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Edward J. Melvin, C.M.

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JUDICIAL
ACTIVISM—THE
VIOLATION OF AN
OATH

EDWARD J. MELVIN, C.M.*

The Declaration of Independence proclaimed the rights to life, liberty and the pursuit of happiness as inalienable, having their source in the Creator.¹ This proclamation was a reflection of the natural law concepts prevalent throughout early American Society.² It was within this

¹ The Declaration of Independence, considered the cornerstone of American political ideals, states:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.


The phrase “life, liberty and the pursuit of happiness” was adopted directly from the natural law concepts of John Locke. Desmond, supra, at 236. Early state constitutions were aimed at ensuring protection of the newly claimed natural right to pursue individual happiness. See, e.g., Virginia Bill of Rights § 1, reprinted in 1 DOCUMENTS OF AMERICAN HISTORY 103 (H. Commager ed. 1968); see also Kenyon, Constitutionalism in Revolutionary America, in CONSTITUTIONALISM: NOMOS XX 87, 97 (1979).

² C. ANTEAU, CONSTITUTIONAL CONSTRUCTION 153 (1982); L. BETH, POLITICS, THE CONSTITUTION, AND THE SUPREME COURT 9 (1962); M. COHEN, REASON & LAW 11 (1972); Corwin, The “Higher Law” Background of American Constitutional Law, 42 Harv. L. Rev. 149 (1928). Natural law may be defined as “a mandatory rule of action, established and promulgated by the Author of Nature, known to man by reason, and imposed upon man by his nature.” McAniff, The Natural Law—Its Nature, Scope and Sanction, 22 Fordham L. Rev. 246, 247 (1953). The Constitution was “an embodiment of the principles of that higher law which was to be presumed to be a standard by which human law could be judged.” L. BETH, supra, at 9. The terms “justice” and “liberty” included in the Preamble to the United States Constitution were reflective of the natural law concepts held by the drafters. Desmond, supra note 1, at 236. Indeed, the most “striking applications of natural law” are found in the first eight amendments to the Constitution. Id.; see Brown v. Walker, 161 U.S. 591, 600 (1896); Pound, Liberty of Contract, 18 Yale L.J. 454, 467 (1909).
philosophical environment that the Founding Fathers undertook to provide the framework for a national government premised upon a doctrine of separation of powers and a system of checks and balances. The Constitution, by detailing how the “great rights of mankind” were to be protected and promoted became, in essence, the legal implementation of a natural law philosophy.

Some of our greatest leaders have recognized that the taking of an oath—an appeal to God to witness the truth of one's statement or the firmness of one's intentions—provides an effective aid in the safeguarding of American values. It is this author’s contention that when a judge takes his oath to uphold the Constitution he promises to carry out the intention of its framers. Since the Constitution provides for a formal amendment

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8 D. Hutchison, The Foundations of the Constitution 6-7 (1975). The Constitution has been described as

[a] framework of government by which alienable rights are surrendered to ruling bodies for orderly conduct of society, and . . . a bill of rights which sets forth and guarantees protection of the inalienable rights, and forbids any infringement thereof by government. No amount of specious argumentation can disprove that such is and was the true intent of our United States Constitution.

Desmond, supra note 1, at 240.

* In the minds of the Founding Fathers, the “great rights of mankind” included the inalienable rights to life, liberty and the pursuit of happiness. The amendments detailed the specific means by which these rights would be protected. Desmond, supra note 1, at 240; see Brogan, The Natural Law: Its Contribution to our Democracy, 22 N.Y. St. B. A. Bull. 220, 223 (1950).

* See C. Antieau, supra note 2, at 153. See generally Desmond, supra note 1, at 235-45. “In the Declaration of the founding fathers, implemented later by the Constitution and the Bill of Rights, was proclaimed a jurisprudence based on Natural Law. They sought that freedom and station to which the law of nature and of God entitled them.” Brogan, supra note 4, at 221.

* George Washington, in his Farewell Address, posed the following rhetorical question: “Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice?” Address by George Washington (Sept. 17, 1796), reprinted in 1 Documents of American History, supra note 1, at 173 (emphasis in original). Similarly, John Marshall, Chief Justice of the Supreme Court, in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), wrote:

[I]t is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

Id. at 179.

* See generally 1 W. Crosskey, Politics and the Constitution (1953); Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 949 (1973); Grey, Do We Have An Unwritten Constitution?, 27 Stan. L. Rev. 703, 703-04 (1975). In construing a written constitution, the object is to effectuate “the intent of the people in adopting it.” 1 T. Coo-
process, to the extent that it remains unamended, it must be interpreted in its original sense. That the original intention of the framers is highly authoritative on later judicial interpretations is evidenced by the words of James Madison himself:

"[If] the sense in which the Constitution was accepted and ratified . . . , [b]e not the guide in expounding it, there can be no security for a consistent and stable [government]."

Nevertheless, in the latter half of the 19th century the Supreme
Court abandoned the philosophy which had given the Constitution its birth. The Court adopted a new theory, which, according to its advocates, represented a “new type” of natural law—Social Darwinism. Since this was not the law of nature accepted by the men who wrote the Constitution, the result was a distortion of the very rights which the Constitution was meant to protect. The Court had assumed the power to amend the Constitution, a task specifically delegated to the people or the legislative branches of federal and state governments in accordance with article 3 of the document. It is submitted that this judicial process of amendment, fostered by a spirit of activism, is not only a violation of the separation of powers doctrine, but also constitutes the violation of a judge’s oath to support the Constitution.

SOCIAL DARWINISM AND THE INFLUENCE OF LAISSEZ-FAIRE PHILOSOPHY ON THE JUDICIARY

In 1859, Charles Darwin published The Origin of Species which espoused the biological theory that all living things were developed from simpler organisms. Through a type of natural selection the “fittest” would survive and reproduce, while the weak would die. The result, Darwin theorized, would be a constant improvement in the quality of the

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11 See infra notes 24-28 and accompanying text.
12 See F. Cahill, JUDICIAL LEGISLATION 22-31 (1952); infra notes 16-23 and accompanying text.
13 See infra notes 29-33 and accompanying text.
14 Berger, Government by Judiciary: John Hart Ely’s “Invitation,” 54 IND. L.J. 277, 282 (1979) (“[t]he fact that the mode is cumbersome does not empower the judges to dispense with it and amend the Constitution themselves”); see Hawke v. Smith, 253 U.S. 221, 227 (1920) (“[i]t is not the function of the courts . . . to alter the method [for change] which the Constitution has fixed”); supra note 8. The originators of the Constitution were firmly opposed to the judiciary acting as a legislating body. G. Wood, supra note 8, at 298, 304. In fact, Hamilton expressed the view that the judiciary “is beyond comparison the weakest of the three departments of power.” The Federalist No. 78, at 504 (A. Hamilton) (R. Luce ed. 1976). He believed that the threat of impeachment would serve as a check against usurpation of the legislature’s authority, from which one commentator extrapolated, “[J]udicial trespass on the legislative domain—policy making—would be . . . impeachable.” Berger, supra, at 278.
15 See L. Lusky, BY WHAT RIGHT? 20 (1975). Lusky states:
One is tempted to conclude that the Justices have adopted a new conception of their role, of the meaning of their oath—prescribed by Article VI—“to support this Constitution.” In short, one is tempted to conclude that there is no longer any problem on which the Court will defer to another organ of government if five or more of the Justices are confident (a) that their own solution is better and (b) that they can, as a practical matter, impose their solution upon society.
Id.
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surviving species.17

Preceding Darwin, Herbert Spencer had popularized evolution as a universal law leading to progress. It was his application of evolution to society, though it antedated Darwin’s work, that came to be known as “Social Darwinism.”18 According to Spencer, progress in society emanated from the economic struggle among men.19 In the business setting, those who could dominate others by their competitive instinct were thought to be the fittest.20

17 Darwin’s theory was that the genetic constitution of populations changes by virtue of selection favoring some individuals more than others in their struggle for existence. He noted that each generation of an organism normally produces many more offspring than can possibly survive. He reasoned that some of these offspring would be better adapted than others. Those better able to withstand the hostile forces of the environment would be the ones with the best chance of survival and of passing on their traits to the next generation. This selection ultimately would lead to greater fitness and better adaptation to the environment.

18 R. Hofstadter, Social Darwinism in American Thought 5-7 (1959). Spencer undertook one of the most ambitious attempts to systematize the implications of evolution in fields other than biology. His theory “that a general law of evolution could be formulated” led to his application of evolutionary theory to society as a whole. Id. at 38. His “fundamental achievement [was] the fusion of laissez-faire as an economic and political doctrine with evolution as a biological and even sociological concept.” W. Marnell, Man-Made Morals 228 (1966). The “survival of the fittest” was a term Spencer coined in an 1852 article entitled “A Theory of Population, Deduced from the General Law of Animal Fertility.” R. Hofstadter, supra, at 38-39.

19 R. Hofstadter, supra note 18, at 39. Spencer was a champion of laissez-faire economics, the central theme of which proffered that man maximizes human happiness and that the state should not meddle in the natural law of political economy. In two famous articles which appeared in 1852, seven years before The Origin of Species was published, Spencer enunciated his view that the pressure of subsistence upon population must have beneficient effect upon the human race. This pressure had been the immediate cause of progress from the earliest human times. By placing a premium upon skill, intelligence, self control, and the power to adapt through technological innovation, it had stimulated human advancement and selected the best of each generation for survival. Id. He argued that it was best for society to let social progress run its own course, and that an immensity of harm inevitably would occur if policies of social reform were implemented in pursuit of erroneous conceptions. His conclusion was that society would recognize the general truths of biology and would refrain from violating the selection doctrine by employing artificial means of preservation of those least able to take care of themselves. Id. at 44.

20 Id. at 44-46. The theory was a perfect justification for many industrialists. John D. Rockefeller, speaking to a Sunday school audience, stated, “[T]he growth of a large business is merely a survival of the fittest. . . . This is not an evil tendency in business. It is merely a working out of a law of nature and a law of God.” Id. at 45 (footnote omitted). Similarly, James J. Hill, a railroad magnate, defended business consolidation by emphasizing that “the fortunes of railroad companies are determined by the law of the fittest.” Id. (footnote omitted). Another railroad executive, Chauncey Depew, asserted that the guests of the great public banquets of New York City represented the fittest of the thousands who had come in search of fortune and power; that it was their superior ability and adaptability that enabled
Promoted by Social Darwinism, laissez faire flowered into political theory and government policy. Legislation enacted to improve the working conditions of individuals was believed to impede natural progression. Led by Justice Stephen J. Field, the notion that the government should "keep its hands off" was the prevailing influence on the Supreme Court until challenged by Justices Holmes and Brandeis.

them to emerge successful from the fierce competition of the city. Id. at 44-45. Andrew Carnegie was another who took comfort in the natural truth of the law of competition. Id. at 45-46.

Id. at 5-7. Laissez faire derived support from the American belief in inevitable progress, which itself was sided by the rapid spread of the doctrine of evolution. E. CORWIN, TWILIGHT OF THE SUPREME COURT 205 n.53 (1970). At the turn of the century, Arthur Twining Hadley stated, "In modern politics we have seen that society is better governed by allowing individuals, as far as possible, to govern themselves. In modern economics we have seen that society is made richer by allowing individuals, as far as possible, freedom to get rich in their own way." A. HADLEY, ECONOMICS, AN ACCOUNT OF THE RELATIONS BETWEEN PRIVATE PROPERTY AND PUBLIC WELFARE 13-14 (1896).

The period that witnessed the popularization of Social Darwinism was one of rapid and striking economic change as well as conservative political mood. The principle served to defend the status quo, and provided conceptual fuel for the attacks against reformers. R. HOFSTADTER, supra note 18, at 7. Conservativism and Spencer’s philosophy stood side by side.

See E. CORWIN, supra note 21, at 79-80. In an early New York case, Judge O’Brien stated that “[a] law that restricts freedom of contract on the part of both the master and servant cannot in the end operate to the benefit of either.” People ex rel. Rodgers v. Coler, 166 N.Y. 1, 16 (1901). He also referred to an old political maxim, "that the government governs best which governs the least." Id. at 14. As the Supreme Court subsequently stated in Lochner v. New York, 198 U.S. 45 (1905), regulatory statutes with primarily economic overtones were considered "mere meddlesome interferences" with the right of individual employers and employees to freely contract for services. Id. at 61.

During the era following Lochner, there were many cases that served to invalidate legislative attempts to minimize the impact of the industrial revolution on workers. Dixon, The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon, 1976 B.Y.U. L. REV. 43, 70-73; see, e.g., New State Ice Co. v. Liebmann, 285 U.S. 262, 278-80 (1932) (invalidation of requirement that ice manufacturers obtain a certificate of convenience and necessity prior to entering into business); Adkins v. Children’s Hosp., 261 U.S. 525, 559 (1923) (District of Columbia minimum wage statute overturned as a “naked, arbitrary exercise” of legislative power without regard to contracts or nature of business); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (state prohibition of “yellow dog” contracts held to be unconstitutional infringement of freedom of contract); Adair v. United States, 208 U.S. 161, 180 (1908) (federal ban on “yellow dog” contracts for interstate railroad employees invalidated as unconstitutional interference with liberty to contract).

W. MARNELL, supra note 18, at 248-49. Marnell describes Field as “[t]he most dedicated Social Darwinian in Court history,” a Justice who "preached and practiced what one might term ‘legal Darwinism.’” Id. Although Justice Field began as a dissenter, see, e.g., Munn v. Illinois, 94 U.S. 113, 136 (1876) (Field, J., dissenting), his freedom of contract philosophy eventually gained a majority, see, e.g., Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897), and continued to influence the Court long after his death, see, e.g., supra note 22. This Supreme Court philosophy, however, faced the persistent dissent of Justices Holmes and Brandeis,
The instrument that the Court used in institutionalizing its new-found philosophy was the fourteenth amendment. In doing so, however, the Supreme Court misinterpreted the amendment's original meaning. The painstaking scholarship of Professor Raoul Berger indicates that the sole purpose of the fourteenth amendment was to constitutionalize the Civil Rights Act of 1866. When the Supreme Court, in *Lochner v. New York*, employed the term “liberty” in the fourteenth amendment to nullify a New York State law which had limited the weekly work hours in a bakery to 60, the Court, using the laissez-faire theory of social progress both of whom “thrust forward maxims of judicial self-restraint . . . .” E. Corwin, The Constitution and What It Means Today 176 (H. Chase & C. Ducat 1973) [hereinafter cited as Corwin’s Constitution]; see, e.g., *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting); *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 216 (1929) (Holmes, J., dissenting); *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83, 96 (1929) (Holmes, J., dissenting); Burns Baking Co. v. Bryan, 264 U.S. 504, 517 (1924) (Brandeis & Holmes, J.J., dissenting).

See J. Ely, Democracy and Distrust 14-15 (1980); J. Grossman & R. Wells, Constitutional Law and Judicial Policy Making 321 (1972). Justice Field, in espousing his philosophy, argued that the passage of the amendment made one a citizen of the United States. Therefore, since personal rights did not arise under the auspices of state authority, the state or local authority could not abridge those rights. W. Marnell, supra note 18, at 250. Between 1889 and 1918 there were 790 cases in which statutes were attacked under the due process and equal protection clauses of the fourteenth amendment. Fifty-three of these were ruled unconstitutional. Id. at 250-51 (citation omitted). “Thus the legal Darwinians found in the Fourteenth Amendment the instrument needed for their purpose.” Id. at 251.

According to Berger, the amendment was designed to embody and protect the Civil Rights Act so as to remove any doubt regarding its constitutionality, and to place it beyond the authority of a later Congress to repeal. Id. Howard Jay Graham, an ardent advocate of an abolitionist reading of the fourteenth amendment, stated that “virtually every speaker in the debates on the Fourteenth Amendment—Republican and Democrat alike—said or agreed that the Amendment was designed to embody or incorporate the Civil Rights Act.” Id. (footnote omitted). House Committee Chairman Wilson stated that blacks should “not be subjected to obligations, duties, pains and penalties from which other citizens are exempted. . . . This is the spirit and scope of the bill, and it does not go one step beyond.” Id. at 27-28. Russell Thayer of Pennsylvania stated that to avoid any misapprehension as to what the “fundamental rights of citizenship” are, they are enumerated in the bill. He added that the bill was for “the protection of the fundamental rights of citizenship and nothing else.” Id. at 28.

Id. at 53. The Court invalidated a New York law which provided that “no employee shall be required or permitted to work in a . . . bakery more than sixty hours in any one week, or more than ten hours in any one day.” Ch. 415, § 110, [1897] N.Y. Laws. The Court noted that the statute necessarily interfered with the freedom of contract between an employer and employee, and held that “[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.” 198 U.S. at 53 (citing *Allgeyer v. Louisiana*, 165 U.S. 578, 589
as the proper guide for the law, had expanded the meaning of the fourteenth amendment; the concept of "liberty" had never before included the freedom to contract.\textsuperscript{**} Criticizing the \textit{Lochner} Court's holding, Justice Holmes, in a well-known dissent, stated that

\begin{quote}
[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . . United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court . . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of \textit{laissez faire}. . . .

I think that the word liberty, in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. . . . A reasonable man might think [the statute] a proper measure on the score of health.\textsuperscript{**}
\end{quote}

\textsuperscript{2} L. BOUDIN, GOVERNMENT BY JUDICIARY 433 (1968). The concept that freedom to contract was a natural right evolved from the \textit{laissez-faire} theory first espoused by Adam Smith. Pound, \textit{Liberty of Contract}, 18 \textsc{Yale} L.J. 454, 456-57 (1909). Many advanced this political doctrine to minimize state functions, the most important of which was enforcement of the obligations created by contract. \textit{Id.}

The Supreme Court construed the fourteenth amendment as "conferr[ing] no new and additional rights, but only extend[ing] the protection of the Federal Constitution over rights of life, liberty, and property that previously existed under all state constitutions." Mobil & Ohio R.R. v. Tennessee, 153 U.S. 486, 506 (1894). Liberty, at the time of the passage of the fourteenth amendment, simply referred to freedom from unlawful restraint. In the late 1800's, however, Justices Bradley and Field expansively defined liberty as "the right to follow any of the common occupations." Butchers' Union S.H. & L.S.L. Co. v. Crescent City L.S.L. & S.H. Co., 111 U.S. 746, 762 (1884); see Warren, \textit{The New Liberty Under the Fourteenth Amendment}, 39 \textsc{Harv. L. Rev.} 431, 447 (1926). In 1897, the Supreme Court, in \textit{Allgeyer v. Louisiana}, 165 U.S. 578 (1897), adopted the view of these Justices, establishing liberty of contract as part of the right to pursue one's trade. Warren, \textit{supra}, at 448. Justice Peckham stated:

\begin{quote}
The liberty mentioned in \textit{the} Fourteenth Amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, . . . but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; . . . to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.
\end{quote}

165 U.S. at 599. Liberty of contract flourished so heartily that by 1923 Justice Holmes declared, "The earlier decisions . . . began within our memory and went no farther than unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, \textit{Liberty of Contract}. . . . It is merely an example of doing what you want to do, embodied in the word liberty." \textsc{Adkins v. Children's Hosp.}, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).

\textsuperscript{2} 198 U.S. at 75-76. It was the Supreme Court's incorporation of Spencer's philosophy into
The Court's practice of striking down laws enacted to protect the weak in society between 1887 and 1937 terminated when, apparently, the pressure of the Depression and the popularity of the New Deal caused the Court to reevaluate its approach. Indeed, the Court thereafter deemed constitutional both the Wagner Labor Relations Act of 1935 and the Fair Labor Standards Act of 1938. Edwin S. Corwin has observed:

Thus the Court has never exercised its censorship of legislation, whether national or State, more energetically than during the half century between 1887 and 1937, when its thinking was strongly colored by laissez faire concepts of the role of government. This point of view, translated into congenial constitutional doctrines, like that of "liberty of contract" and the exclusive right of the States to govern industrial relations, brought hundreds of State laws to grief, as well as an unusual number of Congressional enactments.

The due process clause which inspired Holmes, himself an admirer of Spencer, to protest. R. Hofstadter, supra note 18, at 41; see supra note 28.

50 L. Lusky, supra note 15, at 102-03, 337. The Court departed from its liberty of contract approach in 1934, when it overruled Lochner, in Nebbia v. New York, 291 U.S. 502 (1934), and for the next 2 decades adhered rigorously to the self-restraint principle which dictates that it is for legislatures, and not for the judiciary, to determine the collective interest. "[F]reedom of contract—the slogan emblazoned on the banner of free business enterprise—was consigned to the limbo of obsolete constitutional doctrine." L. Lusky, supra note 15, at 337.

The 1937-1938 Term witnessed the reevaluation of all the earlier precedents bearing on the scope of the Court's authority and the decrease of involvement in economic regulations. By 1937, the restraints on the legislature's power to regulate economic activity began to dissolve: minimum wage laws, the National Labor Relations Act and the Federal Social Security Act were held constitutional. Id. at 102-03. A majoritarian philosophy grew, within which the people and their elected representatives were regarded as the proper determinants of what was in the public interest. Id. at 103.

3 Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453, 464 (1938) (the NLRA is within the constitutional power of Congress to regulate interstate commerce); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 52 (1938) (the procedural provisions of the NLRA do not offend constitutional requirements); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937) (that the NLRA may be one-sided in its application to employers and employees does not render it unconstitutional).

The enactment of the Fair Labor Standards Act was a valid exercise of the power given to Congress by the commerce clause of the Constitution. See, e.g., United States v. Darby, 312 U.S. 100, 123 (1941); Fleming v. A.B. Kirschbaum Co., 124 F.2d 567, 571 (3d Cir. 1941), aff'd, 316 U.S. 517 (1942); Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Div., 111 F.2d 23, 28 (5th Cir. 1940), aff'd, 312 U.S. 126 (1941); Missel v. Overnight Motor Transp. Co., 36 F. Supp. 980, 981 (D. Md. 1941). Indeed, the Act was held to be a reasonable, nondiscriminatory regulation, promoting the interest of society and the welfare of all workers. Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879, 884 (7th Cir.), cert. denied, 347 U.S. 1013 (1954).

33 CORWIN'S CONSTITUTION, supra note 23, at 176.
Roe v. Wade: The Most Recent Example of Judicial Amendment

The Supreme Court in Roe v. Wade again relied upon the fourteenth amendment when it struck down Texas laws that for more than a century had protected unborn human life. As occurred during the Lochner era, when the Supreme Court expanded the meaning of liberty to justify a laissez-faire constitutional approach and to sanction almost unlimited economic freedom as government policy, the Supreme Court, in Roe v. Wade, construed the term liberty as encompassing significantly more than originally was intended.

Raoul Berger's study, Government by Judiciary, establishes that the word "liberty" had an accepted technical meaning both in 1787 and in 1866. Indeed, it had been explained by William Blackstone, who had greatly influenced both the framers of the Constitution and those men who succeeded in enacting the Civil Rights Act of 1866. The accepted

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\* 410 U.S. 113 (1973).
\* Id. at 166. At issue in Roe was the constitutionality of Texas criminal abortion statutes that restricted legal abortions to those performed for the purpose of preserving the life of the mother. Id. at 117-18. Justice Blackmun reasoned that "liberty" for fourteenth amendment purposes embraced a pregnant woman's right of privacy to have an abortion. Id. at 153. Although this right is not absolute, id. at 154, the Court announced that its exercise is guaranteed free of state interference during the first trimester, id. at 164. The Court continued, however, suggesting that the state's interest in protecting potential human life becomes "legitimate" in the second trimester, and "compelling" in the third. Id. For critical commentaries of the Supreme Court's interpretation of the fourteenth amendment in Roe v. Wade, see Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Fordham L. Rev. 807, 835-39 (1973); Ely, supra note 7, at 937-43; Article, The Right to Abortion: Expansion of the Right to Privacy Through the Fourteenth Amendment, 19 Catholic Law 36, 44-48 (1973).


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\* See supra notes 27-29.
\* See R. Berger, supra note 25.
\* Id. at 270-73.

** Blackstone defined personal liberty as "the power of locomotion, of changing situations or moving one's person to whatsoever place one's own inclination may direct, without imprisonment, or restraint, unless by due course of law." 1 W. Blackstone, Commentaries *134. Blackstone also stated that "the law of nature is of course superior in obligation to all others . . . . No human laws are of any validity, if contrary to this." Id. at 41. It is recognized that the framers of the Constitution relied upon this statement. Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 Stan. L. Rev. 845, 858-60 (1978). Similarly, the proponents of the Civil Rights Act of 1866, Senator Trumbull and Representative Wilson, drew Congress' attention to Blackstone's list of fundamen-
meaning of liberty when included in the fourteenth amendment was freedom of locomotion and freedom from physical restraint. Although it may seem disappointing that the concept of liberty had such a narrow scope, it is not for the Supreme Court to justify its interpretation of the Constitution by reading into that document more than what the framers intended. The technical sense of the word "liberty," accepted and intended by the framers of the fifth and fourteenth amendments, has been expanded to include a right to privacy broad enough to encompass a woman's decision to terminate her pregnancy. That this was a result never expected by those who drafted the fourteenth amendment is evident since before, during, and immediately after ratification of the fourteenth amendment, the states were in the process of enacting laws against abortion, generally permitting termination of pregnancy only when necessary to save the life of the mother. In the Roe v. Wade opinion, Justice Blackmun indicated that by the 1950's only one state and the District of Columbia permitted abortion to preserve the mother's health, while three others permitted abortions not "unlawfully" performed. The picture painted by Justice Blackmun himself displays that for more than 100 years, no one had dreamed that liberty in the fourteenth amendment included a "privacy" which permitted abortion. Nevertheless, in 1973, Jus-
tice Blackmun and six colleagues concluded that liberty embodied such a privacy right. Others draw a different conclusion. Professor John Hart Ely, for instance, condemning the Roe v. Wade principle, stated that "[abortion] has nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests."

Roe v. Wade, it is submitted, also violates the tenth amendment. The passing of state anti-abortion laws began in 1820, long before the enactment of the fourteenth amendment. As was noted above, almost all

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44 See infra notes 47-52 and accompanying text. In a brief filed with the Supreme Court, the Reagan administration noted that the Constitution "contains no mention of the words 'privacy' or 'abortion.'" Taylor, Supreme Court Receives Reagan Plea on Abortion, N.Y. Times, July 30, 1982, at D16, col. 4. The brief argued that constitutional abortion rights were based on "a combination of shadows" rather than a specific guarantee. Id. The amicus curiae brief filed by the Justice Department concerned two cases to be reviewed by the Court during the October 1982 Term, Planned Parenthood Ass'n v. Ashcroft, 664 F.2d 687 (8th Cir. 1981), cert. granted, 102 S. Ct. 2267 (1982), and Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198 (6th Cir. 1981), cert. granted, 102 S. Ct. 2266 (1982). In Planned Parenthood, the Eighth Circuit held that a Missouri statute which required that second trimester abortions be performed in a hospital, Mo. ANN. STAT. § 188.025 (Vernon Supp. 1982), was unconstitutional. 664 F.2d at 689-90. In Akron Center for Reproductive Health, the Sixth Circuit struck down an Akron ordinance, AKRON, OHIO CODIFIED ORDINANCES ch. 1870, § 1870.05(B) (1978), requiring parental consent for abortions to be performed on women under 18. 651 F.2d at 1205.

Several others have expressed dismay regarding the Supreme Court's interpretation of the fourteenth amendment in Roe v. Wade. See, e.g., A. Cox, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113-14 (1976); Byrn, Wade and Bolton: Fundamental Legal Errors and Dangerous Implications, 19 CATH. LAW. 243, 245-47 (1973). One commentator noted:

The Court in Wade made no reference to the expressed intent of the framers. It did not explain how, in an era characterized by an "anti-abortion mood," by the proliferation of statutes intended to protect unborn children from abortion, by a war fought to vindicate the fundamental equality of every human being, and by outraged medical protests against the destruction of unborn human life,— in this era the framers of the Fourteenth Amendment and the states that ratified it could possibly have intended to create sub silentio an unarticulated . . . right to destroy a whole class of human beings whom the framers intended to exclude from the Fourteenth Amendment. Perhaps the reason for the lack of explanation is that none exists.

Byrn, supra, at 247 (footnote omitted); see Note, supra note 35, at 237-40.


48 The tenth amendment to the United States Constitution provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.
the states had laws against abortion by 1960. The states were therefore using their power under the tenth amendment to protect the unborn. State legislatures had enacted the statutes, state governors were enforcing them, and state tribunals were adjudicating cases concerning them. Were so many courts and so many government officials enforcing unconstitutional laws or was the Supreme Court in *Roe v. Wade* changing the meaning of the Constitution?

Professor David W. Louisell, voicing his discontent with *Roe v. Wade*, has written:

> By judicial fiat, the mere *ipse dixit* of seven Justices, the decisions supplanted the constitutionally prescribed legislative power of all the states and the federal government with the subjective value judgments of seven Justices. The decisions are the very culmination of the evil of judicial usurpation of legislative power, warned against by Justice Oliver Wendell Holmes, and which took the Court to the edge of doom in the court-packing plan of Franklin Roosevelt in 1937.

More recently, Judge Robert Bork, when a professor at Yale Law School, stated: "I am convinced, as I think almost all Constitutional scholars are, that *Roe v. Wade* is an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority."

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*See supra* note 44.

* The reasoning which underlies the argument that the tenth amendment implicitly affords the states power to regulate abortion as it sees fit found expression in these words of Justice Holmes:

> I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.

Tyson & Brother v. Banton, 273 U.S. 418, 445-46 (1927) (Holmes, J., dissenting); see also R. Berger, supra note 25, at 250 (by its substantive due process stance the Supreme Court "has encroached on the sovereignty reserved to the States by the Tenth Amendment").

Louisell, *The Burdick Proposal: A Life-Support Amendment*, Hum. Life Rev., Fall 1975, at 10 (footnote omitted). The late Professor Alexander Bickel criticized the *Roe* decision on the ground that the abortion controversy is a political and legislative question, not a judicial one. A. Bickel, *The Morality of Consent* 28 (1975). "Should not the question then have been left to the political process, which in state after state can achieve not one but many accommodations, adjusting them from time to time as attitudes change?" Id.; see also L. Lusky, supra note 15, at 16-19.


> [I]t seems clear that in seeking to weigh only the benefits and detriments of early abortion as such, the Court limited and clouded the horizon of its inquiry by collaps-
SHOULD JUDGES REWRITE THE CONSTITUTION?

The Constitution with its amendments was written by men who were committed to a philosophy of natural rights. This philosophy was understood to be the foundation of American government. By ignoring the natural law philosophy, which protected individual rights, and by embracing the laissez faire principles of Social Darwinism, the Supreme Court was distorting the meaning of the Constitution. Although it is difficult to ascertain upon what philosophical underpinnings the Roe v. Wade abortion decision rests, it is clear that the inalienable right to life of an unborn human being has been violated.

When the courts unfold the meaning of the Constitution according to its original underlying philosophy, they act constitutionally, rendering explicit what is sometimes implicit in the document. When, however, they

*See supra* notes 1-5 and accompanying text.
*See* CORWIN’S CONSTITUTION, supra note 23, at 390.

*See* Brown, Individual Liberty and the Common Good—The Balance: Prayer, Capital Punishment, Abortion, 20 CATH. LAW. 213, 223-25 (1974). The Supreme Court upset the natural law balance between individual liberty and the common good by giving so much weight to individual liberty “as to deny the right of society to protect what is now regarded by the best scientific evidence as human life . . . the zygote or first fertilized cell.” *Id.* at 224. While overemphasizing the individual rights of the mother, the Court underemphasized the rights of the fetus. Destro, Abortion and the Constitution: The Need for a Life-Protective Amendment, 63 CALIF. L. REV. 1250, 1252-56 (1975).

Professor Byrn presents a consummate and compelling argument that an unborn infant is indeed a human being, and thus deserving of the right to life. Byrn, supra note 35, at 839-57; see also Riga, Byrn and Roe: The Threshold Question and Juridical Review, 23 CATH. LAW. 309, 317-26 (1978).

*It is indeed arguable that the underlying philosophy of the framers of the Constitution included the unborn within the meaning of the term “person.”* Byrn points out the Supreme Court’s errors in supposing that abortion was not a crime at English common law during the Revolutionary period, Byrn, supra note 35, at 815-27, accusing the Court of perverting the views of the English theorists Bracton, Coke, Hale, Hawkins and Blackstone, *id.* at 827. Two other commentators note the language of the Declaration of Independence as indicative of protection of the unborn: “[A]ll men . . . are endowed by their Creator with certain inalienable Rights, that among these [is] Life . . . .” The Declaration of Independence para. 2 (U.S. 1776); see Conley & McKenna, The Supreme Court on Abortion—A Dissenting Opinion, 19 CATH. LAW. 19, 25-26 (1973). Conley and McKenna observe that the term “creation”
rule based upon principles alien to those ideals which impelled the framers to draft the Constitution, they do not reveal what is implicit in the document; they rewrite the Constitution without the authority of the people.\(^7\)

The perversion of American political theory is more profound when the courts abuse their power through an activism which operates to set aside congressional or state legislation and which is based upon subjective interpretation of constitutional pronouncements. "Judicial activism," therefore, disturbs the entire American system of government.\(^6\) A constitution derives its authority, immediately, from the people. It is the product of a special convention called for the purpose of establishing a higher law. The Supreme Court obtains "derivative authority" from the people through the Constitution. The Supreme Court is but a creature of that document. It is, therefore, a great usurpation for the Court to change the meaning of that which gave it birth.\(^9\) Yet, the Court has changed the

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\(^{7}\) Interpreting the Constitution discordant with the intent of the framers bears obvious dangers:

It does not dispose of the uncomfortable historical facts to be told that "the dead hand of the past need not and should not be binding," that the Founders "should not rule us from their graves." To thrust aside the dead hand of the Framers is to thrust aside the Constitution. The argument that new meanings may be given to words employed by the Framers aborts their design; it reduces the Constitution to an empty shell into which each shifting judicial majority pours its own preferences.


\(^{8}\) See Glazer, Towards an Imperial Judiciary?, 41 PUB. INTEREST 104 passim (1975). See generally C. KILGORE, supra note 41, at 346-53 (the Supreme Court has become the "instrumentality of the destruction of the Constitution"). Judicial activism runs the risk of "warping the Constitution" and "frustrat[ing] the needs of democracy." R. BERGER, supra note 25, at 4-5.


One method of limiting the power of the Court is through the exceptions clause of the Constitution, U.S. CONST. art. II, § 2, cl. 2, whereby Congress can limit the appellate jurisdiction of the Supreme Court. Agresto, supra, at 487-88. One commentator advocates, as "a political rule," the refusal of the elected branches of government to accept immediately any constitutional principle expressed by the Court. Id. at 491.

\(^{9}\) The framers established the Supreme Court through article III: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. The power of judicial review was not established until 1803, when Chief Justice John Marshall decided
meaning of the Constitution so often that it has been called a "continuous constitutional convention." 60

Of course, it would be inaccurate to imply that all or the majority of cases decided by the Supreme Court were not legitimate applications of constitutional law. A small number, however, stand out as improper applications of the Constitution and represent usurpations of power—power belonging to the majoritarian branches of the separation of powers triumvirate. 61

JUDICIAL AMENDMENT AND THE OATH TO SUPPORT THE CONSTITUTION

At the Constitutional Convention, the delegates heard proposals for a uniform loyalty test for American officials, 62 and although these proposals ultimately were rejected, 63 the Convention culminated in the promulgation of two constitutional provisions: one requiring that an oath be taken by the president, and the other exacting an unspecified oath for federal and state officials. 64

Pursuant to this mandate, Title 28 of the United States Code re-

the case of Marbury v. Madison:

[I]f both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

5 U.S. (1 Cranch) 137, 177 (1803). See generally R. Berger, supra note 25, at 351-62 (legitimacy of judicial review). When the Supreme Court abuses the power of judicial review by advocating a social policy contrary to the meaning of the Constitution, the independence of the judiciary is threatened by a hostile Congress and citizenry. See Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring). "Our duty to abstain from confounding policy with constitutionality demands perceptive humility as well as self-restraint in not declaring unconstitutional what in a judge's private judgment is deemed unwise and even dangerous." Id. at 552.

60 J. Beck, The Constitution of the United States 221 (1924); C. Kilgore, supra note 41, at 346.

61 For a discussion of the majoritarian nature of the executive and legislative branches of the federal government, as distinguished from the apolitical function of the judicial branch, see J. Choper, supra note 58, at 4-12.


63 Id.

64 Id. The Constitution enunciates the presidential oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1, para. 8. For other officials, article VI of the same document provides, "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution . . . ." Id. art. VI, para. 3 (emphasis added).
quires that each Justice or judge of the United States take the following oath before commencing their duties of office:

I, ___ do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.  

It may come as a shock to many when Supreme Court Justices admit that they assume the power to change the meaning of the Constitution. Such an admission recently was made by Justice Powell when he commented, “The Court cannot rely solely on what the founding fathers intended, or even on congressional intent when the fourteenth amendment was adopted. Conditions change as our Country matures.” With this statement, Justice Powell clearly is asserting the power to change the meaning of the Constitution. How can such an assertion be reconciled with a Justice’s oath to “support this Constitution”? Is the oath rendered a mere formality when taken by Supreme Court Justices? Various members of that tribunal apparently believe that a majority of the Court can change the meaning of the document they swear to uphold. Article V, however, gives but two methods to change the Constitution. Could it not be argued that the members of the Court who exercise their judicial power to amend the Constitution thereby violate their oaths of office?

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66 Constitutional Interpretation: Interview With Justice Powell, KENYON C. ALUMNI BULL., (Summer 1979), at 15.  
67 See supra text accompanying note 65.  
68 L. LUSKY, supra note 15, at 20; see also Oakes, The Proper Role of the Federal Courts in Enforcing the Bill of Rights, 54 N.Y.U. L. Rev. 911, 930 (1979). Recent political scandals may lead one to scoff at the notion that the oath is more than a mere formality. A “cheapening” of the oath, however, by certain dishonest members of the three branches does not warrant an erasure of the oath from the Constitution. It is hoped that posterity will learn from past mistakes and give greater deference to the Constitution and the ideals it embodies.  
69 Professor Lusky posits that the Justices have adopted a new conception of their role and a new meaning of their oath. L. LUSKY, supra note 15, at 20; see supra note 15 and accompanying text. The result is constitutional revision on an ad hoc basis to implement into policy the Justices’ personal views. L. LUSKY, supra note 15, at 21; see A. BICKEL, supra note 51, at 25-26.  
70 See supra note 8. It has been argued that the framers intended article V amendment procedures to be the sole path of constitutional revision. See R. BERGER, supra note 25, at 318. Elbridge Gerry, a member of the first Congress, went so far as to suggest that any attempt to alter the Constitution outside the framework of article V would be an impeachable offense. See 1 ANNALS OF CONGRESS 503 (J. Gales ed. 1789, cited in R. BERGER, supra note 25, at 318 n.22.
When injustice exists, resolution properly is attained through enactment of corrective laws by Congress and state legislatures. This result is not to be achieved by manipulating the Constitution to extract rights and liberties not there enumerated. A Court majority, according to the American concept, is neither empowered nor possessed of the wisdom to alter the Constitution. Justices of the Supreme Court may swear to support this most cherished document, but this oath is substantially undermined if, without inherent authority, they take it upon themselves to change the meaning of the very document they swear to uphold.

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71 See U.S. Const. art. V.
72 Justice White, dissenting in Roe v. Wade, chastised his Brethren for their “improvident and extravagant exercise” of the “raw judicial power” that the Constitution confers upon the Supreme Court. Roe v. Wade, 410 U.S. 113, 222 (1973) (White, J., dissenting). It is decisions such as Roe that provoke the call for a harnessing of the “raw judicial power” of the Supreme Court through a congressional limitation of the Court’s appellate jurisdiction. See Bartels, Recent Expansion in Federal Jurisdiction: A Call for Restraint, 55 St. John’s L. Rev. 219, 235-39 (1981).