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Majorities May Limit the People's Liberties Only When Authorized To Do So by the Constitution†

BERNARD H. SIEGAN*

This nation has had two centuries in which to contemplate and develop rules of constitutional interpretation, and this opportunity has not been ignored. Of the many theories available to aid Supreme Court Justices in construing the fundamental law, most relate to the role of original understanding. At present, the major dispute is between those who believe that the Constitution should be construed in accordance with original textual meaning, and those willing to depart from this meaning to reach what the interpreter believes will be a result more in keeping with modern society.

I agree with Judge Robert Bork that original textual meaning must be observed, for this concern is, in my view, a basic precept of a society of laws. The existence of a principled legal system requires a societal commitment to enforce the meanings and intentions of those who author laws and legal documents.¹

My difference with Bork lies in interpreting the meaning of the constitutional text.² We disagree about a matter of highest importance: What powers do the federal and state legislatures have to limit individual liberties? Bork represents the majoritarian position that “[t]he only thing majorities may not do is invade the liberties the Constitution specifies.”³ This is opposite to the individualist position that majorities may invade the people’s liberties only when specifically or implicitly authorized by the Constitution. This article fo-

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1. B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 7-21 (1980).

2. See R. BORK, *THE TEMPTING OF AMERICA* (1990).

3. *Id.* at 147.

cuses on the difference between these two views, and supports the individualist position. My inquiry is divided into five parts: First, the original Constitution; second, the Bill of Rights; third, section one of the fourteenth amendment; fourth, the due process clauses; and fifth, judicial responsibility.

When courts interpret laws and legal documents, they usually seek to determine the meaning of the text as written. There being no provision in the document or common law rule to the contrary, the same undertaking is appropriate for construing the United States Constitution. Accordingly, applying traditional interpretive techniques, an exploration of constitutional meaning should begin with a reading of the text. On their face, the documents of concern in this article, either together or separately, do not reveal the extent of the federal or state powers to limit liberties. A more sophisticated reading of them is required, taking into consideration extrinsic matters that explain the text, such as its history and societal context. For the problem at hand, I do not believe an inquiry into these extrinsic sources will settle it, although this will greatly help in its ultimate resolution.

The next step in exploring constitutional meaning is to discern the meanings and intentions of the Framers as expressed while the document was written. Explanations that the Framers presented after the final drafting are useful, but not always persuasive, since the Framers may have been influenced by subsequent events. We may also be able to comprehend meaning by considering extrinsic information bearing on the Framers' meaning, such as their philosophical inclinations and the authorities on whom they relied. Ratifying debates, legal decisions, and media stories and comments may also be informative.

In the following discussion, I shall attempt to utilize the sources of information as described above, but not always in the order described.

I. THE ORIGINAL CONSTITUTION

A. *Text*

In the ratification debates, the Antifederalists—proponents were labeled “Federalists,” and opponents “Antifederalists”—charged that the Constitution created a strong, national government that seriously jeopardized the sovereignty of the states and the liberty of the people. They contended that in relation to the people's liberties, voting majorities were decisive except when the Constitution specifically protected freedom. Since few liberties were safeguarded, the Constitution created a frighteningly powerful national state. The Antifederalists were correct in their count of liberties: a small number were secured. The federal government was limited in power to

suspend the writ of habeas corpus,⁴ to levy taxes,⁵ to pass bills of attainder or ex post facto laws;⁶ jury trials were required in all criminal matters, usually to be held within the state where committed;⁷ treason was defined and its punishment confined;⁸ and no religious test was required as a qualification for any office under the United States government.⁹ No other personal guarantees were provided.

However, the absence of personal protections is not a decisive factor in determining the authority of the proposed government. According to James Madison, the Constitution would never have been ratified if the people believed that all unstated liberties were totally under the control of the federal government.¹⁰ In the ratification debates, the Federalists denied such assertions and, as the subsequent discussion will show, were correct in this interpretation. According to them, the proposed national government was one of limited and enumerated powers; it possessed only those powers specifically vested in it. Theophilus Parsons of Massachusetts, a leading Federalist who was later to become Chief Justice of Massachusetts, asserted that the Antifederalist fears of a powerful national government were groundless since "[n]o power . . . was given to Congress to infringe on any one of the natural rights of the people by this Constitution; and, should they attempt it without constitutional authority, the act would be a nullity and could not be enforced."¹¹ Madison agreed: "every power not granted thereby remains with the people, and at their will."¹² James Wilson, an influential member of the Constitutional Convention and later a Supreme Court Justice, explained that it was not necessary to be more definitive:

[E]very thing which is not given, is reserved . . . [I]t would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence.¹³

4. U.S. CONST. art. I, § 9.

5. *Id.* art. I, § 8.

6. *Id.* art. I, § 9.

7. *Id.* art. III, § 2.

8. *Id.* art. III, § 3.

9. *Id.* art. VI.

10. See 3 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 435 (rev. ed. 1937) (letter from James Madison to Spencer Roane, Sept. 2, 1819).

11. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 538 (1969).

12. 3 *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 620 (J. Elliot ed. 1888) [hereinafter *DEBATES*].

13. Address by James Wilson to a meeting of the citizens of Philadelphia (1787), reprinted in 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 529

The Federalists contended that the national government was so limited in power that a bill of rights was unnecessary; moreover, an enumeration of specific rights might be harmful because first, it would imply the existence of power where there was none, and second, it might not list all rights that were protected, to the detriment of those omitted. In No. 84 of *The Federalist Papers*, Alexander Hamilton argued against any need for including a bill of rights in the constitution. He asserted that the proposed document was intended to regulate not personal and private concerns, but rather, the nation's general political interests. "[T]he people surrender nothing, and as they retain every thing, they have no need of particular reservations." Therefore, a bill of rights was superfluous. Such a declaration might even be dangerous, Hamilton thought, because it would contain various exceptions of powers that were not conferred, and to this extent would furnish a "colorable pretext" for claiming more than was granted—possibly by those disposed to usurpation. "For why declare that things shall not be done which there is no power to do?"¹⁴

Any notion that the Framers sought to establish an authoritarian government is false. The people that authored the Declaration of Independence were not about to substitute one despotism for another. Their concerns were otherwise. The search for a way to control and restrict the powers of elected representatives dominated the politics of the Confederation period.¹⁵

The ratification debates reveal that the protection of the individual from government was then a predominant political concern. The idea was widespread that government was by its nature hostile to human liberty and happiness, and was especially susceptible to corruption and despotism. John Locke's position was widely held, that the state is a necessary evil to which only powers essential to the common good should be granted.¹⁶ Thus, the political environment in the states in the late eighteenth century supported the Federalist interpretation of the Constitution.

According to the Federalist view, the establishment of the constitutional government did not affect the fundamental or natural rights of the governed unless such an outcome was expressly provided for within the Constitution itself. The Constitution did not create those

(1971).

14. THE FEDERALIST No. 84, at 513 (A. Hamilton) (Mentor 1961).

15. G. WOOD, *supra* note 11, at 376. According to Professor Storing, there was unity in belief among the Federalists and Antifederalists on at least one critical point: "[t]he purpose of government is the regulation and thereby the protection of individual rights and that the best instrument for this purpose is some form of limited, republican government." H. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 5 (1981).

16. R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 7-31 (1985); B. SIEGAN, *supra* note 1, at 34-36.

rights, and therefore, it was not a source to which courts could turn for guidance about their breadth and character, except insofar as the document restrained and modified them. Pursuant to the position taken by the Federalists, the judiciary, as the interpreter of the Constitution, would be obliged to enforce liberties of the people by annulling laws that violated them.

In *Federalist No. 78*, Hamilton asserted that the reservations of rights would amount to nothing if the Supreme Court could not declare void those acts contrary to the Constitution.¹⁷ Since few liberties were specified or defined, how would the courts know which liberties to protect, and to what extent? The answer is that the people possessed rights under the common law which the Supreme Court could invoke as required.

The common law, then and now, in England and America, consists of judge-made law, which often protects individual liberties. When they arrived in America, the English colonists applied the only law they knew: the law of England with its emphasis on the common law. According to James Otis, the well-known political leader from Massachusetts, writing in 1764, the common law "is received and practiced upon [in Massachusetts Bay], and in the rest of the colonies; and all antient and modern acts of parliament that can be considered as part of, or in amendment of the common law."¹⁸ Although by then it vigorously condemned the English abuse of power, in 1774, the First Continental Congress declared that the English colonies were entitled to the protections of the common law of England.¹⁹

In the revolutionary period, lawyers and political and intellectual leaders frequently supported their arguments about personal rights by citing the commentaries of Lord Edward Coke (1552-1634) and Sir William Blackstone (1723-1780), the leading interpreters of the common law.²⁰ For decades, American lawyers studied Coke and Blackstone as their preparation for legal practice. Professor Boorstin advises us that Blackstone's *Commentaries* was

the first important and the most influential systematic statement of the principles of the common law. For generations of English lawyers, it has

17. THE FEDERALIST PAPERS NO. 78, at 466 (A. Hamilton) (Mentor 1961).

18. I W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 584 (1953).

19. Declarations and Resolves of the First Continental Congress, 14 Oct. 1774, reprinted in THE MAKING OF THE AMERICAN REPUBLIC: THE GREAT DOCUMENTS 1774-1789, at 1-5 (C. Tansill ed. 1972).

20. B. SIEGAN, *supra* note 1, at 8, 34-37, 88-89.

been both the foremost coherent statement of the subject of their study, and the citadel of their legal tradition. To lawyers on this side of the Atlantic, it has been even more important. In the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law And many an early American lawyer might have said, with Chancellor Kent, that "he owed his reputation to the fact that when studying law . . . he had but one book, Blackstone's *Commentaries*, but that one book he mastered."²¹

Blackstone's interpretations were referred to in the Constitutional Convention and in the *Federalist Papers*.

Lord Coke, the eminent attorney general, jurist, legislator, and legal commentator interpreted the common law as safeguarding individual liberty. He early provided support for judicial review in his famous dictum in *Dr. Bonham's Case*,²² decided by the Court of Common Pleas in 1610. There, Coke ruled that the London College of Physicians was not entitled, under an act of Parliament, to punish Bonham for practicing medicine without its license. Coke declared:

And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void²³

Apparently not much basis exists in the precedents for this dicta, and if followed in England, it was not for long. However, in America, it was used as support for judicial review and for challenging English rule. Notwithstanding Blackstone's commitment to the sovereignty of Parliament, American commentators emphasized the importance he placed on the "absolute" rights of life, liberty and property.²⁴ Blackstone believed the principal end of sovereignty is to protect the enjoyment of these absolute rights, which were subject only to "[r]estraints in themselves so gentle and moderate, as will appear upon farther enquiry, that no man of sense or probity would wish to see them slackened."²⁵ To vindicate these rights when violated, the people were entitled first, to seek judicial relief; second, to petition the king and parliament; and lastly, to use armed force.²⁶

The Constitution was drafted within the context of the common law, as James Kent explained in his authoritative *Commentaries on American Law*:

21. D. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* at 3 (1941) (quoting C. WARREN, *HISTORY OF THE AMERICAN BAR* at 187 (1911)).

22. 77 Eng. Rep. 646 (1610).

23. *Id.* at 652. See Plunknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 36 (1926). Plunknett cited numerous instances when courts from the middle of the fourteenth century to Coke's day ignored statutes of Parliament or disregarded their plain meaning.

24. B. SIEGAN, *supra* note 1, at 36-37; 1 W. BLACKSTONE, *COMMENTARIES* *125, 130, 134, 156.

25. 1 W. BLACKSTONE, *supra* note 24, at *140.

26. *Id.*

It was not to be doubted that the constitution and laws of the United States were made in reference to the existence of the common law In many cases, the language of the constitution and laws would be inexplicable without reference to the common law; and the existence of the common law is not only supposed by the constitution, but it is appealed to for the construction and interpretation of its powers.²⁷

The ratification arguments over the protection of press freedom provide an illustration of the function the judiciary would exercise in securing liberties. Hamilton wrote in *Federalist No. 84* that there was no need to be concerned about securing press freedom, inasmuch as the Constitution does not grant the government any power to restrain it.²⁸ Does this mean, then, that as far as the national government is concerned, freedom of the press is absolute, and not subject to any restraint? James Wilson explained during the ratification debates that freedom of the press was subject to the powers of government under the common law, which were then considerable.²⁹ In other words, the national government had no power to diminish freedom of the press as the term was defined under the common law. However, the national government could still penalize criminal libel under its authority in criminal matters.

From this example, it is apparent that the judiciary would have a large role in defining and protecting freedom, not an unusual role for judges at the time of the framing of the Constitution. In that period, common law tradition espoused the progressive enlargement of the people's liberties. In applying the common law, judges changed it continually pursuant to new understandings and conditions. From the earliest years of the English state, judges and parliament created and steadily expanded common law protections; while at one time only the meager rudiments of criminal procedure were required, by Blackstone's day "absolute rights" to life, liberty and property were acknowledged.

When the Constitution was framed, the judiciary was highly regarded as a guardian of individual rights. Hamilton praised the American judiciary: "The benefits of the integrity and moderation of

27. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 315-16 (Da Capo 1971).

28. THE FEDERALIST NO. 84, *supra* note 14, at 513-14.

29. PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 308-09 (J. McMaster & F. Stone eds. 1888). According to Blackstone, liberty of the press consists in no *previous* restraints upon publications, and not freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

4 W. BLACKSTONE, *supra* note 24, at *151-52.

the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested.”³⁰ For many Americans, the unwritten English constitution, which consisted principally of common law rights, provided a great measure of human freedom. As historian Gordon S. Wood has put it, “what made their Revolution seem so unusual [was that] they revolted not against the English constitution but on behalf of it.”³¹

Although the English Parliament possessed absolute authority to enact and repeal legislation, English custom and tradition required that it honor and observe the unwritten constitution that protected individual rights. Parliament rarely overruled the common law, and when it did, it did so narrowly and mostly to clarify ambiguities. Thus, as a practical matter, the English Parliament was limited in its authority to infringe liberties.

Justice William Bradley once explained that “England has no written constitution, it is true; but it has an unwritten one, resting in the acknowledged, and frequently declared, privileges of Parliament and the people, to violate which in any material respect would produce a revolution in an hour.”³² In this opinion, Bradley espoused the position that American legislatures possessed no greater power over individual rights than Parliament; or as he put it, “[t]he people of this country brought with them to its shores the rights of Englishmen.”³³ Hamilton voiced a similar opinion when he said, “Our ancestors, when they emigrated to this country, brought with them the common law, as their inheritance and birthright”³⁴

Thomas Cooley was a justice of the Michigan Supreme Court and regarded as the leading legal commentator in the last half of the nineteenth century, succeeding for many in the legal community the authoritative status of Blackstone and Kent. He wrote in 1868 that the English legal experience is relevant in interpreting the power of American legislatures:

The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered within any grant or apportionment of power which the people in general terms have made to those departments. The Parliament of Great Britain, indeed, as possessing the sovereignty of the country, has the power to disregard fundamental principles, and pass arbitrary and unjust enact-

30. THE FEDERALIST NO. 78, *supra* note 17, at 470.

31. G. WOOD, *supra* note 11, at 10.

32. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 115 (1873) (Bradley, J., dissenting).

33. *Id.* at 114.

34. *People v. Crosswell*, 3 Johns. Cas. 337, 344 (N.Y. 1804) (argument presented in behalf of defendant).

ments; but it cannot do this rightfully, and it has the power to do so simply because there is no written constitution from which its authority springs or on which it depends, and by which the courts can test the validity of its declared will. The rules which confine the discretion of Parliament within the ancient landmarks are rules for the construction of the powers of the American legislatures; and however proper and prudent it may be expressly to prohibit those things which are not understood to be within the proper attributes of legislative power, such prohibition can never be regarded as essential, when the extent of the power apportioned to the legislative department is considered, and appears not to be broad enough to cover the obnoxious authority. The absence of such prohibition cannot, by implication, confer power.³⁵

The foregoing discussion concerns primarily the constitutional limitations on the national government's powers to proscribe the people's liberties. The position that majorities reign under the Constitution is stronger when applied to the state governments, which already existed and were not created by the Constitution. One might ordinarily believe the states continued to retain all powers except those the Constitution specifically denied them. However, many early judges construed the fundamental law to embody the principle that all legislatures are inherently limited in power. None had the authority to deprive people of their natural liberties.

In *Calder v. Bull* (1798),³⁶ Justice Chase asserted that under the national Constitution, the federal and state legislatures were without power to overrule certain vital principles of free republican government. It would have been senseless, he argued, for people to entrust their legislatures with such powers. They will therefore not be presumed to have done so unless it were so specified.³⁷ Consequently, in *Wilkinson v. Leland* (1829)³⁸ Justice Story concluded:

The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them; a power so repugnant to the common principles of justice and civil liberty; lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being . . .³⁹

In *Fletcher v. Peck* (1810),⁴⁰ per Chief Justice Marshall, and in *Terrett v. Taylor* (1815),⁴¹ per Justice Story, the United States Su-

35. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 175-76 (1868).

36. 3 U.S. (3 Dall.) 386 (1798).

37. *Id.* at 387-89.

38. 27 U.S. (2 Pet.) 627 (1829).

39. *Id.* at 657.

40. 10 U.S. (6 Cranch) 87 (1810).

41. 13 U.S. (9 Cranch) 43 (1815).

preme Court struck down state legislation, in part or in whole, on the basis that the nature of society itself restrains legislative power, even in matters on which federal and state constitutions are silent. In these two cases, the state legislatures had enacted retrospective legislation divesting owners of property they had acquired in good faith. Both justices invoked a natural law principle that forbade the legislature from appropriating property without compensating the owner. Marshall asserted a view which has been much cited in the cases: "It may well be doubted, whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?"⁴²

Marshall's acceptance of natural law principles is also indicated in this passage from his dissenting opinion in an 1827 case:

[I]ndividuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it. The right of coercion is necessarily surrendered to government, and this surrender imposes on government the correlative duty of furnishing a remedy.⁴³

James Kent followed Marshall and Story in upholding the natural law principles, stating in an opinion he wrote in 1811 as Chancellor of New York that judges were not to be confined by the rights enumerated in constitutions:

Our constitutions do not admit the power assumed by the Roman prince; and the principle we are considering [no retroactive laws] is now to be regarded as sacred. It is not pretended that we have any express constitutional provisions on the subject; nor have we any for numerous other rights dear alike to freedom and justice.⁴⁴

Kent wrote that a statute "affecting and changing vested rights is very generally considered in this as founded on unconstitutional principles, and consequently inoperative and void." Kent did not mean by "unconstitutional," contrary to the provisions of the document, but rather, contrary to what he considered to be general limitations implicit in it, based on natural rights and the nature of social

42. *Fletcher*, 10 U.S. (6 Cranch) at 135.

43. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 346-47 (1827) (Marshall, C.J., dissenting). Moreover, according to Marshall, the Framers of the Constitution were intimately acquainted with writings on natural law that declare that contracts possess an original, intrinsic obligation not given by government. Because of this knowledge, Marshall opined that "[w]e must suppose, that the framers of our constitution took the same view of the subject, and the language they have used confirms this opinion." *Id.* at 354.

44. *Dash v. Van Kleeck*, 7 Johns. 477, 505 (N.Y. 1811).

compact.⁴⁵

Nor were the aforementioned opinions isolated ones. According to the well-regarded constitutional scholar Edward Corwin, during the initial period of federal constitutional history, which closed about 1830, leading judges and lawyers accepted the ideas of natural rights and the social compact as bases for constitutional decisions.⁴⁶ Professor J.A.C. Grant reported that between 1816 and 1860, high or federal courts in New York, New Jersey, New Hampshire, Georgia, Maryland, Arkansas, and Iowa held or expressed the belief that natural justice required that compensation must be paid when private property is taken for public use.⁴⁷ Marshall, Story, Kent, and most federal judges were of Federalist persuasion, something that they had in common with most delegates to the Constitutional Convention. Hence, the views of these judges may well represent those at the Convention.

Natural law also dominated intellectual thinking of the period. American constitutional and bill of rights models were constructed at a time when the natural law school of judicial thought was highly influential, and the early evolution of American law coincided with a high tide of individualistic ethics and economics. As Professor Archibald Cox has observed: "Belief in natural rights and natural law were deeply ingrained in the eighteenth-century American mind despite uncertainty whether their source was the King of Kings and Lord of all the earth, the immutable maxims of reason and justice, or the accumulated wisdom of English common law."⁴⁸

B. The Framers' Intentions

The deliberations at the Constitutional Convention show that the delegates sought to strengthen and improve the government existing under the Articles of Confederation to achieve two objectives: First, to create a self-sufficient and limited central government, and second, to prevent the states from restraining and discouraging private commerce. No thought was given to limiting individual rights. While states had adopted bills of rights, the Framers of the federal Consti-

45. See P. BREST & S. LEVINSON, *PROCESS OF CONSTITUTIONAL DECISIONMAKING* 116 (1983).

46. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).

47. Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931).

48. A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 31 (1976).

tution rejected the idea: a proposal made during the Constitutional Convention to establish a committee to draft a bill of rights was defeated by a vote of ten states to none.⁴⁹ Given that many delegates to the Convention were greatly concerned about personal freedom, this vote suggests a consensus that a bill of rights was not required to guarantee liberties. Another possible explanation, that the Framers did not want to protect freedom, is not credible. To the best of my knowledge, no Framers favored strong or absolute governmental powers over the people's liberties.

Thereafter, it was moved for inclusion of a provision "that the liberty of the Press should be inviolably observed."⁵⁰ The states voted against the motion, either seven to four, or six to five. The accounts show that Roger Sherman of Connecticut stated the protection was unnecessary, inasmuch as the power of Congress did not extend to the press.⁵¹ This is additional support for the limited government theory. In Hamilton's opinion, expressed after the Convention, "the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS," prescribing the limits of governmental authority.⁵²

In the ratification debates, the Federalists pointed out that the constitutional text itself showed that the authority of the national government was limited. If the national legislature was to be all powerful, they asked, why does article I, section 8 carefully spell out the powers of Congress? They denied that the necessary and proper clause at the end of section 8 was open ended, or that it modified the severe limitations on the Congress previously expressed. Accounts of the Constitutional Convention show the Framers engaged in extensive and sometimes vitriolic debate on whether certain powers should be authorized.⁵³ These exercises would have been without purpose had the Congress enjoyed broad, undefined powers.

The delegates actually turned down an effort to give Congress immense powers. The Committee of Detail recommended that Congress be given the sweeping power to provide "for the well managing and securing the common property and general interests and welfare of the United States," but this proposal did not appear in any drafts of the Constitution.⁵⁴ The Convention refused to empower the national government to act in many areas: to set up temporary govern-

49. 2 M. Farrand, *supra* note 10, at 582, 587-88.

50. *Id.* at 617.

51. *Id.* at 618.

52. THE FEDERALIST NO. 84, *supra* note 14, at 515.

53. Six prominent delegates refused to sign the Constitution for a variety of reasons, including their concern about powers of the central government. See C. BOWEN, MIRACLE AT PHILADELPHIA 34, 254-64 (1986).

54. I. BRANT, THE FOURTH PRESIDENT: THE LIFE OF JAMES MADISON 186 (1970). See also *id.* at 187-88.

ments in new states; to grant charters of incorporation; to create seminaries for the promotion of literature and the arts; to establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures; to regulate stages on the post road; to establish a university; to encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries; to provide for opening and establishing canals; to emit bills of credit (which then meant printing unbacked paper for circulation as currency); and to make sumptuary laws. Each of these proposals was introduced, and was either voted down or not further considered outside of committee.⁵⁵

The Framers' debate on whether Congress should have the power to print paper money not backed by precious metals is instructive on their meaning of enumerated authority. Because the powers to borrow money and to emit bills of credit had been granted to Congress under the Articles of Confederation, they were automatically extended to the new government in an early draft of the Constitution prepared by the Committee of Detail. Gouverneur Morris of Pennsylvania opposed giving Congress the power to emit bills of credit, and he moved to strike the phrase authorizing it.⁵⁶ Apparently, the delegates believed the absence of language permitting emission was enough to deny Congress this authority. Although most delegates opposed granting this power, and the states voted nine to two in support of Morris' motion, no delegate sought to insert a specific ban.⁵⁷

As would be expected from the earlier discussion, the natural law perspective existed at the Constitutional Convention. When the prohibitions on attainder and ex post facto laws were introduced, Oliver Ellsworth, a Connecticut delegate who later became Chief Justice of the United States Supreme Court, argued that these protections were superfluous, stating that "there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves."⁵⁸ James Wilson likewise opposed inserting the prohibitions, explaining that "[i]t will bring reflexions on the Constitution—and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so."⁵⁹ Prohibitions against such laws were still inserted, apparently under the theory, as

55. B. SIEGAN, *supra* note 1, at 100; see I. BRANT *supra* note 54, at 181-89.

56. 2 M. FARRAND *supra* note 10, at 308-09.

57. B. SIEGAN, *THE SUPREME COURT'S CONSTITUTION* 22-26 (1987).

58. 2 M. FARRAND, *supra* note 10, at 376.

59. *Id.*

subsequently explained by Edmund Randolph, that they were exceptions from particular powers vested by the Constitution that otherwise might be construed as authorizing their passage.⁶⁰ In *Federalist No. 44*, James Madison displayed his belief in natural rights doctrine in the following passage:

Bills of Attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State Constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters.⁶¹

As a member of the first Congress, Roger Sherman drafted a proposed bill of rights which was recently discovered. It contained a "natural rights" provision: "The people have certain natural rights which are retained by them when they enter into Society." He then went on to name them (religion, property, expression, assembly, and so on), and concluded: "Of these rights therefore they shall not be deprived by the Government of the United States."⁶²

Another Framers expressing belief in natural law was William Paterson, who later became a Supreme Court Justice. In 1795, Justice Paterson stated, in an opinion he delivered while on circuit in Pennsylvania, that the "right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. . . . The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation."⁶³

Alexander Hamilton had similar views—as a prominent lawyer of the period, this should not be surprising. In a 1796 opinion that he wrote as a practicing attorney, he said property was immune from legislation that violated natural law:

Without pretending to judge of the original merits or demerits of the purchasers, it may be safely said to be a contravention of the first principles of natural justice and social policy, without any judicial decision of facts, by a positive act of the legislature, to revoke a grant of property regularly made for valuable consideration, under legislative authority, to the prejudice even of third person on every supposition innocent of the alleged fraud or corruption⁶⁴

60. 3 DEBATES, *supra* note 12, at 464-65.

61. THE FEDERALIST No. 44, at 282 (J. Madison) (Mentor 1961). The clauses were inserted according to Madison, because "[o]ur own experience has taught us . . . that additional fences against these dangers ought not to be omitted." *Id.*

62. D. CRUMP, E. GRESSMAN & S. REISS, CASES AND MATERIALS ON CONSTITUTIONAL LAW 519-20 (1989).

63. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795).

64. B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 22 (1938). The opinion related to the matter subsequently litigated in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

Hamilton wrote in 1774: "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole *volume* of human nature, by the hand of the divinity itself; and can never be

I do not know that a natural rights prospective prevailed at the convention. That it was very important in that period is clear. In any event, the evidence is persuasive that the Framers produced a document consistent with the general tenets of natural law, that majorities could not infringe the natural rights of the people.

II. BILL OF RIGHTS

On June 8, 1789, Congressman James Madison introduced in the first House of Representatives a series of amendments to the Constitution that would protect the exercise of named and unnamed rights. Over the next months, Congress debated and considered the matter, and on October 2, 1789 transmitted to the states for ratification,⁶⁵ amendments embodying most of Madison's proposals. The framing of these amendments was prompted by a number of considerations. First, to assure the ratification of the Constitution, the Federalists promised they would seek to amend it after ratification to include a bill of rights. Second, the Federalists were concerned that failure to do so might result in the calling of another Constitutional Convention, which they strongly opposed. In May 1789, both Virginia and New York had requested Congress to convene a second Constitutional Convention. Third, North Carolina and Rhode Island had still not ratified the Constitution, presumably in part because of the absence of a bill of rights. Fourth, Massachusetts, South Carolina, New Hampshire, Virginia, and New York submitted along with their ratifications recommendations that certain amendments be adopted. Virginia went so far as to recommend inclusion of twenty provisions in a proposed bill of rights.⁶⁶

Congress' task was to select rights that would accomplish the normative purpose of protecting liberty, as well as the pragmatic objective of satisfying the public's concerns in this area. The solution rested in protecting both enumerated and unenumerated rights. This problem of enumeration had been discussed during the ratification debates, and I have previously reported Hamilton's objection to guaranteeing specific liberties.⁶⁷

In this regard, the remarks of two future Supreme Court Justices,

erased or obscured." 1 PAPERS OF ALEXANDER HAMILTON 122 (H.C. Syrett ed. 1961).

65. See U.S. CONST. art. V.

66. See D. FARBER & S. SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 226 (1990); THE MAKING OF THE AMERICAN REPUBLIC: THE GREAT DOCUMENTS 1774-1789, at 1009-59 (C. Tansill ed. 1972).

67. See *supra* note 14 and accompanying text.

James Wilson and James Iredell, during the ratification debates are worthy of note, since these remarks likewise presage the framing of amendments to secure both named and unnamed liberties. As a member of the Convention, Wilson participated in the actual drafting of the Constitution. He asserted that an effort by the Convention to protect everyone's liberties would have been futile. "[I]n no one of those books [by the great political writers], nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people as men and as citizens." Wilson rejected the idea: "Enumerate all the rights of men! I am sure, sirs, that no gentlemen in the late Convention would have attempted such a thing."⁶⁸ Moreover, as a legal matter, "every thing that is not enumerated is presumed to be given." Therefore, the consequence of an imperfect enumeration "would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete."⁶⁹ Iredell fully agreed in addressing the North Carolina ratifying convention:

[I]t would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let anyone make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.⁷⁰

In his speech introducing the proposed amendments, Madison similarly expressed concern that a bill of rights might not encompass protections for all the people's liberties:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.⁷¹

The said clause became, in time, the ninth amendment, and read initially in Madison's draft as follows:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.⁷²

68. 2 DEBATES, *supra* note 12, at 424 (remarks of J. Wilson).

69. D. FARBER & S. SHERRY, *supra* note 66, at 224.

70. *Id.*

71. 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 439 (J. Gales and W. Seaton eds. 1834).

72. *Id.* at 435.

The final form of the ninth amendment is essentially a shorter version of this provision: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁷³

Federalist arguments such as those delivered by Madison, Hamilton, Wilson, and Iredell made inevitable the inclusion of the ninth amendment in the Bill of Rights. After continually asserting the problem of securing all rights, the Federalists, faced with fulfilling their commitment to frame a bill of rights, could scarcely have omitted protection for those not mentioned. Madison's original list of enumerated rights and the list Congress adopted contained a far lesser number than the five states had recommended in their ratifications. The ninth amendment provides an explicit basis for enforcing these other rights.

Perhaps more than any other provision, the ninth amendment discloses the intended constitutional relationship between governor and governed. As the Federalists explained during the ratification period, the federal government was not granted authority to abridge the people's liberties, whether identified or not, except when so provided in the Constitution. The rights specifically protected in the original Constitution must have been those of greatest concern to the Framers. They expected that the judiciary would secure these few specified rights as well as the greater number they did not specify. The Framers of the Bill of Rights followed the same approach. Under the pressures generated during and after the ratification proceedings, they specified the rights they considered of greatest concern. Similarly, they anticipated the judiciary would safeguard these, as well as those not named. The ninth amendment was the vehicle they used for the latter purpose. Without this amendment, unenumerated rights might not be protected, and freedom would have been less secure than under the original Constitution, which safeguarded all liberties whether or not specified. The amendment did not accord the federal judiciary more authority than it already possessed.

III. SECTION 1 OF THE FOURTEENTH AMENDMENT

A. Text

When the fourteenth amendment was framed in 1866, the only specific federal restraints on the states were the relatively few con-

73. U.S. CONST. amend. IX.

tained in the original Constitution and the thirteenth amendment, which abolished slavery. The Bill of Rights was applicable only to the federal government and not to the states. By then, the federal judiciary imposed few natural rights limitations on the states. Accordingly, at that time, on most matters, voting majorities reigned in the states except when limited by their own constitutions. The second sentence of section 1 of the fourteenth amendment was intended to limit the powers of the states and their officials to diminish liberties. It reads as follows:

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 deny to any person within its jurisdiction the equal protection of the laws.⁷⁴

While opinion is divergent as to the full meaning of this provision, commentators do agree that at the minimum, it was intended to authorize passage of and to “constitutionalize” the Civil Rights Act of 1866⁷⁵—that is, to assure that the latter’s provisions were permitted by the Constitution, and to place its safeguards beyond the power of any subsequent Congress to repeal. The chief purpose of this Act was to provide federal protection for the emancipated blacks in the exercise of certain enumerated liberties. However, it applied to all the states, and secured protection for whites and all other races as well. The Act provides protection for citizens (with a few designated exceptions) “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property.”⁷⁶ Congressional sponsors of this legislation explained that it embodied Justice Bushrod Washington’s interpretation of the privileges and immunities clause of Article IV, which is discussed later in this article,⁷⁷ as well as the libertarian doctrines espoused by Blackstone and Kent.⁷⁸ The relationship between this Act and the subsequent amendment reveals that at the very least,

74. U.S. CONST. amend. XIV, § 1.

75. Act of April 9, 1866, ch. 31, 14 Stat. 27. Raoul Berger refers to “the all but universal understanding that the Amendment was to embody the Civil Rights Act.” According to him, in the summer election campaign of 1866, the Republicans repeatedly assured the voters that the amendment “was an embodiment of the Civil Rights Bill.” R. Berger, *GOVERNMENT BY JUDICIARY* 103, 115 (1977). Professor Fairman writes that in the House debates on the amendment “[o]ver and over . . . the correspondence between Section 1 of the Amendment and the Civil Rights Act is noted. The provisions of the one are treated as though they were essentially identical with those of the other.” Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *STAN. L. REV.* 5.44 (1949). Harry Flack concludes that “the general opinion, held in the North . . . was that the Amendment embodied the Civil Rights Bill.” H. Flack, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 153 (1908). See also Kelly, *The Fourteenth Amendment Revisited, The Segregation Question*, 54 *MICH. L. REV.* 1049 (1956).

76. Act of April 9, 1866, ch. 31, 14 Stat. 27.

77. See *infra* notes 91-95 and accompanying text.

78. See B. SIEGAN, *supra* note 57, at 46-56.

section 1 protected economic and property rights.

Representative John Bingham of Ohio was the leading author of the second sentence of section 1. It replaced an earlier version, which he also largely authored and presented to the Congress in February, 1866, as follows:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.⁷⁹

Bingham was a member of the committee which ordered both versions to be reported. It is useful to study this earlier version, since Bingham (and probably the committee of which he was a member) sought to achieve essentially the same goals in both efforts. The first part of the original version was worded to incorporate the language of article IV, section 2 of the Constitution, while the second part used terminology not found elsewhere, but reflecting the due process language in the fifth amendment. According to Bingham, the amendment would enable Congress to apply fundamental rights contained in the Constitution to the states: "Every word of the proposed amendment is today in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States."⁸⁰ The Framers had omitted inserting authority for Congress to enforce against the states the "great canons of the supreme law."⁸¹ The amendment would, Bingham said, arm Congress "with the power to enforce the bill of rights as it stands in the Constitution today."⁸² It encompassed those safeguards guaranteed by two of the most critical provisions of the Constitution: the privileges and immunities clause of article IV, and the due process clause of the fifth amendment,⁸³ which together, for Bingham, included all natural and fundamental rights.⁸⁴

The proposed amendment, Bingham asserted, would greatly advance freedom and yet maintain the federal-state balance. "[T]he care of the property, the liberty, and the life of the citizen . . . is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country." Under the amendment, Congress could "punish all violations by

79. CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (1866).

80. *Id.* at 1034.

81. *Id.* at 1090.

82. *Id.* at 1088.

83. *Id.* at 1088-89.

84. *Id.* at 1089-91.

State officers of the bill of rights, but [leave them] to discharge [their] duties.”⁸⁵

Bingham explained that the equal protection provision of the proposed amendment applied the due process guarantee to the states. He equated these two concepts; each comprehended the other. There could be no liberty without equality, and vice versa. For Bingham, equality before the law meant that all laws should apply equally and that no person or group should be favored or denied. When government limits the liberties of certain individuals, it also denies them equality with others not so incapacitated.⁸⁶

Bingham was far from alone in this thinking. For a great many years prior to the Civil War, abolitionists had maintained that the fifth amendment’s due process clause required that the laws treat equally with respect to life, liberty, and property all persons similarly situated.⁸⁷ Legislation treating certain people in a different or special way without adequate cause—therefore unequally—was found to be violative of due process in some judicial decisions prior to the Civil War.⁸⁸ Subsequent to ratification of the fourteenth amendment, courts employed the due process clause, the equal protection clause, or both to nullify legislation arbitrarily denying liberties to individuals or groups. To preserve a statute under either clause, a state had to show that sufficient reason existed to account for the different treatment.⁸⁹

Congressional sentiment was unfavorable to Bingham’s first version, and it was not voted up or down by either House. The major problem with this version was that instead of prohibiting state action infringing on liberties, the amendment placed the obligation to protect liberties entirely on Congress, thus enabling future Congresses to change policy. The final version of the fourteenth amendment was drafted to meet this problem. Consistent with the form of other constitutional protections, it prohibited state action; its purposes could be negated not by the will of another Congress, but only by another amendment. However, the final version empowered Congress to enforce the amendment’s provisions.⁹⁰

85. *Id.* at 1292.

86. CONG. GLOBE, 35th Cong., 2d Sess. 983, 985 (1859); CONG. GLOBE, 34th Cong., 3d Sess. App. 140 (1857).

87. J. TENBROEK, EQUAL UNDER LAW 119-22 (1969).

88. *See* R. MOTT, DUE PROCESS OF LAW 256-74 (1926).

89. *See id.* at 275-99. The similarity of the two clauses is discussed by Chief Justice Earl Warren in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

90. *See* U.S. CONST. amend. XIV, § 5. *See also infra* notes 96-98 and accompanying text.

B. The Framers' Intentions

To comprehend the meaning of the privileges and immunities, due process, and equal protection clauses of section 1, consider explanations the congressional leaders presented to the thirty-ninth Congress, which framed the fourteenth amendment in spring of 1866. In introducing the proposed amendment to the senate, Senator Jacob Howard explained the privileges and immunities clause by quoting from Justice Washington's opinion in *Corfield v. Coryell*,⁹¹ in which he defined the privileges and immunities clause of article IV, section 2. Although privileges and immunities cannot be fully defined in their exact extent and precise nature, the senator observed, Washington's interpretation does give "some intimation of what probably will be the opinion of the judiciary."⁹²

Justice Washington was very extensive in his interpretation of the privileges and immunities clause, as this excerpt discloses:

We feel no hesitation in confining [the constitutional provision to] those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose the Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal⁹³

Senator Howard also embraced within his definition of privileges and immunities the

personal rights guaranteed [sic] and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peacefully to assemble and petition the Government for

91. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

92. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

93. *Corfield*, 6 F. Cas. at 551-52. Washington directed his remarks at the clause in article IV, which differs from the one in the fourteenth amendment in identifying the benefited parties. Article IV refers to "citizens of each state," while the fourteenth protects "citizens of the United States." However, Washington's definition applies to both categories: privileges and immunities "belong, of right, to the citizens of all free governments." It would seem to be a distinction without a difference: Nonetheless, Justice Miller in the Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1872), used it as a basis for his opinion in that case.

a redress of grievances, a right appertaining to each and all of the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.⁹⁴

Instead of offering separate meanings for the due process and equal protection clauses, Howard lumped them together in a short explanation, asserting that these clauses outlaw racial preferences and all class and caste legislation, and secure legal equality for everyone. He subsequently went on to state that section 1 “will, if adopted by the States, forever disable every [state] from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who happen to be within their jurisdiction.”⁹⁵

Howard’s explanation of the meaning of section 5 of the fourteenth amendment is also instructive on interpreting section 1. Section 5 provides: “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”⁹⁶ Howard described section 5 as “a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees”⁹⁷ of section 1. Congress would have the responsibility of seeing to it “that no State infringes the rights of persons or property.”⁹⁸ Here again, Howard advised Congress that section 1 was a broad and substantive restraint on the states.

The famous abolitionist, Representative Thaddeus Stevens introduced the proposed fourteenth amendment into the House of Representatives, stating in part:

The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the “equal” protection of the laws.

I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.⁹⁹

Stevens went on at greater length to explain that section 1 would

94. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

95. *Id.* at 2766.

96. U.S. CONST. amend. XIV, § 5.

97. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

98. *Id.* at 2768.

99. *Id.* at 2459.

reduce or eliminate racial discrimination. The above quoted excerpt reveals his meaning of the section to be consistent with that of Senator Howard, although Stevens was far less specific.

In substance, Stevens made three points: (1) Section 1 embodies the rights specified in the Declaration of Independence ("Declaration") and the Constitution ("organic law"); (2) the Constitution does not apply these rights to the states; (3) the proposed amendment remedies this "defect," and enables Congress—by way of section 5—to apply the rights to the states.

That Stevens viewed section 1 as mandating federal substantive controls over the states is evident from the foregoing excerpt, as well as from remarks he made in relation to the first version of the section.¹⁰⁰ Stevens interpreted the privileges and immunities and equal protection clauses of that version as safeguarding the people against unequal or discriminatory laws, whether or not they implicated race.¹⁰¹ In arguing that Congress' power under the earlier measure was confined, Stevens asserted that it could not "interfere in any case where the legislation of a state was equal, impartial to all."¹⁰² But Congress would have the power to correct "distinction[s] in the same law."¹⁰³ Hence, "[w]hen a distinction is made between two married people or two *femmes sole*, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality."¹⁰⁴ Therefore, according to Stevens, Congress, in enforcing the proposed amendment, would consider the same kind of factors that courts do in determining whether a legislature has infringed due process or equal protection rights.

It is apparent from the explanations presented by Howard and Stevens that the basic rationale behind all three rights clauses of section 1 was similar: each was an extensive guarantee against the deprivation of liberty. In fact, each of the three concepts was a catch phrase of the antislavery movement, directed at oppressive state legislation.¹⁰⁵ In the debates that followed introduction of the amendment, Representative Bingham explained that section 1 protects "the privileges and immunities of all of the citizens of the Republic and the inborn rights of every person within its jurisdiction."¹⁰⁶ For Bing-

100. See *supra* note 79 and accompanying text.

101. See CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

102. See *id.* at 1063.

103. See *id.*

104. *Id.* at 1064.

105. B. SIEGAN, *supra* note 57, at 66.

106. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

ham, privileges and immunities encompassed all fundamental rights, including those contained in the first eight amendments, and he used “inborn” as a synonym for natural rights. “[C]itizens of the United States . . . are entitled to all the privileges and immunities . . . amongst which are the rights of life, liberty, and property, and their due protection in the enjoyment thereof by law.”¹⁰⁷ He believed that both the due process and the equal protection clauses secured natural rights for all persons, regardless of citizenship: “That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment.”¹⁰⁸

In construing a measure of Congress, the explanations of those who introduce it to their respective Houses are of great importance, unless floor debate provides contradictory messages. Nothing in the Congressional debates suggests that Howard, Stevens, and Bingham encountered opposition in their explanations that the three rights clauses of section 1 provided extensive protection for individual liberties, whether for the emancipated blacks or anyone else. Inasmuch as the major terms were widely used during the Civil and pre-Civil War periods to affirm individual rights, especially by the Republicans, who then were in the majority in Congress, the congressmen had at least a layman’s appreciation of the wide scope of the language in section 1.

By 1866, as a result of *Dred Scott*¹⁰⁹ and other decisions, the nation had experienced the enormous power of the United States Supreme Court. One would expect that the congressmen who framed the fourteenth amendment understood that the open language of the rights clauses enabled a court, so disposed, to secure very broadly individual liberties at the state level. In fact, *Dred Scott* interpreted the due process clause of the fifth amendment as substantively protecting liberty and property.¹¹⁰ To no avail, Democrats opposing the fourteenth amendment warned of its broadness and the great threat this created for state autonomy. Surely, if the amendment, as some commentators insist, was confined almost entirely to the subject of race, the very extensive protections—privileges and immunities, due process of law, and equal protection of laws—accorded both “citizens” and “persons” would not have been necessary or appropriate.

Congress wrote the first sentence of section 1 specifically to reverse a major part of the *Dred Scott* decision, that blacks were not citizens of the United States. This sentence provides: “All persons born or naturalized in the United States, and subject to the jurisdic-

107. CONG. GLOBE, 35th Cong. 2d Sess. 984 (1859).

108. CONG. GLOBE, 39th Cong., 1st Sess. 2543 (1866).

109. 60 U.S. (19 How.) 393 (1857).

110. See *infra* text accompanying notes 172, 173.

tion thereof, are citizens of the United States and of the State wherein they reside."¹¹¹ However, though the nation was still reeling from the *Dred Scott* decision, the thirty-ninth Congress did not limit the power of the Supreme Court. It may be true that the Framers of 1787 did not appreciate the potential power of the Supreme Court; clearly that was not the situation for the Framers of 1866.

Stevens was chairman, and Howard and Bingham were members of the Joint Committee on Reconstruction of the thirty-ninth Congress—known as the “Committee of Fifteen”—which originated both the original and final versions of the rights sentence of section 1. The Committee consisted of nine representatives and six senators, and considered various constitutional options relating to reconstruction. It voted to report favorably the proposed fourteenth amendment containing the final version of the rights sentence of section 1. The vote was twelve Republicans for, and three Democrats against. None of the other Republican members of this committee challenged or questioned the explanations of Section 1 presented by Howard, Stevens, and Bingham. Surely, the members of the Committee who presumably gave considerable thought to the matter must have understood reasonably well the extensive language they approved in the rights sentence.¹¹²

IV. DUE PROCESS

The admonition that a person shall not be deprived of “life, liberty or property without due process of law” appears in both the fifth and fourteenth amendments, and has been a major factor in constitutional jurisprudence in this century. Applied substantively to strike down federal and state laws, the due process clauses were the source of protection for economic liberties early in the century, and for abortion rights later on. We know little about what the first Congress, the Framers of the fifth amendment, meant by due process. But as previously indicated, much was said about the concept in the thirty-ninth Congress that authored the fourteenth amendment. The more important question is what the legal meaning was at the time of each framing.

111. U.S. CONST. amend. XIV, § 1.

112. See *infra* text accompanying notes 165-71 regarding the meaning of due process for the public prior to the framing of the fourteenth amendment.

A. The Fifth Amendment

At least three separate meanings may be accorded the fifth amendment's due process clause:

1. It mandates that the federal judiciary give proper and fair process to persons prosecuted or sued for wrongdoing before the imposition of any penalty depriving them of life, liberty or property.

2. In addition to protecting judicial process, it also secures persons from being *arbitrarily* deprived by Congress or a federal agency of life, liberty or property. Hence, the due process provision requires the federal judiciary to monitor the content of federal legislation or regulation for this purpose.

3. It forbids the federal government from depriving any person of life, liberty or property except as a sanction for committing ordinary criminal wrongdoing. This interpretation divides the clause into two parts: deprivation (no person shall be deprived of life, liberty or property) and due process (without due process of law). For the protected area, Congress is limited to enacting a criminal code and police-power measures to which all provisions of the Constitution are subject. "Deprive" does not include imposition of taxes, civil law penalties or compensated eminent domain acquisitions. Only the judiciary may impose penalties, and then, strictly pursuant to proper and fair processes.

Judge Bork subscribes to the first meaning, rejecting any substantive role for the clause. He holds the same position about the due process clause of the fourteenth amendment.¹¹³ In my view, either definition number two or three correctly presents the original meaning; the evidence is not sufficiently clear to me to allow for a more specific answer. What is plain, however, is the existence of strong historical support that the clause originally provided for both procedural and substantive safeguards, as the subsequent discussion will explain. In short, the due process clauses protect a person against government oppression.

The due process concept originated in Chapter 39 of the Magna Charta, which was obtained by threat of force from King John at Runnymede in 1215. This chapter provides in essence that no freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested unless by the lawful judgment of his peers or by the law of the land.¹¹⁴ "A King

113. R. BORK, *supra* note 2, at 31, 60.

114. Translations of the original, which was in Latin, differ. Justice Bradley translated the chapter as follows:

No freeman shall be taken or imprisoned, or be disseized of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him or condemn him but by lawful judgment of his peers or by the law of the land.

had been brought to order . . . by the community of the land under baronial leadership; a tyrant had been subjected to the laws which hitherto it had been his private privilege to administer and modify at will."¹¹⁵ The king's legislative powers were also limited, for "if by 'law of the land' was meant any law which the king might enact, the provision was a nullity."¹¹⁶

The Magna Charta was corroborated by thirty-two statutes and its principles confirmed by many others. It achieved an exalted status in English law. Parliament adopted it and made it part of the common law. All statutes contrary to the charter were declared void, and its liberties were proclaimed to be the birthright of the people of England. In a 1354 statute, due process language was substituted for both "judgment of his peers" and "law of the land": "No man of what state or condition he be, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law."¹¹⁷ In time, "due process of law" became synonymous with "the law of the land," and the two terms have been used interchangeably in state bills of rights.

Blackstone and Coke interpreted Chapter 39 and its successors as protective of human rights. Blackstone stated that this Chapter "alone would have merited the title that it [the Magna Charta] bears, of the *great* charter."¹¹⁸ He construed the chapter as protecting "every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land."¹¹⁹ Parliament and the judiciary expanded the meaning of these protections greatly over the years. For his time, Blackstone considered the rights of life, liberty and property to be comprehended in the "absolute rights of personal security, personal liberty, and private property."¹²⁰

So long as these [rights] remain inviolate, the subject is perfectly free; for every species of compulsive tyranny must act in opposition to one or other of these rights, having no other object upon which it can possibly be em-

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 114-15 (1873) (Bradley, J., dissenting).

115. G. TREVELYAN, *A SHORTENED HISTORY OF ENGLAND* 132 (1942).

116. *Wynehamer v. People*, 13 N.Y. 378, 433 (1856) (Selden, J.).

117. 28 Edw. III, C.3 (1354). The change also imposed a judicial role in enforcing the guarantee.

118. 4 W. BLACKSTONE, *supra* note 24, at *417.

119. *Id.*

120. 1 W. BLACKSTONE, *supra* note 24, at *119-41. Absolute rights could not be controlled or limited except by the law of the land. *See supra* notes 24-26 and accompanying text.

ployed. To preserve these from violation, it is necessary that the constitution of parliaments be supported in its full vigor; and limits certainly known, be set to the royal prerogative And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints.¹²¹

Blackstone condemned laws as destructive of freedom that were wanton and causeless restraints, “whether practiced by a monarch, a nobility, or a popular assembly.”¹²² “[T]hat system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.”¹²³

Thus, paraphrasing Blackstone, the objective of Chapter 39 and its successors was to prohibit rulers or ruling bodies from arbitrarily depriving people of their life, liberty, or property. Procedural guarantees can only partially satisfy this goal. There must also be substantive protection; the fact that a law was passed under all the formalities does not make it a necessary one.

That Blackstone regarded Chapter 39 and its successors as securing substantive rights (in addition to procedural ones) is further evident from his discussion of the right of property. For him, the property right “consists in the free use, enjoyment, and disposal of all . . . acquisitions, without any control or diminition, save only by the laws of the land.”¹²⁴ Declaring that the laws of the land are “extremely watchful in ascertaining and protecting this right,”¹²⁵ he goes on to explain that Parliament enacted statutes “that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if anything be done to the contrary, it shall be redressed, and holden for none.”¹²⁶ Thus, property owners were safeguarded against confiscation, except in the form of a penalty for wrongdoing as determined under the existing law.

The law of the land protected an owner when government invoked eminent domain powers. Only the legislature could acquire property; it could not do so, however, “by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained.” This is but one instance “in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property.”¹²⁷ Although the power of Parliament is absolute, Blackstone

121. *Id.* at *140.

122. *Id.* at *122.

123. *Id.*

124. *Id.* at *134.

125. *Id.*

126. *Id.* at *134-35.

127. *Id.* at *135.

reveals that it was as a practical matter still subject to observing the rights of the people that were protected under the common law.

Sir Edward Coke similarly construed the law of the land as securing both procedural and substantive rights. Adoption of a law or regulation by a governmental authority does not necessarily make it the law of the land. Coke illustrates this point with examples. Explaining the prohibition against disseisin of property in his *Institutes*,¹²⁸ Coke referred to two cases: the first concerned a custom in a town that enabled the lord to occupy the freehold of his tenant upon an arrearage in rent, and the other involved a charter granted by the king allowing a corporation to confiscate cloth dyed with "logwood." No judicial process was required in either prior to executing the claimed power. Each claim of power was adjudged "against the law of the land."¹²⁹

Coke also wrote that the prohibition against being disseised required that "no man ought to be put from his livelihood without answer,"¹³⁰ meaning without proper judicial process. Discussing protection for "liberties" (as provided for under a subsequent issue of the charter), he asserted that

[I]f a grant be made to any man, to have the sole making of cards, or the sole dealing with any other trade, that grant is against the liberty and freedom of the subject, that before did, or lawfully might have used that trade, and consequently against this great charter.

Generally all monopolies are against this great charter, because they are against the liberty and freedom of the subject, and against the law of the land.¹³¹

"Liberties" included other economic activities. An ordinance by a company of merchant tailors "having power by their charter to make ordinances" restricted the sellers from whom members could buy their clothes. This ordinance was adjudged to violate the law "because it was against the liberty of the subject, for every subject [has] freedom to put his clothes to be dressed by whom he will."¹³²

Forfeiture of a protected interest could come about only when its possessor is "brought in to answer . . . by due process of the com-

128. 1 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 46 (1817); see also *supra* notes 22-23 and accompanying text; Carpenter, *Substantive Due Process at Issue: A Resume*, 5 *UCLA L. REV.* 47, 50-57 (1958); Wagner, *Coke and the Rise of Economic Liberalism*, 6 *ECON. HIST. REV.* 30 (1935).

129. 1 E. COKE, *supra* note 128, at 46.

130. *Id.* at 47.

131. *Id.*

132. *Id.*

mon law.”¹³³ Coke explains “process of the law” as including “by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law.”¹³⁴ These were the procedures that had to be observed before interests protected by the charter, as subsequently reissued or supplemented, could be diminished. Hence, the abridgement by the king or other governmental authorities (except probably Parliament, as I have explained¹³⁵) of life, liberty, or property without the person being “brought in to answer” violated due process of law. Thus, persons who abided by the existing laws were safe in their persons and possessions from harm by the king and those claiming under him.

As I have previously indicated, it is most likely that the common law interpretations of Coke and Blackstone were known and accepted by the legal community in late eighteenth century America when the Bill of Rights was framed.¹³⁶ Given this background, it is most difficult to conclude that its framers considered the due process provision as confined to procedural protection.

As Bork’s *The Tempting of America* shows, most American judges have in the past and present accepted substantive due process.¹³⁷ This should not be surprising, for reasons I have presented. Moreover, the idea that the due process concept can be limited to procedure is fanciful; the distinction between procedural and substantive due process has little basis in principle. Consider this analysis. Due process requires that no person be punished for wrongdoing without judicial observance of all procedural safeguards required by the Constitution. If the legislature eliminates any one of these safeguards, it violates due process for the persons affected. Suppose however, the legislature, as part of a regulatory program, makes it a crime for the same persons to engage in particular commercial activity. In this situation, a person’s liberty to pursue certain commerce has been divested without exhaustion of *any* procedural guarantees. (The fact that a judicial proceeding is required to execute the penalty does not change the law’s basic impact.) Judges who likened such deprivation of liberty to a penalty would necessarily find the law beyond the legislative power. Consider Chancellor Kent’s observations in this regard:

133. *Id.* at 50.

134. *Id.*

135. *See supra* text accompanying notes 22-23.

136. *See supra* text accompanying notes 20-26. Coke’s views were generally acceptable to Blackstone. “[H]is [Coke’s] influence, as the embodiment of the common law, was so strong that it is useless to contend that he ‘was either misled by his sources or consciously misinterpreted them’ for Coke’s mistakes, it is said, *are* the common law.” Brockelbank, *The Role of Due Process in American Constitutional Law*, 39 CORNELL L.Q. 561, 562 (1954).

137. R. BORK, *supra* note 2, at 1-141.

[T]here is no distinction in principle, nor any recognized in practice, between a law punishing a person criminally, for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right. The distinction consists only in the degree of the oppression, and history teaches us that the government which can deliberately violate the one right, soon ceases to regard the other.¹³⁸

The reason the due process clause was included in the Bill of Rights has been a matter of some conjecture. One may assume that its meaning in the late eighteenth century comprehended the full roll of procedural guarantees then thought essential in criminal and civil trials. Since the original Constitution and Bill of Rights both provided these protections, the due process clause was to this extent superfluous. The same is not true with respect to substantive protection. Some of the liberties Blackstone and Coke considered as safeguarded under Magna Charta and subsequent English law are not specifically secured in either the Constitution or Bill of Rights, such as the right of reputation and to engage freely in economic activity.¹³⁹ The clause remedies this deficiency. It also provides the Constitution with a great historic symbol against oppression. Its presence made clear Congress could not at its will deprive people of those rights that were of greatest concern in the English speaking world.

The eminent domain (or taking) clause¹⁴⁰ follows the due process clause in the fifth amendment, and this may not be a matter of chance. If the due process clause is of broad substantive character, the taking clause was necessary to preserve the eminent domain power. Together, they may be interpreted as barring the federal government from limiting a person's possession of life, liberty and property, except (1) for wrongdoing, or (2) when the property is taken for public use, upon payment of just compensation. This may be another explanation for the inclusion of the taking clause in the Bill of Rights, since many state bills then omitted such a provision.

Substantive due process was accepted by a number of high courts in the nation's early history. As might be expected from the previous discussion, these decisions waivered between construing law of the

138. *Dash v. Van Kleeck*, 7 Johns. 477, 506 (N.Y. 1811). This case involved retrospective legislation, and did not relate directly to due process of law.

139. Among the specific rights Blackstone referred to and not included in the Constitution and Bill of Rights were those protecting people from slander of reputation and banishment or exile, 1 W. BLACKSTONE, *surpa* note 24, at *130, 133, while Coke asserted, as we have seen, that many economic liberties were secured. *See supra* notes 128-132 and accompanying text.

140. U.S. CONST. amend. V ("[n]or shall private property be taken for public use, without just compensation.").

land and due process clauses as partially or totally protective in scope. The first time the United States Supreme Court considered the meaning of "law of the land" was in 1819, when Justice Johnson in *Bank of Columbia v. Okely* interpreted the law of the land clause of the Maryland Constitution as "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."¹⁴¹ Thus, "law of the land" provided partial substantive protection. On the other hand, the North Carolina Supreme Court held in 1805, in *University of North Carolina v. Foy and Bishop*,¹⁴² that the law of the land clause in the state constitution totally secured the right of property and prohibited the legislature from repealing a prior grant of lands to a university:

The property vested in the Trustees must remain for uses intended for the University, until the Judiciary of the country in the usual and common form, pronounce them guilty of such acts, as will, in law, amount to a forfeiture of their rights or a dissolution of their body.¹⁴³

Regardless of the merits, the legislature could not deprive a legal entity of its property. In 1792, the South Carolina Supreme Court decided that an act of the colonial assembly transferring a freehold from one person to another without any compensation or jury trial was invalid, being "against common right, as well as against Magna Charta."¹⁴⁴

In the often cited case of *Gardner v. Village of Newburgh* (1816),¹⁴⁵ Chancellor Kent found that a right to a stream of water "is as sacred as a right to the soil over which it flows."¹⁴⁶ It was, therefore, "part of the freehold, of which no man can be disseised 'but by lawful judgment of his peers, or by due process of law.' This is an ancient and fundamental maxim of common right to be found in *Magna Charta*."¹⁴⁷ Kent held in essence that the fundamental right to due process of law would be violated if the owner of the land through which the stream flowed was not compensated for the loss he suffered if the flow was diverted by the city.

In the North Carolina decision of *Hoke v. Henderson* (1833),¹⁴⁸ another much cited case, Chief Justice Ruffin of the North Carolina high court reasons similarly, asserting that a legitimate vesting of the property right could not be upset except on account of the owner's subsequent wrongdoing. According to him, the term "law of

141. *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819).

142. 5 N.C. (1 Mur.) 53 (1805).

143. *Foy*, 5 N.C. (1 Mur.) at 79.

144. *Bowman v. Middleton*, 1 S.C.L. (1 Bay) 252 (1792).

145. 2 Johns. Ch. 162 (N.Y. ch. 1816).

146. *Id.* at 166.

147. *Id.*

148. 15 N.C. (4 Dev.) 1 (1833).

the land" requires that before anyone is deprived of property, he shall have a judicial trial according to the common law, "and a decision on the matter of right, as determined by the law under which [the property] vested."¹⁴⁹ This case involved a statute, which in providing for the future election of court clerks, caused some appointed clerks to lose their employment. The property rights in question were those of the incumbent clerks to their positions.

A number of New York opinions subscribed generally to *Hoke's* rationale, culminating in the famous case of *Wynehamer v. People* (1856),¹⁵⁰ involving a state penal statute that forbade the sale of intoxicating liquors owned at the time of enactment (except those for medicinal and religious purposes), and that required the destruction of those intended for sale. *Wynehamer* held that the statute violated the state constitution's due process clause, which protected the prerogatives of ownership. While some regulation is possible, wrote Justice Comstock,

where [property] rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least it cannot be created by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference, although a process and a tribunal are appointed to execute the sentence. If this is the "law of the land," and "due process of law," within the meaning of the constitution, then the legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a preexisting cause, appointing judicial and executive agencies to execute its will.¹⁵¹

149. *Id.* at 14.

150. 13 N.Y. 378 (1856). This decision was not followed in other states, probably for the most part because of the sensitivity of the liquor issue. For a survey of pre-fourteenth amendment cases involving due process or law of the land provisions, see B. SIEGAN, *supra* note 1, at 24-46; R. MOTT, *supra* note 88, at 256-99.

151. *Wynehamer*, 13 N.Y. at 393.

[B]oth courts and commentators in this country have held that these clauses [law of the land and due process], in either form, secure to every citizen a judicial trial, before he can be deprived of life, liberty or property It follows, that a law which should provide in regard to any article in which the right of property is recognized, that it should neither be sold or used, nor kept in any place whatsoever within this state, would fall directly within the letter of the constitutional inhibition; as it would in the most effectual manner possible deprive the owner of his property, without the interposition of any court or the use of any process whatever.

Id. at 433-34 (citations omitted).

For Justice Comstock, New York's due process clause forbids the legislature from depriving a law-abiding person of life, liberty or property. He makes no exception for a regulation enacted by the legislature to further the public interest. Presumably, the police powers would be available to preserve the security of the state and safety of its inhabitants.

Due process jurisprudence has been criticized on the basis that it has protected unenumerated rights. Hence, while originally the term "liberty" may have related only to personal confinement, it has been interpreted over the years to protect other natural and fundamental liberties. However, much of what has occurred in the interpretation of the words "life, liberty and property" does not essentially differ from the course taken by the judiciary concerning other guarantees in the Bill of Rights, a good deal of which has been generally accepted.¹⁵²

As previously noted, before the American Constitution, the English Parliament and judges continually expanded the people's liberties. By the time of Blackstone, the limited rights originally secured in the Magna Charta had become very far reaching; "[s]o long as these remain inviolate," wrote Blackstone, "the subject is perfectly free."¹⁵³

The Constitution's Framers accepted the common law system that encompasses continually changing meanings adapted to new understandings and conditions. Judge Bork tells us that "[j]udges must never hesitate to apply old values to new circumstances, whether those circumstances spring from changes in technology or changes in the impact of traditional common law actions."¹⁵⁴ "To say that such adjustments must be left to the legislature is to say that changes in circumstances must be permitted gradually to render constitutional guarantees meaningless."¹⁵⁵ In an opinion he wrote as a circuit court judge, Bork applied his views quite strongly to support change in the then existing press-reputation balance by augmenting the rights of the press and reducing the rights of persons who contend they have been defamed by it.¹⁵⁶ He denies, however, that these principles support the legitimacy of substantive due process.¹⁵⁷ Un-

152. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Douglas cites many examples of rights specifically protected in the Constitution being interpreted to include rights that are not named but have comparable objectives.

153. 1 W. BLACKSTONE, *supra* note 24, at *140.

154. R. BORK, *supra* note 2, at 169 (quoting *Ollman v. Evans*, 750 F.2d 970, 995-96 (D.C. Cir. 1984) (en banc) (Bork, J., concurring)).

155. *Id.* at 168. "It is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know." *Id.* at 167-68. Such a test endows judges with vast powers.

156. *Ollman v. Evans*, 750 F.2d 970, 993 (D.C. Cir.) (en banc) (Bork, J. concurring), *cert. denied*, 471 U.S. 1127 (1984).

157. R. BORK, *supra* note 2, at 169.

derstandably, many judges over the years operating under similar assumptions have expanded the guarantees of the due process clauses to secure people from various oppressions of the state. Given that (1) English speaking law assumes reasoning by analogy, and (2) the law rejects distinctions without meaningful differences, rules intended basically to protect liberty are not likely to be artificially confined, when to do so supports oppression.¹⁵⁸ Nevertheless, while judicial discretion is considerable under the due process clauses, it is still limited as will be explained subsequently in the section on judicial excesses.

B. *The Fourteenth Amendment*

While not referred to as much as privileges and immunities, due process was the subject of considerable comment in the thirty-ninth Congress. When mentioned, it was always in the context of limiting governmental authority. As we have seen, this perspective was shared by Representative Bingham,¹⁵⁹ whose views on the subject are important in defining section 1, of which he was the leading author. He equated due process with equal protection and fundamental and natural rights. No representative disputed Bingham's explanation that the equal protection provision of his first version of section 1, which was clearly substantive in character, did no more than apply the due process clause to the states.

Justice Hugo Black dubbed Bingham "the Madison of the first section of the Fourteenth Amendment."¹⁶⁰ Regarded as authoritative on the subject, Bingham spoke in Congress about the Constitution and its protection of liberty. He was a moderate in his party, far less radical than, for example, either Howard or Stevens. Unlike most of his Republican colleagues, he opposed the Civil Rights Act of 1866 on constitutional grounds. However, his meanings of privileges and immunities, due process, and equal protection were generally consis-

158. Sir James Mackintosh ascribes the principle of development of the common law to the interpretation of the Magna Carta.

It was a peculiar advantage that the consequences of its principles were, if we may so speak, only discovered slowly and gradually. It gave out in each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required and as their character would safely bear. For almost five centuries it was appealed to as the decisive authority on behalf of the people, though commonly so far only as the necessities of each case demanded.

1 J. MACKINTOSH, HISTORY OF ENGLAND 221 (1830).

159. See *supra* notes 79-86 and accompanying text.

160. *Adamson v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting).

tent with abolitionist positions, and therefore, consistent with those of most members of the Republican Party, who were abolitionists or their supporters. Abolitionist philosophy was generally libertarian, particularly in its antagonism to state powers. The legal authorities most quoted by far in Congress in the debates on the Civil Rights Act of 1866 and the fourteenth amendment were Blackstone and Kent, both of whom were strong supporters of individual liberty. The thirty-ninth Congress was hardly dedicated to exalting the will of the majority.

According to Bingham, the due process guarantee of the fifth amendment secures the natural rights of life, liberty, and property for all persons, and these rights may be extinguished only as punishment for wrongdoing.

[N]atural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied [sic] by the broad and comprehensive word "person," as contradistinguished from the limited term citizen—as the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race, that "no person shall be deprived of life, liberty, or property but by due process of law, nor shall property be taken without just compensation."¹⁶¹ Who . . . will be bold enough to deny that all persons are equally entitled to the enjoyment of the rights of life and liberty and property; and that no one should be deprived of life or liberty, but as punishment for crime; nor of his property, against his consent and without due compensation?¹⁶²

It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides, as we have seen, that *no person* shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality. It protects not only life and liberty, but also property, the product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life.¹⁶³

Representatives, to you I appeal, that hereafter, by your act and the approval of the loyal people of this country, every man in every State of the Union, in accordance with the written words of your Constitution, may, by the national law, be secured in the equal protection of his personal rights. Your Constitution provides that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law—law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice which requires that every man shall have his right; that justice which is the highest duty of nations as it is the imperishable attribute of the God of nations.¹⁶⁴

For Bingham, the concept of due process under the fifth amend-

161. CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859).

162. *Id.* at 985.

163. CONG. GLOBE, 34th Cong. 3d Sess. App. 140 (1857).

164. CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866).

ment was a strong weapon against all forms of government oppression, a view which I did not find challenged in the Congressional debates.¹⁶⁵ Interestingly, Representative Wilson, chairman of the House Judiciary Committee, and floor chairman for the proposed Civil Rights Act of 1866, went so far as to assert that the Act applied the substantive protections of the fifth amendment's due process clause to oppressive legislation in the states.¹⁶⁶ The clause, of course, impacted only the federal government; Wilson's observation is further revealing of the opinion held by some political leaders on the scope of the guarantee.

"Due process" was an often-used term before, during, and after the Civil War. Both sides of the slavery controversy employed it to further their own causes. Proslavery forces contended that slaves were property, and therefore, owners were protected against loss without due process. In contrast, beginning in the mid-1830s, anti-slavery activists thought of the due process guarantee as "constitutionalizing" their natural rights beliefs in the sanctity of life, liberty, and property. They repudiated any notion that a person could be someone else's property; people possessed property in their own selves, and the due process clause obligated the national government to secure it in the territories.

The due process concept was a major verbal weapon for the abolitionists. The respected fourteenth amendment scholar, Howard Jay Graham, observed that due process

was snatched up, bandied about, 'corrupted and corroded,' if you please, for more than thirty years prior to 1866. For every black letter usage in court there were perhaps hundreds or thousands in the press, red schoolhouse and on the stump. Zealots, reformers, and politicians—not jurists—blazed the paths of substantive due process.¹⁶⁷

Thus, the political parties committed to eradicating slavery used the term "due process" to advance this position. In 1843, the Liberty Party platform declared that the fifth amendment's due process

165. For a summary from different perspectives of the congressional debates relating to section 1, see Crosskey, *Charles Fairman, "Legislative History" and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

166. See CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866).

167. H. GRAHAM, *EVERYMAN'S CONSTITUTION* 250 (1968). "Over the next thirty years [from 1834], due process as a substantive conception became part of the constitutional stock in trade of abolitionism." J. TENBROEK, *supra* note 87, at 121. "In comparison with the concept of equal protection of the laws, the due process clause was of secondary importance to the abolitionists. It did, however, reach a full development and, by virtue of its emphasis in the party platforms, a widespread usage and popular understanding." *Id.* at 119-20.

clause legally secured the inalienable rights referred to in the Declaration.¹⁶⁸ The 1848 and 1852 platforms of the Free Soil Party contended that the clause served both as a restraint on the federal government, and as an obligation on the government to enforce the inalienable rights set forth in the Declaration of Independence.¹⁶⁹ More significantly, according to the 1856 and 1860 platforms of the Republican party, the clause denied Congress the power to allow slavery to exist in any territory in the Union: “[I]t becomes our duty [by legislation whenever necessary] to maintain [the due process provision] against all attempts to violate it”¹⁷⁰ In the 1856 political campaign, “due process of law” was a leading catch phrase of Republican orators.¹⁷¹ This Republican affinity for due process is important in understanding its constitutional meaning. Some of those involved in the drafting or consideration of the Republican platforms would probably later, as members of Congress or in other political roles, be responsible for framing or ratifying the fourteenth amendment.

The nation’s high court mirrored the public view of due process. In 1857, Chief Justice Taney invoked substantive due process as one basis for his decision in the *Dred Scott* case. Taney held that Congress had no power to prohibit slavery in specified areas because the “powers over person and property . . . are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them.”¹⁷² Taney explained this “express” limitation as follows:

And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who has committed no offence against the laws, could hardly be dignified with the name of due process of law.¹⁷³

Only two justices went along with Taney’s general line of reasoning. However, by the time the fourteenth amendment was framed

168. J. TENBROEK, *supra* note 87, at 139. The Liberty Party was formed in 1840 and dedicated to antislavery. In 1844, its presidential candidate received 60,000 votes. It continued strong in local elections in 1846, but united in 1848 with the antislavery Whigs and Democrats to form the Free-Soil Party. THE COLUMBIA ENCYCLOPEDIA 1212 (1963).

169. J. TENBROEK, *supra* note 87, at 140-41 nn.3 & 4. This party came into existence during 1847-48 and polled 300,000 votes. Its 1852 candidate for president received over 150,000 votes. It was absorbed into the new Republican Party in 1854. THE COLUMBIA ENCYCLOPEDIA, *supra* note 168, at 767. Consistent with many interpretations of the Magna Charta, the 1852 platform asserted that no man can be deprived of inalienable rights “by valid legislation except for crime.” See *supra* text accompanying notes 141-151.

170. J. TENBROEK, *supra* note 87, at 141 nn.5 & 6.

171. H. GRAHAM, *supra* note 167, at 80.

172. *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857).

173. *Id.*

and ratified in 1866, substantive due process was a viable concept among the Justices. In a federal circuit court case in 1865, Supreme Court Justice Grier held that a Pennsylvania statute repealing a railroad corporation charter violated the due course of law provision of the state constitution.¹⁷⁴ The first High Court interpretation of due process after framing of the fourteenth amendment was *Hepburn v. Griswold* (1870)¹⁷⁵ which concerned in part the due process clause of the fifth amendment. When the *Hepburn* decision was rendered on February 7, 1870, the Court consisted of only seven members. For the majority of four, Chief Justice Chase held (among other issues) that holders of promissory contracts entered into prior to the effective date of the Legal Tender Act of 1862 were deprived by that Act of the right to receive payment in gold or silver coin in violation of the fifth amendment's due process guarantee. Justice Grier was then no longer a member of the Court, but he had been when the case was decided in conference on November 27, 1869, at which time he concurred with the majority.¹⁷⁶ Except for Grier, no change had occurred on the court since 1862.

The majority assumed that the fifth amendment's due process clause secures owners of real estate, and concluded that it protects holders of contracts to the same extent. According to Chase, the clause (as well as other provisions of the fifth amendment) operates "directly in limitation and restraint of the legislative powers conferred by the Constitution."¹⁷⁷ Justice Miller, for the minority of three, did not deny that the clause was a substantive limitation on the legislature. He objected that the effect on holders of contracts was incidental to the purpose of Congress to further the war effort. President Grant subsequently appointed two justices, who on May 1, 1871 in the *Knox v. Lee*,¹⁷⁸ joined with the three dissenters to reverse *Hepburn*. Writing for the majority, Justice Strong applied the same analysis to the due process issue as Miller had in *Hepburn*, and Chase, now in the minority, followed his prior interpretation.

One of the dissenting Justices in *Hepburn* was Swayne, and he and newly appointed Justice Bradley voted with the majority in *Knox*. Neither should be considered antagonistic to substantive due process. On the contrary, both contended in their dissents in the

174. See *Baltimore v. Pittsburgh & C.R. Co.*, 2 F. Cas. 570, (C.C.W.D. Pa. 1865) (No. 827).

175. 75 U.S. 603 (1870).

176. *Id.* at 626.

177. *Id.* at 624.

178. 79 U.S. 457 (1871).

Slaughter-House Cases,¹⁷⁹ which was decided the following year, that the fourteenth amendment's due process clause secured property and economic interests. On the issue of protecting vested property interests, these two Justices would probably have agreed with the four who had made up the majority in *Hepburn*. In *Knox*, Bradley filed a concurring opinion, arguing that Congress had full power to enact the disputed legislation. He did not discuss due process directly. Presumably, Swayne agreed, although he did not file a separate opinion in either case.

As reported in the last section, prior to the Civil War, some state high courts applied due process substantively to strike down legislation.¹⁸⁰ Rejecting complaints that they were making law, the judges maintained they were protecting liberty under their constitutions. Accordingly, New York Supreme Court Justice Bronson asserted that the words " 'by law of the land' [or by due process of law] do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory and turn this part of the Constitution into mere nonsense [For it would mean], '[y]ou shall not do the wrong, unless you choose to do it.' "¹⁸¹

In the first edition of his famous treatise on constitutional limitations, published in 1868, Justice Thomas Cooley concluded that government can violate due process by the limitations it imposes,

and not [by] any considerations of mere form. . . . When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its act is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional defence which have become established in our system of law, and not by any rules that pertain to forms of procedure merely Due process of law in each particular case means, such an exertion of powers of government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.¹⁸²

Cooley conceded that private rights to property may be interfered with by any branch of government without violating due process:

The chief restriction is that vested rights must not be disturbed; but in its application as a shield of protection, the term "vested rights" is not used in any narrow or technical sense, as importing a power of legal control merely,

179. 83 U.S. (16 Wall.) 36, 124 (1872) (Swayne, J., dissenting); *id.* at 111 (Bradley, J., dissenting).

180. *In re Dorsey*, 7 Port. 293 (Ala. 1838); *Wynehamer v. People*, 13 N.Y. 378 (1856); *Westervelt v. Gregg*, 12 N.Y. 202 (1854); *Taylor v. Porter*, 4 Hill 140 (N.Y. 1843); *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1 (1833); *Allen v. Peden*, 4 N.C. (Taylor) 442 (1816).

181. *Taylor v. Porter*, 4 Hill 140, 145-46 (N.Y. 1843). "[W]hen one man wants the property of another, I mean to say that the Legislature cannot aid him in making the acquisition." *Id.* at 147.

182. T. COOLEY, *supra* note 35, at 356.

but rather as implying a vested interest which it is equitable the government should recognize, and of which the individual cannot be deprived without injustice.¹⁸³

He went on to discuss those property interests protected by due process clauses (or their equivalent, law of the land). Thus, according to this highly authoritative commentator, due process at the time the fourteenth amendment came into being provided substantive safeguards for property interests. Cooley rejected the view that due process had no more than procedural significance in civil matters. As previously indicated, this position was probably accepted at that time by a majority of the United States Supreme Court.

V. THE JUDICIAL RESPONSIBILITY

Judge Bork rejects the interpretation that the ninth amendment (or any other constitutional provision) protects unenumerated rights. He objects that such an interpretation gives great discretion to the judiciary to restrain democratic rule. Had the Framers contemplated this vast mandate to the Justices, they would have provided for it specifically in the ninth amendment, with language like, "The courts shall determine what rights, in addition to those enumerated here, are retained by the people," or "The American people, believing in a law of nature and a law of nature's God, delegate to their courts the task of determining what rights, other than those enumerated here, are retained by the people."¹⁸⁴

Bork's premise is incorrect. The Constitution did not establish majority rule; it created a unique system wherein individual liberty often is immune from majority will. Either of Bork's proposed provisions is not only unnecessary, for the reasons previously noted in the section on the Bill of Rights, but also would not be in keeping with the character of our very brief Constitution. The original document, together with its twenty-six amendments, takes up no more than fifteen book-size pages. The language is very concise and often not very informative. The 1787 text does not disclose that the judiciary has the power to protect natural rights, yet it does. The document nowhere provides for judicial review of federal legislation—a most important judicial power, and one of the most critical in the entire Constitution. Not until *Marbury v. Madison*,¹⁸⁵ decided, fifteen years after ratification, did the Supreme Court uphold the right of

183. *Id.* at 357-58.

184. R. BORK, *supra* note 2, at 183.

185. 5 U.S. (1 Cranch) 137 (1803).

the judiciary to invalidate congressional enactments. Nor does the Constitution anywhere refer to the eminent domain or police powers of government: the nation has always assumed the existence of these two critical powers, although the Constitution does not specifically authorize them.

The Constitution is often not very informative about subjects that it does mention. Perhaps the most important clause of article I, section 8, which enumerates the powers of Congress, is clause 18, giving Congress power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this constitution in the Government of the United States, or in any Department or Officer thereof."¹⁸⁶ This language is not very precise, and it accords great discretion to an interpreter. According to Thomas Jefferson and James Madison, the clause restrained the Congress to use only those means absolutely or indispensably necessary to implement an enumerated power.¹⁸⁷ Chief Justice John Marshall construed the clause entirely differently. He held that it gave Congress discretion to adopt any legislation "really calculated to effect any of the objects intrusted to the government."¹⁸⁸

Other clauses are similarly nebulous. What is the meaning of, for example, "cruel and unusual punishment," "due process of law," "privileges and immunities," "equal protection of the laws," "unreasonable searches and seizures," "excessive bail," "just compensation," and "commerce"? Such constitutional words and phrases are not self explanatory and often result in litigation. Nor does the use of common words such as "speech," "press," "religion," and "property," reveal constitutional meaning. Who in the constitutional period could imagine that "freedom of expression" protects the malicious burning of the American flag?¹⁸⁹ Does the first amendment prohibition against Congress passing any law "abridging the freedom of speech, or of the press" protect every utterance or printed symbol? Is every restraint a law or an abridgment? It is obvious that the words used in the amendment are far from absolute and precise in meaning; surely they are not self explanatory. The kind of explanation Bork seeks for the ninth amendment is nowhere to be found in the document.

The Supreme Court's experience shows that confining its authority solely to interpreting specified rights is not much of a restraint. To be sure, the designation of a right serves as a limitation, whereas its

186. U.S. CONST. art. I, § 8, cl. 18.

187. See P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 10-15 (1983).

188. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

189. *Texas v. Johnson*, 109 S. Ct. 2533 (1989).

absence provides none. However, over the years, the Justices have exercised considerable creativity in defining specified rights, as the flag burning example illustrates, largely erasing this distinction. Bork has written that most of the rights recognized by the Supreme Court since 1920 have no root in the Constitution, and he particularly refers to the Court's excesses with respect to freedom of expression, which of course is designated.¹⁹⁰ The problem is not the absence of specific protections as much as it is the absence of judicial restraint.

Bork and others have attacked the Supreme Court for securing the right of privacy, which is nowhere mentioned in the Constitution. Yet, Justice Douglas, author of *Griswold v. Connecticut*,¹⁹¹ which first found protection for this right, based his opinion on the combined meaning of the first, third, fourth, and fifth amendments. Douglas asserted that named guarantees in these amendments "have penumbras, formed by emanations from those guarantees that help give them life and substance."¹⁹² He declined to premise the right of privacy on the due process clause of the fourteenth amendment. He condemned the pre-New Deal Court for acting like a superlegislature in safeguarding unenumerated economic rights under the due process clause.¹⁹³ Thus, given their abundance of ingenuity and creativity, the absence of a particular guarantee hardly disables the Justices from discovering it as part of an enumerated guarantee.

A. *Preserving Liberty*

As the foregoing discussion reveals, a major role of the federal judiciary is to preserve liberty, a mission that is very difficult as a technical matter to perform. Since no constitutional liberties are absolute, how do the Justices decide when either Congress or a state has adopted a law abridging a person's freedom of speech, press, religion, or property? This determination is a matter of judgment, which in the English speaking world judges have been exercising for many centuries. Blackstone considered the problem in his discussion of civil liberty:

[Civil liberty] is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick. Hence we may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the

190. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

191. 381 U.S. 479 (1965).

192. *Id.* at 484.

193. *See id.* at 481-82.

natural, increases the civil liberty of mankind: but every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny. Nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of liberty . . . [T]hat constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.¹⁹⁴

For Blackstone, a law that restrains liberty is acceptable only when it furthers the public good. This is the theme of all rights jurisprudence, and it requires intensive probing of both the person's and the state's interests. In constitutional adjudication, this analysis takes the form of tests to determine whether the legislative means substantially achieve the legislative ends; whether the means and ends are legitimate; and whether, when restraint is necessary, the option utilized is the least onerous. Thus, Chief Justice Marshall declared that for legislation to be constitutional, the end has to be legitimate, and the means appropriate and plainly adapted to that end.¹⁹⁵ Justice Washington's interpretation of privileges and immunities,¹⁹⁶ and the substantive due process and the clear and present danger formulations all require inquiry along these lines. The contemporary Supreme Court will not countenance measures limiting the exercise of fundamental liberties that cannot be vindicated under rigorous application of these standards.

The model I have described for determining whether individual liberties have been violated is rooted in Blackstone, and is consistent with traditional legal rights jurisprudence. It is as follows:

In suits challenging the validity of restraints [upon human freedom], the government would have the burden of persuading a court utilizing an intermediate standard of scrutiny, first, that the legislation serves important governmental objectives; second, that the restraint imposed by government is substantially related to the achievement of these objectives, that is . . . the fit between means and ends must be close; and third, that a similar result cannot be achieved by a less drastic means.¹⁹⁷

Given the constitutional limitations affecting the federal government, Congress must always find authority for its actions. Hence, in litigation affecting liberties, Congress should have the burden to show that the law it has passed is valid under the foregoing tests. Although the issue is not as clear, it is my view that section 1 of the fourteenth amendment shifts the burden of persuasion to the states when they proscribe liberties. As I have reported, section 1 was intended as an extensive restraint on the powers of the states with respect to natural and fundamental rights. Moreover, allocating the

194. 1 W. BLACKSTONE, *supra* note 24, at *121-22.

195. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

196. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

197. B. SIEGAN, *supra* note 1, at 324.

burden of proof is regarded as a question of policy and fairness.¹⁹⁸ The states should be required to provide persuasive justification when they restrain liberty. Demanding that the aggrieved party assume this burden operates to discourage freedom. Such a rule makes it, as a practical matter, quite difficult for the individual to obtain judicial vindication.¹⁹⁹

Bork criticizes the judicial examination I favor as highly subjective and incapable of being construed under objective criteria.²⁰⁰ However, the purpose of the three-pronged model is to limit subjectivity by dividing the inquiry whether liberty has been invaded into relevant parts, rather than deciding it as a whole, without any particular restraints. A detailed decision will also provide greater guidance for both legislators and judges.

Part of the judge's criticism is accurate: justices of equal competence, intelligence, and understanding will at times disagree in interpreting such tests. This is the experience of constitutional, as well as of statutory and common law interpretation. All judicial opinions are just that—opinions, about which disagreement is almost inevitable. It is indeed rare when a constitutional interpretation obtains universal approval. Error is to be expected, but is acceptable, when under a constitutional system which equates the public interest with liberty and not with authority, it operates to limit governmental authority. In determining whether liberty has been denied, the Constitution would seem to require that the examination be tipped to favor its protection.

198. According to Wigmore, the allocation of the burden of proof is merely a question of policy and fairness based on experience in different situations. An important factor is that it should be borne by the party best able to know the truth or falsity of the facts. 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2486, at 275 (3d ed. 1940). Such considerations warrant that governmental authorities bear the burden of explaining and justifying why they have curbed property and economic liberties. Because I propose an intermediate standard of review, the state would confront a less arduous undertaking than in the fundamental liberties area where strict scrutiny is required. See Justice Brennan's discussion on the allocation of the burden of proof in school desegregation cases in *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

199. See *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Nebbia v. New York*, 291 U.S. 502, 548 (1934) (McReynolds, J., dissenting). The Court presently requires that when fundamental liberties are involved the legislature carries the burden of proving that the restraint is necessary to achieve a compelling state interest.

200. R. BORK, *supra* note 2, at 225-29.

B. Judicial Excesses

Although the ninth amendment, the due process provisions, and the other rights clauses of the fourteenth amendment are far reaching, they do not provide a blank check for the judiciary—far from it. There are two reasons for this: each of these provisions is limited in meaning, and the judicial power is confined by the Constitution.

All of the said provisions are intended solely to strike down laws that abridge the exercise of natural or fundamental liberties. They do not relate to political liberties, that is, those liberties created by the political process and not derived from individual initiative. Nor are they limitations on the spending or taxing powers of the legislature. A major failing of the Supreme Court in contemporary years has been in decisions requiring state and federal governments to provide monies and services for certain portions of the population, notwithstanding that failure to so provide did not deny or deprive any person of liberty. Although the federal judiciary has based such decisions on both the due process and equal protection clauses, these clauses have no bearing on the discretion of the legislature to appropriate funds for the public welfare. *Maher v. Roe*²⁰¹ illustrates the distinction that should be observed. When Justice Blackmun protested that Connecticut's failure to fund nontherapeutic abortions denied an indigent woman her constitutional right, Justice Powell replied that it was her poverty, not any law that caused the problem.²⁰²

Moreover, in requiring government to spend or tax, or in monitoring the provision or administration of government services, the judiciary is exercising legislative or executive power, which is contrary to the division of authority mandates of the Constitution. Article III grants nothing other than specified judicial power to the United States Supreme Court. Early judges and commentators construed article III to mean that in constitutional matters, the function of judges was strictly and exclusively judicial. Judges were to be interpreters, exercising no more than a veto or a negative power over legislation or execution of the laws. They had no authority to apply

201. 432 U.S. 464 (1977).

202. *Id.* at 474. According to Chief Justice Rehnquist, "our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1003 (1989). "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference . . . , it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom." *Harris v. McRae*, 448 U.S. 297, 317-18 (1980). For instances when the Supreme Court has not followed this rule and has instead imposed affirmative obligations on government under either the due process or equal protection clauses, see Siegan, *Separation of Powers and Other Divisions of Authority Under the Constitution*, 23 SUFFOLK U.L. REV. 1, 6-11 (1989).

powers granted to the legislative and executive branches of the federal government or reserved to the state governments.²⁰³

In *Federalist No. 81*, Hamilton observes that judges who usurped power could be impeached.²⁰⁴ According to him, the judiciary was to have no

influence over either the sword or the purse, no direction either of the strength or the wealth of the society, and [could] take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.²⁰⁵

I have elsewhere discussed the many deviations from the judicial function that the Supreme Court has effected in contemporary years.²⁰⁶ The Court has required state legislatures to spend for welfare and education, and has altered congressional spending programs. It has overruled political decisions of the executive. It has struck down state laws and regulations benefiting religion. It has acted as a superlegislature by requiring Congress and the states to provide overwhelming evidence—a compelling state interest—justifying the imposition of regulation. Applying scrutiny to laws that is strict in theory, but fatal in fact, preempts the authority of a coequal branch charged with making the laws. No legitimate interpretation of the ninth amendment, or of the privileges and immunities, due process, or equal protection clauses allows for these violations of the separation doctrine.

The High Court has also been derelict in its function of protecting personal liberty. Regardless of constitutional language and purpose, the Court has its own preferences on liberty, giving some very high, and others very low priority. In particular, it has for all practical purposes eliminated protection for the exercise of economic liberties, those having to do with the production and distribution of goods and services. As I have explained in prior writings, this policy runs counter to the meaning of provisions in the original Constitution, the Bill of Rights, and section 1 of the fourteenth amendment.²⁰⁷ In any event, establishing the priority of liberties is a political judgment affecting the character of the society. Although Justices cannot be ex-

203. See Siegan, *supra* note 202, at 4. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

204. THE FEDERALIST PAPERS NO., 81, at 485 (A. Hamilton) (Mentor 1961).

205. THE FEDERALIST NO. 78, *supra* note 17, at 465.

206. See B. SIEGAN, *supra* note 1; B. SIEGAN, *supra* note 57; B. SIEGAN, *supra* note 202.

207. See B. SIEGAN, *supra* note 1.

pected to treat every interest and concern the same, excising from protection liberties that affect substantial numbers of people is a determination exceeding the scope of judicial discretion.

VI. CONCLUSION

The Supreme Court has exercised enormous power, hardly in keeping with Hamilton's description of this branch as the "least dangerous to the political rights of the constitution."²⁰⁸ As it has turned out, the Antifederalists were much more accurate in their assessment that the Court would be extremely powerful and a threat to democratic government. The Antifederalists also were correct in their fears that Congress would greatly reduce state sovereignty. Like the Supreme Court, Congress is exercising extensive powers never envisioned by proponents of the Constitution. The Federalists anticipated that Congress' authority would be moderately exercised due to the diversity of economic, political, and social interests to which it would have to cater.²⁰⁹

The Framers' basic solution to the might of government was to disperse and diffuse it. Probably their most important political accomplishment, the separation of powers, meant spreading authority over and across government. The major difference between the government they established and the one that then existed in England was that majorities were not supreme under ours. For their theory to be effective, each branch had to be strong enough to check and balance the other two. The most salutary aspect of a powerful Supreme Court is that it counters a powerful legislature. As Madison stated: "Ambition must be made to counteract ambition."²¹⁰

Madison and his colleagues believed the legislatures harbored serious threats to freedom. Consider, for example, his observations in *Federalist No. 48*: "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex . . ." "[I]t is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."²¹¹

Other leading Framers were no less apprehensive about lawmakers. Hamilton condemned the state legislatures for failing to safeguard commercial rights.²¹² Gouverneur Morris found in every

208. THE FEDERALIST PAPERS NO. 78, *supra* note 17, at 465.

209. Madison makes this widely quoted argument in THE FEDERALIST NO. 10, at 77-84 (J. Madison) (Mentor 1961).

210. THE FEDERALIST NO. 51, at 322 (J. Madison) (Mentor 1961).

211. THE FEDERALIST NO. 48, at 309 (J. Madison) (Mentor 1961). Madison quoted Jefferson as criticizing the Virginia legislature as "in many instances, decid[ing] rights which should have been left to judiciary controversy." *Id.* at 311.

212. 25 THE PAPERS OF ALEXANDER HAMILTON 479 (H. Syrett ed. 1977).

state legislative department "excesses [against] personal liberty private property [and] personal safety,"²¹³ and Edmund Randolph presented the Virginia Plan to the Convention to overcome the "turbulence and follies of democracy."²¹⁴

According to Charles Grove Haines, in his authoritative work on judicial review, a commonly held belief in 1787 was that the greatest peril to liberty comes from the expanding powers of legislative bodies:

[T]here was more concern as to the restrictions under which governments should operate than as to the functions to be performed. Governments were to be prohibited from interfering with freedom of person, security of property, freedom of speech and of religion. The guaranty of liberty was, therefore, to give the rulers as little power as possible and then to surround them with numerous restrictions—to balance power against power.²¹⁵

On the other hand, the judiciary was considered the branch able to maintain lawful prohibitions and restrictions upon exercise of unauthorized powers by other governmental bodies, as well as by individual officeholders.²¹⁶ Accordingly, even if the Framers foresaw the immense potential of the judiciary, they might nonetheless have accepted it to counter the ever present legislative threat to liberty. In the words of Hamilton:

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.²¹⁷

Turning to section 1 of the fourteenth amendment, there is far less uncertainty as to what its Framers thought about the role of the judiciary. The three rights clauses of this section are extremely broad in language, according large discretion in their interpretation. The speeches of the congressional proponents of the amendment reveal little concern in this regard. Supporters did not limit the judicial power, notwithstanding the storm of criticism directed at the *Dred Scott* decision.

One reason for this attitude is that the Framers intended the

213. 1 M. FARRAND, *supra* note 10, at 512.

214. *Id.* at 51.

215. C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 209-10 (2d ed. 1959).

216. *Id.* at 210-13.

217. *THE FEDERALIST* NO. 78, *supra* note 17, at 469.

clauses to severely restrict the capacity of the states to stifle freedom. In explaining the proposed amendment, Senator Howard and Representatives Stevens and Bingham asserted that section 1 comprehended all the fundamental and natural liberties, and secured them against state action. Other congressional supporters of the proposed section agreed with or did not deny this interpretation.

How well the Supreme Court has performed its constitutional mandate is a matter of great debate. Persons who should have access to the courts are effectively denied it. And the Court engages in practices belonging to other government bodies. However, when it reviews laws and regulations that abridge individual liberties, whether stated or not, it is implementing the Constitution, as written and intended.