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Reflections on Constitutional Interpretation

Raoul Berger*

I. INTRODUCTION

Interpretation of the federal Constitution must proceed from three axioms; two were forcefully stated by Chief Justice Marshall: "[A]ll must admit, that the powers of the government are limited, and that its limits are not to be transcended."1 If the contrary be true, he declared, "then written constitutions are absurd attempts . . . to limit a power, in its own nature illimitable."2 Hence, as Richard Henry Lee stated in the Virginia Ratification Convention, "[w]hen a question arises with respect to the legality of any power, exercised or assumed," the question will be, "[i]s it enumerated in the Constitution? . . . It is otherwise arbitrary and unconstitutional."3 These were not mere philosophical abstractions but instead were a response to inescapable realities, which found expression in the third axiom, sharply articulated on behalf of the Court by Justice Brandeis:

The Constitution . . . preserves the autonomy and independence of the States; [federal supervision of their actions] is in no case permissible except as to matters . . . specifically . . . delegated to the United States. Any interference . . . except as thus permitted, is an invasion of the authority of the State[s]."4

II. THE FRAMERS’ DESIGN

The fact, often overlooked or downplayed, is that the states preceded the nation and in truth created it,5 grudgingly surren-

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* A.B., University of Cincinnati 1932; J.D., Northwestern University 1935; LL.M., Harvard University 1938. Honorary degrees from University of Cincinnati, University of Michigan, and Northwestern University. This article grew out of an address delivered before a judicial seminar under the auspices of the Liberty Fund on May 14, 1997 at Key West, Florida.

3. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 186 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter DEBATES].
5. For extended documentation, see Raoul Berger, Federalism: The Founders'
dering to the federal newcomer only so much power as national purposes required.

Let me brush in some facts. Two days before the Declaration of Independence, on July 2, 1776, Richard Henry Lee proffered a Resolution in the Continental Congress, “[t]hat the[] United Colonies are . . . free and independent States[,] . . . [t]hat a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.” On November 15, 1777, the Congress recommended the Articles of Confederation to the states. Reciting that the members acted as “Delegates of the States affixed to our Names,” Article II provided that “[e]ach state retains its sovereignty, freedom and independence except as expressly delegated to the United States. Article III provided that “[t]he said states hereby severally enter into a firm league of friendship with each other, for their common defense.” This constituted a league, not a nation.

The drafters signed the Articles of Confederation on behalf of the individual states. Similar expressions are exhibited in the Treaty of Peace of September, 1783, with Great Britain. The Constitution itself was signed on behalf of the individual states, and in The Federalist No. 39, Madison was at pains to underscore that ratification “is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. . . . It is to be the assent and ratification of the several States.” The mood was tellingly captured at the Convention by Washington: “[I]ndependent sovereignty is so ardently contended for . . . [that] the local views of each State . . . will not yield to a more enlarged scale of politicks . . . .”

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7. See id. at 111.
8. Id.
9. See id. at 116.
10. In Article I, Britain acknowledged the United States, viz. New Hampshire, Massachusetts, and so on down the roster, to be “sovereign and independent States,” and Article V provided that British subjects could freely “go to any of the thirteen United States.” Id. at 117, 119.
11. The Federalist No. 39, at 246 (James Madison) (Modern Library ed. 1937) [hereinafter The Federalist].
12. 3 Records of the Federal Convention of 1787, at 51 (Max Farrand ed., 1911) [hereinafter Records].
That was a reflection of "localist bias," attributable in no small part to the vast distances, the primeval forests, and the raging torrents that separated the inhabitants. When William Houston was sent from Georgia to the Continental Congress in 1785, he "thought of himself as leaving his 'country' to go to 'a strange land amongst Strangers.'" Madison, who adventured from Virginia to Princeton, New Jersey, said: "Of the affairs of Georgia I know as little as of those of Kamskatska." In the Convention Pierce Butler declared: "Will a man throw afloat his property & confide it to a govt. a thousand miles distant?" In South Carolina, James Lincoln declaimed that adoption of the Constitution "meant a surrender of self-government to a set of men who live one thousand miles distant from you." Local government, it was felt, would be more controllable by the people, whereas federal government was a distant newcomer, distrusted because it would remain "remote and not so immediately subject to control." As Walter Bagehot remarked, the colonists had not struck the shackles of King and Parliament only to be fettered anew by an untried newcomer. Consequently, the states grudgingly parceled out powers for the "common defense" and foreign affairs while retaining what Marshall termed "that immense mass of legislation . . . not surrendered to the general government."

Two spheres of authority emerged. The Committee of Detail Report to the Convention embraced "little more than matters of foreign relations and general commerce." Roger Sherman stated in the Convention that "[t]he objects of the Union . . . were few: 1. Defense agst. foreign danger. 2. against internal disputes & resort to force. 3. treaties with foreign nations. 4. regulation of [foreign] commerce & drawing revenues from it . . . . All other matters . . . would be much better in the hands of the States." James Wilson, second only to Madison as an

15. Id. at 15.
16. 1 Records, supra note 12, at 173.
17. 4 Debates, supra note 3, at 313.
20. Rakove, supra note 13, at 179.
21. 1 Records, supra note 12, at 133.
architect of the Constitution, later observed: "War, commerce &
revenue were the great objects of the Genl. Government."22

Variations on this theme are scattered throughout The Federal-
alist papers. The federal jurisdiction, said Madison in Federalist
No. 39, "extends to enumerated acts only, and leaves to the
States a residuary and inviolable sovereignty over all other ob-
jects."23 In Federalist No. 45 he amplified: the federal powers
"will be exercised principally on external objects, as war, peace,
negotiations and foreign commerce . . . . The powers reserved to
the several States will extend to all the objects which concern
the . . . internal order of the State."24 In Federalist No. 32, Ham-
ilton stated that "the State governments would clearly retain all
the rights of sovereignty which before they had, and which were
not by [the Constitution] exclusively delegated to the United
States."25

Justice Holmes dismissed "the tyro's question: where are you
going to draw the line?"26 It is not difficult to draw the line be-
tween importing grain and growing it.27 Wilson's test is emi-
nently practical: "Whenever an object occurs, to the direction of
which no state is competent, the management of it must, of ne-
cessity, belong to the United States . . . ."28 Thus wild geese, here
today and gone tomorrow, are in no State's jurisdiction, so it falls
to the federal government to regulate their migration.29 Simi-
larly, separate commercial treaties by the thirteen states re-
specting the importation of wheat would plainly be disadvanta-
geous, for it would enable a foreign shipper to play off one state
against another. A central treaty making authority was indis-
pensable.

Some have believed that given conflicting federal and state
provisions, the federal must prevail.30 That is true only where

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22. Id. at 413.
23. The Federalist No. 39, supra note 11, at 249 (James Madison).
24. Id. No. 45, at 303 (James Madison).
25. Id. No. 32, at 194 (Alexander Hamilton).
26. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (May 8, 1921), irz
28. Alpheus Thomas Mason, The States Rights Debate: Antifederalism and
30. See The Federalist No. 32, supra note 11, at 194 (Alexander Hamilton); see
also Lino Graglia, U.S. v. Lopez: Judicial Review Under the Commerce Clause, 74 Tex.
L. Rev. 719, 723 (1996) ("Two entities cannot exercise independent power over one
people because separate powers will come into conflict, and the conflicts can be
the federal government is given exclusive jurisdiction in the premises. It cannot be unduly emphasized that, as Madison stated in No. 39, the states are "no more subject, within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere."31 In the New York Ratification Convention, Hamilton explained that "[t]he laws of the United States are supreme, as to all their proper constitutional objects: the laws of the states are supreme in the same way."32 These considerations were aptly summarized by James Bryce: "The federal government clearly was sovereign only for certain purposes, i.e. only so far as it had received specific powers from the Constitution. These powers did not, and in a strictly legal construction do not now, abrogate the supremacy of the states" in their reserved sphere.33 Madison considered that "[t]he end of constitutional interpretation was to preserve the equilibrium among institutions that the Constitution intended to establish."34 And he emphasized: "It is of great importance as well as of indispensable obligation, that the constitutional boundary between [the Union and the states] should be impartially maintained."35 In our own time, Justice Brandeis, speaking for the Court, summed up this principle when he stated that the Constitution "preserves the autonomy and independence of the States"; federal supervision of state action "is in no case permissible except as to matters . . . specifically . . . delegated to the United States. Any interference . . . except as thus permitted, is an invasion of the authority of the State . . . ."36

Given the Founders' great solicitude to preserve the states' autonomy, Herbert Wechsler justly concluded that there is "a burden of persuasion on those favoring national intervention."37 Today it is fashionable in academic circles to dismiss

peaceably resolved only if one of the entities is legally superior to the other. Conflicts will tend to be resolved in favor of the superior political entity . . . . In the United States, of course, the supreme political entity, as the Constitution explicitly provides, is the central government.")

31. THE FEDERALIST NO. 39, supra note 11, at 249 (James Madison).
32. 2 DEBATES, supra note 3, at 355.
34. RAKOVE, supra note 13, at 345.
35. Letter from James Madison to Spencer Roane (May 6, 1821), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 217 (J.B. Lippincott & Co. 1865).
federalism, but as Herbert Wechsler observed, "[f]ederalism was the means and price of formation of the Union;" the Founders "preserved the states as separate sources of authority and organs of administration—a point on which they hardly had a choice."39

III. THE JUDICIAL ROLE

When Chief Justice Marshall stated that "[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law,"40 he echoed Francis Bacon’s admonition two hundred years earlier that making law is not for judges,41 reiterated by Justice James Wilson in the early days of the Republic and restated down the years.42 The point was pungently made by Chief Justice Hutchinson of the Massachusetts court: "[T]he Judge should never be the legislator because then the Will of the Judge would be the Law: and this tends to a State of slavery."43 This reflected the ethos of the people.

Jefferson Powell recounts that the English Puritans’ suspicion of judges traveled to America. They feared that judges would “undermine the legislative prerogatives of the people’s representatives by engaging in the corruption process of interpreting legislative texts”—that the “advantages of a known and written law would be lost if the law’s meaning could be twisted by judicial construction.”44 They opposed the “judges’ imposition

38. Academe has been encouraged by the Court. "[T]hroughout our history," wrote Philip Kurland, "the Supreme Court has persistently and consistently acted as a centripetal force favoring, at almost every chance, the national authority over that of the states. It made substantial contributions to the ultimate demise of federalism." PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 156-57 (1978).
39. Wechsler, supra note 37, at 543. Wechsler echoed Walter Bagehot: "Americans altogether retained what they could not help, the sovereignty of the separate States . . . . Doubtless the framers of the Constitution had no choice in the matter.” NORMAN ST. JOHN STEVAS, WALTER BAGEHOT 358-59 (1950).
41. See 1 SELECTED WRITINGS OF FRANCIS BACON 138 (Modern Library ed. 1937).
of their personal views." This reads like a modern critique of government by judiciary. As late as 1791, Justice James Wilson called on Americans to discard their "aversion and distrust" of judges, mirroring their "profound fear" of judicial discretion. Small wonder that Hamilton was constrained to assure the Ratiyers that of the three branches, the judiciary was "next to nothing."

Patently, the Founders did not confide the task of revising the Constitution to the Justices, as is attested by Article V, which reserves the right to amend the Constitution to the people themselves. Defending McCulloch v. Maryland, Chief Justice Marshall wrote that the judicial power does not confer "a right to change [the] instrument." Justice Holmes likewise declared that it is not the function of judges to "renovate the law. That is not their province."

That I am not flailing strawmen is demonstrated by Jack Rakove, whose brethren extravagantly extol his merits. He calls upon us "to explain why morally sustainable claims of equality should be held captive to the extraordinary obstacles of Article V" rather than "to rail against the evils of politically unaccountable judges enlarging constitutional rights beyond the ideas and purposes of their original adopters." So, under Rakove's view, judges, not the people, are to change the Constitution. However, the logic of limited grants, whose limits "are

45. Id. at 892.
46. 1 Wilson, supra note 42, at 292-93.
48. The Federalist No. 78, supra note 11, at 504 (Alexander Hamilton).
49. See McPherson v. Blacker, 146 U.S. 1, 36 (1892) ("Still less can we recognize the doctrine that because the constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may therefore be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made."); see also Hawke v. Smith, 253 U.S. 221, 227 (1920).
52. Oliver Wendell Holmes, Collected Legal Papers 239 (1920).
54. Rakove, supra note 13, at 367-68.
not to be passed by those intended to be restrained,” led Justice Story to declare that the Constitution “is to have a fixed, uniform, permanent construction;” it should not be “dependent upon the passions or parties of particular times, but the same yesterday, to-day and for ever.” Unless the Constitution is “fixed,” its limits are writ on water.

Yet another consideration undergirds this view: adoption of the Constitution was vigorously opposed by Anti-Federalists, and the Federalists prevailed on the basis of assurances that the dread of illimitable power was groundless. As Story wrote in another context: “If the Constitution was ratified under the belief, sedulously propagated . . . that such a protection was afforded, would it not now be a fraud upon the whole people to give a different construction to its powers.” This mirrors the doctrine that one who induces another to act to his detriment upon the basis of representations is estopped to repudiate them. Story’s successors stand no better.

A. Original Meaning

Resort to original meaning in the process of interpretation—the canon that a document is to be construed to accomplish the drafter’s intention—is currently under fire. It is urged that the Founders are dead and cannot rule us from their graves, by which reasoning the constitutional text itself goes down the drain. The issue is not rigor mortis, but who shall make the changes—judges or the people, an issue settled by Article V.

Marshall declared that he could cite from the common law “the most complete evidence that the intention is the most sacred rule of interpretation.” Let us defer consideration of the long row of precedents and examine the matter in the light of common sense, for, wrote Hamilton, “the rules of legal interpre-

55. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 426 (1st ed. 1833); see also Hawke v. Smith, 253 U.S. 221, 227 (1910); South Carolina v. United States, 199 U.S. 437, 448-49 (1905); 1 THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 123-24 (8th ed. 1927).
56. See 4 DEBATES, supra note 3, at 446.
57. 2 STORY, supra note 55, § 1084.
60. MARSHALL’S DEFENSE, supra note 51, at 167.
tation are rules of common sense."61 Who better knows what he means than the writer himself? Certainly not the reader, particularly two centuries removed. That was the view of three of England's greatest thinkers. Thus John Locke stated,

When a Man speaks to another, it is ... [to] make known his Ideas to the Hearer.... That then which Words are the Marks of, are the Ideas of the Speaker....

....

...[T]his [then] is certain, their signification, in his use of them, is limited to his Ideas, and they can be Signs of nothing else.62

Thomas Hobbes was of the same opinion: Judges are to be guided by "the final causes, for which the Law was made; the knowledge of which finall causes is in the Legislator."63 And it was epitomized by John Selden, the preeminent seventeenth century scholar: "[A] Man's Writing has but one true Sense, which is that which the Author meant when he writ it."64

B. English Precedents

Judicial espousal of this tenet reaches back to the thirteenth century. Chief Justice Frowicke, a fifteenth century sage, recounted that in 1285 the judges asked the "statute makers whether a warrantie with assettz should be a barre," and "they answered that it shoulde. And so in our dayes, have those that were the penners and devisors of statutes bene the grettest lichte for expocision of statutes."65 Lord Chancellor Hatton said, "when the intent is proved, that must be followed ... but whatsoever there is a departure from the words to the intent, that must be well proved that there is such a meaning."66 Coke stated

61. THE FEDERALIST NO. 83, supra note 11, at 359 (Alexander Hamilton).
64. TABLE TALK: BEING THE DISCOURSES OF JOHN SELDEN, ESQ. 10 (1696).
65. A DISCOURSE UPON THE EXPOCISION & UNDERSTANDING OF STATUTES 151-52 (Samuel Thorne ed., 1942). An English historian concluded that "[t]he rule of reference to the intention of the legislators ... was certainly established by the second half of the fifteenth century." S.B. CHIRMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY 293 (1936) (footnote omitted).
66. CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES, OR ACTS OF
in the *Magdalen College Case* that "in acts of Parliament which are to be construed according to the intent and meaning of the makers of them, the original intent is to be observed."  

While critics of originalism were vainly trying to come up with an alternative, the House of Lords in the 1992 case of *Pepper v. Hart* justified originalism in unequivocal terms. Lord Browne-Wilkinson, in whose opinion all but one Law Lord concurred, asked, why "should the courts blind themselves to a clear indication of what Parliament intended in using those words?"  
And he answered, "[w]e are much more likely to find the intention of Parliament [in the debates] than anywhere else," adding there is a "basic need for the courts to give effect to the words enacted by Parliament in the sense that they were intended by Parliament to bear."

Originalism was not a scholastic exercise rooted in abstraction; it served as a brake on judicial revision of legislative enactments. Such enactments are produced in open debate and by compromises of conflicting interests; they are presumed to represent the will of the people as we have noted in the Puritan tenets. Cass Sunstein justly regards the "impulse toward originalism in constitutional law . . . as a way of limiting judicial discretion and increasing the potential effect of moral and political deliberation in democratic arenas." This attachment to representative government was expressed in the Convention by Elbridge Gerry, when it was proposed to include judges in a Council of Revision. He refused to "make them judges of the policy of public measures," to set them up as "the guardians of the Rights of the people. He relied for his part on the Represen-
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69. Id. at 635.
70. Id.
tatives of the people as the guardians." In our own time, Justice Brandeis referred to the conviction of the American people, that they "must look to representative assemblies for the protection of their liberties."

C. American Adoption of English Practice

Chief Justice Marshall remarked that he could cite from the common law "the most complete evidence that the intention is the most sacred rule of interpretation." Came the Jeffersonian "revolution of 1800" and the Republican victors viewed it as "the people's endorsement" of original intention. In his Inaugural Address, President Jefferson pledged to administer the Constitution "according to the safe and honest meaning contemplated by the plain understanding of the people at the time of its adoption—a meaning to be found in the explanations of those who advocated it." In 1838 the Supreme Court declared that construction "must necessarily depend on the words of the Constitution; the meaning and intention of the conventions which framed and proposed it for adoption and ratification to the conventions ... in the several states ... to which the Court has always resorted in construing the Constitution." "By the outbreak of the Civil War," observes Powell, no friend to original intention, "intentionalism in the modern sense reigned supreme . . . ."

IV. THE FOURTEENTH AMENDMENT

The framers of the Fourteenth Amendment were cognizant of this practice. Senator Charles Sumner, leading proponent of broad rights for the freedmen, said that if the meaning of the Constitution "in any place is open to doubt, or if words are used which seem to have no fixed signification[, e.g.,] equal protection[, we cannot err if we turn to the framers." This was also the

73. 1 RECORDS, supra note 12, at 97-98.
75. MARSHALL'S DEFENSE, supra note 51, at 167.
76. Powell, supra note 44, at 934.
77. 4 DEBATES, supra note 3, at 446 (emphasis added).
79. Powell, supra note 44, at 947.
80. CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866).
approach of members who sat with him in the 39th Congress. In 1871, John Farnsworth of Illinois said of the Amendment, "[l]et us see what was understood to be its meaning at the time of its adoption by Congress."81 James Garfield rejected an interpretation that went "far beyond the intent and meaning of those who amended the Constitution."82 Such statements found authoritative expression in 1872 in a unanimous Senate Judiciary Committee Report, signed by senators who had voted for the Thirteenth, Fourteenth, and Fifteenth Amendments:

In construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended to be accomplished by those who framed it and the people who adopted it....

....

A construction which should give the phrase ... a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution in any other particular. This is the rule of interpretation adopted by all commentators on the Constitution, and in all judicial expositions of that instrument.83

For Eric Foner of Columbia University, the question is "whether the Fourteenth Amendment was a minor adjustment to the Constitution or a change in its basic structure"; he answers that it effected a revolution.84 To the contrary, its aim was limited. The immediate antecedent, the Civil Rights Act of 1866, was triggered by the Black Codes whereby the South sought to return the Freedmen to servitude.85 The Act was designed to save them from oppression and to enable them to exist. Faithfully describing the Bill's provisions, Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, explained that "[t]he great fundamental rights set forth in this Bill [are] the right to

81. THE RECONSTRUCTION AMENDMENTS' DEBATES 506 (Alfred Avins, ed. 1967).
82. id. at 528.
83. id. at 571-72.
acquire property, the right to come and go at pleasure, the right to enforce rights in the courts, [and the right] to make contracts.” In Georgia v. Rachel, the Supreme Court stated that Congress intended by the Act “to protect a limited category of rights.”

A prime reason for the Fourteenth Amendment was to embody the Act and thereby save it from repeal by a subsequent Congress. Without dissent, the Act and Amendment were regarded by the framers as “identical.” George Latham, for example, stated that the Act “covers exactly the same ground as this amendment,” as did Justice Bradley, a contemporary of the Amendment. Historians Charles Fairman, Horace Flack, and neoabolitionist Howard Jay Graham concur that nearly all agreed the Amendment was but an embodiment of the Act. Act and Amendment proceeded on parallel tracks, and it has yet to be explained why the Amendment’s framers suddenly determined to greatly expand the coverage of the Act by the Amendment, particularly when the North was “horrified” by the very notion of equality and repeatedly rejected proposals to bar all discrimination. “[T]he real trouble,” as Negro sympathizer George Julian acknowledged, “is that we hate the Negro.” Another obstacle was the pervasive attachment to state autonomy.

A telling incident speaks against Foner’s “revolution.” Initially the Civil Rights Bill referred to “civil rights and immunities.” John Bingham, draftsman of the Amendment, vehemently

86. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).
88. Id. at 791.
89. CONG. GLOBE, 39th Cong., 1st Sess. 2883 (1866).
91. See HORACE FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 68, 81 (1908); HOWARD JAY GRAHAM, EVERYMAN’S CONSTITUTION, 291 n.73 (1968); Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding, 2 Stan. L. Rev. 5, 44 (1949-50).
93. See GOVERNMENT BY JUDICIARY, supra note 85, at 163.
94. CONG. GLOBE, 39th Cong., 1st Sess. 257 (1866); see also GOVERNMENT BY JUDICIARY, supra note 85, at 13.
95. See id. at 60-64. Alfred Kelly concluded that “the commitment to traditional state-federal relations meant that the radical Negro reform program could be only a very limited one.” Alfred H. Kelly, Comment on Harold M. Hyman’s Paper in New Frontiers of the American Reconstruction 40, 45 (Harold M. Hyman ed., 1966); see also id. at 301, 304.
protested that “civil rights includes every right” and would enable Congress to strike down “every State Constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen.”996 Thereupon “civil rights” was deleted and replaced by “privileges and immunities,” words of art of limited compass.97 Why did Bingham embrace in the Amendment the very breadth he had excoriated in the Civil Rights Bill?

The limited scope of the Fourteenth Amendment is further confirmed by the remarks of Thaddeus Stevens and Senator William Fessenden, the co-chairmen of the Joint Committee on Reconstruction. Stevens had proposed that “[a]ll laws, state or national, shall operate impartially and equally on all persons without regard to race or color.”998 Like similar proposals to bar all discrimination, it fell on stony soil. Subsequently, Stevens lamented that he had longed to remodel “all our institutions as to have freed them from every vestige of . . . inequality of rights . . . [so] that no distinction would be tolerated . . . . This bright dream has vanished.”999 Similarly, Fessenden recognized that “we cannot put into the Constitution, owing to existing prejudices and existing institutions an entire exclusion of all class distinctions.”100 Among those was the exclusion of blacks from suffrage, the “Great Guarantee; and the only Sufficient Guarantee,” said Senator Charles Sumner, without which, Senator Samuel Pomeroy stated, the negro “has no security.”101 Nevertheless, Senator Jacob Howard called attention to the opinion of the Joint Committee that “three fourths of the States . . . could not

96. Cong. Globe, 39th Cong., 1st Sess. 1291 (1866) (emphasis added). Attempts to bar all discrimination were repeatedly rejected. See Government by Judiciary, supra note 85, at 163-64.

97. After reading from the cases, Senator Trumbull, sponsor of the Civil Rights Bill, said, “this being the construction as settled by judicial decisions.” The Reconstruction Amendments’ Debates, supra note 81, at 122. Judge William Lawrence, a member of the 39th Congress, noted that “the courts have by construction limited the words ‘all privileges’ to mean only ‘some privileges.’” Id. at 207. In Yates v. United States, 354 U.S. 298, 319 (1957), the Court stated, “we should not assume that Congress . . . used . . . words . . . in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation.” See also infra text accompanying notes 123, 130.

98. Benjamin B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction 46 (1914).


100. Id. at 705.

101. Id. at 685, 1182.
be induced to... grant the right of suffrage, even in any degree or under any restriction, to the colored race."

Against such facts, the view that the Fourteenth Amendment worked a "revolution" in our system of government resembles the dream of an opium eater. Certainly the "revolution" cannot be rested on the Amendment's provisions for due process of law, privileges or immunities, and equal protection of the laws.

A. "Due Process of Law"

Before the Court began to manipulate due process for the purpose of striking down ameliorative legislation, it was indisputably confined to judicial procedure. So it was understood by Hamilton on the eve of the convention: "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature." In current terms, due pro-

102. Id. at 2766.
103. In the words of Justice Samuel Miller in The Slaughter-House Cases, 33 U.S. (16 Wall.) 36, 82 (1872): "[O]ur statesmen have still believed that the existence of the States with powers for domestic and local government... was essential..." In Adamson v. California, 332 U.S. 46, 53 (1947), the Court approved of Slaughter-House, saying: "It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship."
104. The Court itself referred to "our abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise." Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) (citation omitted).

Gordon Wood regards Hamilton's statement as "an astonishing and novel twist," and cites Edward Corwin to the effect that "law of the land" did not refer exclusively to judicial proceedings, but simply to a law the people adopted "by the intervention of their own legislature." Gordon S. Wood, Comment, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 54, 57 (1997). Hamilton did not define "law of the land" but "due process." Corwin himself stated:

[No one at the time of the framing and adoption of the Constitution had any idea that this clause [in the Fifth Amendment] did more than consecrate a method of procedure against accused persons, and the modern doctrine of due process of law... could never have been laid down except in defiance of history.


Of course, "law of the land" included "laws enacted by Parliament," but it does not follow that they had to be enacted in compliance with or tested by the judicial procedures that governed the trial of an accused. What the barons complained of at Runnymede was a seizure of their persons "without any process whatsoever," Charles
cess was *procedural* only; it never comprehended a judicial power to govern the *substance* of legislation. Justly did Edward Corwin conclude:

[N]o one at the time of the framing and adoption of the Constitution had any idea that this clause [in the Fifth Amendment] did more than consecrate a method of procedure against accused persons, and the modern doctrine of due process of law . . . could never have been laid down except in defiance of history.\(^{106}\)

Due process did not change color when embodied in the Fourteenth Amendment. Judge William Lawrence, a respected member of the 39th Congress, quoted the Hamilton procedural definition in 1871.\(^{107}\) His fellow member, James Garfield, said that it meant “an impartial trial according to the laws of the land.”\(^{108}\) After noting the “fixed” procedural character of due process, Charles Curtis, who rejoiced in judicial adaptation of the Constitution, asked: “But who made it a large generality? Not [the framers]. We [the Court,] did.”\(^{109}\) This violated the age-old common-law rule, reiterated by Chief Justice Marshall, himself a participant in the Virginia Ratification Convention: If a word “was so understood . . . when the constitution was framed . . .

McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27, 43 (1914), without convicting them of violating some law or custom. Paul Vinogradoff observed: “The struggle was waged to secure trial in properly authorized courts in accordance with established law.” Paul Vinogradoff, *Magna Carta, in MAGNA CARTA, COMMEMORATION ESSAYS* at 78, 85 (H. Malden ed., 1917). Fourteenth century statutes spelled out that “law of the land” required a defendant be afforded an opportunity to answer by service of process that was due, i.e. the customary process. Berger, *supra*, at 2. Thus “law of the land” had two components: a standing law or custom that governed particular conduct, and a trial according to customary procedure whether that law had been violated. Due process became identified with the second component, as Hamilton stated.

In England, the provisions of Magna Carta, wrote Harold Hazeltine, “were originally intended, and have since been regarded, as a limitation upon the executive and judiciary, not upon the legislature.” Harold Hazeltine, *The Influence of Magna Carta on American Constitutional Development, in MAGNA CARTA, COMMEMORATION ESSAYS, supra*, at 180, 222. After my study of early American cases, I concluded that the pre-1787 materials do not regard due process as authority to overthrow legislations, i.e., to give it a non-procedural connotation. Berger, *supra*, at 13-22.


107. See CONG. GLOBE, 41st Cong., 3d Sess. 1245 (1871).


the convention must have used the word in that sense." It was reaffirmed by Justice Holmes: An amendment should be read in "a sense most obvious to the common understanding at the time of its adoption."

B. "Equal Protection of the Laws"

"Equal Protection" merely restated in positive terms the Civil Rights Act's negative that "there shall be no discrimination" with respect to the enumerated categories. Activist Paul Brest regards "equal protection as 'indetermina[te].'" His fellow activist, William Nelson, concluded that it was "a vague, perhaps even an empty idea in mid-nineteenth-century America . . . Equality could mean almost anything," a view shared by Wallace Mendelson. That is precisely the situation in which resort must be had to the purpose of the framers. They did not view "equal protection" as broadly inclusive.

Thaddeus Stevens, the Radical leader, "had a quite limited conception of the equal protection clause." Black suffrage undeniably was excluded, and proposals to ban all discrimination were repeatedly rejected. The association of equal protection with the limited goals of the Civil Rights Act is readily demon-

112. For the text of the Civil Rights Bill, see GOVERNMENT BY JUDICIARY, supra note 85, at 24.
116. Senator Charles Sumner, a Radical framer, said: "Every Constitution embodies the principles of its framers. It is a transcript of their minds. If its meaning in any place is open to doubt . . . we cannot err if we turn to its framers." CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866).
117. Earl A. Maltz, The Concept of Equal Protection of the Laws: A Historical Inquiry, 22 SAN DIEGO L. REV. 499, 525 (1985). Maltz found that among the pre-war abolitionists—the avant garde—the right to protection (or equality of protection) was not itself commonly viewed as implying a generalized right to equal treatment. See id. at 517, 510.
118. See supra text accompanying notes 100-01.
119. See GOVERNMENT BY JUDICIARY, supra note 85, at 163.
strable. Samuel Shellabarger stated that it was enacted to secure "equality of protection in those enumerated ... rights,"120 and this was reiterated by Leonard Myers in addressing the Amendment. There was need, Myers said, "to provide equal protection to life, liberty, and property, equal right to sue ... to inherit, make contracts, and give testimony."121 Here is evidence that "equal protection" was identified with the "limited categories" of the Act. Is crystal gazing into constitutional language superior to the framers' own explanations of their purpose?

C. "Privileges or Immunities"

The words "privileges or immunities" were virtually aborted by the Slaughter-House Cases,122 and the Court has declined to resuscitate them.123 Some regard them as mysterious.124 History dispels the mystery. The words "privileges or immunities" are first met in Article IV of the Articles of Confederation, which specifies "all the privileges of trade and commerce."125 For the Founders, the enumerated "privileges of trade or commerce" qualified the general "privileges and immunities."126 The latter words were picked up by Article IV of the Constitution, and Chief Justice White later stated that they were intended to perpetuate the limitations of the earlier Articles of Confederation.127 White also repeated Justice Miller's statement in Slaughter-House that "[t]here can be but little question that ... the privileges and immunities intended are the same in each."128 From the beginning, the Maryland and Massachusetts courts construed Article IV in terms of trade and commerce.129

120. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866).
121. The Reconstruction Amendments' Debates, supra note 81, at 193 (emphasis added).
122. 83 U.S. (16 Wall.) 36 (1872).
123. In Adamson v. California, 332 U.S. 46, 53 (1947), the Court approved the Slaughter-House Cases saying: "It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship," which were negligible.
124. See ROBERT H. BORK, THE TEMPTING OF AMERICA 37 ("[I]t is intended meaning remains largely unknown.").
125. DOCUMENTS OF AMERICAN HISTORY, supra note 6, at 111.
126. See The Federalist No. 41, supra note 11, at 269 (James Madison) ("For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power?").
128. Id. at 296.
129. See Campbell v. Morris, 3 H. & McH. 535, 554 (Md. 1797); Abbot v. Bayley,
In 1866, the Civil Rights Act employed the terms "civil rights and immunities."\textsuperscript{130} Senator Trumbull, sponsor of the Act, explained that "[t]he great fundamental rights set forth . . . [are] the right to acquire property, the right to come and go at pleasure, the right to enforce rights in the courts, to make contract, and to inherit and dispose of property."\textsuperscript{131} John Bingham, draftsman of the Amendment, stated again and again that he relied on Article IV; and on January 20, 1871, he submitted a Report of the House Committee on the Judiciary reciting that the privileges or immunities clause of the Fourteenth Amendment "does not, in the opinion of the committee, refer to privileges and immunities . . . other than those privileges and immunities embraced in the original text of the Constitution, article IV, section 2. The fourteenth amendment, it is believed, did not add to the privileges or immunities before mentioned . . . ."\textsuperscript{132} The Supreme Court likewise declared that the terms did not add to the privileges and immunities provided by Article IV.\textsuperscript{133} Manifestly, "privileges or immunities" was not meant to effect a "revolution" in our constitutional structure. Still less were the courts meant to be the instruments of that "revolution."

V. CONCLUSION

Early on, Hamilton stated in \textit{The Federalist} No. 78 that "[t]o avoid arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."\textsuperscript{134} Not long after, Chancellor Kent emphasized that without the common law "the courts would be left with a dangerous discretion to roam at large in the trackless field of their imagination."\textsuperscript{135} The framers of the Fourteenth Amendment did not enlarge judicial latitude. The Court was then at its nadir as a result of the hated \textit{Dred Scott} decision.\textsuperscript{136} "Bingham, . . . Stevens and the others were among the severest critics of the Supreme Court and judicial review . . . [and] viewed [it] with a profound

\textsuperscript{23} Mass. (6 Pick.) 89, 91 (1827).
\textsuperscript{130} \textit{The Reconstruction Amendments' Debates}, supra note 81, at 121.
\textsuperscript{131} \textit{Id.} at 122.
\textsuperscript{132} \textit{Id.} at 466.
\textsuperscript{133} \textit{See} Maxwell v. Dow, 176 U.S. 581, 596 (1900).
\textsuperscript{134} \textit{The Federalist} No. 78, supra note 11, at 504, 510 (Alexander Hamilton).
\textsuperscript{135} 1 JAMES KENT, \textit{Commentaries on American Law} 341 (14th ed. 1896).
\textsuperscript{136} \textit{See} \textit{Government by Judiciary}, supra note 85, at 222.
and ever growing mistrust ...."137 Hence, enforcement of the Amendment was entrusted by Section 5 to Congress, not the Court.138 Finally, I commend Judge Frank Easterbrook's summation: "Constitutional interpretation ... is a process of holding an actual government within certain bounds."139

137. GRAHAM, supra note 91, at 447-48. Bingham complained that the Court had "dared to descend from its high place in the discussion and decision of purely judicial questions to the settlement of political questions which it has no more right to decide for the American people than has the Court of St. Petersburg." 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 462 (1971).

138. See Ex parte Virginia, 100 U.S. 339 (1879).