

1978

The Constitution Goes to Harvard

Henry Paul Monaghan
Columbia Law School, monaghan@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Constitutional Law Commons](#)

Recommended Citation

Henry P. Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117 (1978).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/633

This Response/Comment is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

COMMENTARY

THE CONSTITUTION GOES TO HARVARD

Henry Paul Monaghan*

I

Doctrinal disorder haunts a generation of Supreme Court decisions construing and applying the strands of the fourteenth amendment.¹ But in a confusion contest between the Court and academic writers on constitutional law, picking a winner would be no simple task. Those of us in the academy, despite our comparatively ample time for reflection, have long resisted discussion of fundamental issues.

Professors Tribe and Michelman, two of our ablest writers, illustrate my point in their provocative recent essays on *National League of Cities v. Usery*.² Neither purports to erect more adequate scaffolding for the decision's federalism foundation.³ Rather, each attempts to transform the

* Professor of Law, Boston University.

¹ "Except in the area of law in which the Framers obviously meant [the equal protection clause] to apply — classifications based on race or on national origin, the first cousin of race — the Court's decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle." Trimble v. Gordon 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting). There is, for this purpose, no material difference between equal protection and due process. See generally Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L.J. 405 (1977). Accordingly, I will use the fourteenth amendment as a generic term to include the substantive component of the due process clause of the fifth amendment.

² 426 U.S. 833 (1976). Tribe, *Unravelling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977) [hereinafter cited as Tribe, *New Federalism*]. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977) [hereinafter cited as Michelman, *States' Rights*]. See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 5-22 (1978) [hereinafter cited as L. TRIBE, *CONSTITUTIONAL LAW*].

³ Indeed, viewed against the backdrop of "normal" (state autonomy) federalism theory, Professor Michelman provides a particularly powerful criticism of *National League of Cities*. For both Tribe and Michelman *National League of Cities*' "federalism" aspect is not the protection of the states *qua* states against national authority. It is, rather, derivative: Congress cannot interfere with the states in the discharge of the independent social service functions which under the fourteenth amendment they "owe" to their citizens.

decision into one which, in Professor Tribe's words, will contribute to a "just constitutional order."⁴ That order, in turn, has a centerpiece, a theory of "affirmative" constitutional claims against the government. I doubt that the persuasiveness of such a theory is enhanced by this reworking of *National League of Cities*. My interest, however, is in the underlying theory, for which *National League of Cities* ostensibly becomes both "surprising"⁵ supporting evidence and an attractive, though subtle, showcase.

The affirmative claims thesis has roots in an earlier, widely noticed essay by Professor Michelman arguing that the fourteenth amendment should be read as requiring the government to satisfy the "minimum just wants" of its citizens.⁶ This conception radically transcends the traditional orthodoxy that the amendment's guarantees are essentially negative — rights to be free from certain governmentally imposed burdens, disabilities and discriminations — rather than a source of positive claims to public funds, employment or property.⁷ At first blush one is tempted to say that, if taken seriously, affirmative claims doctrine would place the entire governmental structure in a gigantic federal judicial receivership.⁸ But given the present level of governmental intervention in health, education, and housing, this objection may not be very formidable. If fourteenth amendment "duties," as posited by affirmative claims theory, are activated in part by legislative recognition of "just wants," judicial decrees would frequently be directives to reshape existing programs rather than to create novel ones.⁹ In any event, both Professors Michelman and Tribe, in apparent recognition of the tension between their view and the central constitutional axiom that, in our representative democracy, policymaking is assigned to the elected branches of the government,

⁴ Tribe, *New Federalism*, *supra* note 2, at 1066.

⁵ *Id.*

⁶ Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). See also Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 59-64 (1977).

⁷ See Monaghan, *supra* note 1, at 413-14. In certain limited areas, such as the criminal process, it is at least arguable that "affirmative" rights are being judicially enforced. See, e.g., *Bounds v. Smith*, 430 U.S. 817 (1977) (constitutional right of access to the courts requires prison authorities to provide prisoners with adequate law libraries and legal assistance).

⁸ This would not be true of a regime based on *Lochner v. New York*, 198 U.S. 45 (1905), which could be enforced by negative decrees.

⁹ See Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 1013-15 (1973) [hereinafter cited as Michelman, *Welfare Rights*].

willingly posit that many affirmative claims would not be judicially enforceable.¹⁰ Mr. Justice Holmes' earthy positivism notwithstanding,¹¹ there is no logical difficulty with this position. Nonetheless, such a limitation is at least suggestive that the affirmative claims theorists apprehend the unpalatability of their view.¹²

My major difficulty is elsewhere. What are the essential premises relating a theory of affirmative claims to the fourteenth amendment? On the surface at least Professors Michelman and Tribe are open to an interpretation that, at bottom, the fourteenth amendment magnetically attracts *any* theory — whether it be that of Herbert Spencer or John Rawls — which its holder asserts will promote a “just constitutional order.” Arguments about the fourteenth amendment are thus transformed into arguments about the nature of distributive justice.¹³ On such a view, as one of my former students contends, the entire history of “Western Democracy,”¹⁴ let alone Justice Frankfurter's traditions of “English-speaking peoples,”¹⁵ becomes a vast reservoir of potential constitutional principles. Assumptions of this, or slightly narrower, dimensions are implicit (they are seldom explicit) in virtually every piece written on the fourteenth amendment, all on the assumed premise that the amendment's language is “open textured” or “spacious.”¹⁶ But is all this correct? Or does the constitution itself, fairly read in light of its “origin and the line

¹⁰ Michelman, *States' Rights*, *supra* note 2, at 1191 n.86; Tribe, *New Federalism*, *supra* note 2, at 1088-90.

¹¹ “Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.” *The Western Maid*, 257 U.S. 419, 433 (1922) (Holmes, J.). *But see* *Giles v. Harris*, 189 U.S. 475, 487-88 (1903) (Holmes, J.).

¹² While Professor Tribe refers to these affirmative claims as “rights,” Tribe, *New Federalism*, *supra* note 2, at 1076, and Professor Michelman calls them “inchoate rights,” Michelman, *States' Rights*, *supra* note 2, at 1191, I have described their theory in terms of “claims.” While this is a matter of form, I do so because traditionally the term right has an “adjudicatory” character. Moreover, I do not believe that the components of the authors' “affirmative claims” can be formulated with enough clarity and specificity to fit within our general conception of what constitutes a “right.” *But see* Michelman, *State's Rights*, *supra* note 2, at 1190 n.84. *See also* Karst, *supra* note 6, at 59-64.

¹³ Of course, the theory must be “principled.” In large measure that requirement means only that the resulting doctrine be logically coherent, a condition applicable to all rational discourse. In addition, I suppose that the requirement of principle would in the specific context of constitutional law require that the doctrine not “obviously” contradict the constitutional text or structure.

¹⁴ Note, *Of Interests Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U.L. REV. 462, 476 (1977).

¹⁵ *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

¹⁶ On the assertedly open-ended nature of the due process clause as a matter of original understanding, *see* Monaghan, *supra* note 1, at 414-16. *Compare* Munzer & Nickel, *Does The Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977).

of [its] growth,"¹⁷ fix relatively circumscribed limits on the *sources* which one may properly invoke for the development of substantive constitutional principle?¹⁸

We are not in need of inventive articles on whether fornication among consenting adults is constitutionally protected activity.¹⁹ We have for a long time been in desperate need of focused and sustained scholarly attention directed to the question of the appropriate sources of doctrine for the fourteenth amendment.²⁰ Happily, I see increasing evidence that academic energy is now being devoted to first principles. Professor Brest has published his pathbreaking casebook, *Processes of Constitutional Decisionmaking*.²¹ Professor Tribe has just published an admirable and stimulating treatise which, *inter alia*, contains a comprehensive model for an "activist," "open-ended" view of the constitution generally and of the fourteenth amendment specifically.²² It will take time to digest this important work, but quite obviously the persuasiveness of his justifications warrants careful attention.

¹⁷ *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.).

¹⁸ The problem is not limited to the due process and equal protection clauses. Professor Ackerman has recently published a book on the taking clause. B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977). He quickly, and apparently happily, comes to the conclusion that nothing in the text or the intent of the clause is helpful as to its content. And this conclusion frees him for a lengthy analysis of the clause, in which he compares two different philosophical world views (Utilitarianism and Kantianism) with that of "Ordinary Layman." So far as I can see, Professor Ackerman's conceptual apparatus is readily transplanted to many constitutional provisions, particularly due process and equal protection. I fully recognize that philosophy is now very "in" among academic lawyers. It is, after all, no surprise that its normative, integrative approach would push economically oriented law thinking and research off center stage. One must, therefore, now have, or at least be prepared to deal with, "world views." But, even so, what has all this to do with constitutional law? For me this is a bothersome problem which runs through all of the jurisprudentially oriented writings of Professor Dworkin on the subject of constitutional law. For him, the fourteenth amendment seems only a platform for the expression of philosophical ideas.

¹⁹ The inevitable has occurred. Despite *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976), a state court has sustained such a claim. See *State v. Saunders*, 46 U.S.L.W. 2344 (Gen. N.J. Dec. 13, 1977), a decision by a court which has long been a "leader" in constitutional invention-innovation (pick one). Professor Tribe would apparently agree with this decision. See L. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 2, § 15-3.

²⁰ This is true even if we rigorously separate the question of what the constitution means from the nature and scope of its judicial construction. L. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 2, § 3-4.

²¹ P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (1975), reviewed in Monaghan, Book Review, 90 HARV. L. REV. 1362 (1977).

²² L. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 2, § 3-4.

II

In *Government by Judiciary*²³ Raoul Berger, too, pursues fundamentals. But he reaches conclusions far different from those of Professor Tribe. Indeed, his conclusions represent a sharp challenge to virtually every current conception of the fourteenth amendment. Berger advances two central points. *First*, the intention of the framers of § 1 of the fourteenth amendment fixes its meaning. *Second*, that intention is both clear and specific: the framers designed § 1 to implant the rights guaranteed by § 1 of the 1866 Civil Rights Act into the constitutional text. The Act provided:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.²⁴

Berger summarizes his view of the fourteenth amendment as follows:

The three clauses of § 1 were three facets of one and the same concern: to insure that there would be no discrimination against the freedmen in respect of "fundamental rights," which [because of the 1866 Act] had clearly understood and narrow compass. Roughly speaking, the substantive rights were identified by the privileges or immunities clause; the equal protection clause was to bar legislative discrimination with respect to

²³ R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

²⁴ 14 Stat. 27 (1866) (current version at 42 U.S.C. §§ 1981-1982 (1970)).

those rights; and the judicial machinery to secure them was to be supplied by nondiscriminatory due process of the several States . . . The framers, it needs to be said at once, had no thought of creating unfamiliar rights of unknown, far-reaching extent by use of the words "equal protection" and "due process." Instead, they meant to secure familiar, "fundamental rights," and only those, and to guard them as of yore against deprivation except by (1) a nondiscriminatory law, and (2) the established judicial procedure of the State.²⁵

In Berger's view, therefore, §1 of the fourteenth amendment was a conservative, restrained measure: its premise was that slavery is not in fact or law abolished unless the freed man has certain *civil* rights: rights to personal security, to contract, to hold property, etc.²⁶ But the amendment's framers intentionally left untouched racial discrimination in political and social matters. This latter fact, Berger contends, is unremarkable, given the pervasive Negrophobia of the day, one shared in varying degrees by the radicals themselves.²⁷

This leads Mr. Berger to two specific conclusions — that the framers intended neither school segregation nor voting in state elections to be within the ambit of §1. More generally, of course, Berger concludes that the Supreme Court decisions imposing nontextually specified values, for example, of the proactive choice variety, unquestionably go far beyond the framer's intention. Their intention was to protect a specific, *closed* category of interests, not to create an open-ended license to the national government, particularly its judges, to demand from the states whatever might momentarily seem essential to current conceptions of "ordered liberty" or a "just constitutional order."

There are, I recognize, lawyers and scholars whose constitutional philosophy is organized around a belief in a "living constitution." As the metaphor expands the Supreme Court plays the role of an on-duty physician charged with keeping the Constitution ever young and healthy. Not surprisingly, proponents of that view express indifference, even scorn,²⁸

²⁵ R. BERGER, *supra* note 23, at 18-19.

²⁶ *Id.* at 22-29.

²⁷ *Id.* at 10 ("The key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia, that the Republicans, except for a minority of extremists, were swayed by racism that gripped their constituents rather than by abolitionist ideology.").

²⁸ See L. LEVY, *JUDGMENTS: ESSAYS IN AMERICAN CONSTITUTIONAL HISTORY* 17 (1972). See Monaghan, *supra* note 1, at 414-15. Professor Cover apparently subscribes to this view. While reviewing Berger's book, he writes,

for any real concern with the intent of those initially responsible for a constitutional provision. But the standing tradition is, at least formally, to the contrary. Thus, in his important article on the segregation cases Professor Bickel began by emphasizing the relevance of an inquiry into original intent.²⁹ He rightly cautioned, however, that such an inquiry be undertaken not in "mechanical" fashion, but rather as "'a function of state craft' and of historical insight."³⁰ So approached, there is an inevitable and ever increasing tendency heavily to discount original intent in certain areas, particularly with respect to the 1789 and 1791 "constitutions," at least if intent is viewed in relatively narrow, specific terms. With respect to general questions of separation of powers³¹ and perhaps of federalism³² the underlying mode of judicial analysis is that of reasoning and drawing inferences from the structure and relationships created by the 1789 document.³³ As to the bill of rights, judges and scholars have downplayed a narrow conception of original intent through a two-stage process. First, the relevance of the concrete historical experience is minimized. For example, they deny that the religion clauses can be said

If the Supreme Court ought to labor under the constraint of the framers' specific intentions it is because we and our progeny will find it useful that the justices be constrained in that way. In other words this reading of the Constitution must stand or fall not upon the Constitution's self-evident meaning, nor upon the intentions of 1787 or 1866 framers. It constitutes a judgment about our own political present and future and about alternative theories of judicial activity which will best serve it. The ultimate and only justification for the constitutional government we have is that it will secure to *us* and our posterity the blessings of liberty — not that it was intended by the framers to bind us.

Cover, Book Review, *THE NEW REPUBLIC*, Jan. 14, 1978, at 26-27. One wonders whether Professor Cover would feel the same way about a constitutional amendment passed ten years ago.

²⁹ Bickel, *The Original Understanding and the Segregation Decision*, 69 *HARV. L. REV.* 1, 2-6 (1955).

³⁰ *Id.* at 5 (quoting F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 76 (1938)).

³¹ *E.g.*, *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977).

³² For a dramatic recent illustration, see *United States Steel Corp. v. Multistate Tax Comm'n*, 98 S. Ct. 799, 807-08 (1978): "This suggests that the Framers used the words 'treaty', 'compact', and 'agreement' as terms of art, for which no explanation was required and with which we are unfamiliar . . . Whatever distinct meanings the Framers attributed to the terms in Art. 1, §10, those meanings were soon lost."

National League of Cities v. Usery, 426 U.S. 833 (1976), correctly asked (but in my opinion incorrectly answered) the question whether the position of the states in the federal union implied some limitation of the otherwise sweeping federal commerce power.

³³ See generally C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

simply to embody the antecedent Virginia practice,³⁴ or the confrontation clause the common law rules of evidence.³⁵ The intent problem is then refocused: original intent is conceptualized at a sufficiently general level to permit dealing with the matters at hand,³⁶ sometimes with considerable strain on the amendment's concrete historical background³⁷ and indeed its language.³⁸ This process has, in part, been reinforced by attempts to distinguish between the "meaning" of the provision, and its "application."³⁹

Set against this background, Berger's uncomfortable and unfashionable analysis is an important one. It will not do, as some have already done, to brush it aside in a peremptory manner. For I would insist that any theory of constitutional interpretation which renders unimportant or irrelevant questions as to original intent, *so far as that intent can be fairly discerned*, is not, given our traditions, politically or intellectually defensible.⁴⁰ And Berger argues that, whatever may be said of the eighteenth century document, the intent of the framers of the fourteenth amendment is clearly discernible.⁴¹ All students of constitutional history agree that a major concern of §1 was to place the 1866 act on an incontrovertible con-

³⁴ See, e.g., L. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 2, § 14-3.

³⁵ See, e.g., Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 568-69 (1978).

³⁶ "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems v. United States*, 217 U.S. 349, 373 (1910). Professor Ely follows that tradition in writing that constitutional provisions should be applied to new situations involving, "the sorts of evils the framers meant to combat and . . . their twentieth century counterparts." Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 929 (1973) [hereinafter cited as Ely, *The Wages of Crying Wolf*].

³⁷ *Williams v. Florida*, 399 U.S. 78, 86-103 (1970) (despite the fourteenth century origins of the twelve-person jury, the sixth and fourteenth amendment jury trial guarantee is satisfied by a six-person body). For further developments, see *Ballew v. Georgia*, 46 U.S.L.W. 4217 (U.S. 1978) (five-person jury held unconstitutional).

³⁸ See, e.g., *Olmstead v. United States*, 277 U.S. 438, 472-75 (1928) (Brandeis, J., dissenting).

³⁹ See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); Gaffney, *History and Legal Interpretation: The Early Distortion of the Fourteenth Amendment by the Gilded Age Court*, 25 CATH. U.L. REV. 207, 215-16 (1976); cf. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 521 (1964) ("[m]eaning is application"). The distinction between changes in meaning and application has been applied in the federalism area. See *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1 (1877).

⁴⁰ Bickel, *supra* note 29, at 3-4.

⁴¹ It needs to be emphasized that the records of the 39th Congress are free from the reproach often leveled at legislative history — that it is 'enigmatic'. A state-

stitutional foundation.⁴² Berger's critical conclusion is that this exhausted their intention. Given the importance of this contention, we shall undoubtedly see, and can no doubt profit from, another round of discussion on that matter. Indeed, Berger's colleague, John Ely, as yet⁴³ no advocate of the position that there is a limitless source of principles for giving content to the fourteenth amendment, has recently prepared an important analysis arguing, *inter alia*, that Berger's description of the evidence of framers' intention is excessively restrictive.⁴⁴

I cannot in this brief comment defoliate that thicket, even if were I to possess far better scholarly qualifications for such a task than I in fact do. My own examination of the historical materials and of the numerous commentaries thereon has left me impressed with the considerable strength of Mr. Berger's case, particularly his conclusion that voting in state elections was not an interest embraced within §1 of the amendment.⁴⁵ But despite the stimulation of his book, I have become increasingly doubtful that any conclusive case can be made one way or the other. It is an understatement to say that the framers lacked clarity in their thinking, and Berger certainly shows that many apparently thought that §1 of the fourteenth amendment and §1 of the 1866 act were equivalents. But the hard fact remains that the amendment's language is eye-catchingly different from and far more inclusive than that of the 1866 act. And, as Professor Ely emphasizes,⁴⁶ that language is entitled to be treated as the strongest and best evidence of the overall intention of the framers, whose

ment such as that of Charles P. Curtis, "It is a [*sic*] hallucination: this search for intent. The room is always dark" simply cannot stand up against these records.

R. BERGER, *supra* note 23, at 6.

⁴² It turns out that the fourteenth amendment was unnecessary for this purpose. The 1866 act could rest upon § 2 of the thirteenth amendment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); L. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 2, § 5-13.

⁴³ Compare Ely, *The Wages of Crying Wolf*, *supra* note 36, with Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, forthcoming in 53 *IND. L.J.* (1978) (lecture delivered on Feb. 7, 1978, at the Indiana Law School) [hereinafter cited as Ely, *Constitutional Interpretivism*].

⁴⁴ Ely, *Constitutional Interpretivism*, *supra* note 43. Like Berger, Ely would emphasize the privileges and immunities clause, rather than the due process clause, as the textual "home" for whatever substantive rights exist. This leads to the question whether that clause is limited to natural persons. C. FAIRMAN, *RECONSTRUCTION AND REUNION, 1864-88: PART ONE 1387-88 (6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES (P. Freund ed. 1971))*.

⁴⁵ I recognize that textually one could argue that this is so because § 2 of the amendment deals with the subject, see *Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974), and accordingly, *only* voting in state elections is exempted from the general reach of § 1.

⁴⁶ Ely, *Constitutional Interpretivism*, *supra* note 43.

“specific” intention in the turbulent thirty-ninth Congress hardly approached unanimity. Moreover, unlike the 1866 act, the congressionally fashioned fourteenth amendment was not a completed legal act: it required ratification in the several states before becoming effective. It is surely plausible, given the general character of §1’s phrasing, that the ratifiers — those who gave the amendment legal life — perceived that they had approved a constitutional change more sweeping than a simple codification of the 1866 act.

Plausible, yes — but a wholly satisfying rebuttal to Berger, no. For I think the framers mirrored the views of the country. We forget that many mid-nineteenth century Americans, perhaps a clear majority, opposed slavery and racial equality with equal intensity. They could logically believe that emancipation required that the freed man possess certain rights to personal security and property. Simultaneously, they could favor rank discrimination against blacks in political and social matters.⁴⁷ Setting the language of the fourteenth amendment against these complexities only deepens the mystery for me. Mindful of Hume’s admonition that “a wise man . . . proportions his belief to the evidence,”⁴⁸ I conclude that what the framers thought §1 embodied cannot be determined with certainty. Nonetheless, the general language of §1, coupled with some supportive legislative history, seems to me to allow the judgment that §1 goes beyond the 1866 act.

Even if its architects intended §1 to transcend the 1866 act, the question persists of how sweeping a change in the governmental structure §1 authorized. Those who attack Mr. Berger frequently slip in a comfortable *non sequitur* at this point: they assume that if Berger is in error, §1 perforce has a dynamic content. Logically, however, their demonstration that Berger’s list of §1 rights is too narrow is not proof that it is proper to measure the content of the fourteenth amendment by other than *some* closed set of rights as they were understood in 1868. In other words, their attack does not dispose of a limited conception of the fourteenth amendment, with the judge’s function being essentially historical⁴⁹ — to enter a time machine, return to the year 1868, and scrutinize “contemporary” sources to determine the extent to which the assertedly expansive language of §1 is qualified and limited by some narrow set of controlling

⁴⁷ This theme runs through D. POTTER, *THE IMPENDING CRISIS 1848-1861* (1977).

⁴⁸ D. HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* 120 (Gateway ed. 1956).

⁴⁹ Mr. Justice Gray once insisted that “all questions of constitutional construction” are, at bottom, “largely a historical question.” *Sparf v. United States*, 156 U.S. 51, 169 (1895) (Gray, J., dissenting).

objectives. Thus §1 would prohibit only what fell within those objectives, however conceptualized, and "their twentieth century counterparts." My own problems become acute here, because I doubt the viability of any such inquiry. But it seems to me that my worries should be shared by the "dynamists" as well. Does the language of §1 yield a "dynamic" content merely because it is *capable* of supporting such a result?⁵⁰ Or is it necessary to go further and establish, a hard task given Berger's contrary showing,⁵¹ that either the framers or the ratifiers intended a dynamic, "open texture" to §1?⁵² Whatever justifications "dynamists" may mount on behalf of their results, the challenges of *Government by Judiciary* cannot honestly be ignored.⁵³

I recognize that one can conceptualize the original intent of the framers and ratifiers at a sufficiently generalized level so that one can resort to the ancient "distinction" between meaning and application. Thus *Roe v. Wade* might be viewed as simply giving new application to the "original" meaning of the due process (or privileges and immunities) clause. But I have considerable difficulty with any such approach to constitutional provisions. Excessive generalization as to "intent" seems at war with any belief that a constitutional amendment is a *conscious* alteration of the frame of government whose major import should be reasonably apparent to those who gave it life. The framers and ratifiers could have enacted an amendment which imposed the dictates of "ordered liberty," static or evolving, on the states. I find too little in the relevant source material, including the constitutional text, to think it more probable than not that any such sweeping change in the governmental structure was intended. Moreover, and more importantly, I am unable to believe

⁵⁰ Many efforts at describing the framers intention in "dynamic" terms are simply conclusory, resting upon the "general" language of § 1. See, e.g., Karst, *supra* note 6, at 17. Notice that Professor Bickel, *supra* note 29, apparently believed that the fact that the amendment's language was capable of a dynamic content did not obviate the need for a sustained focus on the legislative history.

⁵¹ It is almost amusing to see advocates of a dynamic content quoting the few favorable snippets and fragments from the legislative history.

⁵² Professor Bickel's well-known argument that the fourteenth amendment has a general expanding content which was the intended result of a deliberate "compromise" between radicals and moderates, Bickel, *supra* note 29, at 61-63, strikes me as resting on a very dubious historical foundation. See R. BERGER, *supra* note 23, at 104-05.

⁵³ There is an additional problem. I have serious doubts about whether "open textured provisions" can be enforced by courts. These provisions seem to me too indeterminate in content to serve as predicates for judicial action. Professor Fairman states that Senator Reverdy Johnson's position implied that the privilege and immunities clause "for purposes of litigation . . . did not have a definite meaning." C. FAIRMAN, *supra* note 44, at 1297.

By contrast, I am not convinced by Berger's view that congressional power under § 5 is limited by the content of the 1866 act.

that in light of the then prevailing concepts of representative democracy, the framers or ratifiers of §1 intended the *courts* (rather than the national legislature pursuant to §5) to weave the tapestry of federally protected rights against state government.

Finally, I return to where I began. I cannot free myself from some concern for the original intent of those responsible for §1. Thus unliberated and on the basis of the available evidence, I find it impossible to accept a contention that §1 was to encompass claims of affirmative governmental duty. For me the arguments of Professors Tribe and Michelman are incomplete. Professor Tribe focuses upon Supreme Court decisions in support of affirmative claims theory. He is surely right in stressing how frequently they in fact reflect a perception about the importance of certain "just wants."⁵⁴ But I think it fair to say that his analysis feeds heavily upon the existing doctrinal disorder and that the core of recent judicial decisions is hard against him. Professor Michelman advances a different, theoretically oriented approach.⁵⁵ To my eye, its crucial point resides in the assertion that the merits of affirmative claims theory "cannot be conclusively resolved by historical research into what the framers had in mind" and in a supporting footnote endorsing the view that as "a matter of actual history" we have a "natural-law Constitution."⁵⁶ Perhaps he is right in his conclusions about our "actual history." But viewed in terms of "historical research," I am not persuaded. The relevant history simply cannot be read to support a claim that the fourteenth amendment was designed to require affirmative state responses to private claims to governmental services. The political thinking of the amendment's day could neither absorb nor comprehend a conception of modern, "activist" government. The framers and ratifiers of the fourteenth amendment acted against a widely shared intellectual background, that of a negative, limited, passive, laissez-faire government. Thus, I can understand a view of the amendment which goes beyond the 1866 act in an effort to enlarge personal autonomy by positing fundamental rights and a freedom from unreasonable discriminations.⁵⁷ I cannot, however, bridge the gap from the fourteenth amendment to affirmative claims theory, however moving as a matter of political and social justice the latter may be.⁵⁸ Perhaps the intent of the framers can be conceptualized to support

⁵⁴ Tribe, *New Federalism*, *supra* note 2, at 1078-90.

⁵⁵ Michelman, *Welfare Rights*, *supra* note 9, at 1003-19.

⁵⁶ *Id.* at 1005.

⁵⁷ L. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 2, at §§ 15-1 to -21 (1978).

⁵⁸ Of course, sympathy with the affirmative claims theory view has consequences at the judicial level, affecting as it does questions of statutory construction. Michelman, *Welfare Rights*, *supra* note 9, at 1013-14.

affirmative claims theory in the context of an "activist" state, but the task remains unaccomplished.⁵⁹ If it cannot be done, the theory can endure only upon an argument — not palatable to me — that the question of original intent is irrelevant. If so, when did it become irrelevant? Why? Absent a satisfactory account of original intent by affirmative right theorists, I shall persist in the belief that the good citizens of Utah may organize their polity around "right wing" economic and social theory. The fourteenth amendment should not be interpreted in either the Supreme Court or the Harvard Law School to forbid such a result. The fourteenth amendment does not require anti-*Lochner*.⁶⁰

III

If affirmative claims theory cannot be reconciled with any acceptable conception of original intent, Berger's view, whatever its intrinsic merit as an historical inquiry, presents me with an equally unacceptable interpretation of the fourteenth amendment. This is not because I am (as yet) sympathetic to the expansive, open-ended views on the meaning of the constitutional text. Far from it. I prefer to leave the present free to govern itself though the *ordinary* political processes sanctioned by the constitution. My reason is unabashedly conservative: nearly a century of constitutional interpretation contrary to Berger's premises has created and crystallized important expectations far too ingrained in our political-constitutional order to be uprooted. Accordingly, whatever the framers thought about the applicability of the bill of rights to the states, for example, no justice could adequately and responsibly defend today the position that the first amendment restricts only the central government.⁶¹ Of

⁵⁹ One could argue that the *now* apparent vagueness of § 1's language supports a view that the framers intended to enact only general principles, whose meaning might so far evolve as to forbid practices which the framers at that time had no thought of abrogating. See Bickel, *supra* note 29, at 63-64.

⁶⁰ *But see* Tribe, *New Federalism*, *supra* note 2, at 1087-90.

⁶¹ For this reason, Justice Harlan's opinion in *Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part) has always struck me as among the most interesting in constitutional law. There Justice Harlan cast a fifth vote against a congressional act lowering the voting age in state elections to 18. Most of his elaborate opinion was designed to show that the voting was not an interest protected by § 1 of the fourteenth amendment, a position which I think is historically correct but which seemed foreclosed by a long and unbroken line of Supreme Court authority. Justice Harlan admitted this and that if he followed authority he would have felt constrained to uphold that act. 400 U.S. at 152. Nonetheless, he devoted but a few paragraphs to the claims of *stare decisis*, ultimately rejecting it on this "fundamental" matter. *Id.* at 218-19. I think he was mistaken

course, it could be argued that the court as a whole, and not an individual justice, should reconsider that position.⁶² But my own sense is that it is far too late for views which, in the name of original truth, would revolutionize the existing constitutional order.⁶³ Indeed, while current members of the court act — although they do not write — on the view that *stare decisis* is inapplicable to any issue on which they can muster a majority, the corresponding sense of impermanence in constitutional law is misleading. Paul Freund long ago correctly noted that beneath the widely advertised “discord” there is a large measure of “concord” on important issues.⁶⁴ One such area is the applicability of the bill of rights to the states; another is that §1 imposes some restraints beyond those of amendments 1-8. In short, my view is that “old” constitutional revolutions, if that is what they are, are to be protected; new ones quarantined so far as possible.⁶⁵ This is not purely (although it is, no doubt, in part) a psychological mind set resistant to change, one comfortable with the past, “any” past, but fearful of the future. It is, I think, because I really do not believe that “constitutionalizing” a subject — withdrawing it from the reach of the ordinary political process — is readily consistent with the fundamental axiom of our constitutional order, namely, representative democracy.⁶⁶ The “critical” fact, Professor Ely rightly observes, is that

at this point. I have grave doubts that a judge should cast a deciding vote on the basis of a theory, however historically correct, that is unacceptable not only to his own colleagues but which is unlikely to be acceptable to any future justice.

⁶² Berger's central theses are not dependent on how one resolves this separate issue which is one of substantial concern for him. R. BERGER, *supra* note 23, at 412-14.

⁶³ See Monaghan, *supra* note 1, at 409-10 (1977) (criticizing Paul v. Davis, 424 U.S. 693 (1976), for its departure from judicial precedent, even though the decision was probably reflective of original intent).

⁶⁴ P. FREUND, *THE SUPREME COURT OF THE UNITED STATES: ITS BUSINESS, PURPOSES, AND PERFORMANCE* 28-56 (1961). I recognize that this “concord” is not necessarily because of a respect for *stare decisis*; it may simply reflect agreement with the substantive holdings. On the general uses of *stare decisis* in tight spots, see *Wolman v. Walter*, 433 U.S. 229, 251 n.18 (1977).

⁶⁵ I recognize that my view of *stare decisis* may be of more interest to psychoanalysts than to lawyers. Indeed, lawyers might be unkind enough to object to the fuzziness of the formulation in the text. It conceals several discrete problems. Should judges adhere to specific doctrines, e.g., overbreadth; specific theories? Do they have the power to modify theories? The power to add new theories?

Moreover, I recognize that rigid insistence upon *stare decisis* is at variance with powerful intellectual currents, dominant in this century, rejecting any essentially static conception of reality, physical, psychological, historical or otherwise. See F. BAUMAN, *MODERN EUROPEAN THOUGHT* (1977).

⁶⁶ This is a criticism not dependent on which organ “interprets” the constitution. For the document itself is counter majoritarian where it withdraws any question from the ordinary political process. And this is particularly bothersome where indeterminate clauses like

“America has defined and designed its governmental system around the core concept of representative democracy,” and this fact “not only describes the initial [constitutional] document, but its history.” Indeed, “excluding the Eighteenth and Twenty-First Amendments (the latter repealed the former), six of our last ten constitutional amendments have been concerned precisely with increasing popular control of our government, and five of those six . . . extended the franchise to persons who had previously been denied it.⁶⁷

This deep constitutional commitment to representative democracy seems to me to have important consequences for constitutional interpretation. Most importantly for instant purposes, it counsels against the use of constitutional amendments to invalidate the outcome produced by political processes unless the language of the amendment, taken in its historical setting, indicates some genuine concern with the kinds of problems at issue. I recognize, of course, that legislation enacted by the normal “democratic,” political process — or, to put it more accurately, legislation enacted following some accommodation among competing interest groups — often comes down particularly hard on certain minorities and unorganized groups. How that fact is to be taken into account in a satisfactory theory of constitutional adjudication remains to be worked out. But it is surely a long way from that insight to a conclusion that the fourteenth amendment guarantees an extensive range of fundamental rights, to say nothing of affirmative claims, against the government. The “government” in this latter sense is, after all, simply a political process which, perhaps from insensitivity, ranks its priorities differently from those who have a particular view of a “just” social order.

due process are said to dictate such a result. I would add that the counter majoritarian difficulty is magnified where the “interpreter” is a politically insulated body whose deliberations occur in secret. *But see* L. TRIBE, CONSTITUTIONAL LAW §§ 1-7, 1-8, 3-6. In this regard I would add that, with deference to those who disagree, *see* Cover, *supra* note 28, I do not see how the less than perfectly democratic character of the political branches enhances the democratic character of the court.

⁶⁷ Ely, *Constitutional Interpretivism*, *supra* note 43. Compare Wolin, *The State of the Union*, NEW YORK REVIEW OF BOOKS, May 18, 1978, at 28.