscript{126} and reiterated in the 1866 debates.\textsuperscript{127} Conse-

\begin{itemize}
\item \textsuperscript{120}Berger at 37-51.
\item \textsuperscript{121}Compare Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Berger at 297 n.56, 352 n.6.
\item \textsuperscript{122}Ely at 426, 438.
\item \textsuperscript{123}Platt v. Union Pac. R.R., 99 U.S. 48, 58-59 (1878); Adler v. Northern Hotel Co., 175 F. 2d 619, 621 (7th Cir. 1949). In 1791, Jefferson wrote, "It is an established rule of construction where a phrase will bear either of two meanings to give it that which will allow some meaning to other parts of the instrument, and not that which would render all the others useless." 3 M. FARRAND, supra note 40, at 363.
\item \textsuperscript{124}Ely at 425.
\item \textsuperscript{125}COMMAGER, supra note 47, at 111.
\item \textsuperscript{126}"For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general powers? Nothing is more natural or common than first to use a general phrase, and to explain and qualify it by a recital of particulars." THE FEDERALIST, supra note 16, at 269. Earlier that had been stated in M. BACON, supra note 74, \textit{Statute} (I)(2).
\item \textsuperscript{127}Thayer said, "When those civil rights which are first referred to in general terms are subsequently enumerated, that enumeration precludes any possibility that the general words which have been used can be extended beyond the particulars which have been enumerated." Berger at 28; see id. at 31 n.40; Sandtack v. Tamme, 182 F.2d 759, 761 (10th Cir. 1950).
\end{itemize}
sequently the progenitor provision was not a general "equality provision, intended to keep state laws from treating out-of-staters worse than their own citizens," but secured equality only for "the privileges of trade and commerce" and the like. Article IV of the Constitution borrowed the "privileges and immunities" phraseology, and the Civil Rights Bill, as Senator Trumbull explained, sought to make the privileges theretofore available to out-of-staters to resident blacks. Without doubt it "was intended to ensure equality among locals," but only with respect to a limited, clearly enumerated set of rights.

The article IV clause had been judicially construed in three cases, which were repeatedly cited in the 1866 debates. In *Campbell v. Morris* (1797), Judge Samuel Chase, before long appointed to the Supreme Court, stated on behalf of the Maryland court, that the "privileges and immunities" of article IV had a "particular and limited meaning," that it means:

the peculiar advantage of acquiring and holding real as well as personal property, that such property shall be protected and secured by the laws of the state, in the same manner as the property of the citizens of the state is protected . . . . It secures and protects personal rights.

On behalf of the Massachusetts court, Chief Justice Parker held in *Abbot v. Bayley* (1827) that the article IV phrase confers a "right to sue and be sued," that citizens who remove to a second State "cannot enjoy the right of suffrage," but "may take and hold real estate."

Ely ignores these cases and hangs his thesis on a rambling dictum of Justice Bushrod Washington on circuit in *Corfield v. Coryell* (1823). Ely owns that this "was the opinion of a single Justice; it was dictum (the complainant ended up losing in Corfield); and it almost certainly misread the original intent of the clause it was construing . . . ." Ely's expansive reading of the dictum is exploded by the fact that Washington held that an out-of-stater had no right to dredge for oysters in the host State! What Ely regards as "fatal" to my reading—Washington's reference to the right "to pursue and obtain happiness"—therefore did not extend to fishing in the host State. Such are the pitfalls of dependence on dicta. Although Washington closed by saying "we cannot accede to the proposition . . . that the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state"—he gagged on oysters—he yet swallowed suf-
frage: a transient could vote in a sister State, notwithstanding, as the Supreme Court held in an analogous context, that one cannot retain citizenship in one State and vote in another.\textsuperscript{138} A theory which relies on so shaky a dictum by a single Justice in disregard of actual decisions by full courts should be suspect. But to do him justice, Ely suggests that though "Washington may have been wrong about the clause he was interpreting, ... it would seem he was right, almost by necessity, about the clause that would be written with an eye on his remarks."\textsuperscript{137} Nevertheless, Senator Luke Poland, former Chief Justice of the Maine Supreme Court, declared that the "privileges and immunities" clause "secures nothing beyond what was intended by" the original provision [art. IV, §2] in the Constitution.\textsuperscript{138} William Lawrence said, "I will concede that the courts [citing Abbot and Corfield] have by construction limited the words "all privileges' to mean only 'some privileges,'" \textsuperscript{139} and these privileges, as will appear, were enumerated in the Civil Rights Act of 1866, the antecedent of the Amendment.

Before looking to the legislative history for further light, two points call for notice. First "privileges and immunities" had become words of art and were so perceived by the Framers.\textsuperscript{140} This Ely rejects out of hand because commentators' readings run "off in so many directions"; "privileges or immunities ... simply wasn't a term of art." And he brands it as "one of a family of such claims. (Incredibly, ... he [Berger] says, ... 'fundamental,' 'natural' rights had become words of received meaning. ... )"\textsuperscript{141} For that "incredible" statement I cited one of Ely's favorite authorities, Alfred Kelly: natural rights had long before [the Revolution] been given a very positive and specific content. ... The 'rights of Englishmen' were not vacuous; instead they were quite well-developed and specific. The notion of pulling new natural rights from the air to allow for an indefinite expansion can hardly be considered to be

\textsuperscript{138}Id. at 32 n.43.
\textsuperscript{137}Ely at 434. Certainly the sponsor of the bill, Senator Trumbull, did not view Washington's remarks through Ely's lenses; he stated, it "will be seen that he [Washington] enumerates the very rights belonging to a citizen of the United States which are set forth in the first section of this bill." \textsc{Cong. Globe}, 39th Cong., 1st Sess. 474-75 (1866).
\textsuperscript{139}BERGER at 33-39.
\textsuperscript{140}\textsc{Cong. Globe}, 39th Cong. 1st Sess. 1835 (1866). After reading quotations from the several decisions, Trumbull stated, "this being the construction as settled by judicial decisions to be put upon" the "privileges and immunities" of Article IV. \textsc{Cong. Globe}, 39th Cong., 1st Sess. 475 (1866). For citations to all three cases by both Republicans and Democrats, see Avins, supra note 73, at 754-55. If, as Ely reads Washington to say, he feels "no hesitation in confining' privileges and immunities to everything but the kitchen sink," Ely at 433 n.128, how does that square with Washington's exclusion of dredging for oysters? Then too, Senator Trumbull said that Washington "goes further than the bill" under consideration by including "the elective franchise." BERGER at 33.
\textsuperscript{141}See text accompanying notes 143-48 infra.
\textsuperscript{142}Ely at 434 n.129.
within the original spirit of the amendment. 142

Kelly merely restated accepted learning. So, Samuel Adams wrote, “the primary, absolute, natural Rights of Englishmen . . . are Personal Security, Personal Liberty and Private Property.” 148 Two “principal spokesmen” and theorists of the Abolitionist movement, Lysander Spooner and Joel Tiffany, stated that “privileges and immunities” meant that a citizen has a right “to full and ample protection in the enjoyment of his personal security, personal liberty, and private property . . . protection against oppression . . . against lawless violence,” 144 goals that found expression in the Civil Rights Act of 1866. R. M. Thayer explained to the House that “to avoid any misapprehension” as to what the “fundamental rights of citizenship” are, “they are stated in the bill.” 145 After reading from the above-cited cases, Senator Lyman Trumbull, chairman of the Judiciary Committee and sponsor of the bill, said that the “rights of citizens” are the “great fundamental rights set forth in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights that are set forth in this bill,” 146 as the text of the bill corroborates. Justice Field, upon whose dissent in Slaughter-House Ely heavily relies, 147 stated, and the record bears him out, that Corfield v. Coryell “was cited by Senator Trumbull with the observation that it enumerated the very rights belonging to a citizen of the United States set forth in the first section of the act. . . .” 148 These historical facts, not commentator’s conflicting inferences, must furnish the basis of judgment whether “privileges and immunities” had become words of art.

Second, the relevance of the Civil Rights Act of 1866 lies in the fact that the framers regarded it as identical with the Fourteenth Amendment, that the latter was merely designed to “incorporate” and place the Act beyond the power of Congress to repeal. Here Ely muddies the waters;

The shorthand that the amendment “embodied” the Act is used by Berger in an accordion fashion. Introduced so as to mean that the amendment was intended to “remove doubt as to [the Act’s] constitutionality and to place it beyond the power of a later Congress to repeal,” [citation,] at other points

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142BERGER at 35 n.55.
143R. MOTT, DUE PROCESS 133 & n.36 (1926), quoting Letter to Dennys de Bert from Otis, Thomas Cushing, Samuel Adams and Thomas Gray (Boston, Dec. 20, 1765), reprinted in 1 S. ADAMS, WRITINGS 65 (1904).
144BERGER at 22.
145Id. at 28; see also Shellabarger, id. at 170, and text accompanying note 165 infra.
146Cong. Globe, 39th Cong., 1st Sess. 475 (1866); see also James Wilson’s explanation, at text accompanying note 167 infra.
147Ely at 425-27.
148Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 98 (1872). This was an almost verbatim rendering of Trumbull. Note 136 supra.
it is invoked to suggest the idea of equivalence of coverage. [Citation.] This sort of elision [?] is endemic to Berger’s mode of interpretation.\(^{149}\)

To charge me with suppression where at worst Ely can complain of confusion is utterly unwarranted; in fact it is Ely who confuses two separate analytical strands. The framers’ desire to protect the Act constituted the motivation for the Amendment; the “equivalence” goes to an entirely different issue—the scope of the Amendment. Ely grudgingly allows that “there were some actual statements of equivalence, but they were rare and generally couched in terms that made clear the speaker’s understandable desire to minimize the potentially radical sweep of the constitutional language.”\(^{150}\) Baldly stated, the speakers allegedly sought to conceal from Congress and the people that the words had a “radical sweep” which they did not betray! For this there is no evidence, let alone that it would evince political chicanery. Ely’s “rare” is belied by the facts. “[O]ver and over in this debate” on the Amendment, said Charles Fairman, “[t]he provisions of the one are treated as though they were essentially identical with those of the other.”\(^{151}\) An ardent advocate of the broad “non-interpretivist” reading of the Amendment, Howard Jay Graham, wrote that “virtually every speaker in the debates on the Fourteenth Amendment—Republican and Democrat alike—said or agreed that the Amendment was designed to embody or incorporate the Civil Rights Act.”\(^{152}\) Another devotee of a broad construction, Harry Flack, observed, “nearly all said that it was but an incorporation of the Civil Rights Bill . . . there was no controversy as to its purpose and meaning.”\(^{153}\) For example, George Latham stated that “the ‘civil rights bill’ which is now a law . . . covers exactly the same ground as this amendment.”\(^{154}\) There are confirmatory remarks\(^{155}\) and, so far as I could find, none to the contrary. So too, Flack’s canvass of “speeches concerning the popular discussion of the Fourteenth Amendment” led him to conclude that “the general opinion held in the North . . . was that the Amendment embodied the Civil Rights Act.”\(^{156}\) Ely’s rejection of my “claim [that] the coverage of the two was meant to be identical”\(^{157}\) is therefore at war with the facts.

Even in the absence of proof that Act and Amendment were considered to be “identical,” what was said in the debates about the Act would be highly relevant to the scope of the Amendment under the doctrine of pari materia. It has long been settled that “If divers Statutes relate to the

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\(^{149}\)Ely at 434 n.129.

\(^{150}\)Id. (emphasis added).

\(^{151}\)BERGER at 22.

\(^{152}\)Id. at 23.

\(^{153}\)Id. at 23 n.13.

\(^{154}\)Id. at 23.

\(^{155}\)See e.g., Stevens, at text accompanying note 179 infra; Senator Poland, at text accompanying note 138 supra.

\(^{156}\)BERGER at 151-52.

\(^{157}\)Ely at 434 n.129.
same thing, they ought be all taken in consideration in construing any one of them”; “all acts in pari materia, are to be taken together, as if they were one law.” Particularly should this be the case where both were enacted at the very same time and dealt with the same subject matter, so that familiarity with the terms and meaning of the prior act may be presumed. Where terms had been given a distinct meaning in the prior act it requires evidence that the Framers meant to depart therefrom in the later act.

It is no answer to insist that Act and Amendment “say very different things.” Having in the course of the debates, for example, repeatedly spelled out what “privileges and immunities” meant, the Framers could safely assume that the words had the same meaning in the Amendment. As Chief Justice Marshall remarked, a Constitution cannot “partake of the prolixity of a legal code;” Bickel observed that “the specific and exclusive enumeration of rights in the Act” presumably was considered “inappropriate in a constitutional provision.” Then too, as Justice Holmes, reflecting centuries-old learning, held, “it is not an adequate discharge of duty for courts to say: ‘We see what you are driving at, but you have not said it.’ ” If the purpose is “manifest,” said Judge Learned Hand, it “override[s] even the explicit words used.”

What did the Civil Rights Act seek to secure, and what did the Amendment “incorporate”? Ely pays precious little attention to the crucial terms of the Act. Originally the bill provided,

That there shall be no discrimination in civil rights or immunities . . . on account of race . . . but the inhabitants of every race . . . shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase . . . real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishments . . . and no other.

Thayer (and others) assured the framers that “when those civil rights which are first referred to in general terms are subsequently enumerated, that enumeration precludes any possibility that general words which have been used can be extended beyond the particulars which have been enumerated.” Notwithstanding, John Bingham, draftsman of the Amendment, protested that the “civil rights” phrase was “oppressive,”

158 BACON’S ABRIDGMENT, supra note 76, Statute (1) (3). See also United States v. Freeman, 44 U.S. (3 How.) 556,564 (1845).
159 Ely at 434 n.129.
160 BERGER at 110 n.44.
161 Id. at 39.
162 Id. at 369.
163 Id. at 369.
164 Cawley v. United States, 272 F.2d 443,445 (2d Cir. 1969); see also note 76 supra, note 178 infra.
165 BERGER at 24 (emphasis deleted).
166 Id. at 28; see also Shellabarger, at text accompanying note 204 infra.
that it would "embrace every right that pertains to a citizen as such" and strike down "every state constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen." In short he was opposed to striking down all racial discriminations. At his insistence the "no discrimination in civil rights" was deleted. Ely does not pause to explain how Bingham came by the "privileges or immunities" clause of the Amendment to embrace precisely the view that he had categorically rejected, and this by resort to the lesser "privileges" in place of "civil rights."

Such an explanation is the more essential because James Wilson, Chairman of the House Judiciary Committee and Manager of the Bill, had given the "civil rights and immunities" clause a very narrow construction: the words do not mean that in all things, civil, social, political, all citizens, without distinction of race or color shall be equal . . . . Nor do they mean that all citizens shall sit on juries, or that their children shall attend the same schools. These are not civil rights and immunities . . . I understand civil rights to be simply the absolute rights of individuals, such as "The right of personal security, the right of personal liberty, and the rights to acquire and enjoy property."

Since this was likewise the interpretation given by Senator Trumbull, Bingham's insistence on deletion of "civil rights" represents an excess of caution, designed, as Wilson explained, to obviate a "latitudinarian" "construction going beyond the specific rights named in the section." To construe his "privileges or immunities" after Ely's fashion would therefore repudiate Bingham's rejection of an "oppressive" invasion of State sovereignty.

For his reading that the privileges or immunities clause "was intended to insure equality among locals," Ely relies on a general statement from Field's dissent in Slaughter-House which states that the Fourteenth Amendment extends to every citizen the protection article IV gives to citizens of sister States. But Field was quite explicit about the limited scope of the clause. In reply to his own question, "What, then, are the privileges and immunities which are secured against abridgement by State legislation?" Field declared, "In the first section of the Civil Rights Act Congress has given the interpretation of these terms [which] . . . include the right 'to make and enforce a contract . . . .'" Mark that Field thus confirms that the scope of "privileges or immunities" is defined by

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166 BERGER at 119-20.
167 Id. at 27.
168 Text accompanying notes 146, 148 supra.
169 BERGER at 122.
170 Ely at 426.
171 Slaughter-House Cases, supra note 148, at 96; see also text accompanying note 148 supra.
the Act, as the debates amply attest. Given the framers' repeated identification of "privileges or immunities" with the "fundamental" rights enumerated in the Civil Rights Bill, why is this not the situation in which to apply Ely's acknowledgment that "when the language seems out of accord with what we are quite sure was the purpose, we owe it to the framers and ourselves at least to take a second look at the language."\footnote{Text accompanying note 73 supra. (Emphasis added.)}

How does Ely accommodate his reading—"The most plausible interpretation of the privilege or immunities clause is, as it must be, that suggested by its language—that it was a delegation to future decision makers to define and protect certain rights that the document neither lists, at least not exhaustively, nor even in any remotely specific way gives directions for finding"—with the undeniable exclusion of suffrage and segregation from the reach of the Amendment? How does he account for the fact that attempts to prescribe any and all discriminations were repeatedly turned back?\footnote{BERGER at 163-84.} The plain fact, as Senator Fessenden, the highly regarded chairman of the Joint Committee acknowledged, was that "we cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions."\footnote{Id. at 99; see also Stevens' remarks, at text accompanying note 211 infra.}

Ely's answer, hereinafter discussed, is a variant of the "open-ended" theory: the Framers sub rosa incorporated into the "general" terms of the Amendment what had repeatedly been turned down.

### Entitlements

Ely also finds that the privileges or immunities clause ""says rather plainly that there is a set of entitlements that all persons (or at least all citizens) are to get and no state is to take away."\footnote{Ely at 426.} This he derives in part from Field's "rhapsodiz[ing] about 'natural and inalienable rights,'"\footnote{Id. at 427.} and in part from his reading of the "syntax" of the clause as "plainly that of substantive entitlement."\footnote{Id. at 426 n.108.} Field, as we have seen, tied his analysis of the clause to the "interpretation" given by the Civil Rights Act, and that Act was aimed at securing blacks the same rights as whites enjoyed, to protect against discrimination. The evidence that this is all that was contemplated is so copious that one marvels at Ely's reliance on "syntax."\footnote{"The general purpose," the Supreme Court held, "is a more important aid to meaning than any rule which grammar or formal logic may lay down." United States v. Shirey, 359 U.S. 255, 260-61 (1959); see also text accompanying note 163 supra.} For example, Stevens, leader of the Radicals, stated that the Amendment allows Congress to correct the unjust legislation of the States
so far that the law which operates equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way . . . . Your civil rights bill secures the same thing.179

The bill, Shellabarger explained, "secures 'equality of protection in these enumerated civil rights which the States may deem proper to confer upon any race.' "180 Trumbull stated that "if the State of Kentucky makes no discrimination in civil rights between its citizens, this bill has no operation whatever in the State of Kentucky," and he reiterated that it "in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person or property."181 Such was the purpose embodied in the Fourteenth Amendment, as a reconstruction historian cited by Ely has written: "Instead of formulating positively national civil-rights minima . . . the Amendment forbade unequal deprivation of the broad, uncodified mass of civil rights protections which a state professed to afford equally to the generality of its citizens."182

The Bill of Rights

Ely would discredit those who reject Justice Black's theory that the Fourteenth Amendment incorporates the Bill of Rights. Charles Fairman, wrote Bickel, "conclusively disproved Black's contention, at least such is the weight of opinion among disinterested observers."183 The Court itself, as Thomas Grey observed, "clearly has declined" to accept "the flimsy historical evidence" proffered by Black for his incorporation theory.184 Now Ely stamps that view, published by Fairman in 1949, as "voguish" (although his own espousal of non-interpretivism is even more "voguish" for that hardly goes back further than 1954) and states that "It is not so voguish any more," citing Alfred Kelly and Howard Jay Graham, a pair of wishful thinkers who will long be unsurpassed.185 Fairman's 110-page study, a model of fastidious and accurate scholarship, is opposed by Kelly's two pages, which may be summarized in his own terms:

[Note references]
Black’s argument is admitted partisan; it does not balance all the evidence, and at the very least it proves too much. But the Fairman attack also ignores or at least minimizes certain crucial pieces of evidence, that are far more significant than he is willing to admit.186

Presumably Kelly refers to the utterances of Bingham and Howard, which should be dismissed, not minimized. Ely labels me an “enthusiastic advocate”187 of the Fairman view; it was a hard-won enthusiasm for I traversed every inch of the debates, followed in Fairman’s every footnote. Did Ely do as much? It would be redundant to set out the confirmatory evidence detailed in a chapter of my book; there the curious reader will find ample comment on the arguments reiterated by Ely. Let it suffice to examine some of the points he makes.

Black relied on “‘the provisions of the Amendment’s first section, separately and as a whole’” for the incorporation of the Bill of Rights.188 The equal protection clause is without relevance thereto. As to due process, the Fifth Amendment’s due process clause is only one of a numerous cluster of rights; to reason that it picked up all the other rights is to reduce the other provisions to surplusage. When the clause was repeated in the Fourteenth Amendment it did not change color; and the legislative history of the Amendment shows that the Framers conceived of due process in its traditional terms. The Bingham-Howard utterances summoned by Black related to the “privileges or immunities” clause.189 Those words seemed to Black “an eminently reasonable way of expressing the idea that henceforth the Bill of Rights should apply to the States,” and on that score, says Ely, “Justice Black surely has a point.”190 The two concepts, however, are of entirely different provenance, deal with quite different matters, and, to borrow from Ely, “say very different things.”191 “Privileges or immunities” had its roots in article IV, § 2 of the original Constitution, which requires states to accord privileges such as “trade and commerce” to citizens of a sister state. Subsequently the Bill of Rights guaranteed a set of different rights, e.g. free speech, against the federal government. And as Ely himself notes, “if the fourteenth amendment’s privileges or immunities clause had meant to incorporate the entire Bill of Rights, that would include the fifth amendment’s due process clause, and the fourteenth amendment’s due process clause would have been superfluous,”192 an inadmissible interpretation, and one that vitiates Black’s “eminently reasonable way”

187Ely at 429 n.120.
188BERGER at 139.
189Ely at 439 n.143, remarks on Bingham’s “general state of confusion.” For similar expressions by others, see BERGER at 145.
190Ely at 431-32; see also id. at 430 n.122; BERGER at 145-46.
191Ely at 435 n.129.
192Id. at 432.
of applying the Bill to the states.

We start, therefore, with a serious textual obstacle to the Black thesis, not removed, according to Ely, by the legislative history. For he concludes that "although neither the ratified language nor what is known of the intentions that generated it fairly compels the conclusion that the provisions of the Bill of Rights were to be counted among the privileges or immunities, there is at the same time nothing in that language or those intentions that should preclude that result"; "the legislative history argument is one neither side can win". If that be the case, Black's argument fails.

First, given the fact that "privileges and immunities" did not originally comprehend the Bill of Rights, Black's proponents have the burden of proving that there was an intention by the Fourteenth Amendment to depart from that meaning, under Chief Justice Marshall's rule that an "opinion which is to establish a principle never before recognized should be expressed in plain and specific terms." Second, the federal government is one of limited powers; it is not enough that the exercise of power was not "foreclosed"; the question always is: where was the power granted. In light of the Framers' continuing attachment to state sovereignty and to the states' rights reserved by the Tenth Amendment, it must be shown that the new language was designed to curtail

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1 "Id. at 432, 430. In attempting to bolster the Howard-Bingham views, Ely is guilty of the very practice of which he unjustifiably accuses me: interpreting in "accordion fashion," Id. at 435 n.129, more bluntly, of using a double standard. He considers that the solitary remarks of Bingham and Howard "mount a powerful case," id. at 249; on the other hand he rejects the utterances that the Civil Rights Act and the Amendment were "identical" because "they were rare," id. at 435 n.129, although the fact is, as Charles Fairman wrote, "over and over," without contradiction, "the provisions of the one are treated as ... essentially identical with those of the other." Text accompanying notes 151-55 supra.

Why does Ely ignore the unanimity and absence of contradiction on the "identical" issue, whereas he stresses that "no member of the Committee . . . questioned [Howard's] statements in any particular"? Ely 430 n.121. Howard was, however, implicitly repudiated; after he spoke, Senator Poland stated, "The clause . . . that 'no State shall . . . abridge the privileges and immunities of citizens of the United States' secures nothing beyond what was intended by the original [Article IV] provision in the Constitution." BERGER at 148-49, which antedated the Bill of Rights. There were yet other subsequent assurances that the clause was identical with the Act, id. at 149-53, which had no reference to the Bill of Rights. Such remarks testify how little effect the Bingham-Howard remarks had on the thinking of the draftsmen, who were firmly committed to limited objectives. Then too, while Flack gathered from the contemporary prints that the people considered the Amendment "embodied" the Civil Rights Act, see text accompanying note 156 supra, he found no published statement that "the first eight amendments were to be made applicable to the States," BERGER at 152; to the same effect Fairman, BERGER at 148 n.66, indicating that the Bingham-Howard remarks sank without a ripple.

2 "Note 108 supra.

3 "When a question arises with respect to the legality of any power," Lee assured the Virginia Ratification Convention, the question will be "Is it enumerated in the Constitution?" 3 ELLIOT, supra note 50, at 186.

4 BERGER at 60-64. The pervasive attachment to federalism, to State control of local institutions, Paludan repeatedly emphasizes, was "the most potent obstacle to the Negroes' hopes for protected liberty." Id. at 185.
those rights, a conclusion, Ely concedes, that is not “fairly compelled” by the text of “privileges and immunities.” The legislative history clearly blocks such curtailment.

Bearing in mind that according to Flack and Fairman the people were not apprised that the Bill of Rights was to be made applicable to the states, nor that, in Flack’s words, “privileges granted by those amendments were to be considered as privileges secured by the [Fourteenth] amendment,”197 what Black said on another occasion sounds the death knell of his incorporation theory. He wrote, substituting for his “corporations” the words “Bill of Rights,”

The states did not adopt the Amendment with knowledge of its sweeping meaning under its present construction. No section of the Amendment gave notice to the people that, if adopted, it would subject every state law . . . affecting [the Bill of Rights] . . . to censorship of the United States courts. No work in all the Amendment gave any hint that its adoption would deprive the states of their long recognized power to regulate [matters controlled by the Bill of Rights].198

The Equal Protection Clause

To Ely, the equal protection clause clearly illustrates “inescapable open-endedness,” and “awareness,” borrowing from Bickel, “on the part of the framers that it was [a] constitution they were writing, which led to a choice of language capable of growth.”199 One would expect after Gerald Gunther’s discovery of Marshall’s disclaimer that this M‘Culloch dictum implied constitutional powers could “be enlarged by construction or otherwise” that academicians would no longer rely on the dictum.200 Not one to mince words, Ely asserts “the conclusion is utterly inescapable” that we cannot derive the content of the clause “from anything within the four corners of the document or the known intent of the framers.”201 He ignores the evidence that the framers employed equal protection as an adjective adjunct of the substantive privileges or immunities clause, designed to prevent discrimination with respect to the rights earlier enumerated in the Civil Rights Act. A few items must suffice.

In an early version of the amendment, provision was made for both “the same political rights and privileges and . . . equal protection in the

197Id. at 152.
198Id. at 156.
199Ely at 436.
200BERGER at 376-77. Gunther commented, “If virtually unlimited congressional [or judicial, for Marshall also disclaimed a judicial “right to change that instrument,” id. at 377,] discretion is required to meet twentieth century needs, candid argument to that effect, rather than ritual invoking of Marshall’s authority, would seem to me more clearly in accord with the Chief Justice’s stance.” Id. at 378 n.19.
201Ely at 438 (emphasis added).
enjoyment of life, liberty and property,” testimony that “equal protection” did not comprehend “political rights and privileges,” but was confined to “life, liberty or property.” When the “political rights and privileges” was elided, leaving “equal protection” alone, the latter patently did not include the deleted companion “political privileges” and a fortiori, those which had not even been mentioned. To be sure, the “political privileges” was replaced by “privileges and immunities,” but that, as we have seen, did not include “political privileges.” Throughout the debates on the Civil Rights Bill which, it will be recalled, only secured the “equal benefit of all laws for security of person and property,” the Framers interchangeably referred to “equality,” “equality before the law” and “equal protection,” but always in the circumscribed context of the rights enumerated in the bill. Shellabarger’s remarks are illustrative: “Whatever rights as to each of these enumerated civil (not political) matters the State may confer upon one race . . . shall be held by all races in equality . . . It secures . . . equality of protection in those enumerated civil rights. . . .” Bickel concluded that the Moderate leadership (which prevailed) had in mind a “limited and well-defined meaning . . . a right to equal protection in the literal sense of benefitting equally from the laws for the security of person and property.” This is irreconcilable with a “choice of language capable of growth.” Even the abolitionists shrank from “social equality.” In the debates on the fourteenth amendment, for which he voted, James Patterson of New Hampshire stated that he was opposed “to any law discriminating against [blacks] in the security of life, liberty, person, property and the proceeds of their labor. These civil rights all should enjoy. Beyond this I am not prepared to go . . . .” There were similar utterances by others; and there is no evidence that when the words “equal protection of the laws” were embodied in the amendment they were freighted with a new cargo of meaning—unlimited equality across the board. Instead the evidence is plainly to the contrary. The earlier quoted utterance of Patterson is confirmed by the fact that attempts to bar all discrimination were repeatedly voted down. Very early the foremost Radical, Stevens, proposed that

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207 Berger at 171. James Wilson, for example, stressed that the rights enumerated in the Civil Rights Bill were no “greater than the rights which are included in the general terms ‘Life, liberty, and property.’” Berger at 28; cf. text accompanying notes 144-46 supra, text accompanying note 208 infra.
210 Id. 169-72.
214 Id. 170 (emphasis added).
216 Berger at 170 n.20.
217 This is the view of Derrick Bell, a black academician. Berger at 167.
218 Id. at 29.
209 Thomas Davis, a New York Republican, said, Negroes “must be made equal before the law, and be permitted to enjoy life, liberty, and the pursuit of happiness,” but he was against “the establishment of perfect equality between the colored and the white race of the South.” Berger at 170 (emphasis added).
210 Berger at 163-64.
"all national and State laws shall be equally applicable to every citizen .
. that is the one I love . . . ." When he summed up his views on the amend-
ment, he said he had hoped to free our institutions "from every vestige of
. . . inequality of rights . . . that no distinction would be tolerated . . . . This
bright dream has vanished . . . ."211 No amount of crystal-gazing into the
textual "equal protection" can overcome this history—not noticed by Ely.
In sum, the historical facts—including the unmistakable exclusion of suf-
frage and segregation—establish the "known intent," i.e. the limited
meaning equal protection had for the framers.

The Open-Ended Theory

To escape from the facts Ely theorizes that the Framers deliberately
chose language "capable of growth,"212 Bickel's "open-ended phraseology" theory. Again a bare summary of the bulky evidence to the contrary213 must suffice. As Justice Frankfurter's clerk, Bickel's research
led him to the conclusion that "it is impossible to conclude that the 39th
Congress intended that segregation be abolished; impossible also to con-
clude that they foresaw it might be, under the language they were
adopting,"214 a far cry from a "choice of language capable of growth." Wristing with his conscience, Frankfurter asked, "What justifies us in
saying that what was equal in 1868 is not equal now," and concluded that
"the equality of laws enshrined in a constitution which was 'made for an
undefined and expanding future...' [the deflated Marshall dictum] is not
a fixed formula defined with particularity at a particular time."215 Thus
inspired, Bickel, now a research fellow at Harvard revising his memoran-
dum for publication, asked, "what if any thought was given to the long
range effect of the amendment in the future?" And he ventured the ten-
tative hypothesis: could resort to "equal protection of the laws"
have failed to leave the implication that the new phrase, while
it did not necessarily, and certainly not expressly, carry
greater coverage than the old, was nevertheless roomier, more
receptive to the "latitudinarian" construction? No one made

211Id. at 173; see Fessenden, at text accompanying note 174 supra. Stevens also stated
that the Amendment "falls far short of my wishes . . . [but] it is all that can be obtained in
the present state of public opinion." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).
212Text accompanying note 199 supra.
213BERGER at 99-116.
214Id. at 100.
215Id. at 132. This is a variant of the argument that words change their meaning over the
years and that we are therefore justified in adopting the modern meaning. In criticizing
that argument I instanced Hamlet's "can tell a hawk from a hand-saw," i.e. a heron, today
meaning a toothed cutting tool, to illustrate the danger inherent in the substitution of
modern meanings for those of the draftsmen. Id. at 370. From this Ely deduces that I can-
not "tell ambiguity from vagueness," Ely at 434 n.129, though neither was relevant to my
discussion of a change of meaning. Nor was my analysis at that point concerned with the
meaning of "privileges or immunities" or "equal protection."
the point with regard to this particular clause.216

"It remains true," he wrote, "that an explicit provision going further than the Civil Rights Act would not have carried in the 39th Congress." And he noted that the Republicans drew back from a "formulation dangerously vulnerable to attacks pandering to the prejudice of the people." But, he speculated, "may it not be that the Moderates and Radicals reached a compromise permitting them to go to the country with language which they could, where necessary, defend against damaging alarms raised by the opposition but which at the same time was sufficiently elastic to permit reasonable future advances?"217 The votes of 125 to 12 in the House and 34 to 4 in the Senate against suffrage proposals demonstrate that there was no need for such a compromise.218 Bickel's hypothesis, to speak plainly, is that the compromisers concealed the future objectives they dared not avow lest the whole enterprise be im-

Regarding the change of meaning argument, it needs to be noted that Frankfurter was at odds with the framers. In June, 1824, Madison wrote, "What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense?" 3 Farrant, supra note 40, at 464. And on "January 25, 1872, a unanimous Judiciary Committee Report, signed by senators who had voted for the 13th, 14th, and 15th amendments in Congress, declared:

'In construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended to be accomplished by those who framed it, and the people who adopted it.... A construction which should give the phrase "a republican form of government" a meaning different from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and expressed language of the Constitution in any other particular.... A change in the popular use of any word employed in the Constitution cannot retroact upon the Constitution, either to enlarge or limit its provisions.'

Avins, supra note 73, at 2, 571.

The Committee could invoke the authority of Thomas Cooley, cited to us by Ely, at text accompanying note 79 supra:

"A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seems desirable." A court "which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty.... The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time.... The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it."


So too, Justice Holmes declared, "Of course, the purpose of written instruments is to express some intention or state of mind of those who write them, and it is desirable to make that purpose effective." O. W. Holmes, COLLECTED LEGAL PAPERS 206 (1920) (emphasis added). It is only as Academe has struggled to rationalize the desegregation and reapportionment decisions that the "original intention" has been thrown into the discard.

216 BERGER at 101-02. Bickel did not take account of the elision of "the same political rights and privileges." Text accompanying note 202 supra.

217 BERGER at 104.

218 Id. at 105. Senator Sherman told an Ohio audience while the amendment was up for ratification, "we defeated every radical proposition. . . ." Id. at 105.
Ely retorts that "Obtaining ratification of open-ended language in the expectation it will be given an open-ended interpretation is not playing a trick." That "expectation," however, was not disclosed to the ratifiers; on the contrary, they were assured that the amendment went no further than the Civil Rights Act. Senator Fessenden defined a trick as doing "something . . . which you cannot do if you make it plain to their [the people's] senses what is the object." Beckel noted that a candid "formulation" would have "been dangerously vulnerable to attacks pandering to the prejudice of the people," that is, it would have been politically disastrous. In Ely's more subdued phraseology, "The recognition that there was racism in society doubtless was one reason the framers chose open-ended language capable of development over time." Hence, he explains, the speakers sought "to minimize the potentially radical sweep of the constitutional language." They did not merely minimize it, they concealed it. All this, of course, on the supposition, for which there is not a shred of evidence, that they meant to employ two-faced terms. Something that was not disclosed was not ratified, because ratification requires "a full knowledge of all the material facts. If the material facts be either suppressed or unknown" the ratification is invalid. And as Ely states, "something that was not ratified cannot be part of our Constitution."

As part of his critique Ely impugns my statement that "the key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia," paraphrasing my view that "given their racism the fourteenth amendment's framers could not conceivably have intended to draft a provision capable one day of supporting the interference that the blacks are entitled to vote." And he adds an ironical flick that "These, of course, are the self-same framers whose every conception Berger's methodology obligates him to defer to," thereby revealing that his respect for the framers' intent is geared to its correspondence with his predilections. Ely's statement that my views

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219 Ely at 436 n.132.
220 BERGER at 107. A leading Radical, Congressman Schenck of Ohio, averred the Democrats "are afraid that [the amendment] may have some concealed purpose of elevating Negroes . . . [to] make them voters. It goes to no such length." Id.
221 See Flack, at text accompanying note 85 supra.
222 Ely at 434 n.129. In another context, Henry Hart commented on the "ineffability of the assumption that in the interpretation of documents embodying a grant of general fundamental powers from the people to their government the representations made to the people to obtain the grants are irrelevant and what alone counts are the secret thoughts of men who drew the documents the people approved." Hart, Book Review, 67 HARV. L. REV. 1456, 1481 (1954).
223 Ely at 438 n.132. In another context, Henry Hart commented on the "ineffability of the assumption that in the interpretation of documents embodying a grant of general fundamental powers from the people to their government the representations made to the people to obtain the grants are irrelevant and what alone counts are the secret thoughts of men who drew the documents the people approved." Hart, Book Review, 67 HARV. L. REV. 1456, 1481 (1954).
224 Ely 434 n.129.
225 BERGER at 155 n.93.
226 Ely at 418.
227 Ely at 438 n.133.
228 Id.
“border on perversity” calls for a brief summary of some pertinent facts. The rejection of black suffrage by 17-19 states alone testifies to racism; “three-fourths of the States,” said Senator Howard, “could not be induced to grant the right of suffrage.” Senator Sherman said, “there was a strong and powerful prejudice among all classes of citizens against extending the right of suffrage to the negroes.” James Wilson felt constrained to assure the framers that “civil rights” did not extend to mixed schools and jury service. Senator Sherman said, “there was a strong and powerful prejudice among all classes of citizens against extending the right of suffrage to the negroes.”

But, Ely argues, “Curiously lacking is any attempt whatever to account for the fact that the fifteenth amendment, explicitly granting blacks the vote, was proposed and ratified only two years later i.e. 1869-1870, and this "seems fatal . . . to Berger’s general claim of the dominance of ‘Negrophobia.’ " Yet Senator Henry Wilson, a Massachusetts Radical, stated in January 1869, “There is not today a square mile in the United States where the advocacy of equal rights and privileges of those colored men has not been in the past and is not now unpopular.” In a recent historical study Philip Paludan concluded that racism was “as pervasive during Reconstruction as after. Americans clung firmly to a belief in the basic inferiority of the Negro race, a belief supported by the preponderance of nineteenth-century scientific evidence.” Whatever the explanations for adoption of the Fifteenth Amendment, abatement of racial prejudice was not one of them.

Throughout the leading object of the Republicans was to prevent the return to power of the slavocracy, because the combination of Southern and Northern Democrats could control Congress and elect a President. So long as the military occupation controlled the South, the North could block that return to power. In February, 1868, Senator Tipton stated that “negro suffrage was not looked to as a remedy . . . until Congress came to the conclusion that we could not execute the guarantees of the

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228 Id.
229 Text accompanying notes 58-60 supra.
230 Text accompanying note 81 supra.
231 Text accompanying note 167 supra.
232 Berger at 91.
233 Id. at 13.
234 Id. at 436 n.133.
235 Berger at 240.
236 Berger at 240.
237 Berger at 240.
238 A belief in racial equality,” said W. R. Brock, “was an abolitionist invention”; “to the majority of men in the mid-nineteenth century it seemed to be condemned both by experience and by science.” Id. at 13 n.39. See also id. at 12.
239 Id. at 15-16. Blaine of Maine stated, “The effect contemplated . . . is perfectly well understood, and on all hands frankly avowed. It is to deprive the lately rebellious States of the unfair advantage of a large representation in this House. . . .” Id. at 66.
Constitution without raising up a new class of loyal voters. . . .”238 H. E. Paine of Wisconsin stated, “We saw that there was no safety, absolutely no safety, to the nation except upon the solid rock of loyal reconstruction; that to such loyal reconstruction loyal majorities were indispensable; that we could not have majorities of white votes, and therefore must either have black votes or not have the majorities.”239 There were similar utterances by others.240 “There were two alternatives;” said Senator Patterson; “you must either give them indefinite military rule, which might lead to military despotism, or you must create a black voting population. . . .”241

The Fifteenth Amendment does not attest that there was no racism, either in 1866-1867 or in 1869-1870; rather it responded to changed political needs. When a few years later political exigencies dictated, the Republicans handed the Negroes over to the tender mercies of the South in exchange for the disputed Hayes-Tilden presidential settlement. “[T]here seems no doubt,” wrote Samuel Eliot Morison, “that a deal was made by the Republicans with Southern Democratic leaders, by virtue of which, in return for their acquiescence in Hayes’s election, they promised on his behalf to withdraw the garrison and to wink at non-enforcement of Amendment XV [sic], guaranteeing civil rights to the freedmen. The bargain was kept on both sides.”242 Finally, Ely’s appeal to the Fifteenth Amendment poses the question: why did not the framers, now that sentiment had changed, enact a suffrage statute pursuant to the “invitation” allegedly issued by the Fourteenth? Who would know better that they had left that way open? Their resort instead to the difficult ratification by three-fourths of the states testifies that they knew of no such invitation. It is a figment of mid-20th century academic fantasy.

CONCLUSION

Ely’s article marks an advance beyond his fellow “non-interpretivists” who are outraged that one should even question the legitimacy of the Warren Court’s “revolution.”243 He recognizes the merits, the deep-rooted appeal, of the “interpretivist” position, and that it requires an “heroic inference” to conclude “that enforcement of an ‘unwritten constitution’ is an appropriate response in a democratic republic.” To

238AVINS, supra note 73, at 293.
239Id. at 288.
240Senator Morton, id. at 289; Senator Benton, id. at 298.
241Id. at 327.
243Professor Richard Kay wrote of the reapportionment and desegregation decisions: “These doctrines have now become almost second nature to a generation of lawyers and scholars. Thus, it is hardly surprising that the casting of a fundamental doubt on such basic assumptions should produce shock, dismay, and sometimes anger.” Kay, Book Review, 10 CONN. L. REV. 801 (1978).
counter the "impossible" tradition of resting decision on principles "very clearly implicit" in the Constitution, Ely invokes an "invitation" to import extra-constitutional values.

Ely himself dismisses the due process clause from the "invitation" category. His reliance on the privileges or immunities clause runs afoul of the fact that it had acquired a recognized and limited meaning by judicial interpretation which, Senator Trumbull explained, the rights enumerated in the Civil Rights Bill followed, and which, Justice Field correctly stated, furnished the "interpretation" given by Congress to the privileges or immunities of the Fourteenth Amendment. Remains the equal protection clause, that on Ely's broad construction would render the central privileges or immunities clause superfluous, an interpretation that must be rejected. The word "equal" is, to say the least, ambiguous; how far "equality" stretches is subject to endless debate, precisely the situation requiring resort to the framers' intention. Ely's objection that there is no "known intent" is contradicted by the constant association of "equality," "equal protection" with the limited objectives of the Civil Rights Act.

Writing about the Roe abortion decision, Ely stated that "the Court had simply manufactured a constitutional right out of whole cloth and used it to superimpose its own view of wise social policy on those of the legislatures." True, this was under the due process clause; but the "new substantive equal protection," Herbert Packer pointed out, "has under a different label permitted today's justices to impose their prejudices in much the same manner as the Four Horsemen . . . once did."

Ely's solution represents, if not an "impossible" dream, a wildly improbable one. In the face of repeated rejections of attempts in the 39th Congress to abolish all distinctions, frankly acknowledged by Senator Fessenden and Thaddeus Stevens to be impossible of accomplishment, of Bickel's recognition that the framers did not dare to go beyond the

Professor Donald P. Kommers, has written: "The tendency of many reviewers of Berger's book is to dismiss his theory out of hand, in part because the modern liberal mind just cannot imagine turning the clock back to the days prior to Brown v. Board of Education and because of the fundamental fairness or simple justice for which Brown stands. But, as Berger suggests, if the Supreme Court's purpose is to establish justice without reference to the original intent of the framers, then what remains to circumscribe judicial power? Berger's critics have given singularly unsatisfactory answers to this question."

Kommers, Role of the Supreme Court, Rev. of Pol. 409, 413 (July, 1978).

See Sumner, at text accompanying note 77 supra.

4"Ely, supra note 5, at 937.

4"BERGER at 191-92. Philip Kurland stated that "The new equal protection, like the old equal protection, is the old substantive due process. . . . The difference between the new equal protection and the old substantive due process is essentially the difference in the hierarchy of values of the Court." Forum: Equal Protection and the Burger Court, 2 Hastings Const. L.Q. 645, 661 (1975). Gerald Gunther said, "The bad legacy of substantive due process and of ends-oriented equal protection involves a block to legislative ends, an imposition of judicial values as to objectives." Id. at 665.

4"Fessenden, at text accompanying note 174 supra; Stevens, at note 211.
confines of the Civil Rights Act lest the amendment be jeopardized,\textsuperscript{248} of Schenck's repudiation of a "concealed" purpose to grant suffrage,\textsuperscript{249} of Flack's studied conclusion that the broad powers now claimed would have been repudiated by the electorate\textsuperscript{280} (as its repeated rejection of suffrage alone demonstrates), of the Framers' recorded and pervasive attachment to State sovereignty,\textsuperscript{281} Ely would assume that all this was nullified by the talismanic terms of the Fourteenth Amendment, terms that are readily susceptible of a much simpler, traditional interpretation and on Ockham's rule is therefore to be preferred.

But for a few scattered utterances such as that of Frankfurter, the Court, as Thomas Grey has noted, "throughout our history" has resorted to bad legislative history and strained reading of constitutional language to support results that could be better justified by explication of contemporary moral and political ideals not drawn from the constitutional text. . . . [If] judges resort to bad interpretation in preference to honest exposition of deeply held but unwritten ideals, it must be because they perceive the latter mode of decision making to be of suspect legitimacy.\textsuperscript{252}

And as Robert Bork has pungently put it, "The way an institution advertises tells you what it thinks its customer demand,"\textsuperscript{253} for the people are unaware that the Court is engaged in rewriting the Constitution.\textsuperscript{254}

Ely would rescue the Justices from this cruel dilemma by his "invitation" theory. He attributes to Framers distrustful of the courts an invitation to reverse their unmistakable intention, for example, to exclude suffrage, an invitation upon which the Court had not acted on behalf of women, leaving that for the Nineteenth Amendment. He would carve out an exception from the article V amendment power, exclusively reserved to the people themselves, for the judiciary, who Hamilton observed "is next to nothing," a pro tanto repeal by implication which cannot be assumed but must be proved, and which violates the basic principle of government by consent of the governed.\textsuperscript{255} And to crown his theorizing, Ely would confine the "invitation" to which the Framers apparently attached no strings—at least he mentions none—by "principles" which he

\textsuperscript{244} Note 217 supra.
\textsuperscript{249} Note 82 supra.
\textsuperscript{250} Note 86 supra.
\textsuperscript{251} Note 196 supra
\textsuperscript{252} Grey, supra note 35, at 706.
\textsuperscript{253} Bork, at 319.
\textsuperscript{254} In the midst of the Court-packing debate, Professor Felix Frankfurter wrote President Franklin Roosevelt: "People have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course . . . it is they who speak and not the Constitution. And I verily believe that that is what the country needs most to understand." \textit{Berger} at 354, n.15.
\textsuperscript{255} "The people," James Iredell said, "have chosen to be governed under such and such principles. They have not chosen to be governed or promised to submit upon any other." \textit{Id.} at 295-96.
hopes to formulate in order to limit the untethered discretion. Should that not prove possible the courts, Ely admonishes, should "stay away" from the open-ended provisions, "whatever the framers may have been assuming." This at least has the merit of being consistent with his disregard of the Framers' intention. But is it conceivable that the Court would abjure a discretion so fervently defended by Academe because Ely cannot come up with limiting principles? Or if he produces such principles that they will weigh more heavily with the Court than did the Framers' unmistakable intention to exclude suffrage from the scope of the Fourteenth Amendment?

The long-established purpose of constitutionalism is to curb the authority of those entrusted with power; without such limits, the Framers well knew, democracy would lapse into Caesarism. Power vested in judges, they knew, is potentially tyrannical and, as Hamilton stated, was likewise limited. This generation has forgotten that for many years the Court constituted an insuperable obstacle to ameliorative socio-economic legislation—child labor, minimum wages and hours laws, income taxes—acting on what Ely now labels an "invitation" to import extra-constitutional principles. To be sure, the social goals and tactics of the earlier Court were anathema to those who would now rationalize the precisely similar Warren Court tactics because they are enamored of its results. As Senator Sam Ervin remarked, they would "interpret the Constitution to mean what it would have said if they, instead of the Founding Fathers, had written it." Of the academicians' attempts to rationalize such interpretations, a cool-eyed British political scientist wrote,

The quite extraordinary contortions that have gone into proving [that case] make sad reading for those impressed by the high quality of American legal-historical scholarship.

Addendum

As these lines are about to go to the printer, Ely has newly written that we are not "free to make the Constitution mean whatever we please." He has convincingly demonstrated that a divorce between a judge's per-

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255 See Hutchinson, C.J., at text accompanying note 95 supra. Lord Camden stated, "The discretion of a Judge is the law of tyrants. In the best of times it is often times caprice—in the worst, it is every vice, folly and passion, to which human nature is liable." R. Cover, Justice Accused: Anti-Slavery and the Judicial Process 152 (1975) (footnote omitted).
256 Berger at 293-94.
257 See Kurland, at note 246 supra.
259 Beloff, at note 65 supra.
sonal values and the social consensus that activists would have him divine is delusory, that what he is "really . . . discovering . . . are his own values,"265 that judges are by no means "best equipped to make moral judgments, in particular that they are [not] better suited to the task than legislators."264 And he comments that "our society did not make the constitutional decision to move to near-universal suffrage [i.e. a democratic society] and have superimposed on popular decision the values of first-rate lawyers,"265 that is, judges. With this I am in full accord, but in that case what becomes of the "invitation" to "import . . . considerations that will not be found . . . in the Constitution"? A fellow-activist, Michael Perry, who apparently goes too far for Ely,266 has just written of Ely's major premise, the "open-ended theory," that Berger has "devastated the notion that the framers of the fourteenth amendment . . . intended it to be open-ended."267

In contrast to Ely's yet-to-be formulated "principles" that should "limit" untethered judicial discretion, I do not suggest a general, "unified field theory," but make a modest proposal: given that the framers of the Fourteenth Amendment clearly and unmistakably intended to exclude suffrage and segregation from the scope of the amendment—the proof for which at least half-a-dozen commentators, including activists, now accept as solid268—judges are not empowered to decide suffrage and segregation issues. That is a clearly discernible "limit," one which the sovereign people themselves imposed, and which under the democratic principles Ely so eloquently sets forth,269 should command our adherence.

266Id. at 16; see also, id. at 49,51. Ely notes that "Lenin used to claim this godlike gift of divination of the people's 'real interests' . . . ." Id. at 51, n.198. The judge, said Learned Hand, "has no right to divination of public opinion which runs counter to its last formal expression." L. HAND, THE SPIRIT OF LIBERTY 14 (1952).

267Ely, supra note 262, at 56.

268Id. at 38.

269Id. at 48 n.185.

270Perry, Book Review, 78 COLUM. L. REV. 685, 695, 691 (1978). Ely himself is now critical of the proposition that "the Court should give content to the Constitution's open-ended provisions by identifying and enforcing upon the political branches America's fundamental values." Ely, supra note 262, at 15-16. An innocent bystander might wonder why Ely was moved to blast my analysis when it so closely parallels his own.


In a forthcoming article, Louis Lusky, a long-time activist, refers to "Justice Harlan's irrefutable and unrefuted demonstration (in dissent) that the Fourteenth Amendment was not intended to protect the right to vote. . . ." Lusky, Government by Judiciary: What Price Legitimacy, 5 HASTINGS CONST. L. Q._______ (1979).