

Government
by Judiciary

The Transformation
of the
Fourteenth Amendment

All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

—Fourteenth Amendment, §1

Government by Judiciary

The Transformation
of the
Fourteenth Amendment

Raoul Berger

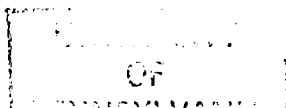
Harvard University Press
Cambridge, Massachusetts
and London, England
1977

To
Leon Green
Cherished friend and mentor

Copyright © 1977 by the President and Fellows
of Harvard College
All rights reserved
Printed in the United States of America

Library of Congress Cataloging in Publication Data
Berger, Raoul, 1901—
Government by judiciary: The transformation of
the Fourteenth Amendment

Bibliography: p.
1. Judicial power—United States. 2. United
States. Constitution. 14th Amendment. I. Title.
KF5130.B4 347'.73'12 77-6777
ISBN 0-674-35795-7



APR 1978

Acknowledgments

Eminent historians, social scientists, and lawyers have read portions or all of my manuscript and favored me with their suggestions. I do not name them in order to spare them the embarrassment of being associated with my views. Above all I am indebted to them for encouragement.

R.B.

Concord, Massachusetts
August 1977

Contents

Part I

1. Introduction	1
2. "Privileges or Immunities"	20
3. "The Privileges or Immunities of a Citizen of the United States"	37
4. Negro Suffrage Was Excluded	52
5. Reapportionment	69
6. The "Open-Ended" Phrasology Theory	99
7. Segregated Schools	117
8. Incorporation of the Bill of Rights in the Fourteenth Amendment	134
9. Opposition Statements Examined	157
10. "Equal Protection of the Laws"	166
11. "Due Process of Law"	193
12. Section Five: "Congress Shall Enforce"	221
13. Incorporation of Abolitionist Theory in Section One	230

Part II

14. From Natural Law to Libertarian Due Process	249
15. "The Rule of Law"	283
16. The Judiciary Was Excluded from Policymaking	300
17. The Turnabout of the Libertarians	312
18. Liberals and the Burger Court	338
19. The Legitimacy of Judicial Review	351

20. Why the “Original Intention”?	363
21. Arguments for Judicial Power of Revision	373
22. “Trial by Jury”: Six or Twelve Jurors	397
23. Conclusion	407
Appendix I. Van Alstyne’s Critique of Justice Harlan’s Dissent	419
Appendix II. Judicial Administration of Local Matters	428
Bibliography	433
Index	447
Index of Cases	477

Part I

Abbreviations

<i>Annals of Congress</i>	<i>Annals of Congress</i> , vol. 1 (1789; 2d ed. 1834, print bearing running head "History of Congress"
Bickel	ALEXANDER M. BICKEL, "The Original Understanding and the Segregation Decision," 69 <i>Harvard Law Review</i> 1 (1955)
Donald, <i>Summer I</i>	DAVID DONALD, <i>Charles Sumner and the Coming of the Civil War</i> (1960)
Donald, <i>Summer II</i>	DAVID DONALD, <i>Charles Sumner and the Rights of Man</i> (1970)
Elliot	JONATHAN ELLIOT, <i>Debates in the Several State Conventions on the Adoption of the Federal Constitution</i> (2d. ed. 1836)
Fairman, <i>History</i>	CHARLES FAIRMAN, <i>Reconstruction and Reunion 1864-1888</i> , vol. 6, part 1 of <i>History of the Supreme Court of the United States</i> (1971)
Fairman, <i>Stanford</i>	CHARLES FAIRMAN, "Does the Fourteenth Amendment Incorporate the Bill of Rights?," 2 <i>Stanford Law Review</i> 5 (1949)
Farrand	MAX FARRAND, <i>The Records of the Federal Convention of 1787</i> (1911)
Federalist	<i>The Federalist</i> (Modern Library ed. 1937)
Flack	HARRY FLACK, <i>The Adoption of the Fourteenth Amendment</i> (1908)
<i>Globe</i>	<i>Congressional Globe</i> (39th Congress, 1st Session 1886)
<i>Globe App.</i>	Appendix to <i>Globe</i>
Graham	HOWARD JAY GRAHAM, <i>Everyman's Constitution</i> (1968)
James	JOSEPH B. JAMES, <i>The Framing of the Fourteenth Amendment</i> (1965)
Kelly, <i>Fourteenth</i>	ALFRED H. KELLY, "The Fourteenth Amendment Reconsidered: The Segregation Question," 54 <i>Michigan Law Review</i> 1049 (1956)
Kendrick	BENJAMIN KENDRICK, <i>The Journal of the Joint Committee of Fifteen on Reconstruction</i> (1914)
Levy, <i>Against the Law</i>	LEONARD W. LEVY, <i>Against the Law: The Nixon Court and Criminal Justice</i> (1974)
Levy, <i>Warren</i>	LEONARD W. LEVY, ed., <i>The Supreme Court Under Earl Warren</i> (1972)
Lusky	LOUIS LUSKY, <i>By What Right?</i> (1975)
Poore	BEN P. POORE, <i>Federal and State Constitutions, Colonial Charters</i> (1877)
TenBrock	JACOBUS TENBROEK, <i>Equal Under Law</i> (1965)
Van Alstyne	WILLIAM W. VAN ALSTYNE, "The Fourteenth Amendment, the 'Right' to Vote, and the Understanding of the Thirty-Ninth Congress," 1965 <i>Supreme Court Review</i> 33

Introduction

My colleagues have learned to respect nothing but evidence, and to believe that their highest duty lies in submitting to it, however it may jar against their inclinations.

Thomas H. Huxley*

THE Fourteenth Amendment is the case study par excellence of what Justice Harlan described as the Supreme Court's "exercise of the amending power,"¹ its continuing revision of the Constitution under the guise of interpretation. Because the Amendment is probably the largest source of the Court's business² and furnishes the chief fulcrum for its control of controversial policies, the question whether such control is authorized by the Constitution is of great practical importance.

Those whose predilections are mirrored in a given decision find such judicial revision an exercise of statesmanship.³ Others consider that a democratic system requires adherence to consti-

* T. H. Huxley, *Man's Place in Nature* (1863), quoted in Homer W. Smith, *Man and His Gods* 372 (1953).

1. *Reynolds v. Sims*, 377 U.S. 533, 591 (1964).

2. Felix Frankfurter, "John Marshall and the Judicial Function," 69 *Harv. L. Rev.* 217, 229 (1955).

3. For example, Anthony Lewis hailed the Warren Court as the "keeper of the national conscience," in "Historical Change in the Supreme Court," *The New York Times Magazine*, June 17, 1962, p. 7, in *Supreme Court Under Earl Warren* 73, 79, 81 (L. Levy ed. 1972). See also A. S. Miller and R. F. Howell, "The Myth of Neutrality in Constitutional Adjudication," 27 *U. Chi. L. Rev.* 661, 686, 689 (1960).

tutional limits, by courts no less than presidents.⁴ This study seeks to demonstrate that the Court was not designed to act, in James M. Beck's enthusiastic phrase, as a "continuing constitutional convention,"⁵ that the role assigned to it was far more modest: to police the boundaries drawn in the Constitu-

4. Chief Justice Marshall stated in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended." "The theory of our governments," said Justice Samuel Miller, "is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers." *Loan Association v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874). "[W]ritten constitutions," said Justice Stanley Matthews, "were limitations upon all the powers of government, legislative as well as executive and judicial." *Hurtado v. California*, 110 U.S. 516, 531-532 (1884).

5. In *The Constitution of the United States* (1922), Beck compared "the work of the Supreme Court to that of a 'continuous constitutional convention' which adapts the original charter by reinterpretation." Quoted in Leonard W. Levy, *Judgments: Essays in American Constitutional History* 18 (1972). In his recent critique of the "Nixon Court," Levy states that the "Court is and must be for all practical purposes a 'continuous constitutional convention' in the sense that it must keep updating the original charter by reinterpretation." L. Levy, *Against the Law* 29, 30 (1974). "Adaptation" and "reinterpretation" are euphemisms for "revision" or "rewriting" the Constitution, the function of a constitutional convention, not the Court. See Louis Lusky, *By What Right?* 21 (1975); Louis Henkin, "Some Reflections on Current Constitutional Controversies," 109 U. Pa. L. Rev. 637, 658-659 (1961).

Solicitor General Robert H. Jackson, later a Justice of the Court, did not share Beck's enthusiasm; the pre-1937 Court, he said, "sat almost as a continuous constitutional convention which, without submitting its proposals to any ratification or rejection, could amend the basic law." R. Jackson, *The Struggle for Judicial Supremacy* x-xi (1941). Ward Elliott reports that Anthony Lewis (who was a leader in the drive that led to the "reapportionment" decision) asked Solicitor General Archibald Cox (who had filed a brief amicus for reapportionment in *Reynolds v. Sims*, supra note 1) when the Court announced its decision, "How does it feel like to be present at the second American Constitutional Convention?" Cox retained enough of his old perspective to answer, "It feels awful." Ward Elliott, *The Rise of a Guardian Democracy* 370 (1974). See infra Chapter 5 note 1.

tion.⁶ A corollary is that the "original intention" of the Framers, here very plainly evidenced, is binding on the Court for the reason early stated by Madison: if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers."⁷

The present generation, floating on a cloud of post-Warren Court euphoria, applauds a Court which read its libertarian convictions into the Fourteenth Amendment, forgetting that for generations the Court was harshly criticized because it had transformed laissez faire into constitutional dogma in order to halt the spread of "socialism."⁸ With Brahmin restraint, Justice Holmes commented, in fear of socialism, "new principles had been discovered outside the bodies of those instruments

6. See infra Chapter 16 at notes 20-28.

7. 9 James Madison, *The Writings of James Madison* 191 (G. Hunt ed. 1900-1910).

8. Joseph H. Choate comprehended that he could rely on the Court to react to the red flag of communism which he waved in *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429, 532 (1895). Justice Stephen Field responded in a concurring opinion: "The present assault upon capital is but the beginning. It will be but the stepping stone to others, larger and more sweeping, till our own political contests will become a war of the poor against the rich." *Id.* 607. On rehearing, Justice Henry B. Brown dissented, saying, "the decision involves nothing less than a surrender of the taxing power to the moneyed class . . . Even the spectre of socialism is conjured up." 158 U.S. 601, 695 (1895). In 1893 Justice David J. Brewer referred to "'the black flag of anarchism, flaunting destruction to property,' and 'the red flag of socialism, inviting a redistribution of property.'" XVI Proceedings of the N.Y. State Bar Assn. 37, 47 (1893), quoted in A. T. Mason, "Myth and Reality in Supreme Court Drama," 48 Va. L. Rev. 1385, 1393 (1962). Such citations can be multiplied.

Justice Black reminded the Court of "the extent to which the evanescent standards of the majority's philosophy have been used to nullify state legislative programs passed to suppress evil economic practices." *Rochin v. California*, 342 U.S. 165, 177 (1952), concurring opinion.

[constitutions] which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago."⁹ In the economic sphere that finally made due process a "dirty phrase."¹⁰ The logic whereby that process becomes sanctified when employed for libertarian ideals has yet to be spelled out.¹¹ Logic, it is true, must yield to history, but history affords the Court even less support than logic.

Commentary on the Court's decisions frequently turns on whether they harmonize with the commentator's own predilections. My study may be absolved of that imputation: I regard segregation as a blot on our society,¹² and before I began to study the reapportionment issue I was taken with the beguiling slogan "one man, one vote." But almost thirty-five years ago I wrote of a decision that responded to my desires that I liked it no better when the Court read my predilections into the Constitution than when the Four Horsemen read in theirs.¹³ Against the fulfillment of cherished ideals that turns on fortuitous appointments must be weighed the cost of warping the Constitution, of undermining "the rule of law." The Court has shown in

9. O. W. Holmes, Jr., *Collected Legal Papers* 184 (1920).

10. Herbert Packer, "The Aim of the Criminal Law Revisited: A Plea for a New Look at 'Substantive Due Process,'" 44 S. Cal. L. Rev. 490 (1971). See *infra* Chapter 14 at notes 64, 77-78.

11. See *infra* Chapter 14 at notes 80-90; and see Robert G. McCloskey, "Due Process and the Supreme Court: An Exhumation and Reburial," 1962 S. Ct. Rev. 34, 44-45. Although McCloskey was very sympathetic to the Warren Court's goals, he concluded that the distinction does not stand up. *Id.* at 51. Chief Justice Stone, wrote Learned Hand, "could not understand how . . . when concerned with interests other than property, the courts should have a wider latitude for enforcing their own predilections that when they were concerned with property itself." L. Hand, "Chief Justice Stone's Conception of the Judicial Function," 46 Colum. L. Rev. 696, 698 (1946).

12. One reads with horror of the Negro lynchings and torture that found their way into the courts as late as 1938. Paul Murphy, *The Constitution in Crisis Times, 1918-1969* 95, 123 (1972).

13. Raoul Berger, "Constructive Contempt: A Post Mortem," 9 U. Chi. L. Rev. 602, 604-605, 642 (1942).

the past that the Constitution can also be twisted to frustrate the needs of democracy.¹⁴ These statements raise a congeries of questions which have been the subject of interminable controversy to which Part II is addressed.

The task here undertaken is that of an historian, to attempt accurately and faithfully to assemble the facts; that effort constitutes its own justification. For a decade the revisionist historians¹⁵ have been engaged in what has been described as an "extraordinary revolution in the historiography" of Reconstruction,¹⁶ throwing fresh light on the reasons for its limited objectives and its failure. To some extent the legal studies of Charles Fairman in 1949 and Alexander Bickel in 1955¹⁷ had shown that the objectives of the framers of the Fourteenth Amendment were limited. Like the revisionist historians, a lawyer too may take another look after the passage of about a quarter-century. Despite the wilderness of commentary, largely devoted to the due process clause, the historical warrant for desegregation, reapportionment, and incorporation of the Bill of Rights in the due process clause remains controversial.¹⁸ Little

14. For a withering condemnation of the Court's antidemocratic course before 1937 see Henry Steele Commager, "Judicial Review and Democracy," 19 Va. Quarterly Rev. 417 (1943).

15. W. R. Brock, Eric L. McKittrick, C. Vann Woodward, David Donald, Harold M. Hyman, Michael L. Benedict. Their works are listed in the bibliography.

16. Alfred H. Kelly, "Comment on Harold M. Hyman's Paper" in *New Frontiers of the American Reconstruction* 40 (H. M. Hyman ed. 1966).

17. C. Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 5 (1949); Alexander Bickel, "The Original Understanding and the Segregation Decision," 69 Harv. L. Rev. 1 (1955).

18. See Alfred H. Kelly, "Clio and the Court: An Illicit Love Affair," 1965 S. Ct. Rev. 119, 132, 134-135; A. H. Kelly, "The Fourteenth Amendment Reconsidered: The Segregation Question," 54 Mich. L. Rev. 1049, 1081 (1956); Howard J. Graham, *Everyman's Constitution* 314 (1968); William W. Van Alstyne, "The Fourteenth Amendment, The 'Right' to Vote, and the Understanding of the Thirty-Ninth Congress," 1965 S. Ct. Rev. 33; Robert J. Harris, *The Quest for Equality* 55-56 (1960).

analysis has been devoted to the role of the privileges or immunities clause in the original scheme of things;¹⁹ nor have studies of the equal protection and due process clauses adequately explored what those terms meant to the framers.

In reconstructing the past, historians generally are compelled to rely on accounts written after the event by participants and witnesses, or on the hearsay versions of those who learned at second-hand what had occurred. Such writings are subject to the infirmities of recollection, or of bias arising from allegiance to one side or the other. The historical records here relied on—the legislative history of the Fourteenth Amendment—are of a far more trustworthy character, being a stenographic transcription of what was said in the 39th Congress from day to day by those engaged in framing the Amendment. It is a verbatim account of what occurred, recorded while it was happening, comparable to a news film of an event at the moment it was taking place and free from the possible distortion of accounts drawn from recollection or hearsay. What men say while they are acting are themselves facts, as distinguished from opinions about facts.²⁰ Such statements constitute a reliable record of what happened as the Amendment was being forged by the framers.

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 statement such as that of Charles P. Curtis, “It is a hallucination: this search for intent. The room is always dark”²¹ simply cannot stand up against these records. Instead of sparse, cryptic remarks there are, for

19. The leading article, D. O. McGovney, “Privileges and Immunities Clause, Fourteenth Amendment,” 4 Iowa L. Bull. 219 (1918) states (at 222 note 2), “this essay . . . might have been entitled the Rule of the Slaughter-House Cases.”

20. In Justice Holmes’ words, a “party’s conduct” may “consist in uttering certain words.” O. W. Holmes, *The Common Law* 132 (1923).

21. “A Better Theory of Legal Interpretation,” 3 Vand. L. Rev. 407, 409 (1950).

example, with respect to suffrage, the unequivocal Joint Report of the Committee on Reconstruction which drafted the Amendment; explanations of the Amendment and the antecedent Civil Rights Act of 1866 by the committee chairmen who had them in charge, and by other members of the committees; statements by leaders of the Republican Party which sponsored both, accompanied by a virtually unanimous chorus of fellow Republicans. These are commonly regarded as the best evidence of legislative “intention.”²² Then there are repeated rejections, by heavy pluralities, of extremist efforts to put through legislation or amendments that would confer suffrage. Thus, the records richly confirm Justice Harlan’s comment: “The history of the Fourteenth Amendment with respect to suffrage qualifications is remarkably free of the problems which bedevil most attempts 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 Amendment did not reach discriminatory voter disqualifications.”²³

In short, the proof is all but incontrovertible that the framers meant to leave control of suffrage with the States, which had always exercised such control, and to exclude federal intrusion. On traditional canons of interpretation, the intention of the framers being unmistakably expressed, that intention is as good as written into the text.²⁴ It is, therefore, as if the Amendment

22. H. M. Hart and A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1266 (1958). Justice Frankfurter stated, “It has never been questioned in this Court that Committee reports, as well as statements by those in charge of a bill or of a report, are authoritative elucidations of the scope of a measure.” *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 399–400 (1951), dissenting opinion. See also *Lusky* 45.

23. *Oregon v. Mitchell*, 400 U.S. 112, 200 (1970), dissenting opinion. Van Alstyne, who is critical of Justice Harlan’s view in *Reynolds v. Sims* (supra note 1), states: “in none of the other kinds of cases where it was brought to bear did it [the historical record] cast the kind of blinding light that Mr. Justice Harlan sees here.” Van Alstyne 36.

24. “A thing may be within the letter of a statute and not within its meaning, and within its meaning though not within its letter. The intention of

expressly stated that "control of suffrage shall be left with the States." If that intention is demonstrable, the "one man, one vote" cases represent an awesome exercise of power, an 180-degree revision, taking from the States a power that unmistakably was left to them. That poses the stark issue whether such revisory power was conferred on the Court. Because the "intention" of the framers is so crucial to examination of this issue, because a commentator should not pit his mere ipse dixit against the Court's finding, for example, that the historical evidence respecting desegregation is inconclusive, it is not enough to retort that the evidence is overwhelming. It is necessary to pile proof on proof, even at the risk of tedium, so that the reader may determine for himself whether it is overwhelming or inconclusive.

Whether the "original intention" of the framers should be binding on the present generation—a question hereafter discussed—should be distinguished from the issue: what did the framers mean to accomplish, what did the words they used mean to them. That must be the historical focus, not what we should like the words to mean in the light of current exigencies or changed ideals. In the words of the eminent British historians H. G. Richardson and G. O. Sayles, "We must learn, not from modern theorists, but from contemporaries of the events we are studying." We should not impose "upon the past a creature of our own imagining."²⁵ One hundred and fifty years earlier Justice James Iredell, one of the first Founders to spell out the case for judicial review, stated, "We are too apt, in estimating a law

the lawmaker is the law." *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903); *United States v. Freeman*, 44 U.S. (3 How.) 556, 565 (1845); *United States v. Babbitt*, 66 U.S. 55, 61 (1861); Matthew Bacon, *A New Abridgment of the Laws of England*, "Statutes" I (5) (7th ed. 1832); *infra* Chapter 9 note 22.

25. "Parliament and Great Councils in Medieval England," 77 *L. Q. Rev.* 213, 224 (1961). Miller and Howell label it an "historical fallacy" to "appraise a former historical era by the criteria of values that have become important since." *Supra* note 3 at 673.

passed at a remote period, to combine in our consideration, all the subsequent events which have had an influence upon it, instead of confining ourselves (which we ought to do) to the existing circumstances at the time of its passing."²⁶

In an area of warring interpretations no useful purpose is served by delivering another *ex cathedra* opinion.²⁷ A commentator should spread before the reader the evidence on which his opinion is based and comment both on discrepant evidence and on opposing inferences.²⁸ Consequently, a polemical tone is inescapable; a student of history can no more avoid criticism of views which seem to him erroneous than did the chemists who disputed the tenability of the phlogiston theory of combustion. To avoid that responsibility is to court the charge of ignoring an influential body of contrary opinion, of selecting only the evidence that advances one's own argument, and, even worse, to cast the reader adrift on a sea of conflicting opinions.

Now that the dust has settled, a synthesis of the historical materials that bear on the three controversial areas will furnish some cross-illumination. No synthesis need undertake to trace in complete detail the development of the Amendment and its antecedent bills. Not only is there no need to duplicate the chronological labors that others have already performed, but to do so is to risk swamping the reader in a mass of detail that is bewildering rather than illuminating.²⁹ Instead my effort will be

26. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 267 (1796). In "the construction of the language of the Constitution . . . as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." *Ex parte Bain*, 121 U.S. 1, 12 (1887).

27. It is unsatisfying to have the fastidiously detailed study of Fairman dismissed with the phrase that it is "in the opinion of this writer against the weight of the evidence." Kelly, *Fourteenth* 1081 note 106. As will develop, Kelly was altogether wrong.

28. Sir Herbert Butterfield, *George III and the Historians* 225 (1969).

29. See Bickel; Joseph B. James, *The Framing of the Fourteenth Amendment* (1956); and Harry Flack, *The Adoption of the Fourteenth Amendment* (1908).

to focus on the facts that seem to me crucial, to take account of discrepant facts, and to analyze views that are opposed to mine.

Following the lead of Howard Jay Graham and Jacobus tenBroek,³⁰ academicians have shown a growing tendency to attribute to the framers of the Fourteenth Amendment moral-legal conceptions formulated by some abolitionists during their crusade of the 1830s–1860s, and to read those conceptions of substantive due process and equal protection into the Amendment. Noble enthusiasm is no less prone to distort the vision than vulgar prejudice. In evaluating the historical facts we do well to bear in mind Flaubert's view that "personal sympathy, genuine emotion, twitching nerves and tear-filled eyes only impair the sharpness of the artist's vision."³¹ Even more, the historian, in the words of C. Vann Woodward, has "a special obligation to sobriety and fidelity to the record."³²

BACKGROUND

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 the racism that gripped their constituents rather than by abolitionist ideology. At the inception of their crusade the abolitionists peered up at an almost unscalable cliff. Charles Sumner, destined to become a leading spokesman for extreme abolition-

Walter Bagehot considered that "history should be like a Rembrandt etching, casting a vivid light on important causes and leaving all the rest unseen, in shadow." Quoted in Van Wyck Brooks, *Days of the Phoenix* 135 (1957).

30. Graham; Jacobus tenBroek, *Equal Under Law* (1965). For discussion of the Graham-tenBroek neoabolitionist theory see infra Chapter 13.

31. 4 Arnold Hauser, *The Social History of Art* 76 (Vintage Books, undated). Hauser states that Flaubert's view was shared by the Goncourts, Maupassant, Gide, Valery, and others. "To get at the truth of our system of morality (and equally of the law)," said Holmes, "it is useful to omit the emotion and ask ourselves [how far] those generalizations . . . are confirmed by fact accurately ascertained." O. W. Holmes, Jr., *Collected Legal Papers* 306 (1920).

32. *The Burden of Southern History* 87 (1960).

ist views, wrote in 1834, upon his first sight of slaves, "My worst preconception of their appearance and their ignorance did not fall as low as their actual stupidity . . . They appear to be nothing more than moving masses of flesh unendowed with anything of intelligence above the brutes."³³ Tocqueville's impression in 1831–32 was equally abysmal.³⁴ He noticed that in the North, "the prejudice which repels the negroes seems to increase in proportion as they are emancipated," that prejudice "appears to be stronger in the States which have abolished slavery, than in those where it still exists."³⁵

Little wonder that the abolitionist campaign was greeted with loathing! In 1837 Elijah Lovejoy, an abolitionist editor, was murdered by an Illinois mob.^{35a} How shallow was the impress of the abolitionist campaign on such feelings is graphically re-

33. David Donald, *Charles Sumner and the Coming of the Civil War* 29 (1960).

34. "[W]e can scarcely acknowledge the common features of mankind in this child of debasement whom slavery has brought among us. His physiognomy to our eyes is hideous, his understanding weak, his tastes low; and we are almost inclined to look upon him as a being intermediate between man and the brutes." 1 Alexis de Tocqueville, *Democracy in America* 363 (1900). In the 39th Congress, Robert Hale of New York stated that the District of Columbia "contains a black population which, undoubtedly, approaches to the very extreme of ignorance and degradation . . . a population that has come into this District suddenly, just freed from slavery, with all the marks and burdens upon them that a state of slavery necessarily fixes upon its victims." *Cong. Globe*, 39th Cong. 1st Sess. 280 (1865–1866), hereinafter cited as *Globe*. In citations to the *Globe*, Senators will be identified as such; all others are representatives.

Even one sympathetic to the Negro cause, Senator Henry Wilson of Massachusetts, was constrained to hope in 1864 that "the school house will rise to enlighten the darkened intellect of a race inbruted by long years of enforced ignorance." Quoted in tenBroek, 164.

35. Tocqueville, supra note 34 at 365, 364.

35a. "[T]he abolitionists were regarded throughout most Northern circles as disagreeable and intemperate radicals and were heckled, harrowed, assaulted and even killed by Northern mobs." Dan Lacy, *The White Use of Blacks in America* 54 (1972).

vealed in a Lincoln incident. A delegation of Negro leaders had called on him at the White House, and he told them,

There is an unwillingness on the part of our people, harsh as it may be, for you free colored people to remain with us . . . [E]ven when you cease to be slaves, you are far removed from being placed on an equality with the white man . . . I cannot alter it if I would. It is a fact.³⁶

Fear of Negro invasion—that the emancipated slaves would flock north in droves—alarmed the North.³⁷ The letters and diaries of Union soldiers, Woodward notes, reveal an “enormous amount of antipathy towards Negroes”; popular convictions “were not prepared to sustain” a commitment to equality.³⁸ Racism, David Donald remarks, “ran deep in the North,” and the suggestion that “Negroes should be treated as equals to white men woke some of the deepest and ugliest fears in the American mind.”³⁹

36. Woodward, *supra* note 32 at 81. “In virtually every phase of existence Negroes found themselves systematically separated from whites [in the North, 1860] . . . in most places he encountered severe limitations to the protection of his life, liberty, and property.” Leon Litwack, *North of Slavery: The Negro in the Free States 91–97* (1961), quoted in C. Vann Woodward, “Seeds of Failure in Radical Race Policy” in Hyman *supra* note 16 at 126.

37. Woodward, “Seeds,” *supra* note 36 at 127, 128, 131, 132. Senator Thomas A. Hendricks of Indiana stated, “The policy of the State has been to discourage their immigration . . . to protect white labor. The presence of negroes in large numbers tends to degrade and cheapen labor, and the people have been unwilling that the white laborer shall be compelled to compete for employment with the Negro.” *Globe* 2939. The Freedmen’s Bureau and Civil Rights Acts “were intended not only to protect the freedmen but also to secure a contented black labor force who . . . stayed in the South.” Morton Keller, *Affairs of State* 65, 143 (1977).

38. Woodward, *supra* note 32 at 82, 83. Senator James R. Doolittle of Wisconsin reported that “four out of five” Wisconsin soldiers “voted against Negro suffrage.” *Globe* 2165.

39. David Donald, *Charles Sumner and the Rights of Man* 202, 252 (1970). An Illinois Radical, John F. Farnsworth, said “‘Negro equality’ is the everlasting

One need not look beyond the confines of the debates in the 39th Congress to find abundant confirmation. Time and again Republicans took account of race prejudice as an inescapable fact. George W. Julian of Indiana referred to the “proverbial hatred” of Negroes, Senator Henry S. Lane of Indiana to the “almost ineradicable prejudice,” Shelby M. Cullom of Illinois to the “morbid prejudice,” Senator William M. Stewart of Nevada to the “nearly insurmountable” prejudice, James F. Wilson of Iowa to the “iron-cased prejudice” against blacks. These were Republicans, sympathetic to emancipation and the protection of civil rights.⁴⁰ Then there were the Democratic racists who unashamedly proclaimed that the Union should remain a “white man’s” government.⁴¹ In the words of Senator Garrett Davis of Kentucky, “The white race . . . will be proprietors of the land, and the blacks its cultivators; such is their destiny.”⁴² Let it

skeleton which frightens some people.” *Globe* 204. William E. Niblack of Indiana reminded the Congress that in 1851 Indiana ratified a Constitution that excluded Negroes from the State by a vote of 109, 976 to 21,084. *Globe* 3212.

“A belief in racial equality,” said W. R. Brock, “was an abolitionist invention”; “to the majority of men in the midnineteenth century it seemed to be condemned both by experience and by science.” “Even abolitionists,” he states, “were anxious to disclaim any intention of forcing social contacts between the races.” Brock, *An American Crisis: Congress and Reconstruction* 285, 286 (1963). See *infra*, Derrick Bell, Chapter 10 at note 6. Racism, Phillip Paludan states, 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.” P. S. Paludan, *A Covenant with Death* 54 (1975). See also Keller, *supra* note 37. Many Republican newspapers in the North opposed “equality with the Negroes.” Flack 41. See also Keller, *id.* at 51, 58, 65.

40. *Globe* 257, 739, 911, 2799, 2948.

41. John W. Chanler of New York, *Globe* 48, 218; Senator James W. Nesmith of Oregon, *id.* 291; Aaron Harding of Kentucky, *id.* 448; Senator Hendricks of Indiana, *id.* 880; Senator Garrett Davis of Kentucky, *id.* 246–250. The sympathetic reformer, Senator William M. Stewart of Nevada, stated, the “white man’s government . . . should not be scoffed at; that it was a prejudice in the country that no man has a right to disregard.” *Id.* 1437.

42. *Id.* 935.

be regarded as political propaganda, and, as the noted British historiographer Sir Herbert Butterfield states, it "does at least presume an audience—perhaps a 'public opinion'—which is judged to be susceptible to the kinds of arguments and considerations set before it."⁴³ Consider, too, that the Indiana Constitution of 1851 excluded Negroes from the State, as did Oregon,⁴⁴ that a substantial number of Northern States recently had rejected Negro suffrage,⁴⁵ that others maintained segregated schools.⁴⁶ It is against this backdrop that we must measure claims that the framers of the Fourteenth Amendment swallowed abolitionist ideology hook, line, and sinker.⁴⁷

The framers represented a constituency that had just emerged from a protracted, bitterly fought war, a war that had left them physically and emotionally drained. It had begun with a commitment to save the Union and had gone on to emancipate the slaves. Now the war-weary North was far from anxious to embark on fresh crusades for the realization of still other abolitionist goals.⁴⁸ While emancipation largely hit slavery in the South, eradication of inequality, as Vann Woodward remarked, required "a revolution for the North as well,"⁴⁹ a revolution for which most Republicans were utterly unprepared. Then too, the fact that Republicans and Democrats had been pretty evenly matched over the years, that some districts definitely were swing areas, led Republicans in those areas to be cautious of affronting their constituents.⁵⁰ Many moderate and conservative Repub-

43. Butterfield, *supra* note 28 at 226; compare Stewart, *supra* note 41.

44. For Indiana see *supra* note 39; for Oregon, see Fairman, Stanford 32 note 58.

45. See Van Alstyne's summary, *infra* Chapter 4 at note 16.

46. See *infra* Chapter 7 at note 41. As late as 1859 the Ohio Court rejected an attack on segregated schools. *Van Camp v. Board of Education*, 9 Ohio 407.

47. For additional details see *infra* Chapter 13.

48. Donald, *Summer II* 232–233; see also *id.* at 158.

49. Woodward, *supra* note 32 at 79; see *infra* Chapter 10 at note 6.

50. David Donald, *The Politics of Reconstruction* 12–13, 61–62 (1965).

licans, as we shall see, were acutely aware of the impact on elections of sweeping radical claims for political, let alone, social, equality for the blacks.⁵¹ While most men were united in a desire to protect the freedmen from outrage and oppression in the South by prohibiting discrimination with respect to "fundamental rights," without which freedom was illusory, to go beyond this with a campaign for political and social equality was, as Senator James R. Doolittle of Wisconsin confessed, "frightening" to the Republicans who "represented States containing the despised and feared free negroes."⁵²

A striking reflection of Northern sentiment was furnished by Thaddeus Stevens, the foremost Radical leader. According to his biographer, Fawn M. Brodie, he

sensed . . . that talk of "social equality" was dangerous politics. When he heard that the ex-slave Frederick Douglass . . . had paraded arm-in-arm with editor Theodore Tilton, he wrote . . . "A good many people here are disturbed by the practical exhibition of social equality in the arm-in-arm performance of Douglass and Tilton. It does not become radicals like us to particularly object. But it was certainly unfortunate at this time. The old prejudice, now revived, will lose us some votes."⁵³

As Stevens revealed, most Republicans were politicians first and ideologues afterward.⁵⁴ Not civil rights for blacks but the dreaded take-over of the federal government by the South was their obsessive preoccupation. Emancipation brought the startling realization that Southern representation would no longer be limited in the House of Representatives to three-fifths of the

51. Speaking on June 4, 1866, James Wilson of Iowa said, "I know that many look forward to the fall elections and shiver in the presence of impartial suffrage." *Globe* 2948.

52. Donald, *Summer II* 158.

53. *Thaddeus Stevens: Scourge of the South* 287 (1959).

54. See Jones 71.

blacks, as Article I, §3, provided. Now each voteless freedman counted as a whole person; and in the result Southern States would be entitled to increased representation and, with the help of Northern Democrats, would have, Thaddeus Stevens pointed out at the very outset of the 39th Congress, "a majority in Congress and in the Electoral College." With equal candor he said that the Southern States "ought never to be recognized as valid States, until the Constitution shall be amended . . . as to secure perpetual ascendancy" to the Republican party.⁵⁵ The North had not fought and quelled rebellion in order to surrender the fruits of victory to the unrepentant rebels. How to circumvent this possibility was the central concern of the Republicans, and it found expression in §2 of the Fourteenth Amendment, which reduced representation in proportion as the right to vote was denied or abridged. Unless we seize hold of the fact that, to borrow from Russell R. Nye, "what lies beneath the politics of the Reconstruction period, so far as it touched the Negro, is the prevailing racist policy tacitly accepted by both parties and by the general public,"⁵⁶ we shall fail to appreciate the limited objectives of the Fourteenth Amendment. That is the reality underlying the limited purposes of the framers of the Fourteenth Amendment, and which circumscribes the so-called "generality" of "equal protection" and "due process."

Proponents of a broad construction of the Amendment have assumed that advocates of a restricted construction have the

55. *Globe* 74; Samuel E. Morison, *The Oxford History of the American People* 714 (1965). Senator John Sherman of Ohio said, "never by my consent shall these rebels gain by this war increased political power, and come back here to wield that political power." *Globe* 745. "I would no more admit the rebels to control these States," said Senator Daniel Clark of New Hampshire, "than I would sail a ship with the mutinous part of a crew, and confine those who were faithful to the captain in the hold or put them in irons." *Id.* 835.

56. "Comment on C. V. Woodward's Paper," in Hyman, *supra* note 16 at 148, 151.

burden of proving that the framers' objectives were limited. The shoe is on the other foot; an interpretation that invades what had long been considered the exclusive province of the States, as, for example, criminal procedure, requires some justification. It is not enough in that situation that the words are capable of a broad meaning; the reservation to the States in the Tenth Amendment of powers not delegated to the federal government calls for a clear showing that the successor amendment was designed to curtail those reserved powers.⁵⁷ Over the years the Supreme Court, to be sure, has steadily eroded those reserved powers, but this simply represents another of the usurpations that bestrew the path of the Court. But the historian, looking to the Constitution itself, may not be blind to the fact that, in the words of Willard Hurst, the reservation "represented a political bargain, key terms of which assumed the continuing vitality of the states as prime law makers in most af-

57. The governing rule was laid down by Chief Justice Marshall: "an opinion which is . . . to establish a principle never before recognized, should be expressed in plain and explicit terms." *United States v. Burr*, 25 F. Cas. (No. 14,693) 55, 165 (C.C. Va. 1807). Long before it was stated, "statutes are not presumed to make any alteration in the common law, farther or otherwise than the act expressly declares: therefore in all general matters the law presumes the act did not intend to make any alteration; for if the parliament had had that design they would have expressed it in the act." Bacon's *Abridgment*, *supra* note 24, "Statutes" 1 (4). An analogous rule was applied to the Constitution in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1872).

Such views were given striking reaffirmation in *Pierson v. Ray*, 386 U.S. 547, 554-555 (1967). After adverting to the common law immunity of judges from suits for acts performed in their official capacity, the Court stated, "We do not believe that this settled principle was abolished by §1983, which makes liable 'every person' who under color of law deprives another person of his civil rights . . . The immunity of judges [is] well established and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." Thus the all-inclusive "every person" was curtailed because of an existing common law immunity; the express reservation of power to the States by the Tenth Amendment demands an even more exacting standard.

fairs.”⁵⁸ No trace of an intention by the Fourteenth Amendment to encroach on State control—for example, of suffrage and segregation—is to be found in the records of the 39th Congress. A mass of evidence is to the contrary, and, as will appear, the attachment of the framers to State sovereignty played a major role in restricting the scope of the Amendment. “[W]e ought to remember,” Justice Holmes said, “the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the [due process] clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court’s own discretion the validity of whatever laws the States may pass.”⁵⁹ The history of the Amendment buttresses the flat statement that no such jurisdiction was conferred.

“What, after all,” asked Wallace Mendelson, “are the privileges and immunities of United States citizenship? What process is ‘due’ in what circumstances? and what is ‘equal protection?’”⁶⁰ Study of what the terms meant to the framers indicates that there was no mystery. 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 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 those rights; and the judicial machinery to secure them was to be supplied by nondiscriminatory due process of the several States. Charles Sumner summarized these radical goals: let the Negro have “the shield of *impartial laws*. Let him be heard in court.”⁶¹ That shield, it will be shown, was expressed in “equal protection of the *laws*; access to protection by the courts found expres-

58. *The Legitimacy of the Business Corporation in the Law of the United States* 140 (1970).

59. *Baldwin v. Missouri*, 28 U.S. 586, 595 (1930), dissenting opinion.

60. *The Supreme Court: Law and Discretion* 16 (1967).

61. *Globe* 675.

sion in “due process of law.” 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.

trial by jury was a fabric woven of many strands—a “seamless web”—we should be slow to countenance a rent, particularly one not dictated by the most urgent need. What necessity impelled the Court to jettison the “very ancient” 12-man jury?

The Court had painted itself into a corner when it held that the Fourteenth Amendment made the “trial by jury” provision of the Bill of Rights mandatory on the States,⁵⁰ a position, as we have seen, that is without historical warrant. Since some States employed less than 12 men, the Court, as Justice Harlan observed, recognized that the “‘incorporationist’ view . . . must be tempered to allow the States more elbow room in ordering their own criminal systems.”⁵¹ The Burger Court is presently retreating from the Warren Court’s imposition of federal requirements on State practice,⁵² and it might well have concluded that the quite recent extension of the Sixth Amendment’s trial by jury to the States was ill-considered and, therefore, as Justice Harlan stated, the Burger Court’s decision in *Duncan v. Louisiana* should be overruled.⁵³ Instead, it chose to rupture a 600-year practice in order to adhere to a dubious decision, illustrating what Washington and Hamilton had warned against: a usurpation to meet a great emergency breeds usurpations where no emergency exists.

50. “In *Duncan v. Louisiana*, 391 U.S. 145 (1968), we held that the Fourteenth Amendment guarantees a right to trial by jury in all criminal cases that, were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.” 399 U.S. at 86.

51. 399 U.S. at 118, dissenting opinion.

52. *Supra* Chapter 18 note 3.

53. 399 U.S. at 118.

Conclusion

THE historical records all but incontrovertibly establish that the framers of the Fourteenth Amendment excluded both suffrage and segregation from its reach; they confined it to protection of carefully enumerated rights against State discrimination, deliberately withholding federal power to supply those rights where they were not granted by the State to anybody, white or black. This was a limited—tragically limited—response to the needs of blacks newly released from slavery; it reflected the hagridden racism that held both North and South in thrall; nonetheless, it was all the sovereign people were prepared to do in 1868.

Given the clarity of the framers’ intention, it is on settled principles as good as written into the text. To “interpret” the Amendment in diametrical opposition to that intention is to rewrite the Constitution. Whence does the Court derive authority to revise the Constitution? In a government of limited powers it needs always be asked: what is the source of the power claimed? “When a question arises with respect to the legality of any power,” said Lee in the Virginia Ratification Convention, the question will be, “*Is it enumerated in the Constitution?* . . . It is otherwise arbitrary and unconstitutional.”¹

1. 3 Elliot 186.

Or, as James Iredell put it, a law “not warranted by the Constitution . . . is bare-faced usurpation.”² Hamilton made clear that action not warranted by the Constitution is no less a usurpation at the hands of the Court³ than of a President. The suffrage-segregation decisions go beyond the assumption of powers “not warranted” by the Constitution; they represent the arrogation of powers that the framers plainly *excluded*. The Court, it is safe to say, has flouted the will of the framers and substituted an interpretation in flat contradiction of the original design: to leave suffrage, segregation, and other matters to State governance. It has done this under cover of the so-called “majestic generalities” of the Amendment—“due process” and “equal protection”—which it found “conveniently vague,” without taking into account the limited aims those terms were meant to express. When Chief Justice Warren asserted that “we cannot turn back the clock to 1868,”⁴ he in fact rejected the framers’ intention as irrelevant. On that premise the entire Constitution merely has such relevance as the Court chooses to give it, and the Court is truly a “continuing constitutional convention,” constantly engaged in revising the Constitution, a role clearly withheld from the Court. Such conduct impels one to conclude that the Justices are become a law unto themselves.⁵

Can it be, then, that in a civilized society there exists no means of ridding ourselves of such a blight as segregation? No cost, it can be argued, is too high to be rid of the incubus. Archibald Cox observes: “To have adhered to the doctrine of ‘separate but equal’ would have ignored not only the revolution sweeping the world but the moral sense of civilization. Law must be binding even upon the highest court, but it must also meet the needs of men and match their sensibilities,” and it is

2. 4 Elliot 194.

3. *Supra* Chapter 17 at note 15.

4. *Supra* Chapter 7 at note 61.

5. “[T]he Justices have given serious cause for suspicion that they have come to consider the Court to be above the law.” Lusk vii; and see id. 101. See Levy, *supra* Chapter 14 note 136; Murphy, *supra* Chapter 15 note 13; and Lewis, *supra* Chapter 17 note 56.

for judges to “make law to meet the occasion.”⁶ But, as Cox recognized, these “libertarian, humanitarian, and egalitarian” impulses “were not shared so strongly as to realize themselves through legislation,” still less through an amendment. They were only realized through the “fate which puts one man on the Court rather than another.”⁷ I cannot bring myself to believe that the Court may assume a power not granted in order to correct an evil that the people were, and remain, unready to cure. Justification of judicial usurpation—the label Hamilton attached to encroachments on the legislative function—on the ground that there is no other way to be rid of an acknowledged evil smacks of the discredited doctrine that “the end justifies the means.”⁸ John Stuart Mill cautioned against man’s disposition “to impose [his] own opinions . . . as a rule of conduct on others.”⁹ The Inquisition burned heretics at the stake to save their souls.

Then there are the costs to constitutional government¹⁰ of countenancing such usurpation. As the Court itself has demon-

6. *The Role of the Supreme Court in American Government* 110 (1976). Cox does not regard the segregation decisions as “wrong even in the most technical sense,” id. 109, although he states, “Plainly, the Court was not applying customary constitutional principles.” Id. 60.

7. Id. 35.

8. Lord Chancellor Sankey stated, “It is not admissible to do a great right by doing a little wrong . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means.” Quoted by Chief Justice Warren in *Miranda v. Arizona*, 384 U.S. 436, 447 (1966). Levy observes that scholars “cannot be ignored and cannot be gainsaid when they insist that any means to a justifiable end is, in a democratic society, a noxious doctrine.” Levy, *Warren* 190.

9. More fully quoted, *infra* note 20.

10. Cox states, “Nearly all the rules of constitutional law written by the Warren Court relative to individual and political liberty, equality, criminal justice, impress me as wiser and fairer than the rules they replace. I would support nearly all as important reforms if proposed in a legislative chamber or a constitutional convention. In appraising them as judicial rulings, however, I find it necessary to ask whether an excessive price was paid for enlarging the sphere and changing the nature of constitutional adjudication.” Cox, *supra* note 6 at 102.

strated, unconstitutional action to cure a manifest evil establishes a precedent, as Washington and Hamilton warned, that encourages transgressions when such urgency is lacking. Time and again the Justices themselves have accused their brethren of acting without constitutional warrant. So to act is to act unconstitutionally; in another field the Court itself branded its own course of conduct over a hundred-year span as "unconstitutional."¹¹ "In a government of laws," Justice Brandeis cautioned, "existence of the government will be imperilled if it fails to observe the law scrupulously."¹² Justice Frankfurter added that "Self-willed judges are the least defensible offenders against government under law."¹³ How long can public respect for the Court, on which its power ultimately depends, survive if the people become aware that the tribunal which condemns the acts of others as unconstitutional is itself acting unconstitutionally? Respect for the limits on power are the essence of a democratic society; without it the entire democratic structure is undermined and the way is paved from Weimar to Hitler.¹⁴

11. *Eric Ry. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938).

12. *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

13. "From the Wisdom of Felix Frankfurter," *Wisdom*, vol. III, No. 28, p. 25 (1959), quoted by Kathryn Griffith, *Judge Learned Hand and the Role of the Federal Judiciary* 209 (1973).

14. As Professor Charles Black stated, when urging noninterference with the Warren Court, "constitutional legality is indivisible . . . the right to wound one part of the body as you may desire is the right to destroy the life." *The People and the Court* 190 (1960). Madison said, "It is our duty . . . to take care that the powers of the Constitution be preserved entire to every department of Government; the breach of the Constitution in one point, will facilitate the breach in another." 1 *Annals of Congress* 500.

In a review of Alexander Bickel's last work, *The Morality of Consent*, Professor Alan M. Dershowitz states that Bickel saw "the Nixon Presidency and Watergate as the 'utterly inevitable' consequence of the undisciplined liberalism and 'result-orientation' of the Warren Court." Dershowitz comments, "A strange relationship, probably wrong and surely overstated." "Book Reviews," *The New York Times Book Review*, September 21, 1975, at 1. But Nixon's "idea" man, Donald Santarelli, quite plainly had learned from the Warren Court. *Supra* Chapter 17 at note 59.

Proponents of the "original understanding," Sanford Levinson justly charges, are rarely prepared to press it all the way: "Thus opponents of the [Vietnam] war eager to return to the original understanding of the War Power are not likely to be eager to return to what was probably the rather conservative initial understanding of freedom of speech."¹⁵ Rigorous constitutional analysis halts at the door of particular predilections. Setting practical considerations aside for the moment, intellectual honesty demands that the "original understanding" be honored across the board—unless we are prepared to accept judicial revision where it satisfies *our* predilections, as is the current fashion. But that is to reduce "law" to the will of a kadi. The list of cases that would fall were the "original understanding" honestly applied is indeed formidable. As Grey summarizes, "virtually the entire body of doctrine developed under the due process clauses of the 5th and 14th amendments," the core "requirement of 'fundamentally fair' procedures in criminal and civil proceedings," and "everything that has been labeled 'substantive due process' would be eliminated," even though it "must constitutionally free the federal government to engage in explicit racial discrimination," for "there is no textual warrant for reading into the due process clause of the fifth amendment any of the prohibitions directed against the states by the equal protection clause." He adds, "there is serious question how much of the law prohibiting state racial discrimination can survive honest application of the interpretive ['original understanding'] model. It is clear that the equal protection clause . . . was *not* intended to guarantee equal political rights, such as the right to vote or to run for office, and perhaps in-

Jefferson "foresaw that if the Constitution were ever destroyed, it would be destroyed by construction or interpretation, in final analysis, by the federal judiciary." Caleb P. Patterson, *The Constitutional Principles of Thomas Jefferson* 70 (1953).

15. S. Levinson, "Fidelity to Law and the Assessment of Political Activity," 27 *Stan. L. Rev.* 1185, 1200 note 68 (1975).

cluding the right to serve on juries."¹⁶ But because repudiation of the cases would have undesirable consequences, it does not follow that the prior determinations were authorized by the Constitution.¹⁷ Whatever may be the merit of Judge Joseph Hutcheson's method of decision in common law cases—first a "hunch," then a hunt for legal rationalization—¹⁸ such reasoning backward in constitutional cases displaces choices already made by the framers. It perilously resembles the subordination of "law" to the attainment of ends desired by a ruling power which was the hallmark of Hitlerism and Stalinism.

Had it fallen to me, therefore, to decide some of the "substantive due process" and "equal protection" cases *ab initio*, I should have felt constrained to hold that the relief sought lay outside the confines of the judicial power.¹⁹ It would, however, be utterly unrealistic and probably impossible to undo the past in the

16. Grey, "Do We Have an Unwritten Constitution?," 27 *Stan. L. Rev.* 703, 710-712 (1975). An earlier illustrative list had been furnished by Bork, "Neutral Principles and Some First Amendment Problems," 47 *Ind. L.J.* 1, 11-12 (1971). If effect be given to the framers' intention, the decision in *Strauder v. Virginia*, 100 U.S. 303 (1879), that Negroes must be permitted to serve as jurors, was wrongly decided. See Chairman Wilson, *supra* Chapter 2 at note 26, the colloquy between Wilson and Delano, and remarks by Moulton and Lawrence, *supra* Chapter 9 at notes 25-27.

17. *Supra* Chapter 14 at notes 103-104.

18. J. C. Hutcheson, "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision," 14 *Cornell L. Q.* 274, 287 (1929). See also Martin Shapiro, *Law and Politics in the Supreme Court* 15 (1964).

19. Justice Stevens recently expressed a similar view. *Runyon v. McCrary*, 96 S. Ct. 2586 (1976), presented the issue whether the federal Act of 1866 prohibits private schools from excluding qualified children on racial grounds:

There is no doubt in my mind that that construction of the statute would have amazed the legislators who voted for it . . . [S]ince the legislative history discloses an intent not to outlaw segregated schools at that time, it is quite unrealistic to assume that Congress intended the broader result of prohibiting segregated private schools. Were we writing on a clean slate, I would therefore vote to reverse.

Concurring opinion.

face of the expectations that the segregation decisions, for example, have aroused in our black citizenry—expectations confirmed by every decent instinct. That is more than the courts should undertake and more, I believe, than the American people would desire. But to accept thus far accomplished ends is not to condone the continued employment of the unlawful means. If the cases listed by Grey are in fact in contravention of the Constitution, the difficulty of a rollback cannot excuse the *continuation* of such unconstitutional practices.

This is not the place to essay the massive task of furnishing a blueprint for a rollback. But the judges might begin by curbing their reach for still more policymaking power, by withdrawing from extreme measures such as administration of school systems—government by decree—which have disquieted even sympathizers with the ultimate objectives. Such decrees cannot rest on the assertion that the *Constitution demands* busing, when in truth it is the Justices who require it²⁰ in contravention of the framers' intention to leave such matters to the States. The doctrinaire extension of false doctrine compounds the arrogation. So too, greater restraint in reapportionment matters, the return of the administration of local criminal, libel, and obscenity law to the States would not only respond to constitutional limitations but to preponderant public sentiment. Judges should take to heart Justice Holmes' admonition in *Baldwin v. Missouri*:

we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the cause in the Fourteenth Amendment as committing

20. Cf. Lino A. Graglia, *Disaster by Decree* (1976). Justice Rehnquist reminded us of John Stuart Mill's statement, "The disposition of mankind, whether as rulers or as fellow citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power." Mill, *On Liberty* 28 (1885), quoted in *Furman v. Georgia*, 408 U.S. 238, 467 (1972), dissenting opinion.

to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.^{20a}

His counsel is heavily underscored by the manifest intention of the framers to limit federal intrusion into State internal affairs to a plainly described minimum.

All this may seem like idle theorizing in light of Justice Stone's famous dictum that "the only check upon our own exercise of power is our own sense of self-restraint."²¹ Were this true, it would offend against one of the most fundamental premises of our constitutional system. "Implicit in the system of government [the Framers] designed," Alpheus Thomas Mason stated, "is the basic premise that unchecked power in any hands whatsoever is intolerable."²² "Unchecked power" emphatically was not confided to the judiciary; as Hamilton wrote in *Federalist* No. 81, the Justices may be impeached for usurpation of legislative power.²³ President Taft, no wild-eyed radical, acknowledged in 1911 that the judicial system was not working as it should, and stated, "Make your judges responsible. Impeach them. Impeachment of a judge would be a very healthful thing in these times."²⁴ Cumbersome as impeachment is, it is yet not so difficult as amendment, which requires approval by three-fourths of the States. At one time Brandeis and Frankfurter, it needs to be remembered, favored an amendment that would remove the due process clause from the Constitution al-

20a. See *supra* Chapter 21 at note 41.

21. *United States v. Butler*, 297 U.S. 1, 79 (1936), dissenting opinion.

22. "Myth and Reality in Supreme Court Drama," 48 *Va. L. Rev.* 1385, 1405 (1962).

23. Quoted *supra* Chapter 15 at note 50.

24. Quoted in Joseph P. Lash, *From the Diaries of Felix Frankfurter* 113 note 3 (1975). See also Lusk 80. The Supreme Court, by Justice Frankfurter, stated, "Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment." *Rochin v. California*, 342 U.S. 165, 172 (1952).

together.²⁵ But such heroic measures would be unnecessary in the face of an aroused public opinion, a mighty engine, as President Nixon learned after the "Saturday Night Massacre."²⁶ "The Court," wrote Charles L. Black, "could never have had the strength to prevail in the face of resolute public repudiation of its legitimacy."²⁷

A prime task of scholarship, therefore, is to heighten public awareness that the Court has been overleaping its bounds. "[S]cholarly exposure of the Court's abuse of its powers," Frankfurter considered, would "bring about a shift in the Court's viewpoint."²⁸ Such awareness is a necessary preliminary for, as Mason observed, "only that power which is recog-

25. Louis Jaffe, "Was Brandeis an Activist? The Search for Intermediate Premises," 80 *Harv. L. Rev.* 986, 989 (1967). In 1924 Frankfurter stated that "The due process clause ought to go." "The Red Terror of Judicial Reform," 40 *New Republic* 110, 113, reprinted in Frankfurter, *Law and Politics* 10, 16 (Macleish and Pritchard eds. 1939).

The requirements for amendment or impeachment, it may be suggested, are so onerous as to render the Court's decisions all but irrevocable. "[I]f the policy of the government is to be irrevocably fixed by the decisions of the Supreme Court," said Lincoln in his First Inaugural Address, "the people will have ceased to be their own rulers." Quoted in Morton Keller, *Affairs of State* 17-18 (1977).

26. Attorney General Elliot Richardson resigned rather than discharge Special Prosecutor Archibald Cox at the insistence of President Nixon. Deputy Attorney General William Ruckelshaus was discharged for refusal to discharge Cox.

27. *The People and the Court* 209 (1960).

28. Quoted in Lash, *supra* note 24 at 59. Rodell referred to "the reverential awe-bred-of-ignorance, with which most Americans regarded the Court" in 1937. *Nine Men* 247 (1955). Professor Charles Black urges that lawyers "never cease to call the Court to account, and to urge reason upon it. Inadequate reason, lack of responsiveness to counter-argument [as in *Reynolds v. Sims*]—these are self-wounding sins in any court." Address, "The Judicial Power as Guardian of Liberties," before a Symposium on "The Supreme Court and Constitutional Liberties in Modern America," Wayne State University, Detroit, Mich., Oct. 16, 1976, at 9. Arrogation of power withheld is far worse.

nized can be effectively limited."²⁹ Calls for disclosure of the Court's real role have been made by both proponents and opponents of judicial "adaptation" of the Constitution. Justice Jackson, it will be recalled, called on the Justices in the desegregation case to disclose that they were "making new law for a new day"; and Judge Learned Hand declared that "If we do need a third [legislative] chamber it should appear for what it is, and not as the interpreter of inscrutable principles."³⁰

Forty years ago the philosopher Morris R. Cohen wrote to Professor Frankfurter, "the whole system is fundamentally dishonest in its pretensions (pretending to say what the Constitution lays down when they [the Justices] are in fact deciding what [they think] is good for the country.)"³¹ But Martin Shapiro argued: "Suicide is no more moral in political than in personal life. It would be fantastic indeed if the Supreme Court, in the name of sound scholarship, were to disavow publicly the myth on which its power rests . . . If the myth . . . is destroyed . . . the Court loses power."³² Power in the service of moral imperatives must not rest on a sham.³³ It is not "scholarship," but obedience to constitutional limitations that calls for a halt. "The foundation of morality," said Thomas Huxley, "is to

29. Mason, *supra* note 22 at 1405. Mason states, "once the public recognizes the personal nature of the judicial power, it would become difficult for the judiciary to function at all." *Id.* 1399.

30. *The Bill of Rights* 70 (1962); see also A. S. Miller and R. F. Howell, "The Myth of Neutrality in Constitutional Adjudication," 27 *U. Chi. L. Rev.* 661, 695 (1960).

31. Letter to Felix Frankfurter, January 27, 1936, L. C. Rosenfield, *Portrait of a Philosopher: Morris Raphael Cohen in Life and Letters* 270 (1962), quoted in Lash, *supra* note 24 at 55. There is a "credibility gap between the Court's pretensions and its actions." P. B. Kurland, *Politics, the Constitution and the Warren Court* xxiii (1970).

32. *Supra* note 18 at 27; see also *supra* Chapter 7 at notes 56-57.

33. Cf. Paul Brest, *Processes of Constitutional Decisionmaking: Cases and Materials* 1146 (1975).

have done, once and for all, with lying."³⁴ On a practical level, as Presidents Lyndon Johnson and Richard Nixon learned, non-disclosure to the people creates a credibility gap.³⁵

The nation cannot afford to countenance a gap between word and deed on the part of its highest tribunal, a tribunal regarded by some as the "national conscience." It should not tolerate the spectacle of a Court that pretends to apply constitutional mandates while in fact revising them in accord with the preference of a majority of the Justices who seek to impose *their* will on the nation. Richard Nixon learned at last that even a President cannot set himself above the law, that he is obliged "to take Care that the Laws be faithfully executed." It is necessary and right that the nine Justices be held to a like standard.³⁶ "The people," in the words of five early State Constitutions, "have a right to require of their . . . magistrates an exact and constant observance" of the "fundamental principles of the Constitution."³⁷ Among the most fundamental is the exclusion of the judiciary from policymaking.

Let it not be said of us as Gibbon said of Rome: "The *image* of a free constitution was preserved with decent reverence. The Roman senate *appeared* to possess the sovereign authority, and devolved on the emperors all the executive powers of government."³⁸ Here no Senate devolved the policymaking powers on the Court; they are self-conferred and survive only because the

34. Quoted in H. T. Mencken, *Treatise of Right and Wrong* 197 (1934).

35. "The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law." *On Lee v. United States*, 343 U.S. 747, 758-759 (1952), Justice Frankfurter, dissenting opinion.

36. Lusk 20.

37. *Supra* Chapter 15 at note 18.

38. 1 Gibbon, *The History of the Decline and Fall of the Roman Empire* 215 (Nottingham Soc. undated) (emphasis added). He said of the Roman emperors that "they surrounded their throne with darkness, concealed their irresistible strength, and humbly professed themselves the accountable ministers of the senate, whose supreme decrees they dictated and obeyed." *Id.* at 303.

American people are unaware that there is a yawning gulf between judicial professions and practice. An end, I would urge, to pretence. If government by judiciary is necessary to preserve the spirit of our democracy, let it be submitted in plainspoken fashion to the people—the ultimate sovereign—for their approval.

Appendix I Van Alstyne's Critique of Justice Harlan's Dissent

PROFESSOR Van Alstyne's article¹ constitutes the most extended attempt to refute Justice Harlan's dissent in *Reynolds v. Sims*.² In the course of my discussion of suffrage, reapportionment, and the "open-ended" theory I sought to take account of his views. That portion of his article which dealt with the "remedy" aspect of Harlan's analysis has in part been discussed in connection with Justice Brennan's adoption of the Van Alstyne argument.³ Van Alstyne also attributes to Harlan the view that "§2 equally precludes the application of any earlier provisions of the Constitution to state voting rights."⁴ He considers that "there was probably no reliable understanding whatever that §2 would preclude Congress (or the courts) from employing sources of constitutional authority other than §2 to affect state suffrage"⁵ and spends many pages demonstrating that there was no such consensus.

Now Harlan was not at all concerned with "other" constitutional provisions; save for a footnote reference to Bingham's explanation of a "republican form of government."⁶ Harlan concentrated on the Fourteenth Amendment. Here is his thesis in his own words: "The history

1. "The Fourteenth Amendment, The 'Right' to Vote, and the Understanding of the Thirty-Ninth Congress," 1965 S. Ct. Rev. 33.

2. 377 U.S. 533, 589 (1964).

3. *Supra* Chapter 5 at notes 102-106.

4. Van Alstyne 39.

5. *Id.* 45.

6. Quoted *id.* 41.

of the adoption of the Fourteenth Amendment provides conclusive evidence that neither those who proposed nor those who ratified the amendment believed that the Equal Protection clause limited the power of the States to apportion their legislatures as they saw fit.⁷ Apparently Van Alstyne bases his inference of preemption of "other" provisions on Harlan's statement that "§2 expressly recognizes the States' power to deny or, in any way, abridge the right" to vote.⁸ To recognize a State power falls short of holding that the Amendment "precludes the application of any earlier provisions of the Constitution." So to hold would imply that "earlier provisions," if any, had been repealed by implication. It cannot be presumed that Harlan was unaware of the elementary proposition that repeals by implication are not favored and require evidence that a repeal was intended.

Apart from a few radical dissentients,⁹ there was a wide consensus that control over suffrage had from the beginning been left with the States, as was categorically stated by Stevens, Fessenden, Conkling, Bingham, and many others.¹⁰ To placate the dissentients there were assurances that the "representation" provision left other provisions, if any, untouched; in other words, they were not repealed by implication. A typical colloquy between Higby and Stevens is cited by Van Alstyne. Higby objected that the "representation" proposal "gives a power to the States to make governments that are not republican in form," and asked Stevens

if it does not acknowledge a power in a State to do such a thing.

MR. STEVENS. Yes, sir, it does acknowledge it, and it has always existed under the Constitution.

MR. HIGBY. I do not acknowledge that it is in the Constitution as it now is.

MR. STEVENS. Then we do not give it to them.

Van Alstyne finds Stevens' response "confusing."¹¹ To "acknowl-

7. 377 U.S. at 595.

8. Van Alstyne 39.

9. Cited id. 49-51.

10. Supra Chapter 4.

11. Van Alstyne 50-51; *Globe* 428. This exchange occurred early in the session. Higby profited from the debates and later stated, "The Government of the United States does not propose or attempt to go into every one of the States now in close fellowship with the Government and represented here, and

edge" that States *have* a power is not to *give* it to them. At another point Stevens stated, "the States have the right . . . to fix the elective franchise," and the representation provision "does not take it from them."¹²

Rejection of the dissentient appeal to "other" constitutional sources for federal power over suffrage¹³ is demonstrated by the fact that a subcommittee of the Joint Committee reported an Amendment "Congress shall have power . . . to secure . . . the same political rights,"¹⁴ thereby expressing its view that Congress did not enjoy that power. And it is confirmed by the passage of the Fifteenth Amendment.¹⁵ If there were "other" constitutional powers for the purpose the Fifteenth Amendment was superfluous. From 1789 to 1866 it was generally accepted that suffrage had been left to regulation by the States,¹⁶ a view reiterated in 1875 by Chief Justice Waite:

The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the State from giving preference, in this particular, to one citizen of the United States over another on account of race. Before its adoption this could be done. It was as much within the power of a State to exclude citizens from voting on account of race . . . as it was on account of age, property, or education. Now it is not.¹⁷

say to them that all classes of citizens without distinction of race or color shall vote. It is true that the general principle has been to leave the question to each of the States." *Globe* 2252.

12. *Globe* 536.

13. Chief of these was the guarantee of "a republican form of government"; Van Alstyne 50.

14. Quoted id. 48 note 46.

15. Auerbach states, "Students of the history of the Fourteenth Amendment agree that the 'congressional understanding of the immediate effect of [the Fourteenth Amendment] enactment on conditions then present' was that it would not deal with the right of suffrage. Otherwise the Fifteenth Amendment would not have been necessary, as Mr. Justice Harlan pointed out." "The Reapportionment Cases: One Person, One Vote—One Vote, One Value," 1964 S. Ct. Rev. 1, 75. The point was made by the Court in *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175 (1874).

16. Supra Chapter 4 at notes 42, 43, 45-48, 57, 64; Chapter 5 at note 49.

17. *United States v. Reese*, 92 U.S. 214, 217-218 (1875). Looking at "equal protection" in 1964, Auerbach considers it an "astonishing result" that would

Of course, this does not dispose of the question: were there such other powers? Van Alstyne, however, makes no attempt to demonstrate that there were. My study of the guarantee of a republican form of government, upon which the dissentents cited by Van Alstyne heavily rely, led me to doubt their existence.¹⁸ Those doubts were strongly reinforced by the historical materials Justice Stewart collected in his opinion in *Oregon v. Mitchell*.¹⁹ In any event, Van Alstyne's elaborate argument that the Fourteenth Amendment does not preclude the application of "other" provisions of the Constitution does not shake Harlan's demonstration that suffrage was excluded from the Amendment itself.

Van Alstyne's attempt to downgrade Stevens' testimony stands no better. Stevens did not consider Negroes prepared for suffrage, nor the North ready to accept it; he had stated that the right of a State to disfranchise "has always existed," that the proposed "representation" provision "does not take it from" the States.²⁰ One could hardly ask for greater clarity. Against this, Van Alstyne quotes Stevens, "If any State shall exclude any of her adult citizens from the elective franchise . . . she shall forfeit her right to representation in the same proportion," and asks whether this evidences Stevens' understanding "that an exception was to be read into the unqualified language of §1 and that the Equal Protection Clause could not be applied against par-

read "equal protection" to allow a State to deny "the right to vote in a state or local election . . . for reasons which have nothing to do with race, color . . . but which nevertheless result in an arbitrary classification." Auerbach, *supra* note 15 at 77-78. But that view is a product of our times, not at all responsive to the intention of the framers, either in 1787 or in 1866. See *supra* Chapter 5 after note 77. In *New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837), the Court declared, "a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States." For the standard of proof required to establish such "surrender" see *supra* Chapter 1 note 57.

18. Fessenden commented on Article I, §2(3), re qualifications of electors in each State, "it has always been considered that the clause . . . acknowledged the rights of the States to regulate the question of suffrage. I do not think it has ever been disputed." *Globe* 1278.

19. 400 U.S. 112, 288-291 (1970), concurring and dissenting in part.

20. *Supra* Chapter 4 at notes 25, 64, 46.

tial and oppressive laws denying the freedmen their voice in the government."²¹ This quotation did not address that issue; but the above quotations plainly indicate Stevens' view that suffrage was to remain the province of the States; that is an "exception" built into "equal protection" by the entire Republican leadership. Bingham stated: "The amendment does not give . . . the power to Congress of regulating suffrage in the several States."²² Senator Howard explained that "the first section of the proposed amendment does not give . . . the right of voting."²³ Toward the close of the session Senator Sherman said, "we have refused" to require the rebel "States to allow colored persons to vote."²⁴ And after passage of the "equal protection" clause, Bingham lent his aid to Tennessee's exclusion of black suffrage, notwithstanding "we are all for equal and exact justice, but justice for all is not to be secured in a day"²⁵—eloquent testimony that "equal protection" was not viewed as a bar to denial of suffrage.

Van Alstyne's statement that Stevens "greatly favored Negro suffrage and constantly supported all efforts to that end, to the extent he thought them politically feasible"²⁶ is not very revealing. In fact, as C. Vann Woodward wrote, "Stevens was not yet prepared to enfranchise the Negro freedmen . . . apart from political reasons he had other doubts about the wisdom of the measure . . . he doubted that the freedmen were prepared for intelligent voting."²⁷ Eric McKittrick stated, "beyond doubt" Stevens "tipped the balance . . . Being none too keen on direct enactment of Negro suffrage."²⁸ It was on Stevens' motion that the Joint Committee on Reconstruction preferred a reduction of representation proposal to one prohibiting discrimination, by a vote of 11 to 3.²⁹ He was taunted during the final debate by Charles A. Eldredge, a Democrat from Wisconsin: "Why is it that the gentleman from Pennsylvania gives up universal suffrage . . . It is . . . for the

21. Van Alstyne 56. But see Bickel, *supra* Chapter 6 at note 27.

22. *Globe* 2542.

23. *Id.* 2766.

24. *Id.* 3989.

25. *Id.* 3979.

26. Van Alstyne 46.

27. *The Burden of Southern History* 92 (1960); *supra* Chapter 4 at note 25.

28. *Andrew Johnson and Reconstruction* 348 (1960).

29. Kendrick 51.

purpose of saving their party in the next fall election."³⁰ Another Democrat, Andrew Rogers, asserted, "The committee does not dare submit the broad proposition to the people . . . of negro suffrage."³¹ In September 1866, when the Amendment was a campaign issue, Stevens assured the Pennsylvania voters that the "Amendment does not touch social or political rights."³²

It is Van Alstyne who would "read into" the words "equal protection" the very suffrage so unmistakably excluded by the framers. For centuries the canon of interpretation has been that a thing may be within the language and yet not within the intention of the framers and therefore not "within the statute."³³ "Equal protection" had limited scope for the framers; it barred discriminatory laws with respect to specified "fundamental rights"—no more.³⁴

The difficulties that confront Van Alstyne's attack on Harlan's analysis may be gathered from his own statement. He makes

several observations generally in agreement with Mr. Justice Harlan's view of what was implied by §2. First, the fact that the Joint Committee considered an amendment to prohibit voting discrimination on racial grounds [and let it wither on the vine] does seem to imply that it otherwise regarded state laws providing for such discrimination as constitutional. Second, the fact that a more limited reduction-of-representation-basis alternative was simultaneously considered and adopted, that the

30. *Globe* 2506.

31. *Id.* 2538. See Van Alstyne's Summary, *supra* Chapter 4 at note 16.

32. James 201. Van Alstyne cites a Stevens statement of two years later: "Since the adoption of the fourteenth amendment . . . I have no doubt of our power to regulate the elective franchise." Van Alstyne recognizes that such a "retrospective view . . . must, of course, be discounted to that extent"; Van Alstyne 64–65; it was in flat contradiction of representations made to secure adoption. Such retrospective statements are to be totally discounted. See *supra* Chapter 3 at notes 51–52; see also Raoul Berger, "Judicial Review: Counter Criticism in Tranquillity," 69 *Nw. U. L. Rev.* 390, 399–401 (1974). In any event, Stevens' later views did not carry the day because Congress passed the Fifteenth Amendment to fill the gap.

33. See *supra* Chapter 1 note 24; Chapter 10 at note 94. See also Pierson v. Ray, discussed *supra* Chapter 1 note 57.

34. See *supra* Chapter 10.

proposal to prohibit discrimination on the basis of race was not adopted [such proposals were voted down by the Senate by very heavy majorities] appears to imply that §2 itself recognizes the exclusive power of states over suffrage qualifications. Beyond this, the speeches by Stevens and Conkling in support of H. R. No. 51 [a predecessor provision cast in terms of racial discrimination] initially appear to the same effect.³⁵

To the "speeches by Stevens and Conkling" should be added those of other prominent leaders, Fessenden, Bingham, Howard and still other Republicans, copiously quoted in Chapters 3 and 4 *supra*, and unmistakably confirmed by the Joint Committee Report. How Van Alstyne can extract from these statements the conclusion that "its [§2] principal proponents emphasized that it did not acknowledge the constitutionality of state disenfranchisement laws"³⁶ escapes my grasp.

Among the facts Van Alstyne musters to counteract an "initial favorable" impression is his "package" argument. In demonstrating that §2 illuminated the exclusion of suffrage from §1 of the Amendment, Justice Harlan stated: "the Amendment is a single text. It was introduced and discussed as such in the Reconstruction Committee, which reported it to Congress. It was discussed as a unit in Congress and proposed as a unit to the States, which ratified it as a unit."³⁷ This is one of the "serious exaggerations" Van Alstyne lays at Harlan's door: "Far from being a single text . . . the Fourteenth Amendment was a package of proposals, the more significant of which were pieced together from independent bills by different men at different times and originally debated as wholly separate amendments."³⁸

Let it be admitted that the different bills were "'originally' debated as wholly separate amendments"; but down the line they were "discussed as a unit" in the form of an amendment combining five sections, and "ratified . . . as a unit" by the States. And though the several sections were introduced "by different men at different times," they were debated in the very same Congress and same short space of

35. Van Alstyne 48–49.

36. *Id.* 44.

37. 377 U.S. at 594.

38. Van Alstyne 42–43.

time.³⁹ Members turned from one subject to the other and then back again, time after time. Throughout the debates discussion of "representation," which became the subject of §2, alternated with discussions of the Civil Rights Bill and the Bingham amendment, the antecedents of §1. Explicit recognition that Negro suffrage was beyond the achievable was the leitmotiv of all the discussions. Are we to assume that the members of Congress erased from their minds all reference made to suffrage because made in the context of the Bill or alternately in that of "representation"? Men do not thus insulate important discussions in airtight mental compartments. For example, Stevens referred in the course of the debate on the Amendment to the Black Codes and stated, "I need not enumerate these partial and oppressive laws," patently because they had been frequently mentioned, and to underscore the obvious said that the "civil rights bill secures the same thing."⁴⁰ With respect to Howard's proposal that citizenship be defined in §1, Fessenden said, "I should like to hear the opinion of the Chairman of the Committee on the Judiciary [Senator Trumbull], who has investigated the civil rights bill so thoroughly, on the subject."⁴¹ Certainly Bingham regarded the Amendment as a "unit," for he said, "The second section excludes the conclusion that by the first section suffrage is subjected to congressional law."⁴² Howard said that "the theory of this *whole* amendment is to leave" suffrage with the States.⁴³ Van Alstyne himself states that "the brevity of the three-day House debate on . . . the packaged Fourteenth Amendment bill, is probably attributable to the fact that its most significant components

39. For example, §2 "was debated in the Senate in February and March of 1866," *id.* 43. In February Bingham reported the Joint Committee resolution, H. R. No. 63, a progenitor of the §1 "privileges or immunities" and "equal protection" provisions and explained them, Bickel 33; *Globe* 1033-1034, "while Trumbull's bills on the same subject of civil rights were prominently before Congress and the country." James 83. TenBroek, 226, states that the "speeches in the May and June debates which deal with the meaning of §1 (whether for or against) other than by specific allusion to the Civil Rights Act do so precisely in the terms employed in the February debate."

40. *Globe* 2459.

41. *Id.* 2893.

42. *Id.* 2542.

43. *Id.* 3039 (emphasis added).

had previously been considered at length."⁴⁴ That no recapitulation of these "components" was deemed necessary is underscored by the frequent statements that the Amendment was designed to constitutionalize the Civil Rights Act. In short, Congress was thoroughly aware of a common purpose to exclude Negro suffrage that animated discussion of the Civil Rights Bill, and of Sections 1 and 2. On Van Alstyne's own reading of Justice Harlan, §1 was "understood at the time of its promulgation not to apply to suffrage qualifications as determined by the states";⁴⁵ it is therefore *in pari materia* with §2 which exhibits a similar understanding. Because "they relate to the same thing, they ought all"—Civil Rights Bill, sections 1 and 2—"to be taken into consideration in construing any one of them."⁴⁶ Plainly Van Alstyne's "package" analysis does not vitiate Harlan's documentation.

Finally, Justice Harlan correctly stated that the Joint Committee on Reconstruction, which fashioned the §2 "representation" provision, "regularly rejected explicitly enfranchising proposals in favor of plans which would postpone enfranchisement, leave it to congressional discretion, or abandon it altogether." And, as he pointed out, "the abandonment of negro suffrage as a goal exactly corresponded with the adoption of provisions to reduce representation for discriminatory restrictions on the ballot."⁴⁷

44. Van Alstyne 43. He considers that §2 "became a part of the Fourteenth Amendment largely through the accident of political exigency rather than the relation which it bore to the other sections of the amendment"; *id.* 43-44. The central "relation" was that Negro suffrage was unacceptable, both in §1 and §2, and those sections could be "packaged" in a unit that was understood by all. As the Joint Committee report stated, the §2 "representation" provision was adopted because an outright grant of suffrage proved unacceptable. *Supra* Chapter 5 at note 49.

45. Van Alstyne 38.

46. *United States v. Freeman*, 44 U.S. (3 How.) 556, 564 (1845). The rule is centuries old: "If any part of a statute be obscure it is proper to consider the other parts; for the words and meaning of one part of a statute frequently lead to the sense of another." Matthew Bacon, *A New Abridgment of the Laws of England*, "Statute," I(2) (3d ed. 1768).

47. *Oregon v. Mitchell*, 400 U.S. 112, 170-171 (1970), dissenting opinion.

Appendix II

Judicial Administration of Local Matters

In a recent evaluation of the Court's assumption of the policymaking role, Archibald Cox wrote:

[W]here the older activist decisions merely blocked legislative initiatives, the decisions of the 1950's and 1960's forced changes in the established legal order. The school desegregation cases overturned not only the constitutional precedents built up over three quarters of a century but the social structure of an entire region . . . The one man, one vote rule asserted that the composition of the legislatures of all but one or two of the 50 states was unconstitutional and had been unconstitutional for fifty or a hundred years [or more] . . . *New York Times Co. v. Sullivan* overturned the law of libel as it had prevailed from the beginning.

Cox comments:

Decisions mandating reforms in the on-going activities of other branches of government often require affirmative action. The affirmative action can be secured [lacking voluntary cooperation, only] by the courts themselves embarking upon programs having typically administrative, executive and even legislative characteristics heretofore thought to make such programs unsuited to judicial undertaking [and arguably therefore never comprehended in the original grant of judicial power].

The most prominent examples are the school desegregation cases. The court determines which students will be assigned to each school, how teachers shall be selected, what security measures shall be adopted, and even where new schools shall be built. When transportation is required, the court directs the expenditure of hundreds of thousands of dollars.

. . . In Boston, for example, the city was induced by fear of fiscal disaster to plan the elimination of 191 teachers. The federal court went down the list, school by school, even hearing the personal pleas of individual teachers, and decided to allow 60 layoffs and disallow 131.

Desegregation decrees have all the qualities of social legislation . . . I can think of no earlier decrees with these characteristics in all constitutional history.

Archibald, Cox, "The New Dimensions of Constitutional Adjudication," 51 *Washington Law Review* 791, 802, 814-815 (1976).

All this on the theory that "the Constitution requires busing"!

A summary of judicial takeovers of legislative and executive prerogatives is furnished in the following article by Wayne King, *The New York Times*, November 13, 1976, pp. 1, 38.

A Federal court ruling ordering Mobile to scrap its city government and replace it with a new one more favorable to blacks has generated a storm of protest in this city, including a petition drive to impeach the judge.

"This is the first time," said Mayor Lambert C. Mims in an interview, "that the Federal Government has told a free people what kind of government they must have."

"If they can do that, they can tell you what time to go to bed, what time to get up, and whether to have pork and beans for lunch."

Yesterday, a newly formed group called the Constitutional Crisis Committee began distributing petitions calling for the impeachment of Federal Judge Virgil Pittman of the Southern District of Alabama.

Judge Pittman two weeks ago ruled in a class-action suit brought by city blacks that the Mobile system of government, a three-member city commission, with each member elected by citywide vote, "precludes a black voter from an effective participation in the election system."

He ordered that in the municipal election next year the commission was to be replaced by a mayor elected by citywide vote and nine council members elected from single-member districts.

Given the city's racially polarized voting pattern, this would likely result in the election of at least three and possibly four blacks.

The court found that the vote of Mobile's blacks, 35 percent of the population, was "diluted" by the white majority, making it unlikely to elect a black in a citywide vote.

The ruling is believed to be the most extensive intrusion by the courts so far into legislative and executive affairs. The Mobile City Commission was established under legislative power of the State of Alabama in 1911 and has twice been retained by popular vote of the city's voters.

There have been a number of recent examples of state and Federal judicial action taking over prerogatives normally reserved to the executive or legislative branches of Government.

In Alabama, Mississippi and Louisiana, Federal courts have ordered state prisons to be brought up to standards set by the courts, in most cases involving large expenditures of state funds.

In New York City, a Federal court ordered the aging Tombs Prison closed and a new facility built.

In New Jersey, a state court in effect ordered the Legislature to enact an income tax by declaring the closing of public schools until adequate financial support was made available—possible only through enactment of the income tax.

In Chicago, a Federal court ordered affirmative action in the hiring of policemen, a step that has also been taken in numerous other places.

In Boston, parts of the operation of public schools have been directed by Federal Judge Arthur Garrity in an effort to correct racial imbalances.

These are part of the growing trend toward "activist" court decisions forcing the requirements of the judiciary onto other branches of Government.

Besides the question of separation of powers among the legislative, executive and judicial branches, these and similar court actions have raised the question of "accountability" of judges—most of whom, particularly those on the Federal bench, are not elected but appointed for terms up to life without review.

In a speech to the new Constitutional Crisis Committee, Mr. Mims, the current Mayor under a rotation system among the commissioners, said: "This decision, if not reversed, could be the beginning of the end for local government and the open door for complete Federal takeover of community affairs."

The city has set aside \$500,000, including \$200,000 in Federal revenue-sharing money, to fight the decision.

Eugene McKenzie, a furniture store owner who is head of the crisis committee, said in an interview that the petitions for impeachment of Judge Pittman were based on "usurpation of the voters' right to choose their form of local government as guaranteed by the Alabama Constitution."

The petition also maintains that the 10th Amendment of the United States Constitution delegating certain powers to the Federal Govern-

ment and reserving others to the states had been breached by the ruling.

Mayor Mims said in an interview that the issue was not racial. "If we'd been bad to blacks, been mean old honkies, then maybe we'd deserve this," he said. "I just hope that blacks will realize that the issue is if a judge can order this, he can order Ku Klux Klansmen into city government."

In his ruling, Judge Pittman observed that "there is no formal prohibition against blacks seeking office in Mobile" and that "since the Voting Rights Act of 1965, blacks register and vote without hindrance."

However, the judge found that "one indication that local political processes are not equally open is the fact that no black person has ever been elected to the at-large city commission."

Although the judge found no current examples of "overt gross discrimination" in city services, he said in his ruling that there were "significant differences and the sluggishness" in responding to needs in black areas as compared to white areas.

Moreover, he found significant racial imbalances in city administrative agencies appointed by the city commissioners.

Mayor Mims said that while such imbalances appear to exist, blacks did have minority representation on all such boards and said that appointments were made according to qualifications and not according to race.

Judge Pittman's ruling is being appealed to the Court of Appeals for the Fifth Circuit in New Orleans. No hearing date has been set, and no ruling is expected before the date of the municipal elections next August. The city will ask for a stay of the order, if necessary, to continue to elect the commissioners as its form of Government. The Mayor also said that the city would continue its appeals to the United States Supreme Court if necessary.

Bibliography

BOOKS

- Acheson, Dean. *Morning and Noon* (Boston, Houghton Mifflin, 1965).
- Adams, John Quincy. *Life in a New England Town: 1787, 1788. Diary of John Quincy Adams* (Boston, Little, Brown, 1903).
- Allen, Sir C. K. *Law in the Making*, 6th ed. (Oxford, Clarendon Press, 1958).
- Bacon, Matthew. *A New Abridgment of the Laws of England*, 8 vols., 3d ed. (London, 1768).
- Baldwin, Henry. *A General View of the Origin and Nature of the Constitution and Government of the United States* (Philadelphia, J. C. Clark, 1837).
- Bemis, Samuel F. *John Quincy Adams and the Foundation of American Foreign Policy* (New York, Knopf, 1949).
- . *John Quincy Adams and the Union* (New York, Knopf, 1956).
- Benedict, Michael Les. *A Compromise of Principle: Conservative Republicans and Reconstruction 1863–1869* (New York, Norton, 1975).
- Berger, Raoul. *Congress v. The Supreme Court* (Cambridge, Mass., Harvard University Press, 1969).
- . *Executive Privilege: A Constitutional Myth* (Cambridge, Mass., Harvard University Press, 1974).
- . *Impeachment: The Constitutional Problems* (Cambridge, Mass., Harvard University Press, 1973).
- Bickel, Alexander M. *The Least Dangerous Branch* (Indianapolis, Bobbs-Merrill, 1962, paperback ed.).
- Black, Charles L., Jr. *The People and the Court* (New York, Macmillan, 1960).

- Blackstone, William. *Commentaries on the Laws of England* (London, 1765–1769).
- Brest, Paul. *Processes of Constitutional Decisionmaking: Cases and Materials* (Boston, Little, Brown, 1975).
- Brock, W. R. *An American Crisis: Congress and Reconstruction* (London, Macmillan, 1963).
- Brodie, Fawn M. *Thaddeus Stevens: Scourge of the South* (New York, Norton, 1959).
- Brooks, Van Wyck. *Days of the Phoenix* (New York, Dutton, 1957).
- Butterfield, Sir Herbert. *George III and the Historians* (New York, Macmillan, 1969).
- Cardozo, Benjamin N. *The Nature of the Judicial Process* (New Haven, Yale University Press, 1921).
- Coke, Edward. *Institutes of the Laws of England*, 4 vols. (London, 1628–1641).
- Commager, Henry Steele. *Documents of American History*, 7th ed. (New York, Appleton, 1963).
- Corwin, Edward S. *American Constitutional History*, A. T. Mason and G. Garvey, eds. (New York, Harper & Row, 1964).
- . *The Doctrine of Judicial Review: Its Legal and Historical Basis and Other Essays* (Princeton, Princeton University Press, 1914).
- Cover, Robert. *Justice Accused: Antislavery and the Judicial Process* (New Haven, Yale University Press, 1975).
- Cox, Archibald. *The Role of the Supreme Court in American Government* (New York, Oxford University Press, 1976).
- Donald, David. *Charles Sumner and the Coming of the Civil War* (New York, Knopf, 1960).
- . *Charles Sumner and the Rights of Man* (New York, Knopf, 1970).
- . *The Politics of Reconstruction* (Baton Rouge, Louisiana State University Press, 1965).
- Elliot, Jonathan. *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 4 vols., 2d ed. (Washington, D.C., J. Elliot, 1836).
- Elliott, Ward E. Y. *The Rise of a Guardian Democracy* (Cambridge, Mass., Harvard University Press, 1974).
- Fairman, Charles. *Mr. Justice Miller and the Supreme Court* (Cambridge, Mass., Harvard University Press, 1939).

- . *Reconstruction and Reunion 1864–1878*, vol. 6, part 1, of *History of the Supreme Court of the United States* (New York, Macmillan, 1971).
- Farrand, Max. *The Records of the Federal Convention of 1787*, 4 vols. (New Haven, Yale University Press, 1911).
- . *The Federalist* (New York, Modern Library ed., 1937).
- Flack, Harry. *The Adoption of the Fourteenth Amendment* (Baltimore, Johns Hopkins University Press, 1908).
- Frankfurter, Felix. *The Commerce Clause Under Marshall, Taney and Waite* (Chapel Hill, University of North Carolina Press, 1937).
- . *Law and Politics*, A. Macleish and E. F. Prichard, eds. (New York, Harcourt Brace, 1938).
- . *Mr. Justice Holmes and the Supreme Court* (Cambridge, Mass., Harvard University Press, 1938).
- . *Of Law and Men*, Philip Elman, ed. (New York, Harcourt Brace, 1956).
- Freedman, M., ed. *Roosevelt and Frankfurter: Their Correspondence 1928–1945* (Boston, Little, Brown, 1967).
- Gibbon, Edward. *The History of the Decline and Fall of the Roman Empire* (New York, Nottingham Society, undated).
- Gillette, William. *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (Baltimore, Johns Hopkins University Press, 1965).
- Goebel, Julius. *Antecedents and Beginnings to 1801*, vol. 1 of *History of the Supreme Court of the United States* (New York, Macmillan, 1971).
- and T. R. Naughton. *Law Enforcement in Colonial New York (1664–1776)* (Montclair, N.J., Patterson Smith, 1970).
- Graglia, Lino A. *Disaster by Decree* (Ithaca, Cornell University Press, 1976).
- Graham, Howard Jay. *Everyman's Constitution* (New York, Norton, 1968).
- Griffith, Kathryn. *Judge Learned Hand and the Role of the Federal Judiciary* (Norman, University of Oklahoma Press, 1973).
- Gunther, Gerald, ed. *John Marshall's Defense of McCulloch v. Maryland* (Stanford, Stanford University Press, 1969).
- Haines, Charles G. *The Revival of Natural Law Concepts* (Cambridge, Mass., Harvard University Press, 1930).
- Hale, Sir Matthew. *History of the Pleas of the Crown* (London, 1736).

- Hamilton, Alexander. *The Papers of Alexander Hamilton*, H. C. Syrett and J. E. Cooke, eds. (New York, Columbia University Press, 1962).
- . *Works*, H. C. Lodge, ed., 12 vols. (New York, Knickerbocker Press, 1904).
- Hand, Learned. *The Bill of Rights* (Cambridge, Mass., Harvard University Press, 1962).
- . *The Spirit of Liberty*, Irving Dillard, ed. (New York, Knopf, 1952).
- Harris, Robert J. *The Quest For Equality* (Baton Rouge, Louisiana State University Press, 1960).
- Hart, Henry M., and Albert Sacks. "The Legal Process: Basic Problems in Making and Application of Law" (unpublished mimeographed edition, 1958).
- Hauser, Arnold. *The Social History of Art*, 4 vols. (New York, Vintage Books, undated).
- Heller, Francis H. *The Sixth Amendment to the Constitution of the United States* (Lawrence, Kan., University of Kansas Press, 1951).
- Himmelfarb, Gertrude. *Victorian Minds* (New York, Knopf, 1968).
- Hockett, H. C. *The Constitutional History of the United States, 1826-1876* (New York, Macmillan, 1939).
- Holmes, Oliver Wendell, Jr. *Collected Legal Papers* (New York, Harcourt Brace, 1920).
- . *The Common Law* (Boston, Little, Brown, 1881).
- Horwitz, Morton J. *The Transformation of American Law* (Cambridge, Mass., Harvard University Press, 1977).
- Howe, M., ed. *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski* (Cambridge, Mass., Harvard University Press, 1953).
- Hughes, Charles Evans. *The Autobiographical Notes of Charles Evans Hughes*, D. J. Danielski and J. S. Tulchin, eds. (Cambridge, Mass., Harvard University Press, 1973).
- . *The Supreme Court of the United States: Its Foundation, Methods and Achievements, an Interpretation* (New York, Columbia University Press, 1928).
- Hurst, James Willard. *The Legitimacy of the Business Corporation in the Law of the United States* (Charlottesville, University of Virginia Press, 1970).

- Hyman, Harold M. *A More Perfect Union* (New York, Knopf, 1973).
- Jackson, Robert H. *The Struggle for Judicial Supremacy: A Study of a Crisis in American Political Power* (New York, Knopf, 1941).
- James, Joseph B. *The Framing of the Fourteenth Amendment* (Urbana, Ill., University of Illinois Press, 1965).
- Jefferson, Thomas. *Writings*, P. L. Ford, ed., 10 vols. (New York, Putnam, 1892-1899).
- Keller, Morton. *Affairs of State* (Cambridge, Mass., Harvard University Press, 1977).
- Kendrick, Benjamin. *The Journal of the Joint Committee of Fifteen on Reconstruction* (New York, Columbia University Press, 1914).
- Kent, James. *Commentaries on American Law*, 9th ed. (Boston, Little, Brown, 1858).
- Kluger, Richard. *Simple Justice* (New York, Knopf, 1976).
- Kurland, Philip B. *Politics, the Constitution and the Warren Court* (Chicago, University of Chicago Press, 1970).
- Lacy, Dan. *The White Use of Black in America* (New York, Atheneum, 1972).
- Lash, Joseph P. *From the Diaries of Felix Frankfurter* (New York, Norton, 1975).
- Lerner, M., ed., *The Mind and Faith of Justice Holmes* (Garden City, N.Y., Halcyon House, 1943).
- Levy, Leonard. *Against the Law: The Nixon Court and Criminal Justice* (New York, Harper & Row, 1974).
- . *Judgments: Essays in American Constitutional History* (Chicago, Quadrangle Books, 1972).
- , ed. *Judicial Review and the Supreme Court* (New York, Harper & Row, 1967).
- , ed. *The Supreme Court Under Earl Warren* (New York, Quadrangle Books, 1972).
- Lusky, Louis. *By What Right?* (Charlottesville, Michie Co., 1975).
- McClellan, James. *Joseph Story and the American Constitution* (Norman, Okla., University of Oklahoma Press, 1974).
- McCloskey, Robert G. *The American Supreme Court* (Chicago, University of Chicago Press, 1960).
- Mellwain, Charles H. *Constitutionalism: Ancient and Modern*, rev. ed. (Ithaca, Cornell University Press, 1947).

- McKittrick, Eric L. *Andrew Johnson and Reconstruction* (Chicago, University of Chicago Press, 1960).
- McRee, G. J. *Life and Correspondence of James Iredell*, 2 vols. (New York, Appleton, 1857-1858).
- Madison, James. *Writings*, G. Hunt, ed., 9 vols. (New York, Putnam, 1900-1910).
- Mason, Alpheus T. *Harlan Fiske Stone: Pillar of the Law* (New York, Viking Press, 1956).
- . *Security Through Freedom: American Political Thought and Practice* (Ithaca, Cornell University Press, 1955).
- . *The Supreme Court: Palladium of Freedom* (Ann Arbor, University of Michigan Press, 1962).
- and W. M. Beaney. *American Constitutional Law* (New York, Prentice-Hall, 1954).
- Mencken, Henry T. *Treatise of Right and Wrong* (New York, Knopf, 1934).
- Mendelson, Wallace. *Justices Black and Frankfurter: Conflict in the Court* (Chicago, University of Chicago Press, 1961).
- . *The Supreme Court: Law and Discretion* (Indianapolis, Bobbs-Merrill, 1967).
- Miller, Charles A. *The Supreme Court and the Uses of History* (Cambridge, Mass., Harvard University Press, 1969).
- Morison, Samuel Eliot. *The Oxford History of the American People* (New York, Oxford University Press, 1965).
- Muller, Herbert. *Uses of the Past* (New York, Oxford University Press, 1952).
- Murphy, Paul. *The Constitution in Crisis Times, 1918-1969* (New York, Harper & Row, 1972).
- Paludan, Phillip S. *A Covenant With Death* (Urbana, University of Illinois Press, 1975).
- Patterson, Caleb P. *The Constitutional Principles of Thomas Jefferson* (Austin, Texas, University of Texas Press, 1953).
- Pendleton, Edmund. *Letters and Papers*, D. J. Mays, ed. (Charlottesville, University of Virginia Press, 1967).
- Poorc, Ben P. *Federal and State Constitutions, Colonial Charters*, 2 vols. (Washington, D.C., Government Printing Office, 1877).
- Powell, Thomas Reed. *Vagaries and Varieties in Constitutional Interpretation* (New York, Columbia University Press, 1956).

- Randall, J. R. *The Making of the Modern Mind* (Boston, Houghton Mifflin, 1940).
- Richardson, James O. *Compilation of the Messages and Papers of the Presidents, 1789-1897*, 10 vols. (Washington, D.C., Government Printing Office, 1897).
- Roberts, Owen. *The Court and the Constitution* (Cambridge, Mass., Harvard University Press, 1951).
- Rodell, Fred. *Nine Men* (New York, Random House, 1955).
- Rutherford, Thomas. *Institutes of Natural Law*, 2 vols. (Cambridge, J. Bentham, 1754-1756).
- Samuels, Ernest. *Henry Adams: The Major Phase* (Cambridge, Mass., Harvard University Press, 1964).
- Shapiro, Martin. *Law and Politics in the Supreme Court* (New York, Free Press of Glencoe, 1964).
- Smith, Homer W. *Man and His Gods* (Boston, Little, Brown, 1953).
- Smith, Page. *John Adams*, 2 vols. (Garden City, N.Y., Doubleday, 1962).
- Smith, Zephaniah. *A System of Laws of the State of Connecticut* (Windham, Conn., Z. Smith, 1795-1796).
- Stampf, Kenneth M. *The Peculiar Institution* (New York, Vintage Books, 1956).
- Story, Joseph. *Commentaries on the Constitution of the United States*, 2 vols., 5th ed. (Boston, Little, Brown, 1905).
- Strickland, S. P., ed. *Hugo Black and the Supreme Court: A Symposium*; Foreword by C. L. Black (Indianapolis, Bobbs-Merrill, 1967).
- TenBroek, Jacobus. *Equal Under Law* (London, Collier Books, 1965).
- Tocqueville, Alexis de. *Democracy in America*, 2 vols. (New York, Colonial Press, 1900).
- Twiss, Benjamin R. *Lawyers and the Constitution* (Princeton, Princeton University Press, 1942).
- Washington, George. *Writings*, J. Fitzpatrick, ed., 39 vols. (Washington, D.C., Government Printing Office, 1940).
- White, G. Edward. *The American Judicial Tradition* (New York, Oxford University Press, 1976).
- Wilson, Edmund. *Europe Without a Baedeker* (New York, Farrar Strauss, 1966).
- . *Patriotic Gore* (New York, Oxford University Press, 1962).

- Wilson, James. *Works*, R. G. McCloskey, ed., 2 vols. (Cambridge, Mass., Harvard University Press, 1967).
- Wood, Gordon. *The Creation of the American Republic 1776-1787* (Chapel Hill, University of North Carolina Press, 1969).
- Woodward, C. Vann. *The Burden of Southern History* (Baton Rouge, Louisiana State University Press, 1960).
- Wright, Benjamin F. *The Growth of American Constitutional Law* (Boston, Houghton Mifflin, 1942).

ARTICLES

- Allen, Francis. "The Constitution: The Civil War Amendments: XIII-XV," in Daniel Boorstin, *An American Primer* 165.
- Arnold, Thurman. "Professor Hart's Theology," 73 *Harvard Law Review* 1298 (1960).
- Auerbach, Carl. "The Reapportionment Cases: One Person, One Vote—One Vote, One Value," 1964 *Supreme Court Review* 1.
- Bell, Derrick. "Book Review," 76 *Columbia Law Review* 350 (1976).
- . "The Burden of Brown on Blacks: History Based on Observations of a Landmark Decision," 7 *North Carolina Central Law Journal* 25 (1975).
- Berger, Raoul, "Constructive Contempt: A Post-Mortem," 9 *University of Chicago Law Review* 602 (1942).
- . "Judicial Review: Counter Criticism in Tranquillity," 69 *Northwestern University Law Review* 390 (1974).
- . "War-Making by the President," 121 *University of Pennsylvania Law Review* 29 (1972).
- Bickel, Alexander M. "The Original Understanding and the Segregation Decision," 69 *Harvard Law Review* 1 (1955).
- . "Is the Warren Court Too 'Political'?" *The New York Times Magazine*, September 25, 1966, in L. Levy, ed., *The Supreme Court Under Earl Warren* 216 (1972).
- and Harry Wellington. "Legislative Purpose and the Judicial Process: The Lincoln Mills Case," 71 *Harvard Law Review* 1 (1957).
- Bishop, Joseph W., Jr. "The Warren Court is Not Likely to be Overruled," *The New York Times Magazine*, September 7, 1969, in L. Levy, ed., *The Supreme Court Under Earl Warren* 93 (1972).
- . "What is a Liberal—Who is a Conservative?" 62 *Commentary* 47 (September 1976).

- Bork, Robert J. "Neutral Principles and Some First Amendment Problems," 47 *Indiana Law Journal* 1 (1971).
- Braden, George D. "The Search for Objectivity in Constitutional Law," 57 *Yale Law Journal* 571 (1948).
- Burns, James McGregor. "Dictatorship—Could It Happen Here?" in C. Roberts, ed., *Has the Court Too Much Power* 234 (1974).
- Cahn, Edmond. "Brief for the Supreme Court," *The New York Times Magazine*, October 7, 1956, in L. Levy, ed., *The Supreme Court Under Earl Warren* 28 (1972).
- . "Jurisprudence," 30 *New York University Law Review* 150 (1955).
- Chayes, Abram. "The New Judiciary," 28 *Harvard Law School Bulletin* 23 (1976).
- Claggett, Bruce M. "Book Review," 27 *Harvard Law School Bulletin* 3 (1976).
- Commager, Henry Steele. "Constitutional History and the Higher Law," in C. Read, ed., *The Constitution Reconsidered* 225 (1939).
- . "Judicial Review and Democracy," 19 *Virginia Quarterly Review* 417 (1943).
- Cooper, Tim. "Freund: 40 Years of Supreme Court History Recalled," 64 *Harvard Law School Record* 1 (1977).
- Corwin, Edward S. "The Decline of Due Process Before the Civil War," 24 *Harvard Law Review* 460 (1911).
- . "The 'Higher Law' Background of American Constitutional Law," 42 *Harvard Law Review* 149 (1928).
- Cox, Archibald. "The New Dimensions of Constitutional Adjudication," 51 *Washington Law Review* 791 (1976).
- Curtis, Charles P. "A Better Theory of Legal Interpretation," 3 *Vanderbilt Law Review* 407 (1950).
- . "Review and Majority Rule," in E. Cahn, ed., *Supreme Court and Supreme Law* 170 (1954).
- . "The Role of the Constitutional Text," *id.* 64.
- Dahl, Robert. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," 6 *Journal of Public Law* 279 (1957).
- Dershowitz, Alan M. "Book Review," *New York Times Book Review*, September 21, 1975, at 1.
- Dixon, Robert. "Reapportionment in the Supreme Court and

- Congress: Constitutional Struggle for Fair Representation," 63 Michigan Law Review 209 (1964).
- Douglas, William O. "Stare Decisis," 49 Columbia Law Review 735 (1949).
- Downing, Rondel G. "Judicial Ethics and the Political Role of the Courts," 35 Law and Contemporary Problems 94 (1970).
- Ely, John Hart. "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 Yale Law Journal 920 (1973).
- Fairman, Charles. "Does the Fourteenth Amendment Incorporate the Bill of Rights?," 2 Stanford Law Review 5 (1949).
- Finn, Chester E. "Book Review," Commentary 78, April 1, 1976.
- Frank, John. "Review and Basic Liberties," in E. Cahn, ed., *Supreme Court and Supreme Law* 109 (1954).
- Frankfurter, Felix. "John Marshall and the Judicial Function," 69 Harvard Law Review 217 (1955).
- . "Memorandum on 'Incorporation' of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment," 78 Harvard Law Review 764 (1965).
- . "The Supreme Court and the Public," 83 Forum 329 (1930).
- Frantz, Laurent B. "Congressional Power to Enforce the Fourteenth Amendment Against Private Acts," 73 Yale Law Journal 1353 (1964).
- . "Is the First Amendment Law?—A Reply to Professor Mendelson," 51 California Law Review 729 (1963).
- Grant, J. A. C. "The Natural Law Background of Due Process," 31 Columbia Law Review 56 (1931).
- Grey, Thomas C. "Do We Have an Unwritten Constitution?" 27 Stanford Law Review 703 (1975).
- Hamilton, Walton H. "The Path of Due Process of Law," in C. Read, ed., *The Constitution Reconsidered* 167 (1938).
- Hand, Learned. "Chief Justice Stone's Conception of the Judicial Function," 46 Columbia Law Review 696 (1946).
- Hawkins, Vaughan. "On the Principles of Legal Interpretation, with Reference Especially to the Interpretation of Wills," 2 Juridical Society Papers 298 (1860).
- Henkin, Louis. "'Selective Incorporation' in the Fourteenth Amendment," 73 Yale Law Journal 74 (1963).
- . "Some Reflections on Current Constitutional Controversies," 109 University of Pennsylvania Law Review 637 (1961).

- Hooker, Roger W. "A 'Quiet, Undramatic' Leader," The New York Times, August 19, 1976.
- Horn, Robert H. "Book Review," 88 Harvard Law Review 1924 (1975).
- Horwitz, Morton J. "The Conservative Tradition in the Writing of American Legal History," 17 American Journal of Legal History 275 (1973).
- . "The Emergence of an Instrumental Conception of American Law, 1780–1820," in 5 *Perspectives in American Legal History* 287 (1971).
- Hurst, James Willard. "The Role of History," in E. Cahn, ed., *Supreme Court and Supreme Law* 60 (1954).
- . "The Process of Constitutional Construction," in id. 55.
- Hutcheson, Joseph C. "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision," 14 Cornell Law Quarterly 274 (1929).
- Jaffe, Louis. "The Supreme Court Debated—Another View," The New York Times Magazine, June 5, 1960, in L. Levy, ed., *The Supreme Court Under Earl Warren* 199 (1972).
- . "Was Brandeis an Activist? The Search for Intermediate Premises," 80 Harvard Law Review 986 (1967).
- Jurow, Keith. "Untimely Thoughts: A Reconsideration of the Origins of Due Process," 19 American Journal of Legal History 265 (1975).
- Kauper, Paul. "Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The *Griswold* Case," 64 Michigan Law Review 235 (1965).
- . "Some Comments on the Reapportionment Cases," 63 Michigan Law Review 243 (1964).
- Kelly, Alfred H. "Clio and the Court: An Illicit Love Affair," 1965 Supreme Court Review 119.
- . "Comment on Harold M. Hyman's Paper," in H. M. Hyman, ed., *New Frontiers of the American Reconstruction* 41 (1966).
- . "The Fourteenth Amendment Reconsidered: The Segregation Question," 54 Michigan Law Review 1049 (1956).
- Korman, Edward R. "Book Review," 4 Hofstra Law Review 549 (1976).
- Levinson, Sanford. "Fidelity to Law and the Assessment of Political Activity," 27 Stanford Law Review 1185 (1975).
- Levitan, David. "The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory," 55 Yale Law Journal 467 (1946).

- Lewin, Nathan. "Avoiding the Supreme Court," *The New York Times Magazine*, October 17, 1976 at 31.
- Lewis, Anthony. "A Man Born to Act, Not to Muse," *The New York Times Magazine*, June 30, 1968, in L. Levy, ed., *The Supreme Court Under Earl Warren* 151 (1972).
- _____. "A Time to Celebrate," *The New York Times*, May 13, 1974, p. 29.
- _____. "Historical Change in the Supreme Court," *The New York Times Magazine*, June 2, 1962, in L. Levy, ed., *The Supreme Court Under Earl Warren* 77 (1972).
- _____. "What Qualities for the Court?" *The New York Times Magazine*, October 6, 1957, id. 114.
- Linde, Hans. "Judges, Critics and the Realist Tradition," 82 *Yale Law Journal* 227 (1972).
- Lofgren, Charles A. "United States v. Curtiss-Wright Export Corporation: An Historical Reassessment," 83 *Yale Law Review* 51 (1973).
- McCloskey, Robert G. "Due Process and the Supreme Court: An Exhumation and Reburial," 1962 *Supreme Court Review* 33.
- McDougal, Myres, and Asher Lans. "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy," 54 *Yale Law Journal* 184 (1945).
- McGovney, D. O. "Privileges and Immunities Clause, Fourteenth Amendment," 4 *Iowa Law Bulletin* 219 (1918).
- Mason, Alpheus Thomas. "The Burger Court in Historical Perspective," 47 *New York State Bar Journal* 87 (1975).
- _____. "Myth and Reality in Supreme Court Drama," 48 *Virginia Law Review* 1385 (1962).
- Mendelson, Wallace. "Mr. Justice Black's Fourteenth Amendment," 53 *Minnesota Law Review* 711 (1969).
- _____. "Mr. Justice Frankfurter: Law and Choice," 10 *Vanderbilt Law Review* 333 (1957).
- Miller, Arthur S. "An Inquiry into the Relevance of the Intention of the Founding Fathers, With Special Emphasis upon the Doctrine of Separation of Powers," 27 *Arkansas Law Review* 584 (1973).
- Miller, Arthur S., and Ronald F. Howell. "The Myth of Neutrality in Constitutional Adjudication," 27 *University of Chicago Law Review* 661 (1960).

- Morrison, Stanley. "Does the Fourteenth Amendment Incorporate the Bill of Rights?," 2 *Stanford Law Review* 140 (1949).
- Neal, Phil C. "Baker v. Carr: Politics in Search of Law," 1962 *Supreme Court Review* 252.
- Newmeyer, Kent. "Book Review," 19 *American Journal of Legal History* 66 (1975).
- Nye, R. B. "Comment on C. V. Woodward's Paper," in H. M. Hyman, ed., *New Frontiers of the American Reconstruction* 148 (1966).
- Packer, Herbert. "The Aim of Criminal Law Revisited: A Plea for a New Look at 'Substantive Due Process,'" 44 *Southern California Law Review* 490 (1971).
- Pollak, Louis. "The Supreme Court Under Fire," 6 *Journal of Public Law* 428 (1957).
- Pound, Roscoe. "Common Law and Legislation," 21 *Harvard Law Review* 383 (1908).
- Richardson, H. G., and G. O. Sayles. "Parliament and Great Councils in Medieval England," 77 *Law Quarterly Review* 213 (1961).
- Rodell, Fred. "The Crux of the Court Hullabaloo," *The New York Times Magazine*, May 29, 1960, in L. Levy, ed., *The Supreme Court Under Earl Warren* 192 (1972).
- _____. "It is the Warren Court," *The New York Times Magazine*, March 13, 1966, id. 136.
- _____. "The 'Warren Court' Stands Its Ground," *The New York Times Magazine*, September 27, 1964, id. 209.
- Rostov, Eugene V. "The Democratic Character of Judicial Review," 66 *Harvard Law Review* 193 (1952).
- _____. "The Japanese-American Cases—A Disaster," 54 *Yale Law Journal* 489 (1945).
- Shattuck, Charles E. "The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions which Protect 'Life, Liberty and Property,'" 4 *Harvard Law Review* 365 (1891).
- Sowell, Thomas. "A Black 'Conservative' Dissents," *The New York Times Magazine*, August 8, 1976, p. 14.
- Steel, Lewis M. "Nine Men in Black Who Think White," *The New York Times Magazine*, October 13, 1968, in L. Levy, ed., *The Supreme Court Under Earl Warren* 82 (1972).
- Stephenson, D. G. "Book Review," 61 *Virginia Law Review* 1338 (1975).

- Sutherland, Arthur E. "Privacy in Connecticut," 64 *Michigan Law Review* 283 (1965).
- Thayer, James Bradley. "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harvard Law Review* 129 (1893).
- Van Alstyne, William W. "The Fourteenth Amendment, The 'Right' to Vote, and the Understanding of the Thirty-Ninth Congress," 1965 *Supreme Court Review* 33.
- Warren, Charles. "The New 'Liberty' under the Fourteenth Amendment," 39 *Harvard Law Review* 431 (1926).
- Wofford, John. "The Blinding Light: The Uses of History in Constitutional Interpretation," 31 *University of Chicago Law Review* 502 (1964).
- Woodward, C. Vann. "Seeds of Failure in Radical Race Policy," in H. M. Hyman, ed., *New Frontiers of the American Reconstruction* 12 (1966).
- Wright, J. Skelly. "Professor Bickel, The Scholarly Tradition, and the Supreme Court," 84 *Harvard Law Review* 769 (1971).

MISCELLANEOUS

- Act of April 9, 1866, Ch. 21, 14 Statutes 27.
- 1 *Annals of Congress*, vol. 1 (1789), 2d ed. (Washington, Gales & Seaton, 1834, print bearing running head "History of Congress").
- 2 *Annals of Congress*, vol. 2 (1791), id.
- Charles L. Black, Jr., Address, "The Judicial Power as Guardian of Liberties," before a Symposium on "The Supreme Court and Constitutional Liberties in Modern America," Wayne State University, Detroit, Mich., October 16, 1976 (unpublished).
- Congressional Globe*, 39th Congress, 1st Session (1866).
- . 39th Congress, 2d Session (1867).
- . 40th Congress, 3d Session (1869).
- . 42d Congress, 1st Session (1871).
- Hearings on Executive Privilege before the Senate Subcommittee on the Separation of Powers*, 92d Congress, 1st Session (July 1971).
- Hearings on the Supreme Court before the Senate Subcommittee on the Separation of Powers*, 90th Congress, 2d Session (June 1968).

General Index

Note: for members of the Congress, a * before the name indicates Senator; a † indicates Representative.

- Abolitionism, abolitionists, 161; loathing for, 10-14; theories, 10, 110-111, 203, 205, 207-208, 230-245; and privileges and immunities, 22, 28; Bingham's position and, 119, 147, 207, 232-234; and Civil Rights Act, 164; view of equality, 167; and *Dred Scott* decision, 222, 256; fugitive slave cases, 226; and natural rights, 255, 390, 391. *See also* Neoabolitionism
- Absolute rights, 49. *See also* Fundamental rights
- Acheson, Dean, 244, 289
- Act of March 3, 1875, 224
- Adams, Abigail, 272
- Adams, John, 252, 287, 308; on property, 267; on laws, 288-289; on exact observation of Constitution, 293, 352
- Adams, John Quincy, 308; on three-fifths clause, 72; on Justices, 335
- "Adoption" theory, 134, 135. *See also* Bill of Rights
- Alabama, 200
- "Aliens," 217, 218
- Allen, Francis, 99
- Amendment process, 101, 132, 282, 287, 291, 299, 321, 330, 335, 363-364, 414, 415; libertarian view, 315-316; and Founders, 317-318; and judicial review, 353-354; and Marshall in *M'Cullough*, 375, 376. *See also* Judicial revision
- Ames, Chief Justice (R.I.), 256
- *Anthony, Henry B. (R.I.), 60
- Antislavery, *See* Abolitionism
- Anti-Slavery Society, 235
- Apportionment: and suffrage question, 64-68, 69-77; malapportionment, 71-72, 74, 75, 78; State, and admission to Union, 81. *See also* Reapportionment; Representation
- Arnold, Thurman, 292, 298
- Articles of Confederation, 47
- †Ashley, James M. (Ohio), 55, 59, 84
- Auerbach, Carl, 373; on Supreme Court and 14th Amendment history, 54; on republican form of government, 80-81; on Amendment language, 99-100; on equal protection and suffrage, 421-422
- Bacon, Francis, 20
- Bacon, Matthew: on statutes, 8, 17, 204, 366, 368, 427; on jury, 400
- Bagehot, Walter, 10

- †Baker, Jehu (Ill.): on due process, 204-205; on §5, 225
- Baldwin, Abraham, 39
- Baldwin, Justice Henry, 345, 379
- Bancroft, George, 222
- Bank of United States, 375, 378
- †Banks, Nathaniel P. (Mass.), 59, 67
- Beane, W. M., 249, 257
- Beard, Charles, 357, 358
- Beck, James M., 2
- Bedford, Gunning, 357
- Bell, Derrick, 13; on abolitionists' view of equality, 167; on desegregation, 327-328
- Bemis, Samuel F., 22, 335
- Benedict, Michael L.: on §2, 53; on Congressional power, 190; interpretation of 39th Congress, 234, 236, 237-239, 242; cited, 5, 147
- Bensen, Egbert, 134, 223
- Berger, Raoul, cited, 4, 50, 87, 88, 117, 182, 194, 224, 251, 253, 284, 287, 291, 295, 304, 309, 321, 333, 355-361 *passim*, 375, 388, 394, 395, 405, 424
- Bickel, Alexander, 57, 127, 349; on Freedmen's Bureau Bill, 24, 71; on Black Codes, 26; on Civil Rights Bill, 27, 29, 39, 165, 170, 172-173; "open-ended" theory, 94, 99, 100-110; and Justice Frankfurter, 100, 101, 118, 123, 128, 130; on desegregation, 118, 348; view of Bingham, 120-121, 122, 142, 145; on judicial review, 129, 311; on Black and due process, 201; on Framers and amendment process, 316; on rule of law, 320; on 5 to 4 opinions, 323; on *Brown* decision, 324; on "reason," 347; and original intent, 367, 368; on Nixon-Watergate as result of Warren Court, 410; cited, 5, 9, 23, 25, 125, 137, 146, 171, 186, 263, 295, 320, 423, 426
- Bill of Rights, 184, 231, 349; incorporation into 14th Amendment and invocation against States, 5, 134-156, 182, 199, 272-275, 276, 339, 340, 350; Trumbull and, 34-35; as grant of power, 184
- 1st Amendment, 134, 137-138, 147, 183, 270, 271, 327
- 4th Amendment, 147
- 5th Amendment, 216, 219, 267;
- Bingham reads equal protection into, 140, 171, 176, 203, 204; due process, 141, 143, 146, 151, 193, 196, 200, 206, 213, 271; Warren on, 210-211; "person," 217
- 6th Amendment, 196, 216; Levy on, 343, 402, 404, 406
- 7th Amendment, 196, 216, 402, 405
- 8th Amendment, 326
- 9th Amendment, 388-390
- 10th Amendment, reservation of powers, 17, 76, 103, 137, 154-155, 250, 264, 294, 352, 380, 381
- †Bingham, John A. (Ohio), 84, 105, 149, 150, 419, 425; privileges or immunities clause, 22, 44, 136, 241; on Civil Rights Bill, 23, 114; on equal protection, 34, 111, 175, 176, 181-182, 203, 215; deletion of "no discrimination in civil rights" from Civil Rights Bill, 34, 38, 102, 112, 114, 115, 119-121, 154, 164, 180, 212; and prototype amendment, 43, 47, 140-147, 171, 172, 173, 178, 180, 185-187, 188, 203, 217-218, 219, 220, 426; on suffrage, 60, 65, 79, 82, 83, 237, 420, 423; on state sovereignty, 61, 155; Justice Brennan on, 92-93, 94, 95; Kelly on,

- 110-112, 122-123, 207, 236; oratory, 112, 145; neoabolitionist reliance on, 119, 147, 207, 232-234; Bickel's view, 120-121, 122, 142, 145; and scope of due process, 139-140, 202, 203-204, 205, 231, 241; on Bill of Rights, 140-144; State protection, 154, 177-178, 184-185; and power over States, 222, 227-235, 240
- Bishop, Joseph W., Jr., 326; on liberals, 314; on judicial review, 351
- Black, Charles L.: on 14th Amendment and discrimination, 127-128; on judicial function, 310; on inequality and judicial power, 327; reevaluation of view of Supreme Court, 346-350; on judicial review, 353-354; on constitutional legality, 410; on Supreme Court accountability, 415
- Black, Justice Hugo L., 99, 193, 208, 322, 324, 325, 331, 341, 346, 354, 387; on corporations and 14th Amendment, 71, 107; and "open-ended" theory, 100; and changing Constitution, 101, 132, 201, 264, 283, 293, 367, 368, 375; and Bingham, 121, 145, 147; "incorporation" theory of Bill of Rights, 136-140, 148-153 *passim*, 262, 263; on States' powers, 155-156, 349; on due process, 200-201, 206, 207, 213, 249, 250, 258, 262, 264, 266, 268, 275; on law of land, 289; and Council of Revision, 300; on death penalty decision, 326, 340; on popular conscience, 328; and 9th Amendment, 389, 390
- Black Codes, 25-26, 47, 48, 153, 172, 175, 178, 209, 426
- Blackmun, Justice Harry Andrew, 323, 339
- Blacks: lynchings, 4; problem of equality, 10-15, 29, 77, 85-86, 160, 167, 170-171, 233-234, 240, 242-243, 348; suffrage question, 12, 14, 29, 30-31, 32, 52-68, 70-71, 76, 79, 82, 88, 90-98, 99, 102, 105-106, 108, 109, 118, 122-123, 126, 147, 154, 166, 167, 188, 202, 208, 215, 236, 237, 239, 422; and problem of representation, 15-16, 64-68, 76, 97-98; limited civil rights for, 18-19, 24-30, 36, 46-48, 70, 136, 153, 407; citizenship, 37, 40, 41, 44-46, 50, 215; and school segregation, 100-101, 117-127 *passim*, 413, equal protection, 107, 169, 172, 174-175, 176, 179, 183, 191, 239, 241; opposition views, 158, 159, 161-163; status as slaves, 168-169; judicial protection for, 201, 202, 211, 213, 217, 224; Supreme Court failure to protect, 258, 322. *See also* Discrimination; Racism; Reapportionment; Suffrage
- Blackstone, William, 195, 203, 303, 371; and fundamental rights, 20-21, 22, 34, 35, 36, 42, 213, 243; on legislative intention, 162; and equal protection, 168; on due process, 198; on personal liberty, 270; on law without equity, 307; on trial by jury, 399, 400
- †Blaine, James G. (Me.), 66, 72, 73, 74, 75, 165
- "Blank check to posterity," 99, 106, 201, 264
- Bloodworth, Timothy, 394
- Bolognian law, bloodletting case, 162

- Bork, Robert J.: on reapportionment cases, 89-90; on framers' purpose, 214; on Supreme Court rationale, 319; cited, 191, 272, 292, 412
- Boudinot, Elias, 316
- †Boutwell, George S. (Mass.), 52, 55, 68, 82, 92, 95, 96, 234
- †Boyer, Benjamin M. (Pa.), 68, 97, 159
- Braden, George D., 260, 263, 278
- Bradley, Justice Joseph P., 38; on rights, 33, 49; on Congressional corrective power, 76, 183, 190-191; on Congressional enforcement power, 226
- Brandeis, Justice Louis D., 275, 297, 333, 334, 336, 352; and due process, 259, 414; on free speech and press, 271; on amendments nullifying Supreme Court decisions, 321; on scrupulous observation of law, 410
- Brennan, Justice William J., 343; "open-ended" theory, 57, 65, 68, 99, 100, 221, 419; on reapportionment, 90-98; on Congressional enforcement power, 225-226, 228; on Frankfurter, 263; on overturned precedents, 345
- Brest, Paul, 224, 370-371, 416
- Brewer, Justice David J., 3, 334
- Bright, John, 53
- Brock, W. R., 5, 13, 54
- Brockenbrough, William, 376, 378
- Brodie, Fawn M., 15, 58, 126, 161, 235, 236
- Brooks, Van Wyck, 10
- †Broomall, John M. (Pa.), 23, 43, 68, 202, 216, 218-219, 273
- Brown, Justice Henry B., 3
- Burckhardt, Jacob, 292
- Burger, Chief Justice Warren, 323, 339; on amendment process, 315; on death penalty decision, 326, 344; on Supreme Court as continuing Constitutional Convention, 297, 342; and precedent, 344-345; and 12-man jury, 397. *See also under* Supreme Court
- Burns, James McGregor, 331
- Burton, Justice Harold H., 128, 132, 280
- Busing, 327
- †Butler, Benjamin F. (Mass; 40th Congress), 74
- Butler, Justice Pierce, 296
- Butterfield, Sir Herbert, 9, 14
- Cahn, Edmond: on desegregation via judicial decision, 131, 287; on judicial moral responsibilities, 334; on judicial review, 351
- California, 79
- Camden, Lord, 253, 267, 307
- Cardozo, Justice Benjamin N., 322, 334, 336; on free speech, 272; "ordered" liberty, 273-275; on mandate of statute, 289, 310
- †Chanler, John W. (N.Y.), 13
- Chase, Chief Justice Salmon P., 38, 61-62, 323
- Chase, Justice Samuel (Md.), 32, 309; on privileges and immunities, 33-34, 169; and extraconstitutional power, 251, 252, 254
- Chayes, Abram, 278
- Children, 73
- Choate, Joseph H., 3, 269
- Churchill, Winston, 314
- Cincinnati *Commercial*, 233
- Citizenship: and fundamental enumerated rights, 25, 28, 32, 34, 40, 149, 210, 218; United States and State, 37-51, 216, 390, 426; black, 37, 40, 41, 44-46, 50, 215; and suf-

- frage, 86; "citizens" vs. "persons," 215-220
- Civil liberties: and property, 266; Court's "preferred position" on, 269-282; cases, decisions, 14, 324; and Burger Court, 338-339
- Civil rights. *See* Civil Rights Act of 1866; Discrimination; Fundamental rights
- Civil Rights Act of 1866, 12, 21, 60, 147, 368, 426; privileges or immunities in, embodied by 14th Amendment, 20, 22-36, 38-40, 46, 48, 50-51, 71, 102-103, 111, 115, 140, 146, 149, 150, 152, 154, 159, 167, 172, 174, 179-180, 211, 212, 213, 218, 219, 239, 241, 244, 273, 391; deletion of "no discrimination in civil rights," 24, 34, 38, 102, 104, 112, 115, 119-122, 123, 154, 160-161, 164, 179-180, 212, 216; veto, 29, 42, 62, 162-163, 170, 178, 239; citizenship, 40-43, 44, 46; applicable to blacks and whites, 47, 108, 169; black suffrage and, 53, 55, 94, 96, 188; and States' Rights, 62, 70-71, 76, 184, 275; equal protection in, 107, 133, 168, 169-171, 172, 175, 176-177, 209; authority for, 113-114; and school segregation, 118-119, 124-125, 412; and Bingham amendment, 141; and Bill of Rights, 143; and nondiscriminating State, 150, 154, 178, 212; opposition to, 157, 158, 159; and due process, 201, 202, 203; "citizens," 216-217; enforcement of, 224-225, 227, 229; on going beyond, 236, 240, 241-242, 243; and neoabolitionist theory, 239-240
- Civil Rights Act of 1871, 224
- Civil Rights Act of 1875, 105-106
- Civil War, 14, 60, 222, 233, 236, 390
- Claggett, Bruce M., 285, 316-317
- *Clark, Daniel (N.H.), 16, 26, 125, 201, 210
- Clark, Kenneth, 266
- Clark, Justice Tom, 128, 130, 131, 324
- Clarke, Justice John H., 334
- Clifford, Justice Nathan, 256
- Cohen, Morris R., 336, 416
- Coke, Edward, 35, 365; on law of land, 194, 195-196, 197-198, 199; on due process, 195, 197-198; on 12-man jury, 398-400
- Coleman, William, 129
- Colorado, 56, 59, 80
- Comity clause (Art. IV, §2). *See* Constitution, U.S.
- Commager, Henry Steele: on desegregation, 121; on (pre-1937) Supreme Court record, 332; cited, 5, 21, 198, 253, 284, 285, 291
- Commerce clause, 284
- Common law: terms, and Constitution, 194-195; rationale for libertarians, 320-322; meanings of terms, 382, 385, 386; and jury number, 397, 398; partial departure from, 402-404
- Comstock, Justice (N.Y.), 255
- Congress, U.S.: and suffrage control, 33, 61, 62, 83-86, 421, 423, 427; and Bingham amendment, 43, 141, 171; Justice Miller's view of control by, 46, 48; Trumbull's 1871 remarks, 49; admission of States with no black suffrage, 56; power over States, 76, 79, 105-106; and republican form of government, 77-84; and segregated schools, 123, 124; and equal protection, 173, 179,

- 183-192; "citizen" vs. "person," 215, 216, 219; enforcement power vs. courts', 221-229; and provisions of First and Fifth Amendments, 271; impeachment power, 294-295, 303; and Council of Revision, 300; judicial policing power, 302, 304, 305, 309, 311; and judicial review, 352, 356-360; powers, and *M'Cullough*, 375, 377, 378. *See also* House; Senate
- First Congress, 35, 39, 72, 253, 296, 316, 317, 389; and Bill of Rights, 134, 138, 146, 182, 272, 275; and due process, 194, 196; jury of vicinage proposal, 402; free speech, 272
- Thirty-ninth Congress: records of, 6-7, 368; no intent to encroach on States, 18; on Civil Rights Act, 22-36, 51, 113; views on suffrage, 52, 68; Republican hegemony and representation, 70-74, 91; and republican form of government, 77, 78-80, 82; and Declaration of Independence, 87, 88; and school segregation, 118, 130; and Bill of Rights, 139, 339; opposition to Amendment in, 157-165; North, and State sovereignty, 182; and Congressional grant of power, 184-192; and due process, 201-206, 233; alleged abolitionist influences and political groupings, 237-239, 240. *See* Framers of 14th Amendment
- †Conkling, Roscoe (N.Y.), 40, 52, 169, 425; on black suffrage, 58-59; on State sovereignty, 61, 62, 66-67, 79, 84, 154, 420; on emancipation and rights, 113; on enforcement power, 228
- Connecticut, 55, 89, 92, 200; law on due process, 198, 199, 210
- Conservatives, and course of 14th Amendment, 237-239, 244
- Constitution, U.S.: prolixity of codes vs., 39, 110; rules of construction, 45-46, 363-372; malapportionment in, 72; Warren on right to vote in, 76-77; guarantee of republican government, 77-83, 85; and Declaration of Independence, 87-88; common law definitions, 195; rights secured by, and courts, 223-226; written and fixed, 132-133, 252, 275, 288-291, 311, 364; judicial oath, 289, 292-293; fixed choices, 291-299; judicial policing power, 302, 304, 309, 311, 355; "flexibility" of, 329; rewriting, 407-418. *See also* Amendment process; Bill of Rights; Framers; Judicial review; Judicial revision; Rule of law; Supreme Court
- Article I, §2, 89
- Article III (jury), 401, 403, 405
- Article IV, §2, 21-22, 29, 30, 32, 34, 36, 38-40, 41, 42, 43, 49, 50, 103-104, 111, 112, 138, 140, 141, 144, 146, 149-150, 169, 171, 202
- Article VI, 143
- 11th Amendment, 321
- 13th Amendment, 23, 113-114, 169, 216-217
- 15th Amendment, 85, 86, 106, 132, 167, 421, 424
- 16th Amendment, 321, 325, 383
- 17th Amendment, 86-87
- 19th Amendment, 85, 86
- Constitutional conventions: federal, 77, 267, 300, 302, 357-358, 378; State, 194, 293, 318
- Continental Congress, 21, 88, 198, 400

- Contract, right of, 24, 29, 35, 125, 165, 169; and marriage, 161-163; "liberty of," 269-270
- †Cook, Burton C. (Ill.), 26, 31, 41
- Cooley, Thomas, 273
- Cooper, Tim, 335
- Corbin, Francis, 252-253, 288
- Corporations, 71, 105, 107
- Corwin, Edward S.: on abolitionism and natural law, 255; on Framers' "bet" on democracy, 303; and judicial review, 357-358, 361; on original intention, 363; cited, 20, 197, 256, 365
- Council of Revision, 300-306, 325
- Counsel, right to, 345
- Courts: 14th Amendment enforcement power, 221-222, 228-229; Congress and general jurisdiction of lower Federal, 223-224, 309; jurisdiction in Civil Rights Act, 224-225; shift to legislative policymaking, 249; task of, 291-294
- Cover, Robert, 230, 251, 307, 366; on law and natural right, 252, 254, 388, 390
- *Cowan, Edgar (Pa.), 58, 62, 113, 125, 126, 154, 160, 202, 235
- Cox, Archibald, 2, 77, 267, 269, 324, 415; on reapportionment cases, 69; on *Brown*, 177; on due process, 206; on natural law, 257, 388; on controversial decisions, 278, 279; on Supreme Court and public policy, 305; on history of libertarian view, 312, 313; on obscenity decision, 327; on Burger Court, 340; on judicial review, 355; on segregation and lack of amendment, 408-409; evaluation of Supreme Court's policymaking, 428-429
- Cranch, William, 308
- Crime, and Supreme Court decisions, 326, 338-339
- Criminal procedure, and States, 17, 135-136, 143, 200, 338; and number on jury, 151, 215; and procedural due process, 255
- Crosskey, William, 358
- †Cullom, Shelby M. (Ill.), 13
- Curtis, Justice Benjamin, 196-197, 199, 256
- Curtis, Charles P., 6, 256; on due process, 200, 258; libertarian viewpoint, 315; on past and current meanings, 369
- Curtis, George Ticknor, 113
- Dahl, Robert, 331
- *Davis, Garrett (Ky.), 13, 39, 41, 42, 43-44, 50, 55, 66, 68, 157, 158, 159
- †Davis, Thomas T. (N.Y.), 61, 125, 170, 186, 218
- †Dawson, John L. (Pa.), 158
- Death penalty decision, 261, 325-326, 329, 340, 346, 347, 350
- Declaration of Independence, 85, 87-88, 149, 231, 295, 348, 390, 391
- †Defrees, Joseph H. (Ind.), 175
- †Delano, Columbus (Ohio), 61, 115, 163, 233, 412
- Democratic party: racism, 13, 368; matched with Republicans, 14; Northern, and Southern representation, 16; and black suffrage, 53, 56, 66, 67-68, 91, 96-97, 98; on privileges and immunities and suffrage, 114; opposition to Amendment, 157-163, 189; and Bingham amendment, 187; and Bingham's Ohio district, 233; and action of 39th Congress, 237, 239, 244
- Denman, Lord Chief Justice, 375
- Dershowitz, Alan M., 410
- Desegregation. *See* Segregation

- Dickinson, John, 87, 292, 302, 371
 Disclosure, 116
 Discrimination, protection against, 15, 18; in Civil Rights Act, 24-25, 27, 31, 33-34, 40-41, 216-217; Graham on racial, 36; deletion of "no discrimination in civil rights" clause, 24, 34, 38, 102, 104, 112, 114, 115, 119-122, 123, 154, 160-161, 164, 179-180, 212, 216; legislative, in 14th Amendment, 37, 43-48, 64, 96, 103, 107, 108, 111, 133, 136, 150, 155, 167, 372, 424; in 1871, 50; and meaning of equal protection, 132, 170, 172-175, 176, 179-181, 185, 186, 188, 191, 204, 211-214, 241; C. Black on, 127-128, 348; not all discrimination covered by Amendment, 163-164; and meaning of due process, 203; statutory and judicial, 209, 210-211; racial, and original understanding, 411. *See also* Fundamental rights; Legislation; Privileges and immunities
 District of Columbia, 11, 53, 123-124
 Dixon, Robert, 68
 Dr. Bonham's case, 194
 Donald, David: on racism, 12; on black suffrage, 55; on Sumner, 71, 79, 236; on Bingham, 233-234; on political complexion of 39th Congress, 236, 237; cited, 5, 11, 14, 15, 53, 58, 74, 80, 82, 96, 168, 222, 238, 241
 †Donnelly, Ignatius (Minn.), 26, 52, 55, 125
 *Doolittle, James R. (Wisc.), 12, 15, 23, 59, 63, 66, 104, 149, 243
 Douglas, Justice William O., 85, 151, 274, 297, 322; on full disclosure, 116; on equal protection, 191; on enforcement discretion, 228; on inappropriate legislation, 258; on Supreme Court as super-legislature, 258, 265; and judicial idiosyncrasy, 262; on "penumbras" and "emanations," 265, 294; on change in American law, 283; on judicial standards, 293; on Council of Revision, 300; on Constitution vs. decisions, 297; on Supreme Court as Council of Revision, 302-303; idiosyncrasy, 320; Levy on, 328, 344
 Douglass, Frederick, 15, 161
 Downing, Rondel G., 365
 Due process, 5, 6, 49, 174, 193-220, 235, 389, 408; economic application, 4; limited purpose, 16, 18-19, 108; and reapportionment, 69; and open-ended theory, 102, 110-111; and absorption of Bill of Rights, 138-143 *passim*, 146, 147, 150-151; procedural, 176, 231, 232, 241, 255, 259-260, 273; what it did not mean, 193-195; history, 195-200; in 39th Congress, 201-206; neoabolitionist theory and framers, 207-208; transformation by Supreme Court, 208-214 (*see also* Substantive, *infra*); "persons" in, 215-220; and enforcement power, 227; Holmes on, 383, 384; Frankfurter on, 385; and natural rights, 390
 Substantive, 10, 71, 119, 230; development of, 139, 249-269, 390; and natural law, 257; transformation by Supreme Court, 258, 269-279, 302-303; Black and Frankfurter, 259-265; economic application, 265-269; repudiated, 265-266; and "preferred position" of civil liberties, 269-282; and "pri-

- vacy" cases, 392; and original understanding, 411, 412
 †Eckley, Ephraim R. (Ohio), 43, 64, 218
 Eisenhower, Dwight D., 129
 †Eldredge, Charles A. (Wisc.), 61, 423-424
 Elections, Wilson on equality in, 88-89
 Electoral college, 16
 Eliot, Charles W., 314
 †Eliot, Thomas D. (Mass.), 23, 26, 68, 164
 Elliot, Jonathan, cited, 117, 253, 399, 401, 407, 408
 Elliott, Ward: on Republicans and black votes, 53; on *Reynolds v. Sims*, 89; cited, 2, 68, 69, 99, 157, 288, 304, 313, 317
 Ellsworth, Oliver, 304, 357, 360
 Ely, John, 285, 325
 Emancipation, 13, 14, 15-16, 25, 40, 87, 113
 Enforcement power, 185, 189-190, 221-229
 Enfranchisement. *See* Suffrage
 Enumerated rights. *See* Fundamental rights
 Equal Educational Opportunities Act of 1974, 229
 Equal protection, 6, 95, 119, 166-191, 390, 408; abolitionist concept, 10; limited purpose and meaning, 16, 18-19, 107, 133, 165, 203, 204, 209-214, 241-242, 372; Bingham on, 34, 111, 140, 141, 143-144, 145, 203, 204; Justice Miller and, 48; and suffrage, 57, 83, 166; and apportionment, 69, 70, 74, 75, 89; and republican form of government, 80-82; open-ended theories, 101-103, 108, 110-112; and segregation, 127, 128-133, 245, 288, 422-423, 424; substantive, 140, 230, 231; history, 168-169; extent of, 169-177; TenBroek's argument, 177-183; Congressional power over, 183-192; "persons" vs. "citizens," 215, 217-218, 219; and enforcement power, 227; and Reconstruction period, 235; C. Black on, 248-249
 Equality: problems of black, 10-15, 29, 77, 85-86, 160, 167, 170-171, 233-234, 242-243, 348; Lincoln on black, 12, 85, 161, 348; South's view, 26-27; with respect to rights, 29, 34, 49; Warren on political, 53-54, 85-86; Sumner on, 73, 77, 82, 96, 168; in Declaration of Independence, 87-88, 390, 391; limited meaning, 170-176, 179; TenBroek on, 177; statewide vs. nationwide, 184; Justice Douglas on, 191; before law, and due process, 201, 202-203, 208, 212; Harris on equal protection and, 211; Bingham and "absolute," 233
Expressio unius, 223
 Fairman, Charles: studies of 14th Amendment, 5, 9, 116; on Civil Rights Act and 14th Amendment, 22-23; on privileges and immunities, 28; on *Cotfield* and inclusion of suffrage, 32; on Black's history, 136, 137; on Bingham, 145; on Howard, 148, 149; on Amendment and States, 152, 156; on enforcement power, 225, 227; on reinterpretation of history, 243; on obscurantist phrases, 258-259; cited, 107, 115, 127, 141, 144, 146, 150, 153, 160, 212, 223, 226, 235, 333, 349

- †Farnsworth, John F. (Ill.), 12-13, 44, 67, 74, 126, 161, 176, 209, 219
- Farrand, Max, cited, 77, 267, 291, 300, 301, 302, 305, 358, 359, 371, 379, 401
- Federal government: possible takeover by South, 15; citizenship and, 37-51; Black on Bingham and, 121; Bill of Rights protection against, 138, 182; and Bingham amendment, 178, 186; Founders' fear of, 182-183, 356, 358-359. *See also* States
- Federalism, 155
- Federalist, The, 284; No. 25, 299, 329; No. 41, 28; No. 43, 77-78; No. 45, 178; No. 48, 250, 251, 292; No. 52, 78; No. 54, 73, 78, 85, 293, 294; No. 78, 261, 293, 304, 308, 316, 353, 359-360, 394; No. 81, 294, 414; No. 84, 21
- *Fessenden, William P. (Me.), 45, 108, 109, 112, 148, 162, 170, 175, 425; on suffrage, 30, 59, 62, 65, 84, 85, 92, 422; on citizenship, 46; on republican form of government, 78; on class distinctions, 99; on ambiguity, 106; on "indirection," 107; on black schools, 126; illness, 147; on narrow wording, 164, 165; on State power, 178; on Radicals, 235; on Sumner, 236; influence, 238, 239; on existing prejudice, 239, 242-243
- Field, Justice Stephen, 3, 49, 296, 334, 391; on privileges and immunities, and citizenship, 38, 42, 47-48, 49; on black jurors, 71; on discrimination, 181-182; on nay-saying power, 305; parochial ties, 333
- †Finck, William E. (Ohio), 234
- Finn, Chester E., Jr., 328
- First Congress. *See* Congress
- Flack, Harry: on Radicals and States' Rights, 63; on intent of Amendment, 104-105, 148, 153, 158-159; on Amendment and Civil Rights Act, 151-152; on Bill of Rights, 149; on direct Congressional power, 187, 188; cited, 9, 13, 23, 71, 127, 142, 233
- Flaubert, Gustave, 10
- Florida, 74
- Ford, Gerald, 290
- Fortescue, Chief Justice, 365
- Founders: and republican form of government, 77-78, 79; disliked policy and constitutionality, 92; and Bill of Rights, 135; preference for States over federal government, 182, 356, 358-359; exclusivity of enforcement power, 223; and fixed, written Constitution, 252, 291; government of limited powers, 253-254; and judicial policymaking, 257, 303-304, 305, 306, 311; and property, 266-268; and freedom of speech and press, 271; and due process, 273; and State sovereignty, 284; and power, 292; importance of Constitution and rule of law, 295-296, 298-299; and judicial review, 297, 356-360, 361; libertarian view, 314; and amendment process, 317-318, 375; value choices, 319; and jury, 329, 399, 402-404; original intention, 365, 366-367, 371; and Lusky's theory, 387, 393, 396; and Grey's theory, 388, 396
- Four Horsemen, 4, 192, 333
- Framers of Constitution: original intention, 3, 363-372, 374, 378, 382, 411; meanings of terms, 195, 314-

- 315, 316, 318; exclusion of judiciary from policymaking, 249-250, 308, 311; and property, 267; and "ordered liberty," 275; value choices, 285-286, 293; rule of law, 290-291; and Council of Revision, 300-302, 325; and judicial review, 303-304, 351, 353, 355-356, 359-362; constitutional change and Court's verbalization, 318-320; death penalty, 350; Lusky on intentions, 393-394; and jury, 401-403, 405
- Framers of 14th Amendment, intentions of: limited, 5, 7-8, 16-19, 48, 103, 115, 133, 156, 167, 176, 242, 273, 372; on privileges and immunities, 20-22, 33, 34, 36, 167; on citizenship, 38, 39-40, 44, 45, 46, 49; Trumbull on (1871), 50-51; on equality, 54; on suffrage, 56, 57-60, 76, 81-82, 115-116, 132, 244, 264, 284, 424; on black juries, 71; and Warren's opinion in *Reynolds*, 89-90, 348; and Brennan's opinion in *Oregon*, 91-98; "elastic language" and, 94, 99, 107-108; on State sovereignty, 76, 136, 242, 275, 277; and Bickel's theory, 100-110; and Kelly's theory, 110-112; and Van Alstyne's theory, 112-116; on segregation, 118-119, 124-126, 130, 284; and Bill of Rights, 136-137, 142-143, 146, 150-151, 152-156; and intermarriage, 161-162; and equal protection, 169-176, 191, 241-242; and tenBroek's thesis, 177-183; and due process, 193-194, 201-206, 258; triune, in regard to rights—equal protection—judicial protection, 209-214; on "citizens" and "persons," 219-220; and enforcement power, 223-227; and Warren's opinion in *Brown*, 245, 408; and judicial power, 250, 391; Miller and Howell on, 281; and going beyond, 286, 288; and justice, 289; C. Black on "discrimination," 348; Levy on, 370. *See also* specific framers and subjects
- France, Anatole, 267
- Frank, John, 332
- Frankfurter, Justice Felix, 224, 268, 272, 297, 300, 316, 324, 331, 335, 416, 417; on reports and remarks, 7, 136; on privileges and immunities clause, 49; on "guarantee clause," 80, 81; and Bickel, 100, 101, 118, 123, 128, 130, 324; and *Brown*, 128-133; and due process, 151, 152, 193, 199, 205, 259-261, 262, 279-280, 414; on Civil War amendments, 167; on judicial power, 251, 264-265, 266, 292, 294; on Marshall and natural law, 253; and constitutionality, 271, 297; and "preferred freedom," 278; on Justices, not Constitution, speaking, 280, 296, 354; on commerce clause, 284; on Court self-will, 311, 410; on shifts of opinions, 325; and original intent, 368; on Marshall on Constitution, 373-374; and judicial revision, 384-386; on Court's abuse of powers, 415; cited, 1, 134, 153, 160
- Frantz, Laurent B., 226, 360
- Freedmen: protection for, 15, 47, 209, 217; and representation, 16; and fundamental rights, 18, 20, 24-25, 40, 46. *See also* Blacks
- Freedmen's Bureau Bill, 12, 24, 45, 71, 126, 154, 158, 159
- Freemen, 89, 92
- Free speech, 271-272. *See also* Speech, freedom of

- Freund, Paul A., 335, 369
 Fugitive Slave Act, 222, 226, 254
 Fundamental enumerated rights: protection against discrimination, 15, 18-19, 64, 96, 102-103, 153, 167; scope of, 20-22, 24-36, 120-121, 161-165, 174, 211; and citizenship, 39-46, 48; and equal protection, 111, 133, 140-141, 169-183; and due process, 141-142, 208-214; and "persons" and "citizens," 215, 219-220; "fundamental" as Supreme Court label, 274, 279; non-enumerated, 388-389. *See also* Privileges and immunities
- †Garfield, James A. (Ohio), 23, 40, 55, 59, 67, 181, 190, 208
 Garrison, William Lloyd, 58, 230, 234
 Georgia, 72, 399
 Gerry, Elbridge: on Bill of Rights, 135; and Council of Revision, 301-302, 334, 379, 394; on representatives of people, 303; on amendment process, 317-318, 354
 Gettysburg Address, 85, 348
 Gibbon, Edward, 307, 417
 Gibson, Justice (Pa.), 296-297
 Gillette, William, 71
 Goebel, Julius, 196, 291, 400
 Goldberg, Justice Arthur J., 324; on opponents of 14th Amendment, 159; on original intent, 367-368; and 9th Amendment, 389
 Goodwin, Richard, 333
 Gorham, Nathaniel, 301
 Government by consent, 295-296
 Graglia, Lino A., 413
 Graham, Howard Jay: on Civil Rights Act and 14th Amendment, 23; on *Corfield* "protection," 33; on racial discrimination, 36; on Trumbull's 1871 remarks, 49-50; on framers' federalism, 63; on school segregation, 119, 127, 131, 288; on Bill of Rights, 146; interpretations of due process, 204-208 *passim*; abolitionist theory, 230-242 *passim*, 391; defends judicial change, 282; cited, 5, 10, 28, 51, 120, 222, 250, 254, 333, 334, 348
 Grand jury, 151, 152, 156
 Grant, J. A. C., 250
 Grant, Ulysses S., 50, 322
 Gray, Justice Horace, 367
 Grayson, William, 400
 Great Britain, 380
 Grey, Thomas C.: critique of Supreme Court, 283-284, 319; on judicial review, 351; and judicial revision, 373, 387-391, 393; on original understanding applied, and Supreme Court cases, 411-412, 413; cited, 99, 137, 198, 231, 243
 Griffith, Kathryn, cited, 223, 259, 330, 333, 354, 410
 *Grimes, James W. (Iowa), 60, 235
 †Grinnell, Josiah B. (Iowa), 27, 125
 Gunther, Gerald, 377, 378
- Haines, Charles G., 249, 250, 252, 257
 Hale, Sir Matthew, 20, 400
 †Hale, Robert S. (N.Y.), 61, 112, 182, 226; on blacks, 11; on State protection, 144, 153-154, 177, 178; and Bingham, 145-146, 171, 172, 181, 186-187, 217-218; on Bill of Rights power, 184
 Hamilton, Alexander, 132, 191, 251, 252, 257, 260, 261, 292, 318, 322, 335, 356, 410; on due process, 194, 196, 198, 205, 385; and courts'

- powers, 293, 294, 304, 305, 358; on impeachment provision, 294-295, 408, 414; on breach of fundamental laws, 299, 311; on judicial role, 308, 365; on binding Constitution and amendment process, 316, 353-354, 394-395; on "plea of necessity," 329; and judicial review, 359-360; on treaty power, 381; on usurpation, 409
 Hamilton, Walton H., 193, 249
 Hand, Judge Learned, 275, 331, 334; on Chief Justice Stone, 4; on scope and terms of 14th Amendment, 166, 195; on exclusive enforcement power, 223, 229; and judicial review, 250, 287; on substantive due process, 259; on judges and public opinion, 261; on liberty and property, 267; on judicial personal preferences, 279, 333; on role of Supreme Court, 305; on Platonic Guardians, 336; on meanings and judges' construction, 341; and amendment, 354; on "third legislative chamber," 416
 †Harding, Aaron (Ky.), 13, 53, 189
 Harlan, Justice John Marshall, 68, 152, 222, 264, 335; on 14th Amendment, 1, 86; on Amendment and suffrage, 7, 348, 349; and legislative history of Amendment, 54, 64, 65, 69, 74, 75, 85; Brennan on, 91, 97-98; on Bill of Rights, 135, 136; on privileges and immunities, 209; on due process, 213-214, 280; on new meanings in Amendment, 259; clear intention to be effectuated, 330; on Supreme Court supervisory power, 339; State reapportionment cases, 392; on "incorporationist" view and criminal procedures, 406; Van Alstyne's critique, 419-427
 †Harris, Benjamin G. (Md.), 26-27
 Harris, Robert J.: on triune aspect of Amendment, 210-211; on Radicals, 223; cited, 5, 168, 177, 179, 227
 Hart, H. M., 7
 Hartley, Thomas, 72
 Hauser, Arnold, 10
 Hawkins, Vaughan, 372
 Heller, F. H., 399
 *Henderson, John B. (Mo.), 23, 26, 29-30, 59, 63, 66, 164, 175; Ten-Brock on, 35-36
 *Hendricks, Thomas A. (Ind.), 12, 13, 97, 157, 170, 234
 Henkin, Louis, 2, 134, 138, 328
 Henry, Patrick, 317, 405
 †Higby, William (Calif.), 26, 79-80, 141, 142, 178, 179, 420-421
 †Hill, Ralph (Ind.), 80
 Himmelfarb, Gertrude, 292
 Historians, revisionist, 5-6, 17-18
 Hitler, Adolph, 312
 Hobart, Justice, 194
 Hockett, H. C., 376
 Holmes, (of Mass. Ratifying convention), 401
 Holmes, Justice Oliver Wendell, Jr., 151, 191, 208, 279, 297, 315, 335, 336, 352; on economic due process, 3-4; statements are conduct, 6; emotions distort facts, 10; on States' powers, 18; on history, 90; on constitutionality, 133, 271; on black suffrage under equal protection, 166-167; on abolitionists, 235; on due process, 259; on scope of 14th Amendment, 266, 270-271; on liberty of contract, 269; on law and justice, 289; on rule of law, 320; can't dismiss doctrine as nonsense,

- 321; on sense of community, 325; on original meanings, 367, 369, 370; on judicial revision, 379-384
- Hooker, Roger W., Jr., 290
- Horn, Robert H., 343, 345
- Horwitz, Morton: on written constitutions, 252; on Story and legal positivism, 254; "instrumentalism," 306-308; on transformation in common law, 321-322
- †Hotchkiss, Giles W. (N.Y.), 61, 154, 186, 187, 218, 228
- Hough, Charles M., 193
- House of Representatives: and Southern representation, 15-16, 52, 66; Judiciary Committee, 22, 120, 213, 216; three-fifths clause, 72; and Florida constitution, 74; speeches in after Howard's speech, 150-152; Kelly on broad readings in, 159; political complexion, 237. *See also* Congress
- House Resolution No. 51, 79
- House Resolution No. 63, 140-147, 171-172, 185-187. *See also* Bingham, John A.
- House Un-American Activities Committee, 313
- *Howard, Jacob M. (Mich.), 23, 33, 59, 104, 225, 227, 425; on Civil Rights Act, 27; on suffrage, 30, 56, 60, 65-66, 92, 94, 108-110, 147, 154, 423; on privileges or immunities, 38, 43, 102, 103-104, 136; proposal on citizenship, 44-45, 426; on Declaration of Independence and suffrage, 88; speech explaining background of privileges or immunities, 147-149; on first section of Amendment, 174, 175, 185; on equal protection, 180, 210, 212; on citizens' protection, 218; on enforcement power, 227-228; as Radical, 236
- *Howe, Timothy O. (Wisc.), 26, 66, 149, 216, 226
- Hubbard, Justice, 255
- †Hubbell, James R. (Ohio), 31
- Hughes, Chief Justice Charles Evans: and *Carolene* footnote, 276, 277; on Supreme Court, 296; on Magna Charta and colonists, 361; on Marshall on Constitution, 374, 375, 379
- Hume, David, 251
- Hurst, Willard: on reservation of powers, 17-18; on framers' delegating rule-making power, 228; on official power, 287-288; on makers of policy, 315; on amendment process, 354; on constitutional meaning, 369, 371; on *Missouri v. Holland*, 381; on Marshall's law-making, 386
- Hutcheson, Joseph, 412
- Hutchinson, Chief Justice Thomas (Mass.), 307
- Huxley, Thomas H., quoted, 1, 349-350, 416-417
- Hyman, Harold M., 5; on preeminence of States, 63; on Republicans, 64; on State protection, 181; on racism, 233; cited, 71, 77, 113, 190
- Illinois, 11, 109, 234
- Immunity, immunities: Wilson on, 27-28; carried over to Amendment, 179-180; in Civil Rights Act, 216. *See also* Privileges and immunities
- Impeachment, power of, 294-295, 303, 395, 414, 415
- Income tax decision, 321, 325
- "Incorporation" theory. *See* Bill of Rights

- Indiana, 13, 14, 109, 170, 234
- Inequality. *See* Equality
- "Inhabitants" vs. "citizens" in Civil Rights Act, 216-217
- "Instrumentalism," 306, 308, 322-331, 354
- Iredell, Justice James, 256, 257, 359; on history of law, 8-9; and judicial power, 251, 252; on people's watchfulness, 288; on government by consent, 295-296; need to control legislature, 304; on negating an act, 309; on amendment power, 317; on trial by jury, 399; on usurpation, 408
- Jackson, James, 135, 253
- Jackson, Justice Robert H., 123, 131, 152, 323, 324, 335, 342, 395; on Supreme Court, 2, 281, 325, 331, 345, 354, 416; on segregated schools, 128; on 14th Amendment, 130, 156; on racism, 133; rule of law, 298
- Jaffe, Louis, 274, 331, 415; on conscience of people, 260, 326; on public confusion, 263; on obscenity, 326; on judicial insensitivity, 338
- James, Joseph B.: on Bingham and due process, 203, 204; on courts' slavery decisions, 222; on Radicals, 238; cited, 9, 15, 24, 52, 58, 62, 64, 105, 116, 126, 147, 165, 205, 227, 236, 426
- Japanese relocation, 331-332
- Jarvis, Charles, 317
- Jefferson, Thomas, 87, 287, 316, 378; on opponents and legislative intention, 157; on Coke, 197; on written constitution, 252, 291, 336-337, 364; on free press, 272; on binding constitution, 288, 369; and check on judicial power, 307; on Constitution, 341, 360, 411; on judiciary, 365; on original meaning of Constitution, 366-367
- †Jenckes, Thomas A. (R.I.), 80
- Johnson, Andrew, 126, 209; veto of Civil Rights Bill, 29, 42, 62, 162-163, 170, 178
- Johnson, Justice A. S., 255
- Johnson, Lyndon, 417
- *Johnson, Reverdy (Md.), 39, 98, 226; on suffrage, 66, 68; on privileges and immunities, 102, 103; on segregation, 123, 125; on scope of "contract," 161, 162; and due process, 206
- Johnson, Justice William, 251, 308, 309
- Joint Report of the Committee on Reconstruction. *See* Reconstruction, Committee on
- Judicial procedure: States', 152, 154; and due process protection, 176, 195, 198-199, 201, 202-206, 209-210, 211-214; and Civil Rights Bill, 202, 209, 213
- Judicial redress, deprivation of, 173
- Judicial review, 57, 287, 311, 317, 332, 387, 394; Kelly on, 129; and due process, 206; Congressional distrust of, 222; Douglas on enforcement power and, 228; narrow construction, 249-250; Iredell on, 251, 309; question of antidemocraticism, 284-285; Hamilton on, 294, 308; Justice Gibson and, 296-297; Framers on, 302-304; Levy on, 346; legitimacy, 351-362; debate over, 355; States against, 388; and facts found by jury, 405

- Judicial revision, 1-3; Warren's, 89-90, 131, 133, 245; Brennan's, 91-92; open-ended theory for, 99-100, 101; vs. amendment process, 132-133, 282, 287, 318, 330; and judicial power, 250-252, 254-282; Lusky on, 277-278, 391-396; and rule of law, 286-299; thrusting aside Framers, 314-315; C. Black on, 346-350; dangers of, 364, 407-408, 409-410; Marshall and arguments for, 373-379; Holmes and, 379-384; Frankfurter and, 384-386; Grey and, 387-391. *See also* Supreme Court
- Judiciary: common law immunity, 17; enforcement power under Civil Rights Act, 224-225, 227; enforcement power under 14th Amendment, 228-229; shift from supervision of procedure, 249; Founders' distrust of federal, 253; and rule of law, 288-299; oath, 289, 292-293; and Council of Revision, 300-302, 308; policing function, 302, 304, 305, 309, 311, 355; restricted power of, 303-306; discretion, 306-311, 321, 322, 363, 382; and social problems, 365. *See also* Judicial review; Judicial revision; Policymaking; Supreme Court
- Judiciary Act of 1789, 309
- †Julian, George W. (Ind.), 13, 52, 91, 161, 233
- Jurow, Keith, 195, 197, 198
- Jury: blacks on, 27, 71, 103, 119, 158, 159, 163, 239; trial by, 35, 199, 343, 399-401; number on, 151, 152, 215, 329, 340; number on, and problem of "vicinage," 397-406
- Just compensation clause, 151
- Justice, and rule of law, 288-289
- Kauper, Paul, 392; on *Baker v. Carr*, 69; on republican form of government guarantee, 81
- Keller, Morton: on Black Codes, 25; on black suffrage, 56, 105; on post-war Court, 223; cited, 12, 13, 105, 161, 237, 415
- †Kelley, William D. (Pa.), 68, 79, 178
- Kelly, Alfred H.: on Civil Rights Act debates, 23; on J. E. Wilson, 27, 40; on fundamental rights, 32, 34, 35, 36; open-ended theory, 57, 100, 110-112, 159; on limited Negro reform program, 64; on Warren and reapportionment, 70; on Justice Harlan, 75; on Civil Rights Act of 1875, 105-106; and segregation coverage, 119, 121, 122, 124; on Bill of Rights incorporation, 146, 149; on Black Codes, 153; on broad antidiscrimination proposals, 164; on general equality, 172, 173, 175; on antislavery influence, 207, 230, 236-237, 239; on Radicals, 235-236, 237, 238-239, 241; summation of §1, 240; change of analysis, 242; on Supreme Court's use of history, 319; cited, 5, 9, 82, 89, 102, 148, 157, 168, 229, 348, 388
- Kendrick, Benjamin, cited, 23, 52, 70, 96, 108, 109, 126, 140, 142, 147, 163, 171, 235, 238, 423
- Kent, James, 22, 27, 112, 144, 253; on rights, 21, 35, 42, 243; and due process, 199; need for common law, 308; on manipulation of law, 321; cited, 198, 210
- Kentucky, 178, 235
- †Kerr, Michael C. (Ind.), 39, 184
- King, Rufus, 302
- King, Wayne, article by, 429-431

- Kluger, Richard: on NAACP and desegregation case, 121-123, 128-133 *passim*; cited, 100, 101, 112, 117-118, 119, 160, 280, 324, 348
- Korman, Edward R., 338
- Ku Klux Klan Act, 181
- Kurland, Philip: on reapportionment, 69, 263; on Supreme Court prevention of executive overreach, 305; on Supreme Court and crime, 326; on segregation cases, 328; on Court personnel, 335; on Warren Court, 344, 347; on Court credibility gap, 416; cited, 260, 262, 321
- Lacy, Dan, 11
- Landis, James M., 224
- *Lane, Henry S. (Ind.), 13, 62, 115, 201, 216, 225
- *Lane, James H. (Kan.), 59
- Lash, Joseph P., cited, 129, 336, 414, 415, 416
- Laski, Harold J., 235, 261
- †Latham, George R. (W. Va.), 23, 43, 61, 104, 150, 154, 172
- †Lawrence, William (Ohio), 226, 412; on enumerated fundamental rights, 25, 28, 30, 31, 125, 181; on suffrage, 68; on political rights, 163; on Civil Rights Act application to "citizens," 217
- †LeBlond, Francis (Ohio), 84
- Lee (of Va. Ratifying Convention): on enumerated powers in Constitution, 117, 407
- Legal Tender Acts, 323
- Legislation, laws: intention, 7, 45, 365-367; Bacon on, 17, 366, 368; nondiscriminatory, 19, 150, 154, 168, 178; equal protection against discriminatory, 18, 42, 45, 47-48, 96, 107, 111, 133, 172-176, 179, 191-192, 203, 204, 209-210, 211-212, 214, 241; TenBroek's argument on equal protection, 177-183; by Congress vs. by States to enforce equal protection, 183-191; judicial power to override, 194, 258, 262, 265-266, 303; due process and "law of land," 195-200, 213, 390; and judicial review, 250, 297, 309; and concept of "natural law," 249, 250, 251-258, 275; *Carolene* footnote on, 276; and Council of Revision, 301; and common law, 307; lawmaking, by Supreme Court, 340, 386, 387-396. *See also* Discrimination; Judicial revision
- Legislative policymaking. *See* Policymaking
- Legislature: exclusivity of, and judicial power, 250, 256, 290, 302-303; Marshall on, 256, 293-294; Court as super-legislature, 265, 303; will of, and judicial role, 310, 368-369; repressive, in libertarian view, 313
- Levinson, Sanford, 411
- Leviton, David, 395
- Levy, Leonard W.: on Supreme Court as constitutional convention, 2; on Fairman and Bill of Rights, 137; on meanings of terms, 194, 370; on fair trial, 199; on due process, 199; on Graham and TenBroek, 230-231; on Black, 262; on Court's economic predilections, 268-269; on Justices' view of selves, 278; on Rostow, 285; on Warren approach, 286; on original meanings, 287, 363; and rule of law, 298, 329-330; on Justices, 323, 328, 335, 339; on Court's criminal policy, 326; on post-Civil War black rights and Court, 332; evaluation of, on

- Burger Court, 340-346; evaluation of, on usurpation and judicial review, 352-353, 355-361; on scholars justifying means, 409; cited, 263, 282, 285, 288, 314, 315, 320, 321, 325, 333, 334, 398, 408
- Lewin, Nathan, 338
- Lewis, Anthony: and Archibald Cox, 2; on Court and social change, 283, 306; on racial problems, 327; on Court appointments, 335; on Warren, 328; cited, 1, 135, 408
- Liberator, The*, 254
- Libertarians, libertarianism, 391; and Supreme Court, 3-4; and due process, 208, 266, 269-282; turn-about, 312-337; view of amendment process, 315-316, 318; and Court record, 332; and Burger Court, 338-339; C. Black evaluation of, 346
- Liberty: and property, 267; freedom from personal restraint, 270; of contract, 269-270; and freedom of speech, 270-273; "ordered," 273-275, 347. *See also* Civil liberties; "Life, liberty and property"
- "Life, liberty and property": as fundamental rights, 20-22, 28-29, 33, 34, 35, 42, 103, 124-125, 141, 143, 210, 211, 215; and citizenship, 40; equal protection of, 92, 168-171, 174, 176, 181, 186, 190, 203; as Bill of Rights for Bingham, 146-147; and due process, 195-197, 200, 202, 208; and "citizens" and "persons," 217, 218-220. *See also* Discrimination; Due process; Equal protection
- Lincoln, Abraham, 314, 323; on black equality, 12, 85, 161, 348; on State sovereignty, 60-61; on Supreme Court, 415
- Linde, Hans, 320, 322
- Litwack, Leon, 12
- Locke, John, 20, 168, 266-267
- Lofgren, C. A., 395
- †Logan, John A. (Ill.; 40th Congress), 115-116, 202
- Lovejoy, Elijah, murder of, 11
- Lusky, Louis: on inequality, 192; on "ordered" liberty, 274; on Court's demand for social changes, 260; on Black, 262; on *Carolene* footnote as doctrine, 275-278; on Court's freedom, 279, 306; on Hamilton on courts, 294; on changes in criminal proceedings, 283, 339; on government by law, 320; on people's will, 354; on usurpation, 354; and judicial revision, 387, 391-396; on Court above law, 408; cited, 2, 134, 135, 137, 138, 282, 287, 290, 414
- McCarthy, Joseph, 313
- McClellan, James, 373
- McCloskey, Robert G.: on development of substantive due process, 249; on ambiguous definitions by Court, 258; on Supreme Court Justices, 335; cited, 4, 334, 351
- McDougal, Myres, and Asher Lans: on government by elite, 314; on amendment process, 315; on original intention, 363, 367; cited, 288, 318, 320
- *McDougal, James A. (Calif.), 103
- McGovney, D. O., 37
- McIlwain, Charles, 298-299
- McKay, Robert, 101
- †McKee, Samuel (Ky.), 53, 68, 201, 225
- McKittrick, Eric L., 5; on racist opposition to Amendment, 160; on Ste-

- vens and black suffrage, 423; cited, 236, 237
- Maclaine, Archibald, 295
- McLean, Justice John, 254
- McRee, G. J., cited, 288, 296, 304, 310
- McReynolds, Justice James Clark, 269-270, 335
- Madison, James, 252, 287, 309, 316; on Constitution, 3, 291, 364, 410; on enumeration of powers, 28; on trial by jury, 35, 163; on republican form of government, 77-78, 83; on state and federal governments, 134, 135; on state vs. federal protection, 182, 272; on common law, 195; on government departments, 250; on power, 250-251, 292; on property, 267; and Council of Revision, 301; on limited discretionary powers, 304; conflicting views on judicial power, 358-359, 360; on *McCullough* decision, 376, 378; on treaty power, 381; on Bill of Rights, 389; on jury from vicinage, 401, 402, 405
- Magna Charta, 194, 195, 196, 197, 199, 361
- Maine, 55
- Majorities: points of view toward popular, 312-313, 314; and amendment process, 317; shifting judicial preferences of, 315, 323-325
- Malapportionment. *See* Apportionment
- Mansfield, Lord, 307
- Marriage, *See* Miscegenation
- Marshall, Chief Justice John, 92, 255, 289, 309, 357, 359, 360, 389; on limited governmental power, 2, 253-254; on plain expression, 17; on citizenship, 45; "a Constitution we are expounding," 101, 374, 379; on Constitution, 110, 191, 286, 291, 367; on Bill of Rights and States, 182; on common law meanings, 195, 271, 404; on legislature, 256, 293-294; on constitutionality, 271; Frankfurter on use of commerce clause, 284; on "government of laws," 290; on judicial power, 304, 310-311; on usurpation, 352; opinions, and judicial revision, 373-379, 393-394; and judicial lawmaking, 386; and trial by jury, 403
- †Marshall, Samuel S. (Ill.), 61, 159
- Marshall, Justice Thurgood, 57, 121, 343
- Maryland, 33, 125, 196, 400
- Mason, Alpheus Thomas: on due process, 257; on Court as super-legislature, 265; on Frankfurter, 278-279; on Court and social revolution, 283; on Court as final arbiter, 303; on power, 414, 415-416; cited, 249, 261, 267, 276, 280, 294, 300, 302, 334
- Mason, George, 301, 394, 399
- Massachusetts, 34, 196, 317, 401; and black suffrage, 55; and Sumner, 73, 79; Constitution, selectivity on equal protection, 168-169; 1692 law on due process, 198, 199, 209-210; abolitionists, 207-208; segregated schools, 233; Constitution, on separation of powers, 250, 290; Constitution, on exact observance, 287, 352; fixed constitution, 290-291; on trial by jury, 399
- Matthews, Justice Stanley, 2, 167, 205, 212
- Mencken, H. T., 417
- Mendelson, Wallace: on meanings of terms, 18, 100, 194; on Bingham,

- 145; on Frankfurter, 264-265; on Holmes, 289; on rule of law, 298; on Court as national conscience, 331; cited, 153, 258, 263, 271, 303
- Mercer, John, 357
- Migrants, 32; citizenship rights, 39-40, 43, 44, 50; protection, 144
- Mill, John Stuart, 409, 413
- Miller, A. S. (and R. F. Howell): on historical record, 243; on Frankfurter, 264; on ambiguity, 281; on original intention, 368; cited, 1, 8, 151, 282, 285, 286, 288, 290, 314, 331, 363, 365, 416
- Miller, Charles A., 319
- †Miller, George F. (Pa.), 67, 68, 225
- Miller, Justice Samuel: power limited, 2; on privileges and immunities, 37-38, 39, 40, 41, 42, 44, 45, 46-49; on States' Rights, 63, 76, 136; on nondiscriminatory legislation, 181; on equal protection and due process, 203, 211, 216; on abolitionists, 235; and natural law, 256-257; on judges' predispositions, 333
- Mimmesota, 55
- Miscegenation, 103, 158, 161-163, 174, 241
- Mississippi, 25, 200
- Missouri, 24
- Moderates: and Civil Rights Act, 29, 102-103; Bickel on, 104-105, 108, 165, 170; Kelly on, 110-112; course of, in 39th Congress, 235-239, 244
- Morison, Samuel Eliot, 16
- †Morrill, Justin S. (Vt.), 24, 127, 236
- *Morrill, Lot M. (Me.), 127
- Morris, Gouverneur, 305
- Morrison, Stanley: on privileges and immunities, 37; on Bingham, 144; on liberty vs. property, 267-268; cited, 135, 137
- †Moulton, Samuel W. (Ill.), 26, 31, 162, 169-170, 175, 412
- Movement, right of, 28, 36
- Muller, Herbert, 252
- Murphy, Paul: on Warren, 245, 286; on Court's gaining power, 305; cited, 4, 131, 276, 324, 325
- NAACP, and desegregation case, 75, 119, 121, 129, 348
- National Advisory Commission on Civil Disorders, 327
- Natural law: and Court power, 249, 250; opinions of, 251-258, 275
- Natural rights, 102, 113, 181, 213, 243; Kelly, had established meaning, 35; Grey on, 387, 388-391
- Naughton, T. R., 196
- Neal, Phil C., 77, 184
- Nebraska, 60, 82
- "Necessary and proper" clause, 226
- Negroes. *See* Blacks
- Neoabolitionism, 23, 34-36, 65, 88, 119, 127, 207-208, 348. *See also* Abolitionism
- "Neoprivacy" cases, 392
- *Nesmith, James W. (Ore.), 13
- Neutral principles, 285
- Nevada, 56, 59, 200
- New England: black suffrage in, 55, 58, 59, 90; Higby on, 79
- New Hampshire, 55, 196, 287, 399
- New York, 67, 196, 200, 234; and black suffrage, 55, 90, 109; delegation and Bingham amendment, 142; law on due process, 198, 199, 210; reversal of *Wynehamer*, 256; and trial by jury, 399
- New York *Herald*, 238
- New York Times*, on Burger Court, 338

- †Newell, William A. (N.J.), 55, 109
- Newmeyer, Kent, 87
- †Niblack, William E. (Ind.), 13, 68, 159
- Nicholas, Wilson Cary, 309, 337
- Nixon, Richard M., 290, 314, 326, 329, 397, 417; judicial appointments, 323, 335; and public opinion, 414
- North: racism in, 10-16, 90-91, 94, 118, 127, 133, 160, 242, 407; reapportionment, 70-71; and suffrage, 71, 80, 90-91, 94, 98, 154, 243, 422; and segregation, 101, 118, 123, 127; and miscegenation, 161; and Radicals' proposals, 164; and State sovereignty, 182; modern views not acceptable to post-Civil War, 183; and postwar Southern constitutions, 200; fugitive slave decisions and, 222; and abolitionism, 234-237; and school busing, 327
- North Carolina, 196, 287, 288, 295, 394; on trial by jury, 399, 400
- *Nye, James W. (Nev.), 169
- Nye, Russell R., 16, 231, 240
- Obscenity decisions, 326-327
- Ohio, 14, 60, 82, 233, 234
- "One person, one vote," 4, 8, 54, 70, 75, 76, 85, 89, 90, 264, 322. *See also* Reapportionment; Representation
- Opelusa Ordinance, 26
- "Open-ended" theories, 57, 94, 99-116
- Opposition to 14th Amendment, 79-80, 157-165, 189
- Oregon, 14
- "Original intention," 3, 7-9, 363-372, 411-412
- Owen, Robert Dale, 58, 93-94, 109, 142
- Packer, Herbert: on substantive equal protection, 191-192; on economic-libertarian distinction, 268; cited, 4
- Paludan, Phillip: on racism, 13; on federalism, 155; on Court's non-succor of blacks, 258; cited, 60, 61, 136, 273
- Parker, Chief Justice Isaac (Mass.), 32, 34, 183
- Parker, John, 323
- Parliament, 290, 320
- Paterson, Justice William, 267
- Patterson, Caleb P., 411
- †Patterson, James W. (N.H.), 29, 125, 170-171
- Patterson, Judge Robert, 331
- Peckham, Justice Rufus Wheeler, 216
- Pendleton, Edmund, 309, 317, 403
- Pennsylvania, 261, 424; black suffrage, 82; segregated schools, 126, 160; on intermarriage, 161; Constitution, 196, 287, 297; Democratic party in, 234; provision for free speech and press, 272; trial by jury, 399, 400, 402
- Personal security right of, 21, 28, 36, 42, 108, 163, 169, 239
- "Persons" vs. "citizens," 215-220
- Phillips, Wendell, 94, 230, 307
- †Pike, Frederick A. (Me.), 126, 164
- Pinckney, Charles, 302
- *Poland, Luke P. (Vt.), 59, 62, 225; on privileges and immunities, 38-39, 42, 104, 148-149; on suffrage, 66; on §1 and Declaration of Independence, 88; on enforcement power, 227
- Police regulation, 190
- Policing boundaries, judicial function, 302, 304, 305, 309, 311, 355
- Policymaking, 194, 260, 280, 326, 349, 413; exclusion of judiciary

- from, 249-250, 257, 277, 292, 293, 300-311, 362, 364, 394; defense of judicial, 282, 333; Warren and, 286. *See also* Judicial revision
- Political rights, 29, 30, 35, 92, 120, 163, 169, 171, 239, 391
- Poll tax, State, 191
- Pollak, Louis, 369, 373, 378
- *Pomeroy, Samuel C. (Kan.), 54, 56
- Pound, Roscoe, 252
- Powell, Justice Lewis F., 339
- Powell, T. R., 323
- Power: government of limited, 2, 252, 253-254, 292, 295, 364; judicial usurpation of, 17, 292, 294, 295, 317, 351-354, 395-396, 407-410, 414; restrictions of, in Bill of Rights, 184; extraconstitutional judicial, 250-251, 254-255, 257, 258, 292, 293, 364, 373-396; heightened awareness of Court's abuse, 415-418
- Precedent disregarded, 321, 344-345, 410
- Presidential oath, 293, 295, 304-305
- Press, freedom of, 271, 272, 275, 332
- Prettyman, Judge E. Barrett, 123-124
- †Price, Hiram (Iowa), 141, 218, 273
- Prison, Chief Justice, 183
- Privileges and immunities, 6, 18, 180, 187, 191, 241, 273; and Civil Rights Act of 1866, 20, 22-31, 32, 34-35, 38-43, 103, 111, 164, 213; in Article IV, 2, 29, 36, 38-40, 41, 43, 103, 111, 148-149; and suffrage, 30-31, 60, 84, 86, 92, 94; set out in cases, 31-34; and citizenship, 37-51, 215-219; "puzzlement" over, 102-104; established sense, 108; Kelly on, 110-112; Van Alstyne on, 114; and Bill of Rights incorporation theory, 136, 138-140, 148; Bingham on, 140, 144, 171-172; Rogers on, 158; framers' purpose, 208-211; and enforcement power, 227; and "natural rights," 390. *See also* Miller, Justice
- "Proceedings," meaning of, 201
- Property, right of, 33, 34, 35, 36, 42, 43, 108, 125, 141, 162, 169, 180, 239; slaves as, 89, 201, 256; importance of, 266-268
- Public, general: and substantive due process, 261; Court impositions on, 264-265; faith in, 314; and amendment process, 316-317, 330-331; sense of the community, 322-328; sovereignty, 361, 369; and restraint by the Court, 413-418
- Racism: in North, 10-16, 90-91, 94, 118, 127, 133, 160, 242, 407; Southern, 26-27, 407; persistent, 85, 133; and suffrage, 85, 90-91, 94; and Constitution, 87; and segregation, 118, 127, 327; opposition to Amendment, 157-158, 160; and abolitionism, 233-236; modern, 327-328
- Radicals: and Civil Rights Act, 29; and state sovereignty, 63, 188; and Freedman's Bureau Bill, 71; North and South reconstruction idea, 80; and Declaration of Independence, 87; Bickel on, 104-105; Kelly on, 105-106, 110-112, 241; Howard among, 108, 147; Van Alstyne's theory, 113; broad antidiscrimination proposals, 163-164; and judiciary, 223; Bingham and suffrage proposals, 233-234; dislike of, 235-236; in abolitionist theory, 236-239, 240, 244; did not prevail, 237-239
- †Randall, Samuel J. (Pa.), 159

- Randolph, Edmund: on republican government, 77; on power, 288; proposes Council of Revision, 300; constitutional plan, 359; on jury, 400, 401, 403
- Ratification of 14th Amendment, 55, 57, 59, 115-116, 152-153, 155
- †Raymond, Henry J. (N.Y.), 23, 40-41, 42, 187, 201, 210
- Reapportionment, 4, 5, 57, 69-98, 349; one person, one vote, 54; *Reynolds v. Sims*, 85-90, 348; *Oregon v. Mitchell*, 90-98; justices and cases, 259, 263, 264, 392. *See also* "One person, one vote"; Representation
- "Reason," C. Black on, 347-348, 349, 350
- Reconstruction, Joint Committee on, 30, 59, 62, 65, 99, 136, 425; on suffrage, 7, 55-56, 66, 67, 109-110, 421, 427; Report, on suffrage, 7, 84, 90, 93-94; on privileges and immunities, 92; on representation, 96, 423; Report, on further legislation, 105; Bingham's proposals, 120, 142, 187; Howard's summary of views, 147-148; subcommittee proposal on protection, 179; and substantive due process, 206; alleged Radical control, 235, 237
- Reconstruction period: revisionist historians on, 5; racism in, 16; opposition to measures, 157-158, 233; abolitionism in, 235
- Reed, Justice Stanley F., 128, 131, 324, 342
- Rehnquist, Justice William H., 215, 323, 339, 341, 413
- "Remedy," § 2 as, 97-98, 202
- Representation, 426; major purpose to curtail Southern, 15-16; Con-
- gressional, and suffrage, 52, 64-66, 67, 70, 72, 98, 368; State, and suffrage, 53-54, 62, 73-74, 75-77, 78, 81; proposals on, 96, 420-421. *See also* Reapportionment
- Republican form of government, 77-84, 208
- Republican party, 7; racism and, 10, 13; and black equality, 14-15; hegemony and reduced Southern representation, 15, 16, 52-53, 70, 98; on Black Codes, 25-26; on political vs. civil rights, 30; and citizenship, 40; and black suffrage, 55-59 *passim*, 71, 90-91, 93-94, 105, 109, 113, 147, 368, 423; and state sovereignty, 61, 63, 64, 71; Sumner and, 77, 96; Van Alstyne's view, 82, 113, 114-115; Bickel on, 102, 104-105; Kelly's theory, 110-112, 165, 239; and Bingham's amendment, 120, 141, 142, 187; correction of discrimination, 181; in Ohio, 234; in structure of 39th Congress, 235-240
- Residents, 42-43, 44, 45, 50
- Rhett, Edmund, 25
- Rhode Island, 55, 161, 256
- Richardson, Elliot, 415
- Richardson, H. G., cited, 8, 74
- Right to vote. *See* Suffrage
- Rights: Justice Miller's, 38; of citizens and freemen, 45; substantive and adjective, 209-211, 214; creation of new, 212-214. *See also* Civil Rights Act of 1866; Fundamental rights; Natural rights; Political rights
- Roane, Spencer, 376, 378
- Roberts, Justice Owen, 322; on ordered liberty, 274, 275
- Rodell, Fred, 287; on nation's priorities, 268; on Warren and his Court,

- 287, 312, 324, 341, 344; on judicial policymaking, 303; on civil liberties decisions, 324; on Court appointments, 335; on awe for Court, 415; cited, 269, 323, 333
- †Rogers, Andrew J. (N.J.), opposition Democrat, 68, 111, 126, 158, 159-160, 161, 189, 203, 232, 424
- Roosevelt, Franklin D., 280, 296, 354
- Rosenfield, L. C., 336, 416
- Rostow, Eugene V., 284, 285, 315, 331, 332, 351
- †Rousseau, Lovell H. (Ky.), 158
- Ruckelshaus, William, 415
- Rule of law, 4, 288-299, 320, 330, 342, 355-356
- Rutherford, Thomas, 366, 370
- Sacks, Albert, 7
- Samuels, Ernest A., 269, 314
- Sankey, Lord Chancellor, 409
- Santarelli, Donald E., 329, 369, 410
- "Saturday Night Massacre," 415
- *Saulsbury, Willard (Del.), 30, 115, 157, 158
- Sayles, G. O., cited, 8, 74
- †Schenck, Robert C. (Ohio), 107, 115
- Schools: segregated, 14, 123-124, 233, 241, 243; not touched by Civil Rights Act, 27; Massachusetts desegregation case, 82; desegregation question, 102, 117-133, 158, 159, 208; and Civil Rights Act, 160, 239, 244; Warren on, 245; extension of *Brown* beyond, 349. *See also* Segregation; *Brown v. Board of Education* (Index of Cases)
- Schurz, Carl, report (*Education of the Freedmen*), 125
- Segregation, 4, 117-133, 174; question of authority to change, 5, 8, 117-128; of schools, 14, 27, 123-124, 233, 241, 243; exclusion of, 27, 102, 208, 284, 288, 407; "desegregation" case, 75, 100, 117, 128-133, 245, 264, 280, 319, 324, 327-328, 348, 349, 392-393, 413; Bickel on, 100-103; question of changing by amendment process, 282, 287, 315, 408
- Selden, Justice, 255
- Senate: citizenship discussion, 41-43; Judiciary Committee, 22, 74, 237, 238; malapportionment, 72; and Florida Constitution, 74; and 17th Amendment, 86-87; gallery segregation, 125; Howard on Amendment, 147-149; narrow success of Amendment in, 165; radicals in, 238. *See also* Congress
- †Shanklin, George S. (Ky.), 189
- Shapiro, Martin: on Hand, 287; on Court neutrality, 320; cited, 306, 330, 412
- Shattuck, Charles E., 200, 270
- Shaw, Chief Justice Lemuel (Mass.), 82, 254
- Shelburne, Earl of, 290
- †Shellabarger, Samuel (Ohio), 62, 80, 184, 217; on rights, 25, 31, 41, 70-71, 175, 176-177, 178, 180
- *Sherman, John (Ohio), 16, 63, 71, 216; on rights, 24-25, 30, 71; on suffrage, 59, 234, 423; on Amendment, 105, 115, 152, 238; racism, 233
- Sherman, Roger, 302
- Slave Codes, 25
- Slavery, 14, 41, 113, 234; and Black and Slave Codes, 25-26; representation and, 72, 78; Bingham's position, 145-146; entrenched in courts, 222; freedom to criticize, 273

- Slaves, 23, 40, 168; views of, 10-11; as property, 87, 201, 256
- Smith, Homer W., 1
- Smith, Page, 267, 289
- Smith, Zephaniah, 307
- Socialism, Supreme Court and, 3-4
- "Socially desirable" theory, 322-325
- South: freedom in, 14, 15; congressional representation, 15-16, 52, 53, 66, 70-72, 98; racial problems, 25-27, 133, 170, 201, 242, 407; and black suffrage, 58, 71, 80, 98, 154, 237; Democratic resurgence, 91; postwar constitutions, 200; white discrimination, 216; freedom to criticize slavery, 273
- South Carolina, 72, 82; Constitution, 196, 200; and trial by jury, 399, 400
- Sowell, Thomas, 328
- Spaight, Richard, 310, 359
- †Spalding, Rufus P. (Ohio), 23
- Speech, freedom of, 137-138; "liberty" extended to, 270-273; First Congress rejected extension to States, 271-272; in States, 275; Court protection, 332
- Spencer, Herbert, 266
- Spooner, Lysander, 22, 207
- Stampp, Kenneth M., 24, 169, 201, 273
- State constitutions: and racial discrimination, 120; bills of rights, 135, 272; and law of land, 195-196, 199-200; purpose of due process, 256; on trial by jury, 399
- States: control of suffrage, *see* Suffrage; protection against discrimination by, *see* Discrimination; Due process; Equal protection; representation and curtailment of suffrage, 15-16, 52, 53-54, 62, 64-68, 70-77, 78, 98, 368; criminal proce-
- dures, 17, 135, 136, 143, 151, 200, 215, 255, 338; reserved powers, 17-18, 76, 154-155, 243, 250, 380, 381-382, 384; control over blacks, 26-27; privileges or immunities and citizenship of, 31-32, 38, 39-51; those with black suffrage, 55-56, 90-91; suffrage and number to ratify Amendment, 57, 58-59, 108; sovereignty, 60-64, 70-73, 74, 76, 87, 103, 114, 124, 130, 136, 154-155, 189, 242, 264, 275, 277, 284; republican form of government, 77-84, 85; and Declaration of Independence, 88; and Bill of Rights, 134-156, 182, 263, 339, 340, 350; with nondiscriminatory laws, 150, 154, 178; laws of, and opposition to Amendment, 161, 163-164; no duty to supply rights, 176, 179, 407; protection of against federal government, 182-183, 356, 358-359; courts, and enforcement power, 224, 227, 228; and federal judicial power, 253, 284, 305, 309; repudiation by, of Court's death penalty strictures, 261; and imposition of free speech and press, 270-271, 272-275; right of privacy vs. reserved rights, 392-393; officials bound by supreme law, 355-356; precedents for judicial review, 360; and jury of vicinage, 401-406
- Statutes. *See* Laws
- Steel, Lewis M., 327
- Stephenson, D. G., 343, 344
- Stevens, Justice, 412
- †Stevens, Thaddeus (Pa.), 23, 45, 74, 84, 105, 147, 154, 176, 226, 238, 239; and political and social equality, 15, 122, 126, 161; on representation, 16, 70; and Republican

- ascendancy, 52; on blacks, 58; and suffrage, 62, 63, 67, 92, 93-94, 96, 109, 164, 420-426 *passim*; on Declaration of Independence, 87-88; on inadequacy of Amendment, 105, 106, 150, 188, 237; and Bingham, 112; broad antidiscrimination proposal, 163, 173, 217; explanations of Amendment, 172, 173, 175, 180, 188-189, 204, 227; and equal protection, 187, 212; dislike of, 235; and Sumner, 236
- Stewart, Justice Potter, 135, 325; dissent in reapportionment case, 90, 263-264, 422
- *Stewart, William M. (Nev.), 13, 43, 80, 97, 106; on black representation, 97-98; and Stevens, 235-236
- †Stillwell, Thomas N. (Ind.), 62
- Stone, Chief Justice Harlan F., 37, 268, 333, 391; Learned Hand on, 4; on 10th Amendment, 155; and *Carolene* footnote, 208, 275, 276; on "liberty of contract," 269; on Court course, 278-279; on self-restraint, 414
- †Storm, John B. (Pa.; 42d Congress), 153
- Story, Justice Joseph, 61, 199, 254; on apportionment of State legislatures, 70; on common law definitions, 194-195; on Court's power, 289; on Constitution, 364, 365-366, 370
- Sue and be sued, right to, 34, 169-170
- Suffrage: control reserved to States, 7-8, 29, 30, 32-33, 62-68, 78, 82, 85, 89-98 *passim*, 136, 144, 155, 163, 241, 244, 245, 264, 284, 298, 348, 349, 368, 372, 392, 420-427; question of as right, 29, 30-31, 32, 34, 70, 83-84, 104, 167, 174, 239, 241; and representation, 52, 53-54, 64-66, 69-77; exclusion of black, 54-68, 76, 83, 90-98, 115-116, 118, 122-123, 126, 166, 202, 208, 215, 239, 322, 407; states permitting black, 55-56, 90-91; and republican form of government, 77-84; Van Alstyne's theory, 82-83, 112-114, 172, 419-427; and Declaration of Independence, 88; attempt to provide after 1876, 93-94, 109-110; Bickel's theory, 102-109; TenBroek on, 188-189; and abolitionist theory, 234, 236, 237, 239. *See also* Blacks
- *Sumner, Charles (Mass.), 26, 53, 216, 238; on slaves, 10-11; on blacks, 18, 58; and suffrage question, 54, 167, 239; suffrage proposals rebuffed, 57, 59-60, 71, 82, 105; on representation, 73-74; and republican form of government, 77, 78-79, 80, 82; Brennan and, 96, 98; on segregation, 123, 126-127, 131; broad anti-discrimination proposal, 164; on "equality before the law," 168, 170, 201, 208, 212; and Tancy, 222; dislike of, 236, 237; and Democrats, 244; on original intention, 372
- Supreme Court revisionism, 1-5, 191-192, 373-396; original intention, 3, 7-9; and reserved powers, 17; privileges and immunities decisions, 31-33, 50, 211; citizenship decisions, 37-38, 39, 41-42, 43, 46-49, 215; reapportionment decisions, 53-54, 69-70, 76, 80-81, 85-98; on state governments, 83; desegregation cases, 100, 101, 117-118, 128-133; and incorporation of Bill of Rights, 134-135, 136-139,

- 143, 145, 148, 151, 155-156; on opposition to a bill, 160; on generalities of the 14th Amendment, 166, 167-168; on State protection, 183, 184; interpretations of due process, 193, 201, 208, 212, 214, 250, 256-257, 258-269, 391; and 14th Amendment enforcement power, 221-224, 228-229; abolitionist theory and, 231-232, 243-245; civil liberties and preferred position, 269-282; authority to go beyond original intention, 283-284, 288-299, 314-322, 367-372, 407-413; becomes a Council of Revision, 302-303; true function of, 304-306; libertarian turnabout, 312-314; shifting majorities and leadership of, 323-324, 333; and community feeling, 325-330; record of, 331-334; personnel, 333-336; and judicial review, 351-362; morality required, 386; and jury number, 397-406; importance of controlling government by, 413-418. *See also* under *substantive headings*; *names of justices*; *Index of Cases*
- Burger (Nixon) Court: Levy on, 2, 285, 323, 340-346; criticisms of, 333, 338-340; C. Black on, 346-350; retreat from Warren Court, 406
- Warren Court, 406; enthusiasm for, 1, 3, 283, 286-288, 290, 305, 312, 332; as Council of Wise Men, 278-279; policymaking by, 305-306; Levy on, 340-341, 344; C. Black on, 346-350, 410
- Sutherland, Arthur: on due process, 193; on Frankfurter and revisionism, 262-263; libertarian turnabout, 312; on judicial function, 335
- Sutherland, Justice George, 335, 374
- Swayne, Justice Noah H., 38
- Taft, Chief Justice William Howard, 202, 334; on impeachment of judges, 414
- Tancy, Chief Justice Roger Brooke, 222, 226
- TenBroek, Jacobus, 10; on privileges and immunities, 28, 35-36; on Declaration of Independence, 87; on Bingham and Bill of Rights, 146-147; on equal protection, 177-183, 185, 186, 187, 188-190, 209; on due process, 203; on Bingham, 207, 210; on rights, 211, 213, 219-220; abolitionist theory, 230, 231, 232, 234, 236, 239, 391; cited, 22, 23, 27, 120, 159, 163, 212, 222
- Tennessee, readmission of: black suffrage excluded, 56, 79, 80, 95, 105, 111, 175, 234, 423; Sumner's proposal, 59-60, 62
- Texas, 166, 200
- Thayer, James Bradley, 305
- †Thayer, Martin Russell (Pa.), 23, 25, 27, 28, 30, 68, 158, 218
- 3 Edw. III, ch. 8, 198
- 37 Edw. III, ch. 3 cap. 8, 198
- †Thomas, John L. (Md.), 124-125, 171
- Tiffany, Joel, 22, 207
- Tilton, Theodore, 15, 161
- Tocqueville, Alexis de: on slaves, 11; on miscegenation, 163; on Court appointments, 336; cited, 87
- Treason, 195, 404
- Treatymaking power, 380
- Truman, David, 320
- Truman, Harry S, 335
- *Trumbull, Lyman (Ill.), 39, 63, 108, 112, 159, 165, 168, 170, 185, 216,

- 238, 426; and Civil Rights Act, 22, 25-26, 29, 30, 33, 34-35, 38, 47, 71, 94, 108, 115, 154, 209, 211, 243; on citizens' rights, 41, 42; on citizenship, 44, 45, 49-50; on suffrage, 55, 158; on State sovereignty, 62, 154; on Tennessee government, 79; on correlation of rights, 103; Kelly on, 149-150; on applicability of Civil Rights Act, 178, 212; on Sumner, 236
- Tucker, Thomas, 134-135
28 Edw. III, ch. 3 (1354), 197, 198
25 Edw. III (1352), 197
- Twiss, Benjamin R., 200
- Usurpation. *See* Power
- †Van Aernam, Henry (N.Y.), 23, 104, 150
- Van Alstyne, William W.: on reapportionment, 54, 69-77; on suffrage, 55-56, 57, 172; open-ended theory, 57, 65, 68, 100, 112-116; view on republican form of government, 77, 79, 80, 82, 83; critique of Harlan's opinion in *Reynolds*, 419-427; cited, 5, 7, 14, 52, 97
- *Van Winkle, Peter C. (W. Va.), 157
- Vermont, 55, 196, 272, 287; trial by jury, 399
- Vicinage, jury of, 400, 401-406
- Vinson, Chief Justice Fred M., 325, 333; and *Brown*, 128-129, 131, 324, 342
- Virginia, 195; Ratification Convention, 117, 252, 288, 304, 309, 311, 317, 407, trial by jury, 399, 401, 403, 405; Constitution, 196
- *Wade, Benjamin F. (Ohio), 44, 148
- Waite, Chief Justice Morrison R.: on 15th Amendment, 86, 421; on States, 144; on law, 289
- †Warner, Samuel L. (Conn.), 223
- Warren, Charles: on "liberty," 270; on free speech and due process, 271-272, 273; cited, 134, 256, 269
- Warren, Chief Justice Earl, 68, 262, 324, 328, 333, 409; apportionment issue and *Reynolds* opinion, 53-54, 70, 75, 76-77, 85-90, 347-348; on turning clock back, 128, 131, 408; and *Brown*, 129, 133, 324; analysis of equal protection and due process, 210; evaluation of *Brown* statements, 243-245; enthusiasm for, 286-288; on judicial oath, 292-293; and rule of law, 298; on Constitution, 319; and death penalty, 236, 240; and neoabolitionists' theories, 247-248. *See also* under Supreme Court
- †Washburne, Elihu B. (Ill.), 147
- Washington, Justice Bushrod, 38: on fundamental rights, 22, 31-32, 139, 210, 211
- Washington, George, 299, 331, 410
- Webster, Daniel, 145
- Wechsler, Herbert, 349, 356
- Weld, Theodore, 231
- Wellington, Harry, 347
- White, Alexander, 295, 316
- White, Justice Byron R., 57, 265, 340; on due process clause, 272-273; and ordered liberty, 275; and 12-man jury, 397, 398, 401-405
- White, Judge Edward, 383
- White, G. E.: on common law cases, 321; on Court criminal decisions, 339; cited, 253, 298, 323, 324, 334
- Whites: and reapportionment, 70; within coverage of Amendment, 216. *See also* Blacks; Equality

- *Williams, George H. (Ore.), 52-53
- Wilson, Edmund, 273, 374
- *Wilson, Henry (Mass.), 11, 25, 26, 59, 66, 113, 123, 124; unremitting prejudice, 240
- Wilson, James, 73, 252, 394; on elections, 88-89, 92; on impeachment, 295; on Council of Revision, 301; on control of Congress, 304, 361; on interpretation of statutes, 366; on jury of vicinage, 402
- †Wilson, James F. (Iowa), 13, 15, 21, 22, 26, 30, 120, 123, 158, 170, 175, 412; on school and jury segregation, 27; on civil and fundamental rights, 40, 118-119, 141-142, 163; on deletion of "no discrimination in civil rights" phrase, 114, 122, 161; on posterity, 107; on Civil Rights Act, 136, 143, 158, 159, 179-180, 213, 216, 127, 219, 244; on Bingham amendment, 187; on due process, 202; distrust of judiciary, 222
- †Windom, William (Minn.), 26, 29, 31, 43, 126, 171, 209
- Wisconsin, 12, 55, 222
- Witness, right to be, 125
- Wofford, John, 368, 370
- Women, 73, 85-86
- Wood, Gordon, cited, 87, 307, 361
- †Woodbridge, Frederick E. (Vt.), 43, 141, 142, 178, 179, 180, 218, 227
- Woodward, C. Vann, 5, 10; on racism, 12; on equality, 14, 175; on §2, 53; on abolitionists, 234-235; on Stevens and black suffrage, 423; cited, 58, 60, 109, 233
- Wright, Benjamin F., 300, 302
- Wright, J. Skelly, 322
- Writ and due process, 197, 198
- Wythe Committee, 399
- *Yates, Richard (Ill.), 55, 61, 66, 163-164, 244
- Yates, Robert, 359
- Zeisel, Hans, 398

Index of Cases

- Abbott v. Bayley, 6 Pick. 89 (Mass. 1827), 32, 34, 39, 183
- Ableman v. Booth, 62 U.S. (21 How.) 506 (1858), 222, 226
- Adamson v. California, 332 U.S. 46 (1947), 49, 121, 136, 137, 138, 139, 148, 149, 151, 152, 205, 207, 208, 249, 262, 368
- Adkins v. Children's Hospital, 261 U.S. 525 (1923), 133, 269, 271, 323
- Allgeyer v. Louisiana, 165 U.S. 578 (1897), 269
- A.F. of L. v. American Sash Co., 335 U.S. 538 (1949), 261, 264
- American Security Co. v. District of Columbia, 224 U.S. 491 (1912), 167
- Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951), 385
- Aptheker v. Secretary of State, 378 U.S. 500 (1964), 389
- Baker v. Carr, 369 U.S. 186 (1962), 69, 80, 167, 264, 348
- Baldwin v. Missouri, 281 U.S. 586 (1930), 18, 259, 266, 383, 413-414
- Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), 134, 143, 145, 182
- Beauharnais v. Illinois, 343 U.S. 250 (1952), 152, 156
- Bell v. Maryland, 378 U.S. 226 (1964), 132, 159, 368, 375
- Belmont Bridge v. Wheeling Bridge, 138 U.S. 287 (1891), 76
- Bennecke v. Insurance Co., 105 U.S. 355 (1881), 155
- Blake v. McClung, 172 U.S. 239 (1898), 38
- Blask v. Sowl, 309 F. Supp. 909 (W.D. Wis. 1967), 352
- Board of Education v. Barnette, 319 U.S. 624 (1943), 266, 294, 300
- Bolling v. Sharpe, 347 U.S. 497 (1954), 210, 389
- Boyd v. United States, 116 U.S. 616 (1886), 267
- Boys Market v. Clerks' Union, 398 U.S. 235 (1970), 323
- Bradwell v. State, 38 U.S. (16 Wall.) 130 (1872), 31
- Brown v. Allen, 344 U.S. 443 (1953), 325
- Brown v. Board of Education, 347 U.S. 483 (1954), 100, 117, 127, 128, 131, 231, 243-245, 266, 286, 288, 327, 342, 348, 392

- Buchanan v. Warley, 245 U.S. 60 (1917), 48
- Burnet v. Coronada Oil & Gas Co., 285 U.S. 393 (1932), 321
- Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884), 182
- Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), 251, 309
- Campbell v. Morris, 3 H. & McH. 535 (Md. 1797), 32, 33, 34, 169
- Cantwell v. Connecticut, 310 U.S. 296 (1940), 389
- Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950), 123-124
- Chambers v. Baltimore & Ohio R.R., 207 U.S. 142 (1907), 38
- Chambers v. Florida, 309 U.S. 227 (1940), 213
- Chapman v. Alabama, 386 U.S. 18 (1967), 339
- Chicago, M. & St. P. R. Co. v. Minnesota, 134 U.S. 418 (1890), 139, 206-207
- Church of the Holy Trinity v. United States, 143 U.S. 457 (1891), 191
- Civil Rights Cases, 109 U.S. 3 (1883), 76, 191, 222
- Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), 380
- Coleman v. Alabama, 399 U.S. 1 (1970), 297, 345, 397
- Colgate v. Harvey, 296 U.S. 404 (1935), 37
- Commonwealth v. Caton, in 2 Letters and Papers of Edmund Pendleton 416 (D.J. Mays ed. 1967), 309
- Connecticut General Ins. Co. v. Johnson, 303 U.S. 77 (1938), 71, 107, 156
- Corfield v. Coryell, 6 F. Cas. (No. 3230) 546 (C.C.E.D. Pa. 1823), 22,
- 29, 31-32, 33, 34, 39, 41-42, 43, 47, 50, 94, 103, 148
- Dandridge v. Williams, 397 U.S. 471 (1970), 265
- Davidson v. New Orleans, 96 U.S. 97 (1877), 203
- Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840), 305
- Dennis v. United States, 341 U.S. 494 (1951), 132
- Detroit Bank v. United States, 317 U.S. 329 (1943), 211
- Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), 44, 204, 222, 256
- Duncan v. Louisiana, 391 U.S. 145 (1968), 135, 137, 138, 214, 259, 273, 288, 400, 406
- Duplex Co. v. Deering, 254 U.S. 443 (1921), 157
- Eakin v. Raub, 12 S. & R. 330 (Pa. 1825), 297
- Eckenrode v. Pennsylvania R. Co., 164 F.2d 996 (3d Cir. 1947), 74
- Eisner v. Macomber, 252 U.S. 189 (1920), 367, 383
- Entick v. Carrington, 19 How. St. Tr. 1029 (1765), 253, 267
- Eric Ry. Co. v. Tompkins, 304 U.S. 64 (1938), 297, 352, 410
- Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), 160
- Ex parte Bain, 121 U.S. 1 (1887), 9
- Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807), 195
- Ex parte Grossman, 267 U.S. 87 (1925), 371
- Ex parte Virginia, 100 U.S. 339 (1879), 71, 221

- Ferguson v. Skrupa, 372 U.S. 726 (1963), 258, 266
- Flast v. Cohen, 392 U.S. 83 (1968), 300, 303
- Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), 253
- Florida v. Williams, 399 U.S. 78 (1970), 397
- Flournoy v. Hewgley, 234 F.2d 213 (10th Cir. 1956), 155
- Furman v. Georgia, 408 U.S. 238 (1972), 261, 326, 413
- Gardner v. Newburgh, 2 Johns. Ch. 162 (N.Y. 1816), 253
- Gassies v. Ballou, 31 U.S. (6 Pet.) 761 (1832), 45
- Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), 367, 378-379
- Gideon v. Wainwright, 372 U.S. 335 (1963), 389
- Gitlow v. New York, 268 U.S. 652 (1925), 137, 270-271
- Gompers v. United States, 233 U.S. 604 (1914), 382, 384
- Graves v. O'Keefe, 306 U.S. 466 (1939), 297
- Gray v. Sanders, 372 U.S. 368 (1963), 85
- Gregg v. Georgia, 96 S. Ct. 2909 (1976), 261, 340
- Griswold v. Connecticut, 381 U.S. 479 (1965), 101, 258, 262, 265, 266, 294, 300, 303, 328, 354, 389, 390
- Halcy v. Ohio, 332 U.S. 596 (1948), 261
- Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966), 139, 191, 201, 264, 293
- Hawaii v. Mankichi, 190 U.S. 197 (1903), 8, 162
- Hawke v. Smith, 253 U.S. 221 (1920), 364, 371
- Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869), 257
- Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934), 374
- Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820), 289
- Hurtado v. California, 110 U.S. 516 (1884), 2, 195, 198, 205, 212
- In re Winship, 397 U.S. 358 (1970), 250, 275, 289
- Johnson v. Louisiana, 406 U.S. 356 (1972), 283, 320
- Johnson v. United States, 163 F. 30 (1st Cir. 1908), 369, 382-383
- Katz v. United States, 389 U.S. 347 (1967), 292
- Katzenbach v. Morgan, 384 U.S. 641 (1966), 166, 226, 228
- Keifer & Keifer v. R.F.C., 306 U.S. 381 (1939), 269
- Kent v. Dulles, 357 U.S. 116 (1958), 389
- Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1858), 226-227
- Kirby v. Illinois, 406 U.S. 682 (1972), 345
- Livingston's Executor v. Story, 36 U.S. (11 Pet.) 351 (1837), 345
- Loan Association v. Topeka, 87 U.S. (20 Wall.) 655 (1874), 2, 256
- Lochner v. New York, 198 U.S. 45 (1905), 266, 279, 325, 383
- Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947), 260
- Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964), 90, 264

- Luther v. Borden, 48 U.S. (7 How.) 1 (1849), 81
- M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), 2, 39, 110, 253, 310, 352, 375-378, 379, 386, 393
- McGautha v. California, 402 U.S. 183 (1971), 326
- Magg v. Miller, 296 F. 923 (D.C. Cir. 1924), 74
- Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), 290, 291, 305, 380
- Mastro Plastics Corp. v. Labor Board, 350 U.S. 270 (1956), 160
- Maxwell v. Dow, 176 U.S. 581 (1900), 215
- Messon v. Liberty Fast Freight Co., 124 F.2d 448 (2d Cir. 1942), 74
- Metropolitan Board of Excise v. Barrie, 34 N.Y. 657 (1866), 256
- Meyer v. Nebraska, 262 U.S. 390 (1923), 269-270
- Miller v. Herzfeld, 4 F.2d 355 (3d Cir. 1925), 74
- Miller v. McQuerry, 17 F. Cas. (No. 9853) 332 (C.C.D. Ohio, 1853), 254
- Minersville School District v. Gobitis, 310 U.S. 586 (1940), 261
- Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874), 32, 76, 83-84, 86, 88, 289, 421
- Miranda v. Arizona, 384 U.S. 436 (1966), 409
- Missouri v. Holland, 252 U.S. 416 (1920), 379-382, 384
- Missouri v. Lewis, 101 U.S. 22 (1879), 184
- Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), 325
- Mobile & Ohio Railroad v. Tennessee, 153 U.S. 486 (1894), 214
- Morehead v. Tipaldo, 298 U.S. 587 (1936), 269
- Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856), 196, 256
- N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958), 389
- National Ins. Co. v. Tidewater Co., 337 U.S. 582 (1949), 193, 253, 311, 385
- National Labor Relations Board v. Thompson Products, 141 F.2d 794 (9th Cir. 1944), 157
- New York v. Miln, 36 U.S. (11 Pet.) 102 (1837), 422
- New York Times Co. v. Sullivan, 376 U.S. 254 (1964), 389, 428
- New York Trust Co. v. Eisner, 256 U.S. 345 (1921), 90
- Nixon v. Herndon, 273 U.S. 536 (1927), 167
- Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827), 183, 191, 286, 352, 378
- Olmstead v. United States, 277 U.S. 438 (1928), 410
- On Lee v. United States, 343 U.S. 747 (1952), 417
- Oregon v. Mitchell, 400 U.S. 112 (1970), 7, 54, 57, 68, 77, 86, 90-98, 99, 100, 152, 209, 221, 228, 264, 330, 348, 349, 350, 422, 426
- Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), 310, 311, 379
- Owings v. Hull, 34 U.S. (9 Pet.) 606 (1835), 155

- Palko v. Connecticut, 302 U.S. 319 (1937), 272, 273-274, 275
- Parker v. Munday (N.J. 1791), 1
Coxe's L. Rep. 70 (1816), 404
- Patton v. United States, 281 U.S. 276 (1930), 397
- Phillips v. Gookin, 231 Mass. 250, 120 N.E. 691 (1918), 74
- Pierson v. Ray, 386 U.S. 547 (1967), 17, 225, 404, 424
- Plessy v. Ferguson, 163 U.S. 537 (1896), 128, 324
- Poe v. Ullman, 367 U.S. 497 (1961), 258, 275, 280
- Pollock v. Farmers Loan & Trust Co., 157 U.S. 429 (1895), 3, 321
- Pollock v. Farmers Loan & Trust Co., 158 U.S. 601 (1895), 3
- Powell v. McCormack, 395 U.S. 486 (1969), 352, 395
- Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), 61, 222, 226
- Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830), 379
- Prudential Ins. Co. v. Check, 259 U.S. 530 (1922), 270
- Rainwater v. United States, 356 U.S. 590 (1958), 49
- Ranisay v. Allegre, 25 U.S. (12 Wheat.) 611 (1827), 251
- Reynolds v. Sims, 377 U.S. 533 (1964), 1, 2, 7, 53-54, 64, 69, 74, 77, 85, 86, 89-90, 97, 286, 348, 415, 419-420, 425
- Roberts v. Louisiana, 96 S. Ct. 3001 (1976), 340
- Robinson v. California, 370 U.S. 660 (1962), 275
- Rochin v. California, 342 U.S. 165 (1952), 3, 199, 259, 262, 293, 414
- Runyon v. McCrary, 96 S. Ct. 3586 (1976), 412
- Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), 7
- Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850), 224
- Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), 6, 17, 33, 37-38, 40, 42, 44-49, 51, 63, 76, 139, 153, 181, 211
- Snidach v. Family Finance Corp., 395 U.S. 337 (1969), 262
- Snyder v. Massachusetts, 291 U.S. 97 (1934), 274
- South Carolina v. United States, 199 U.S. 437 (1905), 371
- Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), 321
- Sparf v. United States, 156 U.S. 51 (1895), 367
- State v. Kieran, 5 R.I. 497 (1858), 256
- Stockdale v. Hansard, 112 E.R. 1112 (Q.B. 1839), 375
- Stone v. Powell, 96 S. Ct. 3037 (1976), 338
- Strauder v. Virginia, 100 U.S. 303 (1879), 166, 412
- Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803), 183
- Sugarman v. Dougall, 413 U.S. 634 (1973), 215
- Swift v. Tyson, 40 U.S. (16 Pet.) 1 (1842), 297, 352
- T.I.M.E. v. United States, 359 U.S. 464 (1959), 223
- Townsend v. Sain, 372 U.S. 293 (1963), 398
- Trop v. Dulles, 356 U.S. 86 (1958), 251, 292, 293, 319, 326
- Truax v. Corrigan, 257 U.S. 312 (1921), 202
- Twitchell v. Pennsylvania, 74 U.S. (7 Wall.) 321 (1868), 153

- Ullman v. Poe, 350 U.S. 422 (1956), 268
- Union Starch & Refining Co. v. National Labor Rel. Board, 186 F.2d 1008 (7th Cir. 1951), 157
- United States v. Arredondo, 31 U.S. (6 Pet.) 691 (1832), 223
- United States v. Ash, 413 U.S. 300 (1973), 345
- United States v. Babbitt, 66 U.S. 55 (1861), 8
- United States v. Barnes, 222 U.S. 513 (1912), 46
- United States v. Burr, 25 F. Cas. (No. 14,693) 55 (C.C. Va. 1807), 17, 371, 404
- United States v. Butler, 297 U.S. 1 (1936), 414
- United States v. Carolene Products Co., 304 U.S. 144 (1938), 208, 275-277, 391
- United States v. Cruikshank, 92 U.S. 542 (1875), 86, 144, 183
- United States v. Cruikshank, 25 F. Cas. (No. 14,897) 707 (C.C.D. La. 1874), 183, 191, 226
- United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), 395
- United States v. Darby, 312 U.S. 100 (1941), 155
- United States v. Federal Power Commission, 191 F.2d 796 (4th Cir. 1951), 137
- United States v. Freeman, 44 U.S. (3 How.) 556 (1845), 8, 124, 427
- United States v. Gilliland, 312 U.S. 86 (1941), 45
- United States v. Lovett, 328 U.S. 303 (1946), 385
- United States v. Oglesby, 163 F. Supp. 203 (W.D. Ark. 1958), 352
- United States v. 1,629.6 Acres of Land, County of Sussex, Del., 503 F.2d 764 (3d Cir. 1974), 352
- United States v. Pan-American Petroleum Co., 55 F.2d 753 (9th Cir. 1932), 155
- United States v. Rabinowitz, 339 U.S. 56 (1950), 325
- United States v. Reese, 92 U.S. 214 (1875), 421
- United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820), 195
- United States v. Wade, 388 U.S. 218 (1967), 345
- United States v. Wong Kim Ark, 169 U.S. 649 (1898), 371
- Van Camp v. Board of Education, 9 Ohio 407 (1859), 14
- Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (1795), 267
- Vezie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869), 204, 250
- Walker v. Sauvinet, 92 U.S. 90 (1875), 212
- Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796), 9
- Weems v. United States, 217 U.S. 349 (1910), 383
- Wesberry v. Sanders, 376 U.S. 1 (1964), 71
- West Chester & Philadelphia Railroad Co. v. Niles, 55 Pa. 209 (1867), 161
- Wheeler v. Montgomery, 397 U.S. 280 (1970), 315
- Whitney v. California, 274 U.S. 357 (1927), 259, 271
- Williams v. Florida, 399 U.S. 78 (1970), 320, 397-406

- Windham v. Felbridge, Y.B. 33 Hen. 4, f. 38, 183
- Wisconsin R.R. Comm. v. C.B. & Q.R.R. Co., 257 U.S. 563 (1922), 137
- Wright v. Vinton Branch, 300 U.S. 440 (1937), 137
- Wynchamer v. The People, 13 N.Y. 378 (1856), 139-140, 254-256, 391
- Yick Wo v. Hopkins, 118 U.S. 356 (1886), 167
- Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), 374, 384, 395