

# BOSTON COLLEGE LAW REVIEW

---

VOLUME XXIX

SEPTEMBER 1988

NUMBER 4-5

---

## JUSTICE BRENNAN VS. THE CONSTITUTION†

RAOUL BERGER\*

Not content to rest on his *ex cathedra* statements from the marble halls of the Supreme Court, Justice Brennan latterly has descended into the forensic arena to expatiate on his remarkable interpretations of the Constitution.<sup>1</sup> His fresh theories recall Anatole France's delicious satire on the Dreyfus case. Captain Dreyfus had been cashiered and sent to Devil's Island on the basis of testimony fabricated by the Army. The case would not stay buried and, as France tells it, the Minister of War called on the General in charge and noticed that all the walls were covered with shelves laden with files extending up to the ceiling, while porters were bringing in fresh bales of packets, which the General, with the "radiant look of a hero," said were fresh "proofs." "Very good," said the Minister, "very good! but I am afraid that this [Dreyfus] business may lose its beautiful simplicity . . . . Proofs! of course it is good to have proofs, but perhaps it is better to have none at all." Initially, he continued, the case was "invulnerable because it was invisible. Now it gives an enormous handle for discussion."<sup>2</sup> That may equally be said of Brennan's explanations.

One who doffs the judicial robe and enters the debate about the Court's ongoing revision of the Constitution must expect to be viewed as just another debater, particularly when he speaks harshly of the opposition. Those who differ with him "feign self-effacing deference to specific judgments of those who forged the original social compact," that is "arrogance clothed as humility." It is arrogant "to pretend that . . . we can gauge accurately the intent of the framers."<sup>3</sup>

Consider Brennan's opinion that it is impossible "accurately to gauge the intent of the framers," and his assertion that critics of that view "have no familiarity with the historical record."<sup>4</sup> Let us look at the record with respect to federal intervention in matters of suffrage under the cloak of the fourteenth amendment. Section two reduces

---

† Copyright © Boston College Law School

\* Raoul Berger is a retired Charles Warren Senior Fellow in American Legal History at Harvard Law School.

<sup>1</sup> See Address by Justice Brennan, Georgetown University, Washington, D.C., (October 1, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 11 (Federalist Soc'y 1986); [hereinafter *THE GREAT DEBATE*]; Brennan, *Reason, Passion, and the Progress of the Law*, 42 REC. B.A. CITY OF N.Y. 948 (September 17, 1987).

<sup>2</sup> A. FRANCE, *PENGUIN ISLAND* 193-94 (Mod. Lib. ed. 1909).

<sup>3</sup> *THE GREAT DEBATE*, *supra* note 1, at 14.

<sup>4</sup> *Id.* at 15.

state representation in the House of Representatives in proportion as blacks are denied the franchise. Discriminate if you will, but at a price. Senator Jacob Howard, who, with Elisha Washburne, "had been the only Republicans to hold out for black suffrage to the end, all the others proved willing to abandon it,"<sup>5</sup> said that "[t]he second section leaves the right to regulate the elective franchise with the States, and does not meddle with that right."<sup>6</sup> Howard is confirmed by the Report of the Joint Committee on Reconstruction, which drafted the amendment: "[i]t was doubtful . . . whether the States would consent to surrender a power they had always exercised, and to which they were attached." Consequently, the Committee commended section two because it "would leave the whole question with the people of each State, holding out to all the advantage of increased political power as an inducement to allow all to participate in its exercise."<sup>7</sup> Such reports in the legislative history of statutes carry great weight.<sup>8</sup>

Where Justice Brennan could not discern the framers' intent, Justice Harlan declared that the one man-one vote doctrine flew "in the face of irrefutable and still unanswered history."<sup>9</sup> Brennan explains that "[r]ecognition of the principle of 'one man, one vote' as a constitutional one redeems the promise of self-governance by affirming the essential dignity of every citizen in the right to equal participation in the democratic process,"<sup>10</sup> nullifying the judgment expressed in the fifteenth, sixteenth and twenty-sixth amendments that jurisdiction over suffrage required action by the people, never mind the demands of "human dignity," of which more anon.

Nor is the doctrine of "original intent" the bastard doctrine Justice Brennan depicts; its roots go back over six hundred years.<sup>11</sup> John Selden, a seventeenth century sage, stated: "A Man's Wrying has but one true sense, which is that which the author meant when he writ it,"<sup>12</sup> particularly when the author contemporaneously explained what he meant. This is the essence of communication; a speaker or writer must be allowed to explain what he meant by his utterance; the listener or reader may not put his own meaning in the mouth of the speaker or writer. Not surprisingly, Chief Justice Marshall

<sup>5</sup> M. L. BENEDICT, *A COMPROMISE OF PRINCIPLE* 170 (1974); see J.B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 82 (1956).

<sup>6</sup> ALFRED AVINS, *THE RECONSTRUCTION AMENDMENTS' DEBATES* 220, 237 (1967).

<sup>7</sup> *Id.* at 94.

<sup>8</sup> See *Wright v. Vinton Branch*, 300 U.S. 440, 463 (1936); *United States v. Wrightwood Dairy*, 315 U.S. 110, 125 (1942); *Union Starch & Refining Co. v. NLRB*, 186 F.2d 1008, 1012 (7th Cir. 1951).

<sup>9</sup> *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring). Activist Louis Lusk wrote that Harlan's demonstration is "irrefutable and unrefuted." Lusk, *Government by the Judiciary: What Price Legitimacy?*, 6 HASTINGS CONST. L.Q. 403, 406 (1979).

<sup>10</sup> *THE GREAT DEBATE*, *supra* note 1, at 22.

<sup>11</sup> See R. Berger, *Original Intention in Historical Perspective*, 54 GEO. WASH. L. REV. 101 (1986). For a summary, see R. BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 193-201 (1987). The English historian, S. R. Chrimes, concluded that, "the rule of reference to the intention of the legislators . . . was certainly established by the second half of the fifteenth century." S.R. CHRIMES, *ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY* 293 (1936). In *Magdalen College Cases*, Chief Justice Coke stated, "in Acts of Parliament which are to be construed according to the intent and meaning of the makers of them, the original intent and meaning is to be observed." 77 Eng. Rep. 1235, 1245 (1615).

<sup>12</sup> JOHN SELDEN, *TABLE TALK: BEING THE DISCOURSES OF JOHN SELDEN, ESQ.* 10 (1696). On the heels of the Convention, Justice James Wilson, a leading Framer, wrote, "[t]he first and governing maxim in the interpretation of a statute is to discover the meaning of those who made it." 1 WORKS OF JAMES WILSON 75 (McCloskey ed. 1967).

declared that he could cite from the common law "the most complete evidence that the *intention* is the most sacred rule of interpretation."<sup>13</sup> An activist commentator who sought to read original intent out of the common law conceded that, from the Jefferson Administration onward, original intent has been the reigning doctrine of American law.<sup>14</sup> Another activist, Thomas Grey, acknowledges that "interpretivism," or intentionalism, is a view "of great power and compelling simplicity . . . deeply rooted in our history and our shared principles of political legitimacy. It has equally deep roots in our formal constitutional law."<sup>15</sup> Such views should not be derided as "arrogance clothed in humility."

#### DUE PROCESS OF LAW

Justice Brennan postulates "the patent ambiguity of the terms 'due process of law,'" an assumption history contradicts. He notes its derivation from Magna Carta, the "equivalent" of "law of the land."<sup>16</sup> Elsewhere I have traced the "procedural" course of "law of the land" and its identification with due process, the process that is due.<sup>17</sup> Here it must suffice that on the eve of the Federal Convention Hamilton stated: "[t]he words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; *they can never be referred to an act of the legislature.*"<sup>18</sup> Charles Curtis, an admirer of the Court's innovations, nevertheless considered that the meaning of due process of law in the fifth amendment "was as fixed and definite as the common law could make a phrase . . . . It meant a procedural due process."<sup>19</sup> Of due process we may say with Chief Justice Marshall, speaking of "treason:" "It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it."<sup>20</sup> Certainly that was how Hamilton understood the concept.

But for what John Hart Ely justly labels a couple of "aberrational" cases,<sup>21</sup> that was the accepted meaning which the fourteenth amendment did not change. John Bingham, draftsman of the fourteenth amendment, said that its meaning had long ago been settled by the courts.<sup>22</sup> The Supreme Court stated in *Hurtado v. California* that the phrase was used in the fourteenth "in the same sense and with no greater extent" than in the fifth.<sup>23</sup>

<sup>13</sup> JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 167 (G. Gunther ed. 1969).

<sup>14</sup> Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 926-27, 934, 946 (1985). The Court, said Jacobus tenBroek, "has insisted, with almost uninterrupted regularity, that the end of constitutional construction is the discovery of the intention of those persons who formulated the instrument." tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction*, 27 CALIF. L. REV. 399 (1939).

<sup>15</sup> Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975).

<sup>16</sup> *Reason, Passion, and the Progress of the Law*, *supra* note 1, at 967; Address by Justice Brennan, entitled *The Fourteenth Amendment*, N.Y.U. School of Law, (August 8, 1986), at 13-14 (mimeographed copy) [hereinafter *The Fourteenth Amendment*].

<sup>17</sup> See Berger, "Law of the Land" Reconsidered, 74 NW. U.L. REV. 1 (1979).

<sup>18</sup> 4 PAPERS OF ALEXANDER HAMILTON 35 (Syrett & Cooke eds. 1962) (emphasis added).

<sup>19</sup> Curtis, *Review and Majority Rule*, in *SUPREME COURT AND SUPREME LAW* 170, 177 (E. Cahn ed. 1954). Charles Haines wrote that in England due process of law referred to "a method of procedure in criminal trials," and America accepted it "with the usual English significance," not "as a check on legislative authority." C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 410 (1932).

<sup>20</sup> *United States v. Burr*, 25 F. Cas. 55, 165 (C.C. Va. 1807) (No. 14,693).

<sup>21</sup> J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 16, 18 (1980).

<sup>22</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

<sup>23</sup> *Hurtado v. People of California*, 110 U.S. 516, 535 (1884).

Brennan asserts, however, relying on *Hurtado*, decided in 1884, that the Court "from the beginning rejected the notion that 'due process of law' as used either in the fifth or the fourteenth amendments, embraced nothing except what was the 'law of the land,' as sanctioned by settled usage."<sup>24</sup> As regards the fifth amendment, 1884 manifestly was not "from the beginning." The issue in *Hurtado* was whether California could prosecute a criminal offense by information a prosecutor filed, rather than by grand jury indictment. Noting that the fifth amendment expressly provided both for due process and indictment by grand jury, whereas the latter was absent from the fourteenth, the Court declined to read a grand jury requirement into the due process of the fourteenth. The gratuitous dictum that judicial *procedure* was not frozen in ancient patterns was hardly an invitation to employ due process in order to censor *substantive legislation*. That was a generic alteration of a later day, when the Court, to quote Justice Brennan, was "shield[ing] the excesses" of "expanding capital from governmental restraints."<sup>25</sup> Since then, the Court has repudiated that practice, referring to "our abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise . . . . We refuse to sit as a 'superlegislature to weigh the wisdom of legislation.'"<sup>26</sup>

This abnegation, however, did not extend to "social" legislation, a differentiation without textual basis.<sup>27</sup> Judge Learned Hand considered that "[t]here is no constitutional basis for asserting a larger measure of judicial supervision over liberty than over property."<sup>28</sup> As Justice Brennan notes, the fourteenth amendment lay "substantially dormant as a document of human freedom until at least the 1930s."<sup>29</sup> So we are constrained to assume that the recent Court has drunk more deeply of the Pierian Spring than did its predecessors, notwithstanding that "constructions by contemporaries" of the Constitution carry great weight because, Justice William Johnson explained, they "had the best opportunities of informing themselves of the framers of the constitution and of the sense put upon it by the people when it was adopted by them."<sup>30</sup>

In truth "liberty" is a frail support for a "document of human freedom." That word, James Wilson explained to the framers of the fourteenth amendment, reading Blackstone's definition, meant freedom of locomotion, the right to come and go where one pleases.<sup>31</sup> This definition had special relevance for the framers because the Black Codes riveted blacks to their habitat on pain of being sold into virtual slavery under the vagrancy laws.<sup>32</sup> During the Ratification campaign, "liberty" was again explained in terms of

---

<sup>24</sup> *The Fourteenth Amendment*, *supra* note 16, at 14.

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963).

<sup>27</sup> Brennan observes, "[i]t was in particular the Fourteenth Amendment's guarantee that no person be deprived of life, liberty, or property . . . that led us to apply many of the specific guarantees of the Bill of Rights to the States." *THE GREAT DEBATE*, *supra* note 1, at 20-21. The clause does not differentiate between liberty and property. History discloses that "property" was actually more highly prized by the Founders than "liberty." See R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 266-68 (1977).

<sup>28</sup> *LEARNED HAND, THE BILL OF RIGHTS* 50, 51 (1962).

<sup>29</sup> *The Fourteenth Amendment*, *supra* note 16, at 19.

<sup>30</sup> *Ogden v. Saunders*, 25 U.S. 132 (12 Wheat.) 213, 270, 290 (1827).

<sup>31</sup> See *AVINS*, *supra* note 6, at 164.

<sup>32</sup> Senator Henry Wilson urged the Framers to insure that the freedman "can go where he pleases." *AVINS*, *supra* note 6, at 98.

freedom to come and go.<sup>33</sup> So far as Brennan regards it as "a solemn duty to interpret and apply the new constitutional restraints in the spirit and sense intended by their framers,"<sup>34</sup> he is wide of the mark. Chief Justice Taney emphasized, "[i]f in this court we are at liberty to give old words new meanings . . . there is no power which may not, by this mode of construction, be conferred on the general government and denied to the States"<sup>35</sup> in contravention of the tenth amendment. Earlier Madison wrote, 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."<sup>36</sup>

Against this Brennan asserts that:

the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not on any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great *principles* to cope with current problems and current needs.<sup>37</sup>

This is empty rhetoric. The "principles" were articulated in "words"; change the meaning of the "words" and you change the "principles."<sup>38</sup> Brennan is welcome to give words that *he* employs a new meaning, but he may not saddle the framers with *his* meaning. He departs from the views expressed by Marshall,<sup>39</sup> Taney, Madison, and the Court itself.<sup>40</sup> And in more decorous diction, he is affirming that the Founders "may not rule us from their graves," thus repudiating the Constitution, text and all, whilst he purports to speak in its name.

Brennan's escape from the procedural content — "the sweeping generalities of its language"<sup>41</sup> — of due process stirs large doubts. In England, he notes, due process was a check only on the Crown, not on Parliament.<sup>42</sup> The framers rejected parliamentary supremacy and vested "sovereignty in the people at large."<sup>43</sup> From this rejection Brennan

<sup>33</sup> Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435, 448 (1985).

<sup>34</sup> *The Fourteenth Amendment*, *supra* note 16, at 13 (emphasis added).

<sup>35</sup> Passenger Cases, 48 U.S. (7 How.) 283, 478 (1849).

<sup>36</sup> THE WRITINGS OF JAMES MADISON 191 (G. Hunt ed. 1910).

<sup>37</sup> THE GREAT DEBATE, *supra* note 1, at 17.

<sup>38</sup> The "words" in a written Constitution designed to limit power, were meant to "bind" down our delegates "from mischief by the chains of the Constitution," said Jefferson, 4 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 543 (2d ed. 1836).

<sup>39</sup> If a word was understood in a certain sense "when the Constitution was framed," said Chief Justice Marshall, then the "convention must have used the word in that sense," and it is that sense which is to be given judicial effect. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824).

<sup>40</sup> In *South Carolina v. United States*, the Court declared, "[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. . . . 'Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.'" 199 U.S. 437, 448-49 (1905); *see also* *Hawke v. Smith*, 253 U.S. 221, 227 (1920); T. COOLEY, CONSTITUTIONAL LIMITATIONS 54 (1st ed. 1868).

<sup>41</sup> After noting the "fixed" procedural character of due process, Charles Curtis, who rejoiced in judicial "adaptation" of the Constitution, asked, "[b]ut who made it a large generality? Not they [the Framers]. We [the Court] did," *Curtis*, *supra* note 19, at 177.

<sup>42</sup> *Reason, Passion, and the Progress of the Law*, *supra* note 1, at 964.

<sup>43</sup> *Id.* at 965.

wrings the non-sequitur that "merely following the rule is not enough to satisfy the demands of due process."<sup>44</sup> Lodging sovereignty in the people merely transferred the power of making rules, and sheds no light on whether "merely following the rule" is enough. Brennan recognizes that the framers considered officials as "agents of the people, to whom certain limited authority had been delegated;" that the Constitution was "a great power of attorney, under which no power can be exercised but what is expressly given;" and that it "served to restrain their [agents'] conduct."<sup>45</sup> These "restraints" are set at naught by his theory that he can change the meaning of the words the framers used to articulate them. Inasmuch as due process had a centuries-old procedural content, that "definition," according to Justice Story, as good as stood in the text.<sup>46</sup> Justice Story merely restated the long-standing canon that common law terms in an enactment are to be given their common law meaning.<sup>47</sup> Where is Justice Brennan authorized to revise those terms?

His warrant for casting this history into the discard is James Wilson's statement that "they who execute, and they who administer the laws, are so much the servants, and therefore as much the friends of the people, as those who make them." Under such a theory of government, due process could no longer mean mere official conformity to duly enacted legal rules — governance by reason alone. Instead, due process requires fidelity to a more basic and more subtle principle: the essential dignity and worth of each individual.<sup>48</sup> The context of Wilson's remarks repels so far-fetched an implication. Gordon Wood, whom Brennan cites, paraphrases Wilson:

Although the authority of their governors and judges became in 1776 as much the "child of the people" as that of the legislators, the people could not forget their traditional colonial aversion to the executive and judiciary, and their fondness for their legislatures, which under the British monarchy had been the guardians of their rights and the anchor of their political hopes.<sup>49</sup>

Wilson, then a Justice, commented in his 1791 Lectures, that:

it is high time . . . that we should chastise our prejudices . . . . The executive and judicial powers are now drawn from the same source, are now animated by the same principles, and are now directed to the same ends, with the legislative authority: they who execute, and they who administer the laws, are so much the servants, and therefore as much the friends of the people, as those who make them.<sup>50</sup>

---

<sup>44</sup> *Id.* at 973.

<sup>45</sup> *Id.* at 965.

<sup>46</sup> Justice Story stated that when the draftsmen employed common law terms, the common law "definitions are necessarily included, as much as if they stood in the text." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820); see also *supra* note 39.

<sup>47</sup> For citations, see Berger, *Bills of Attainder: A Study of Amendment by the Court* 63 CORNELL L. REV. 355, 360-62 (1978).

<sup>48</sup> *Reason, Passion, and the Progress of the Law*, *supra* note 1, at 966.

<sup>49</sup> G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1777-1787* 598 (1969).

<sup>50</sup> *Id.*

To extract from Wilson's plea to bury the "prejudice" against the judiciary a shift from the procedural meaning of due process to "fidelity to the underlying vision of human dignity enshrined in the Due Process Clause"<sup>51</sup> is a triumph of legerdemain.

#### "PURE REASON" AND "PASSION"

Another example of Brennan's "instant history" is furnished by his account of how federal judges came to resort to "pure reason." He proceeds from the "struggle between the Republican President [Jefferson] and Congress and the Federalist bench," that came to a head in the impeachment and acquittal of Justice Samuel Chase in 1805.<sup>52</sup> From this he deduces that "The Judicial branch was thus *born* not on the lofty peaks of pure reason, but in the trenches of partisan politics."<sup>53</sup> The judicial branch, however, was "born" in 1787 when the framers created a federal judiciary. The "origins of the formalist conception," presumably meaning reliance on "pure reason," Brennan attributes to the "spectre of politicization that hung over the Court in its early years," that is, the judiciary's understanding of the need "to tether its decisions to constitutional principles and not party affiliation."<sup>54</sup> By way of confirmation, he cites to the preface to 1 Cranch of the Supreme Court's Reports, wherein the reporter, William Cranch, Chief Justice of the District of Columbia Circuit, stated that "the least possible range ought to be left to the discretion of the Judge . . . Every case decided is a check upon the Judge. He cannot decide a similar case differently without strong reasons, which, . . . he will wish to make public."<sup>55</sup> "Thus," Brennan concludes, "were institutionalized two important checks on judicial discretion — the recording of precedent, and the requirement of a public and reasoned explanation of the judicial result."<sup>56</sup>

A reporter of the Court's opinions, however, could hardly "institutionalize . . . checks upon judicial discretion." Moreover, reasoned opinions were a familiar staple of English courts; Marshall's opinion in *Marbury v. Madison*<sup>57</sup> is a classic example, and this before the Chase impeachment. Nor did Cranch derive his checks from the blue; they were of long standing. The colonists, Gordon Wood found, had "a profound fear of judicial independence and discretion."<sup>58</sup> And adherence to precedent was deeply rooted in

---

<sup>51</sup> *Reason, Passion, and the Progress of the Law*, *supra* note 1, at 974. Edward J. Erler comments on Brennan's exaltation of "human dignity" that it "flies in the face of the literal language of the Constitution itself," i.e., the eighth amendment's contemplation of the deprivation of life, with due process, and "contradicts the clear and unequivocal language of the Constitution." E. Erler, *Constitutional Scholarship: What Next?* 5 CONST. COMMENTARY 17, 52, 57 (1988).

<sup>52</sup> *Reason, Passion, and the Progress of the Law*, *supra* note 1, at 955.

<sup>53</sup> *Id.* at 956 (emphasis added).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 956-57.

<sup>56</sup> *Id.* at 957.

<sup>57</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>58</sup> Wood, *supra* note 49, at 298. Morton Horwitz found that "judicial innovation itself was regarded as an impermissible exercise of will." Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820* 5 PERSPECTIVES IN AMERICAN HISTORY 287, 303 (1971). Even the Tory Chief Justice Hutchinson of Massachusetts declared in 1767 that "the *Judge* should never be the *Legislator*: Because, then the Will of the Judge would be the Law: and this tends to a State of Slavery." *Id.* at 292.

English law and was echoed by Hamilton in *Federalist* No. 78.<sup>59</sup> Hamilton stated, "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty."<sup>60</sup> The Chase impeachment did not charge "politicization" of the Supreme Court's decisions, but his use of charges to the jury as a pulpit for rabid assaults on the Jeffersonians, a frequent practice of Federalist judges.<sup>61</sup>

To "avoid undue politicization of the judiciary," Brennan recounts, "it was essential that their decisions be the product of reason rather than party politics," leading to neglect of a counterpoise to "pure reason." That leavening element he denominated "passion," meaning "the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason."<sup>62</sup> More crudely, Justice Douglas acknowledged the great role of a Justice's "gut reactions."<sup>63</sup> Given that suffrage was excluded from the fourteenth amendment and left to the States, as the text reveals, Brennan's "intuitive and emotional responses" can hardly justify his reversal of the framers' determination by the one man-one vote decision. True it is that often "judges must choose between basic principles;"<sup>64</sup> but it does not follow that they are free to reverse such a constitutional provision.

Nor is Brennan's reliance on Cardozo well taken. In *The Nature of the Judicial Process*, Brennan tells us, Cardozo "adhered to pure reason as the goal to which judges . . . should continue to aspire."<sup>65</sup> Some years later, however, Cardozo would come to champion the role of "intuition," quoting, "[t]he law has its piercing intuitions, . . . its tense apocalyptic moments . . . . Imagination, whether you call it scientific or artistic, is for [both law and science] the faculty that creates."<sup>66</sup> Cardozo was discussing the process of reasoning, "when one is hard beset,"<sup>67</sup> and perplexities are resolved by a flashing insight. This was intuition as an aid to pure reason, not its antithesis. No scientist would wait for "passion" in the sense of the "heart rather than the head"<sup>68</sup> to solve a problem in mathematics or physics. Cardozo's most vaulting imagination would not have led him to reverse the framers' manifest determination.

"Intuition" led to the highly controversial Supreme Court decisions invalidating economic and social legislation, of which *Lochner v. New York* was the most famous example.<sup>69</sup> There the Court struck down a New York statute that limited the number of hours per week that bakery employees could work as a deprivation of liberty, holding that the law interfered with the liberty of bakery owners and workers to contract freely

<sup>59</sup> THE FEDERALIST No. 78, at 510 (A. Hamilton) (Mod. Lib. ed. 1937). Without the common law, i.e., precedent, wrote Chancellor Kent, "the court would be left with a dangerous discretion to roam at large in the trackless field of their own imagination." 1 J. KENT, COMMENTARIES ON AMERICAN LAW 373 (6th ed. 1858).

<sup>60</sup> THE FEDERALIST, *supra* note 59, at 510.

<sup>61</sup> R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 225-26 (1973).

<sup>62</sup> *Reason, Passion, and the Progress of the Law*, *supra* note 1, at 958.

<sup>63</sup> Douglas admitted "that the 'gut' reaction of a judge at the level of constitutional adjudication dealing with the vagaries [?] of due process . . . was the main ingredient of his decision." W.O. DOUGLAS, THE COURT YEARS, 1939-1975 8 (1981).

<sup>64</sup> *Reason, Passion, and the Progress of the Law*, *supra* note 1, at 953.

<sup>65</sup> *Id.* at 958.

<sup>66</sup> *Id.* at 959.

<sup>67</sup> B. CARDOZO, PARADOXES OF LEGAL SCIENCE 59 (1928) [hereinafter CARDOZO, PARADOXES].

<sup>68</sup> *Reason, Passion, and the Progress of the Law*, *supra* note 1, at 958.

<sup>69</sup> *Id.* at 959; see *Lochner*, 198 U.S. 45 (1905).



with each other. Liberty had been defined by Blackstone as freedom of locomotion, to go where one pleased without restraint.<sup>70</sup> It seems clear, for instance, that liberty did not comprehend freedom of speech, considered by Cardozo "the matrix, the indispensable condition, of nearly every other form of freedom."<sup>71</sup> Yet, as Charles Warren pointed out, the "free speech" of the first amendment could not have been comprehended in the due process of the fifth because, "having already provided in the First Amendment an *absolute prohibition* on Congress to take away certain rights" it is "hardly conceivable that the framers . . . would, in the Fifth . . . provide that Congress *might* take away the same rights by due process of law."<sup>72</sup> No pre-1787 extension of "liberty" to freedom of contract came to my attention.<sup>73</sup> Dissenting in *Lochner*, Justice Holmes observed that "[S]unday laws and usury laws are ancient examples" of interference with liberty to contract, and cited numerous modern examples.<sup>74</sup> *Lochner* offered no explanation for its abandonment of the settled common law meaning of "liberty," which the Ratifiers of the fourteenth amendment also understood to mean merely freedom of locomotion.<sup>75</sup> Instead, the Court resorted to naked fiat: "There is no reasonable ground for interfering with the . . . right of free contract," thus postulating that such a right exists.<sup>76</sup>

In truth, the Court was engaged in shoving *laissez faire* down the throat of the American people, deciding, as Holmes said, "upon an economic theory which a large part of the country does not entertain."<sup>77</sup> Later he explained that underlying such decisions was the "comfortable classes'" fear of socialism that influenced judicial action, leading to "a wholesale prohibition of what a tribunal of lawyers does not think about right," and to the discovery of "new principles . . . outside the bodies of [the several constitutions]."<sup>78</sup> To borrow from Cardozo, *Lochner* transformed the word "liberty" in order "to prevent the natural outcome of a dominant opinion."<sup>79</sup> For Brennan, however, *Lochner* fell short because it focused on "negative liberty" as "freedom from restraint," noting that Cardozo summarized "positive liberty" in terms of equality of bargaining

---

<sup>70</sup> 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 134 (1765-1769). "In the beginning of constitutional government," Cardozo wrote, "the freedom that was uppermost in the minds of men was freedom of the body." CARDOZO, PARADOXES, *supra* note 67, at 97. Charles Warren concluded, "there seems to little question that, under the common law, the word 'liberty' meant simply 'liberty of person', or, in other words, 'the right to have one's person free from physical restraint.'" WARREN, *The New 'Liberty' Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440 (1926).

<sup>71</sup> *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

<sup>72</sup> Warren, *supra* note 70, at 441 (emphasis in original).

<sup>73</sup> Edward Corwin wrote, "[p]rior to the Civil War American constitutional law and theory evince a quite surprising unconcern regarding 'liberty'. . . . So far as the power of the states was involved, in brief, liberty was the liberty which the *ordinary* law allowed and nothing more." E. CORWIN, *THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY* 78 (1934).

<sup>74</sup> 198 U.S. at 75.

<sup>75</sup> Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio and Pennsylvania*, 18 AKRON L. REV. 435, 448 (1985). In the debates on the amendment, Senator Henry Wilson of Massachusetts had urged the Framers to insure that the freedman "can go where he pleases." AVINS, *supra* note 6, at 98.

<sup>76</sup> 198 U.S. at 57.

<sup>77</sup> *Id.* at 75.

<sup>78</sup> O.W. HOLMES, *COLLECTED LEGAL PAPERS* 184 (1920).

<sup>79</sup> B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 80 (1920) [hereinafter CARDOZO, *NATURE*].

position.<sup>80</sup> Perhaps Cardozo felt constrained to accept "freedom of contract" as existing law and suggested a way of tempering it. The mistake of the Justices, Brennan considers, however, was that the "judges had cut themselves off from other sources of inspiration that could have enriched their rational debate."<sup>81</sup> It escapes him that *Lochner* was not a product of "pure reason," but of "passion," that it drew "inspiration" from a bias in favor of the propertied class of which for many years the Court was the handmaiden.<sup>82</sup> Their "intuition" ran counter to Brennan's.

#### DEATH PENALTIES

Justice Brennan's penchant for identifying his personal predilections with constitutional dogma is starkly revealed by his treatment of death penalties. Until recent times, a leading opponent of death penalties, Hugo Bedau, acknowledged, "An unbroken line of interpreters held that it was the original understanding and intent of the Eighth Amendment to proscribe as 'cruel and unusual' only modes of execution which compound the simple infliction of death with additional cruelties," for example, "burning at the stake, crucifixion."<sup>83</sup> In 1972, the majority of the Court, Justice Brennan participating, discovered in *Furman v. Georgia* that the eighth amendment's "cruel and unusual punishments" clause curtailed the state's sovereign power over death penalties.<sup>84</sup> That clause had been lifted from the English Bill of Rights of 1689. For 100 years thereafter, a whole catalog of crimes continued to be punished by death.<sup>85</sup> When the eighth amendment added the clause in 1789, the companion fifth amendment contemplated that one could be deprived of life after a due process proceeding.<sup>86</sup> The First Congress, which had drafted the Bill of Rights, enacted the Act of April 30, 1790,<sup>87</sup> which made a number of offenses punishable by death, thus evidencing the draftsmen's understanding that death penalties had not been banned. Nothing in the history of the fourteenth amendment indicates an intention to abolish the States' rights to impose death penalties.<sup>88</sup>

For Justice Brennan, however, "death stands condemned as fatally offensive to human dignity."<sup>89</sup> The "fundamental premise" of the "cruel and unusual punishments" clause, he asserts, is "that even the most base criminal remains a human being possessed

<sup>80</sup> *Reason, Passion, and the Progress of the Law*, *supra* note 1, at 960.

<sup>81</sup> *Id.*

<sup>82</sup> In the 19th century, Leonard Levy observes, "a property-minded judiciary had run amok, inventing judicial doctrines to protect corporate interests from public regulation." The Court "shaped constitutional law so that employers were free to exploit workers in accord with so-called laws of supply and demand and free competition." Levy, *Property as a Human Right*, 5 CONST. COMMENTARY 169, 177, 178 (1988).

<sup>83</sup> H. BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 35 (1977).

<sup>84</sup> 408 U.S. 238 (1972).

<sup>85</sup> In 1785 Archdeacon William Paley justified "England's 'Bloody Code' of more than 250 capital crimes." *McGautha v. California*, 402 U.S. 183, 281 (1971).

<sup>86</sup> Sanford Levinson, an activist, considers that this presents a "devastating problem." Levinson, *Wrong But Legal*, THE NATION, Feb. 26, 1983, at 248. Stephen Gillers, another activist, wrote this is "uncontested." Gillers, *Berger Redux*, 92 YALE L.J. 731, 740 (1983).

<sup>87</sup> 1 Stat. 117 § 21 (1st Cong., 2d Sess.) (1791).

<sup>88</sup> Gillers regards it as an "uncontested proposition" that adoption of the fourteenth amendment "was not intended to invalidate capital punishment." Gillers, *supra* note 86, at 740.

<sup>89</sup> *Furman v. Georgia*, 408 U.S. at 286, 305 (Brennan, J., concurring). Condemning *Dred Scott*, William Cullen Bryan asked, are we "to admit that the Constitution was never before rightly understood, even by those who framed it?" A. NEVINS, 1 THE EMERGENCE OF LINCOLN 96 (1950).

of some potential, at least, for human dignity."<sup>90</sup> English and early American law, however, cared not a whit for "human dignity." Blackstone wrote that some punishments "fix a *lasting stigma* on the offender, by slitting the nostrils, or branding in the hand or cheek;" other punishments "consist principally in their *ignominy* . . . such as whipping, . . . the pillory, the stocks, and ducking stool."<sup>91</sup> Lord Camden, who had been Chief Justice of the Court of Common Pleas, referred in the course of the 1791 debate on Fox's Libel Act to the punishment that might "be inflicted . . . whether it was fine, imprisonment, loss of ears, whipping or *any other disgrace*."<sup>92</sup> Such punishments were common in colonial and early American law.<sup>93</sup> A Massachusetts statute of 1791 provided that highway robbers should be burned on the forehead, or hand.<sup>94</sup> As late as 1823, Nathan Dane noted such punishments as "pillory, branding, whipping."<sup>95</sup> Nathaniel Hawthorne's *The Scarlet Letter* recorded such an incident. Imprisonment is also an affront to "human dignity." Would Justice Brennan abolish imprisonment for murder?

The Founders did not share Brennan's exalted view of the importance of the individual vis-a-vis the State. As Gordon Wood wrote, "The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution."<sup>96</sup> "Ideally, republicanism obliterated the individual." John Dickinson wrote, "A *people* is travelling fast to destruction, when *individuals* consider *their* interests as distinct from *those of the public*."<sup>97</sup> Alpheus Thomas Mason concluded that "[i]n the Convention and later, states rights — not individual rights — was the real worry."<sup>98</sup> "The original Constitution," wrote Zechariah Chafee, "did very little to protect human rights against the States."<sup>99</sup>

Given this prevailing attitude, it is not surprising that when the Founders came to spell out individual rights in the Bill of Rights, the list was meager indeed. Four amendments are concerned with criminal proceedings, another with civil suits, the others safeguard freedom of speech and religion, the right to bear arms and a ban against quartering soldiers in private homes. The "human rights" fashioned of late by the Court are judicial fabrications without constitutional warrant.<sup>100</sup> Brennan's invocation of "human dignity" is of this order. He acknowledges that his

<sup>90</sup> THE GREAT DEBATE, *supra* note 1, at 24.

<sup>91</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 377 (1765–1769) (emphasis in original).

<sup>92</sup> Sparf & Hansen v. United States, 156 U.S. 51, 136 (1895) (Gray, J., dissenting) (emphasis added).

<sup>93</sup> A. EARLE, CURIOUS PUNISHMENTS IN BYGONE DAYS 3, 72, 139, 147, 318 (1896).

<sup>94</sup> R. PERRY, SOURCES OF OUR LIBERTY 237 (1959).

<sup>95</sup> 2 Dane Ab. 569, 570, *quoted in* Ex parte Wilson, 114 U.S. 417, 428 (1885).

<sup>96</sup> WOOD, *supra* note 49, at 53; *see also id.* at 57–58.

<sup>97</sup> *Id.* at 61 n.30 (emphasis in original).

<sup>98</sup> A. MASON, THE STATES RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION 75 (1964).

<sup>99</sup> Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 90 (1968). Justice Brennan notes that "[t]he original document before addition of any of the amendments, does not speak primarily of the rights of man, but of the abilities or disabilities of government." THE GREAT DEBATE, *supra* note 1, at 18.

<sup>100</sup> In the recent "sodomy" case, *Bowers v. Hardwick*, Justice White observed that despite the procedural implications of the due process clause language, the Court has read substantive restrictions into due process and recognized "rights that have little or no textual support in the constitutional language." 106 S. Ct. 2841, 2844 (1986). The Court refused "to discover new fundamental rights embedded in the Due Process Clause" explaining that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no

is an interpretation to which a majority of my fellow Justices [7] — not to mention, it would seem, a majority of my fellow countrymen — does not subscribe . . . . On this issue, the death penalty, I hope to embody a community striving for human dignity for all, although perhaps not arrived.<sup>101</sup>

And Brennan is not content merely to express a pious hope but, departing from the usual practice, dissents in case after case.<sup>102</sup> Not long since, the New York Times noted that "Opponents of the death penalty, acknowledging the overwhelming public, political and legal support for the death penalty, are . . . saying that they expect it to be a long time before public attitudes can be changed."<sup>103</sup> Manifestly, the people do not share Brennan's conception of what "human dignity" requires, so that, were he in the majority, he would embody his own predilection in the Constitution.<sup>104</sup> The philosopher Sidney Hook decried those "who know what the basic needs . . . *should* be, who know not only what these needs are but what they require *better* than those who have them or should have them."<sup>105</sup>

#### APPEALS TO CARDOZO

Justice Brennan's panegyrist, Robert McKay, congratulates him for "building upon [Cardozo's] important work;"<sup>106</sup> and in delivering the Cardozo lecture before the Association of the Bar of the City of New York, Brennan repeatedly invoked Cardozo's authority for his own pronouncements. But Brennan's view of the judicial role is poles removed from that of Cardozo.

Preliminarily, it is to be emphasized that Cardozo wrote against the background of the common law, studding his writings with examples therefrom. From earliest times, the making of the law of torts, contracts and the like had been confided to judges by Parliament. The Statute of Westminster (1285), for instance, authorized the issuance of writs in cases "of like nature," giving rise to the vast jurisdiction of Action on the Case.<sup>107</sup>

cognizable roots in the language or design of the Constitution." *Id.* at 2846. "Otherwise," he stated, "the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." *Id.* For citations to activists who agree that there is no constitutional warrant for the "human rights" created by the modern Court, see Berger, *Michael Perry's Functional Justification for Judicial Activism*, 8 U. DAYTON L. REV. 465, 466 (1983).

<sup>101</sup> THE GREAT DEBATE, *supra* note 1, at 24. Brennan confirms John Hart Ely's demonstration that at the end of every voyage of "discovery," what the judge is "really . . . 'discovering' . . . are his own values." Ely, *The Supreme Court 1977 Term: Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 16 (1978). It gives one pause to be reminded by Ely that "Lenin used to claim this god-like gift of divination of the people's 'real' interests." *Id.* at 51 n.198.

<sup>102</sup> "[T]he refusal by some judges to quit dissenting, long after they have failed to have their way on an issue, contributes to an impression that they write on a clean slate," i.e., voicing their own predilections. Lewis, *supra* note 51, at 23-24.

<sup>103</sup> N.Y. Times, Aug. 19, 1985, at A-13. "Capital Punishment is very popular all over the country." Sherill, *Death Row on Trial*, N.Y. Times, Nov. 13, 1983 (Magazine), at 80.

<sup>104</sup> Compare *supra* note 34 and accompanying text.

<sup>105</sup> S. HOOK, PHILOSOPHY AND PUBLIC POLICY 28 (1980) (emphasis in original). Sir (now Lord) Noel Annan, Vice Chancellor of the University of London, rejected the theory that governments "can identify what people would *really* want were they enlightened." That would justify the State "in ignoring what ordinary people say they desire or detest." Introduction to I. BERLIN, PERSONAL IMPRESSIONS xvii (1980).

<sup>106</sup> Reason, Passion, and the Progress of the Law, *supra* note 1, at 975.

<sup>107</sup> 13 Edw. I ch. 24 (1285).

The origin of such rules, Cardozo observed, "was the creation of the courts themselves, could be 'abrogated' by them,"<sup>108</sup> and could be modified or *set aside by Parliament*." Very different is the judicial role under a Constitution designed, as Chief Justice Marshall declared, to *limit* power, under which the Court claims finality for its judgments.<sup>109</sup> In *Marbury v. Madison*, Chief Justice Marshall held that Congress could not alter the Constitution, even with the object of enlarging the Court's "original" jurisdiction. And in his *Defense of McCulloch v. Maryland*, Marshall wrote that the judicial jurisdiction does not extend to the "assertion of a right to change" the Constitution.<sup>110</sup> That right was reserved to the people themselves by the Article V process of amendment.<sup>111</sup> To alter the meaning due process or "cruel and unusual punishments" had for the Founders is to rewrite the Constitution, a fact that no euphemism can disguise. Brennan's highly regarded colleague, Justice Harlan, stated: "When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect."<sup>112</sup> These considerations are enhanced when the issue is how far the alleged generalities of the fourteenth amendment curtail the residuary state control of internal matters guaranteed by the tenth.

For Cardozo a statute was binding: "[i]n particular [a judge] may not substitute his own reading for one established by the legislature, acting within constitutional limitations, through the pronouncements of a statute."<sup>113</sup> Judges have no right "to ignore the mandate of a statute, and render judgment in despite of it."<sup>114</sup> Still less may they act in despite of a constitutional mandate, the determination of the sovereign people, for example, to exclude suffrage from the fourteenth amendment. Cardozo regards *stare decisis* as "at least the everyday working rule of our law,"<sup>115</sup> "the rule and not the exception."<sup>116</sup> Although no slave to precedent, he nonetheless wrote that "What has once been settled by a precedent will not be unsettled overnight."<sup>117</sup> Compare 180 years of unchallenged death penalties. Again and again Cardozo emphasized that "the process by which judges work is one of erosion rather than avulsion. Here a little and there a little."<sup>118</sup> The "doctrine of traditional development will forbid far-reaching change, change revolutionary in the suddenness of its onset and the extent of its upheaval."<sup>119</sup> It suffices to mention the one man-one vote and death penalty decisions to demonstrate how far removed Brennan is from Cardozo's thinking.

Cardozo's conception of the judicial role, even within the generous confines of the common law, was vastly more modest than that of Justice Brennan: "Judges are not

---

<sup>108</sup> B. CARDOZO, *THE GROWTH OF THE LAW* 136-37 (1924) [hereinafter *CARDOZO, GROWTH*].

<sup>109</sup> See *Cooper v. Aaron*, 358 U.S. 1 (1958).

<sup>110</sup> Marshall, *supra* note 13, at 209.

<sup>111</sup> The Constitution was not to be "amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made." *McPherson v. Blacker*, 146 U.S. 1, 36 (1892).

<sup>112</sup> *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970) (Harlan, J., dissenting).

<sup>113</sup> CARDOZO, *PARADOXES*, *supra* note 67, at 55.

<sup>114</sup> CARDOZO, *NATURE*, *supra* note 79, at 129.

<sup>115</sup> *Id.* at 20; see also *id.* at 112; CARDOZO, *GROWTH*, *supra* note 108, at 62.

<sup>116</sup> CARDOZO, *NATURE*, *supra* note 79, at 149.

<sup>117</sup> CARDOZO, *PARADOXES*, *supra* note 67, at 29.

<sup>118</sup> *Id.* at 42, 56.

<sup>119</sup> *Id.* at 121.

commissioned to make or unmake rules at pleasure in accordance with changing views of expediency or wisdom."<sup>120</sup> Recognizing that there were gaps in the common law that called for "interstitial" legislation, Cardozo yet believed that the judge "is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness."<sup>121</sup> Nevertheless, Brennan quotes this passage,<sup>122</sup> oblivious that he is doing precisely what Cardozo condemns by seeking to "embody [a hoped for future] community striving for human dignity for all," while the people cling to death penalties. In Cardozo's view, "the power of innovation of any judge" is insignificant.<sup>123</sup> "Narrow at best," he wrote, "is any freedom that is allotted to us."<sup>124</sup> Over-emphasis on this small enclave obscures the larger problem presented by Brennan's indisputable judicial revision of the Constitution, e.g., death penalties and the one man-one vote, often in despite of the people's will.

Repeatedly Cardozo stressed that the criterion is not "what I believe to be right;"<sup>125</sup> it is not for the judge "to impose upon the community as a rule of life his own idiosyncracies of conduct or belief."<sup>126</sup> Rather, "he would be under a duty to conform to accepted standards of the community, the *mores* of the times."<sup>127</sup> Above all, Cardozo rejected a "jurisprudence of mere sentiment or feeling."<sup>128</sup> Brennan's treatment of due process and of death penalties exemplifies Cardozo's warning that reasoning is "vitiated . . . by starting with a prepossession and finding arguments to sustain it,"<sup>129</sup> the process James Harvey Robinson termed "wishful thinking."<sup>130</sup> Brennan's stress on "justice" takes small

<sup>120</sup> CARDOZO, *NATURE*, *supra* note 79, at 68. Chief Justice Marshall cautioned that "[t]he peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." MARSHALL, *supra* note 13, at 190-91. Justice Story likewise stated, "the wisdom or expediency of a measure is no test of its constitutionality." Story, *supra* note 46, at § 970. Justice Holmes stated, "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." *Adkins v. Children's Hospital*, 261 U.S. 525, 570 (1923) (Holmes, J., dissenting). And Justice Black, who shared many of Brennan's social goals, derided "rhapsodical strains, about the duty of the Court to keep the Constitution in tune with the times." Needed change was to be met by the amendment process of article V. *Griswold v. Connecticut*, 381 U.S. 429, 522 (Black, J., dissenting). In *McCray v. United States*, Justice Edward White said, "no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust." 195 U.S. 27, 54 (1904). Holmes and Black could appeal to the authority of the Court itself.

<sup>121</sup> CARDOZO, *NATURE*, *supra* note 79, at 141. For the Framers, "judicial innovation itself was regarded as an impermissible exercise of will." Horwitz, *supra* note 58, at 298. Chief Justice Rehnquist rephrased the idea: "[t]he Justices of the Supreme Court were not appointed to roam at large in the realm of public policy, and strike down laws that offend their own ideas of what laws are desirable." W. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 314 (1988).

<sup>122</sup> See *Reason, Passion, and the Progress of the Law*, *supra* note 1, at 961.

<sup>123</sup> CARDOZO, *NATURE*, *supra* note 79, at 136.

<sup>124</sup> CARDOZO, *GROWTH*, *supra* note 108, at 61.

<sup>125</sup> CARDOZO, *NATURE*, *supra* note 79, at 89.

<sup>126</sup> *Id.* at 108. Brennan professes to share this view; see *supra* text accompanying note 34.

<sup>127</sup> CARDOZO, *NATURE*, *supra* note 79, at 108.

<sup>128</sup> *Id.* at 106. "Lawyers who are unwilling to study the law as it is, may discover, as they think, that study is unnecessary; sentiment or benevolence or some vague notion of social welfare becomes the only equipment needed . . . Nothing can take the place of rigorous and accurate and profound study of the law as already developed by the wisdom of the past." CARDOZO, *GROWTH*, *supra* note 108, at 59-60.

<sup>129</sup> CARDOZO, *PARADOXES*, *supra* note 67, at 126.

<sup>130</sup> J.H. ROBINSON, *MIND IN THE MAKING* (1921).

account<sup>131</sup> of Cardozo's struggle to define the term, and his conclusion that "when all is said and done," it "remains to some extent . . . the synonym of an aspiration, a mood of exaltation, a yearning for what is fine or high."<sup>132</sup> That is hardly sufficient warrant for curbing a state's right to control administration of its own internal affairs.

#### CONCLUSION

The foregoing, to my mind, amply demonstrates that Justice Brennan brings his own agenda to the Constitution and is committed to a course that cannot be reconciled with the Constitution or with long established methods of construction. He exemplifies what Fred Rodell of Yale found so praiseworthy in Chief Justice Warren, who "brush[ed] off pedantic impedimenta to the results he felt were right," was not a "look-it-up-in-the-library" intellectual, and was "almost unique" in his "off-hand dismissal of legal and historical research."<sup>133</sup> In place of Warren's litmus test "Is it fair?"<sup>134</sup> Brennan substitutes "Does it offend human dignity?" To give Brennan his due, he now essays to proffer some quasi-historical-analytical justification for his interpretive approach. Whether he has succeeded the reader must decide.

<sup>131</sup> It is said that when Justice Holmes left the Massachusetts bench for the Supreme Court "he was admonished to do Justice. He responded thoughtfully that his job was merely to enforce the law." W. MENDELSON, *JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT* 116 (1961). Writing of self-conscious judicial activism, Dean Acheson said that a judge "may conscientiously be seeking to administer justice, but it is personal justice — the justice of Louis IX or Harun-al-Rashid — not that described on the lintel of the the Supreme Court Building, 'Equal Justice Under Law.'" D. ACHESON, *MORNING AND NOON* 69 (1965). Latterly Chief Justice Rehnquist wrote, "the Court has no generalized mandate to 'do justice.'" REHNQUIST, *supra* note 121, at 175.

<sup>132</sup> CARDOZO, *GROWTH*, *supra* note 108, at 87.

<sup>133</sup> Rodell, *It is the Warren Court*, N.Y. TIMES, Mar. 13, 1966 (Magazine), at 30 in L. LEVY ED., *THE SUPREME COURT UNDER EARL WARREN*, 137-39, 142 (1972). In both *Brown v. Board of Education* (desegregation) and *Reynolds v. Sims* (reapportionment), Rodell takes pleasure in recounting, "Warren was quite unworried that legislative history, dug from a library, might not support his reading." *Id.* at 94.

<sup>134</sup> Referring to the "hard core," "liberal" wing of the Court, Justice Frankfurter wrote to Judge Learned Hand that "[t]heir common denominator is a self-righteous power-lust." H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 181 (1981).

At the conclusion of his *Paradoxes of Legal Science*, Cardozo wrote, "I may seem to quote overmuch. My excuse is the desire to make manifest the truth that back of what I write is the sanction of something stronger than my own unaided thought . . ." CARDOZO, *PARADOXES*, *supra* note 67, at 313. How much more may a lesser person be indulged for following his example.