The transformation of the American Constitution

Stephen Heywood Seay

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THE TRANSFORMATION OF THE AMERICAN CONSTITUTION

A Thesis
Presented to the Faculty of California State University, San Bernardino

In Partial Fulfillment of the Requirements for the Degree Master of Arts in Interdisciplinary Studies

by
Stephen Heywood Seay
May 1990
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AMERICAN CONSTITUTION

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Abstract

This thesis examines the fundamental transformations in the American Constitution through the adoption of the fourteenth amendment. The fourteenth amendment has been for some years the focal point of the debate about how the Constitution should be interpreted. Chapter One provides a critique of the current debate over original intent jurisprudence. The end of Chapter One and all of Chapter Two is spent identifying and analyzing the principles that the Constitution protects and why it is important to adhere to those principles.

The final half of the thesis is dedicated to showing how the transformation occurred, and how the use of the Fourteenth Amendment has brought about changes in the First Amendment.

The Conclusion is a summary of the results of Judicial activism and Legislative inaction.
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Modern Day Views Of The American Constitution

Our amended Constitution is the lodestar for our aspirations. Like every text worth reading, it is not crystalline. The phrasing broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure. This ambiguity of course calls for the interpretation, the interaction of reader and text.¹

The preceding quotation is Justice William Brennan's response on October 12, 1985, to Attorney General Edwin Meese III's call for a "jurisprudence of original intent". It is a statement of his judicial philosophy and it illustrates one side of a constitutional argument that is now raging in the United States. Can our judges today be expected to render judicial decisions based on the text of our Constitution? Or more accurately, can our judicial system, faced with obviously new and unanticipated questions of law in today's modern world, be expected to give decisions based on a 200-year-old text? Justice Brennan does not think so. In the same speech again responding to Meese, the Justice noted that:

There are those who find legitimacy in fidelity to what they call 'the intentions of the Framers.' In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that
feigns self-effacing deference to the specific judgments to those who forged our original social compact. But in truth, it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage, we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality.

The framers had many differences not the least of which was their differing views on slavery. It is true that the language of the Constitution undeniably allows the existence of slavery. How could such a document be at once the basis for securing individual freedoms and at the same time allow the existence of slavery? Justice Brennan's answer to that question was:

But our acceptance of the fundamental principles [in the Constitution] should not bind us to those precise, at times anachronistic, contours. Successive generations of Americans have continued to respect these fundamental choices and adopt them as their own guide to evaluating quite different historical practices. Each generation has the choice to overrule or add to the fundamental principles enunciated by the Framers; the Constitution can be amended or it can be ignored. . . . The ultimate question must be what do the words of the text mean in our time? The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.
Others in agreement with Justice Brennan, claim that these same sentiments were held by the Supreme Court 80 years ago. Justice McKenna in *Weems v U.S.*, held that:

Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. This peculiarity is true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice John Marshall, designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which its prophecy can be made. In application of a Constitution, therefore, our contemplation cannot be only of what has been, but of what may be. 4

Another question that needs to be asked is this: If the founding fathers actually did expect the Constitution to be followed as they originally intended, what was the ground of thier expectations? Were they endowed with some special wisdom that allowed them to invest its practical expression in the Constitution? Were they arrogant enough to believe that this special wisdom would last throughout the ages? These questions are in part the arguments used to take the offensive against those who adhere to the doctrine of original intent. But, are these arguments valid? Do they make historical sense? It would seem that this reasoning has been used quite effectively and not without some applause from the original intent side. For example in *Brown v Board of Education*, which brought about the end of
racial segregation in public schools, both sides approved of the steps toward equality. There have been cases that can be pointed to and considered successes for the philosophy opposed to original intent. But the facts are that this philosophy is inadequate and outright wrong when observed in a closer way. Here is what four great statesmen have to say about this philosophy:

'The Constitution is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.'

'If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, the people will have ceased to be their own rulers.'

'The Court has improperly set itself up as a super-legislature . . reading into the Constitution words and implications which are not there, and which were never intended to be there . . . We want a Supreme Court which will do justice under the Constitution--not over it.'

'An activist jurisprudence, one which anchors the Constitution only in the consciences of jurists, is a chameleon jurisprudence of changing color and form in each era.'

These words sound like those of Edwin Meese. The last quotation is the Attorney General's. But the first comes from Thomas Jefferson, the second from Abraham Lincoln, and the third from Franklin D. Roosevelt.

The quotations were found in an article written by Stuart Taylor in Current magazine. He sums up the argument
against Brennan's philosophy this way:

Its scorn for the 'Original Intention' approach begs the question of where—if not from those who wrote and ratified the Constitution and its amendments—unelected judges get a mandate to override the will of the political majority by striking down democratically enacted laws. The trouble is that judges of all political stripes have gone beyond the Constitution's principles to new circumstances. They have written their own moral and political values into it, pretending to have found them there. Sometimes they have interpreted the Constitution to forbid things explicitly allowed by its language.®

Lino A. Graglia in a recent Article writes in a similar verse,

The inevitable conclusion that has to be seen is that we would no longer be a government of the people but it boils down to whether, the country should be governed in regard to basic issues of social policy: whether such issues should be decided by elected representatives of the people, largely on a state-by-state basis, or, as has been the case for the last three decades, primarily by a majority of the nine Justices of the United States Supreme Court for the nation as a whole. . . . nearly every fundamental change in domestic social policy has been brought about not by the decentralized democratic (or, more accurately, republican) process contemplated by the Constitution, but simply by the Court's decree. The Court has decided on a national basis and often in opposition to the wishes of a majority of the American people, issues literally of life and death, as in its decisions invalidating virtually all restrictions on abortion and severely restricting the use of capital punishment.®
Graglia goes on to list additional social implications handed down by the Court, such as expansion of criminal rights, limiting state power to control street demonstrations, vagrancy, public morality, pornography, obscenity, nudity, school prayer, aid to religious schools, busing, reapportionment, libel, slander, and many others.

It would seem clear that the founders did have an original intention in writing the Constitution. It was not intended to be an exercise in futility that they remained in isolation during the summer of 1787 while hashing out their differences and finally coming to a consensus. They indeed had a plan and an understanding of how the government should work and of the principles that it needed to rest on. That is where the division and misunderstanding stems from as far as this constitutional debate of original intention is concerned.

Brennan believes that the Constitution rests on nothing more than "majestic generalities and ennobling pronouncements." In other words, the Constitution means what the justices say it means at any particular time. It is a changing, organic document that can mean one thing one day and something else the next. To quote Lino Graglia again,

The central question presented by constitutional law—the only question the great variety of matters dealt with
under that nubric have in common—is how, if at all, can such power in the hands of national officials who are unelected and effectively hold office for life be justified in a system of government supposedly republican in form and federalist in organization? That notion that a court has 'power to overrule or control the action of the people's representatives,' Justice Owen Roberts confirmed during the New Deal Constitutional Crisis, is a misconception; the Court's only function in a constitutional case is to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former.  

What then does the Constitution rest on? What is the philosophy behind it?

The Constitution, I believe, rests on the foundation provided for it in the Declaration of Independence which says, "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. Among them is life, liberty and the pursuit of happiness." What does it mean to say that all men are created equal?

A member of the Constitutional Convention and a leading Federalist, James Wilson, remarked that,

Between beings, who in their nature, powers, and situation are so perfectly equal, that nothing can be ascribed to one, which is not applicable to the other. There can be neither superiority nor dependence with regard to such beings, no reason can be assigned, why anyone should assume authority over others, which may not, with equal propriety, be assigned, why each of those
others should assume authority over that one. To constitute superiority and
dependence, there must be an essential
difference of qualities on which those
relations may be founded.9

This is not to say that there are no natural
inequalities among humans, only that there are none that
would make one being a natural ruler over another.
People are to be treated, and to treat others, in such a
way as to honor these natural rights granted to them by
their Creator, as the Declaration asserts.

As Harry V. Jaffa writes in an article published in
the Harvard Journal of Law and Public Policy:

One should not speak of the 'values' of
the Constitution, for the Constitution
rests upon principles, which are an enti-
rely different animal. The confusion of
principles with values -- which in the
language of the present day philosophy
[i.e. Justice Brennan] and social
science means essentially something
subjective, is a symptom of the disease
from which we suffer, and which, to some
extent, makes conservatives not much
more constructive than their political
opponents.10

Our government, our regime, is based on the natural
rights philosophy, and to say that they have no
relevance today is to stray far off the path and at
worst to jeopardize our system of law. Things do change,
and to no one's surprise, the founders could not have
anticipated everything that has happened since the
founding. They could not have seen all the technological advances such as cars, airplanes, or space flight, therefore, it would have been impossible for them to have addressed those specific issues. But I disagree with the opponents of original intention when they say that the principles need to be changed with the passage of time. It was true 200 years ago that man was entitled to life, liberty and the pursuit of happiness. It is true today, and it will be true a thousand years from now.

Graglia has written that,

> It cannot be too strongly emphasized, therefore, that the Constitution we actually have bears almost no relation to, and is often clearly irreconcilable with the Constitution of Justice Brennan's vision. No more is necessary to rebut all contemporary defenses of judicial activism that a copy of the Constitution be kept close at hand to demonstrate that the defenders of judicial activism are invariably relying on something else.\(^1\)

Abraham Lincoln, who understood the Constitution better than almost anyone before or since, said that:

> Without the Constitution and the Union, we could not have attained the result: but even these are not the cause of our great prosperity. There is something back of these, entwining itself more closely about the human heart, that something is the principle of Liberty to all—the principle that clears the path for all—gives hope to all—and, by consequence, enterprise and industry to all. The expression of that principle, in our Declaration of Independence, was most happy and fortunate . . . The assertion of that principle, at that time, was the
word 'fatally spoken,' which has proved an 'apple of gold' to us. The Union, and the Constitution, are the pictures of silver, subsequently framed around it. The picture was made, not to conceal, or destroy the apple; but to adorn and preserve it. The picture was made for the apple, not the apple for the picture.\(^{12}\)

What Lincoln was explaining, was the genius behind the Constitution and the Union. The reason natural rights are honored as they are is because of the principle of equality expressed in the Declaration of Independence. The principle was to be enshrined by the Constitution, and not the other way around.

To summarize this first section, it can be said that according to Justice William Brennan and those that agree with him, the Constitution is based on ennobling values and grand generalities. The framers' intentions can, at best, be glimpsed and, at worst, completely disregarded by the current generation. Crises occurring during this period of time need to be resolved based on what seems right to the judge and does not necessarily need to be connected principally to the Constitution. Over and against this thesis presented by the opponents of "original intention," are the arguments for original intention that claim to be able to understand, not perfectly, but with a certain degree of certainty, the principles that the framers were trying to enshrine in the Constitution. Those principles, known as natural
rights, can be understood and applied to modern-day legal cases.
Principles of Equality

Another issue in the debate is the argument of those who adhere to original intent that the judicial activism of the Court has usurped the proper constitutional authority of the legislature. Both conservatives, in the laissez-faire era of the 1890-1930s, and the liberals in the 1950-70s who sought a broad application of the Bill of Rights of the States, have used the Court as a shortcut around the legislative branch. According to Hamilton in Federalist paper No. 78, the judiciary has the distinct purpose of interpretation and clarification; to tell us what the laws mean. It serves a moderating function between the people and its government. To quote Hamilton,

    it serves to moderate the immediate
    mischiefs of those which may have been
    passed but it operates as a check upon
    the legislative body in passing them.13

But the court has subtly moved from a position of clarifying and interpreting the laws written by the legislature to interpret the laws according to the judges personal beliefs. These supralegislative forays by the Court into our political process have resulted in a group of nine justices and its elected officials leading the country, by decree instead of by popular vote.

Whether right or wrong, the Court has also found
significant new principles in the Constitution that cannot, by any stretch, be implied by the framers. For example, the incorporation of the Bill of Rights by the equal protection clause of the 14th Amendment. Leonard W. Levy, writing in The Fourteenth Amendment and the Bill of Rights: the Incorporation Theory, says this about Charles Fairman's research concerning the incorporation theory:

Fairman reviewed the same history that Black had reversed and came to the conclusion that the record 'overwhelmingly' refuted Blacks incorporation thesis. In addressing himself to the immediate background of the amendment, Fairman did not only analyze the congressional debates, he also explored the newspapers, the 1866 campaign speeches of significant members of congress, the gubernatorial messages calling for state consideration of the proposed amendment, and the records of state ratifying legislatures. The evidence dictated his finding that Congress and the Country, in framing and ratifying the amendment, did not understand that Section one incorporated the first eight Amendments, that in fact they had no clear understanding of the meaning of the Amendment's trilogy, taken separately or together. What was clear was only that Negroes were to have the same civil rights as white men and that the states could not deny the rights undefined and un-enumerated, of United States Citizenship.

Chief Justice John Marshall's opinion in a 1833 case of Barron vs. Baltimore, forty years after the Constitutional Convention, addressed the question of incorporation by reiterating that the Federal Constitu-
tion did not apply to the states. So, based on the court's actions before the fourteenth amendment, and the historical record during the ratification process, the incorporation theory as advanced by the Court in the last ninety years is not grounded in the intent of the framers. The question then is who is responsible to bring about social change?

Justice William Brennan in a recent speech says this about the Court's role in societal change,

Unabashed enshrinement of majority will, would permit the imposition of a social caste system or wholesale confiscation of property so long as a majority of the authorized legislative body, fairly elected, is approved. Our Constitution could not abide such a situation. It is the very purpose of a constitution, and particularly of the Bill of Rights, to declare certain values transcendent, beyond the reach of temporary political majorities.\(^\text{15}\)

Justice Brennan believes that the court is the agent that accomplishes these changes in society. Brennan sees the court as providing the just remedies for these excesses of the legislative process. The framers, though, did intend those that come after them to look back and follow the principles they enshrined in the Constitution. The evidence that they believed this is the fact that the Constitution was written down. The oath taken by the President, members of Congress and the Supreme Court all dictate that they uphold the Constitution. Ideally, all
laws violating the spirit and the letter of the Constitution would be nullified. These and others prove the point that the Constitution was held above other law. That is not to say that the Framers were not realists. In fact, indirect constitutional recognition of slavery was a concession by the framers because of political necessity to get the Constitution ratified. If slavery had not been allowed in the Constitution, there was a good chance it may have not been ratified by the southern states. But slavery had already been put on the road to extinction with the passage of the Northwest Ordinance of 1787. This ordinance outlawed slavery in the territories northwest of the Ohio River so that it would not spread. So began the principle that slavery was the exception and freedom the rule.

The principles of equality or the "standard maxim" that Lincoln referred to have always been a part of this regime. The idea that opponents of original intention have the idea that the Constitution does not address those kinds of issues, so principles perceived as not existing in it need to be created in order to address certain problems existing in society. If anything was clear from all the sources at the time of the revolution, it was the general sentiment that the people had to create a new government that secured liberty from tyranny, and that its principles would be enduring for
ages to come. The Declaration of Independence is the most obvious evidence of these facts.

In the next chapter, I will deal with the question of what these principles were and if they really are part of the Constitution.
The American Constitution:
A Document Designed to Protect Principles of Equality

The principles enshrined in our Constitution came from somewhere. It was Abraham Lincoln's contention that the principles enshrined in the Constitution are found in the Declaration of Independence. In one of his debates with Stephen Douglas, Lincoln said:

Chief Justice Taney, in his opinion in the Dred Scott case, admits that the language of the Declaration is broad enough to include the whole human family, but he and Judge Douglas argue that the authors of that instrument did not intend to include Negroes, by the fact that they did not at once actually place them on an equality with the whites. Now this grave argument comes to just nothing at all, by the other fact, that they did not at once, or ever afterwards, actually place all white people on an equality with one another. And this is the staple argument of both the Chief Justice and the Senators, for doing this obvious violence to the plain unmistakable language of the Declaration. I think the authors of that notable instrument intended to include all men, but they did not intend to declare all men are equal in all respects. They did not mean to say all were equal in color, size, intellect, moral development, or social capacity. They defined with tolerable distinctness, in what respect they did consider all men created equal. Equal in 'certain inalienable rights, among which are life, liberty, and the pursuit of happiness.' This they said and this they meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet that they were able to confer it immediately upon them. In fact, they had no power to confer such a
boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society which could be familiar to all, and revered by all, constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.16

The Constitution is an embodiment of these principles, not only does it contain them but it provides the organization to protect them. The Constitution was designed to be the instrument or haven for all of the natural rights possessed by its citizens. The Constitution was to act as a servant of the people and provide a means of securing them natural rights. The framers of the Constitution clearly recognized that human beings by their very nature were entitled to these inalienable rights. These rights were entitled to the people, according to Thomas Jefferson, by "the laws of Nature and Nature's God."17

The historical events that helped form the Declaration and Constitution was the national environment that surrounded the revolution in the years just prior to it. The influence of the enlightenment and a great religious awakening helped shape the colonists' minds during the middle part of the 1700s.

Enlightenment thinkers such as Locke and Montesquieu
influenced to no small degree the framers of the Declaration and the Constitution. In fact, Thomas Jefferson had this to say about the Declaration:

[The Declaration] was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing of the sentiments of the day, whether expressed in conversation, letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc. 18

The enlightenment thinking was only one part of the catalyst that helped form the Constitution. The other was the general religious awakening of the time.

In the introduction of his book, The First Amendment, T. Daniel Shumate wrote:

Three phenomena affected all the colonies during the 18th Century: The Great Awakening, beginning in New England and stimulating evangelization elsewhere; Anglican efforts to establish episcopacy in the colonies; and the Enlightenment. 19

These two agents, the Enlightenment and the great religious awakening caused a general backlash against anything perceived by the colonists as tyranny. It is also true that as the "experiment" with republicanism persisted, it became evident to the Framers that a government protecting the natural rights of its citizens was a regime that would be obeyed and honored.

A civil society based on these fundamental prin-
ciples functioned better than societies that did not acknowledge or respect them. Although the Declaration says that these truths are self-evident, and all men are created equal, it took a long time to lay them out in a written form, and even longer to create a government that protected and respected them.

During the interim between the Declaration of Independence and the creation of the Constitution, the Articles of Confederation held the states together. Many problems developed during the interim which could not be addressed effectively through the Articles. The inability of the Confederation to raise funds was one of its most persistent problems. It was unable to pay back foreign countries the money that were borrowed during the Revolutionary War. The Confederation was also unable to pay back its own citizens for debts incurred during the war. In addition, the territories, which should have rightfully been handed over to the states by England after the war, were still in British hands. Not only were the outposts and territories being held but there was absolutely no power of retribution since no troops could be enlisted.

Alexander Hamilton, in the Federalist Papers, wrote that the main vice of the Confederation was "the principle of legislation for states or governments, in their corporate or collective capacities, as con-
He was arguing that the Confederation, in principle was wrong, because it could not deal with a citizen directly. Its only power extended to the state in which he resided. The Confederation, therefore, could not exercise any effective power but was restricted to mere recommendations which the states could observe or disregard.

The issues of an ineffective Confederation, the desire of the people to secure their natural rights, the Enlightenment and religious revival of the 1700s, all caused the Constitutional Convention of 1787. The delegates were faced with providing the nation with a form of government that was energetic and representative to secure liberty, yet powerful enough and responsive enough to protect the citizens' natural rights.

Was the Constitution the product of a natural rights philosophy? Undoubtedly it was. But arguments have been proposed which claim that it could not possibly have been so. We need not look too much farther than Justice Brennan to find this argument against the natural rights philosophy. He has said that "Typically, all that can be gleaned is that the framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in
cloaks of generality." And, "Each generation has the choice to overrule or add to the fundamental principles enunciated by the framers; the Constitution can be amended or it can be ignored."  

But the facts are that even our founding fathers did not even debate as to the fundamental principle undergirding our Constitution. Thomas Jefferson, the architect of our Declaration of Independence, which enshrined natural rights at the beginning of that document to the standard any legitimate government should be designed to protect, was in wholehearted agreement with the principles enunciated in the Constitution. When Madison sent a draft of the Constitution to him while an ambassador to France, he agreed with Madison that, "If they approve the proposed convention in all its parts, I shall concur in it cheerfully,"  

John Jay in Federalist Paper No. 2 makes it clear that his assumption is that the Constitution rests squarely on the principle of natural rights and a limited government to protect those rights when he wrote, Nothing is more certain than the indispensable necessity of government, and it is equally undeniable that whenever and however it is instituted, the people must cede to it some of their natural rights in order to vest it with requisite powers.  

In fact, in arguing against adding a Bill of
Rights, Alexander Hamilton says,

For why declare that things shall not be done which there is no power to do? The truth is, after all the declarations we have heard, that the Constitution is itself, in every rational sense and every useful purpose, a Bill of Rights.  

What Hamilton was saying in essence is that the Constitution protected the public's natural rights in two significant ways. One way was by actually writing into the body of the Constitution fundamental principles or natural rights that could never be violated such as the establishment of the writ of habeas corpus, the prohibition of ex-post-facto laws and of titles of nobility.

The other way it protected the citizens' natural rights was by never addressing the subject of certain natural rights, such as freedom of the press. For example, nowhere in the body of the Constitution is there any language expressly securing the freedom of religion. Because of the principle of a limited government, which meant that the people ceded to government only certain natural rights as its responsibility, there was no need to write into the Constitution a freedom of religion clause since that right was never given to it to protect.

There are those who could argue that the Constitution when drafted the summer of 1787 was not in its complete form because later a Bill of Rights was added. But they fail to bring up the point that one of the strongest
reasons for attaching the Bill of Rights was not to protect freedom as much as that it was used by the Federalists to defuse an attempt by the Antifederalists to discredit the constitution. James Madison took the lead in drafting the bill so that he could defuse the AntiFederalists' attack, so he could provide the groundwork for a Bill of Rights if there was to be one.

Not only did our founding fathers see that the Constitution embodied natural rights, it is also clear that Abraham Lincoln clearly saw that fact also. While debating Stephen Douglas, Lincoln made this point about natural rights:

All honor to Jefferson—to the man who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all men and all times and so to embalm it there, that today and in all coming days it shall be a rebuke and stumbling block to the very harbinger of reappearing tyranny and oppression. That abstract or universal principle is that all men are created equal. 25

That principle, of course, is the principle of equality and natural rights. Lincoln saw our Constitution as an instrument to secure those natural rights. He knew that without this principle, this basis, our Constitution could be construed as having any meaning the judiciary may want. In fact, at the time Lincoln was debating
Douglas, the effects of the Dred Scott case were increasing the tension between the North and the South. Lincoln fought the Civil War, to restore the foundation of the Constitution—the Declaration of Independence. But at the same time another philosophy called positivism gained popular appeal.

Stephen Douglas' doctrine of popular sovereignty is a classic example of the positivistic philosophy. Was slavery to be introduced into the territories, or was it to be kept out? According to the doctrine of popular sovereignty, the people had to decide the issue. The decision to allow slavery into the territories was not based on the fundamental principle of equality and the natural rights of every human being but on what society determined was right or wrong. So positivism is the practical approach to a problem based on human will rather than on a fundamental principle.

William Brennan's philosophy is not far removed from Stephen Douglas'. Although Stephen Douglas fought for the principle of majority rule and Justice Brennan for personal rights based on human principles, they each argued, one by majority rule and the other by Judicial rule, that "human will" at any particular time in history determines what policy government should follow.

In summary, it can be seen that our founding fathers, as well as others down through the ages including Abraham
Lincoln, perceived that our Constitution rested on the fundamental principles enshrined in the Declaration of Independence. These principles were known as Natural Rights. But soon after the Civil War, the new philosophy of positivism became popular and that has proved to have an enduring quality up to and including today.
The Transformation of the American Constitution
Through the Fourteenth Amendment

Nowhere can the change in our Constitution be seen more clearly than in the use of the 14th Amendment. Was it to be used, as some say, to incorporate the Bill of Rights and apply them to the states? There are, of course, arguments presented by both sides wishing to prove their thesis. For example, Michael Keith Curtis in his book, *No State Shall Abridge*, sets forth his arguments for the incorporation theory, while Raoul Berger in his book *Government by the Judiciary*, takes the opposite side, arguing that the Fourteenth Amendment was not supposed to be incorporated to the States. What was the amendment designed to do? Without a doubt, it was designed to recognize the black man's inalienable right of equality, and to secure his natural rights of life, liberty and the pursuit of happiness.

To understand whether or not the Fourteenth Amendment was supposed to incorporate the Bill of Rights to the States, it is important to understand that period of time. It is an unquestionable fact that the Constitution was an instrument that was meant to secure natural rights. It is also true that it assumed slavery existed, and made references to that institution. Also, it is clear that the men who framed the Constitution were well
aware of the incongruency of these two doctrines. These men, the Framers as Lincoln asserted, did not leave the institution of slavery to itself. By an act of Congress they made its extension into illegal territories. It is also clear that because of issues like slavery and mistrust of a national government, the Federal Government was created with substantial limits, while the state governments retained a considerable degree of power.

Over the next decades the debate over whether or not slavery should be allowed into the territories became more and more an issue. This issue of whether or not to allow slavery into the territories soon raised the question of states rights and ultimately climaxed in the Lincoln-Douglas debates. Lincoln held that the principles enshrined in the Declaration of Independence, of equality was of more fundamental importance then that of Popular sovereignty. Adding to these facts was the Supreme courts offensive attempt to define the black man as a piece of property. With these important historical facts in mind the question of what was the Fourteenth Amendment designed to become was somewhat easier to answer. Raoul Berger, in his book Government by Judiciary, points out numerous quotations by those debating the amendment that make it clear that they were discussing the constitutionalizing of natural rights for all people, and specifically of the black man. Berger cites person
after person, who during the debates surrounding the ratification to the Amendment, state that they do not see the Amendment incorporating the Bill of Rights. For example, George R. Latham of West Virginia stated that: "the civil rights bill which is now a law covers exactly the same ground as this amendment." In the first section Berger points out in other examples the Framers were clear that it was natural rights they were talking about. Some of the examples stated were, "the enumerated rights I stated in the (Civil Rights) bill were the fundamental rights of citizenship," said Martin Thayer of Pennsylvania.

Are these fundamental rights talked about by Martin Thayer the same as the natural rights in the Declaration of Independence? Representative Wilson asked the same question, and in his description, he seems to come to that conclusion:

What do these terms mean? Do they mean that in all things, civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed, nor do they mean that all citizens shall sit on juries, or that their children shall attend the same schools. These are not civil rights and immunities. Well, what is the meaning? What are Civil Rights? I understand civil rights do be simply the absolute rights of individuals, such as the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. The use of these words are closely related to the
Michael Curtis, on the other hand, views the debates in a different way. In his book, *No State Shall Abridge*, he takes a different perspective on the incorporation theory. He maintains that James Madison had the incorporation theory in mind when he purposed the Bill of Rights. Curtis explains that Madison was won over by Jefferson to believe that with a Bill of Rights attached to the Constitution the citizens of the United States would establish a bulwark against state and federal encroachment on their fundamental rights. Madison, was actually conceding a point to the states. He, being a realist, knew that without a Bill of Rights the states would probably not ratify the Constitution because of their fear of the new federal government. In fact Curtis, concedes that the evidence seems to indicate that incorporation was not the desired end, but that the fact of the matter is different because of new facts he has uncovered. He asserts that the republicans especially Representative Bingham, who authored the Fourteenth Amendment, viewed it as an incorporation tool. But time after time the record indicates that the sentiment was clearly the opposite. For example, M. Russell Thayer of Pennsylvania said,

...to avoid any misapprehension as to what the fundamental rights of
Citizenship are, they are stated in the bill. The same section goes on to define what were the civil rights and immunities which are to be protected by the bill. When those civil rights, which are first referred to in general terms (that is, civil rights and immunities) are subsequently enumerated, that enumeration precludes any possibility that the general words which have been used can be extended beyond the particular which have been enumerated. That the bill was for the protection of the fundamental rights of citizenship and nothing else."

Also James Patterson of New Hampshire, noted:

I am opposed to any law discriminating against [blacks] in the security of life, liberty, property and the proceeds of their labor. These civil rights all should enjoy. Beyond this I am not prepared to go, and those pretended friends who urge political and social equality are the worst enemies of the colored race.

The framers were talking about equality in natural rights and that is where they stopped. These facts are also supported by history. The Civil War had just ended and even the North was perplexed at its dilemma of somehow incorporating the Negroes into society. The North, who supposedly treated Negroes as equal had segregation laws in effect and only a two states allowed them to vote. According to Roscoe Conkling,

The northern states, most of them, do not permit Negroes to vote. Some of them repeatedly and lately pronounced against it. Therefore, even if it were defensible as a principle for the Central Government to absorb by Amendment the power to
control the action of the states in such a matter, would it not be futile to ask three-quarters of the States to do for themselves and others, by ratifying such an Amendment, the very thing most of them have already refused to do in their own cases?31

From these examples and others it can be seen that the scope of the amendment was narrow in its application. It extended to the ex-slaves the natural rights of all men but did not go any further. The issue of whether the bill of Rights should be incorporated by the amendment as not included in its meaning. The goal and purpose of the Constitution of 1787 was to establish equality, but the Fourteenth amendment, which continued to expand equality, was not supposed to be used by the court to incorporate the Bill of Rights and apply them to the states. Section I of the fourteenth amendment it says:

All persons born or Naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor any deny to any person within its jurisdiction the equal protection of the laws.32

It is fairly certain that the Framers' view on what equal protection of the laws meant was that the Negro's
natural rights were included but his political rights were not. If Negro suffrage had been included another amendment would not have been needed. Senator Hendrick, an Indiana Democrat:

To recognize the Civil rights of the colored people as equal to the Civil rights of the white people, I understand to be as far as Senators desire to go; in the language of the Senator from Massachusetts (Sumner) to place all men upon an equality before the law, and that is proposed in regard to their civil rights, (natural rights).

James W. Patterson of New Hampshire was "opposed to any law discriminating against (blacks) in the security and protection of life, liberty, person and property, 'beyond this I am no prepared to go', explicitly rejecting political and social equality." It is true that the amendment was meant to do away with the black codes that had been legislated in the States. But to say that the amendment was designed to redefine the relationship between the National government and the State government would be wrong. The emphasis was to remedy and extend the original constitution's privileges and immunities to all of the citizens not just the white man. It is also clear that the framers did not see the amendment as a way for congress to legislate its will over the states. In fact it was the opposite they felt that the existence of the states with power for domestic and local government was essential to the working of
government. As I mentioned earlier, in *Barron v. Baltimore*, Chief Justice Marshall says after a discussion of nation-state relations, "If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the States." And he continues,

> It is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our Country, deemed essential to Union, and to the attainment of those invaluable objects for which the Union sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government not against those of the local governments.\(^\text{35}\)

The Framers of the Fourteenth amendment understood that the meaning of the amendment applies to states in a very narrow way. It was not to confer or regulate rights, but to require that whatever rights and obligations were imposed by the states, those should be without distinction based on race. This did not in any way refute or overrule Barron. He did not allow the Bill of Rights to be placed on the States. The amendment extended the states obligation to equal protection of
natural rights to Negroes. In view of the limited objectives of securing life, liberty and the pursuit of happiness or natural rights to Negroes, how has the amendment undergone such change? They did not intend the amendment to become such a broad, general catch-all. Was it wrong that the amendment did not provide full equality? Probably so but it was as far as they could go politically at that period of history.

In summing up, Berger who holds the perspective that the Fourteenth Amendment was a step toward equality but not full equality is probably the closest to the truth. There are too many clear facts, such as the clear records of the debate, the passage of an additional amendment, the situation on inequality in the northern state, the Supreme Court readings prior to the amendment that make arguments such as Curtis'; difficult to defend. Curtis does however, make arguments like:

The idea that the constitution protected fundamental liberties of citizens against state action was accepted by republicans of all political persuasion. Its most ardent exponent was John Bingham, a conservative to centrist republican. Bingham's greatest problem in getting the final draft of his proposal for a Fourteenth Amendment accepted was not that it departed from what Republicans thought appropriate. It was that many republicans had so convinced themselves of the correctness of their constitutional views that they considered the Fourteenth Amendment superfluous. They thought blacks were already citizens; that states were already prohibited from
depriving free persons of due process; that all the privileges or immunities or rights of American Citizens protected them throughout the nation, even in the South.36

Even though a majority of the republicans thought that, the final effect of the Fourteenth Amendment was not supposed to be incorporation. Just a few years later in 1875 a Constitutional Amendment was brought forward, called the Blaine Amendment proposing aid to religion. It was defeated by the Senate never making it to the state legislators for ratification. Why would the House have asked for a Constitutional Amendment to aid religion if the Fourteenth Amendment had been meant to incorporate the Bill of Rights? The only answer can be that it did not mean for it to incorporate the Bill of Rights. The framers of the amendment went as far as they could go. They moved toward the standard maxim but did not attain it. Were they naive to think that with such a narrow construction of the amendment they could solve the problem of inequality? On the basis of recent Supreme Court rulings it would seem so. It is evident that the failure of the Congress to legislate effectively has caused the Supreme Court to legislate unilaterally its own will. By looking at the transformation of the amendment over the last 100 years, it can be seen how this has occurred.

The Civil Rights Cases of 1883 hinged on the question
of whether or not Congress could pass legislation giving any person the full and equal enjoyment of accommodation, advantages, facilities, and privileges, based on Section I and Section V of the amendment. The court held that:

Until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against state laws and acts done under state authority.37

Justice Bradley goes on to state that:

The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or an crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation, but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, any may presumably be indicated by resort to the laws of the state for redress.38

Also in an earlier case, called the Slaughterhouse Casaes, it was held that the amendment was not intended to extend to legislation granting exclusive franchises within the state of Louisiana. To quote Justice Miller:

We do not see in those amendments (Thirteenth and Fourteenth) any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesman still believe
that the existence of the states with powers for domestic and local government, including the regulation of civil rights, the rights of person and of property, was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the states, and to confer additional power on that of the nation.39

In these two cases, one starts to see that the limited, narrow construction of the amendment which the framers intended produced results that were not altogether equitable. But again the issue was two-fold. Would the legislative branch do what it needed to do by passing legislation to shore up the amendment's true meaning, or would it abdicate it rightful obligation and allow the court to create social change?

Because the states were seen as the final authority over its own citizens, the inequality of their laws were not overruled. This can be seen even better in Plessy v. Ferguson, which established the doctrine of separate but equal. In Plessy, Justice Brown wrote,

The object of the Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.40

He went on to list the circumstances permitting and
even requiring the separation of the races, [such as public facilities, schools, marriage and theaters]. "If one race is inferior to the other socially, the constitution of the United States cannot put them upon the same plane." These cases to be sure, were not all the court had to say about the amendment. In an opinion given in 1880 a black man, Strauder, sought to have his murder trial removed to a federal court since West Virginia law did not permit negroes to be eligible for service on petit juries. The Supreme Court sustained Strauder's request and, through Justice Strong said:

The words of the amendment contain a necessary implication of a positive immunity or right, most valuable to the colored race, the right to exemption from unfriendly legislation against them distinctly as colored - exemption from legal distinctions, implying inferiority in civil society, lessening security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race. The very fact that colored people are singled out and expressly denied by statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of that race that equal justice which the law aims to secure to all others.42

So, while opinions like Strauder's did afford equal
protection to some, most, like *Plessy*, were so narrow that the Negro race suffered discrimination. The extent of the amendment's application was not broad enough to give its equal protection of laws clause its needed, full application which should have been what Justice Harlan's dissent, in *Plessy v. Ferguson*, stated: "Our constitution is color-blind and neither knows or tolerates classes among citizens." Justice Harlan went on to echo some fairly prophetic words about what this ruling would produce.

The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the constitution, (13, 14, 15th amendments) by one of which the blacks of this country were made citizens of the United States and the states in which they respectively reside, and whose privileges and immunities, as citizens, the states are forbidden to abridge. Sixty million of whites are in no danger from the presence here of eight million of blacks. The destines of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be
allowed to sit in public. Coaches occupied by white citizens? That as all will admit, is the real meaning of such legislation as was enacted in Louisiana.\footnote{43}

For the next 58 years the Negro was discriminated against under the protection of law. Not until the 1954 case of Brown v. Board of Education of Topeka was there a remedy under law. But although Brown v. Board is said to have rendered a correct conclusion to the case, the basis on which the conclusion rests, is questionable.

According to Berger, Alexander Bickel, who had the job of compiling the legislative history of the amendment, helps us to see why the Court rested its conclusion on sociological evidence and not law. Bickel delivered his memorandum to Justice Frankfurter, for whom he was doing the research for. It stated:

It is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting. There is no evidence whatsoever showing that for its sponsors (framers) the civil rights formula had anything to do with un-segregated schools.\footnote{44}

Because of this kind of analysis, Chief Justice Warren based the conclusions of the Court on the unsettled, changing ground of social science.

Brown v. Board was evidence of a court taking the law into its own hands. Its supra-legislative act of
declaring desegregation illegal under the constitution, based on nothing other than sociological evidence, was a mistake.

There seems to be substantive evidence that the natural implications of the Natural Rights law supplies a much firmer basis of law. These implications based on the fact that all men are created equal and are endowed with life, liberty and the pursuit of happiness, would mean people could live where they pleased, go to school where they pleased, based not on color or race but intelligence, ambition and content of their character.

The conclusions that can be drawn from the transformation of the Fourteenth Amendment are these. First, the underlying principles of the amendment were exactly the same ones that were used in the constitution; the principles of equality and natural rights. But because of the politically difficult times following the Civil War, the interpretation of the amendment by the court did not afford equal protection to black men. Instead of expanding the amendment's meaning based on the principles of equality nothing was done for over a half a century, so the problem of inequality persisted until the Court ruled in Brown v. Board that inequality would not be tolerated legally. But the process of change had shifted in a bold way. It was not the legislative branch that had lead the way as the
constitution envisioned, and, secondly, the court had gained a significant say in social change in a supra-legislative capacity. Thirdly the principles on which equality stood had subtly changed. It was no longer based on certain inalienable rights but on societal, scientific evidences, or on human will.
The Transformation Of The First Amendment
Through The Fourteenth Amendment

Looking at the First Amendment, its meaning was changed in an innocent enough way. The adoption of the 14th Amendment paved the way for the incorporation of the First Amendment. The chief purpose of the 14th Amendment, was to insure the freedom of the Negroes and protect their proper status as citizens of the United States. It is true to say that, up to and including today, it has been used for many other purposes besides this. In fact, in Marnell's words, "for the first 70 years of its history, the 14th Amendment was not cited, in any case directly concerned with a religious issue as such a guarantee." But as the due process clause of the 14th Amendment was used selectively to incorporate various parts of the Bill of Rights, the time finally came when the Establishment Clause was also incorporated. The use of the due process clause to incorporate the free exercise clause of the First Amendment was alluded to in a Supreme Court case called Hamilton v. Regents of the University of California. It was mentioned in the obiter dictum only, but the process was already a long way down the road toward its incorporation. The Hamilton case hinged on the question of whether a student who had religious scruples against bearing arms could be
compelled, under penalty of expulsion, to take military drill in the University of California. The Supreme Court ruled that while the religious beliefs of Hamilton were protected by due process of law, he was not being compelled to attend the University and could assert no constitutional right to do so without complying with the State's requirement of military training. With the groundwork now set to address religious issues, the Supreme Court was asked to address problems having to do with the Establishment Clause.

In 1947, a case was brought before the Supreme Court called Everson v. Board of Education of Township of Ewing. The case involved a New Jersey statute that allowed local school districts to make rules and contracts for the transportation of children to and from schools. The township of Ewing authorized reimbursement to parents of money they had spent for bus transportation of their children on regular buses operated by the public transportation system. Part of this payment was to parents, who had sent their children to a Catholic parochial school.

Everson brought a suit against the board challenging the right of the board to reimburse parents of parochial school students, contending that the statute violated the Constitution, specifically the Establishment of religion Clause. The court, in a five to four decision,
concluded that the township had not violated the Establishment Clause because, as Justice Black said:

We must be careful in protecting the citizens of New Jersey against State-establishment churches to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.46

His argument hinged on the fact that it provided benefit to the individual and not the State. With this decision, two things became particularly clear. First, Justice Black said that the First Amendment meant at least this: neither State nor Federal Government can set up a church. Because of the incorporation of the First Amendment by the Fourteenth Amendment, it was possible to declare the First Amendment open to interpretation by the Court. Secondly, the decision set forth the requirements of the Establishment Clause which Justice Black said:

The Federal Government cannot pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a
state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or vice-versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between Church and State.47

The case opened the doors for numerous other cases which changed the meaning and application of the First Amendment. There are two cases that dealt with the concept of released time and dismissed time; the practice of conducting religious instruction within the school building. In a case called McCollum v. Board of Education of Champaign, the question arose whether or not religious instruction could be given to a student while in a public classroom.

Justice Black outlined the case and summarized the majority opinion this way:

"This beyond all question is a utilization of the tax-established and tax-supported public school system to aid religious groups and to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the 14th Amendment) as we interpreted it in Everson v. Board of Education.48"

Black then turned to the respondent's argument, which rested on two premises: that the First Amendment was intended to forbid only governmental preference for one religion over another and not governmental assistance for all religions, and that the Fourteenth Amendment did
not make the establishment of religion clause of the First Amendment applicable to the States. He rejected both arguments. After stating that no hostility to religion was intended in his opinion, he concluded, "The First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims free from the other within their respective spheres." 49

Justice Reed, dissenting in the case, found himself unable to determine precisely what released time aspect of the Champaign plan was unconstitutional. He said:

I conclude that their [courts] teachings are that any use of a pupil's school time, whether the use is on or off the school grounds, with the necessary school regulations to facilitate attendance, falls under this ban . . . 50

He then turned to the history of the First Amendment and found that Thomas Jefferson, as rector of the University of Virginia for which Madison was one of the visitors, had established a system of released time at the university. He cited the aid that religion receives from the State in the form of no tax exemption. He gave the example of chaplains who invoke the divine blessing of Congress at each daily meeting, the commissioned chaplains in the armed forces, the compulsory attendance at church services at West Point and Annapolis. He concluded by saying:

The prohibition of enactments respecting the establishment of religion does not
bar every friendly gesture between church and state. It is not an absolute gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together, any more than the other provision of the First Amendment--free speech, free press are absolutes... This court cannot be too cautious in upsetting practices embedded in our society by many years of experience. A state is entitled to have great leeway in its legislation when dealing with the important social problems of its population. A definite violation of legislative limits must be established. The Constitution should not be stretched to forbid national customs in the way courts act to reach arrangements to avoid federal taxation. Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people. This is an instance where, for me, the history of past practices is determinative of the meaning of a constitutional clause, not a decorous introllection to the study of its text. The judgment should be affirmed.51

In this ruling, as in Everson, the Court had now established a precedent that subjected the First Amendment, as it related to the States, to its litmus test.

Secondly, it had taken a new view, a non-historical view of the First Amendment's objective. This view results in a much broader interpretation of the Establishment Clause. It view contends that the clause prohibits any governmental support of religion. Historically is definitely skewed. It not only ignores the
overwhelming social sentiment of this time but also
neglects, without comment, the origin of the First
Amendment. The founders' opinion, was that the Amendment
prohibited a national church and was not willing to
address State issues about religion.

Four years later, Zorack v. Clauson came up for
review by the court, and it modified its stand on released
time. Justice Douglas distinguished Zorach from McCollum
by emphasizing the differences between the two plans.
In McCollum, the students used government facilities
while receiving religious instruction; in Zorach, they
did not. In McCollum, the state's compulsory school
attendance machinery was used to make students go to
religion classes, but in Zorach, students could remain
at school in study hall.

But most importantly, Justice Douglas said that the
establishment prohibition did not preclude government
from accommodating the interest of religion. His opinion
was:

    . . . we find no constitutional require-
ment which makes it necessary for
government to be hostile to religion and
to throw its weight against efforts to
widen the effective scope of religious
influence that would be preferring those
who believe in no religion over those who
do believe. We are a religious people
whose institutions presuppose a Supreme
Being.52

The decision affirmed the New York statute as
Within a decade, two cases appeared before the Supreme Court dealing with prayer. The first case was the *Regents Prayer* case. The New York State Board of Regents allowed schools to open their days with a recital of a prayer. In a six-to-one opinion, the Supreme Court held the statute to be unconstitutional on the fact that the Establishment Clause was violated because the prayer was composed by government officials. Justice Black stated that:

... when the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.53

Justice Stewart filed the only dissenting opinion, which followed a pattern of dissent in bases-cited facts such as references to the Deity in the National Anthem and the Pledge of Allegiance, the National Day of Prayer, chaplains in the service and in penal institutions, and finally in the Declaration of Independence.

In the *Murray v. Curlett*, Bible reading in public schools was also found unconstitutional. Justice Clark delivered the majority opinion maintaining that the reading of the Bible and recitation of the Lord's Prayer were religious exercises prescribed as classroom
activities, and concluded it was a violation of the Establishment Clause. Justice Steward again rendered the dissenting opinion.

This brought up two points which up until that time had not been expressed.

As a matter of history, the First Amendment was adopted solely as a limitation upon the newly created national government. The events leading to its adoption strongly suggest that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national Church, but would also be unable to interfere with existing State establishments. Each State was left free to go its own way and pursue its own policy with respect to religion. I accept, too, the preposition that the 14th Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision evidently designed to leave the states free to go their own way should not have become a restriction upon their autonomy.54

He concluded with his second point:

For a compulsory state educational system so structures a child's life [so] that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality but rather as the establishment of a religion of secularism or at the least, as a government support of the beliefs of those who think that religious exercises would be conducted only in private.55

These two points practically and constitutionally
were consistent with the founding fathers' intentions. The court, as it has done to the 14th Amendment, changed the First Amendment's meaning to fit their particular bias. William Marnell, in his book *The First Amendment*, wrote:

The First Amendment meant only a fraction of that [what it means today] when it was adopted. States did have established churches then; they did pass laws to aid one religion and to show preference for one religion over others long after the adoption of the First Amendment, and these facts went unchallenged for decades. When it was adopted, the First Amendment meant precisely what it said: Congress could make no law respecting an establishment of religion or prohibiting the free exercise thereof. The states were left free to deal with the problem of religion and religious establishment as they saw fit, under provision of their constitutions.56

In 1970, the new Chief Justice Warren Burger had his first occasion to render an opinion on the Establishment Clause. The Chief Justice portrayed the relationship between church and state as one of benevolent neutrality. In *Walz v. Tax Commission*, which concerned the constitutionality of property tax exemptions given religious institutions, the Chief Justice said:

The Establishment and Free Exercise Clause of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective not to write a statute. In attempting to articulate the scope of the two Religion Clauses,
the Court's opinions reflect the limitations inherent in formulating
general principles on a case-by-case basis. The considerable internal
inconsistency in the opinions of the Court derives from what, in retrospect,
may have been too sweeping utterances on aspects of these clauses that seemed
clear in relation to the particular cases but have limited meaning as general
principles. The Court has struggled to find a neutral course between the two
Religion Clauses, both of which are cast in absolute terms, and either of which,
if expanded to a logical extreme, would tend to clash with the other.57

The Chief Justice concluded that the Court needed to adopt a more flexible balancing approach. That approach was developed in succeeding decisions of the Burger Court.

In summary, the First Amendment has undergone a similar transformation as has the Fourteenth Amendment. The First Amendment, appearing from an historical perspective, was meant to do two things. First it was meant to forbid the establishment of a National Church. Congress could not provide assistance in the establishment of any church. This had only to do with our national government and was in no way expected to hinder state governments in their legislative capacities. Secondly, in Madison's words, it was designed to:

... assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.58
Because of the transformation of the 14th Amendment, the First Amendment has become vulnerable to the Supreme Court's interpretation. It simply has to be seen historically that the Founding Fathers' wishes and opinions have not been adhered to. In the Court's quest for uniformity (to maintain complete separation of Church and State), it has violated the spirit of the First Amendment. In reviewing the Court's cases since the Hamilton case of 1934, one became aware of the directionless options of the High Court's rulings. The desire for continuity throughout its rulings have resulted in confusion.

There has also been a decreasing trust and a growing skepticism by the public. The incorporation of the First Amendment by the Fourteenth Amendment leaving the states vulnerable to the Court's rulings, and the supra-legislative activity of the Court in a political area of law, has contributed to the undermining of the public's confidence.

As Jefferson wrote in his Notes on the State of Virginia, "Truth can stand by itself." What is needed is a return by the Court to the intentions adopted by the Founding Fathers and enshrined in our Constitution.

The point of this section is to draw attention to the fact that historically the Constitution's meaning and principles have undergone a transformation and an outright
usurpation of its legitimate power and prestige, principally by a combination of legislative ambivalence and Supreme Court activism. The final section will deal with some of the results of the transformation and advance some constitutional answers to this problem.
Conclusion

It is a very evident fact that there has been, over the last 200 years, a reshaping or a transformation of our American Constitution. The founders would be greatly surprised, to say the least, at the type of document their Constitution resembles. It is now seen by a majority (i.e. William Brennan) as a "lodestar": full of organically changing words that can mean one thing one day and something else twenty years later. It can be adhered to or discarded according to the need of the times. This loss of our guarantee has occurred for at least three apparent reasons. The first is due to the loss of principle, that at the time of the founding was taken for granted: of equality and natural rights. The principle enunciated in the Declaration of Independence that says that these truths are self-evident: that all men are created equal and are endowed by their Creator with certain inalienable rights. That common knowledge held by the founders has somehow escaped some of the generations, including our own. Instead, a relativistic basis is now undergirding our constitution, that has little to do with principles and inalienable rights. The second reason for the change in our Constitution has to do with our legislative branch's inability to legislate in difficult areas. The
Fourteenth Amendments use could have been drastically altered if the legislature just after the Civil War had passed laws broadening the rights of blacks instead of allowing inequality to persist. The Fourteenth Amendment principles became an instrument of oppression and unfairness that was only remedied after decades of indifference. But to fault the legislative efforts in these areas is only to say more should have been done and could have been done in a constitutional context. The problem or fault lays by far at the feet of the judiciary. The supralegislative efforts by the court is well documented and undeniably a fact of American constitutional history. The courts use of power to change the meaning of the Fourteenth Amendment, and the use of that amendment to incorporate the rest of the Bill of Rights. The usurpation of state power, are a few of its most obvious supralegislative efforts. It has, through its misuse caused an erosion of confidence by the public. Especially in regard to some of its early civil rights decisions about desegregation. That is not to say that desegregation was not a good idea but that it was not the court's right to be the branch that legislated those decisions. These reasons seem to be preeminent in the transformation process.

Where have these influences led us? The effects of these changes do at least two major mischiefs. First,
the public confidence in its government begins to erode. The well balanced government designed by the founders becomes unbalanced. The checks and balances devised to protect the branches from one another, and ultimately to protect the citizens from the government, do not work as well as they should. For example, the non-elected judicial branch becomes the nine man tribunal that dictates policy. A non-elected, life tenured, almost completely unchecked branch, not responsive to our republican views becomes the catalyst of republican change. It finds "new" rights in our constitution, it says what the constitution really means and then presses those views on its citizens. This happens while the legislative branch is lagging behind unable or unwilling to move in difficult areas. There must be a re-balancing or realignment of our branches of government as well as a rediscovery of the principles on which it is to operate.

What needs to be done to ensure the existence of our regime? It will require a tremendous change of heart and mind to see a return to our roots. We need to reestablish the principle of equality as a cornerstone of our regime. We need a Supreme Court that will restrain itself from tampering with issues clearly legislative in nature and finally a legislative branch willing to take on its responsibility to be the catalyst in political
change. If these suggestions were followed, we would be an even more tranquil, peaceful nation.
ENDNOTES


2) Ibid., pp.7.


6) Ibid., pp. 1, 36.


8) Ibid., p. 20.


24) Ibid., p. 513.


32) Fourteenth Amendment of the American Constitution.


38) Ibid.


40) Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138 41 L. Ed. 256 (1896).

41) Ibid.


47) Ibid.

49) Ibid.
50) Ibid.
51) Ibid.
55) Ibid.
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