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THE ROLE OF HISTORY IN INTERPRETING
THE FOURTEENTH AMENDMENT

William E. Nelson*

How can recourse to history provide the Supreme Court with an approach to interpreting the Reconstruction Amendments in general and the Fourteenth Amendment in particular? In The Fourteenth Amendment: From Political Principle to Judicial Doctrine,¹ I argued that recourse to history in the form of original intention could not by itself provide any simple, unidimensional interpretive principle with which to give clear meaning to the text of Section 1.² I showed that Section 1 emerged out of the Radical Republicans’ commitment to the protection of human rights and equality and that the section could never be comprehended fully except by reference to that commitment.³ On the other hand, I also showed that when Democrats in Congress and in the state legislatures objected that the Fourteenth Amendment would alter existing balances of federalism in fundamental ways, Republicans responded that Section 1 would have no effect in states like those in the North that accorded their citizens the rights listed in the Bill of Rights together with other fundamental rights.⁴ Keeping faith with this history would require the Court, in a role of discoverer of original intent, to take seriously the amendment’s commitment to local self-rule.

I concluded from this history that the men who framed and ratified Section 1 of the Fourteenth Amendment meant simultaneously to protect rights and to preserve the then-existing balance of federalism.⁵ Although the protection of rights and the preservation of federalism strike us as inconsistent goals, I argued that the two goals seemed far more consistent to the Radicals, who had had a long history of using state institu-

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2. Id. at 2-12.

3. Id. at 13-39, 64-90.

4. Id. at 91-147.

5. Id. at 110-12, 150-51.
tions to protect human rights. I noted, however, that as soon as cases involving Section 1 came before the Supreme Court, the tension between rights protection and local self-rule became apparent. Once the Justices came face to face with this tension that had lain beneath the surface of the amendment throughout the process of its enactment and ratification, the Court could not, of course, come to any resolution by simple recourse to original intent.

The best the Court could do, I maintained, was what it did in its first four decades of Fourteenth Amendment adjudication, beginning with the *Slaughter-House Cases* in 1873. It pursued a middle path between excessive protection of rights to a degree that would destroy local power and excessive concerns about local power that would lead to the repression of rights. Doctrinally the Court allowed states to determine the scope of their citizens' rights but then required that all citizens be treated equally in their enjoyment of those rights. However, beginning with *Lochner v. New York*, the Court abandoned its course of protecting only equality in the enjoyment of rights rather than rights themselves. Since *Lochner* the Court has behaved more haphazardly, at times insisting only that states act rationally and equally in enforcing rights, but at other times identifying certain rights as fundamental and requiring their absolute protection.

In light of this history, how should the Supreme Court interpret the Fourteenth Amendment today? The controlling principle that will give definitive meaning to Section 1 is not readily available either in the amendment's text or in the original intentions of its framers and ratifiers.

6. Id. at 36-39.
7. Id. at 160-67.
8. 83 U.S. (16 Wall.) 36 (1873).
10. 198 U.S. 45 (1905).
11. See Nelson, supra note 1, at 197-200.
Nor is there a clear, unvarying path of Supreme Court adjudication from which fixed doctrine can be distilled. The controlling principle for interpreting Section 1 must come instead from some contemporary judgment about how best to apply the amendment.

Two striking historical events suggest one approach from which such a judgment might flow. This approach will be set forth below in a most tentative fashion, with no claim that it is the only or even the best possible approach.

One of the two events is the collapse of communism in the streets of Moscow in August 1991. Notably, the communist leaders in the Kremlin commanded enormous coercive power at the time they staged their coup. The Soviet military enjoyed unrestrained technological superiority over the Moscow populace, with the capacity to eliminate the entire population through a single nuclear strike or to kill people seriatim with weapons such as tanks and tactical air strikes. But communist ideology no longer possessed any power to inspire either the Russian masses or the military. Meanwhile, a dream of Western-style freedom inspired thousands who took to the streets in protest and dared the army to put them down. The uninspired soldiers refused to fire their weapons of destruction on the inspired protesters, and with their refusal, communism died.

The triumph of the British raj in nineteenth century India is the other event suggesting the same approach to interpreting the Fourteenth Amendment. In the mid-nineteenth century, a military force containing less than 40,000 men from the British Isles—substantially fewer than the 671,654 police in the United States in 1988—kept an entire subcontinent with a population approaching 150 million people under subjugation. While the British army undoubtedly had organizational and technological superiority, the main British weapon was the ability to co-opt Indian elites into supporting British rule. The British, that is, inspired Indian elites with a promise of a better life in a Westernized culture: through English-style education,

the creation of Western markets and an unthinking assumption of cultural superiority, the British created an ideology that conferred far greater power on them in India than their minuscule army could ever have done.\(^\text{19}\) As one historian has written, British dominance in India was not merely, not even primarily, the result of British military power. . . . Remembering the vast size of the territory defended and administered in British India alone (not counting the so-called Native States) and the total of its population, it is obvious that the British could never have done it alone, and indeed that they never even considered doing so. In other words, most Indians were willing collaborators . . . . [T]he English . . . offered, as no other alien or indigenous system had done in Indian memory, a degree of civil order and a set of new attitudes and techniques focused on economic growth from which some Indians as well as Englishmen could gain.\(^\text{20}\)

These two examples suggest that ideologies with inspirational power may be as important as military technology and coercive legal institutions in enabling a government to rule effectively. The two examples also suggest an approach to the question posed at the outset of this Essay—whether history can provide the Supreme Court with guidance in properly interpreting Section 1 of the Fourteenth Amendment. They suggest that, after identifying the diverse, competing principles that the framers and ratifiers of the Fourteenth Amendment incorporated into its text, the Court should examine the inspirational power of those principles. It should thereupon commit itself to the furtherance of the principles best able to generate public support for the judiciary’s duty to “administer justice without respect to persons, and do equal right to the poor and to the rich.”\(^\text{21}\)

There are, as we have seen, two competing sets of principles—federalism and local, legislative self-rule on the one hand, and equality and protection of fundamental rights on the other. The first set of principles, in and of themselves, lack inspirational power. Among judges, lawyers and law professors, occasional proceduralists may be inspired by doctrines of federalism, but the public at large is typically indifferent to the

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doctrinal issues determined in cases such as Teague v. Lane. Some people and, probably, most lawyers may care whether minority defendants are tried in criminal cases by juries representing a racially fair cross-section of the community—the underlying substantive issue in Teague. But only federal judges and federal court mavens care about the narrow issue in Teague—whether new constitutional rules of criminal procedure should be applied retroactively to cases on collateral review and thus, in turn, whether state or federal judges should resolve the underlying substantive issue.

Likewise, issues concerning the allocation of power among equal branches of government and practices of judicial deference to legislative decision-making, in and of themselves, inspire no one but occasional lawyers and proceduralists. The general public does not care about a case like United States v. Munoz-Flores, which held that a statute imposing a monetary special assessment on a defendant convicted of aiding the illegal entry of aliens into the United States was not a revenue measure and hence did not violate the clause of the Constitution requiring revenue measures to originate in the House of Representatives rather than the Senate. While people do care about how much they pay in taxes and perhaps about whether illegal aliens gain entry into the United States, few Americans know that the Constitution requires revenue bills to originate in the House and even fewer care.

Doctrines of federalism, separation of powers and judicial deference to legislative decision-making gain some bite, however, from the linkages they have to other deeper and more compelling policies. Federalism, for example, is linked to more meaningful concerns about local self-rule. When John W. Davis argued for the various school boards in Brown v. Board of Education that “the very strength and fiber of our federal system is local self-government” under the control of “those most immediately affected by it,” he struck a responsive chord in the South where local self-rule had real meaning. But localism inspired Southerners because of the substantive ends it furthered—ends fundamentally racist in nature. Only forces outside Southern communities had the capacity to end white repression of blacks in the South, and preservation of local autonomy offered a means of continuing the exclusion of outsiders from

Southern political life and thereby preserving white insiders’ hegemony over blacks.

Localism has, indeed, typically been connected to racism, nativism and other sorts of xenophobia in American history. From as early as 1660, when Massachusetts Puritans drove Quaker refugees out of Boston,26 through centuries of Southern negrophobia,27 to the efforts of New York in the 1960s to keep Spanish speakers from voting,28 local governments have worked to preserve the power of local elites and to prevent outsiders and underclasses from participating in established local institutions on equal terms with those who controlled them. Many Americans value this local power immensely and gain inspiration from calls to preserve it. Yet the Supreme Court, which should search in its constitutional decision-making for inspirational principles that call out the best rather than the worst in Americans, has no business protecting racism, nativism and xenophobia. To the extent that arguments in support of federalism and local self-rule are a mere pretext for bigotry, the Court must not heed them. The Justices, instead, are obligated by their oaths to “administer justice without respect to persons, and do equal right” to all.29

At times, arguments protective of federalism and localism overlap with concerns about separation of powers and deference to legislative decision-making. They become, in effect, concerns about the preservation of democratic processes and democratic self-rule. How much inspirational force can a judicial commitment to democratic decision-making, and a resultant commitment in support of judicial deference to legislative policy judgments, have? The answer, I suggest, depends on how the democratic process is functioning.

Today, democracy carries little inspiration for many Americans, as shown by a prevalent distrust of politics and increasing voter apathy.30


The problem lies with our currently dominant conception of democracy. Americans tend to understand democratic politics as a struggle between interest groups, each of which is striving to maximize its share of society's resources and power. Democracy appears to have little connection with the disinterested pursuit of the public good. On the contrary, democracy seems merely to be a set of institutional procedures, like federalism and separation of powers, that enable one private interest to triumph over another.\textsuperscript{31}

Such a view of democracy has little inspirational power: the fact that people with one point of view gain a few more votes than people with a competing point of view provides no reason why the first viewpoint should dominate the second. The mere fact, for instance, that heterosexual men outnumber but nevertheless fear homosexual men is not a basis for criminalizing homosexuality. Arguments like those in \textit{Bowers v. Hardwick},\textsuperscript{32} that the "Court . . . comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution" and thereby "takes to itself further authority to govern the country without express constitutional authority"\textsuperscript{33} mean little to most people in the context of a case determining the constitutionality of criminalizing sodomy. Far more compelling to many Americans is Justice Blackmun's dissenting argument in \textit{Bowers} "that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do."\textsuperscript{34} Equally compelling to others is Chief Justice Burger's concurring statement that declaring "the act of homosexual sodomy . . . somehow protected as a fundamental right would be to cast aside millennia of moral teaching."\textsuperscript{35} In the end, analyses of the duty of judges to defer to legislative policy choices does not explain why sodomy should be a crime. Only the moral evil of sodomy, if in fact one believes it to be morally evil, can constitute a legitimate reason for making it a crime. And the ultimate argument for

\textsuperscript{31} See ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 280-98 (1989) (discussing difficulties in notion of common good from traditionalist, modernist and pluralist perspectives); DIONNE, supra note 30, at 142-44 (discussing adoption by liberal Democrats of special interest group causes instead of creating integrated platform for public good as condemning Democratic Party to anti-democratic factionalism).

\textsuperscript{32} 478 U.S. 186 (1986).

\textsuperscript{33} Id. at 194-95.

\textsuperscript{34} Id. at 214 (Blackmun, J., dissenting).

\textsuperscript{35} Id. at 197 (Burger, J., concurring).
decriminalization is "the right [of people] to be let alone" in their intimate affairs.³⁶

But while democracy has little rhetorical pull today, it has had greater inspirational power at times in the past. During the New Deal, for example, President Franklin D. Roosevelt linked claims on behalf of democracy to claims about social justice; in his vision, the triumph of democracy would bring with it the triumph of social justice. Democracy thus gained inspirational power during the New Deal because Roosevelt was able to portray narrow private and special interests as the enemy of democracy, and to convince people that the triumph of democracy would bring an end to the pursuit of special interests inimical to the attainment of justice.³⁷ By invalidating legislation of the democratically chosen President and Congress, the Supreme Court cast itself in the role of representative of special interests holding back reforms beneficial to the people as a whole.³⁸ As a result, "the face-off between the Executive and the Court in the 1930's . . . resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments."

Thus, while judicial appeals to legislative deference today lack inspirational power in the context of cases like Bowers v. Hardwick,⁴⁰ they did have that power in the 1930s in the hands of a Brandeis, Cardozo or Stone. This history suggests that the eagerness of judges to defer to legislative policy choices, or in the alternative to declare them constitutionally invalid, must accordingly depend upon subtle contextual judgments about whether the legislature acted as representative of the people at large or of mere special interests, and about whether the Court possesses an inspirational principle upon which the court can base an act of invalidation.

³⁶. Id. at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), overruled by Katz v. United States, 389 U.S. 347, 352 (1967)).
³⁷. See ALAN BRINKLEY, VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN, AND THE GREAT DEPRESSION 79-81 (1982) (sharing the wealth was popular idea during Franklin D. Roosevelt's administration); FRANK FREIDEL, FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY 202-03, 207 (1990) (comparing special interests to overthrow of royalty as requirement to restore democracy); WILLIAM E. LEUCHTENBURT, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 183-84 (1963) (characterizing economic elite as inspiring imposition of industrial dictatorship).
³⁸. See DIONNE, supra note 30, at 142 (discussing reliance on judicial decisions by liberal Democrats as means to implement social change instead of political reform as bypassing democratic process); FREIDEL, supra note 37, at 162-64, 225-26 (describing Supreme Court's initial opposition to New Deal legislation).
⁴⁰. Id.
Where, in sum, can the Court find inspirational foundations for constitutional decisions in Fourteenth Amendment cases? One easy answer is to turn to promotion of equality and protection of fundamental rights—principles with a textual base in Section 1 of the Fourteenth Amendment and with an intentionalist base in the original understanding of the amendment's framers. Promoting equality and protecting rights is always inspirational. But this is not the only source to which the Court can turn for inspiration; democracy, at times, is another. A democratic legislative decision codifying the will of the people at large and promoting the general interest against some narrow special interest should at times also command judicial respect. Whether respect for democracy has rhetorical pull always depends, however, on the nature of the legislative process in any particular case and on how the legislation under challenge actually functions in the world. When, as in *NLRB v. Jones & Laughlin Steel Corp.*,\(^1\) legislation such as the National Labor Relations Act furthers the public good by stimulating economic growth and equalizing the bargaining power of competing economic groups, the Court should uphold it. But when, as in *Bowers v. Hardwick*,\(^2\) legislation represents the triumph of one interest or lifestyle over another, the Fourteenth Amendment authorizes the Court to strike it down if it treats individuals unequally or deprives them of their fundamental rights.

\(^1\) 301 U.S. 1 (1937).

\(^2\) 478 U.S. 186 (1986).