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Conservative and liberal scholars are conspiring to convince Americans that those who framed and ratified the Constitution meant to secure only a narrow range of liberties. Conservative scholars maintain that constitutional provisions were intended to protect a narrow range of liberties because contemporary conservatives are hostile to most individual rights. When judges and citizens realize that the constitutional framers protected very few freedoms, the right hopes, Americans will reject the liberal egalitarian values of the Warren Court and its academic supporters as constitutionally illegitimate. Liberal scholars maintain that constitutional provisions were only intended to protect a narrow range of individual liberties because contemporary liberals are hostile to originalism. When judges and citizens realize that the constitutional framers protected very few freedoms, the left hopes, Americans will abandon the strict historicist methods of constitutional interpretation used by leading members of the Rehnquist Court and its academic supporters.

To further the disparate goals of their interpretive conspiracy, contemporary theorists rely heavily on a selective use of history. Such leading—and politically diverse—constitutional commentators as Robert Bork, Raoul Berger, Paul Brest, Michael Perry and Thomas Grey consistently treat as authoritative historical evidence suggesting that seemingly broad declarations of constitutional rights were actually designed to achieve more limited objectives. Remarkably, the liberal members of this conspiracy rarely point to available historical evidence suggesting that the Framers used such open ended language as "due process," "privileges and immunities" and "equal protection of the laws," because they had expansive no-

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tions of the rights retained by the people.[1] Thus, constitutional theorists of quite different persuasions commonly emphasize Leonard Levy's controversial claim that the First Amendment was originally understood as only prohibiting prior restraints on speech[2] and ignore subsequent works which conclude that the Founding Fathers had significantly broader conceptions of expression rights.[3]

"No law" in the First Amendment apparently has too many libertarian implications for members of the contemporary interpretive conspiracy to interpret that phrase as meaning "no law." "No State" in the equal protection clause, however, has a delightfully inegalitarian connotation which ensures that both conservative and liberal law professors will interpret that phrase as meaning "no state." Constitutional theorists on both the left and the right insist that the persons responsible for framing and ratifying the Fourteenth Amendment used the words "No State" because they intended that only state officials be constitutionally prohibited from violating the majestic principle of equality before the law. Thus, their writings agree that proper originalist analysis leaves the federal government constitutionally free to discriminate on racial or any other grounds. Robert Bork declares that *Bolling v. Sharpe*,[4] the case holding school segregation laws in the District of Columbia unconstitutional, is a decision that "rested on no precedent or history." "[H]istory compels the opposite conclusion," he insists, because "the equal protection clause, under which *Brown* had been decided, applied only to the states; no similar clause applied to the federal government, which governed the District of Columbia."[5]

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1. The canonical works on non-interpretivism all contain long sections endorsing the most restrictive historical interpretations of significant constitutional liberties. See especially Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 223-24, 229-34 (1980); Michael J. Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* 62-90 (Yale U. Press, 1982); Thomas C. Grey, *Do We Have an Unwritten Constitution*, 27 Stan. L. Rev. 703, 710-14 (1975).

2. Leonard W. Levy, *Freedom of Speech and Press in Early American History* (Harper & Row, 1963). See Grey, 27 Stan. L. Rev. at 713 (cited in note 1); Perry, *The Constitution, the Courts, and Human Rights* at 63-64 (cited in note 1).

3. See Merrill Jensen, *Book Review*, 75 Harv. L. Rev. 456 (1961); Dwight L. Teeter, *A Legacy of Expression: Philadelphia Newspapers and Congress During the War for Independence, 1775-1783*, (unpublished dissertation, University of Wisconsin, 1966); David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. Rev. 455 (1983); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 Stan. L. Rev. 795 (1985); Lucas A. Powe, Jr., *The Fourth Estate and the Constitution* 22-50 (U. of Cal. Press, 1991). Indeed, even Levy now admits that the Framers had a substantially broader understanding of the First Amendment than his earlier writings suggest. Leonard W. Levy, *Emergence of a Free Press* ix-xii (Oxford U. Press, 1985).

4. 347 U.S. 497 (1954).

5. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 83 (Free Press, 1990).

Bork's history is enthusiastically endorsed by his left-wing co-conspirators. Leading proponents of non-originalist theories of constitutional interpretation gleefully declare that if the Supreme Court can only strike down those practices that the Framers would clearly have regarded as unconstitutional, then the Warren Court grossly abused the judicial power when declaring unconstitutional dual school systems in the nation's capital. Originalists are "entirely correct," Brest warns, when they assert that *Bolling* "is not supported by even a generous reading of the fifth amendment."[6] Grey bluntly points out that originalism leaves the federal government "constitutionally free . . . to engage in explicit racial discrimination."[7]

Neither Bork nor Brest (nor any of their co-conspirators) actually cite any member of the Reconstruction Congress who stated or otherwise maintained that the national government, unlike the states, would retain the power to discriminate. Nor do they point to any legislation considered by Congress immediately after the Civil War that would have clearly been unconstitutional if enacted by a state. Rather, this remarkable consensus among constitutional commentators that the equal protection clause limits only state power is based on only one datum, the constitutional text. The Fourteenth Amendment explicitly states that "no *State* shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws," and no provision in the Constitution explicitly declares the federal government is so constrained. If the Framers had wanted to limit the federal government, conventional wisdom maintains, the Fourteenth Amendment would have declared that "Neither the federal government nor the states shall . . . ." Apparently, the interpretive principle at work is *res ipsa loquitur*: the thing speaks for itself.

When the persons responsible for framing and ratifying the Fourteenth Amendment speak for themselves, however, they offer a different explanation for their failure to mention the federal government. Although members of the Thirty-Ninth Congress did not specify any precise constitutional limitations, their speeches consistently assumed that Congress was already constitutionally prohibited from depriving any citizens of the equal protection of the law. Thaddeus Stevens, for example, stated that all of the provisions in section one are "asserted, in some form or other, in our Declaration or organic law." Additional constitutional language was necessary,

6. Brest, 60 B.U. L. Rev. at 233 (cited in note 1).

7. Grey, 27 Stan. L. Rev. at 711 (cited in note 1). I do not know of any prominent constitutional theorist who questions the historical/textual claims made in the above paragraph.

he informed his colleagues, because "the Constitution limits only the action of Congress, and is not a limitation on the States." Section One would thus ensure that the existing constitutional limitation on federal power to discriminate would henceforth also constrain state power. "This amendment," Stevens observed, "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."[8]

Leading participants in the debate over the Fourteenth Amendment treated as common knowledge the proposition that the pre-Civil War Constitution already prohibited federal laws inconsistent with equal protection. Lyman Trumbull, the author of the Civil Rights Bill of 1866, asserted that one of the "fundamental rights" of "citizens of the United States" was that "restraints introduced by law should be *equal to all.*"[9] Representative Samuel Randall, an opponent of the amendment, claimed that "[t]he first section proposes to make an equality in every respect between the two races, notwithstanding the policy of discrimination which has *heretofore been exclusively exercised by the States.*"[10] John Bingham declared that "every word," of his proposal that "Congress shall have power to make all laws which shall be necessary and proper to secure to . . . all persons in the several States equal protection in the rights of life, liberty, and property . . . is to-day in the Constitution."[11]

Raoul Berger makes much of Bingham's mistaken belief that the phrase "equal protection . . . stands in the very words of the Constitution."[12] None of Bingham's colleagues, however, corrected this "error" or otherwise objected when Stevens, Trumbull and others indicated that the federal government was already constitutionally obligated to treat all citizens equally. Instead, the Framers of the Fourteenth Amendment consistently proclaimed that equal protection was a fundamental principle that should constrain governments in all free societies. Senator Jacob Howard, a leading member of the Joint Congressional Committee responsible for the amendment, insisted that "[w]ithout this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government."[13] Representative John Farnsworth of

8. Cong. Globe, 39th Cong., 1st Sess. 2459 (1866).

9. Id. at 1757.

10. Id. at 2530.

11. Id. at 1034.

12. Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 140 (Harv. U. Press, 1977) ("*Government by Judiciary*").

13. Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

Illinois similarly contended that "equal protection of the laws" is "the very foundation of a republican government" and "the undeniable right of every subject of the Government."[14] In a more controversial speech, Bingham stated that equal protection was one of "the inborn rights of every person" that "[n]o State ever had the right . . . to deny."[15] These hardly sound like legislators who believed that the federal government would be constitutionally free to discriminate against racial minorities and make other arbitrary distinctions after ratification of the Fourteenth Amendment.

Contemporary lawyers and citizens, therefore, can offer perfectly originalist justifications for the claim that the federal government cannot practice racial or other forms of invidious discrimination. The persons responsible for framing and ratifying the Fourteenth Amendment intended to ensure that no governmental official could violate basic principles of equality. They chose the limiting phrase "No State shall deny" only because they believed that the Constitution already prohibited federal officials from making arbitrary and discriminatory distinctions among individuals. A Fourteenth Amendment which specified that "neither Congress nor the states shall deny to any citizen the equal protection of the laws" would, in their view, have been as redundant as a provision which stated "neither Congress nor the states shall deny due process of law." Originalists can, of course, debate when and whether the Constitution should incorporate the assumptions that constitutional framers make about what is already covered by the text.[16] This dispute, however, is between two different methods of interpreting the original intentions of the Framers and not between originalists and some other school of constitutional thought.

More significantly, this brief explanation of the original meaning of "No State" provides another example of how "law office history" perverts contemporary constitutional theory. The historical evidence demonstrating that members of the Thirty-Ninth Congress did not intend to limit equal protection constraints to the states is hardly obscure. The crucial statements quoted above are often quoted (though for other purposes) in well-read treatises on the original meaning of the Fourteenth Amendment. Several appear in

14. Id. at 2539.

15. Id. at 2542.

16. Obviously, originalists who believe the federal government should be free to discriminate in any way among citizens must also demonstrate that the persons responsible for framing and ratifying the original constitution believed the federal government should be free to discriminate in any way among citizens. Such a proposition seems to me to be historically dubious.

Raoul Berger's *Government by Judiciary*.[17] Constitutional theorists do not recognize that "No state shall deny" in the Fourteenth Amendment does not mean "only states shall not deny" only because such a conclusion would subvert their political purposes. These purposes require both conservatives and liberals to depict constitutional framers as fairly rigid statists. The greatest fear that many law professors on both the left and the right have is that historical investigation will reveal that the persons responsible for framing and ratifying constitutional provisions shared at least some of the decent liberal egalitarian values that animated Earl Warren, William Brennan and Thurgood Marshall.

17. See Berger, *Government by Judiciary* at 140-41 (quoting Bingham), 210 (quoting Howard) (cited in note 12).