1-1-1989

American Constitutionalism and the Myth of Creative Era Essay

Daniel S. Goodman

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol29/iss3/7

This Essay is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE CREATIVE ERA

Daniel S. Goodman*

Even in the modern world, we live with myths. When we reach the limits of our science, we create belief systems based not on fact but on faith. When economics can no longer predict the effects of government policies, we take comfort in the myth of the perfectly functioning market. And when the science of law fails to give us answers, we make recourse to something we call "the intentions of the Framers"—the grand and all-illuminating design that was set down two centuries ago. It is a fiction that such a thing exists, a fiction too that it is fully educible to modern judges. But the greatest fiction is that these men—farmers and lawyers and merchants—gave us the answers to all our modern contingencies.

It is this ultimate myth, nurtured throughout two hundred years, that has left our courts in their present crisis of confidence: no longer sure that they partake of the true vision of justice, unwilling to be bound by an antiquated worldview, yet uncertain what other modern institution can better lead the people through the moral wilderness. Perhaps the Supreme Court merely has been afflicted with the twentieth century malaise, the uncertainty that is all we have left in our post-Einsteinian world that has robbed us of our objectivity, our fixity, our right and wrong. Adrift on a sea of doubt, borne by forces it cannot control, the Court seeks to revivify the myth of political creation, to preserve tradition and the rule of law while legitimizing itself as the sole interpreter of the sacred document that somehow

© 1989 by Daniel S. Goodman

* A.B., 1983, Stanford University; J.D., 1986, Stanford University. The author wishes to thank John Libby and Jon Sands for their helpful comments.
holds, as did the tablets that Moses brought down from Mount Sinai, a piece of the eternal verities.

Liberals, confronted with a Court that no longer partakes of their vision, find comfort neither in the intent of the Framers nor in the expanded discretion of the judiciary. Conservatives seek a return to traditional values by transfiguring the beliefs of the men who won our independence, making their eighteenth century provincialism the standard by which rights should still be measured, unless those rights are explicitly altered by the daunting process of constitutional amendment.

Above this political landscape hovers the genius of the Framers, who in a matter of months wrote the charter for the longest-lived democracy the world has ever seen. Today, in a society where heroes are made overnight, and legends in not much more than that, it is not surprising that the infallibility of the Framers has become the most powerful, and the most enduring, of our political mythologies.

Since the originalist myth, however, tells us so little about the future course of constitutional law, we need to discover in the present what the law should be. The Supreme Court increasingly appears to be institutionally incapable of fulfilling this role alone. The role of mythic storyteller must therefore fall to the people and their representatives. The jurisprudential point is this: When the Constitution stagnates, suffocating under the weight of its mythic symbolism, social progress is put in jeopardy. Renewal must come from the Court or from the people. But it must come.

I. Recapturing The Revolutionary Spirit

A. The Paradox of Stability and Change

In a government of laws, not men, the structure of rights and obligations upon which the body politic rests cannot be subject to the whims of incumbency or the vicissitudes of the mob. But the Constitution established a democracy, not a necrocracy, and the Framers did not intend their will to bind all subsequent generations of Americans.¹ The Framers thus made provision for amendment of the Con-

¹. The idea of political stagnation was anathema to the founders of our nation. Professor Alexander Bickel has written that

[their] were strong, hopeful men ... living at a time of burgeoning intellectual inquiry, when the best of men remembered change and looked for it. They did not believe in a stable world. They were themselves the instruments of change, innovators, tinkerers, inventors; they could not have believed that they were the last of their breed.

stitution. Yet it is unclear to what extent the Constitution was meant to be (or, alternatively, to what extent it should be) a document that can evolve, in the courts or in the legislature, as opposed to a document that can be changed only by the Article V amendment process.

This is no mere sophistry. The fundamental antinomy of constitutional government is the need to make change possible, but not too possible. One way this can be done is if certain principles are unalterable, subject only to definition at the edges. To this end some legal scholars have tried to root justice in some immutable foundation, as Jefferson did when he spoke of the rights that men were given “by nature’s law and nature’s God.” But the history of the emancipation of the slaves and of women has shown that even the most basic notions—such as “equality”—have come to mean something very different from what they meant to the Framers, and appeals to natural or divine law are frighteningly susceptible to “errors” in translation on the part of self-appointed intermediaries. Absent a transcendent authority—be it political or sacred—that is easily understood and commonly believed in, change is always disjunctive, ahistorical.

What is needed is some way to link the present to the past. By arguing that present decisions are only an extension of enduring principles (or better yet, merely the unfolding of some preexistent design) we offer assurance that change is neither abrupt nor uncertain, but represents a kind of continuity on a larger scale. This continuity is not engendered merely by the fact that the administration of our political sacraments derives from a form of apostolic succession; indeed a central distinction between democracy and monarchy is that our elected officials bear no ties of consanguinity other than those of a broadly delimited ideology.

Lineal descent is not unique to democracy; solidarity with the past is common to a wide variety of political systems where legitimacy is based on historicity. The core of the paradox is not merely the need to maintain a succession of leaders, but the need to maintain a smooth succession of policies and beliefs. In our representative democracy, the connection with the past must be more immediate than in monarchy or autarchy; the past must be immanent in the

2. In Federalist 43, Madison wrote that the Constitution “guards against the extreme facility, which would render [it] . . . too mutable; and that extreme difficulty, which might perpetuate its discovered faults.” The Federalist No. 43 (J. Madison).

3. Bickel noted that change must be gradual in order to be legitimate, or at least to appear so: “The coloration of the new should not clash with that of the old. Change should not come about in violent spasms. Government under law is a continuum, not a series of jerky fresh departures.” A. Bickel, supra note 1, at 109.
present. Thus, we number our Congresses, as if to prove the orderly succession of lawmaking; but the Supreme Court, the final arbiter of the constitutionality of laws, does not number its sessions. Its legitimacy is not merely linear but transcendent and perpetual.\(^4\)

B. Paralysis

Two centuries after the Constitution became the supreme law of the new nation, the body politic is stricken with lethargy. Indeed, in our nation’s history the Constitution has been amended only twenty-six times, and no constitutional convention has been held since the Framers set forth the charter that we today hold sacrosanct.\(^6\) It is our peculiar late-twentieth century reverence for the original document that unifies foundation and eschatology in a perfect circle, as if all the seeds of legitimate possibility were contained in that hoary parchment.\(^6\)

The unwillingness to alter the Constitution is not new. In a speech at Savannah, Georgia in 1847, Daniel Webster, only three generations removed from the time of the Framers, stated: “Our duty is to be content with the Constitution as it is, to resist all changes from whatever quarter, to preserve its original spirit and original purpose, and to commend it, as it is, to those who are to come after us.”\(^7\) Abraham Lincoln, as a Congressman in 1848, warned the House of Representatives against attempts to alter the Constitution, and Grover Cleveland likened it to the Ark of the Covenant.\(^8\)

Judges have often shared with politicians this awe of the constitutional charter. In *Cohens v. The Bank of Virginia*,\(^9\) Chief Justice

---

4. Regrettably, such concepts are difficult to discuss casually or metaphorically, being heavily freighted with non-political baggage. The idea of the simultaneous existence of all time has a considerable history in early Christian doctrine. Boethius discussed this notion in *The Consolation Of Philosophy*, written in the early sixth century, and a similar issue had formed a part of the Arian Controversy which split Christianity prior to the Council of Nicea in 325. See A. Jones, *Constantine and the Conversion of Europe* 119-21 (1978).

5. The Framers themselves shared no such reservations about change. In Federalist 78, Hamilton wrote that a “fundamental principle of republican government . . . admits the right of the People to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness.” *The Federalist* No. 78 (J. Madison).

6. There is a type of moth, namely the species Operophtera of the Geometridae family, that lives its entire lifespan without ever consuming food. Lacking a digestive tract, these insects carry within themselves all the food they will ever need, accumulated at the larval stage. See Heinrich, *Thermoregulation in Winter Moths*, Scientific American 104, 111 (March 1987).


Marshall wrote: "A constitution is framed for ages to come, and is designed to approach immortality as near as mortality can approach it." A half century later, Justice Field, dissenting in the *Legal Tender Cases*, wrote:

The only loyalty which I can admit consists in obedience to the Constitution and laws made in pursuance of it. It is only by obedience that affection and reverence can be shown to a superior having a right to command. So thought our great Master when he said to his disciples: 'If ye love me, keep my commandments.'

There is a great disjunction between constitution-making and the more mundane practice of lawmaking. Despite Congress' dogged avoidance of the responsibility for altering the Constitution, subconstitutional lawmaking has continued apace, as the flood of laws promulgated by Congress grows more torrential with each passing year. What we have witnessed is the apotheosis of the Constitution. No longer a blueprint for a government, it has become the sum total of all our rights and liberties. The founders, like the document itself, have become sanctified—minor deities from whose fecund intellects sprang, fully formed, not merely a nation but a new consciousness, a new dialectic, unalterable and irresistible. No mere malcontents, politicians, and partisans, the Framers have become *parens patriae*—as Aeneas was to Rome or Abraham to the Isrealites.

The philosopher Parmenides believed that only the changeless is real, and similarly we hold that what is true and just cannot change. Thus, to change the Constitution would be an admission that the Constitution was somehow imperfect, and with it our social order. Plato's ideal polity is changeless—free from the forces of decay and corruption by virtue of its perfection. Like his unchanging forms, which were ideal versions of their earthly counterparts, the Republic represented the highest good of political community. Change would therefore constitute degeneration. When Solon gave the Athenians their laws, his one condition was that they were not to

11. The presocratic philosophers in general, and not just Parmenides and his Eleatic school, were obsessed with the definition of being and change. The philosophers who we now call Qualitative Pluralists, principally Empedocles and Anaxagoras, also postulated that the ultimate stuff that composed the universe was immutable, but attempted to explain the appearance of change in terms of the mixing and separation of an infinitely divisible and qualitatively homogeneous universal mixture.
13. *Id.*
be altered for 100 years. Three millenia later, the men who conceived the new nation imposed only one similar condition, that, no amendment which may be made prior to the Year One Thousand eight hundred and eight shall in any manner affect the first and fourth Clauses in the Ninth Section of the first Article, and that no State, without its Consent, shall be deprived or its equal suffrage in the Senate.

At the same time, although not explicitly, the Framers sought to embed certain principles in a structure that was highly resistant to haphazard change.

The legacy of their fortitude is both a blessing and a curse. The nation has survived for two hundred years with only one (unsuccessful) insurrection and no significant violent challenges to the political legitimacy of the institutions of government. Political traumas such as the Whiskey Rebellion in 1794, the nullification crisis in South Carolina in the 1830’s, the Civil War and Reconstruction, the anti-war and race riots of the 1960’s, and Watergate, have demonstrated the durability of the system as well as its flaws. But the costs of constitutional paralysis are exemplified by the failure of the Equal Rights Amendment, which would merely have ensured, in general terms, a liberty that few principled people could conceivably disagree with. Its failure is more a testimony to the difficulty of approaching constitutional reform than to the unpopularity of the notion of equal protection for women. And such a basic freedom as the right to privacy, which most Americans undoubtedly would accept in some form or another, is forced to exist as a “penumbral” specter, created and protected through the agency of the courts, where it is subject to criticism from originalists and overzealous application by civil libertarian judges. Even the Bill of Rights itself was made to apply to the states only through its “incorporation” into the Fourteenth Amendment by the Supreme Court.

Thus, constitutional change has taken place almost exclusively in the courts. No other governmental branch has shown itself capa-

14. See PLUTARCH, SOLON ch. 25.
15. U.S. CONST. art. V. (The clauses of article I referred to in Article V provided, respectively, that Congress could not restrict the migration or importation of persons into the several states, and that no direct tax could be levied except in proportion to census results).
16. Max Lerner wrote: “Like every people, the American people have wanted some anchorage, some link with the invariant.” Lerner, Constitution and Court as Symbols, 46 YALE L.J. 1290, 1294 (1937).
17. The Court has itself declared fundamental other rights which do not appear in the Constitution, such as the right to education and the right to personal autonomy. See J. ELY, DEMOCRACY AND DISTRUST 59 (1980).
ble of sustaining a challenge to the legitimacy of the Court or of providing widely acceptable alternate means of revising the Constitution. To understand why this situation has developed, we need to explore the psychological roots of constitutional decisionmaking.

II. CONSTITUTIONALISM AND THE MYTH OF THE CREATIVE ERA

Mircea Eliade has theorized that myths represent an attempt to revive a “creative era” in which the world was given form and existence. They are attempts to reestablish that creativity in the present day. He writes: “Since the sacred and strong time is the time of origins, the stupendous instant in which a reality was created, was for the first time fully manifested, man will seek periodically to return to that original time.”18 In the process of recalling the myths, man mimics and revivifies the deeds of the ancestors.19 Thus, in primitive cultures, religious rituals are an effort to reactualize the creative era in the present time.20

Two centuries of American constitutionalism have been a frustrated effort to reactualize our own creative era, to apply the selflessness and vision we attribute to the founders to the new conditions and sensibilities of the modern world. But the key to this reinvocation is affirmation, not change. Thus, the very existence of the myth depends on the belief that the Court is merely repeating a pattern or replaying a theme—admittedly with room for interpretation but with no room for deviation. Eliade notes that such myths allay man’s fears by assuring him “that what he is about to do has already been done.”21

The mythology of foundation, of conception, animates our reverence for the works of the Framers. Surely, we think, the men who established America were not ordinary men.22 This glorification of the founders through the haze of history is no mere fortuity, but a natural characteristic of mythogenesis. The embellishment of historical reality is one of the most common of human psychological phenomena. Individuals exaggerate; cultures mythologize. Eliade speaks of “[t]he anhistorical character of popular memory, the inability of

19. Id. at 13.
21. M. ELIADE, supra note 18, at 141.
22. The view of one commentator is typical: “Whatever the cause, it seems clear that the present age is not productive of a political leadership comparable with the past . . . .” J. BECK, THE CONSTITUTION OF THE UNITED STATES 277 (1924).
collective memory to retain historical events and individuals except insofar as it transforms them into archetypes." This trait is compounded by the common human tendency to associate creation with magical powers. "The idea that perfection was at the beginning appears to be quite old," writes Eliade. "In any case it is extremely widespread." Creation is perfection; with the passage of time comes only corruption. Thus we now see the Framers as having lived in a magical time of origins; indeed their very acts established this creative time. "The idea implicit in this belief," writes Eliade, "is that it is the first manifestation of a thing that is significant and valid, and not its successive epiphanies."

The myth of conception has power in modern political discourse just as it had in primitive societies. Thus, the future is seen as the gradual unfolding of the primordial adumbration. The historian Wilson McWilliams put it well: "In a vital sense, human time is changeless, and the American past and the American future are not separable." De Toqueville wrote that the "whole destiny of America is contained in the first Puritan who landed on these shores, as that of the whole human race in the first man." Beginnings possess a symbolic fullness, replete with a "multiplicity of meanings" of "indeterminate and indeterminable character." They are both perfection and enigma.

The power of mythology, of the unexplored psyche, is easily dismissed by the post-Freudian rationalist, the unwavering advocate of "the science of law." But law is rightly said to be not a science but an art, predicated on a faith in things that can neither be proved nor tested. This highlights the importance of myth. Where belief systems are subjective, myth expresses what cannot rationally be known. "Myth is thus a vital ingredient of human civilization," says Eliade, "It is not an idle tale, but a hard-worked active force; it is not an intellectual explanation or an artistic imagery, but a pragmatic charter of primitive faith and moral wisdom." Felix Frankfurter, too, observed: "We live by symbols."

For constitutional change to occur, the agency of change must be able to root itself in the unchangeable, and to perform the ritual

24. M. ELIADE, supra note 18, at 51.
25. M. ELIADE, supra note 18 at 34 (emphasis deleted).
of self-authentication by reproducing the political cosmogony in the present. In uniting the contemporary with the panhistorical, unalterable origin, the artificer can draw upon the pleromatic clay of creation to fashion new forms out of that timeless and changeless substance. This change is no more than the internalization and transformation of the origin, or in Christological terms, a kind of immaculate conception where the new—which existed all along—is born of the old, without diminishing or challenging it. "And so we beat on," Fitzgerald wrote, "borne back ceaselessly into the past."

III. COURTS AS SHAMENS

For two centuries, constitutional change has occurred almost exclusively in the courts. That is an unremarkable observation—what is interesting is why the fount of regeneration has been confined to a single place. Only rarely since the principle of judicial review was announced in *Marbury v. Madison* have the other branches questioned the Court's claim to be the sole interpreter of the constitutional oracle. It is only to the Supreme Court that we have entrusted "the evolving standards of decency that mark the progress of a maturing society." This trust may be attributable to the power of the Court to control the ritual of the theophany, of the manifestation of the political deities. It is not surprising that the Justices, but not the Congress, speak constantly of the intention of the Framers; they are the Pythia, the voice of the creators.

The ability to divine the purposes of nature or the gods has always conferred a measure of political power. The Delphic priestesses could cause the postponement of a battle or military expedition by deeming the oracles unpropitious. Roman priestesses held similar power. In the third and fourth centuries B.C., the college of the priests regularly advised the Roman magistracy on matters of ritual, law, and judicial procedure. The papacy later exerted considerable political influence, not only within Italy but throughout Europe, as well as reigning over a sizeable earthly domain for over a thousand years.

30. 5 U.S. (1 Cranch) 87, 137 (1803).
31. One of the clearest examples of a challenge to the finality of a Supreme Court ruling is Lincoln's opposition to the Dred Scott decision. See A. BICKEL, supra note 1, at 259-61.
33. See, e.g., HERODOTUS, HISTORIES bk. VI, ch. 115 (1987); id. bk. V. chs. 90-91; id. bk. VII, chs. 140-43, 149; Suetonius, The Twelve Caesars, Julius Caesar ch. 59, Augustus chs. 91-92 (1930); H. SCULLARD, FROM THE GRACCHI TO NERO 7 (3d ed. 1970).
Today, in our agnostic polity, the Supreme Court fills the role of spiritual leader. “It is,” writes Sanford Levinson, “the institutional church that incarnates the sacred document.”

Levinson notes that “[t]he possibility of radical indeterminacy in regard to God’s law or to the Constitution is one of the sources . . . of a search for some visible institution which will provide firm answers to those questions that might otherwise tear us apart.”

The Supreme Court has occasionally recognized that the opinions of the Framers cannot be a prescription for all time—“a political straight-jacket for the generations to come”—but they have recognized this not so much to debunk the myth as to perpetuate the judicial role as sole interpreters of the constitutional scheme. In *McCulloch v. Maryland,* when many of the men who wrote the Constitution were still alive and the myth of their infallibility was still in its infancy, the Court noted that the Constitution was “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” More than a century later, the Court found cause to repeat these words. In *Missouri v. Holland,* the Court referred again to the mutability of the constitutional design, this time in order to uphold a treaty and a related statute against Tenth Amendment challenge. Justice Holmes wrote for the Court:

> [W]e must realize that [the Framers] . . . have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Similarly, the Court has stated that the cruel and unusual punishment clause “is not fastened to the obsolete but may acquire meaning

---

39. *Id.* at 407.
41. 252 U.S. 416 (1920).
42. *Id.* at 433.
as public opinion becomes enlightened by a humane justice." Concurring in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Frankfurter made perhaps the boldest (and most poetic) statement of this principle: "It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."

The shift from a vision of individual rights as paramount and inviolable, toward a more collective view of society, has made many of the beliefs of the Framers seem somewhat antiquarian, although certainly not obsolete. In *Home Building & Loan Association v. Blaisdell*, the issue facing the Court involved the construction of the contract clause. The Court wrote:

> It is manifest from . . . our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the inter-relation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the state are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends."

In an uncharacteristic departure from Framer-worship, the Court continued:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitu-

43. *Weems v. United States*, 217 U.S. 349, 378 (1910). In the same case the Court noted that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Id.* at 373.

44. 343 U.S. 579, 610 (1952). Frankfurter had foreshadowed this theme in his majority opinion in *Rochin v. California* earlier that year: "[T]he gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application." 342 U.S. 165, 170 (1952).

tion meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the Framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.\footnote{Id. at 442-43.}

In order to justify its pretensions to be no less than the voice of the Constitution, while at the same time giving itself room for expansive interpretations of the original intent, it is necessary for the Court to proclaim the Constitution ambiguous (or incomplete), while simultaneously maintaining that it is the only governmental branch that is fit to decide where the constitutional scheme needs elaboration, and what elaboration is proper. While the Court is rarely explicit about its monopoly on the power to divine when the words of the Framers are inapplicable to modern situations, this conceit underlies many of its opinions. Justice Brennan's concurrence in \textit{School District of Abington Township v. Schempp} provides a masterful example of the Court's ability to impose its own values while purporting to be faithful to the "true" values and aims of the Framers:

\[\text{[A]n awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems. . . . A more fruitful inquiry, it seems to me, is whether the practices here challenged threaten those consequences which the Framers deeply feared. . . . Our task is to translate 'the majestic generalities of the Bill of Rights, conceived as part of the liberal government in the eighteenth century, into concrete restraints on officials dealing with the twentieth century . . . }\footnote{374 U.S. 203, 234-37 (1963) (Brennan, J., concurring) (quoting West Virginia State Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943)).}

The American populace has, by and large, been willing to assent to the Court's role as keeper of the constitutional flame. This deference to judicial wisdom occasionally borders on the extreme. In a book written in the 1920s, the then Solicitor General of the United States contended that,

the Supreme Court is not only a court of justice, but in a qualified sense a continuous constitutional convention. It continues the work of the Convention of 1787 by adapting through interpretation the greater charter of government, and thus its duties become political, in the highest sense of that word, as well as
It is necessary to examine the forces that have produced such extreme imagery and have conferred upon the Court its cabalistic power.

A. Above the Fray

Much of the perceived legitimacy of the judicial monopoly on constitutional decisionmaking derives from the Court's image as an apolitical body. Unlike the chief executive or members of the legislature, federal judges do not face re-election and the concomitant pressures of the political process. Life tenure is, as it was intended to be, a critical means of separating the judiciary from the worst forms of partisan influences. And in the public eye, at least for the most part, judges have been viewed as statesmen rather than politicians. This view is, happily, matched by the general self-perception of judges. An incident from the last century illustrates this self-image well. A bitter partisan dispute questioned the results of the 1876 Presidential election between Democratic candidate Samuel Tilden and Republican candidate Rutherford Hayes. A special electoral commission was established to resolve the dispute. Everyone on the Commission—senators and congressmen and Supreme Court Justices—voted along party lines. But Justice Bradley, a Republican appointee who cast his ballot for the Republican Hayes, drew upon all the nobility of his lofty office to declare:

So far as I am capable of judging my own motives, I did not allow political, that is, party, considerations to have any weight whatever in forming my conclusion. I know that it is difficult for men of the world to believe this, but I know it, and that is enough for me.49

No elected politician with party ties could credibly make such a statement. That a Justice of the Supreme Court could reflects our national view of the judiciary as existing above the realm of politics.

This distancing of the courts from the political process is manifested in many forms. The policy that the federal courts may not give advisory opinions is one example. Professors Hart and Wechsler noted that this limitation serves the interest of "having courts func-

48. J. Beck, supra note 22, at 221.
49. Quoted in A. Bickel, supra note 1, at 185. For a more detailed discussion of the Byzantine political maneuverings surrounding the controversy, see H. Barnard, Rutherford B. Hayes and His America 329-96 (1954).
ation as organs of the sober second thought of the community appraising action already taken, rather than as advisers at the front line of governmental action . . . .” 50 The "political question" doctrine is another means by which the courts are distanced from politics. That doctrine states in part that where judicial standards are inappropriate for resolving a question, the courts must leave its resolution to the other branches of government. 51 In Colegrove v. Green, a case involving congressional districting in Illinois, the Court stated: "[T]his controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally remained aloof." 52 It is perhaps significant that the collapse of the Roman republic was preceded by the increasing politicization of the law courts. 53

Whatever the reality of the judicial posture, the judiciary is perceived as the impartial, apolitical branch. Max Lerner commented on the myth of judicial neutrality in 1937:

We have somehow managed in our minds to place judges above the battle. Despite every proof to the contrary, we have persisted in attributing to them the objectivity and infallibility that are ultimately attributes only of godhead. The tradition persists that they belong to no economic group or class; that they are not touched by economic interests; that their decisions proceed through some inspired way of arriving at the truth; that they sit in their robes like the haughty gods of Lucretius, high above the plains on which human beings swarm, unaffected by the preferences and prejudices that move common men. 54

The aura of unimpassioned reason legitimizes the Supreme Court's antimajoritarian nature. Questionable though it is, it often serves as the basis for blind faith in judicial impartiality. Calvin Coolidge's Solicitor General, James Beck, wrote that "[t]he Supreme Court . . . compels the living generation, too often swept by selfish interests and frenzied passions, to respect the immutable principles of liberty and justice. The Court is thus the trustee for the unborn, for it protects their heritage from spoliation in the mad excesses of party

52. 328 U.S. 549, 553 (1946).
54. Lerner, supra note 16, at 1131.
strife . . . ." This legitimacy is further enhanced by the Court's seeming reluctance to decide constitutional issues.56

In contrast to the spiritual purity of the courts, the other branches of government are tainted by their connection to the political world. The President would seem to be particularly well placed to manipulate symbolism. Being one person, he can speak with greater force than a divided Congress or a divided Court. In our modern television age, he is the focal point of media attention, if not the chieftain of the global village itself. And he presides over a bureaucracy that has grown enormously in size and power since George Washington took the oath of office in 1789.

The reason the President cannot control the mythic symbolism of the Constitution is the same as the reason that the crowned heads of Europe could never assert religious, as well as political, hegemony. It is a very simple reason: The President cannot live in the profane world of politics and still have power in the sacred world inhabited by the creative force. Sullied by the battles and compromises of the electoral process, he cannot reach the transcendent grail. He must rule over the world of men, not the spiritual world of the Constitution.

The legislature is even less able to command the mythic symbolism. The deliberations of the Roman senate were characterized by the political struggles of rival factions.67 Today, the veneer of parliamentary procedure cannot mask a deliberative process that is fundamentally comprised of competing interest groups. The legislative process is an unalterably competitive one, with the medium of exchange being political favors, not exegetical truth, and the argot of discourse cost-benefit, not rights and liberties.

The image of judicial purity and legislative worldliness can, of course, be overdrawn. There is legislation aimed at preserving rights, and Supreme Court justices—as far as we know—are not above horse-trading.68 But the quiddity of electoral politics is entirely different than that of the judiciary. The legislature deals with entitlements and obligations that are contingent, variable. The Court searches for rights that are permanent, inherent in the very nature of the American polity. There is little stigma in repealing a law; but the overturning of a judicial precedent is a momentous event.

57. H. Scullard, supra note 33, at 7.
If politics is the art of the possible, constitutional interpretation is the art of the necessary. Congress, an institution whose god is change and whose religion is policy, cannot command the mythic symbolism of an institution dedicated to preservation of tradition. Original creation is looked upon with reverence, while current efforts at change, divorced from the immutable and enduring first principles, are seen as self-interested and often gratuitous. A changeable present has none of the appeal of a paradisal past, and it is the institution that incarnates the heroic age in the present age of strife and corruption that will be sanctified as the agency that can divine the meaning of the sacred plan.

The paradox is that the Framers themselves were politicians motivated by powerful interests. We must not too quickly label them “statesmen,” lest we forget the bitter division between the small and large states, between the commercial North and the agrarian South. Recognizing the partisanship of the Convention of 1787, we might think that the legislature better recreates the strong and heroic age, when battles were fought and won for the sake of clearly defined geographical consistencies. But legislatures do not perform the ritualized return to origin, the reiterative function that gives power to the myth of original perfection. Lacking the distance from political (unheroic) conflict, the ability to perform the mystical ceremony, and the capacity for ritual regeneration of sacred time, the legislature is mired in the mundane, institutionally incapable of conjuring the symbolism that is a prerequisite of touching, and changing, the Constitution.

Professor Bickel attributed the Court’s legitimating function and power to control symbolism to its continuity. Unlike other governmental institutions, its renewal is gradual, not sudden. The executive, by virtue of its singularity, is altered precipitously. The Court, and the lower courts, metamorphose only over long periods of time. Professor Bickel seems to say that what gives the Court its aura of legitimacy is a two-fold continuity: its continuity of membership and its continuity of doctrine. But there is a deeper, subliminal attraction of judicial myth-making, which is explored in the next section.

B. The Ritual of the Courts

The sessions of both the Supreme Court and the two houses of the legislature begin with prayer. But after that elevated moment of

59. A. Bickel, supra note 1, at 31.
60. Renewal is, of course, less abrupt in the administrative arm of government.
solemnity, the legislature returns to its partisan free-for-all, marked by logrolling, politicking, filibustering, and the like. Despite the superficial formality of procedure that marks the typical legislative session, and the occasional presence of noble sentiments that transcend parochialism and party politics, the grit of its existence is the machinations of interest groups.

The Supreme Court, in contrast, is our constitutional priesthood. The Court reads the sacred writings of the ancestors, often with a Talmudic attention to intricacy. Even the raiment of the Justices resemble the robes of the ancient priests. Like the mystery cults that proliferated around the Mediterranean in the centuries surrounding the beginning of the Christian era, the gatherings of the Justices are secretive events. Disclosure of their private deliberations is forbidden. And, perhaps, most importantly, the Court speaks the sacred language of the past, the language of precedent. These precedents can be traced back to the earliest days of the republic, back to the creative era itself. Legislatures, on the other hand, speak the profane language of policy and private interests, and their concern is with the problems of the present.

There is also a deeper, spiritual ritual, by which the Justices, seeking the "intent" of the Framers, symbolically transport themselves to the fabled time of the beginning, if they do not indeed transform themselves into the very persons of the Framers. This is commonplace in constitutional interpretation, and the Court has said: "It is never to be forgotten that, in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed the instrument."61 This ritual transformation allows the Justices to speak as if they were the Framers themselves—a glossalalia on which the mythic power of judicial constitutionalism rests.

C. The Court's Regenerative Function

Whereas the goal of the legislature is change, the duty of the courts is reaffirmation. Their duty is not to generate new wisdom, new truths, but to interpret the old. They recreate a reality through repetition, rather than creating one of their own.62 Paradoxically, it is this limitation that gives the Court its power, for it allows the

61. Ex parte Bain, 121 U.S. 1, 12 (1887).
62. See M. Eliade, supra note 23, at 34. The Court's behavior recalls a line from the Hindu Satapatha Brahmana: "We must do what the gods did in the beginning." VII, 2, 1, 4 (quoted in M. Eliade, supra note 23, at 21).
Court to claim the mantle of the Framers. By reproducing the original reality, it becomes the keeper of the sacred power, which in turn bestows upon the Court its intrinsic permanence and potency.\textsuperscript{63} Thus, judicially-instigated change must always appear to be based on historical precedent, such that it is not really change but development.\textsuperscript{64} Alexander Bickel has written that "history is a recurrent major theme in the Supreme Court, as it necessarily must be in an institution charged with the evolution and application of society’s fundamental principles."\textsuperscript{65}

This reaffirmation performs a further symbolic function, assuring Americans of the rightness of their political quest. It represents the ritual sanctification of a constitutional faith that is as much allegory as it is political science. One recent writer has commented: "The citizens of a republic . . . require some means of consecrating their way of life—a set of metaphysically (as well as naturally) self-evident truths; a moral framework within which a certain complex of attitudes, assumptions, and beliefs can be taken for granted as being right."\textsuperscript{66} At a psychological level, the ritual of reaffirmation links moderns with the heroic, creative past. It relieves the terror of the new, replacing it with the safety of predestination. And it assures those who live in an unheroic age that they are nevertheless repeating the patterns set down by the archetypal forerunners.\textsuperscript{67}

The practical importance of continuity should not, however, be understated. Where laws are constantly in flux there is likely to be little individual security or political stability. This is nowhere more true than with constitutions. Evanescent rights are nonexistent rights. Cleon warned the Athenians that "a city is better off with bad laws, so long as they remain fixed, than with good laws that are constantly being altered."\textsuperscript{68} Repeated affirmation of the constit-

\begin{footnotes}
\item[63] See M. Eliade, supra note 18, at 12.
\item[64] "[T]he constraints of precedent have been and perhaps should be reserved not for our institutions of progress, but for our institutions of restraint." Schauer, Precedent, 39 Stan. L. Rev. 571, 605 (1987).
\item[65] A. Bickel, supra note 1, at 109.
\item[66] Bercovitch, The Rites of Assent: Rhetoric, Ritual, and the Ideology of American Consensus, in The American Self 15 (1981). One writer has stated: "A true constitution has sound claims to obedience and even veneration: It is the command of the people, an original compact expressing their inalienable sovereignty; . . . and an earthly expression of the eternal principles of the law of nature." C. Rossiter, The Political Thought of the American Revolution 225-26 (1953). Similarly, Bickel wrote that "the Constitution and Court have evolved into potent symbols of continuity and unity." A. Bickel, supra note 1, at 94.
\item[67] See E. Neumann, supra note 27, at 131.
\item[68] Thucydides, History of the Peloponnesian War 213 (1954).
\end{footnotes}
tional prescription and a reluctance to change unnecessarily serves to preserve the stable bedrock on which a society must be built. The Roman state endured for as long as it did partly because the Romans created a mythology about themselves that was based on respect for tradition and obedience to authority, whereby "change could only mean increase and enlargement of the old."^{69}

D. The Dependency of the Courts

Despite its monopolistic control over the wisdom of the Framers, the judiciary remains in many senses the weakest branch. A lesson well known by the pontifex maximus in republican Rome and the papacy in the fourteenth century is that moral authority does not always make for political power. It is, however, this political weakness that enhances the Court's moral authority. The judiciary, cut off from access to the treasury and the armed forces, poses little threat of overpowering the other two branches. In recognizing this inherent debility, Hamilton wrote in Federalist 78 that the "judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution" because it "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever." Possessing neither force nor will, Hamilton wrote, it retains only judgment. Federalist 81 attempted to dismiss any fears that judicial power would threaten the legislative function:

> Particular misconstructions and contraventions of the will of the Legislature, may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power . . .

Madison shared this conviction that the judiciary was the weakest branch and feared "a dangerous union of the Legislative & Executive departments,"^{70} warning that,

> Experience has proved a tendency in our governments to throw all power into the legislative vortex. The Executives of the states are in general little more than Cyphers; the legislatures omnipotent. If no effectual check be devised for restraining the instability and encroachments of the latter, a revolution of some

^{69} H. ARENDT, ON REVOLUTION 201 (1963).
^{70} J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 312 (1966).
Undoubtedly, the power of the Court has expanded dramatically since the eighteenth century, and decisions concerning abortion and busing, to cite two prominent examples, have illustrated that the line between adjudication and legislation is blurred, that the Court has invaded the policy-making realm of government. But it is too facile to say glibly that the Framers could not have foreseen this growth of power, that it renders their complacency misguided. All three branches of the federal government have expanded tremendously, and it is not clear that the Court has much power to make policy or set the national agenda. The judiciary in general, and the Supreme Court specifically, remain limited by the appointment power of the President, and Congress' power to impeach and remove judges, create new tribunals and limit the jurisdiction of existing courts. The use of other restraints, such as the ability to change the size of the Court or extend its adjournment, remains possible, if unlikely. These powers, combined with the judicial awareness that its force derives from acceptance, keep the courts in check, and not the slender reed called "judicial restraint." And thus the Court remains spiritually potent, but unable to exert focused political power, much like the modern pope.

IV. HAZARDOUS RETURNS

A. Constitutional Convention

Article V of the Constitution provides for amendment by the people of the states. It might seem that the most powerful re-enactment of the creation myth would be another constitutional convention, imitating the Framers not symbolically, but actually. Constitutional renewal would be the door to the strong, creative time, the ultimate manifestation of power and self-governance.

Indeed, the Framers demonstrated by the inclusion of Article V that they intended the Constitution to be a dynamic, living instrument. George Washington, in his farewell address, spoke for the generation that had invented a new nation when he said "[t]he basis of our political system is the right of the people to make and alter their Constitutions of government." Thomas Jefferson supported popular amendment to the Constitution in preference to Delphic pronouncements by the judiciary as to the document’s meaning. In a
letter to a friend criticizing *Marbury v. Madison*, he wrote: "The ultimate arbiter is the people of the union, assembled by their deputies in convention at the call of Congress or of two thirds of the States." He also implored that we should not "weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs." More recently, Raoul Berger has written that "[t]he only ... constitutional grant [of the power to adapt to change] is that of Article V, which confers power on the people, not on the Court." I do not propose to address the arguments for and against a constitutional convention, or the fears that it might go terribly awry. These are amply discussed elsewhere. Rather, I will attempt here to examine why we have never had another constitutional convention. In doing so, I return to my theme, that constitutional change is possible only where the agency of change can command the mythic symbolism of the creative era.

By now, the act of our constitutional foundation has become a virtually mythical event. Although a detailed documentary record survives, the popular view is disconnected from this historical basis, and reflects an attitude of reverence and awe. There are few today who think our current leaders as wise and selfless as the Framers. Thus, to call another convention would seem an act of political blasphemy and indictment of the plan on which the nation was built. In mythic terms, the present is never as sacred as the past, and a time of "new beginnings" that seeks to reshape the inheritance of the past can never be as magical as the time of the first creation. "The paramount time of origins," Eliade says, "is the time of the cosmogony,

---

73. *Id.* at 124 (letter to Samuel Kercheval).
74. R. Berger, *Death Penalties* 60 (1982).
76. Recent challenges to the completeness of this documentary record can only serve to further shroud the creative time in the haze of mythic prehistory. For a discussion of the defectiveness of the record of the Constitutional Convention, see Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 Tex. L. Rev. 1 (1986).
the instant that saw the appearance of the most immense of realities."\(^{77}\) Perfection lies always at the beginning, not in transmutative acts of later generations.

Further, Americans do not see themselves, or their representatives, as fit to commune with the godhead itself. The advantage of the Supreme Court as the agency of constitutional change is that it serves as a kind of priesthood, trained in the arcane meaning of the text, skilled in exegesis, and steeped in ritual. Institutionally, it has been performing the rite of recreation for nearly two centuries. A constitutional convention, unprecedented in the two hundred years since the charter was first written, would represent not an extension of the past but a radical discontinuity. In a country where political tradition is accorded enormous respect, this is all but unacceptable.

B. *Populism and its Dangers*

Jefferson thought the creative spirit could be sustained by a kind of grass-roots democracy based on small political units. In a letter to Samuel Kercheval in 1816 he wrote:

> The article, however, nearest my heart is the division of counties into wards. These will be pure and elementary republics, the sum of all which taken together compose the State, and will make of the whole a true democracy as to the business of the wards, which is that of nearest and daily concern. The affairs of the larger sections: of counties, of States and of the Union... will be delegated to agents elected by [the people]... and representation will thus be substituted where personal action becomes impracticable.\(^{78}\)

One manifestation of the commitment to popular sovereignty is the frequent appearance in state constitutions of provisions guaranteeing the right of revolution or the right to change or abolish the existing form of government. Nearly four-fifths of American states now have, or at one time had, such a provision.\(^{79}\) Justice Douglas

---


78. *The Political Writings of Thomas Jefferson*, 148, at 97 (E. Dumbauld ed. 1955). That same year Jefferson had written in another letter: "As Cato concluded every speech with the words, 'Carthago delenda est,' so do I every opinion with the injunction, 'divide the counties into wards.'" *Id.* at 99-100 (letter to Joseph Cabell). Jefferson's commitment to this ideal was not merely rhetorical. He unsuccessfully proposed to the first Congress that each county be divided into wards of five to six square miles. *See id.* at 101 (letter to John Cartwright).

called the exercise of revolution a "great sovereign right," and Lincoln pronounced it "a most sacred right—which we hope and believe, is to liberate the world." Jefferson insisted that "the tree of liberty must be refreshed, from time to time, with the blood of patriots and tyrants."

More recently, Benjamin Barber has raised the cry for a participatory, "strong" democracy, characterized by "unmediated self-government by an engaged citizenry." Barber argues that our present representative democracy, combined with a liberal conception of absolute individual rights and a Cartesian psychological frame that emphasizes separateness, produces a social alienation that is inimical to popular sovereignty and consensual decisionmaking. He offers a vision of muscular, creative democracy, facilitated by such modern miracles as "television town meetings" and a "civic videotex service." But one must wonder if Barber's utopia is not simply a brave new world of technologized, pixilated politics—a high-tech democracy that "empowers" the citizenry by imposing a collectivist ethic that amplifies the power of the vocal and influential. Barber's ideal state is certainly majority-protective, but at the expense of minorities and the socially disenfranchised. His California democracy of "fraternal feelings" and "species identity" seeks not merely to encourage altruism but to program it into the polity. It is at bottom a chimerical vision, for human nature is not determined by the structures of government, but the structures of government by human nature. Barber's nostalgic vision of Periclean elitism and eighteenth century xenophobia overlooks not merely the physical and demographic differences of our present society but the legal and political changes that have enfranchised the weak and disadvantaged, whose rights are better protected by the courts than by the mob of a modern-day agora.

The Founders were, by and large, fearful of unrestrained democracy, and they wrote a constitution to ensure that the government would be, in Bracton's phrase, not under a man, but under god and law. In Federalist 10, Madison warned of the dangers of faction, which he said were unconstrained in a pure democracy but held in
check in a republican democracy. And at the end of a century of
government by law, the Supreme Court said: "[W]hile the people are...
the source of political power, their governments, national and
State, have been limited by written constitutions, and they have
themselves thereby set bounds to their own power, as against the
sudden impulses of mere majorities."88 Hannah Arendt contends that
the Framers' suspicion of democracy stemmed from their belief in
"the radical separation of law and power," which means that not all
that is possible is legitimate.88

History, too, cautions us that to entrust the ship of state to as
fickle a captain as the popular whim is to endanger its journey. It
was the hubris of the Athenian demos, kindled by the demagogue
Alcibiades, that launched the Sicilian expedition in 415 B.C., the
tragic defeat of which ultimately destroyed the Athenian state. "The
result of this excessive enthusiasm of the majority," Thucydides
wrote, "was that the few who actually were opposed to the expedi-
tion were afraid of being thought unpatriotic if they voted against it,
and therefore kept quiet."87

The fundamental weakness of majoritarianism is that it is not a
political system at all. It is the absence of politics, for it holds that all
decisions, all rights, are perpetually up for grabs, that existing struc-
tures can be toppled whenever a majority, no matter how slight,
thinks it a good thing to do. In the extreme, liberties, freedoms, and
principles become ephemeral, dependent, anchorless. It becomes a
state without government—anarchy.

But in a more limited sense, popular participation remains the
essence of representative democracy. In such a system, it is the peo-
ple who are sovereign, and they must peer into the abyss with the
knowledge that they are no longer governed by an all-embracing di-
vine or natural law, but by themselves. They must seek to govern as
best they can, not with illusions but with stable structures and sober
principles. They must give themselves laws that represent the noblest
aspirations of the human spirit, live by them wherever possible, and
change them whenever necessary.

V. DEMYTHOLOGIZING CONSTITUTIONALISM

In our modern constitutional scheme, the courts alone are per-
mitted to recite the hieros logos—the sacred myth of the Framers.

86. H. ARENDT, supra note 69, at 166.
87. THUCYDIDES, supra note 68, at 425.
But this very power imposes a limitation: The Court is bound inextricably to the Constitution, imprisoned in a role that is interstitial rather than generative. Unlike Congress, the Executive, or the people themselves, the judicial dominion is not one of creation, only of interpretation. The Court lacks the Promethean vision of possibility, and can see only the past. Or, like the inhabitants of Laputa in Swift’s Gulliver’s Travels, the Court cannot see what lies in front of it, but rather has one eye turned upward, as if to ponder a higher purpose, and the other turned inward, as if to ascertain the inner meaning of the constitutional text.

The Court is imprisoned by the centripetal force of its interpretive, inward-looking role. Although it has occasionally resisted these forces and pushed its circle of influence perceptibly outward, it is not powerful enough to sustain an indefinite expansion of its domain. Just as the gravitational force of a planetary mass becomes weaker the farther away one travels, so does the power of the Court diminish as it attempts to take on roles that the Constitution never intended for it. The stasis of judicial constitutionalism is a product of the judiciary’s inherently limited role. Judges are not actors but interpreters. Possessed of “the passive virtues,” they share too the passive faults. Not leaders, they are condemned to be followers; at best their triumph is one of nullification, of refusal.

The reverence paid to the insight of the Framers is surely deserved. But no political ideas are timeless, no edifices flawless. What is needed is a new philosophy, one that recognizes that the Framers prescribed a fluid, dynamic theory of government, not an inflexible structure. Jefferson, as usual, put it best:

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country . . . . But I know that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of barbarous ancestors . . . . Let us follow no such example, nor weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its
own affairs. Let us . . . correct the crude essays of our first and inexperienced, although wise, virtuous, and well-meaning councils. 88

That is not a prescription for any particular method of reform. It is certainly not a cry for ochlocracy, for the heady but dangerous populism of the days that followed the French Revolution. We may well fear that popular constitution-making, if not conducted properly, may turn into a constitutional lynch-mob—open season on civil liberties.

This essay suggests a liberal justification for a traditionally conservative approach. Now that the judicial tide has turned, progressives can no longer expect the courts to set the course for social change. If liberals expect a continuation of what they cherish as social progress, they can no longer look to the courts as a dependable ally. The emergence of a powerful “originalist” judicial voice portends a more conservative constitutional interpretation and an unwillingness to read modern values into the eighteenth and nineteenth century texts. This reticence has stemmed from the Court’s desire, not easily condemned, “to assure itself and the public that announcing rights not readily identifiable in the Constitution’s text involves much more than the imposition of the Justices’ own choice of values on the States and the Federal Government.” 89

It has long been a conservative orthodoxy that the American constitutional scheme “was designed to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times.” 90 Recently, the Court has refused to take an “expansive view” of its “authority to discover new fundamental rights imbedded in the Due Process Clause,” noting: “The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” 91

Much of the challenge to the “liberal” Supreme Court jurisprudence of the Warren and early Burger years has focused on the expansive reading of the constitutional text. Critics have argued that the Court has gone beyond the document itself in its search for new rights never countenanced by the Framers. Many of the centerpieces of this liberal jurisprudence, the critics contend, are the result of ille-

88. The Political Writings of Thomas Jefferson, supra note 72, at 123-24 (letter to Samuel Kercheval).
gitimate departures from the original intent.

In Mapp v. Ohio, the Court dramatically altered the limits of constitutional protections by declaring that the Fourteenth Amendment "incorporated" the provisions of the Bill of Rights and made them applicable to the individual states as well as to the federal government. In Griswold v. Connecticut, the Court relied not on a specific constitutional provision but on its vision of a right to privacy created by the penumbras of various amendments in the Bill of Rights in order to invalidate Connecticut's statute prohibiting birth control. And Roe v. Wade, striking down state antiabortion laws according to a judicially determined formula of trimesters, has often been criticized as heralding a return to the hated substantive due process of the Lochner era. Each of these results could more effectively have been accomplished through constitutional amendment, had a favorable political majority existed. Whether or not these outcomes could have been reached through the process of constitutional amendment, it appears that in the intermediate future the judicial avenue of constitutional change will be considerably less accommodating.

VI. Conclusion

The purpose of this essay has been to expose the powerful forces that bewitch American constitutionalism, and to argue that logos is not telos, that our rights and liberties have not been established for all time—that they have only been conceived. To view freedoms as static is not to preserve them but to suffocate them. Even if we refuse to believe that there is a Hegelian dialectic toward greater freedom—a spirit immanent in history that will progressively free us from our chains—it seems clear that there are many social practices that were accepted in the days of the founding fathers that are no longer tolerable today. To deny the possibility of an evolving vision is to stultify moral evolution and ossify an eighteenth century worldview.

93. 381 U.S. 479 (1965).
94. 410 U.S. 113 (1973). So much ink has been spilled over these decisions, particularly Roe v. Wade, that it would be frivolous, if not presumptuous, to discuss them here at greater length. For some particularly skillful discussions of Roe v. Wade and judicial activism, see Epstein, Substantive Due Process by Any Other Name: The Abortion Cases, 1973 Sup. CT. REV. 159; Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L. J. 920 (1973).
95. See Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703 (1975).
Constitutional change should not be made to wait for the terrible swift sword of civil war, such as that which gave us the Fourteenth Amendment. Nor should the rights of oppressed minorities depend on nineteenth century interpretations of equal protection. If our nation is, in Martin Luther King's words, to "live out the true meaning of its creed: . . . 'that all men are created equal,'" we must banish the ghosts of the past and accept our legacy as guardians and cultivators of the rights our forebearers had the penetrating insight only dimly to perceive.