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CHARLES FAIRMAN, "LEGISLATIVE HISTORY," AND THE CONSTITUTIONAL LIMITATIONS ON STATE AUTHORITY

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"[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were."

—OLIVER WENDELL HOLMES, JR.

IN *ADAMSON V. CALIFORNIA*, the reader may recall, Justice Hugo L. Black expressed the view that the Privileges and Immunities Clause of the Fourteenth Amendment ought to be taken as making the first eight amendments—the so-called Bill of Rights—good against the states. He said he was persuaded this was what the clause had been intended to accomplish. Justice William O. Douglas and the late Justices Frank Murphy and Wiley Rutledge agreed with these views.¹ So, it looked for a time as if these views might quite possibly become the views of the Court, with the next change in its personnel.

To many persons, this was an insufferable prospect. For, if such a thing had come about, certain of our states would have had to mend their ways: they would have had to observe all the provisions of this Bill of Rights that Americans have long been taught to revere. So, Charles Fairman, then a member of the law faculty of Stanford University, went to work to try to discover whether the views of Justice Black were really true. "Letters," we are told, "went out to libraries and depositories throughout the country. Microfilm, books, and documents came back."² Then, after some two years of poring over these,

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¹ 332 U.S. 46, 68-125 (1947).

² President's Page, 2 Stanford L. Rev. 1, 4 (1949).

the result was given to the country in the *Stanford Law Review*: a long article attacking the views of Justice Black, and the other Justices just mentioned, as erroneous.³

In a book I published last year, I commented unfavorably upon Mr. Fairman's article.⁴ And, now, in a recent number of this *Review*, he has attacked me and the conclusions I reached in my book, as to the meaning of the first eight amendments. Of my conclusions, he says that they are wrong; and of me, he says that I am "not candid and objective"; that I have "suppressed" countervailing relevant evidence; in short, that I have undertaken deliberately to mislead my readers.⁵

It seems to me the situation is one calling for a reply; and while I am about it, I shall put in a few words in behalf of Justice Black, as well.⁶

I. THE FOURTEENTH AMENDMENT

1

Mr. Fairman's attack on the views of Justice Black was published under the title, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" This was followed by a subtitle, "The Original Understanding." So far as the main title is concerned, it was a complete misnomer;

³ Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *Stanford L. Rev.* 5 (1949), cited hereinafter as "Fairman I."

⁴ Crosskey, *Politics and the Constitution in the History of the United States 1171 and 1381 n. 11* (1953), cited hereinafter as "Pol. & Con."

⁵ Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 *Univ. Chi. L. Rev.* 40 (1953), cited hereinafter as "Fairman II."

⁶ The materials hereinafter presented relating to the progress of the Fourteenth Amendment through Congress and its later interpretation in that body, I first worked up when the chapters on that amendment in my *Politics and the Constitution* were written. I thought of including a consideration of these materials in that book, but finally decided against this, partly because the book was already overlong anyway, and partly because it seemed to me unnecessary to do so. The first section of the amendment seemed very clear in the light of the neglected prior law; the congressional materials, therefore, merely corroborated an otherwise clear text. When Mr. Fairman's article was published, I again considered whether I should include a consideration of the legislative history of the amendment in the book; but I again decided against it. It seemed to me Mr. Fairman's article was its own refutation. In this view I apparently was mistaken. A Wall Street lawyer for whom I have the highest respect has written me that it seems to him Mr. Fairman damaged Justice Black considerably. Various other persons have told me that Mr. Fairman's article has made quite an impression. And one reviewer of my book, who reviewed it favorably in three different publications—62 *Yale L. J.* 1145; 2 *U. of Kan. L. Rev.* 115; and the *Louisville Courier-Journal* (May 17, 1953)—refers to my omission to consider the legislative history of the Fourteenth Amendment, in one of these reviews, as "perhaps the one sour note" in the book. I can only conclude that what seemed obvious to me about Mr. Fairman's article was not equally so to persons who had not made a first-hand examination of the materials he treated, and who, perhaps, were unfamiliar with the old Republican constitutional ideas which are dealt with in the second section of this article. So, belatedly, I herein seek to repair the censured omission from my book.

for there was not, in the one hundred thirty-nine pages of Mr. Fairman's article, a single line devoted to the question which the title asked. Instead, his entire effort was an attempt to get into the minds of various persons living in the years 1866-68 and immediately thereafter, in order to determine whether *they thought* the amendment, by its Privileges and Immunities Clause, "incorporate[d] the Bill of Rights." He said he found a "mountain of evidence" that they did not think the clause did this; and in these circumstances he apparently concluded he was under no necessity at all of considering what the clause in question meant, though he did give brief consideration to what, he thinks, "the founders of the Fourteenth Amendment" *thought* it meant. And what he thinks they thought it meant is "what is 'implicit in the concept of ordered liberty.'" But, because the Supreme Court had already held the Due Process Clause of the amendment meant this same thing,⁸ Mr. Fairman's conclusion really was that the Privileges and Immunities Clause adds nothing to what the Supreme Court holds the Due Process Clause requires. So, the clause might as well have been omitted from the amendment.

It was the foregoing singular character of Mr. Fairman's article that led me to comment unfavorably upon it in my book of last year. I said:

Entirely apart from questions of the adequacy, and of the handling, of the evidence which Mr. Fairman presents, it is to be remembered that a recurrence to evidence of the sort he presents, is illegitimate in the case of a provision, like the first section of the Fourteenth Amendment, which is clear in itself, or clear when read in the light of the prior law. It is doubly illegitimate when it is remembered that most of what the first section of that amendment requires, was also required by Amendments II-VIII. *Cf.*, discussion herein in chapters xxx and xxxi. Mr. Fairman apparently forgets that the ultimate question is not what the legislatures meant, any more than it is what Congress or the more immediate framers of the amendment meant: it is what the amendment means. *Cf.*, Holmes, *The Theory of Legal Interpretation*, 12 HLR, 417 (1899).

I also characterized Mr. Fairman's article as "an elaborate attempt to justify the Supreme Court's continued flouting of the plain and simple provisions of the Fourteenth Amendment."⁹

Mr. Fairman now intimates that I cannot get rid of his "mountain of evidence" by "suddenly pronounc[ing] crystal clear" "what others have found obscure."¹⁰ In this, he is undoubtedly correct: my "pro-

⁷ Fairman I, at 134, 138-39.

⁸ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

⁹ Pol. & Con. 1171.

¹⁰ Fairman II, at 44.

nouncements," sudden or otherwise, are of no importance. Yet if the Fourteenth Amendment actually is clear in the light of the neglected and forgotten facts that I brought forward,¹¹ there certainly can be no doubt that the legitimacy of Mr. Fairman's whole effort disappears. For it is elementary that not even "legislative history" *properly so-called* can be employed to contradict and destroy the plain letter of a clear text. And still less can some of the other "evidence" in Mr. Fairman's "mountain" be used for such a purpose.

The first section of the Fourteenth Amendment—the only section with which we shall here be concerned—reads as follows:

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

The facts that make clear the meaning and purpose of the foregoing provisions are certain features of our constitutional law as that law existed in 1866–68, when the Fourteenth Amendment was drawn and adopted. These features of that law are a part, and a very important part, of "the circumstances" in which the words of the amendment were used, and we take account of them—as Justice Holmes suggested in the passage I have quoted above¹²—in order to answer the question what the words of the amendment must have meant "in the mouth of a normal speaker of English, using them in [those particular] circumstances in which they [in fact] were used."

The first feature of the prior law that is relevant to this inquiry is one of the holdings of the Supreme Court, in the *Dred Scott Case*, of 1857:¹³ that, under the Constitution of the United States, no person of African descent, whether a slave or not, was, or could be, a citizen of the United States; and this, whether he was a citizen of one of our states or not. This holding was still unoverruled when the Fourteenth Amendment was drawn and adopted. A second relevant circumstance is that there were, at that time, in the local laws, or constitutions, of certain of our states, provisions denying local state citizenship to persons of African descent. In the light of these two features of the prior law, the purposes of the initial provision of the amendment defining

¹¹ Pol. & Con. ch. xxxi.

¹² Holmes, *Collected Legal Papers* 203, 204 (1921).

¹³ 19 How. (U.S.) 393 (1857).

state and national citizenship seem perfectly clear: the foregoing doctrine of the *Dred Scott Case* was to be nullified as a proposition of our constitutional law; the newly emancipated Negroes were to be made citizens of the United States; and they also were to be made citizens of the particular states in which they resided, whether the state laws and constitutions permitted this or not.

Now, it certainly would require great hardihood to deny that this first provision of the Fourteenth Amendment was clear. And, as a matter of fact, this never has been denied; and neither has it been doubted that the foregoing features of the prior law help to make the purposes of the provision apparent. The situation in respect to the other three provisions of the first section of the amendment is in all respects similar, save that, in their case, certain of the features of the prior law that make them clear have been forgotten, or, where this is, perhaps, not quite true, their relevancy has been.

Thus, it was another of the doctrines of the *Dred Scott Case* that all the various privileges and immunities recognized in the Constitution and its various amendments were privileges and immunities of citizens of the United States *only*; that is, they were, *all of them*, according to the Court, privileges and immunities of citizens of the United States, *and of no other persons whatsoever*. In the Court's opinion, this doctrine was developed with the utmost detail and particularity, and it was on this precise ground that Dred Scott was denied the privilege of suing in the United States courts under the interstate diverse-citizenship jurisdiction; for that privilege, the Court held, was, like all others under the Constitution and its various amendments, available only to those citizens of the states who were also citizens of the United States, as Dred Scott (they held) was not, and could not be.

The foregoing doctrine, unoverruled in 1866-68, seems undeniably relevant in considering what was the meaning of the command, in the amendment then adopted, that "no State sh[ould] make or enforce any law which sh[ould] abridge the privileges or immunities of citizens of the United States." To a correct understanding of this provision, one other fact, however, must be brought to view: the fact that it had been a settled doctrine of the Supreme Court, since 1833, that none of the privileges and immunities recognized in the first eight amendments was good against the states. This doctrine had been established in that year, in the case of *Barron v. Baltimore*.¹⁴ And when this circumstance also

¹⁴ 7 Pet. (U.S.) 243 (1833).

is considered, the meaning and purpose of the Privileges and Immunities Clause of the Fourteenth Amendment seem undeniably obvious: the clause was intended to wipe out the doctrine of *Barron v. Baltimore* as a part of our constitutional law. It was intended to make good against the states, *in favor of all citizens of the United States*, all the privileges and immunities under the first eight amendments, and, as well, any similarly ineffective rights under the original Constitution. The clause seems about as clear as a clause could be.

Passing, now, to the third clause of the Fourteenth Amendment, which forbids "any State [to] deprive any person of life, liberty, or property, without due process of law," what are the facts of prior law relevant to its meaning? First of all, there is the fact that the Fifth Amendment had provided generally (though this had been restricted to the nation only by the *Barron* case) that "no person sh[ould] be deprived of life, liberty, or property, without due process of law." It is an elementary and sensible rule, known to every lawyer, that terms and provisions of prior law, if they occur in new laws, are there to be given (unless otherwise expressly provided) the meaning they had in the prior law, at the date of the adoption of the new provisions.¹⁵ Applied to the Due Process Clause of the Fourteenth Amendment, this means that that clause properly has, as against the states, the same meaning that the Due Process Clause of the Fifth Amendment had, or had come to have, as against the nation, in 1866-68, when the Fourteenth Amendment was adopted.

As a matter of fact, there had not been, up to that time, many decisions by the Supreme Court on the subject of due process of law. The fantastic modern development known as "substantive due process" lay in the future; and there is, therefore, no more actual warrant for this doctrine, as against the states, under the Fourteenth Amendment than there is for it, as against the nation, under the Fifth. On the other hand, it had been decided by the Court that the general "due-process" guaranty of the Fifth Amendment necessarily comprehended, as to the particular aspects of "process" to which they relate, all the particular "process" guaranties covered in the Fourth, Sixth, Seventh, and Eighth Amendments, in the other clauses of the Fifth Amendment, and in the original Constitution. This decision had been made in the case of *Murray's Lessee v. Hoboken Land and Improvement Company*, in 1855. "To what principle," Justice Benjamin R. Curtis had therein

¹⁵ *Reiche v. Smythe*, 13 Wall. (U.S.) 162, 164 (1871); *Case of the Sewing Machine Companies*, 18 Wall. (U.S.) 553, 584 (1873).

asked for a unanimous Court, "are we to resort to ascertain whether a process, enacted by Congress, is due process?" "We must examine the Constitution," he replied, "to see whether that process is in conflict with *any* of its provisions." (Emphasis supplied.) And this he proceeded to do for the Court, in the case they had before them.¹⁶

Like Justices Bradley and Swayne, in the *Slaughter-House Cases* of eighteen years later,¹⁷ the Court of 1855 seems to have thought that the right given by the Due Process Clause of the Fifth Amendment "includ[ed] almost all the rest" of those the first eight amendments covered. And a little reflection will convince the reader that this was a necessary view. For "almost all the rest" of these rights are particular "process" guaranties; the various aspects of legal process to which they relate necessarily fall within the comprehensive words of the general "due-process" guaranty, too; and as to the matters to which they relate, nothing other than what they command can possibly be "due"—that is, required—"process of law" under the Constitution. So, if "due process of law" was to mean the same thing in the Fourteenth Amendment as it did in the Fifth, it necessarily followed that all the "process" guaranties, general and particular, in Amendments IV–VIII, as well as any in the original Constitution, were made good against the states, *in favor of all "persons,"* whether aliens or citizens, by the Due Process Clause of the Fourteenth Amendment.

The remaining clause of this amendment, the Equal Protection Clause, is to be fully understood only in reference to a certain proposition of constitutional law which was not actually settled when the Fourteenth Amendment was adopted. This was the general meaning of the Privileges and Immunities Clause of Article IV of the original Constitution. It runs as follows:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Though there was a very different theory as to the meaning of this clause that had widespread currency in the years before the Fourteenth Amendment was drawn, the clause, according to the now accepted view, gave to "the Citizens of each State," only an equality in rights, "in [each of *the other*] States," with such other state's own citizens. This was the view of the clause that a number of state courts had taken in the years before the drafting of the Fourteenth Amend-

¹⁶ 18 How. (U.S.) 272 (1855).

¹⁷ 16 Wall. (U.S.) 36, 118–19 (1873).

ment;¹⁸ but though there was an elaborate dictum in favor of this view in the *Dred Scott Case*,¹⁹ the point was actually open, since, in the one case that had come to the Supreme Court under this clause, in 1855, the Court had refused to indicate its view as to the general meaning of the clause in question. It simply denied the particular right that was claimed in the case.²⁰

Under the view now accepted, the theoretically primitive power of each of the states to create inequalities in rights among its own citizens, or among them and outsiders not citizens of any other of the United States, was deemed to survive completely under the clause in question. Each state had the power, too, according to this now accepted view, to create inequalities in rights, even as against citizens of other American states, provided only it did not deny to these any privilege or immunity that it gave to its own citizens generally. For the right to "equality" given by the clause was deemed to confer a right merely to that minimum of privileges and immunities which each particular state, in the exercise of its power to create special privileges and immunities, might choose to accord to its own citizens as a group. The "Citizens of [other] States" were not, in other words, considered to be entitled, in a state, to the special "privileges and immunities" which the state might choose to confer upon more favored members of its own citizenry, or, presumably (if this should occur), upon favored Americans of other states or favored foreigners.

And as Chief Justice Taney had pointed out in the *Dred Scott Case*, even this imperfect right was lost by any "person who, being the citizen of a State, migrate[d] to another State." For, then, as he explained, such a person "bec[a]me subject to the laws of the [latter] State in which he live[d], and [was] no longer a citizen of the State from which he [had] removed." The rights given under this Privileges and Immunities Clause were "confined," the Chief Justice said, "to citizens of a State, who"—being, of course, also citizens of the United States—"[were] temporarily in another State *without taking up their residence*." For if they took up their residence and became domiciled within the state, they at once came *completely within the state's jurisdiction* to discriminate in favor of other individuals, and against them;

¹⁸ See *Campbell v. Morris*, 3 H. & McH. (Md.) 535 (1797); *Abbot v. Bayley*, 6 Pick. (Mass.) 89 (1827); *Lemmon v. The People*, 20 N.Y. 562, 580-81 (1860).

¹⁹ 19 How. (U.S.) 393, 407, 422, 584 (1857).

²⁰ *Conner v. Elliott*, 18 How. (U.S.) 591 (1855).

that is, to deny them rights that the state gave to its other citizens as a group.²¹

In view of all these facts as to what, from the point of view of 1866-68, might well thereafter be held to have been the prior law, the meaning and purpose of the Equal Protection Clause of the Fourteenth Amendment seem clear: "No state shall deny to *any person within its jurisdiction* the equal protection of the laws." The clause was intended to supplement the old, inadequate Privileges and Immunities Clause of the original Constitution, by destroying utterly the state power which had survived thereunder, of discriminating between "persons" in the predicament which the Equal Protection Clause describes; that is, "person[s] within [a state's] jurisdiction." For, in the light of the facts that have been recounted, it seems a certainty that these words were intended, not as words of limitation, but as precautionary words of emphasis, inserted to remove all possible doubt that the right to "equal protection" which the clause conferred was to belong to all "persons" even though they should be, in the fullest possible sense, "within [the] jurisdiction" of the state concerned. And if "equality in protection" were accorded to these persons who "resided within the state," it would, of course, likewise have to be accorded to all other "citizens," under the Privileges and Immunities Clause of the original Constitution.

The foregoing are the facts of the prior constitutional law—many of them, because of their obsolete character, now largely forgotten—which I brought to bear upon the various provisions of the first section of the Fourteenth Amendment, in my book of last year.²² They are the facts on the basis of which I ventured, in Mr. Fairman's words, to "pronounce" the provisions of the amendment "clear." He does not like this, because, if the amendment in fact *is* clear, it renders his "mountain of evidence," such as it is, irrelevant. Yet I venture to think that nine out of ten persons, possessed of the various facts of prior law here presented, would agree at once that the words of the Fourteenth Amendment—if not, indeed, clear in themselves—at least are clear when read in the light of these "circumstances" of 1866-68, "in which [the words] were used."

And this seems especially true of the Privileges and Immunities Clause, with which Justice Black and Mr. Fairman were primarily

²¹ 19 How. (U.S.) 393, 407, 422 (1857).

²² Pol. & Con. ch. xxxi. The reader of this article will find the matters so far treated, more extensively treated in the book in question.

concerned: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The doctrine of the *Dred Scott Case* alluded to above settles at once what "the privileges or immunities of citizens of the United States" were under the prior law, and, therefore, what they also were under the Fourteenth Amendment. And since, to be meaningful *new law*, the clause in question necessarily had to apply to "privileges or immunities" previously abridgable through state action, the doctrine of *Barron v. Baltimore* at once identifies the "privileges or immunities" under the first eight amendments as the principal area in which the clause in question, *as new law*, was intended to have force. To these "privileges or immunities," there are to be added only a few similarly restricted "privileges or immunities" from the original Constitution.²³ There are no others as to which the provision, *as new law*, could have any meaning whatsoever. So, again, it appears, the meaning was clear; and it follows that Mr. Fairman's effort to contradict and destroy this clear meaning of the Fourteenth Amendment was not legitimate.

2

The illegitimacy of Mr. Fairman's whole effort was not its only fault. In addition, there was his handling, or mishandling, of the evidence. For most of the real evidence he had was supportive of Justice Black. Mr. Fairman misconstrued this evidence in case after case; and where he did not misconstrue it, he belittled it. Also, he omitted all mention of much evidence connected with certain transactions he discussed that was plainly corroborative of Justice Black's conclusions. And there is the fact, finally, that most of Mr. Fairman's "mountain of evidence" was imaginary: it was made up of items that were not evidence at all, either one way or the other, on the point he discussed; or else it was evidence of so unreliable a kind that to ground a trustworthy conclusion on it was impossible.

Mr. Fairman began with a consideration of the events in Congress connected with the drafting of the Fourteenth Amendment. I shall do the same; but there are certain preliminary matters that first require attention.

Thus, in the course of his article, Mr. Fairman again and again impugned the ability of Senator Jacob M. Howard, of Michigan, and Congressman John A. Bingham, of Ohio, who, between them, drew the first section of the Fourteenth Amendment. Howard drew its first

²³ "The Privilege of the Writ of Habeas Corpus" is the most important of these.

clause defining national and state citizenship, which was added as an amendment to the section in the Senate. Bingham drew the rest. Bingham, therefore, got most of Mr. Fairman's attention; but Howard got attention, too; and so did some of the others more remotely connected with the subject. Mr. Fairman's method was to let drop, here and there, throughout his discussion, derogatory hints and comments which gave the impression that the framers of the amendment, and Bingham in particular, were not very bright; that they held the strangest ideas about the Constitution; knew little about it, or about the decisions of the Supreme Court under it; that they were poor draftsmen; and that it was not to be expected anything intelligible could come from their hands.

Such an impression is almost totally false. Bingham and Howard were able, though confessedly ardent, men; and the perfect fit that existed between their concise first section and all the various facts of the prior law they desired to reform shows that they—and particularly Bingham—were very good draftsmen, indeed. It is clear, too, that they had an intimate knowledge of the Supreme Court's decisions on the matters with which they had to deal. But the fact remains that they did hold certain constitutional views that are apt to seem remarkable to most lawyers today; views that ran counter to certain earlier decisions the Supreme Court had made, or counter to views that have since come to be unquestioningly accepted. These views, however, Howard and Bingham did not hold alone. For the views in question were the common faith of the political party to which they belonged; they turn up, over and over again, in the debates in Congress; and it is quite impossible to understand aright the debates over the Fourteenth Amendment, or to comprehend what Bingham had in mind when he drew the first section of that amendment in its initial form, unless these views are known and understood and kept constantly in mind.

The first of these old, Republican constitutional views had to do with the general meaning of the Privileges and Immunities Clause of Article IV of the original Constitution. It will be remembered that it ran as follows:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

The usual view of this clause, as already indicated, takes it as if it read: "The citizens of each state shall be entitled in *each of the other*

states, to all privileges and immunities of the citizens of the state in which they shall happen to be." If this was the meaning of the clause that was actually intended—as I think it almost certainly was—the clause was very badly drafted. For the clause does not purport to relate to privileges and immunities "in the *other* states"; it purports to relate to them "in the *several* States," and "the several States" included *all* the states, not excepting that of which a particular "citizen" might be a member. This suggests that a nationally uniform body of "privileges and immunities" was intended; and since the clause does not purport to confer upon "the Citizens of each State" "the privileges and immunities of *the* citizens of the several states," but, instead, "the Privileges and Immunities of Citizens" "*in* the several States," there is obviously nothing in this part of the clause that establishes that the varying privileges and immunities of state citizenship were meant. And there is nothing in the use of "the Citizens of each State" as the grammatical subject of the provision that compels this conclusion, either; for, if the clause meant what Howard and Bingham and many others believed that it did, "the Citizens of each State" was a perfectly appropriate subject for the provision. "The effect of this clause," said Howard, "was to constitute *ipso facto* the citizens of each one of the original States citizens of the United States."²⁴ The clause, in other words, was understood as if it read: "The citizens of each state shall be entitled to all privileges and immunities of citizens of *the United States* in the several states." Of course the clause does not quite say this; but it comes a good deal closer to saying it than it does to saying what it is ordinarily taken to mean.²⁵

²⁴ Cong. Globe, 39th Cong. 1st Sess. 2765, col. 2 (1866).

²⁵ It is not easy to assign a firm reason to support the accepted view of the old Privileges and Immunities Clause in the original Constitution. I formerly thought comparison with the somewhat similar clause in the Articles of Confederation would be enough to support it. See Pol. & Con. 1124. But knowing, now, more about the old Republican views, I think it clear that comparison with the clause in the Articles rather tends to make the accepted view of the clause in the original Constitution seem more doubtful than ever. For the clause in the Articles guaranteed to "the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, . . . all privileges and immunities of free citizens in *the several* states," and it accompanied this with an unmistakable interstate equality guaranty in contrasting language: "the people of each state shall have free ingress and regress to and from *any other* state, and shall enjoy therein all the privileges of trade and commerce, subject to *the same* duties, impositions and restrictions as *the inhabitants thereof respectively*. . ." There is nothing in the records of the Federal Convention that affords any clue to what was intended by the clause in the Constitution; and to the best of my recollection, the clause evoked no significant comments in the ratification campaign. I think the only solid reason that can be given against the old Republican view of the clause is that, if it had been understood in the Federal Convention as the Republicans of the Civil War period understood it, there would have been no prohibition of state bills of attainder and state *ex-post-facto* laws in section 10 of Article I. For

That John A. Bingham had long held this view of the clause in question appears with complete certainty from a speech he delivered in Congress, in 1859, in opposition to the admission of Oregon as a state under the constitution then presented for Congress' approval. Bingham objected to this Oregon constitution as in conflict with the Constitution of the United States. His objections were aimed at a certain provision giving the right to vote at all elections to aliens, under certain restrictions, and, also, at another provision which ran as follows:

No free negro or mulatto, not residing in this State at the time of the adoption of this constitution, shall ever come, reside or be, within this State, or hold any real estate, or make any contract, or maintain any suit therein; and the Legislative Assembly shall provide by penal laws for the removal by public officers of all such free negroes and mulattoes, and for their effectual exclusion from the State, and for the punishment of persons who shall bring them into the State, or employ or harbor them therein.

In the course of his discussion of this latter provision, Bingham quoted the Privileges and Immunities Clause of the original Constitution and offered his interpretation of it as follows:

The citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to "all privileges and immunities of citizens in the several States." Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to "all privileges and immunities" of citizens of the United States in the several States. There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is "the privileges and immunities of citizens of the United States in the several States" that it guaranties.²⁶

This speech of 1859 also settles beyond any doubt that Bingham had long thought these "privileges and immunities of citizens of the United States" were those conferred, in specific terms, by other provisions of the Constitution and its various amendments. The speech, it is true, is full of talk about "natural rights" and "natural law"; but, though he clearly regarded governmental acts contrary to "natural rights" and "natural law" as completely unrighteous, there is nothing to indicate that he thought the existence of a "right" under "natural law" was in itself enough to make it a constitutionally enforceable

the Privileges and Immunities Clause of Article IV would have made the prohibition of bills of attainder and *ex-post-facto* laws in section 9 of Article I good against the states, and the prohibitions in section 10 would have been unnecessary.

²⁶ Cong. Globe, 35th Cong. 2d Sess. 984, col. 1 (1859).

“privilege or immunity of citizens of the United States.” Instead, he thought the contrary. He said:

The conclusion that any State constitution, or State law, which conflicts with the Constitution of the United States, and impairs any right, political or personal, *guarantied thereby*, is null and void, logically results from that provision which declares the Constitution of the United States, and the laws and treaties made in pursuance thereof, to be the supreme law of the land. To the right understanding of the limitations of the Constitution of the United States upon the several States, it ought not to be overlooked that, *whenever the Constitution guaranties to its citizens a right, either natural or conventional*, such guarantee is in itself a limitation upon the States. . . . (Emphasis supplied.)²⁷

And that he intended to include rights guarantied by the amendments in what he was saying is shown by the fact that he relied upon the Due Process Clause of the Fifth Amendment, in his attack on the anti-Negro provision of the Oregon constitution.²⁸ So, seven years before his drawing of the Fourteenth Amendment, Bingham already regarded “the privileges and immunities of citizens of the United States” as those guarantied by the Constitution and its several amendments. This is an important fact, because Mr. Fairman undertook, in his article, to question Bingham’s truthfulness in telling the House of Representatives, in 1871, that, when he had drawn the Privileges and Immunities Clause of the Fourteenth Amendment, he had intended it to make good as against the states, among other “privileges or immunities of citizens of the United States,” all those conferred by the first eight amendments.²⁹

Now, although as indicated, Bingham did not take the position that there were any “privileges or immunities of citizens of the United States” beyond those enumerated in the Constitution and its various amendments, there were many others of these old Republicans of the Civil War period who did so. They relied, in this connection, upon a statement made by Justice Bushrod Washington, of the United States Supreme Court, in the circuit-court case of *Corfield v. Coryell*, in 1823.³⁰ The Justice had therein declared that the “privileges and immunities” under the old Privileges and Immunities Clause of the original document included all those “which [were], in their nature, fundamental; which belong[ed], of right, to the citizens of all free governments; and which ha[d], at all times, been enjoyed by the citizens of the several states which compose this Union, from the time

²⁷ *Ibid.*, at 982, col. 3.

²⁹ Fairman I, at 136-37.

²⁸ *Ibid.*, at 984, col. 3.

³⁰ 4 Wash. C. C. 371 (1823).

of their becoming free, independent, and sovereign." The Justice went on:

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 personal; and an exemption from higher taxes and impositions than are paid by *the other citizens of the state*; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added *the elective franchise*, as regulated and established by the laws or constitution of the state in which it is exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union." (Emphasis supplied.)

The opinion in this *Corfield* case is obviously hard to reconcile with the view of this old Privileges and Immunities Clause that is accepted today. The time, it should be remembered, was before the decision of the Supreme Court in *Barron v. Baltimore*; the existence of unalienated, unenumerated "rights of the people"—that is, of the citizens of the United States—against both the states and the nation was plainly implied by the Ninth Amendment;³¹ and taking into account what he had to say about taxation and the right to vote, it is difficult, in the extreme, to take Justice Washington otherwise than as speaking of "the privileges and immunities of citizens in *the several states*"—the subject with which he began—and not merely about "the privileges and immunities enjoyed by the citizens of each state, in *every other state*"—the subject to which he referred in conclusion. But be this as it may, the Republicans of the Civil War period did, nearly all of them, take him in the broader sense; and on that basis, they claimed for the citizens of the United States "in the several States," under the clause in question, all the privileges and immunities of citizenship "which," in their view, "were fundamental" to that status; all those,

³¹ Compare Pol. & Con. 1078 and 1090 n.

in other words, "which belonged, of right, to the citizens of all free governments." And that this claim was sincerely made is shown by the fact that so able a Supreme Court Justice as Joseph Bradley was ready to hold, and did hold for himself and Justice Swayne, in the *Slaughter-House Cases*, of 1873,³² that the clause in question did have the meaning in which these early Republicans believed. But he added that it was not necessary to rely on implication and English history to ascertain what some of "the privileges and immunities of citizens of the United States" were; for "some of the most important of them" were "authoritatively declared" in the Constitution and the first eight amendments. And then he proceeded to list the privileges and immunities there to be found.

Besides this peculiar view of the old Privileges and Immunities Clause of the original Constitution, the Republicans of the Civil War period, including John A. Bingham, took a most peculiar view of the "due-process" guaranty of the Fifth Amendment: they took it as embodying a right to "equal protection of the laws" in the enjoyment of "the rights of life, liberty and property." Bingham spoke of these rights, in his speech of 1859, as "natural or inherent rights, which belong[ed] to all men," he said, "irrespective of all conventional regulations." And he thought it "significant"—and, quite evidently, appropriate—that the Constitution guaranteed these rights, in the Fifth Amendment, "by the broad and comprehensive word 'person,' as contradistinguished from the limited term 'citizen.'" But the guaranty of course applied, he explained, to all citizens and, therefore—as he argued later in his speech—created "privileges and immunities of citizens of the United States."³³

The Due Process Clause of the Fifth Amendment runs as follows:

No person shall be deprived of life, liberty, or property, without due process of law.

And the question is how the Republicans of the Civil War period could take these words as comprehending "equal protection of the laws," especially when it is remembered how very important an element in their conception of this "protection" was affirmative governmental action to protect each individual against molestations in his rights by other individuals *not* concerned in government. The answer evidently is that they took the "due process" guaranty to mean that "no person

³² 16 Wall. (U.S.) 36, 117-19 (1873).

³³ Cong. Globe, 35th Cong. 2d Sess. 983, col. 3, and 984, col. 1 (1859).

sh[ould] be deprived of life, liberty, or property, *by anyone*—whether private person or governmental officer, state or national—without due process of law.” That this was a possible interpretation, so far as the mere words of this particular clause were concerned, can scarcely be denied; and, so interpreted, the clause would confer a general right against everyone, and it would then become the duty of state and national officers, not only to refrain from the acts forbidden by the clause to them, but to protect every person from the forbidden molestations by other private persons, in their interests of life, liberty, and property. This would follow because the provision conferring this general right is a part of the Constitution—“the supreme Law of the Land”—which all state and national officers take oath to support.

That John A. Bingham took the Due Process Clause of the Fifth Amendment in the foregoing manner is shown by the following passage in reference to it taken from his speech of 1859:

The charm of th[e] Constitution lies in the great democratic idea *which it embodies*, that *all men, before the law, are equal* in respect of those rights of person[s] which God gives and *no man or State* may rightfully take away, except as a forfeiture for crime.³⁴ (Emphasis supplied.)

Again, he contended that the free persons of color who were to be excluded from Oregon and deprived of their rights of life, liberty, and property there, under the constitutional provision he was attacking, were—

. . . citizens by birth of the several States, and therefore [were] entitled to all the privileges and immunities of the citizens of the United States, amongst which [were] the rights of life and liberty and property, *and their due protection in the enjoyment thereof by law*; and therefore [he held] this section for their exclusion from [Oregon] and its courts, to be an infraction of that wise and essential provision of the national Constitution . . . to wit: “The citizens of each state shall be entitled to all privileges and immunities of citizens IN THE SEVERAL STATES.”³⁵ (First emphasis supplied.)

This notion—that the Due Process Clause of the Fifth Amendment comprehended “equal protection of the laws”—was, as already indicated, not a notion peculiar to John A. Bingham. Instead, as will presently be seen, it was a notion common to a great many other Republicans of the period. It is, therefore, necessary to bear this notion in mind in reading the debates on the Fourteenth Amendment; for, if it is not borne in mind, a false understanding of much that was said is certain to result.

³⁴ *Ibid.*, at 985, col. 2.

³⁵ *Ibid.*, at 984, col. 3.

The last of the constitutional matters as to which Bingham and most of the other Republicans of his time held ideas distinctly their own was the true constitutional status of free Negroes in state and nation. Their ideas on this subject, and the reasons for them, are as well illustrated in the following passage from Bingham's speech of 1859 as in any matter that could be quoted:

Who, sir, are citizens of the United States? First, all free persons born and domiciled within the United States—not all free white persons, but all free persons. You will search in vain, in the Constitution of the United States for that word *white*; it is not there. You will look in vain for it in that first form of national Government—the Articles of Confederation; it is not there. The omission of this word—this phrase of caste—from our national charter, was not accidental, but intentional. I beg leave to refer, gentlemen, to the Journal of the Continental Congress, volume 2, page 606. By this reference it will be seen that in that Congress, on the 25th of June, 1778, the Articles of Confederation being under consideration, it was moved by the delegates of South Carolina to amend the fourth article, by inserting after the word “free” and before the word “inhabitants,” the word “white,” so that “the privileges and immunities of citizens in the several states should be limited exclusively to white inhabitants.” The vote on this amendment was taken by States, and stood two States for, and eight against it, and one equally divided. This action of the Congress of 1778 was a clear and direct avowal that all free inhabitants, white and black, except “paupers, vagabonds, and fugitives from justice,” (which were expressly excepted,) were [“]entitled to all the privileges and immunities of free citizens in the several States.”

At the time of the adoption of the Constitution, only some States, South Carolina, Virginia, and Delaware, made *color* a qualification or basis of suffrage. In five of the others the elective franchise was exercised by free inhabitants, black and white; and therefore, in five of the States, black men coöperated with white men in the elections, and in the formation of the Constitution of the United States. Inasmuch as black men helped to make the Constitution, as well as to achieve the independence of the country by the terrible trial by battle, it is not surprising that the Constitution of the United States does not exclude them from the body politic, and the privileges and immunities of citizens of the United States. That great instrument included in the new body politic, by the name of “the people of the United States,” all of the then free inhabitants or citizens of the United States, whether white or black, not even excepting, as did the Articles of Confederation, paupers, vagabonds, or fugitives from justice. Thenceforward, all these classes, being free inhabitants, irrespective of age, or sex, or complexion, and their descendants, were citizens of the United States.³⁶

Now, all this, it is needless to point out, was directly contrary to the Supreme Court's decision in the *Dred Scott Case*, just two years before, that no person of African descent, whether a slave or not, was, or could possibly be, a citizen of the United States under the

³⁶ *Ibid.*

Constitution, or entitled to the benefit of any privilege or immunity thereunder. Are we to conclude, then, that Bingham was ignorant of this case and what it had decided? By no means. He knew the Court's long opinion well enough to quote from it, in his speech of 1859, certain passages setting forth a proposition with which he agreed, and which he was seeking to establish in his speech. This was in connection with his attack on the provision in the Oregon constitution that gave the right to vote at all elections to aliens. Bingham thought this unconstitutional, as it undoubtedly was. He maintained that, by the very terms of the Constitution, all political powers and political privileges under it were to be exercised, both in state and nation, by citizens of the United States only. To establish this proposition, he had to show, among other things, that, in the Constitution, the terms "people of the United States" and "citizens of the United States" were synonymously used. In proof of this, he cited Rawle and Kent. Then, "for the benefit of the other side of the House"—that is, the Democrats—"who profess[ed]," he said, "a more than Eastern devotion to the Supreme Court of the United States and its decision in the Dred Scott case"—for their benefit, he quoted two passages from that case in which the Court had quite correctly taken the precise position he was seeking to establish.³⁷ And it is interesting to note that one of the passages he quoted was one of those wherein the Court had indicated that all "personal rights and privileges" under the Constitution and its various amendments were to be taken as "rights and privileges of citizens of the United States" only. For this means that Bingham was familiar with this doctrine of the Court when he delivered his speech of 1859. Yet we find him ostentatiously insisting, contrary to that doctrine, that the rights of life, liberty, and property, under the Fifth Amendment, were guaranteed to all "persons," aliens and citizens alike; and that, since these were "natural rights," this was exactly the way the thing should be.³⁸ So here, again, he was arguing in blithe disregard of established Supreme Court doctrine. And of course his use of the Fifth Amendment to attack the Oregon exclusionary provision was likewise contrary to the Court's decision in *Barron v. Baltimore*.³⁹

The truth undoubtedly is that John A. Bingham, in common with most other Republicans of his time, thought these, and others of the

³⁷ *Ibid.*, at 983, col. 1.

³⁸ *Ibid.*, col. 3.

³⁹ *Ibid.*, at 984, col. 3.

Supreme Court's decisions, wrong. They thought, and quite correctly, that the states, and particularly the late slaveholding states, had been allowed to flout the Constitution, left and right, in the years leading up to the Civil War; that, in this way, exaggerated notions of "States' Rights" had developed; and that this philosophy had at length been responsible for secession and open rebellion. And because they believed passionately in their own ideas about "the privileges and immunities of citizens of the United States"; about the availability to all "persons," as against the states, of the "due-process" guaranty of the Fifth Amendment; about the citizenship of free Negroes; and many other matters, they went on, for years, arguing, in constitutional debates, upon the assumption that their ideas, and not the conflicting Supreme Court decisions, were the law.

And when, at last, in 1866, they, and particularly John A. Bingham, were faced with the task of drawing an amendment to end, and prevent for the future, the conditions they detested, they found it extremely hard to get over their accustomed modes of thought. This is shown by the fact, which will soon be apparent, that John A. Bingham undoubtedly drew the first draft of what is now the first section of the Fourteenth Amendment, upon the assumption that all the Republican constitutional theories we have just been over were the standing law. Bingham's first draft did not meet with approval in Congress; it was criticized by both friend and foe. So, Bingham tried again. This time, as the discussion in the first section of this paper shows, he did face up to most of the realities of the situation; but there was still one respect in which he failed to do so: he failed to recognize that prudent draftsmanship required a negation of the still unoverruled doctrine of the *Dred Scott Case* that persons of African descent, whether slaves or not, were not, and could not possibly be, citizens of the United States under the Constitution. Nor was Bingham alone among the Republicans in Congress in being slow to perceive that such a negation was necessary to the sure accomplishment of the purposes they had in view. For Bingham's first section, though it lacked such a negation, got through the House of Representatives without anyone's suggesting that such a negation was required. It was only when it reached the Senate that the necessity of such a provision was perceived by Senator Benjamin F. Wade, of Ohio, and such a provision afterwards added on motion of Senator Howard, of Michigan,⁴⁰

⁴⁰ Cong. Globe, 39th Cong. 1st Sess. 2768, col. 3, and 2890, col. 2 (1866),

Nothing could be more eloquent of the sincere conviction lying back of these old, forgotten Republican constitutional ideas than these effects they had on the drafting of the Fourteenth Amendment. And if they affected its drafting, it is natural to suppose they affected the debates over it, as well. That they did so, in fact, will presently be perceived. And, hence, the necessity, before pointed out, of keeping these old, forgotten ideas constantly in mind in what follows.⁴¹

3

Mr. Fairman began his account of the proceedings in Congress with the debate on what was known as the Civil Rights Bill, in the Senate. This debate took place between January 29 and February 2, 1866, before what was to become the initial section of the Fourteenth Amendment had been proposed in any form to Congress. The debate, therefore, was not really of much relevance to Mr. Fairman's subject; but he began with it, nonetheless, apparently because of certain materials it contained that could be presented as contradictive of Justice Black's conclusions.

The Civil Rights Bill, as eventually enacted over President Johnson's veto, on April 9th,⁴² provided in its first section as follows:

All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding.

The remainder of the act consisted of provisions for the enforcement of the foregoing section.

The declaratory provisions with which the act began rested mainly

⁴¹ Further evidence of the old Republican constitutional ideas dealt with in this section, and their background, may be found *passim* in Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 *Yale L. J.* 371, 48 *Yale L. J.* 171 (1938); *The Early Antislavery Backgrounds of the Fourteenth Amendment*, [1950] *Wis. L. Rev.* 479, 610; Graham, *Procedure to Substance*, 40 *Calif. L. Rev.* 483 (1953); and ten Broek, *The Antislavery Origins of the Fourteenth Amendment* (Berkeley and Los Angeles, 1951). It is not meant, by this citation, to endorse all the uses made, and not made, by these authors, of the evidence their writings contain.

⁴² 14 *Stat. at L.* 27 (1866).

on the Republican theory that the *Dred Scott Case* was wrong in holding that free persons of African descent, born within the country, were not citizens of the United States; but it was contended, alternatively, that even if such persons were not citizens, Congress could make them such under its naturalizing power, the *Dred Scott Case*, again, notwithstanding.

As for the provision that followed, securing equal rights, power to enact that was thought, in the Senate, to result from the power recently given Congress to enforce the Thirteenth Amendment, which abolished slavery and involuntary servitude in the United States. Senator Trumbull, of Illinois, who introduced the Civil Rights Bill, argued that the abolition of slavery had made the former slaves into free citizens of the United States, and that the power of Congress to enforce this measure must be a power to secure to them the substance of their newly acquired free status. He then inquired what kinds of rights free citizens, in the past, had been recognized as having and, in that connection, cited several state cases decided under the Privileges and Immunities Clause of Article IV of the original Constitution and, finally and chiefly, Justice Bushrod Washington's views as to the character of "the privileges and immunities of citizens" under that clause, in *Corfield v. Coryell*.⁴³

These citations and some others that need not be noted here enabled Mr. Fairman to implant the notion in the minds of his readers, at the very start, that "the privileges and immunities of citizens of the United States," to the men of the Thirty-ninth Congress, were those ill-founded "privileges and immunities" that Justice Washington spoke of in *Corfield v. Coryell*, rather than those plainly guaranteed by various provisions of the Constitution and its several amendments. In addition to this, he was enabled, by the materials he cited, to present Senator Trumbull as muddle-headed and thus to add to the impression, which he sought throughout to give, that the leaders in the Thirty-ninth Congress were not competent men. In Mr. Fairman's account, it is always the critics and opponents of what was being done who were the able lawyers and men of competence; that is, such men, in the main, were the Democrats.

So far as Senator Trumbull is concerned, Mr. Fairman's treatment of him was quite unwarranted. As already indicated, Trumbull introduced the case material mentioned above for the purpose of showing

⁴³ Cong. Globe, 39th Cong. 1st Sess. 474 et seq. (1866); cf. *ibid.*, at 600, col. 1.

what kinds of rights, in the past, had been deemed fundamental to the status of a free citizen; his materials were certainly germane to this purpose; and they fully justified the conclusion he drew from them: that the rights listed in the act, equality in the enjoyment of which was to be secured thereby, were of the kinds that in the past had been considered to be the birthright of all free citizens.

They were, nevertheless, rights of a peculiar kind: they were rights that were to be subject to regulation by the states, and all the Civil Rights Act required was that the state regulations of these rights be equal as between all citizens. They were, then, rights, or "privileges and immunities," altogether different from those existing under the absolute requirements and prohibitions in the first eight amendments and various other parts of the Constitution. And since the subject in hand was so very different, it is in no way strange that, in the Civil Rights Act debate, the men in the Senate evinced no awareness at all that "the privileges and immunities of citizens of the United States" comprehended those guaranteed in the Constitution and its several amendments. And their use of the phrase, in that debate, in reference to the vaguer rights of which Justice Washington had spoken is no evidence at all that they did *not* think the phrase covered both categories of "privileges and immunities." And, in fact, as will be seen, many of them did think that both categories were covered.

The initial form of what is now the first section of the Fourteenth Amendment was introduced in the House and the Senate, from the Joint Committee on Reconstruction, on February 13, 1866.⁴⁴ In the Senate, the measure was ordered to lie on the table, and no debate or action on it ever occurred. In the House, on the other hand, the matter was debated on February 26, 27, and 28. The debate ended in a postponement of the measure until the second Tuesday in April.⁴⁵ The matter was not again reached, however, until the 5th of June. By that date, the Fourteenth Amendment, in its final form, had been proposed by the Joint Committee and passed by the House. So, John A. Bingham, of the Joint Committee, moved that the matter that had come up be "indefinitely postponed, for the reason that the constitutional amendment already passed by the House cover[ed] the whole subject-matter." It is thus evident that, in Bingham's opinion, the Fourteenth Amendment covered everything he had intended in the amendment that had been postponed. His motion was agreed to.⁴⁶

⁴⁴ *Ibid.*, at 806 and 813.

⁴⁵ *Ibid.*, at 1095.

⁴⁶ *Ibid.*, at 2979-80.

The initial form of what eventually became the first section of the Fourteenth Amendment ran 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.

Bingham, the draftsman of this proposal for the Joint Committee, opened the debate upon it, on February 26th. He began by drawing attention—

. . . to the fact that the amendment proposed st[oo]d in the very words of the Constitution of the United States as it came to us from the hands of its illustrious framers. Every word of the proposed amendment [was] today in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States. The residue of the resolution, as the House w[ould] see by a reference to the Constitution, [was] the language of the second section of the fourth article, and of a portion of the fifth amendment adopted by the first Congress in 1789, and made a part of the Constitution of the country.

He then quoted exactly the language of these two provisions and went on:

Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by Congressional enactment, to enforce obedience to these requirements of the Constitution. Nothing can be plainer to thoughtful men than that if the grant of power had been originally conferred upon the Congress of the nation, and legislation had been upon your statute-books to enforce these requirements of the Constitution in every State, that rebellion, which has scarred and blasted the land, would have been an impossibility.

I ask the attention of the House to the further consideration that the proposed amendment does not impose upon any State of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution.

He next quoted the Supremacy Clause, which makes the Constitution "the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," and proceeded:

Could words be stronger, could words be more forceful, to enjoin upon every officer of every State the obligation to obey these great provisions of the Constitution, in their letter and their spirit? I submit to the judgment of the House, that it is impossible for mortal man to frame a formula of words more obligatory than those already in that instrument, enjoining this great duty upon the several States and the several officers of every State in the Union.

And, sir, it is equally clear by every construction of the Constitution, its contemporaneous construction, its continued construction, legislative, executive, and judicial,

that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States.

But the states had not all of them been faithful; the provisions of the Constitution had been violated, and were still being violated, in many of the states; and, so, on behalf of the Joint Committee, Bingham proposed adoption of the amendment before the House, to enable Congress to enforce them.⁴⁷

Read in the light merely of the Supreme Court's then past constitutional decisions and various other ideas of constitutional law which have since come to be unquestioningly accepted, the foregoing statements by John A. Bingham undoubtedly seem a confused mass of untruths and impossibilities. But if we bear in mind the various constitutional theories set forth in the last section; if we remember that these were the common faith of the Republican party of the time; and if we remember that Bingham himself had given the plainest proof that he entertained these theories in his speech of 1859, then there is, assuredly, not much difficulty in understanding what he had to say; and it then becomes apparent, as was suggested earlier, that Bingham actually drew this first draft of what became the first section of the Fourteenth Amendment, upon the assumption that his own constitutional ideas and those of his Republican brethren, and *not* the Supreme Court's constitutional decisions, were the standing law.

Thus, in the light of the ideas in question, Bingham's statement that everything in his amendment was in the Constitution, except the grant of power to Congress, becomes, from his point of view, obviously true. For, as we saw, he held a view of the Due Process Clause of the Fifth Amendment—perfectly possible on the basis of its mere words—which resulted in an “equal-protection” duty toward all “persons” on the part of both state and national officers. So, as to the second half of his amendment, his statement was true, from his point of view, in substance; and as to the first half, it was true literally, because the first half of his amendment was in the very words of the Privileges and Immunities Clause of Article IV of the original Constitution. And if we remember that Bingham construed that clause as a guaranty of “the privileges and immunities of citizens [of the United States] in the several states”—that is, in all the states—and remember, further, that, in his speech of 1859, he had plainly evinced

⁴⁷ *Ibid.*, at 1033-34.

his belief that these "privileges and immunities" were the various rights that were guaranteed specifically in the Constitution and its several amendments, then the basis for his belief that his strangely worded amendment would empower Congress to enforce the Constitution, including "the immortal bill of rights," upon the several states becomes perfectly apparent. And that he drew his amendment in the way he did, and talked about it to the House in the way he did, is proof positive that, in Bingham's opinion, his fellow Republicans had similar ideas and would understand what he had to say. And that they did understand him and did entertain similar ideas appears from the fact that no one denied his amendment would have the effect he claimed for it; that is, that it would make the Bill of Rights enforceable by Congress against the states. No one asked him how a power in Congress to enforce the Privileges and Immunities Clause of Article IV of the original Constitution could possibly empower that body to enforce the Bill of Rights against the states; yet this is the first thing that would be asked him by anyone understanding the clause in Article IV as that clause is understood today. Bingham's amendment was attacked by some men of his own party; but it was neither attacked by them, nor queried, because of its first clause, but because of its second, which gave Congress power "to make all laws which sh[ould] be necessary and proper to secure . . . to all persons in the several states equal protection in the rights of life, liberty, and property." It was said that this was a general power of legislation with respect to "life, liberty, and property," limited only by a requirement that the legislation must be equal;⁴⁸ and it was on this ground that action on the amendment was postponed, and Bingham compelled to try again. Merely on the basis, then, of the behavior of the House, the inference seems warranted that the constitutional ideas treated in the preceding section were widely entertained among Republicans in 1866; but, in what follows, much other evidence will be found that they were, in fact, the common faith of the Republican party of the time.

Now, how did Mr. Fairman deal with the statement Bingham made in introducing his amendment? Mr. Fairman did various things. For one thing, he presented it as settled law, in 1866, that the Privileges and Immunities Clause of Article IV of the original Constitution did not have the meaning in which Bingham believed, or the more exten-

⁴⁸ *Ibid.*, at 1063, col. 3.

sive meaning in which many other Republicans of Bingham's time believed, but the meaning it is accepted as having today.⁴⁹ This is simply not in accord with the facts: the meaning of the clause was *not* then settled. But even if it had been settled as Mr. Fairman represented, it would probably have had no more effect on the modes of argument of Bingham and his fellow Republicans than did the doctrines of *Barron v. Baltimore* and the *Dred Scott Case*. To apply these various doctrines and cases as tests of the meaning of statements by Bingham and others, as Mr. Fairman constantly did, inevitably results in a complete misreading of the evidence.

Another thing that Mr. Fairman did was to insist that Bingham's reference, in his speech, to "this immortal bill of rights embodied in the Constitution" was not sufficiently clear. He should, Mr. Fairman insisted over and over again, have said "Amendments I-VIII."⁵⁰ This seems a strange argument coming from Mr. Fairman, and in the very article he had chosen to entitle: "Does the Fourteenth Amendment Incorporate the Bill of Rights?" "Bill of Rights," it seems, was good enough for Mr. Fairman to use to inform all and sundry what his article was about; but it was not good enough for Bingham to use to inform the House of Representatives what his proposed amendment was meant to accomplish; and this, although "bill of rights" had been in use in the sense in which Bingham used it since the earliest days of the government.

But Mr. Fairman insisted that the context actually establishes that Bingham did not mean "Amendments I-VIII" at all when he referred to "this immortal bill of rights embodied in the Constitution." "What is the antecedent?" Mr. Fairman demanded. And, then, answering his own question, he went on as follows:

Evidently, the "privileges and immunities" (Art. IV, § 2) and the rights of "life, liberty, and property" of the Fifth Amendment—these comprise "the immortal bill of rights." In this spacious gesture Bingham certainly does not seem to be making any particular reference to Amendments I to VIII. Let us take note that, on this occasion at any rate, "the immortal bill of rights" is to Bingham a fine literary phrase not referring precisely to the first eight Amendments.⁵¹

Now, who ever heard of a "bill of rights" consisting of the Privileges and Immunities Clause of the original document, and the Due Process Clause of the Fifth Amendment? The correct answer to Mr. Fair-

⁴⁹ Fairman I, at 9-13.

⁵⁰ *Ibid.*, at 26, 53, 78, and 136.

⁵¹ *Ibid.*, at 26.

man's question, "[w]hat is the antecedent [of 'this immortal bill of rights' in Bingham's speech]," almost certainly is that the words did not have any antecedent. Mr. Fairman should have remembered he was dealing with the report of a speech. Bingham, in the course of it, had been reading provisions out of the Constitution; he probably had a copy of the document in his hand; and when he came to the place where he referred to "this immortal bill of rights embodied in the Constitution," he may very well simply have held the document up, as Mr. Fairman says, "in [a] spacious gesture." There certainly is nothing to warrant Mr. Fairman's unheard-of interpretation.

Another of Mr. Fairman's arguments to show that Bingham could not possibly have meant "Amendments I–VIII" is based on the fact that Bingham argued that had Congress, from the beginning, had and exercised the power his amendment would confer, it would have prevented the Great Rebellion. "It is difficult," says Mr. Fairman, "to square this with *any* reading of the proposal; but pretty surely, the enforcement of the long calendar in Amendments I to VIII would not have thwarted secession."⁵² I find it difficult to believe that Mr. Fairman did not know what Bingham meant; for what Bingham meant appears from a speech delivered by Congressman Robert S. Hale, a Republican from New York, from whom Mr. Fairman quoted extensively, and from points very close to the material in question. Hale said:

But the gentleman [meaning Bingham] says, there is, and there has been from first to last, a violation of the provisions of this bill of rights by the very existence of slavery itself; that the institution of slavery itself has existed in defiance of the provisions of the bill of rights; that all the anomalies and all the enormities that have grown out of that institution have been equally in violation of it. I concede there is much force in that reasoning. Slavery was an anomaly under the Constitution; under the strict language of the Constitution I cannot see how it ever could have been claimed to exist.⁵³

Bingham, of course, had not actually said these things in his speech on the proposed amendment; but the fact that Hale at once understood what he did say as referring to these ideas shows that Bingham must have expressed them before, and probably frequently, in Congress. And they put an altogether different face on Mr. Fairman's argument.

Besides Bingham, the only other speaker on February 26 was An-

⁵² *Ibid.*

⁵³ Cong. Globe, 39th Cong. 1st Sess. 1065, cols. 2–3 (1866).

drew Jackson Rogers, of New Jersey. As his name might be taken to imply, he was a Democrat and one with "a more than Eastern devotion to the Supreme Court and its decisions." These latter and "States' Rights" were his main reliance in making what Mr. Fairman thinks were telling points against Bingham. The only point upon which he agreed with Bingham was that, "because the Constitution authorize[d] Congress to carry the powers conferred by it into effect, privileges and immunities [were] not considered within the meaning of powers, and therefore Congress ha[d] no right to carry [them] into effect." But he thought this was the way things ought to be. Bingham's proposal to change this was the most "dangerous to the liberties of the people and the foundation of th[e] Government" of all the changes that had ever been proposed. There is nothing in his speech that sheds any real light upon our problem.⁵⁴

The first speaker on February 27 was William Higby, a Republican from California. He favored the proposed amendment. He said it was his understanding that—

. . . this joint resolution, should it become part of the Constitution of the United States, w[ould] only have the effect to give vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality, but which ha[d] received such a construction that they ha[d] been entirely ignored and ha[d] become as dead matter in that instrument.⁵⁵

If Higby had heard Bingham's speech of the day before, it can only be concluded that he agreed wholly with Bingham about the Privileges and Immunities Clause of Article IV of the original Constitution; about the meaning of the Due Process Clause of the Fifth Amendment; about the incorrectness of *Barron v. Baltimore*; and all the rest.

With a single exception, the same may be said of the next speaker, William D. Kelley, a Republican from Pennsylvania. He disagreed with Bingham about the non-existence, under the existing Constitution, of congressional power to enforce "the privileges and immunities of citizens of the United States" as against the states; but he must have agreed with Bingham as to everything else. He said, in concluding his speech:

. . . Mr. Speaker, I repeat that I hold that all the power this amendment will give is already in the Constitution. I admit that it has lain dormant. I admit that there has been raised over it a superincumbent mass of State and political usage and judicial decisions that . . . is mountain high; but when I remember the mass of judicial de-

⁵⁴ *Ibid.*, at 1034, col. 2, and App. 133.

⁵⁵ *Ibid.*, at 1054, col. 1.

cisions, of State and political usage, which was swept away by the decision of Judge Taney's court that the Missouri compromise was unconstitutional, I am persuaded that it will yet be quickened and called into action. The aroused people will demand that all the powers of the Constitution be exercised so that each State shall be guaranteed a republican government, and the citizens of each State shall enjoy peaceably the privileges and immunities of citizenship in the respective States; but as some gentlemen question the existence of the power, and others the propriety of exercising it at this time, I hope we will submit this amendment to the people, that they may more explicitly empower Congress to enforce and maintain their rights throughout the limits of our widespread country.⁵⁶

The next speaker was Robert S. Hale, mentioned earlier. Though a Republican, Hale was against the proposed amendment; but he made clear, in the course of his remarks, that his "argument [was] directed exclusively to the consideration of the final clause of the amendment proposed, which," he observed, "[was] founded on the fifth article of the amendments."⁵⁷ He indicated that he thought it "in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, m[ight] be overridden, m[ight] be repealed or abolished, and the law of Congress established instead." It was, he declared, "an utter departure from every principle ever dreamed of by the men who framed our Constitution." At this point he was interrupted by Thaddeus Stevens, of Pennsylvania, the chairman of the House delegation to the Joint Committee. In evident disagreement with Hale, Stevens demanded to know whether Hale "mean[t] to say that, under this provision, Congress could interfere in any case where the legislation of a State was equal, impartial to all." "[Was] it not," he went on, "simply to provide that, where any State makes a distinction in the same law between different classes of individuals, Congress sh[ould] have power to correct such discrimination and inequality?" But Hale denied flatly that the provision had this character, and went on: [I]t is a grant of power in general terms—a grant of the right to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation.⁵⁸

A mere reading of the proposed amendment ought, it would seem, to have been enough to convince Hale that he was mistaken; but he was apparently firmly convinced of his view, and his long speech against the second clause of the proposed amendment was the result.

⁵⁶ *Ibid.*, at 1057, col. 3, and 1063, col. 1.

⁵⁷ *Ibid.*, at 1064, col. 3.

⁵⁸ *Ibid.*, at 1063, col. 3

But though Hale's speech was in fact, and avowedly, directed exclusively at the second clause, there was one point in it, at which he must have seemed to his hearers—as it is clear he did to John A. Bingham—to be arguing against the necessity of the first clause of the amendment. At this point, he said:

Now, what are these amendments to the Constitution numbered from one to ten, one of which is the fifth article [now] in question? What is the nature and object of these articles? They do not contain, from beginning to end, a grant of power anywhere. On the contrary, they are all restrictions of power. They constitute the bill of rights, a bill of rights for the protection of the citizen, and defining and limiting the power of Federal and State legislation. They are not matters on which legislation can be based.

And, then, after a brief crack at Higby, of California, Hale went on as follows:

Throughout they [the initial amendments] are prohibitions against legislation. Throughout they provide safeguards to be enforced by the courts, and not to be exercised by the Legislature. And they provide in this noble fifth article, among others—provisions which at this time especially deserve the attention of the American people—that no person shall be deprived of life, liberty, or property, without due process of law.

Then, after a brief interruption, Hale concluded this portion of his speech, with an appeal to the House that it was unwise, in the excited times in which they were, to tamper with a constitution which had been so thoroughly tested as ours had been, not only in times of peace, but in both foreign war and civil war; and especially, when "its sufficiency for all circumstances and all trials" had been so thoroughly demonstrated.

At this point, John A. Bingham interrupted and spoke as follows:

The gentleman [Mr. Hale] will allow me to ask him to point to a single decision. The gentleman says the sufficiency of the Constitution has been tested and found in the past. I ask him now if he knows of a single decision in which the sufficiency of the Constitution to secure to a party aggrieved in his person within a State the right to protection by the prosecution of a suit, which by the organic law of the State was denied to him, has ever been affirmed, either by Federal statute or Federal decision, or whether the nation has not been dumb in the presence of the organic act of a State which declares that eight hundred thousand natural-born citizens of the United States shall be denied the right to prosecute a suit in their courts, either for the vindication of a right or the redress of a wrong? Where is the decision? I want an answer.

Bingham's reference was to the anti-Negro exclusionary provision of the Oregon constitution which he had attacked in his speech of 1859. Hale answered Bingham as follows:

I have not been able to prepare a brief for this argument, and therefore I cannot refer the gentleman to any case. As I never claim to be a very learned constitutional lawyer I have no hesitation in making the admission that I do not know of a case where it has ever been decided that the United States Constitution is sufficient for the protection of the liberties of the citizen. But still I have, somehow or other, gone along with the impression that there was that sort of protection thrown over us in some way, whether with or without the sanction of judicial decision that we are so protected. Of course, I may be entirely mistaken in all this, but I have certainly somehow had that impression.

Now, here, clearly, was a man—a lawyer—who had never even heard of *Barron v. Baltimore*, a lawyer who, upon reading the various initial amendments, had naturally taken all the sweeping, general prohibitions they contain as applying, in favor of the citizen, against both the nation and the states. As he had put it in his own speech, they were “a bill of rights for the protection of the citizen, and defining and limiting the power of Federal and State legislation.”

Nor was Robert S. Hale, of New York, the only man in the Thirty-ninth Congress in the plight just described. Charles H. Eldridge, a Democrat from Wisconsin, must also have believed that the Bill of Rights applied generally to state as well as national action, and he must have been equally ignorant of *Barron v. Baltimore*. For after Hale had answered Bingham, Eldridge broke in to ask whether “the gentleman from Ohio [Mr. Bingham] ha[d] found or heard of a case in which the Constitution of the United States ha[d] been pronounced to be insufficient”; “insufficient,” that is, as Hale had said, “for the protection of the liberties of the citizen,” and for protecting them, of course, as against the states. This is clear from the context. Hale said: “I would rather leave these gentlemen to answer one another at some other time, if it will answer their purposes as well.” Bingham “beg[ged] leave to say that [he was] ready to answer the gentleman now, and to produce such a decision, whether the gentleman from New York [was] or [was] not.” But Hale was obdurate. He said it was a “side issue” to his speech and refused to give way. So, Bingham was obliged to forgo, for the moment, the correcting of Hale’s error by the citation of *Barron v. Baltimore*.⁵⁹

This whole incident, with all the light it sheds on Bingham’s purposes, Mr. Fairman omitted from his article. Instead, he inserted in it, in incomplete and misleading form, a long series of interruptions by Bingham to correct other misrepresentations that Hale was making.

⁵⁹ *Ibid.*, at 1064, col.¹ 2-3.

"Bingham's answers," Mr. Fairman says (but they were corrections, not answers), "simply did not meet *the issue*. [Emphasis added.] Maybe he was intentionally evasive. It seems more likely, however, that he was exercised over the bad things he wanted to hit, without ever having thought out, inclusively and exclusively, the import of the words he had chosen."⁶⁰ Now, all this, on Mr. Fairman's part, was wholly gratuitous and misleading. "The issue," so far as his article was concerned, was whether Bingham's amendment was intended to empower Congress to enforce the Bill of Rights against the states. When Bingham had wanted to speak out on that "issue," Hale had prevented him: a fact which Mr. Fairman omitted. As for "the issue" in Hale's speech, what was the use of speaking out on that? Thaddeus Stevens had tried to correct Hale on that and wholly failed. And anyone who will read the original record will find that Bingham's "answers," as Mr. Fairman incorrectly called them, were wholly adequate to each of "the issues" to which they were severally directed. It is true, they were brief; and this is what enabled Mr. Fairman to present them as "maybe . . . intentionally evasive." But the reason they were brief, he omitted. For, while Hale did, at one point, invite Bingham to correct him if he was wrong in something he had just said, he had, *before that*, four times complained of Bingham's interruptions. And Bingham had agreed that he "ought not" to interrupt, and added that he "d[id] not wish to do it"; but he apparently felt compelled to do so by the untrue things that Hale was saying.⁶¹

Mr. Fairman's handling of the foregoing incident is not untypical of his handling of the evidence all through his discussion of the debates in Congress. Thus, for example, he omitted any mention of a speech by Hiram Price, a Republican from Iowa, who spoke immediately after Hale had finished. Price was for the amendment. He said:

I but state a fact well known to every man who has taken the trouble to know anything, that for the last thirty years a citizen of a free State dared not express his opinion on the subject of slavery in a slave State.

The Constitution had not prevented this suppression of free speech. He wanted it amended so that it would do so; so that "each citizen of every State sh[ould] have the same rights and privileges as the citizens of every other State." He believed the proposed amendment would accomplish this, and he was therefore for it.⁶² His reference to freedom of

⁶⁰ Fairman I, at 31 and 32.

⁶¹ Cong. Globe, 39th Cong. 1st Sess. 1064 and 1065 (1866).

⁶² *Ibid.*, at 1066-67.

speech makes clear that he must have understood the proposed amendment as empowering Congress to enforce the Bill of Rights against the states; but it did not get him into Mr. Fairman's article.

Price was the last speaker on February 27. The first speech on the 28th that contains anything relevant to our problem is that of Frederick E. Woodbridge, a Republican from Vermont. "What is the object of the proposed amendment?" he asked, and then answered as follows:

It merely gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship. It is intended to enable Congress by its enactments when necessary to give to a citizen of the United States, in whatever state he may be, those privileges and immunities which are guaranteed to him under the Constitution of the United States. It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever State he may be that protection to his property which is extended to the other citizens of the State.⁶³

"This explanation," Mr. Fairman observed in his article, was "rather hazy." He then proceeded to restate it—or, more accurately, to misstate it—in his own words, so that, in the end, it appeared hazier still.⁶⁴ Now, what are the facts? Of the three sentences in Woodbridge's statement, only the last can be considered "hazy." That sentence plainly related to the second (or "equal-protection") clause of the proposed amendment; and as to its effect, Woodbridge does, indeed, seem to have been confused. But there is no confusion in his first two sentences, which relate to the first (or "privileges-and-immunities") clause of the amendment. He says plainly that it will enable Congress to secure to citizens, as against the states, all the natural rights pertaining to citizenship and, in addition, all privileges, and immunities, guaranteed by the Constitution. Woodbridge, then, was one of those who took the Privileges and Immunities Clause of Article IV of the original Constitution—and, by necessary consequence, the first clause of the proposed amendment—as comprehending not only the "privileges and immunities" guaranteed, *in specie*, by the first eight amendments and other parts of the Constitution, but, likewise, as comprehending all the "privileges and immunities" that were "fundamental" and "belonged, of right, to the citizens of all free governments," of which Justice Washington had spoken in *Corfield v. Coryell*. And there were many other men in Congress who had this idea, too.

The next speaker was John A. Bingham, making the last major

⁶³ *Ibid.*, at 1088, col. 2.

⁶⁴ Fairman I, at 33.

speech in the debate. In introducing him, Mr. Fairman said: "Here was a final opportunity to meet the questions raised during the debate."⁶⁵ The implication plainly was that Bingham had been evasive before and might be expected to be so again. The central question was whether the amendment meant what Robert S. Hale and the Democrats had charged; and, if it did not, what it did mean. On this central question, Bingham spoke as follows:

I repel the suggestion made here in the heat of debate, that the committee or any of its members who favor this proposition seek in any form to mar the Constitution of the country, or take away from any State any right that belongs to it, or from any citizen of any State any right that belongs to him under that Constitution. The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. It "hath that extent—no more."⁶⁶

Now, what was there evasive about this? To be sure, what Bingham said can be made to seem contradictory by imputing to him ideas that he did not have. But if we remember all that appeared so clearly in his speech of 1859—his interpretation of the Privileges and Immunities Clause of Article IV of the original Constitution; his belief as to the nature of the "privileges and immunities" comprehended thereunder; his interpretation of the Due Process Clause of the Fifth Amendment; his belief that it comprehended "equal protection of the laws"; his insistence that the rights of "life, liberty and property" thereunder were "natural or inherent rights which belong to all men"; his consequent belief in the propriety of its guaranty of these rights to all "persons," alien and citizen alike; and, last of all, his very evident belief that *Barron v. Baltimore* was totally wrong—if we remember all these things, the seeming contradictions in his statement above quoted disappear. It should be remembered, too, that his statement was made to his fellow Republicans, who held constitutional theories essentially similar to his own; and the Democrats present, though they did not, in general, assent to the Republican views, very certainly understood them. So, unless his statement is distorted by imputing to him ideas he did not have, it seems about as straightforward as a statement could be.

Bingham went on:

Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens

⁶⁵ *Ibid.*

⁶⁶ Cong. Globe, 39th Cong. 1st Sess. 1088, col. 3 (1866).

of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law; but they say, "We are opposed to its enforcement by act of Congress under an amended Constitution, as proposed." That is the sum and substance of all the argument that we have heard on this subject. Why are gentlemen opposed to the enforcement of the bill of rights, as proposed? Because they aver it would interfere with the reserved rights of the States! Who ever before heard that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States, or to impose upon him, no matter from what State he may have come, any burden contrary to that provision of the Constitution which declares that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States?

What does the word immunity in your Constitution mean? Exemption from unequal burdens. Ah! say gentlemen who oppose this amendment, we are not opposed to equal rights; we are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property; we are only opposed to enforcing it by national authority, even by the consent of the loyal people of all the States.⁶⁷

Now, the foregoing paragraphs, together with the extract from Bingham's speech first quoted above, were likewise quoted in his article, by Mr. Fairman, wherein he then offered the following comment upon them:

Bingham certainly says that the effect of his proposal is to arm Congress with power to enforce the bill of rights: it will do this and nothing more. What bill of rights? Once more he makes it clear by the context: The bill of rights that says that the citizens of the United States shall be entitled to the privileges and immunities of citizens of the United States in the several states (which refers to, but misquotes, Art. IV, § 2) and that no person shall be deprived of life, liberty, or property without due process of law (which is one of the Fifth Amendment's limitations on the Federal Government). And this measure would take from the state no authority it now enjoys under the Constitution; it would impose no obligation to which the state is not already bound.⁶⁸

Bingham did not "misquote" the first clause of Article IV, section 2, because he was *not* quoting; he was giving the substance of the clause as he believed it to be. And he did not agree that the Fifth Amendment was a limitation merely on the federal government. Like most of the Republicans of his time, he believed the decision in *Barron v. Baltimore* had been totally wrong, as it is clear it was. And this of course explains his insistence that his amendment would not take away from the states any rights that belonged to the states under the Constitution. As for

⁶⁷ *Ibid.*, at 1089, col. 1.

⁶⁸ Fairman I, at 33 and 34.

Mr. Fairman's attempt to show, once more, that Bingham was using "bill of rights" in a special, unheard-of sense, this is based on the following sentence from the first of the two paragraphs last quoted above, in which Bingham seemed to be speaking of the Privileges and Immunities Clause of Article IV of the original Constitution as a provision in the Bill of Rights:

Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property, without due process of law. . . .

But, in the second of the two paragraphs last quoted above, Bingham seemed to be speaking of the Due Process Clause of the Fifth Amendment as *being* the Bill of Rights. He said:

Ah! say gentlemen who oppose this amendment, . . . we are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property. . . .

Would anyone argue that this sentence proves that Bingham thought the Due Process Clause of the Fifth Amendment *was* the Bill of Rights, or that he was using "bill of rights," in this instance, in a completely unheard-of sense in which it stood for *just one* of the many provisions of the Bill of Rights as ordinarily understood? It is important to remember that the sentence in question is from a report of a speech; that reporters are sometimes guilty of mistakes and omissions; and that speakers, especially ardent men like John A. Bingham, are sometimes guilty of slips and lapses, too. The rational conclusion would therefore seem to be that, in the instance last cited above, either Bingham or his reporter made an error; and probably the reporter, since three words restore the passage to good sense. They appear below in italics:

Ah! say gentlemen who oppose this amendment, . . . we are not opposed to *the provision in* the bill of rights that all shall be protected alike in life, liberty, and property. . . .

And the instance on which Mr. Fairman relies is of the same character. Either Bingham or his reporter made a mistake; and one word is enough to cure it. Again, it appears in italics:

Gentlemen admit the force of the provisions in the bill of rights, *and* that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property, without due process of law. . . .

A position that requires for its support such arguments as this one of Mr. Fairman is a weak position, indeed.

Bingham turned next to a consideration of the speech which his fellow Republican, Robert S. Hale, of New York, had made on the day before. He pointed out that Hale had "sa[id] that the Constitution does contemplate equality in the protection of the rights of life, liberty, and property in every State," and that "he [had] admit[ted] it does contemplate that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several States." He also pointed out that Hale had "take[n] care not to utter one single word in opposition to that part of the amendment which s[ought] the enforcement of [the second of these provisions]." But he had raised the cry of "States' Rights," said Bingham, in reference to the other clause of the amendment, which sought "to secure to all persons in the several States equal protection in the rights of life, liberty, and property."

[Yet] if a State has not the right to deny equal protection to any human being under the constitution of this country in the rights of life, liberty, and property [—and this Hale had admitted—] how can State rights be impaired by penal prohibitions of such denial, as proposed?

The gentleman seemed to think that all persons could have remedies for all violations of their rights of "life, liberty, and property" in the Federal Courts.

I ventured to ask him yesterday when any action of that sort was ever maintained in any of the Federal courts of the United States. . . .

A gentleman on the other side interrupted me and wanted to know if I could cite a decision showing that the power of the Federal Government to enforce in the United States courts *the bill of rights under the articles of amendment to the Constitution* had been denied. I answered that I was prepared to introduce such decisions; and *that is exactly what makes plain the necessity of adopting this amendment.* (Emphasis supplied.)

Bingham then cited *Barron v. Baltimore*, in which the Supreme Court had held, despite the undeniable generality of most of the provisions of the first eight amendments, that the Court could not apply any of them to the states. "These amendments," the Court had said, "contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them." Bingham also cited a later case, *Livingston v. Moore*, in which the foregoing doctrine was referred to as "now settled." And he concluded with the question: "What have gentlemen to say to that?"⁶⁹

Mr. Fairman complained very strangely of Bingham, at this point, that "he hailed *Barron v. Baltimore* as though it were a vindication of

⁶⁹ Cong. Globe, 39th Cong. 1st Sess. 1089, cols. 2 and 3, and 1090, col. 1 (1866).

his position.”⁷⁰ Well, was it not a vindication, on the point for which he cited it? He cited it because, as he said, the decision in the case was “exactly what ma[de] plain the necessity of adopting [the proposed] amendment” giving Congress power to do what the Court had declined to do. And certainly the case did make plain the necessity he spoke of, or the necessity, in the alternative, of adopting an amendment prohibiting the states, in terms, from violating the rights covered in the first eight amendments. In the end, Bingham drew an amendment which did both these things; but at the preliminary stage of the drafting, he had in mind an enforcing power for Congress only.

One would suppose, too, that, in the passages last cited, Bingham had made sufficiently clear what he was trying to do in his proposed amendment. For, in these passages, he speaks of “the bill of rights under the articles of amendment to the Constitution.” Apparently, however, not even this was good enough for Mr. Fairman. True, he did not directly say this. Instead, having given the passage in which Bingham cited *Barron v. Baltimore* and *Livingston v. Moore*, Mr. Fairman plunged immediately into a wholly false issue. Here it is:

Those cases never intimated that the various requirements of the first eight Amendments really extended to the states, but that Congress was without power to make the requirements effective; the powers of Congress never entered into the question.⁷¹

And Bingham never intimated that the cases he cited did go into these matters.

A little further on in Mr. Fairman’s article, we get this:

Another observation: if Bingham’s object was to make the provisions of the first eight Amendments applicable to the states, why did he not say so? He was being closely pressed: What was *his* understanding of his proposal? In one single sentence he could have affirmed such a purpose with crystal clarity. And yet in all his sea of rhetoric, he never expressed so simple a proposition.⁷²

The foregoing “observation” of Mr. Fairman is without the slightest basis in fact. To begin with, “Bingham’s object” was *not*, at this stage, “to make the provisions of the first eight Amendments applicable to the states.” He considered them already to be so, not only because of the complete generality of most of their provisions, but because of the clause in Article IV of the original document which he believed secured to “the Citizens of each State” “all Privileges and Immunities of Citi-

⁷⁰ Fairman I, at 35.

⁷¹ *Ibid.*, at 34.

⁷² *Ibid.*, at 36.

zens [of the United States] in the several States." Bingham's "object," at this preliminary stage of the drafting, was to give Congress power to enforce the first eight amendments in what he conceived was their true application. And on this, his true "object," he was *not* "being closely pressed"; he was not "being pressed" on this at all. Not a single Republican questioned the desirability of this, his repeatedly avowed "object." None questioned that his amendment would accomplish this object, and none asked how it could possibly do so. These facts, it should again be emphasized, are a sufficient indication of just how prevalent the constitutional beliefs explained in the preceding section of this article were among the Republicans of 1866. For only on the basis of such beliefs about the Constitution could Bingham's amendment accomplish its avowed "object," as all seemed to think it would. The point of disagreement among the Republicans was as to whether Bingham's amendment would not do more than he desired; whether the words of its second clause would not give Congress a general power to legislate on the subjects of "life, liberty, and property." And on this point Bingham certainly spoke out. He "repel[led] th[is] suggestion," and declared his proposal to be "simply a proposition to arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today." And if there could be any real doubt about what "bill of rights" Bingham meant, that doubt would surely be dispelled by his later reference to "the bill of rights under the articles of amendment to the Constitution" and his citation of *Barron v. Baltimore* (in which the Supreme Court had refused to enforce *that* "bill of rights" against the states) as "exactly what ma[de] plain the necessity of adopting [his proposed] amendment."

That Bingham considered *Barron v. Baltimore* and *Livingston v. Moore* to be wrong is evident from what he had to say after his triumphant question, "What have gentlemen to say to that?" He "st[oo]d relieved," he said, "from entering into any extended argument in answer to these decisions of [the] courts" refusing to enforce the Bill of Rights against the states. Here, certainly, he was intimating that the cases were wrong; and that this could be shown, as I have elsewhere done.⁷³ But it was unnecessary for his purposes to show this, Bingham said, because there was another way, besides enforcement through the courts, by which the Constitution was made binding upon state officers. This was by a principle Daniel Webster had once invoked

⁷³ Pol. & Con. ch. xxx.

in another connection: the principle that the Constitution addresses its various injunctions and prohibitions to the individual consciences of all state officers, legislative, executive, and judicial, who must take oath to support it upon entering upon their duties. And then, going again upon the plain assumption that *Barron v. Baltimore* was wrong, and that the Bill of Rights applied to the states, Bingham insisted that the Bill of Rights had all along bound the consciences of all state officers. And, hence, his argument that "the adoption of the proposed amendment w[ould] take from the States no rights that belong[ed] to the States."⁷⁴

And the necessity for this amendment, apart from *Barron v. Baltimore*, arose, he explained, from the way the "necessary and proper" clause was drawn. "The word 'powers' [in that clause] control[led] the whole question." "The Government of the United States ha[d] no legislative powers, save the express grants and the general grant to pass all laws which sh[ould] be necessary and proper to carry into execution all other powers vested by the Constitution in the Government of the United States, or in any department or any officer thereof. . . . A grant of power, according to all construction, [was] a very different thing from a bill of rights."⁷⁵ And it followed that Congress had no power to enforce the Bill of Rights; and, hence, the necessity of the amendment. With this particular view of Bingham's, some of his fellow Republicans did not agree; but Bingham felt sure of it and acted, as we shall see, in complete consistency with it.

As to the political necessity of his measure, Bingham had the following to say:

It seems to me . . . clear that if you intend to have these thirty-six States one under our Constitution, if you intend every citizen of every State shall in the hereafter have the immunities and privileges of citizens in the several States, you must amend the Constitution. It cannot be otherwise. Restore those States with a majority of rebels to political power, and they will cast their ballots to exclude from the protection of the laws every man who bore arms in defense of the Government. The loyal minority of white citizens and the disfranchised colored citizens will be utterly powerless. There is no efficient remedy for it without an amendment to your Constitution.⁷⁶

Now, in spite of the fervor of Bingham's appeal, it appears that there had already been a caucus of the Republicans, and that a postponement had been agreed upon between them. This is evident from certain remarks that Roscoe Conkling, a Republican of New York, and a

⁷⁴ Cong. Globe, 39th Cong. 1st Sess. 1088, col. 3, and 1090, col. 1 (1866).

⁷⁵ *Ibid.*, at 1093, col. 3.

⁷⁶ *Ibid.*, at 1094, col. 2.

member of the Joint Committee, made just after Bingham finished speaking. Conkling said:

Mr. Speaker, I have not sought the floor for the purpose of discussing the merits of this amendment. It was introduced several weeks ago and considered in the committee of fifteen. At that time and always I felt constrained to withhold from it my support as one of the committee, and when the consent of the committee was given to its being reported I did not concur in the report. So much I deem it fair and right to say.

There are, Mr. Speaker, I know, a number of gentlemen upon the one side and the other of this question who wish further time to consider it, if not to discuss it, and I therefore intend, without any hostility to the gentleman who has it in charge, but at least, I think, by his *quasi* consent, to make a motion to postpone. But before I do so, my colleague, [Mr. Hotchkiss,] I believe, wants to say a word, and if he will say it now I will allow him to do so and then resume the floor.⁷⁷

Mr. Fairman presented Mr. Hotchkiss—Giles W. Hotchkiss, a Republican from New York—as being willing to agree only to an amendment providing for the single right “that no State shall discriminate against any class of its citizens.” This was not in accordance with the facts. After apologizing for detaining the House, Hotchkiss began his speech with this plain statement:

I have no doubt that I desire to secure *every privilege* and *every right* to every citizen in the United States that the gentleman who reports this resolution [i.e., Bingham] desires to secure. (Emphasis supplied.)

Now, bearing in mind that Hotchkiss had just been listening to a speech in which Bingham had described his amendment as intended “to arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution,” and in which he had cited the Supreme Court’s decision in *Barron v. Baltimore* as being “exactly what ma[d]e plain the necessity of adopting this amendment”—bearing in mind these characteristics of Bingham’s speech, how is it possible to understand Hotchkiss otherwise than as declaring his own desire to secure to all citizens in the several states “every privilege and every right” that the Bill of Rights contains? But having made his clear introductory statement, Hotchkiss began to talk, in a rather confusing way, about the second clause only of Bingham’s amendment, without any express indication that it was about the second clause only that he was speaking. He said he was sure Bingham was aiming only at discrimination; yet, as he understood the proposal before the House, it would authorize Congress “to establish uniform laws throughout the United States upon

⁷⁷ *Ibid.*, col. 3.

the subject named, the protection of life, liberty and property." That would be dangerous, "should the power of this Government, as the gentleman from Ohio fear[ed], pass into the hands of the rebels." At this point, Bingham interrupted:

The gentleman will pardon me. The amendment is exactly in the language of the Constitution; that is to say, it secures to the citizens of each of the States all the privileges and immunities of citizens of [sic] the several States. It is not to transfer the laws of one State to another State at all. It is to secure to the citizen of each State all the privileges and immunities of citizens of the United States in the several States.

Hotchkiss' answer, apparently in interruption of Bingham, was as follows:

The first part of this amendment, to which the gentleman alludes, is precisely like the present Constitution; it confers no additional powers.⁷⁸ It is the latter clause wherein Congress is given the power to establish these uniform laws throughout the United States.

And he meant, of course, the "uniform laws" of which he had been speaking before Bingham's interruption. We thus have this clear indication from Hotchkiss himself that he had all along been speaking, after his brief introductory statement, about the second clause only of Bingham's amendment; and there was no excuse for taking him in any other sense.

Hotchkiss had the following to add on the same subject:

Now, if the gentleman's object is, as I have no doubt it is, to provide [that is, provide in the second clause] against a discrimination to the injury or exclusion of any class of citizens in any State from the privileges which other classes enjoy, *the right* should be incorporated into the Constitution. It should be *a constitutional right* that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation. But this amendment proposes to leave it to the caprice of Congress; and your legislation upon the subject would depend upon the political majority of Congress, and not upon two thirds of Congress and three fourths of the States. (Emphasis supplied.)

And then, having finished with this part of the amendment to which he objected, he expressed, once more, his complete agreement with Bingham's avowed objectives as follows:

Now, I desire that the very *privileges* [not "privilege"] for which the gentleman is contending shall be secured to the citizens; but I want *them* [not "it"] secured by

⁷⁸ It will be noted from this remark by Hotchkiss that he must have been taking the old Privileges and Immunities Clause of Article IV just as John A. Bingham took it; but that he apparently disagreed with Bingham's view that Congress had no power to enforce that clause under the then existing Constitution.

a constitutional amendment that legislation cannot override. Then if the gentleman wishes to go further, and provide by laws of Congress for the enforcement of *these rights* [not "this right"] I will go with him.

But now, when we have the power in this Government, the power in this Congress, and the power in the States to make the Constitution what we desire it to be, I want to secure *these rights* [not "this right"] against accidents, against the accidental majority of Congress. Suppose that we should have here the influx of rebels which the gentleman predicts; suppose a hundred rebels should come here from the rebel States. Then add to them their northern sympathizers, and a reasonable percentage of deserters from our side, and what would become of this legislation? And what benefit would the black man or the white man derive from it? Place *these guarantees* [not "this guarantee"] in the Constitution in such a way that *they* [not "it"] cannot be stripped from us by any accident, and I will go with the gentleman. (Emphasis supplied.)⁷⁹

And in Bingham's second effort at drafting, these things that Hotchkiss suggested were the things that Bingham did.

When Hotchkiss had finished, Conkling resumed the floor and moved a postponement until the second Tuesday in April. One of the Democrats then moved "to lay the whole subject upon the table." This took precedence over Conkling's motion; but it was promptly voted down. The motion to postpone was then adopted. Bingham voted for it.⁸⁰ And, as pointed out earlier, by the time the matter was reached again, the Fourteenth Amendment had been passed by the House of Representatives.

Before taking up the debate in Congress when that amendment was passed, it seems desirable to look briefly at the debates in the House over the Civil Rights Bill, which began the day after the debates we have just been over were finished. The debates over the Civil Rights Bill contain certain relevant materials which Mr. Fairman chose to omit, and there are certain inaccuracies in his presentation of these debates that require correction.

James F. Wilson, a Republican from Iowa, had charge of the bill in the House. In opening the debate, he admitted there were certain constitutional difficulties. He said:

Some of the questions presented by this bill are not entirely free from difficulties. Precedents, both judicial and legislative, are found in sharp conflict concerning them. The line which divides these precedents is generally found to be the same which separates the early from the later days of the Republic. The further the Government drifted from the old moorings of equality and human rights, the more numerous became judicial and legislative utterances in conflict with some of the leading features of this bill.

⁷⁹ *Ibid.*, at 1095.

⁸⁰ *Ibid.*

And he might have added, what it is plain he thought, and rightly thought, that these "judicial and legislative utterances" were in conflict with the Constitution as well.

The initial provision of the bill ran, it will be remembered, as follows:

All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States without distinction of color.

Wilson said he thought this "merely declaratory" of what the law already was. But admitting, for the sake of argument, that Negroes were not citizens, the provision in the bill was a valid exercise of Congress' power to naturalize. Both these views flew directly in the face of still unoverruled doctrines of the *Dred Scott Case*; but this fact meant little to these Republicans of 1866.

The remainder of the first section of the bill, at this stage of its passage through Congress, ran as follows:

There shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

There was considerable opposition to the bill because of the first clause in the foregoing, preceding the semicolon. It was feared it might be taken to forbid discriminations in "political rights," such as the right to vote and hold public office.

Wilson argued that "civil rights" did not comprehend "political rights." He also maintained that the bill did not create any new rights. He said:

Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. We are following the Constitution. We are reducing to statute form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen.

Later, as we shall see, Wilson was to declare more specifically that the bill merely proposed to enforce the Due Process Clause of the Fifth Amendment upon the states. But at this point, he went on as follows:

I am aware, sir, that this doctrine is denied in many of the States; but this only proves the necessity for the enactment of the remedial and protective features of this bill. If the States would all observe the rights of our citizens, there would be no need of this bill. If the States would all practice the constitutional declaration, that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several States," and enforce it, as meaning that the citizen has [all the nonpolitical rights mentioned by Justice Washington in the *Corfield* case], we might very well refrain from the enactment of this bill into a law. If they would recognize that "general citizenship" . . . which under this clause entitles every citizen to security and protection of personal rights . . . , we might safely withhold action. *And if, above all, Mr. Speaker, the States should admit, and practice the admission, that a citizen does not surrender these rights because he may happen to be a citizen of the State which would deprive him of them,* we might, without doing violence to the duty devolved upon us, leave the whole subject to the several States. But, sir, the practice of the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny. (Emphasis supplied.)

Here, especially in the italicized passage, we get a clear view of how these old Republicans thought about the Privileges and Immunities Clause of Article IV of the original Constitution. They thought "the several States" in that clause meant what it said; that is, "all the states," and not "every other state." And, so, they read the clause as a guaranty to "the Citizens of each State," of "all" the "Privileges and Immunities of Citizens" of the United States, in every state in the Union. And among the rights that were covered was the right to "equal protection" in "life, liberty, and property," which it was proposed to enforce upon the states, in the Civil Rights Bill.

As for the constitutional power to do this, Congressman Wilson relied on the broad implications of the whole constitutional document. For our purposes, the last paragraph of his speech sufficiently indicates his position. It ran as follows:

Upon this broad principle I rest my justification of this bill. I assert that we possess the power to do those things which Governments are organized to do; that we may protect a citizen of the United States against a violation of his rights by the law of a single State; that by our laws and our courts we may intervene to maintain the proud character of American citizenship; that this power permeates our whole system, is a part of it without which the States can run riot over every fundamental right belonging to citizens of the United States; that the right to exercise this power depends upon no express delegation, but runs with the rights it

is designed to protect; that we possess the same latitude in respect to the selection of means through which to exercise this power that belongs to us when a power rests upon express delegation; and that the decisions which support the latter maintain the former. And here, sir, I leave the bill to the consideration of the House.⁸¹

Now it can be seen at once that, on this question of power, James F. Wilson and John A. Bingham were far apart. To Bingham, the Civil Rights Bill was a proposal to enforce against the states, in favor of all citizens, one of the provisions of the Bill of Rights; and, as we know, he believed an amendment to the Constitution to be necessary to enable Congress to do this. It is therefore not surprising to find him attacking the bill as unconstitutional, in a speech he made on the 9th of March. He had other things against it, however. He thought "the term civil rights include[d] every right that pertains to the citizen under the Constitution, laws, and Government of this country"; that "political rights" were comprehended by the term; and, hence, that the prohibition of state discrimination in "civil rights" among citizens of the United States, in the second clause of the first section of the bill, would be held to prohibit discrimination in "political rights," and not merely discriminations among them in the nonpolitical rights which the final clause of the section enumerated. He thought such a result undesirable, and he therefore moved recommitment of the bill, with instructions to strike out the second clause of the first section, and to make one other change the nature of which need not be noted.⁸²

In reference to this action of Bingham's, Mr. Fairman had the following to say:

The bill—recalling its terms once more—(1) forbade discrimination in civil rights on account of race, and (2) gave the right to contract, sue, etc., and to the equal benefit of the laws for security of person and property. Bingham wanted to have the bill recommitted with instructions to strike out the first of the two provisions above, and in lieu of the penal provisions to substitute a civil action. These changes, he seemed to believe, would meet constitutional objections—though Representative Wilson replied, very justly, that as to the powers of Congress, there was no difference in principle between what he would strike and what he would accept.⁸³

The implication of all this was, of course, that Bingham just could not think straight; and, hence, that nothing comprehensible in the way of legal draftsmanship was to be expected from him.

Now, what are the facts as to Bingham's position? The truth is that

⁸¹ *Ibid.*, at 1115-19.

⁸² *Ibid.*, at 1271, col. 3, and 1291, cols. 2 and 3.

⁸³ *Fairman I*, at 39-40.

he would not "accept" *any* of the Civil Rights Bill. He indicated clearly in his speech that he meant to vote against it, whether the changes he suggested were made or not. And he did vote against it, even though the second clause of the first section was eventually taken out. Moreover, he did *not* "seem to believe" that the changes he proposed "would meet constitutional objections." In opening his speech, he said he supposed the constitutional objections he meant to urge would be said to apply, as well, to the instructions he had introduced by way of amendment to the pending motion to recommit, and added the following comment:

[A]lthough the objections which I urge against the bill must, in the very nature of the case, apply to the proposed instructions, I venture to say no candid man, no right-minded man, will deny that by amending as proposed the bill will be less oppressive, and therefore less objectionable. Doubting, as I do, the power of Congress to pass the bill, I urge the instructions with a view to take from the bill what seems to me its oppressive and I might say its unjust provisions.⁸⁴

Bingham apparently knew that the bill was going to pass, despite his own constitutional objections to it; and he was simply trying to make it what he would have wanted it to be, had his constitutional scruples not existed.

Those scruples rested on the same conviction that had led him to propose his amendment that had been postponed on the day before. He said:

I beg gentlemen to consider that I do not oppose any legislation which is authorized by the Constitution of my country to enforce in its letter and its spirit the bill of rights as embodied in the Constitution. I know that the enforcement of the bill of rights is the want of the Republic.

And of the substance of the final clause of section 1 of the pending bill, he had the following to say:

I say, with all my heart, that that should be the law of every State by the voluntary act of every State. The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many of the States of the Union. I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future.

This last seems an important statement; for it indicates that Giles W. Hotchkiss, on the day before, had succeeded: he had convinced Bingham that the way to accomplish the ends he had in view was by express constitutional prohibitions to the states against violating those

⁸⁴ Cong. Globe, 39th Cong. 1st Sess. 1290-91 (1866).

rights which, theretofore, he had desired only to empower Congress to enforce upon them.

Later in his speech, Bingham declared his conviction "that the care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by [the] Constitution, [was] in the States, and not in the Federal Government." And he added:

I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution.⁸⁵

Here, then, we have another clear statement from Bingham as to the purpose his postponed amendment had been meant to serve; clear, that is, provided we do not impute to Bingham an idea he did not have; the idea that the Bill of Rights did not mean all the things it so plainly says, but instead meant what the Supreme Court said that it meant in *Barron v. Baltimore*.

Mr. Wilson, of Iowa, was pretty wroth. He was not going "to be driven or lured," he said, from the position he had originally taken.

The gentleman from Ohio tells the House . . . that we cannot interpose . . . for the protection of rights. Can we not? What are the great civil rights to which the first section of the [pending] bill refers? *I find in the bill of rights which the gentleman desires to have enforced by an amendment to the Constitution*, that "no person shall be deprived of life, liberty, or property without due process of law." I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specially named, and these are the rights to which this bill [now pending] relates, having nothing to do with subjects submitted to the control of the several States.

And now, sir, we are not without light as to the power of Congress in relation to the protection of these rights. (Emphasis supplied.)

At this point Wilson cited, and read from, the Supreme Court case of *Prigg v. Pennsylvania*,⁸⁶ in which the Supreme Court had upheld the constitutionality of the Fugitive Slave Act enforcing upon the states the provision in Article IV of the Constitution, that—

[n]o Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

⁸⁵ *Ibid.*, at 1291, cols. 1 and 3, and 1292, col. 3.

⁸⁶ 16 Peters (U.S.) 539 (1842).

And Wilson then argued, by a plain analogy, that, if Congress had power under the Constitution to enforce the foregoing provision upon the states, then it certainly had power to enforce upon them the similarly worded provision in the Fifth Amendment, that—

[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

And he added:

Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy. That is the doctrine of the law as laid down by the courts [in the *Prigg* case]. There can be no dispute about this. The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy.

And that was all the pending bill proposed to do.⁸⁷

Now, the foregoing all seems plain enough, provided, only, we do not impute to James F. Wilson an idea he did not entertain; the idea, once more, that the Bill of Rights did not mean all the things it so plainly says, but, instead, meant what the Supreme Court said that it meant in *Barron v. Baltimore*. Wilson, no more than John A. Bingham, entertained such an idea. To him, *Barron v. Baltimore*, like the *Dred Scott Case*, was one of those “drift[ings] from the old moorings of equality and human rights,” of which he had spoken when he first introduced his bill. He plainly considered the Bill of Rights as binding upon the states. He thought Congress already possessed of power to enforce it upon the states. And he thought all his Civil Rights Bill proposed to do was to enforce one of the several provisions that the Bill of Rights contains: the Due Process Clause of the Fifth Amendment.

If Wilson thought this of the Civil Rights Bill, he must, of course, have agreed in the view of the Due Process Clause of the Fifth Amendment which, we have seen, John A. Bingham took in his speech of 1859 and apparently still took, in 1866, when he drew his postponed amendment to the Constitution. In other words, Wilson must have agreed with Bingham that the clause in question comprehended “equal protection in the rights of life, liberty, and property,” because it was for this that the Civil Rights Bill provided. It is plain, then, that Bingham and Wilson parted company only on the question of congressional power to enforce against the states the rights of citizens of the United States. Wilson, reading the Constitution in the light of its expressly declared

⁸⁷ Cong. Globe, 39th Cong. 1st Sess. 1294, cols. 2 and 3 (1866).

purpose of "secur[ing] the Blessings of Liberty" to "the People of the United States," had no difficulty in concluding that Congress had this power. Bingham, on the other hand, adhering to the letter of a part of the "necessary-and-proper" clause, could not convince himself that Congress had it. On this particular question, Wilson of course was right, and Bingham wrong; but that cannot alter the fact of Bingham's conviction, or its relation to his purposes in presenting the constitutional amendment which the House postponed.

Such, then, are the facts in the history of Congress which are related, either directly or indirectly, to the intended purpose of Bingham's postponed constitutional amendment. Far clearer than legislative history generally is, these facts permit no reasonable doubt as to what John A. Bingham intended. Neither do they permit any reasonable doubt that the House was made aware of Bingham's purpose. James F. Wilson understood that purpose, as his reply to Bingham on the Civil Rights Bill shows; and the plainly probable conclusion is that the others did, also. After all, counting his reference to the subject in his speech on the Civil Rights Bill, Bingham made clear his purpose at no less than six different points in his several speeches. And his statements, and the statements of the other Republicans in the Thirty-ninth Congress, can be made to seem unclear only by the kind of treatment to which Mr. Fairman subjected them: the imputation to these men of constitutional ideas they did not entertain. When their statements are read with their particular constitutional convictions in mind, they tell a clear and easily comprehensible story.

4

What was to become the Fourteenth Amendment was introduced in the House, from the Joint Committee on Reconstruction, on May 8, 1866. The first section was in its final form, except that the initial clause defining state and national citizenship was missing. The section read 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.

The fifth section of the amendment read as follows:

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article [that is, all the provisions of the Fourteenth Amendment, including those in section 1].

It is apparent at a glance that John A. Bingham, who was the draftsman of the first section of the proposed amendment, had followed the suggestion made by Giles W. Hotchkiss, of New York, when his earlier proposed amendment had been postponed. It is apparent, too, that, except upon the subject of Negro citizenship, Bingham had finally faced up to the realities of the situation and was no longer assuming that the constitutional beliefs of himself and his fellow Republicans were the standing law. Recognizing, apparently, that the state-court theory, rather than the Republican theory, of the Privileges and Immunities Clause of the original document might conceivably become the established view, Bingham had carefully avoided its uncertain language—"Privileges and Immunities of Citizens"—and spelled out exactly what he meant. And his "equal-protection" clause, in his second effort, seems to have been fashioned with care to plug the hole in the right of equality that would result, should the state-court view of the old Privileges and Immunities Clause come to prevail, as it afterwards did. Faced, too, with the then still unoverruled doctrine of the *Dred Scott Case* that all privileges and immunities under the Constitution were privileges and immunities of citizens of the United States, and of no one else, Bingham nevertheless drew his "due-process" clause, relating, as we know, to rights he deemed "the natural rights of all men," in such a manner that it could, even under the Court's established doctrine, hardly be taken as other than what he intended it to be. For, having forbidden the states, in favor of citizens, to violate the "due-process" guaranty of the Fifth Amendment as one of "the privileges or immunities of citizens of the United States," he repeated this particular prohibition, in specific terms, in favor of all "persons." And unless the Court was prepared to make the second prohibition altogether meaningless, that prohibition could not possibly have been construed to create privileges or immunities of citizens of the United States only. So, in the end, except for his continuing cocksureness about Negro citizenship, Bingham did a very good drafting job, indeed.

The amendment was introduced in the House by Thaddeus Stevens of Pennsylvania, the chairman of the House delegation to the Joint Committee. Of its first section, Stevens had the following to say:

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. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in courts, or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen. Some answer, "Your civil rights bill secures the same things." That is *partly true* [supplied emphasis], but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed.⁸⁸

As Mr. Fairman observed in his article, the rest of the paragraph on the initial section is of the same general "political" character as the final sentence above and, so, need not be quoted here.

Now, how did Mr. Fairman deal with Stevens' introductory statement? He gave it much as it has been given here and then offered these immediate comments:

As Stevens saw it, *discrimination* was the great evil, *equal* protection was the dominant purpose of Section 1. He made no reference to any other object.⁸⁹

It can hardly be gainsaid that "as Stevens saw it, discrimination was the great evil." When he got started talking on it, he could hardly stop; but that does not make "equal protection . . . the dominant purpose of Section 1," a section that did three different things, of which the provision for "equal protection" was only one. And as for Mr. Fairman's third comment—that Stevens "made no reference to any other object"—it is simply *flatly untrue*. Stevens said that all the provisions of section 1 were "asserted, in some form or other in our DECLARATION or organic law." "But the Constitution," he added, "limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect. . . ." This was as much as to say that the "limitations" in the Constitution not already applicable to the states were being made applicable to them by the amendment. And what were the "limitations"

⁸⁸ *Ibid.*, at 2459, cols. 2 and 3.

⁸⁹ Fairman I, at 44.

in the Constitution that answered to this description? They were the "limitations" in the first eight amendments and a few other similarly defective "limitations" in the original document, of which the most important was "the Privilege of the Writ of Habeas Corpus."

Mr. Fairman's next witness was the next major speaker, a Democrat, William E. Finck, of Ohio. On section 1, he had only the following to say:

Well, all I have to say about this section is, that if it is necessary to adopt it, in order to confer upon Congress power over the matters contained in it, then the civil rights bill, which the President vetoed, was passed without authority, and is clearly unconstitutional.⁹⁰

Mr. Fairman presented this statement of Finck's as proof that Finck could see *nothing* in the amendment that was not in the Civil Rights Bill. Here is the comment he made:

Over and over in this debate, the correspondence between Section 1 of this 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. But what were the rights established by the Act: to contract, to sue, to testify, to buy, hold, and sell, to enjoy the full and equal benefit of the laws for the security of person and property.⁹¹

First of all, it is proper to point out that the last sentence of the foregoing passage from Mr. Fairman's article was highly misleading. "The rights . . . to contract, to sue, to testify, to buy, hold, and sell [property]" were not "established by the [Civil Rights] Act." Just one right was established by that act: the right to equality before the law. The subjects of contracting, suing, testifying, and buying, holding, and selling property were mentioned in the act, together with some other matters, only to indicate the fields within which the right to equality before the law was being secured. Mr. Fairman's way of putting the matter was misleading for two reasons. First, it tended to implant in the minds of his readers that the rights to contract, sue, testify, etc. were "the privileges and immunities of citizens of the United States" which were intended in the Privileges and Immunities Clause of the Fourteenth Amendment. Second, it tended to disguise the patent absurdity of the proposition he sought to establish in reference to the debates over the Fourteenth Amendment, in the Thirty-ninth Congress; the proposition, that is, that the men of that Congress thought there was a one-to-one correspondence between section 1 of the Fourteenth Amendment and the Civil Rights Act. For, in the light of what the

⁹⁰ Cong. Globe, 39th Cong. 1st Sess. 2461, col. 1 (1866).

⁹¹ Fairman I, at 44.

Civil Rights Act truly was, what he sought to establish was that the men in that Congress thought both the Privileges and Immunities Clause and the Due Process Clause of the Fourteenth Amendment were altogether devoid of meaning.

We may turn now to the question of whether the above-quoted statement of William E. Finck bore out, or exemplified, what Mr. Fairman had to say in the first two sentences of the passage from his article last quoted. The reader should look back at William E. Finck's statement. Did he "note" "the correspondence between section 1 of the amendment and the Civil Rights Act"? Obviously, he did not. Did he say anything about the "essential identity" of "the provisions" of the two measures? Again, it is obvious, he did not. And that no "correspondence" between them, no "essential identity" of their respective "provisions," can be inferred justifiably from what Finck did say will be apparent from a consideration of the arguments that had been advanced in the House, in support of the constitutionality of the Civil Rights Bill, when that measure had been up for consideration; arguments, it may be added, that Mr. Fairman totally ignored.

Thus, when he had first presented the bill to the House, James F. Wilson, of Iowa, had argued that all it proposed to do was to enforce rights already given against all the states, including that whereof a man was a citizen, by the Privileges and Immunities Clause of Article IV of the original Constitution. The states were already constitutionally bound to do what the bill required; but some of them had violated, and were still violating, these rights of the citizens; and in these circumstances, Congress, the legislature of a government formed to "secure the Blessings of Liberty" to "the People of the United States," could certainly step in and enforce these privileges and immunities of the citizens of the United States, against these recalcitrant states. That had been the argument when the bill was introduced; yet, in the constitutional amendment now proposed, William E. Finck was faced with a provision forbidding the states to "make or enforce any law which sh[ould] abridge the privileges or immunities of citizens of the United States," and with another giving Congress power "to enforce" this prohibition by "appropriate legislation." Small wonder, then, that, being a Democrat, Finck cried out as he did against the amendment. What he said undoubtedly shows that he took the Privileges and Immunities Clause of the Fourteenth Amendment as comprehending the privileges and immunities given in the Privileges and Immunities

Clause of the original document; but there is nothing at all to show that he did not also take the clause in the amendment as comprehending "the Privilege of the Writ of Habeas Corpus," as well as all those privileges and immunities conferred by the first eight amendments. Mr. Fairman was simply giving rein, in dealing with Finck, to a very vivid imagination.

And, again, consider the argument James F. Wilson had made, in answer to John A. Bingham, just before the Civil Rights Bill had passed. "In relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them . . . raises by implication the power in Congress to provide appropriate means for their protection [as against the states]." "I find in the bill of rights which the gentleman [Bingham] desires to have enforced by an amendment to the Constitution that 'no person shall be deprived of life, liberty, or property, without due process of law.'" Wilson then went on to say that he considered the Civil Rights Bill to be merely an enforcement of these "rights thus specifically given," together with certain others, of an adjective nature, "which [were] necessary for [their] protection and maintenance and perfect enjoyment." And since the Civil Rights Bill provided for "equal protection" in the enjoyment of these rights, it is clear that Wilson, as pointed out earlier, must have been taking the "due process" guaranty in the Fifth Amendment as John A. Bingham had taken it in his speech of 1859; that is, as comprehending "equal protection of the laws."

Such, then, had been the views taken, and the argument made, when the Civil Rights Bill had passed. And what was William E. Finck faced with, in the constitutional amendment proposed less than two months later—an amendment that had just been introduced with an explanation that it would "supply a defect" in the Constitution, the defect that that instrument "limit[ed] only the action of Congress, and [was] not a limitation on the states"? First of all, Finck was faced with a prohibition to the states from "mak[ing] or enforc[ing] any law which sh[ould] abridge the privileges or immunities of citizens of the United States," a provision which, in view of Stevens' explanation, he must surely have taken to comprehend those under the first eight amendments, or, in other words, the Bill of Rights, which had been treated, when the Civil Rights Bill was passed, as already binding upon the states. Second, he was faced with a prohibition to the states from doing what was prohibited in the Due Process Clause of the Fifth Amendment, although, when the Civil Rights Bill was passed, that clause and

amendment had been treated as already binding upon the states, and, indeed, as the very basis of the Civil Rights Bill. And whereas "equal protection" had then been treated as comprehended in the "due-process" guaranty of the Fifth Amendment, it was now, in the proposed new amendment, apparently considered to be something separate which could be secured, as against the states, only by a separate and distinct provision. And, finally, Finck was faced with the provision giving Congress power to enforce all these requirements upon the states, although, when the Civil Rights Bill had passed, power to enforce every one of them had been claimed as already belonging to Congress. So, considering all these facts, it is surely no cause for wonder that Finck, being a Democrat, cried out as he did against the proposed amendment. But there is nothing in what he had to say that affords the slightest proof of the one proposition Mr. Fairman was interested in establishing: that William E. Finck was of the opinion the proposed amendment would *not* make good, as against the states, the provisions of the first eight amendments.

Mr. Fairman's next witness was James A. Garfield, of Ohio. Although Garfield was a Republican, Mr. Fairman praised "his high standing" and "the clarity of his legal conceptions," because Mr. Fairman conceived that Garfield was on his side of the question. On the first section of the amendment, Garfield had the following to say and was quoted as follows by Mr. Fairman:

I am glad to see this first section here which proposes to hold over every American citizen, without regard to color, the protecting shield of law. The gentleman who has just taken his seat [Mr. Finck] undertakes to show that because we propose to vote for this section we therefore acknowledge that the civil rights bill was unconstitutional. He was anticipated in that objection by the gentleman from Pennsylvania. [Mr. Stevens.]

And Stevens had said that it was only "partly true" that the "civil rights bill secure[d] the same things.'" Garfield went on:

The civil rights bill is now a part of the law of the land. But every gentleman knows that it will cease to be part of the law whenever the sad moment arrives when that gentleman's [Finck's] party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here.⁹²

⁹² Cong. Globe, 39th Cong. 1st Sess. 2462, col. 3 (1866).

Mr. Fairman's interpretive comment was as follows:

It is precisely in order to give permanence to the principles of the Civil Rights Bill that Section 1 is to be written into the Constitution.⁹³

But Garfield had certainly not said this; and if such had been the *only* purpose of section 1, its Equal Protection Clause would have been all that would have been required. Garfield's real ideas on the subject of Mr. Fairman's sole interest were very different from what Mr. Fairman seemed to believe. These ideas of Garfield's appear from certain evidence, to be presented later, which Mr. Fairman omitted: Garfield believed that section 1 of the amendment made all the privileges and immunities under the Constitution and its initial amendments good against the states.

The next speaker was Martin F. Thayer, a Republican from Pennsylvania. He had somehow confused the first and second sections of the amendment. What Mr. Fairman reported him as saying of section 1 really had reference to section 2; and the following, purportedly relating to section 2, which Mr. Fairman omitted, must obviously be taken to relate to section 1:

With regard to the second section of the proposed amendment to the Constitution, it simply brings into the Constitution what is found in the bill of rights of every State of the Union. As I understand it, it is but incorporating in the Constitution of the United States the principles of the civil rights bill which has lately become a law. . . .⁹⁴

He added that this latter was being done for the reason assigned by James A. Garfield, and not for the reason suggested by William E. Finck. The quoted comment by Thayer, if read without any reference to the sense of the two statements of which it is composed, certainly sounds as if he had been talking about just one thing in the two statements. But it was the Equal Protection Clause that put into the Constitution the principle of the Civil Rights Bill, and Thayer's first statement seems to have been a comment on the other two clauses of section 1. So, the probability is that there was some slight garbling in the reporting. And what Thayer seems to have meant was that the effect of the first two clauses in making the first eight amendments good against the states was only a bringing into the Constitution of the United States, as against the states, of restrictions that were already contained in their own constitutions: a fact that was at least approximately true.

⁹³ Fairman I, at 45.

⁹⁴ Cong. Globe, 39th Cong. 1st Sess. 2465, col. 1 (1866).

Thayer was followed by Benjamin M. Boyer, a Pennsylvania Democrat. All Boyer had to say of the first section was the following:

The first section embodies the principles of the civil rights bill, and is intended to secure ultimately, and to some extent indirectly, the political equality of the negro race. It is objectionable also in its phraseology, being open to ambiguity and admitting of conflicting constructions.⁹⁵

Mr. Fairman quoted the foregoing without comment; but apparently he meant to present Boyer as one who saw nothing in the first section of the amendment, except "equal protection of the laws" and some things that obviously were not there. Yet a statement that the first section "embodie[d] the principles of the civil rights bill" was not a statement that it did not "embody" other things, too. And the talk about Negro "political equality," despite the way it is reported, is impossible to take as referring to section 1. It fits the second section of the amendment, not the first.

William D. Kelley, of Pennsylvania, undertook to answer the Democrats who had spoken, and Boyer in particular. Of the first section of the amendment, he had the following to say:

Let us look at these provisions so fearfully denounced by the gentlemen. Does my colleague [meaning Boyer] think he could go safely through his district in Pennsylvania denouncing the proposition to embody in the Constitution of the United States [the provisions contained in the first section]?

There is not a man in Montgomery or Lehigh county that will not say those provisions ought to be in the Constitution if they are not already there.⁹⁶

Mr. Fairman's only comment on this was the following:

(In his speech supporting Bingham's earlier draft, Kelley had twice expressed the view that everything in the proposal was already a part of the law [i.e., of the Constitution], and that its effect was only to clarify.)⁹⁷

Apparently Mr. Fairman considered the foregoing statements of Kelley's as proof that he could not possibly have thought the Fourteenth Amendment made the Bill of Rights applicable to the states, because, forsooth, the Supreme Court had held, in *Barron v. Baltimore*, that the Bill of Rights did not apply to the states, and, so, of course, if the amendment made the Bill of Rights applicable to the states, it would *not* have been a "provision" such as Kelley had said it was: a provision "already in the Constitution." But let us examine the matter a little

⁹⁵ *Ibid.*, at 2467, col. 2.

⁹⁶ *Ibid.*, at 2468, col. 1.

⁹⁷ Fairman I, at 46.

more closely and see if this inference follows. And in this connection, it is well to bear in mind that, when Kelley had declared that all the power under John A. Bingham's earlier draft had been in the Constitution "from the hour of its adoption," he had accompanied this statement with an admission that the power "ha[d] lain dormant"; "that there ha[d] been raised over it a superincumbent mass of state and political usage and judicial decisions that [was] mountain high." For these statements mean that Kelley was not a man who felt that extreme devotion to the Supreme Court's decisions that Mr. Fairman seems to feel.

Now, if Kelley thought the Privileges and Immunities Clause of the Fourteenth Amendment was "already [in substance] in the Constitution," he must have thought it meant the same thing as the Privileges and Immunities Clause in Article IV of the original document. And if he thought this, it is clear he must have interpreted the clause in the original document as if it read: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens [of the United States] in the several States." This follows because the clause in the amendment employed the more exact phrase "privileges or immunities of citizens of the *United States*." And if Kelley thought this the meaning of the clause in the original document, what reason is there to think that he did not take that clause, and, hence, the Privileges and Immunities Clause of the amendment, as comprehending the privileges and immunities covered by the Bill of Rights? The answer is: "None at all." And this seems especially clear when it is considered that he took the Bill of Rights as applying to the states. This is evident from the fact that he thought the Due Process Clause of the Fourteenth Amendment was also "already in the Constitution." For this means he took the Due Process Clause of the Fifth Amendment as applicable to the states, and that means he thought *Barron v. Baltimore* was wrong. And if he thought *Barron v. Baltimore* was wrong, then he of course took the Bill of Rights as applying to the states, and the Privileges and Immunities Clause of the original document as implemented with all the privileges and immunities that the Bill of Rights contains. So, there is nothing in the fact that Kelley thought the Privileges and Immunities Clause of the Fourteenth Amendment to be "already in the Constitution" which compels the conclusion Mr. Fairman apparently drew; the conclusion, that is, that Kelley had no idea the Privileges and Immunities Clause of the amendment comprehended the privileges and im-

munities covered by the Bill of Rights. Instead, the very opposite conclusion is indicated.

The next reference to section 1 was by another Pennsylvania Republican, John M. Broomall. He had the following to say:

Now, what is this that is submitted for our action? I will consider the several propositions briefly; I am only sorry that I am limited to so short a space of time. We propose, first, to give power to the Government of the United States to protect its own citizens within the States, within its own jurisdiction.⁹⁸

This peculiar mode of referring to section 1 was doubtless occasioned by a view of the general subject that had several times been urged in the debates on John A. Bingham's postponed amendment, and in the debates on the Civil Rights Bill. Thus, Bingham had argued that it was an anomaly that the Government could protect the citizen in his rights abroad, but could not protect him in his rights within the country, and that the anomaly ought to be ended by the adoption of his amendment.⁹⁹ Broomall's characterization of section 1 as a proposal to empower the Government "to protect its own citizens within the States, within its own jurisdiction" was, it should be observed, a true and proper one with respect to all three clauses of the section. He went on:

Who will deny the necessity of this? No one. The fact that all who will vote for the pending measure, or whose votes are asked for it, voted for this proposition [i.e., proposal] in another shape, in the civil rights bill, shows that it will meet the favor of the House. It may be asked, why should we put a provision in the Constitution which is already contained in an act of Congress? The gentleman from Ohio [Mr. Bingham] may answer this question. He says the act is unconstitutional. Now, I have the highest respect for his opinions as a lawyer, and for his integrity as a man, and while I differ from him upon the law, yet it is not with that certainty of being right that would justify me in refusing to place the power to enact the law unmistakably in the Constitution. On so vital a point I wish to make assurance doubly sure.

Th[is] measure . . . will meet with no opposition from those on whom the country depends for its safety, because if it is not necessary it is at least harmless. If we are already safe with the civil rights bill, it will do no harm to become the more effectually so, and to prevent a mere majority from repealing the law and thus thwarting the will of the loyal people.¹⁰⁰

Mr. Fairman's interpretive comment on the foregoing was as follows:

He [Broomall] had thought Congress had authority to forbid discrimination in civil rights; Bingham had thought otherwise. Now the question will be settled and

⁹⁸ Cong. Globe, 39th Cong. 1st Sess. 2498, col. 1 (1866).

⁹⁹ *Ibid.*, at 1090, col. 2.

¹⁰⁰ *Ibid.*, at 2498, cols. 1 and 2.

the provisions of the Act will surely have constitutional force. That is what Section 1 meant to Broomall.¹⁰¹

Was this comment of Mr. Fairman justified? Certainly it was not justified by Broomall's characterization of section 1 as a proposal to empower the Government "to protect its own citizens within the States, within its own jurisdiction." Neither was it justified by his reference to the congressmen who voted for the Civil Rights Bill as having "voted for this proposition"—that is, this proposal—"in another shape"; for that was only to say that the Civil Rights Bill had also been a proposal—that is, a "proposition"—for "the Government of the United States to protect its own citizens within the States, within its own jurisdiction." There remain the remarks beginning: "It may be asked, why should we put a provision in the Constitution which is already contained in an act of Congress?" This undoubtedly refers to the Civil Rights Act; but is it justifiable to take the words "a provision" in the sentence quoted, and the various remarks that follow that sentence, as having reference to the whole first section of the amendment before the House, which they did *not* fit, rather than as having reference only to "a [single] provision" of the section, its Equal Protection Clause, which they did fit? It seems clear that the answer to this question must be in the negative. Broomall, at this point, was speaking of the Equal Protection Clause only, and it is a safe surmise that no one who heard him misunderstood him as Mr. Fairman apparently misunderstands him today.

The next speaker was George S. Shanklin, a Democrat from Kentucky. He thought the first section "[struck] down the reserved rights of the States" and "invest[ed] all power in the General Government."¹⁰² Presumably, he meant that the first section and the fifth section together did these things. It is a sufficient commentary on these views to repeat that Shanklin was a Democrat. There was nothing in his speech throwing any light on our problem.

The next speaker, Henry J. Raymond, of New York, was apparently regarded by Mr. Fairman as one of his star witnesses. Raymond got quite an introduction: "old line Whig, original Republican, publisher of the *New York Times*—clearheaded, well informed, a man of principle, long and responsibly related to the major developments in government

¹⁰¹ Fairman I, at 46.

¹⁰² Cong. Globe, 39th Cong. 1st Sess. 2500, col. 3 (1866).

and politics." "Now," said Mr. Fairman, "he explains his understanding of Section 1 of the Amendment."¹⁰³ Here it is:

The principle of the first [section], which secures an equality of rights among all the citizens of the United States, has had a somewhat curious history. It was first embodied in a proposition introduced by the distinguished gentleman from Ohio, [Mr. Bingham,] in the form of an amendment to the Constitution, giving to Congress power to secure an absolute equality of civil rights in every State of the Union. It was discussed somewhat in that form, but, encountering considerable opposition from both sides of the House, it was finally postponed, and is still pending. Next it came before us in the form of a bill, by which Congress proposed to exercise precisely the powers which that amendment was intended to confer, and to provide for enforcing against State tribunals the prohibitions against unequal legislation. I regarded it as very doubtful, to say the least, whether Congress, under the existing Constitution, had any power to enact such a law; and I thought, and still think, that very many members who voted for the bill also doubted the power of Congress to pass it, because they voted for the amendment by which that power was to be conferred. [The vote against the motion to table was meant.] At all events, acting for myself and upon my own conviction on this subject, I did not vote for the bill when it was first passed, and when it came back to us from the President with his objections I voted against it. And now, although that bill became a law and is now upon our statute-book, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it.

Now, sir, I have at all times declared myself heartily in favor of the main object which that bill was intended to secure. I was in favor of securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction; all I asked was that it should be done by the exercise of powers conferred upon Congress by the Constitution. And so believing, I shall vote very cheerfully for this proposed amendment to the Constitution, which I trust may be ratified by States enough to make it part of the fundamental law.¹⁰⁴

Mr. Fairman's interpretive comment was as follows:

Once again, equality in the enjoyment of the civil rights—to contract, to sue, to hold property, etc.—is the great objective, and want of clear authority in Congress to achieve that end is the defect that the proposed Amendment would remedy.¹⁰⁵

Now, what is there, in the quoted excerpt from Raymond's speech, to bear out the view of Mr. Fairman that Raymond was "explain[ing] his understanding of Section 1," in what he said; and that "his understanding" was that "want of clear authority to achieve th[e] end [of equal civil rights within the states for all citizens was] the defect that the proposed Amendment [by its first and fifth sections] would rem-

¹⁰³ Fairman I, at 47.

¹⁰⁴ Cong. Globe, 39th Cong. 1st Sess. 2502, cols. 1 and 2 (1866).

¹⁰⁵ Fairman I, at 47-48.

edy"? The answer is that there are two things in the Raymond excerpt that tend to bear Mr. Fairman out. They are both commas. One is before, and the other after, the "which" clause in the first sentence of the excerpt. With this clause punctuated as the reporter of the speech apparently punctuated it, Raymond is indeed made to speak of "the principle of the first [section]" and to describe that principle as that of "secur[ing] an equality of rights [in the states] among all the citizens of the United States"; and this, of course, was the precise principle of the Civil Rights Act. But it seems a pretty absurd description of "the principle of the section" for so "clearheaded" and so "well informed" a man as Raymond to make. For he had only to look at the section to see that what he had described as *its* "principle" was, in fact, but one of three "principles" in it. So, considering that the elimination of the two commas that favor Mr. Fairman's view restores Raymond's statement to a sensible description of the third "principle" of the section, the reasonable conclusion would seem to be that the Equal Protection Clause of the section was what he was describing, and that the commas on which Mr. Fairman relied were the interpolation of an uncomprehending reporter. And it may be added that Raymond does not seem, in the foregoing passage, to have been "explain[ing] his understanding of Section 1" at all; not even "his understanding" of its third "principle"; instead, he was pronouncing an elaborate encomium on his own, highly admirable consistency.

Mr. Fairman, in his article, next takes up briefly the views of three more Democrats and three more Republicans, none of whom, in reality, had anything to say that throws light on our problem. The three Republicans were George F. Miller, of Pennsylvania; Thomas D. Eliot, of Massachusetts; and Ephraim R. Eckley, of Ohio. All three were so obscure on section 1 that it is impossible to tell what they thought about it. Of the three Democrats, one was Rufus P. Spalding, of Ohio. A "war" Democrat, he was enthusiastically in favor of the amendment in all its parts. Of the first section, he said only that "a person m[ight] read it five hundred years hence without gathering from it any idea that this rebellion ever existed."¹⁰⁶ This apparently meant that he thought its provisions just, as, indeed, they were; but this sheds no light on what he thought they concretely meant. The second Democrat, Samuel J. Randall, of Pennsylvania, was outraged because the amendment proposed equality between the black race and the white race be-

¹⁰⁶ Cong. Globe, 39th Cong. 1st Sess. 2509, col. 3 (1866).

fore the law. He referred to the fact that section 1 provided for this, and he ranted considerably over it; but there is nothing to show that he thought section 1 confined to "equal protection of the laws."¹⁰⁷ The third Democrat was our old friend, Andrew Jackson Rogers, of New Jersey. Mr. Fairman informed his readers, in italics, that Rogers had "*sat as a member of the Joint Committee on Reconstruction.*" Apparently, he wanted his readers to think that now they were about to get some real light on section 1. Here it is:

It saps the foundation of the Government; it destroys the elementary principles of the States; it consolidates everything into one imperial despotism; it annihilates all the rights which lie at the foundation of the Union of the States, and which have characterized this Government and made it prosperous and great during the long period of its existence.

It is true that Rogers also said: "This [first] section of the joint resolution is *no more nor less* [emphasis supplied] than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill. . . ." But Rogers' "no more nor less" was mere rhetoric, as the next paragraph of his speech demonstrates. In it, after reading the first section of the amendment, he went on as follows:

What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities.¹⁰⁸

As may be seen, Rogers, in the foregoing, had gotten considerably beyond the Civil Rights Act, which secured merely a right of equality before the law, in respect of the particular subjects it enumerated. And if he thought section 1 "w[ould] prevent any State from refusing anything to anybody embraced under this term privileges and immunities," and, also, that the term embraced "all the rights we have under the laws of the country," then of course he must have thought all the rights under the first eight amendments were included. But Rogers was obviously a ranter, and his views are not worth much as evidence.

The remaining participants in the House debate were John F.

¹⁰⁷ *Ibid.*, at 2530.

¹⁰⁸ *Ibid.*, at 2538, cols. 1 and 2.

Farnsworth, of Illinois, and John A. Bingham, of Ohio. On section 1, Farnsworth, a lawyer by profession, spoke as follows:

So far as this section is concerned, there is but one clause in it which is not already in the Constitution, and it might as well in my opinion read, "No State shall deny to any person within its jurisdiction the equal protection of the laws." But a reaffirmation of a good principle will do no harm, and I shall not therefore oppose it on account of what I may regard as surplusage.

"Equal protection of the laws;" can there be any well-founded objection to this? Is not this the very foundation of a republican government? Is it not the undeniable right of every subject of the Government to receive "equal protection of the laws" with every other subject? How can he have and enjoy equal rights of "life, liberty, and the pursuit of happiness" without "equal protection of the laws?" This is so self-evident and just that no man whose soul is not too cramped and dwarfed to hold the smallest germ of justice can fail to see and appreciate it.¹⁰⁹

Mr. Fairman's interpretive comment was as follows:

To Farnsworth, Section 1 means equal protection, expressed with harmless surplusage.¹¹⁰

Now, except that he did not apparently think "equal protection" was comprehended in the "due-process" guaranty found in the Bill of Rights, Farnsworth was obviously a man holding the same constitutional views as William D. Kelley and John A. Bingham. For, if he thought the substance of the Privileges and Immunities Clause of the amendment was already in the Constitution, he must have been taking the Privileges and Immunities Clause of the original document as a guaranty to "the Citizens of each State" of "all Privileges and Immunities of Citizens [of the United States] in the several States"; for that is what the clause in the amendment was. And his belief that the Due Process Clause of the amendment was, also, in substance, already in the document shows that he was taking the various privileges and immunities under the Bill of Rights as already good against the states. And because the old Privileges and Immunities Clause was, to him, a guaranty of "*all* Privileges and Immunities of Citizens [of the United States]," it is clear he must have been taking that guaranty as implemented with those privileges and immunities that were conferred by the Bill of Rights. So, although section 1 did mean, to Farnsworth, "equal protection, expressed with harmless surplusage," no such inference can be drawn from that fact as Mr. Fairman wanted his readers to draw. Instead, the indicated conclusion is that Farn-

¹⁰⁹ *Ibid.*, at 2539, col. 3.

¹¹⁰ Fairman I, at 51.

worth believed all privileges and immunities under the Bill of Rights were included under the old clause of the original document, and, likewise, under the new clause of the amendment.

In closing the debate, John A. Bingham spoke as follows on section 1:

The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.

Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.

The second section excludes the conclusion that by the first section suffrage is subjected to congressional law; save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people. Why should any American citizen object to that? But, sir, it has been suggested, not here, but elsewhere, if this section does not confer suffrage, the need of it is not perceived. To all such I beg leave again to say, that many instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, "cruel and unusual punishments" have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which the United States had provided no remedy and could provide none.

Sir, the words of the Constitution that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" include, among other privileges, the right to bear true allegiance to the Constitution and

laws of the United States, and to be protected in life, liberty, and property. Next, sir, to the allegiance which we all owe to God our Creator, is the allegiance which we owe to our common country.

The time was in our history, thirty-three years ago, when, in the State of South Carolina, by solemn ordinance adopted in a convention held under authority of State law, it was ordained, as a part of the fundamental law of that State, that the citizens of South Carolina, being citizens of the United States as well, should abjure their allegiance to every other government or authority than that of the State of South Carolina.

At this point, Bingham read the South Carolina ordinance and went on as follows:

There was also, as gentlemen know, an attempt made at the same time by that State to nullify the revenue laws of the United States. What was the legislation of Congress in that day to meet this usurpation of authority by that State, violative alike of the rights of the national Government and of the rights of the citizen?

In that hour of danger and trial to the country there was as able a body of men in this Capitol as was ever convened in Washington, and of these were Webster, Clay, Benton, Silas Wright, John Quincy Adams, and Edward Livingston. They provided a remedy by law for the invasion of the rights of the Federal Government and for the protection of its officials and those assisting them in executing the revenue laws. (See 4 Statutes-at-Large, 632-33.) No remedy was provided to protect the citizen. Why was the act to provide for the collection of the revenue passed, and to protect all acting under it, and no protection given to secure the citizen against punishment for fidelity to this country? But one answer can be given. There was in the Constitution of the United States an express grant of power to the Federal Congress to lay and collect duties and imposts and to pass all laws necessary to carry that grant of power into execution. But, sir, that body of great and patriotic men looked in vain for any grant of power in the Constitution by which to give protection to the citizens of the United States resident in South Carolina against the infamous provision of the ordinance which required them to abjure the allegiance which they owed their country. It was an opprobrium to the Republic that for fidelity to the United States they could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law. 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. That is the extent it hath, no more; and let gentlemen answer to God and their country who oppose its incorporation into the organic law of the land.¹¹¹

Now, although, as we have seen, John A. Bingham had faced up to the realities in his drafting, the foregoing remarks show, beyond any doubt, that he had not changed his constitutional convictions. *Barron v. Baltimore* he still plainly considered to be wrong. This is

¹¹¹ Cong. Globe, 39th Cong. 1st Sess. 2542-44 (1866).

shown by his insistence that, "contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union." It is also shown by his statement that his amendment, and its "due-process" clause in particular, would "take from no State any right that ever pertained to it." And it is shown, finally, by his insistence that "no State ever had the right . . . to deny to any freeman the equal protection of the laws"; for, as we observed earlier, Bingham derived this right to "equal protection" from the Due Process Clause of Amendment V.

Besides his continuing belief that the Bill of Rights already bound the states under a proper view, various of Bingham's other constitutional notions plainly continued. Thus, he still derived "equal protection" from the "due-process" guaranty in Amendment V; for he insisted, as has just been noted, that "no State ever had the right to deny [such] protection." He still believed, too, that "equal protection" and "due process" were "the inborn rights of every person," the rights of "citizen and stranger" alike; and he drew his amendment accordingly. And he still believed that the old Privileges and Immunities Clause of the original Constitution was a guaranty of "all Privileges and Immunities of Citizens [of the United States] in the several States"; that is, in all the states, including that of which a man was a resident. This is shown by his selection of this clause as the basis of his claim of rights for "the citizens of the United States resident in South Carolina," as against that state. And, finally, it is clear that he was still taking this clause as implemented with the various rights created by the adoption of the first eight amendments. This appears from his insistence that the clause "include[s], among other privileges, the right . . . to be protected in life, liberty, and property"; for this right, as already noted, Bingham was still deriving from the Due Process Clause of Amendment V.

Now, if all these views of Bingham's are borne in mind when his remarks on section 1 are read, those remarks are certainly perfectly straightforward and easily comprehensible. And his remarks, it should be remembered, were addressed to his fellow Republicans, who entertained views essentially similar to his own, and to Democrats who understood all these Republican views, even though they did not, in general, agree with them. For, in the light of these facts, the chance that Bingham was not understood by his hearers is very small, indeed. Nevertheless, it is clear that minds unaware of these old Republican theories of the Constitution might very easily take Bingham's re-

marks as confused, incoherent, and incomprehensible. And it was thus that Mr. Fairman presented them.

We thus come to the end of the debate on the Fourteenth Amendment in the House of Representatives; for, shortly after Bingham finished his speech, the amendment passed, on the 10th of May, 1866.¹¹² That the debate gives no warrant whatever for the inference Mr. Fairman sought to draw from it is evident. That inference was that the members of the House believed there was a one-to-one correspondence between section 1 of the amendment and the Civil Rights Act; that the provisions of the two measures were "essentially identical." Such a correspondence did, indeed, exist between the Civil Rights Act and the Equal Protection Clause of the amendment; and those members who derived "equal protection" from the "due-process" guaranty of Amendment V may, perhaps, have regarded the Equal Protection Clause as needlessly repetitious of a part of what the Due Process Clause of the amendment secured. But there was no way in which the Civil Rights Act and the Privileges and Immunities Clause of the amendment could possibly have been regarded as identical, even by members, if there were any such, who thought the two measures related to the same rights; the vague "privileges and immunities," that is, of which Justice Washington had spoken in *Corfield v. Coryell*. For, whereas those rights were subjected to state power under the Civil Rights Act, provided only the exercise of state power was equal, the "privileges or immunities" to which the amendment related were absolutely given: "no State [could] make or enforce any law which sh[ould] abridge [them in any way at all]." The remarks of the members upon which Mr. Fairman relied can therefore reasonably be taken to relate only to that part of section 1 as to which they were true; and they were abundant in the debate because of the Democratic accusation of Republican inconsistency in the premises.

The debate, then, wholly fails to bear Mr. Fairman out. But, although so much is evident, it would be idle to pretend that the debate on the amendment, standing by itself, was very informative as to what the House thought the Privileges and Immunities Clause of the amendment meant. Thaddeus Stevens' statement was clear that "the Constitution limit[ed] only the action of Congress, and [was] not a limitation on the States," and that "this amendment supplie[d] that defect." Bingham's speech was clear, too, provided only that the old

¹¹² *Ibid.*, at 2545.

Republican constitutional ideas are borne in mind in reading it. But, beyond these two, only three members gave any indication of their views on the subject. Thus, it seems reasonably certain that Martin F. Thayer, of Pennsylvania, took the Privileges and Immunities Clause as making the Bill of Rights good against the states. And in the case of William D. Kelley, of the same state, and John F. Farnsworth, of Illinois, there can be very little doubt, indeed, that they so took it. But the other members simply did not speak on the point, either one way or the other; and neither did they say anything from which their views on the subject can be inferred.

As to why the debate should have had this character, there are several obvious reasons. In the first place, section 1 was not really new to the House. It was quite plainly Bingham's postponed amendment made over in the manner Giles W. Hotchkiss had suggested when the postponement had occurred. The other sections of the amendment were, on the other hand, entirely novel. In addition to this, they were political: they constituted the means by which the Republicans hoped to hold on to control of the national government. In these circumstances, they naturally received most of the attention. And there is finally the fact that the Privileges and Immunities Clause of the amendment undoubtedly was very plain, to the Republicans of the Thirty-ninth Congress, in its effect of making the Bill of Rights good against the states.

To perceive this clearly, it is well to remember that John A. Bingham, only a few weeks before, had proposed an amendment empowering Congress "to make all laws which sh[ould] be necessary and proper to secure *to the citizens of each state all privileges and immunities of citizens in the several States.*" Bingham then had called attention to the fact that the words in italics were the words of the Privileges and Immunities Clause of Article IV of the original Constitution. He had then informed the House that the purpose of the amendment was to enable Congress to enforce the Bill of Rights against the states, and he had repeated this, over and over again, in his speeches. Yet no one had asked him how the words of his amendment could possibly have the effect he claimed for them, although this would be the first thing asked by anyone understanding the clause in the original document as that clause is understood today. It would seem to follow that the prevailing view of the clause, in the House, must have been that which Bingham had expounded in his speech of 1859; that is, that the clause was a guaranty to "the Citizens of each State" of "all Privileges and

Immunities of Citizens [of the United States] in the several States," meaning by "several States" "all the States," including that of which a man was a resident. It is also clear that the House must have been taking the clause, so interpreted, as implemented with all the privileges, and immunities, created by the first eight amendments. These things follow because only upon such assumptions can the general acceptance of Bingham's postponed amendment as adequate for the purpose he announced it to have be explained. And no Republican objected to this thing that Bingham desired to do. As Giles W. Hotchkiss' speech quite plainly indicated, there was apparently general Republican support for "secur[ing] every privilege and every right to every citizen of the United States that [Bingham] desire[d] to secure." The vote against tabling was significant of this fact, too. And if the Republicans of the House, because of the way they interpreted the Privileges and Immunities Clause of the original document, considered Bingham's postponed amendment adequate to empower Congress to enforce the Bill of Rights against the states, then it would seem to be a certain thing that they must at once have taken the Privileges and Immunities Clause of the Fourteenth Amendment as a prohibition to the states to violate the various provisions which the Bill of Rights contains. So, although the debate on the amendment is nearly silent on the point, a pretty sure inference as to the understanding of the House is possible if these earlier circumstances are brought to view. And these inferences are well confirmed, we shall presently see, by debates by many of the same men in the House, after the Fourteenth Amendment was adopted.

5

On May 23, the Senate took up the joint resolution proposing what was to become the Fourteenth Amendment. It was presented on behalf of the Joint Committee by Senator Jacob M. Howard, of Michigan. Howard's exposition of the first section, especially of the Privileges and Immunities Clause, was very full and clear. After reading the whole section to the Senate, he drew particular attention to the clause just mentioned, pointing out that it was "a general prohibition upon all the States." He regarded it, he said, as "very important." It "relate[d] to the privileges and immunities of citizens of the United States as such, and as distinguished from all other persons not citizens of the United States." He then drew attention to the Privileges and

Immunities Clause in Article IV of the original Constitution; quoted it; and then went on as follows:

The effect of this clause was to constitute *ipso facto* the citizens of each one of the original States citizens of the United States. And how did they antecedently become citizens of the several States? By birth or by naturalization. They became such in virtue of national law [that is, the law of nations], or rather of natural law which recognizes persons born within the jurisdiction of every country as being subjects or citizens of that country. Such persons were, therefore, citizens of the United States as were born in the country or were made such by naturalization; and the Constitution declares that they are entitled, as citizens, to all the privileges and immunities of citizens in the several States. They are, by constitutional right, entitled to these privileges and immunities, and may assert this right and these privileges and immunities, and ask for their enforcement whe[r]ever¹¹³ they go within the limits of the several States of the Union.

It would be a curious question to solve what are the privileges and immunities of citizens of each of the States in the several States. I do not propose to go at any length into that question at this time. It would be a somewhat barren discussion. But it is certain the clause was inserted in the Constitution for some good purpose. It has in view some results beneficial to the citizens of the several States, or it would not be found there; yet I am not aware that the Supreme Court have ever undertaken to define either the nature or extent of the privileges and immunities thus guaranteed. Indeed, if my recollection serves me, that court, on a certain occasion not many years since, when this question seemed to present itself to them, very modestly declined to go into a definition of them, leaving questions arising under the clause to be discussed and adjudicated when they should happen practically to arise. But we may gather some intimation of what probably will be the opinion of the judiciary by referring to a case adjudged many years ago in one of the circuit courts of the United States by Judge Washington; and I will trouble the Senate but for a moment by reading what that very learned and excellent judge says about these privileges and immunities of the citizens of each State in the several States. It is the case of *Corfield vs. Coryell*, found in 4 Washington's Circuit Court Reports, page 380.

Howard then read to the Senate the passage from *Corfield v. Coryell* which was quoted and discussed in the second section of this article. He then concluded that "[s]uch [was] the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution."¹¹⁴

Mr. Fairman quoted the second of the two foregoing paragraphs from Howard's speech in his article and then spent nearly two pages

¹¹³ The Congressional Globe says "whenever"; but the sense obviously requires "wherever."

¹¹⁴ *Ibid.*, at 2765.

commenting on it in a manner that gives the impression that Howard was just another of these Republican ninnies from our Civil War period, who simply did not know what he was doing.¹¹⁵ This, of course, was intended to detract from the effect of Howard's very clear statement (which Mr. Fairman had to present next) that the Privileges and Immunities Clause of the proposed amendment would make the first eight amendments good against the states. Mr. Fairman's remarks need not be quoted. Suffice it to say that the one thing they make apparent is that, at the time he wrote them, he was quite unaware of the doctrine of the *Dred Scott Case*, still unoverruled when the Fourteenth Amendment was drawn, that all privileges and immunities under the Constitution and its several amendments were privileges and immunities of citizens of the United States, and of no one else.¹¹⁶

After his brief discussion of the privileges and immunities under Article IV of the original document, Howard went on as follows:

To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed 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 peaceably to assemble and petition the government for a redress of grievances, a right appertaining to each and all 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.

Now sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for

¹¹⁵ Fairman I, at 55-57.

¹¹⁶ In fairness to Mr. Fairman, it ought to be pointed out that the entire Supreme Court, also, had become unaware of this doctrine of the *Dred Scott Case* by 1900, when the case of *Maxwell v. Dow*, 176 U.S. 581, was decided. Cf. *Pol. & Con.* 1130-31.

public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.¹¹⁷

Now, here, certainly, was a plain enough indication for any one that the whole iniquitous doctrine of *Barron v. Baltimore* was intended to be wiped out: the Bill of Rights, as a whole, was to be made good against the states. Noteworthy, too, is Howard's explanation of the phrasing of the clause as due to the unoverruled doctrine of the *Dred Scott Case*, that all privileges and immunities under the Constitution and its several amendments were privileges and immunities of citizens of the United States, and of no one else. For, though the case was not cited, Howard's mention of "the present settled doctrine . . . that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States" can have referred to nothing else. So, it is apparent that Bingham and the committee had, in fact, drawn this clause with this *Dred Scott* doctrine in mind, as, indeed, anyone knowing the doctrine would at once infer upon reading the clause they drew.

Howard went on as follows:

Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment, which declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article." Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.

This completed what Howard had to say on the Privileges and Immunities Clause. In reference to the rest of the first section, he

¹¹⁷ Cong. Globe, 39th Cong. 1st Sess. 2765, col. 3 (1866).

pointed out that its "last two clauses . . . disable[d] a State from depriving not merely a citizen of the United States, but any person, whoever he m[ight] be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State." He next expatiated on the desirability of abolishing "all class legislation," as, he indicated, the last clause of the section would do; and he concluded by drawing attention to the fact that "the first section [did] not give to either [the black man or the white man] the right of voting."

The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.¹¹⁸

Now, how did Mr. Fairman deal with Howard's very plain statement? He began by admitting that it was "clear," "full," and "unequivocal," and that "it must be given very serious consideration, coming from the Senator who had the measure in charge." Then he started in to try to discredit it. His first attempt was the exposition of the following purely imaginary difficulty:

If the new privileges and immunities clause incorporated the provisions of Amendments I-VIII, it must include the due process clause of Amendment V. But how can this be maintained in view of the fact that a separate due process clause was found necessary? Howard did not meet this obvious question. He did, however, note that the due process clause extended to *any person*, whereas the privileges and immunities were enjoyed by *citizens of the United States*. One who accepts Howard's view must admit the consequence, that the only essential function of the due process clause was to protect such "persons" as were not "citizens." There were aliens—and there were corporations, which, it was held, were not "citizens" within the meaning of Article IV, Section 2, although "citizens" within the benefit of the diversity jurisdiction provision of Article III. As a matter of formal analysis, then, one might attribute to the Committee a design to give the citizen the protection of the entire Bill of Rights, and then, consciously duplicating in part, to extend to aliens, or to corporations, or to both, a particular one of the several guarantees of Amendments I-VIII. Such a view would, however, be quite unrealistic. Although it was noted in debate that "person" was wider than "citizen," no particular interest in either the alien or the corporation was expressed. They simply did not enter into the actual discussion, one way or the other. And if it was no special concern for their protection that produced the striking departure from the principles of drafting, how is Howard's statement to be squared with the presence of a due process clause in the Amendment?¹¹⁹

¹¹⁸ *Ibid.*, at 2765-66.

¹¹⁹ Fairman I, at 58-59.

Now, what are the facts? It is true there was nothing in the debates about corporations, and there is no reason at all to believe that corporations were intended to be comprehended by the word "person" in the amendment, though this is not to say that their stockholders are not entitled to protection in their corporate interests under the various clauses of section 1. But when you have conceded these things, you have exhausted every bit of truth that Mr. Fairman's argument contains. We have seen that, as early as 1859, Bingham, the draftsman of the first section, had considered the rights under the Due Process Clause of the Fifth Amendment to be the "natural, or inherent, rights" of all men. He had then called attention to the fact that the amendment guaranteed these rights "by the broad and comprehensive word 'person,' as contradistinguished from the limited term 'citizen.'" And he had plainly seemed to think this appropriate. It is, then, not surprising that, when he came to draft the first section of the Fourteenth Amendment, he should have drafted it as he did. He followed the same scheme in both the postponed version and the adopted version, making good, or enabling Congress to make good, the whole Bill of Rights in favor only of "citizens," but making good, or enabling Congress to make good, the "due-process" guaranty, or what he regarded as comprehended in it, in favor of all "persons" whatsoever. And in argument before the House, Bingham had called attention to the fact that the amendment would enable Congress "to protect by national law the privileges and immunities of all the citizens of the Republic and *the inborn rights of every person* within its jurisdiction whenever the same sh[ould] be abridged or denied by the unconstitutional action of any State"; that it would supply the "great want of the citizen *and stranger* [in the states], protection by national law from unconstitutional State enactments." And Howard, as we have just seen, had also called attention to the differing terms of the first clause of the amendment, on the one hand, and its second and third clauses, on the other. So, to say there was no basis in the debates for what the first section of the amendment plainly meant and very obviously was intended to mean was to say what was quite untrue. Mr. Fairman's difficulty with the Due Process Clause was totally imaginary.

He next attempted to prove that the rest of the Senate did not agree with Howard as to what the first section of the amendment meant. His methods were the same as he had used in dealing with the House

debate; but there were fewer speakers in the Senate, and he had much less material to work with.

When Howard had finished his speech, Senator Benjamin F. Wade, of Ohio, obtained the floor and spoke in part as follows:

In the first section of the proposition of the committee, the word "citizen" is used. That is a term about which there has been a good deal of uncertainty in our Government. The courts have stumbled on the subject, and even here, at this session, that question has been up and it is still regarded by some as doubtful. I regard it as settled by the civil rights bill, and, indeed, in my judgment, it was settled before. I have always believed that every person, of whatever race or color, who was born within the United States was a citizen of the United States; but by the decisions of the courts there has been a doubt thrown over that subject; and if the Government should fall into the hands of those who are opposed to the views that some of us maintain, those who have been accustomed to take a different view of it, they may construe the provision in such a way as we do not think it liable to construction at this time, unless we fortify and make it very strong and clear. If we do not do so there may be danger that when party spirit runs high, it may receive a very different construction from that which we would now put upon it. I find that gentlemen doubt upon that subject, and I think it very easy now to solve that doubt and put the question beyond all cavil for the present and for the future.¹²⁰

Wade, therefore, proposed an amendment to the first section of the amendment to accomplish this purpose and, as well, certain other amendments to later sections for other purposes. Considerable differences of opinion developed among the Republicans (though not as to the meaning of the first section as the section stood), and other amendments were proposed to sections other than the first, by other senators. In consequence of these differences among themselves, the Republicans went into caucus on the subject. The caucus sat from Thursday, May 24, to Tuesday, May 29, during which time the sessions of the Senate were either much abbreviated or altogether omitted,¹²¹ and the eventual debate that occurred in the Senate after the caucus was over was undoubtedly much briefer than it would have been had the caucus not occurred. And, hence, the scarcity of material available to Mr. Fairman for expounding his version of the Senate's views.

Nevertheless, he had some. Thus, he found two senators, both Democrats, who complained that they did not know what "the privi-

¹²⁰ Cong. Globe, 39th Cong. 1st Sess. 2768 (1866).

¹²¹ Compare the remarks of Senator Saulsbury, Delaware Democrat, after the caucus was over. *Ibid.*, at 2869, col. 2. Also, the remarks of Senator Hendricks, another Democrat, of Wisconsin. *Ibid.*, at 2938, col. 3.

leges or immunities of citizens of the United States" comprehended. These were Reverdy Johnson, of Maryland, and Thomas A. Hendricks, of Indiana. Hendricks complained at one point as follows:

What citizenship is, what are its rights and duties, its obligations and liabilities, are not defined or attempted to be defined; but these vexed questions are left as unsettled as during all the course of our history, when they have occupied the attention and taxed the learning of the departments of Government.

Again, Hendricks asked rhetorically, at another point, what the Privileges and Immunities Clause meant. "It is a little difficult to say," he said, "and I have not heard any Senator accurately define, what are the rights and immunities of citizenship; and I do not know that any statesman has very accurately defined them. . . ." And, later, asking the same question again, his comment was: "We do not know, the Senator from Michigan says."¹²² As for Senator Johnson, his comment was as follows:

I am decidedly in favor of the first part of the section which defines what citizenship shall be, and in favor of that part of the section which denies to a State the right to deprive any person of life, liberty, or property without due process of law, but I think it is quite objectionable to provide that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," simply because I do not understand what will be the effect of that.¹²³

Mr. Fairman gave all four of the foregoing passages to his readers without comment. It was, nevertheless, apparently his hope that they would be taken as indications of disagreement with Howard's view that the Privileges and Immunities Clause of the amendment would make the first eight amendments good against the states. There is virtually no possibility that such was the intention of the two speakers. The rights under the first eight amendments were undeniably in the nature of "privileges or immunities"; those "privileges or immunities" were undeniably possessed by every "citizen of the United States"; and, as Howard had pointed out, and Hendricks and Johnson, both good lawyers, undoubtedly well knew, the Supreme Court had held, in the *Dred Scott Case*, that they were "privileges or immunities" that were possessed by no other persons whatsoever. In the

¹²² Ibid., at 2939, col. 1; 3039, col. 3; and 3040, col. 1. Hendricks did try to make it appear that "abridge" was unclear in the Privileges and Immunities Clause; but this was obviously a mere attempt to take tactical advantage of an opinion Senator Howard had just expressed, that "abridge" was not clear, used, in a later section, in reference to the right to vote, which he pointed out was "indivisible" and, so, "incapable of abridgment." Ibid., at 3039, cols. 2 and 3.

¹²³ Ibid., at 3041, col. 3.

light of these facts, the application of the clause in question to the "privileges or immunities" under the first eight amendments was certainly simple, obvious, and undeniable; the natural reference of Hendricks' and Johnson's remarks was, therefore, to the uncertainty arising from the still unsettled meaning of the Privileges and Immunities Clause in the original Constitution, as, indeed, Hendricks, with sufficient clarity, indicated.

Another of Mr. Fairman's witnesses was Senator John B. Henderson, of Missouri. He said:

I propose to discuss the first section only so far as citizenship is involved in it. I desire to show that this section will leave citizenship where it now is. It makes plain only what has been rendered doubtful by the past action of the Government. If I be right in that, it will be a loss of time to discuss the remaining provisions of the section, for they merely secure the rights that attach to citizenship in all free Governments.¹²⁴

Mr. Fairman's comment was:

Unless the first eight Amendments enumerate "rights that attach to citizenship in all free governments," Henderson's understanding is to be counted as opposed to that of Howard.¹²⁵

Mr. Fairman apparently thinks that such a view of the rights under the first eight amendments would be absurd, and it was his hope that his readers would think the same. But the real question is what the men in the Senate thought, in 1866. Howard, as we have seen, had described these rights as "fundamental rights lying at the basis of all society and without which a people c[ould] not exist except as slaves, subject to a despotism." Henderson may very well have been of the same opinion; but the truth is it cannot be told, from what he said, what his views were on the subject of Mr. Fairman's sole interest.

Another witness for Mr. Fairman was Senator Timothy C. Howe, of Wisconsin. After reading section 1, he spoke as follows:

Sir, does anyone object to putting that proposition into the Constitution? Does anyone on this floor desire to reserve to any State the right to abridge the privileges or immunities of citizens? Do you do it in the State in which you reside, sir, [Mr. Hendricks in the chair,] and whose legislation and institutions you have done so much to mold? Is it done in any of the States represented here? I cannot deny it for all of them; but for many of them I do happen to know that no such abridgment of privileges or immunities is tolerated. Is it necessary, however, to incorporate such an amendment into your Constitution? Do you find in any of these communities seeking to participate in the legislation of the United

¹²⁴ *Ibid.*, at 3031.

¹²⁵ Fairman I, at 63.

States an appetite so diseased as seeks to abridge these privileges and these immunities, which seeks to deny to all classes of its citizens the protection of equal laws?

And having mentioned equality before the law, off the Senator went in a long discussion of the "black codes" of the South and wound up by citing a Florida statute whereunder Negroes alone were taxed to support Negro schools and also subjected to taxation, along with whites, for the support of white schools.¹²⁶

Mr. Fairman admitted in his article that all "this [was] not much help in [his] inquiry"; and yet he drew from it this inference: that, when Howe had asked whether the privileges and immunities of citizens were denied in the various states, he had had reference, "one would suppose," to "discriminations against the Negro rather than [to] legislation inconsistent with the provisions of the federal Bill of Rights."¹²⁷ Well, if "one would suppose" any such thing, "one would [be] suppos[ing]" something for which there is, in Howe's remarks, not one single iota of evidence.

Another of Mr. Fairman's witnesses was Senator Luke P. Poland, of Vermont. He was a Republican; but Mr. Fairman conceived that Poland had spoken for his thesis. So, Poland got quite an introduction:

Prior to coming to the Senate he had served for seventeen years as Justice and Chief Justice of the Supreme Court of [Vermont]. This is, then, an able and discriminating lawyer.¹²⁸

Of section 1 of the amendment, Poland had the following to say:

The clause of the first proposed amendment [i.e., of section 1] that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," secures nothing beyond what was intended by the original provision in the Constitution, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

But the radical difference in the social systems of the several States, and the great extent to which the doctrine of State rights or State sovereignty was carried, induced mainly, as I believe, by and for the protection of the peculiar system of the South, led to a practical repudiation of the existing provision on this subject, and it was disregarded in many of the States. State legislation was allowed to override it, and as no express power was by the Constitution granted to Congress to enforce it, it became a dead letter. The great social and political change in the southern States wrought by the amendment of the Constitution abolishing slavery and by the overthrow of the late rebellion render it eminently

¹²⁶ Cong. Globe, 39th Cong. 1st Sess. App. 219, col. 1 (1866).

¹²⁷ Fairman I, at 63.

¹²⁸ *Ibid.*, at 60-61.

proper and necessary that Congress should be invested with the power to enforce this provision throughout the country and compel its observance.

Now that slavery is abolished, and the whole people of the nation stand upon the basis of freedom, it seems to me that there can be no valid or reasonable objection to the residue of the first proposed amendment [i.e., of section 1]: ["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.]"

It is the very spirit and inspiration of our system of government, the absolute foundation upon which it was established. It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution. Notwithstanding this we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States, and I cannot doubt but that every Senator will rejoice in aiding to remove all doubt upon this power of Congress.¹²⁹

Mr. Fairman's comment on Poland's views was as follows:

Poland's opening sentence is quite inconsistent with Howard's speech. The new privileges and immunities clause "secures nothing beyond" what was intended by Article IV, Section 2: now, he says, after systematic evasion, the proposition is to be reaffirmed and, most important, Congress is to be given power to enforce it. Howard had said it accomplished all this, plus the incorporation of the provisions found in Amendments I to VIII. But in the face of this statement, Poland says it imports nothing more than the clause in the original Constitution. A provision in the original Constitution, proposed in 1787 and adopted in 1789, certainly did not incorporate the provisions of amendments proposed in 1789 and adopted in 1791.¹³⁰

The foregoing comment of Mr. Fairman might pass muster with readers uninformed of the old Republican constitutional ideas that were explained in the second section of this article. But with those ideas in mind, it can at once be seen that Mr. Fairman's comment was completely misconceived. It is simply not true that "Poland's opening sentence [was] quite inconsistent with Howard's speech." The new Privileges and Immunities Clause was a prohibition addressed to *all* the states, and it was a prohibition against their "mak[ing] or enforc[ing] any law which sh[ould] abridge the privileges or immuni-

¹²⁹ Cong. Globe, 39th Cong. 1st Sess. 2961, col. 1 (1866).

¹³⁰ Fairman I, at 61-62.

ties of citizens of *the United States*." In the light of these two facts, Poland's equating of this new clause with the old Privileges and Immunities Clause of the original document is an indication that he was reading the old clause in the common Republican sense we have so often noted; that is, he was taking it to say: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens [of the United States] in the several States," meaning by "the several States" "all the states." And since he was thus taking the clause as a guaranty to "the Citizens of each State," as against all the states, of "*all* Privileges and Immunities of Citizens [of the United States]," he obviously was taking it as comprehensive of those conferred by the first eight amendments. So, rightly understood, Poland's statement is a confirmation, not a contradiction, of what Howard had said.

But what of Mr. Fairman's argument that it was impossible for the old Privileges and Immunities Clause to comprehend the privileges and immunities conferred by the first eight amendments; that "a provision in the original Constitution, proposed in 1787 and adopted in 1789, certainly did not incorporate the provisions of amendments proposed in 1789 and adopted in 1791"? This argument is certainly a very remarkable one to find in a paper intended to be read by lawyers. For, while Mr. Fairman's statement was true enough¹³¹ before December 15, 1791, when the first eight amendments became effective, it was not true at all thereafter. For a general provision relating to "*all* Privileges and Immunities of Citizens [of the United States]," such as the clause in question was under Poland's view, would of course become immediately implemented with all after-created privileges, or immunities, of this kind, as soon as any such privileges or immunities were created. This is elementary law, as every lawyer reader of this article will at once recognize.

Mr. Fairman's last witness was Senator Garrett Davis, of Kentucky, a Democrat. Except that he was against everything in the amendment, including its Privileges and Immunities Clause, it is apparent that he was, as to that clause, of the same opinion as Senator Poland. The Privileges and Immunities Clause of the amendment was "unnecessary," Davis declared, "because that matter [was] provided for in article four, section two, of the Constitution." He then quoted the old Privileges and Immunities Clause and added that it "comprehend[ed]

¹³¹ That is, with the exception of the mistake as to the date of adoption of the Constitution.

the same principle in better and broader language."¹³² What there was "better and broader" about it, he did not, however, explain.

We thus come to the end of the evidence in the Senate debates that relates to the first section of the amendment and, particularly, to the Privileges and Immunities Clause thereof. That the debate contained nothing at all indicative of disagreement with Howard's view that the clause in question would make the first eight amendments good against the states is manifest. And since the rights under those amendments were undeniably in the nature of "privileges or immunities"; since those "privileges or immunities" were possessed by every "citizen of the United States"; and since, as Howard indicated, the established doctrine of the Supreme Court was that they were possessed by no one else, the manifestly probable conclusion is that there was very general agreement among the Senators that the Privileges and Immunities Clause would have this effect that Howard had pointed out. As to whether the clause would have the further effect of securing to citizens all those vaguer rights of which Justice Washington had spoken in *Corfield v. Coryell*, that depended upon the view that should eventually be taken of the old Privileges and Immunities Clause of the original Constitution.

It remains only to add that, because of the amendments to the joint resolution that had been made in the Senate, the measure had to go back to the House for its concurrence. The resolution passed in the House on June 13.¹³³ No debate of significance to our problem occurred, though Aaron Harding, of Kentucky, did declare that the amendment would "at once transfer all powers from the State governments over the citizens of a State to Congress."¹³⁴ It is sufficient to say that Harding was a Democrat.

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In view of the clarity of their statements to this effect, one might have supposed Mr. Fairman would have been content to concede that John A. Bingham and Jacob M. Howard, at least, were convinced the Fourteenth Amendment made the Bill of Rights effective as against the states. But not so; he attempted to prove that they did not in fact believe this.¹³⁵ In all the circumstances, it is not surprising that his proof was not entirely convincing.

¹³² Cong. Globe, 39th Cong. 1st Sess. App. 240, col. 2 (1866).

¹³³ *Ibid.*, at 3149.

¹³⁴ *Ibid.*, at 3147, col. 3.

¹³⁵ Cf. Fairman I, at 58, 122-23, 126-32, and 134.

The first piece of "proof" consisted of the fact that, after the Fourteenth Amendment was proposed, but before it was adopted and effective, Congress admitted Nebraska to the Union with a constitution containing a provision inconsistent with the Seventh Amendment. The provision read as follows: "The right of trial by jury shall remain inviolate, but the legislature may authorize trial by a jury of a less number than twelve men, in inferior courts." Mr. Fairman argued that this proved that Congress—Bingham and Howard included—did not really think the Fourteenth Amendment would make the Bill of Rights good against the states. In view of the fact, however, that Nebraska was admitted a year and a half before the Fourteenth Amendment became effective, it is a little difficult to see in what the proof consists. Moreover, even if the amendment had been effective, there were political considerations that would account for Congress' action in hastening to admit this state to the Union with a constitution containing a provision that the Fourteenth Amendment would annul: the Republicans were anxious to hold control of the Government, and Nebraska was known to be a Republican state. The rest of Mr. Fairman's "proof" was comparable.

Thus, on March 2, 1867, Congress had passed, over the President's veto, an act to provide for the more efficient government of the rebel states.¹³⁶ The act laid down the conditions upon which those states were to be entitled once again to representation in Congress. One of the conditions was that each state must form "a constitution of government in conformity with the Constitution of the United States in all respects," which constitution, furthermore, was required to be submitted to, and approved by, Congress.

Of the ten states affected by the foregoing act, seven were readmitted to representation in Congress in 1868,¹³⁷ and the other three, during 1870.¹³⁸ Of the ten constitutions submitted to Congress, five, according to Mr. Fairman, were in full conformity with the Constitution of the United States, even upon the assumption, which he was trying to disprove, that the Bill of Rights had been made effective as against the states. These were the constitutions of Arkansas, North Carolina, Alabama, Mississippi, and Florida. But the constitutions of the other five states—Georgia, Louisiana, Texas, South Carolina, and Virginia—had features which, Mr. Fairman thought, should have engaged the atten-

¹³⁶ 14 Stat. at L. 428 (1867).

¹³⁷ 15 Stat. at L. 72 and 73 (1868).

¹³⁸ 16 Stat. at L. 62, 67, and 80 (1870).

tion of Congress if it was actually believed by that body that the Fourteenth Amendment had made the Bill of Rights good as against the states. Yet Congress paid no attention to these features of these constitutions; and, so, Mr. Fairman argued, it was clear Congress did not think the Fourteenth Amendment had the effect in question. And since Bingham and Howard, as members of the Joint Committee on Reconstruction, were prominent participants in the business of approving these constitutions and favored approval, Mr. Fairman argued that they did not think so, either.

The constitutions of Louisiana, Texas, South Carolina, and Virginia may be considered together. The constitution of South Carolina and the constitution of Virginia each lacked a "grand-jury" guaranty; the constitution of Louisiana provided that "prosecutions sh[ould] be by indictment or information";¹³⁹ and the constitution of Texas provided that "no person sh[ould] be holden to answer for any criminal charge, but on indictment or information. . . ."¹⁴⁰ Now, Mr. Fairman did not argue that any of these constitutions was in actual conflict with the Bill of Rights. He seemed to recognize that a mere omission to recite, in a state constitution, some or all of the provisions of the Bill of Rights would not be sufficient to bring it into conflict with the Constitution of the United States; and recognizing that the Bill of Rights permits the use of "informations" in crimes not "capital . . . or otherwise infamous," he explicitly admitted that the Louisiana and Texas requirements that *all* criminal cases should rest on "indictments *or* informations" did not conflict with the Constitution of the United States, either. But what he did argue was that these features of these four constitutions were of a character that would have led Congress to inquire into the actual practices of these states in the use of grand juries if Congress had really understood that the Bill of Rights had been made good against the states by the Fourteenth Amendment; and that, since Congress did not do this, it follows that Congress—Bingham and Howard included—did not think the amendment had such an effect.

The foregoing argument is certainly very badly misconceived. The condition that had been set for the readmission of the late rebel states to Congress was that they should draw up, and submit to Congress, state constitutions in conformity with the Constitution of the United States. If the constitutions submitted to Congress met that condition, as Mr. Fairman admits those of Louisiana, Texas, South Carolina, and

¹³⁹ La. Const. Art. 6 (1868).

¹⁴⁰ Texas Const. Art. 1, § 8 (1845).

Virginia did, then that was the end of the matter that Congress had to pass upon. It can thus be seen that the whole basis of Mr. Fairman's argument with respect to these four constitutions was imaginary, and that leaves of his "proof" only certain features in the constitution of the state of Georgia.

According to Mr. Fairman, there were two features of the Georgia constitution that should have engaged Congress' attention if that body believed the Fourteenth Amendment had made the Bill of Rights good against the state. The first was a provision that "there sh[ould] be no jury-trial before the district judge[s of the state] except when demanded by the accused, in which case the jury [was to] consist of seven."¹⁴¹ The district judges were to have "jurisdiction to hear and determine all offences not punishable with death or imprisonment in the penitentiary";¹⁴² in other words, jurisdiction over petty offenses. The Sixth Amendment requires a jury trial "in all criminal prosecutions." Mr. Fairman therefore argued as follows:

We need not enter upon any minute investigation of what was understood in 1868 to be the sweep of that requirement. Undoubtedly there are some minor offenses that may be made triable without the jury. The matter remains obscure. For present purposes it is quite enough to say this: If Congress, when it examined Georgia's Constitution, had understood that the Fourteenth Amendment meant Amendments I to VIII, it must certainly have paused and debated whether the provision quoted above could meet the test.¹⁴³

Mr. Fairman's conclusion might possibly be in order if Congress had been going through this Georgia constitution section by section. I say "possibly" because most—perhaps, all—of our states had had guaranties of jury trial in criminal cases from the beginning of the Government; yet these had uniformly been construed as not requiring the jury in the case of petty offenses.¹⁴⁴ In the light of these facts, it is very far from certain that Mr. Fairman's conclusion would be in order even if Congress had been making the sort of detailed, section-by-section examination of this Georgia constitution that Mr. Fairman's mode of speaking implied. But, in fact, no such examination was being made. It is relevant to remember that Congress had five other state constitutions before it along with this Georgia constitution. The six documents

¹⁴¹ Ga. Const. Art. V, § iv, par. v (1868).

¹⁴² Ga. Const. Art. V, § iv, par. ii (1868).

¹⁴³ Fairman I, at 128.

¹⁴⁴ See Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917 (1926).

ran to a total of over eighty thousand words; the Georgia constitution alone ran to nearly twelve thousand. To the bill approving these six constitutions, the House devoted part of two days; the Senate proceeded a little more deliberately, devoting to them part of five days.¹⁴⁵ In both houses, nearly all the time was spent upon the political aspects of the bill; whether the constitutions had been legally adopted in the states from which they came; and like matters.¹⁴⁶ Very little time, indeed, was devoted to the content of the documents in question. In this matter, Congress was apparently relying, as it would be apt to do, on its Joint Committee; and what was said, or not said, in the committee, upon the matter in issue, there is no way of knowing. There was thus, in reality, no basis for the inference Mr. Fairman desired his readers to draw.

The same considerations, along with others, apply to the other provision of the Georgia constitution upon which Mr. Fairman relied. It was a requirement that the superior courts of the state should "render judgment without the verdict of a jury in all civil cases founded on contract, where an issuable defence [was] not filed on oath."¹⁴⁷ Mr. Fairman did not actually declare this contrary to the Seventh Amendment. He merely suggested: "If there were members of Congress who really believed that 'privileges and immunities' included the civil jury as defined by the Seventh Amendment, then surely the provision above would have been drawn into discussion."¹⁴⁸ For reasons similar to those assigned in the case of the "petty-offenses" provision, all basis for this inference appears to be wanting. But even if it were otherwise, and even if, in addition, the provision had been one clearly violative of the Bill of Rights, instead of one rather plainly in accord therewith,¹⁴⁹ the rational probability, in view of all the other facts, would certainly be that both Congress and its committee had overlooked it. It was, after all, a small detail buried in the middle of a 12,000-word document, which was under consideration at the same time with five other documents even longer.

Mr. Fairman's final effort in the case of Bingham was his questioning of Bingham's veracity in the explanation Bingham gave to the

¹⁴⁵ Cong. Globe, 40th Cong. 2d Sess. 2445-56 and 2461-65 (1868).

¹⁴⁶ *Ibid.*, at 2858-60, 2861-72, 2895-2904, 2927-35, 2963-70, and 2998-3029.

¹⁴⁷ Ga. Const. Art. V, § iii, par. iii (1868).

¹⁴⁸ Fairman I, at 128.

¹⁴⁹ A similar rule of court in the District of Columbia was upheld under the Seventh Amendment in *Fidelity and Deposit Co. v. United States*, 187 U.S. 315, 320 (1903).

House of Representatives, in 1871, as to how he came to change the form of the first section of the Fourteenth Amendment from what he had used in his earlier proposed amendment that had been postponed. Justice Black had cited this explanation of Bingham's as corroborative of the inference to be drawn from the other congressional evidence thus far considered. In his speech of 1871, Bingham pointed out that the original Constitution had contained various "negative limitations" on the powers of the states, such, for example, as the provision that "no State shall pass any *ex post facto* Law"; that these had always been enforced without hesitation, against the states, by the United States courts; but that, although the first eight amendments secured "rights dear to the American citizen," the Supreme Court, in *Barron v. Baltimore*, had declined to enforce these against the states because they were not in the form of the "negative limitations" on state power in the original document. He then went on as follows:

In reexamining that case of *Barron*, Mr. Speaker, after my struggle in the House in February, 1866, [i.e., when his first proposed amendment had been postponed] . . . I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: "Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention." *Barron vs. The Mayor, &c.*, 7 Peters, 250.

Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said "no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts;" imitating their example, and imitating it to the letter, I prepared the provisions of the first section of the fourteenth amendment as it stands in the Constitution. . . .

Here he quoted the last three clauses of section 1, which he had drawn, and went on as follows:

Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.

He then read those amendments verbatim and added the following comment:

These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment. The words of that amend-

ment, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," are an express prohibition upon every State of the union, which may be enforced under existing laws of Congress, and such other laws for their better enforcement as Congress may make.¹⁵⁰

The foregoing seems a perfectly straightforward and wholly credible account of what any lawyer would infer anyway from the circumstances in which Bingham had been acting when the Fourteenth Amendment was drawn. Yet Mr. Fairman's comment on it was as follows:

Maybe this statement after the event accurately expresses what lay in Bingham's mind in 1866; but it is what he said and did that counts, and never in the reported debates did he refer specifically to Amendments I to VIII.

Read alone and out of context, Bingham's speech of 1871 sounds definitive. One might fancy that for the instruction of uninformed Congressmen sitting about him he was unlocking the book of History. Actually he was in the midst of a debate with Representatives Farnsworth and Garfield, Republicans, who had been there too, and who had refreshed their recollections by a study of the *Congressional Globe*. At one point Garfield retorted to Bingham, "My colleague can make but he cannot unmake history."¹⁵¹

Now, the foregoing certainly gives the impression that Farnsworth and Garfield disagreed with Bingham on the subject in which Mr. Fairman was interested; and certainly there was no point in the quotation from Garfield unless it related to the subject of Mr. Fairman's interest, too. Yet, when the record is consulted, it turns out that the quotation had no reference to that subject at all. Garfield was trying to show that less congressional power had been intended by the fifth section of the Fourteenth Amendment, read with its first section, than had been intended in Bingham's earlier postponed amendment. In proof of this, Garfield declared that "the gentleman who [had] reported [the Fourteenth Amendment] from the committee, the late Mr. Stevens, of Pennsylvania, [had] said that it came far short of what he wished, but after full consideration, he believed it the most that could be obtained." Here, Bingham broke in:

My colleague will allow me to correct him again. The remark of Mr. Stevens had no relation whatever to that provision [meaning the first section], none at all.

¹⁵⁰ Cong. Globe, 42d Cong. 1st Sess. App. 83, col. 3, and 84, cols. 1 and 2 (1871). In this speech of 1871, having, by then, the Privileges and Immunities Clause of the Fourteenth Amendment to rely upon, Bingham praised the Supreme Court's decision in *Barron v. Baltimore* as correct. And no longer needing the old Privileges and Immunities Clause of the original Constitution, he also expounded as correct the state-court theory of the clause in question.

¹⁵¹ Fairman I, at 136.

It was at this point that Garfield retorted: "My colleague can make, but he cannot unmake history." And he added:

I not only heard the whole debate at the time, but I have lately read over, with scrupulous care, every word of it as recorded in the Globe. I will show my colleague that Mr. Stevens did speak specially of this very section.

Garfield then read *together two widely separated* passages from Stevens' speech so as to give the impression to his hearers that Stevens had been talking about the first section.¹⁵² Reference to the original record shows, however, that Bingham was correct.¹⁵³ Garfield was "pulling a fast one." What Mr. Fairman was doing when he quoted Garfield and wrote the comment quoted above, I leave to the reader to decide; but that he may be in a position to decide, I shall put him in possession of a very striking array of facts about this debate of 1871 which Mr. Fairman omitted.

The debate was over a bill, H.R. 320, to enforce the provisions of the Fourteenth Amendment. It became the act of April 20, 1871, more commonly known as the Ku Klux Act.¹⁵⁴ The act was directed at the activities of the Klan in the southern states. Power to pass it was claimed under the power given Congress to enforce the Fourteenth Amendment. The views of Bingham and, as we shall see, of various others, as to the meaning of the Privileges and Immunities Clause of the amendment were expressed in these debates, in connection with the dispute over the extent of this congressional enforcing power.

Bingham had not been the first speaker to take the clause in question as comprehending all "privileges or immunities" given in specific form by the Constitution and its several amendments. He had been anticipated in this view, on March 29, by George F. Hoar, a Republican from Massachusetts. Hoar, however, had taken the clause to comprehend, as well, all other "privileges or immunities" that were "fundamental" to the status of a free citizen; all those that "belonged of right to the citizens of all free governments." Hoar's views appear in the following excerpt from his speech:

Now, Mr. Speaker, I desire also to advert for a moment in this connection to the meaning of the "privileges and immunities of the citizen," as used in the fourteenth amendment to the Constitution, and used also in the original text of the instrument. Congress is empowered by the fourteenth amendment to pass all "appropriate legislation" to secure the privileges and immunities of the citizen.

¹⁵² Cong. Globe, 42d Cong. 1st Sess. App. 151, cols. 1 and 2 (1871).

¹⁵³ Cong. Globe, 39th Cong. 1st Sess. 2459 (1866).

¹⁵⁴ 17 Stat. at L. 13 (1871).

Now, what is comprehended in this term, "privileges and immunities?" Most clearly it comprehends all the privileges and immunities declared to belong to the citizen by the Constitution itself. Most clearly, also, it seems to me, it comprehends the privileges and immunities which all republican writers of authority agree in declaring fundamental and essential to citizenship. I will here cite the weighty and pregnant words of Judge Washington, in the case of *Corfield vs. Coryell*, (4 Washington Circuit Court Reports, 380).

And he read to the House the passage from that case which we have met so often before.¹⁵⁵ The day previous, Samuel Shellabarger, a Republican from Ohio, had made the same vague claim, without, however, saying anything about the privileges and immunities declared in specific form in the Constitution.¹⁵⁶ In his speech of the 31st, Bingham had referred to Shellabarger's vague view and, for himself, repudiated it.¹⁵⁷

James A. Garfield spoke on April 4, or, in other words, after Shellabarger and Hoar and Bingham all had spoken. After dealing with other aspects of the bill before the House, Garfield turned to the meaning of the Fourteenth Amendment:

I ask the attention of the House to the first section of that amendment, as to its scope and meaning. I hope gentlemen will bear in mind that this debate, in which so many have taken part, will become historical, as the earliest legislative construction given to this clause of the amendment. Not only the words which we put into the law, but what shall be said here in the way of defining and interpreting the meaning of the clause, may go far to settle its interpretation and its value to the country hereafter.

He then turned to a detailed consideration of the first section and, in connection with his consideration of the Privileges and Immunities Clause thereof, had the following to say:

My colleague [Mr. Shellabarger] and also the gentleman from Massachusetts, [Mr. Hoar] have given a breadth of interpretation to the force of these words "privileges" and "immunities" which, in my judgment, are [sic] not warranted, and which go [sic] far beyond the intent and meaning of those who framed and those who amended the Constitution.

Here Garfield quoted the passage from Hoar's speech that was quoted above, in which Hoar had declared that the Privileges and Immunities Clause of the amendment "most clearly . . . comprehend[ed] all the privileges and immunities declared . . . by the Constitution itself . . . [and] also . . . those . . . which all republican writers of authority

¹⁵⁵ Cong. Globe, 42d Cong. 1st Sess. 334, col. 1 (1871).

¹⁵⁶ *Ibid.*, at App. 69, col. 1.

¹⁵⁷ *Ibid.*, at App. 84, cols. 2 and 3.

agree[d] in declaring fundamental and essential to citizenship." Garfield then went on as follows:

He [Hoar] then quotes from Judge Washington's opinion in the case of Corfield *vs.* Coryell a statement that the fundamental rights of citizenship "are 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."

Now, sir, if this is to be the construction of the clause, the conclusion is irresistible that Congress may assert and maintain original jurisdiction over all questions affecting the rights of the person and property of all private citizens within a State, and the State government may legislate upon this subject only by sufferance of Congress. It must be remembered that Judge Washington was interpreting the second section of the fourth article of the Constitution, and that neither he in 1820, nor any other judge before or since, has authorized so broad a construction of the power of Congress as that proposed by the gentleman to whom I refer.

And with this he turned to a consideration of the Due Process Clause, and the Equal Protection Clause, of the amendment.¹⁵⁸

Now, is it not obvious that Garfield did *not* disagree with George F. Hoar that the Privileges and Immunities Clause of the Fourteenth Amendment "most clearly . . . comprehend[ed] all the privileges and immunities declared to belong to the citizen by the Constitution itself"? He disagreed only with Hoar's further view, shared by Shellabarger, that the clause also "comprehend[ed] those privileges and immunities which all republican writers of authority agree[d] in declaring fundamental and essential to citizenship." In other words, James A. Garfield agreed completely with John A. Bingham as to what the Privileges and Immunities Clause of the amendment meant; they parted company only over the degree of authority belonging to Congress by virtue of the enforcing power given in the fifth section. Yet Garfield is one of the men whom Mr. Fairman presented, in the House debate over the amendment, as being able to see, in its first section, nothing but "equal protection of the laws," and he is one of the men who, Mr. Fairman plainly implied, disagreed with Bingham's statement of the meaning of the Privileges and Immunities Clause, in this debate of 1871.

What of John F. Farnsworth, the other man impliedly so presented by Mr. Fairman? Did he disagree with Bingham on the point in question? There is certainly no indication of this in his speech, which preceded Bingham's. Instead, the speech quotes approvingly the statement of Thaddeus Stevens, in introducing the amendment, that "the Consti-

¹⁵⁸ *Ibid.*, at App. 150, col. 2, and 152, col. 3.

tution limit[ed] only the action of Congress, and [was] not a limitation on the States"; but that "the amendment supplie[d] that defect."¹⁵⁹ It would seem, then, that Farnsworth agreed with Bingham, as, indeed, we concluded from his own remarks when proposal of the amendment had been under discussion. And he did not dissent from Bingham's explanation of the Privileges and Immunities Clause when Bingham made it, though he did interrupt Bingham repeatedly for other purposes. The truth is that Farnsworth, like Garfield, disagreed with Bingham only on the authority of Congress under the fifth section of the amendment, read with the first. Here are his differing views:

The first section of the amendment requires no legislation; "it is a law unto itself;" and the courts can execute it. If it requires "enforcing" legislation, what kind does it require? Certainly not a law which goes a long way beyond the scope of the provision. The Constitution cannot be extended by the law. It is very clear to my mind that the only "legislation" we can do is "enforce" the provisions of the Constitution upon the laws of the State.¹⁶⁰

The enforcing power, in his opinion, was given mainly for use in reference to sections of the amendment other than the first.

Farnsworth and Bingham and Garfield and Hoar were not the only men in the House of Representatives, in 1871, who took the Privileges and Immunities Clause of the amendment as comprehending all the privileges and immunities conferred by the Constitution and its several amendments. After Hoar had spoken, James Monroe, of Ohio, expressed his complete agreement with Hoar's views:

It is difficult for me to understand how any one could have listened the other day to the clear argument of the gentleman from Massachusetts [Mr. Hoar] without being convinced that there is abundant authority in the Constitution for the enactment of a law so greatly needed as the one now before this House.

I refer to what was presented in regard to . . . the meaning of the words "privileges or immunities" in the Constitution and the prohibition upon the States not to abridge these to citizens of the United States. . . .¹⁶¹

Still later, Benjamin F. Butler, of Massachusetts, expressed his full agreement with both Hoar and Bingham.¹⁶²

Then there was Horace Maynard, of Tennessee, who, though not speaking on the meaning of the Privileges and Immunities Clause directly, nevertheless defined the words "rights, privileges, or immunities" in the bill to enforce the Fourteenth Amendment, in a manner that can leave no doubt as to how he took the clause in the amendment it-

¹⁵⁹ *Ibid.*, at App. 115, col. 3.

¹⁶¹ *Ibid.*, at 370, col. 3.

¹⁶⁰ *Ibid.*, at App. 117, col. 1.

¹⁶² *Ibid.*, at 448, col. 2.

self. Asked what he thought the phrase in the bill comprehended, he replied:

I suppose it embraces all privileges and immunities secured by the Constitution; for example, those guaranteed by the constitutional provision I have just cited, securing to citizens of each State "all privileges and immunities of citizens in the several States." It would include also the right of voting secured by the fifteenth amendment; it would include any of the personal rights which the Constitution guarantees to the citizen—freedom of speech, of the press; in religion, in house, papers, and effects; from arrest without warrant, from being twice put in jeopardy for the same offense; indeed, every personal right enumerated in the Constitution.¹⁶³

And Henry L. Dawes, of Massachusetts, spoke on the subject as follows:

The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill. They are not defined in it, and there is no attempt in it to put limitations upon any of them; but whatever they are, however broad or important, however minute or small, however estimated by the American citizen himself, or by his Legislature, they are in this law. The purpose of this bill is, if possible, and if necessary, to render the American citizen more safe in the enjoyment of those rights, privileges, and immunities. No subject for legislation was ever brought before the American Congress so broad and comprehensive, embracing as it does all other considerations hitherto affecting the life, liberty, and pursuit of happiness of every citizen of this Republic. When, sir, by the adoption of the Constitution in 1789 [sic] the American citizen for the first time stood forth before the world, his relations to his Government were so peculiar, the rights which this Constitution had secured to him, the privileges under it which he was to enjoy, and the immunities which it clothed him with were so peculiar, that he stood before the world a wonder and a marvel among the nations of the earth and all the subjects of other Governments in this world.

Sir, in the progress of constitutional liberty, when, in addition to those privileges and immunities thus secured to him, there were added from time to time, by amendments, others, and these were augmented, amplified, and secured and fortified in the buttresses of the Constitution itself, he hardly comprehended the full scope and measure of the phrase which appears in this bill. Let me read, one by one, these amendments, and ask the House to tell me when and where and by what chosen phrase has man been able to bring before the Congress of the country a broader sweep of legislation than my friend has in the bill here. In addition to the original rights secured to him, in the first article of amendments he had secured the free exercise of his religious belief, and freedom of speech and of the press. Then again he had secured to him the right to keep and bear arms in his defense. Then, after that, his home was secured in time of peace from the presence of a soldier; and, still further, sir, his house, his papers,

¹⁶³ *Ibid.*, at App. 310, col. 2.

and his effects were protected against unreasonable seizure. Let me read, Mr. Speaker, this article in full:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Then, again, as if that were not enough, by another amendment he was secured against trial for any alleged offense except it be on the presentation of a grand jury, and he was protected against ever giving testimony against himself. Then, sir, he was guaranteed a speedy trial, and the right to confront every witness against him. Then in every controversy which should arise he had the right to have it decided by a jury of his peers. Then, sir, by another amendment, he was never to be required to give excessive bail, or be punished by cruel and unusual punishment. And still later, sir, after the bloody sacrifice of our four years' war, we gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens who sprang into being, as it were, by the wave of a magic wand. *Still further, every person born on the soil was made a citizen and clothed with them all.* Lastly, sir, every one of them was given the ballot.

It is all these, Mr. Speaker, which are comprehended in the words "American citizen," and it is to protect and to secure him in these rights, privileges, and immunities this bill is before the House. (Emphasis supplied.)¹⁶⁴

Though Dawes did not speak expressly on the meaning of the Privileges and Immunities Clause of Amendment XIV, no doubt seems possible, in view of his statement italicized above, as to how he took it.

Another man whose view appeared clear even though he did not speak directly on the subject was John B. Hawley, a Republican from Illinois. He said, in part:

Sir, before the late war it is a matter well known to you and to every man born and reared in this land that throughout the southern States of the Union there was no freedom of speech, no freedom of person, no freedom to express the opinions which were entertained by freemen unless those opinions were in consonance and in conformity with the opinions of the dominant class of the southern States.

Sir, we have in the Constitution of the United States, and have always had, sufficient guarantees, in my judgment, to protect the citizens of the United States in all parts of the great Republic. It was not necessary that we should amend the Constitution of the United States in order to give to the citizens of the United States the right to be protected throughout the length and breadth of the land. But, sir, the Constitution of the United States was perverted, and those rights which were guaranteed by it were not executed in behalf of the citizens of the

¹⁶⁴ Ibid., at 475, col. 3.

United States. But if these rights inhered in the Constitution before the war and before the adoption of the constitutional amendments, how much more do they now attach to every American citizen.¹⁶⁵

Hawley's remarks were admittedly not specific; yet, in the light of his reference to freedom of speech and his plain expectation that this would now be secured to "every American citizen" in the southern states, how is it possible to doubt that he read the new Privileges and Immunities Clause as making the Bill of Rights good against the states, in favor of all citizens?

Significant, too, is the fact that there were no denials of Bingham's view, though two men did take the inconsistent, but completely impossible, view that the Privileges and Immunities Clause of the amendment meant the same thing as the Privileges and Immunities Clause of the original document, *and* that the latter clause had the meaning the state courts had held it to have before the Fourteenth Amendment was drawn and adopted. Charles W. Willard, a Republican from Vermont, was one of those taking this position,¹⁶⁶ and Michael C. Kerr, of Indiana, a Democrat, was the other. Kerr said:

But I want also to invite attention to the meaning of the words "privileges and immunities" as used in this [first] section of the amendment. It appears to be assumed in the popular mind, and too often by the law-makers, that these are words of the most general and comprehensive nature, and that they embrace the whole catalogue of human rights, and that they confer the power and the obligation to enact affirmative and most dangerous laws. . . . I understand their primary object to be to secure equal privileges and immunities to the citizens of *each* State while *temporarily* sojourning in any other State; and its secondary and only other purpose is to prevent any State from discriminating in its laws *in favor of or against* the citizens of any other State, *merely because* they are the citizens of such other State, or, in other words, for mere *sectional* reasons. (Emphasis Kerr's.)¹⁶⁷

Since this view would make "the privileges or immunities of citizens" abridgable by each state, provided only there were no such inequali-

¹⁶⁵ *Ibid.*, at 380, col. 2.

¹⁶⁶ *Ibid.*, at App. 187.

¹⁶⁷ *Ibid.*, at App. 47 and 48. Kerr seemed, however, to think the Bill of Rights bound the states. He said, at one point (*ibid.*, at App. 46, col. 3): "I ask the attention of every gentleman on this floor to the first eleven amendments of the Constitution of the United States, and I say that in them, as against the United States and the States and all the world, the Constitution guaranties to the people certain great personal rights." And then, with seeming inconsistency, he reportedly added: "It is true these amendments are limitations on the powers of Congress as against the States; but yet they are fundamental guarantes to the people." Probably this sentence was garbled in the reporting. Insert "two of" in it after "true," and it makes good sense as a reference to Amendments X and XI.

ties in the abridgment as Kerr described, it is obviously impossible to reconcile this view with the language of the Fourteenth Amendment, which declares that no abridgments of citizens' rights shall take place.

The more judicious Democrats appeared to concede the correctness of Bingham's position on the Privileges and Immunities Clause and argued only that power to enact the proposed bill could not be derived from limitations on state power, even when read with the enforcing power given Congress in the fifth section of the amendment. Thus, Samuel S. Cox, a Democrat from New York, argued in this way; yet he plainly conceded the correctness of Bingham's view that the first eight amendments were made good against the states. He said:

Turn to the tenth article of the first series of amendments, so often quoted as the key to the inner and true meaning and spirit of the Constitution, and you will find it stated that "all powers not expressly [sic] granted by the Constitution to the Federal Government are reserved to the States respectively or to the people."

Remember that this amendment just quoted was one of the first ten for which Congress, on March 4, 1789 [sic], expressed this desire by their proposal, "in order to prevent misconstruction or abuse of powers, that further and restrictive clauses should be added." And yet the gentleman from Ohio [Mr. Bingham] says that—

"These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment."

All that Congress [i.e., the First Congress¹⁶⁸] proposed by way of restriction upon the States was that their form of government should be republican, and that no law or ordinance should be passed which would conflict with the Constitution and any law of the United States which pursued the Constitution.

The Constitution was a grant of powers by the States. Any of its amendments relied on here to sustain this legislation, *especially the first series referred to*, are "restrictions" on the powers of the States. They add no new powers to the Federal Government. They have reference to personal liberty, trial by jury, etc., and are an extension of the guarantees which the citizen already had under State laws.¹⁶⁹ (Emphasis added.)

Some of Cox's historical facts were a bit confused; but it is plain he agreed with Bingham that the first eight amendments had been made good against the states by the Fourteenth Amendment.

So did Edward Y. Rice, of Illinois, another of the Democrats. He admitted that "the class of persons made citizens by the first section of the fourteenth amendment of the Constitution were brought within the provisions of every part of the Constitution affecting or securing the rights of the citizen"; but he denied absolutely that any power

¹⁶⁸ Of course it was the Federal Convention that proposed the "restrictions upon the States" which Cox mentioned; but what he was driving at is nevertheless apparent.

¹⁶⁹ Cong. Globe, 42d Cong. 1st Sess. 454, col. 3 (1871).

resulted thereunder to Congress, whether the first section was read with the fifth or not.¹⁷⁰

Horatio C. Burchard, of Illinois, was another who argued in much the same way. He began by attacking as incorrect the view of Samuel Shellabarger and others, that "the privileges or immunities of citizens of the United States" included all those that were "fundamental" to the status of a free citizen; all those, in other words, that "belonged of right to the citizens of all free governments." He pointed out that this view was based on "the *obiter dictum* of a single circuit judge"; was contrary to the views of the great commentators, Kent and Story; and did not have the support of a single judicial decision. On the other hand, he did *not* attack as incorrect Bingham's view that the Privileges and Immunities Clause of the Fourteenth Amendment made the first eight amendments good against the states; he maintained merely that a congressional power to enforce the first eight amendments upon the states was not an authority to enact the bill before the House. He said:

Others have advocated the power of Congress to punish crimes as proposed in the second section of the bill, interpreting the words "immunities and privileges of a citizen of the United States" to mean the right[s] secured to the people in the first eight articles of amendments to the Constitution. They hold that the fourteenth amendment forbids a State from abridging these enumerated rights. The gentleman from Massachusetts [Mr. Dawes] and the gentleman from Ohio [Mr. Bingham] both defended this bill under such a construction of this clause. Unfortunately for their argument the privileges and immunities there enumerated affecting life and personal security are only found in articles four, five, and six, and are specific limitations, relating to the mode of procedure or jurisdiction and extent of punishment in cases of arrest or trial for supposed criminal offenses.

He then read Amendments IV, V, and VI and proceeded as follows:

These are but privileges or immunities against the issue of judicial process and conviction upon criminal charges except in the manner and cases authorized. The taking of life or injury to person is not there forbidden to individuals or the right to life and liberty affirmed as in the Declaration of Independence. I cannot see, therefore, how the application of these eight amendments to the States, or even giving the General Government authority to secure to its citizens all the privileges and immunities there asserted, can be held to confer the right upon the Federal courts to punish murders or other offenses against life and person. These elaborate arguments as to what are the privileges and immunities of citizens of the United States have little pertinency to this bill. The constitutional prohibition is against a State's making or enforcing a law abridging them; the second section of the bill makes no reference to State laws or the action or non-action of State authority, it relates to the crimes and conspiracies of private individuals.¹⁷¹

¹⁷⁰ *Ibid.*, at 396, col. 2.

¹⁷¹ *Ibid.*, at App. 314, cols. 1 and 2.

Again it is apparent that the correctness of Bingham's view of the Privileges and Immunities Clause was recognized; his view of the power resulting to Congress only was questioned.

Such, then, is the striking body of evidence that Mr. Fairman omitted from his article. In the Forty-second Congress, in 1871, Bingham's view, that the Fourteenth Amendment made the first eight amendments good against the states, was very clearly the prevailing view on the subject.

7

Mr. Fairman began the next section of his article as follows:

We look away from the record of the debates in Congress to inquire what the country understood to be the import of Section 1 of the proposed Amendment. Mr. Flack examined a considerable number of Northern newspapers, and reported (an admission against the thesis he was defending) the following observation: "There does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not. . . ." Presumably this excluded the press reports of May 24 on Senator Howard's speech of the 23d: for the *New York Herald* and the *New York Times*, which Mr. Flack had before him, did quote in full the passage where it was said that the personal rights guaranteed by the first eight amendments were among the new "privileges and immunities."

Other newspaper files have been examined in preparing the present article, and no instance has been found to vary what has been set out above.¹⁷²

The "Mr. Flack" whom Mr. Fairman mentioned was Horace Edgar Flack, who, some forty-odd years ago, published a book entitled *The Adoption of the Fourteenth Amendment*, in which he presented the conclusion that the Privileges and Immunities Clause of that amendment had been intended to make the first eight amendments good against the states. The book contained a brief chapter, of twenty pages, entitled "The Amendment before the People." It is evident, from what Mr. Fairman said, that he meant to present the conclusions he reached, in the section of his article dealing with this same topic, upon the joint authority of himself and Mr. Flack.

Flack did not say in his book how many newspapers he examined. Altogether twenty-four newspapers and the *Atlantic Monthly* are mentioned in Flack's brief chapter. It appears, however, that he did not examine so large a number of newspapers. He examined five New York newspapers: the *Herald*, *World*, *Times*, *Evening Post*, and *Tribune*. He examined two Washington newspapers: the *Chronicle* and *National Intelligencer*. And he examined one Cincinnati newspaper: the *Com-*

¹⁷² Fairman I, at 68.

mercial. But the rest of the papers he mentioned, he had found quoted, he tells us, in the *New York World* or in McPherson's *Scrap Book*. In other words, Flack apparently examined a total of eight newspapers.

Mr. Fairman informed his readers that "other newspaper files ha[d] been examined in preparing [his] article. . . ." Like Flack, he neglected, however, to say how many; but there are only five newspapers of the day mentioned in his section on "the amendment before the people," and it is safe to surmise, in view of his elaborate presentation of null results elsewhere in his article, that, if he had examined any other newspaper files and found nothing in them, he would have informed his readers of the fact. The five newspapers he mentioned were the *New York Herald*, the *New York Times*, the *Cincinnati Commercial*, the *Chicago Tribune*, and the *Boston Daily Advertiser*. But the first three of these were examined by Flack, also. So it appears that the "other newspaper files" Mr. Fairman "examined" were two; and the total number of newspapers he and Flack together examined appears to have been ten.

Now, I have never looked at the newspapers of 1866-68, when the Fourteenth Amendment was adopted; and I never expect to. I have, however, looked at all available newspapers for the years 1787-88, when the original Constitution was adopted. And I know that the policy of the different printers—as newspaper publishers were then commonly called—varied enormously. Some few ignored the Constitution entirely; some others practically gave over their columns completely to the constitutional controversy; and the rest ranged in between. A paltry sampling, comparable to that which Mr. Fairman and Mr. Flack, between them, made of the newspapers of 1866-68, could, in the case of the newspapers of 1787-88, lead to enormous errors as to what the original ratification campaign was like. And I see no reason to doubt that the same chance of error exists in dealing in that manner with the adoption of the Fourteenth Amendment.

No figures could be found for the number of newspapers in the country in 1866-68; but, in 1870, there were 542 dailies and 4,425 weekly newspapers, or a total of 4,967.¹⁷³ The figures for 1866-68 could not have been very different; and out of this total of nearly five thousand newspapers, Mr. Flack and Mr. Fairman apparently examined, between them, ten papers and, with the exception of a single citation to the *Atlantic Monthly*, neglected the country's periodical

¹⁷³ Hudson, *Journalism in the United States* 771 (New York, 1873).

press completely. I do not, therefore, think that either of them, or both together, have been in any position to make statements implying that the country was not on notice that the Fourteenth Amendment would make the Bill of Rights good against the states.

As a matter of fact, Mr. Fairman, percentage-wise, made a pretty good case against himself. Of the five newspapers he mentions, two, the *New York Herald* and the *New York Times*, "quote[d] in full," he says, "the passage [from Senator Howard's speech] where it was said that the personal rights guaranteed by the first eight amendments were among the new 'privileges and immunities.'" And in a third paper, the *Boston Daily Advertiser*, he found the following:

The Senate having taken up the amendment, Mr. Howard explained it, section by section. The first clause of the first section was intended to secure to the citizens of all the States the privileges which are in their nature fundamental, and which belong of right to all persons in a free government. *There was now no power in the Constitution to enforce its guarantees of those rights. They stood simply as declarations, and the States were not restricted from violating them, except by their own local constitutions and laws. The great object of the first section, fortified by the fifth, was to compel the States to observe these guarantees, and to throw the same shield over the black man as over the white, over the humble as over the powerful. This does not give the right of suffrage which has always been regarded, not as a fundamental right, but as a creation of law. (Emphasis added.)*¹⁷⁴

Now, it is true, Mr. Fairman treated the foregoing as totally inadequate because it did not contain the magic words: "Amendments I to VIII." But most persons reading this notice would have gathered that the privileges and immunities guaranteed by the Constitution were meant in the amendment; that the states were now free to violate these; and that the amendment was intended to remedy this situation. And why that was not adequate is pretty hard to see. So, counting this instance, sixty per cent of the newspapers Mr. Fairman apparently looked at gave clear notice to their readers that all rights guaranteed by the Constitution and its several amendments would be made good by the Fourteenth Amendment as against the states. In addition to this, another paper he looked at, the *Chicago Tribune*, printed a speech by Congressman Jehu Baker, of Illinois, which, we shall see in a moment, gave clear notice of this fact, too. That raises the percentage to eighty; and if anything like this percentage held for the press as a whole, the country was very well notified, indeed.

Of course, Mr. Fairman would probably say that the percentage

¹⁷⁴ Fairman I, at 69.

is wrong; that the papers Mr. Flack examined ought to be taken into account, too. But the difficulty is that Flack either missed or forgot the important excerpt from the Howard speech, in both the *New York Herald* and the *New York Times*. This suggests that his search of the newspapers he looked at was probably not very thorough, and he may, therefore, very well have missed or forgotten similar material in the other papers he examined, too.

The rest of the material presented by Mr. Fairman to show the nature of the ratification campaign before the people consisted of excerpts from speeches of politicians running for election to Congress and the like, which Mr. Fairman had culled out of the newspapers he examined. He declared there was "not a word [in these speeches] to suggest the incorporation of Amendments I to VIII."¹⁷⁵ This was true, in the main, of the excerpts he introduced; but it was certainly not true, as already intimated, of those he presented from a speech on "the Reconstruction Amendment" by Congressman Jehu Baker, of Illinois. Baker was one of those Republicans, of whom we have already met so many, who thought *Barron v. Baltimore* and the *Dred Scott Case* were wrong. So, of section 1 of the amendment, he said:

This section I regard as more valuable for clearing away bad interpretations and bad uses of the Constitution as it is than for any positive grant of new power which it contains. How admirable, how plainly just, are the several provisions of it!

And, then, in reference to the Privileges and Immunities Clause particularly, he had the following to say:

What business is it of any State to do the things here forbidden? to rob the American citizen of rights thrown around him by the supreme law of the land? When we remember to what an extent this has been done in the past, we can appreciate the need of putting a stop to it in the future.¹⁷⁶

Now, the magic words "Amendments I to VIII" are confessedly lacking in Baker's remarks; but do his words leave any doubt that to him "the privileges and immunities of citizens of the United States" included those under the first eight amendments? "The supreme law of the land" was the Constitution, and the Constitution included all of its amendments.

Though it is plain that Mr. Fairman misconstrued this Baker speech, this sort of thing was not the major fault with this particular part of Mr. Fairman's article. It was simply, once more, that the sampling

¹⁷⁵ *Ibid.*, at 72.

¹⁷⁶ Cong. Globe, 39th Cong. 1st Sess. App. 256, col. 2 (1866).

he made was entirely too small to justify any conclusion, one way or the other, on the subject of his interest. He quoted only five senators and five representatives. In the Thirty-ninth Congress that proposed the amendment, there were fifty senators and two hundred representatives. All the representatives and a third of the senators were being re-chosen in 1866, and, in addition, there were many state legislative elections, in all of which the Fourteenth Amendment was an issue. Mr. Fairman's sample was hopelessly small. It could not possibly ground any just opinion as to how the amendment was presented to the people.

8

Mr. Fairman's next effort was to examine the proceedings in the thirty-seven state legislatures that passed on the amendment. But the difficulty here was that there was almost nothing to examine. As he himself explained, the legislatures, with the single exception of that of Pennsylvania, "kept no record of debates, but only a journal of motions and votes." To be sure, the newspapers in the localities where the legislatures were sitting probably published summaries of, or excerpts from, some of these debates; but Mr. Fairman dismissed these sources as "inadequate" after having consulted, apparently, just one newspaper on the subject, the *Boston Daily Advertiser*. That left him with just two kinds of evidence on these proceedings in the legislatures: "the governor's message, and"—as he said—"possibly a report from the legislative committees on federal relations." (Emphasis supplied.)¹⁷⁷

Now, the short of it is that, in his examination of the legislative proceedings in the various states, Mr. Fairman found nothing significant, either one way or the other, as to the legislatures' or the governors' understandings of the Privileges and Immunities Clause in any but three states. These three were Ohio, Pennsylvania, and Massachusetts. In the other states, the governors and the legislative committees, where there were any such, either did not speak at all on the meaning of this clause or else they spoke so vaguely that it cannot be told what they thought on the one question in which Mr. Fairman was interested.

In Ohio, Governor J. D. Cox, in his annual message, spoke of the amendment as containing a—

¹⁷⁷ Fairman I, at 82; cf. 117. There is also a summary of "the debate" in the Indiana legislature to be found in Brevier Legislative Reports (1867); but the Republicans refused to say anything, and the Democrats said nothing of importance to our problem.

. . . grant of power to the National Government to protect the citizens of the whole country in their legal privileges and immunities, should any State attempt to oppress classes or individuals, or deprive them of the equal protection of the laws. . . .

And he added the following comment:

[This] was proven necessary long before the war, when it was notorious that any attempt to exercise freedom of discussion in regard to the system which was then hurrying on the rebellion, was not tolerated in the Southern States; and the State laws gave no real protection to immunities of this kind, which are of the very essence of free government. The necessity, also, of having somewhere a reserved right to protect the freedom of the slaves whom the war emancipated is too palpable for argument. If these rights are in good faith protected by State laws and State authorities, there will be no need of federal legislation on the subject, and the power will remain in abeyance; but if they are systematically violated, those who violate them will be themselves responsible for all the necessary interferences of the central government.¹⁷⁸

It seems perfectly evident that Cox thought the Fourteenth Amendment would make freedom of speech and the press, under the First Amendment, good against the states; and since the Privileges and Immunities Clause was the one clause of the new amendment that could, upon a straightforward reading, have this effect, it is reasonable to conclude that Cox was reading the clause as it had been read, and intended, in Congress.

Yet here is the first comment on Cox's remarks that Mr. Fairman made:

This means that, to Governor Cox, Section 1 included freedom of speech within the state. Whether the freedom thus to be protected would, in his opinion, have been merely in respect of matters of federal cognizance does not appear.¹⁷⁹

Neither does it appear how the first section of the Fourteenth Amendment could possibly have been taken, upon any straightforward reading, as conferring a right of free speech so fragmented. Mr. Fairman also said:

Giving to the Governor's words their fullest meaning, he was saying that Section 1 guarantees free speech and "immunities of this kind, which are of the very essence of free government." One would be vaulting rather far to conclude that these words meant that the Amendment would bring with it Amendments I to VIII.¹⁸⁰

Here, as earlier, Mr. Fairman was apparently hoping his readers would have the same low opinion of certain of the privileges and immunities

¹⁷⁸ Ohio Exec. Doc. for 1866, Pt. I, 281-82 (1867).

¹⁷⁹ Fairman I, at 96-97.

¹⁸⁰ *Ibid.*, at 97.

conferred by the Bill of Rights that he himself holds.¹⁸¹ His comments on Cox demonstrated nothing but unwillingness to recognize evidence contradictory of his own conclusions.

Another instance of the same sort was his handling of the one legislative debate on the amendment that was reported; that is, the debate in the legislature of Pennsylvania. Thus, he informed his readers that, in this debate, "not one sentence c[ould] be found suggesting that the first eight Amendments were incorporated in the [Fourteenth Amendment]."¹⁸² Let us see. The debate was, in large measure, merely an inter-party brawl between the Republicans and the Democrats; but there was some discussion of the issues. The Democrats maintained that the amendment would confer the right of suffrage upon the Negro, and on Congress all the powers of legislation which the states theretofore had been deemed to possess. They did not deny that the Privileges and Immunities Clause would make the first eight amendments good against the states. Rather, they seemed to argue that there was nothing in the Constitution or the new amendment that confined the privileges and immunities under the amendment to those enumerated in the Constitution. One Democratic speaker defined "privilege" as "'everything that it is desirable to have'" and "immunity" as "'a privileged freedom from anything painful.'"¹⁸³ These definitions would certainly have comprehended all the rights conferred by the first eight amendments. Justice Washington's vague views in *Corfield v. Coryell* were quoted;¹⁸⁴ and it was declared that, "in no part of the proposed article, nor in the Constitution as it now st[oo]d, [was] there given a catalogue of the 'privileges and immunities' of citizens, which by this clause the States [were] prohibited from abridging."¹⁸⁵ And from this alleged want, the inference was then drawn that Congress would have the right to create "privileges or immunities of citizens," which the Democrats declared was equivalent to a general legislative authority.

Now, there was obviously nothing in these far-fetched arguments contradictory of the view that the Privileges and Immunities Clause would make the first eight amendments good against the states; and in the argument of one Democratic speaker that the clause would

¹⁸¹ Cf. excerpt from Fairman I quoted in note 199 *infra*.

¹⁸² Fairman I, at 112.

¹⁸³ Pa. Leg. Rec., App. xiii, col. 1.

¹⁸⁴ *Ibid.*, at App. xxv, col. 1.

¹⁸⁵ *Ibid.*, at App. lii, col. 3.

confer Negro suffrage, awareness of this other effect of the clause clearly appears. Thus, he said of section 1:

Unless under cover of the loose wording of this section, it is intended to establish negro suffrage, by declaring that all citizens of the United States are citizens of the States and that States may not deny any of the privileges or immunities of citizens to persons born or naturalized therein, the whole section is mere surplusage, *conveying no additional right or safeguard not already conveyed in better form and hedged in and surrounded by the solemn sanction of the people in every State of the Union.* (Emphasis supplied.)¹⁸⁶

The italicized words, it is plain, were a reference to the various state bills of rights, which were, in general, much more elaborate than the Bill of Rights in the Constitution of the United States. And what this Democrat was saying, in effect, was this: that he could not believe the Privileges and Immunities Clause was intended merely to make the first eight amendments good against the states, because this was needless, since every right those amendments contained was already secured by the bills of rights attached to the various state constitutions. His statement, of course, was not quite literally accurate; but it was very nearly so, and it shows that the Democrats were aware of the view of the clause taken, and intended, in Congress. And the casualness with which this view was assumed certainly suggests that it must have been a view of the clause that was very generally understood.

Mr. Fairman quoted the foregoing excerpt in his article, but between excerpts from other Democratic speakers in a manner that made its true import much less noticeable. Various arguments by Republicans showing that they were taking the Privileges and Immunities Clause in the way it had been taken in Congress, he did not quote at all. Thus, one Republican speaker, in answer to Democratic contentions that the amendment was not needed, pointed to the fact that, in the years before the war, the freedom of the press had been interfered with in the southern states; that the mails had been rifled; and that all Abolitionist printed matter found in them had been consigned to the flames. And he added:

There was not only the rifling of mails, but a denial of the constitutional right of free speech and whoever went down South was obliged to put a padlock on his mouth.¹⁸⁷

These things, he insisted, might happen again, unless they were guarded against by adoption of the amendment; and since the Privileges

¹⁸⁶ *Ibid.*, at App. lxvii, col. 2.

¹⁸⁷ *Ibid.*, at App. xlv, col. 3, and xlv, cols. 1 and 2.

and Immunities Clause was the one clause of the amendment that, straightforwardly taken, could guard against these things, it is clear that this speaker must have been taking that clause as it had been taken, and intended, in Congress. And it is to be noted that he did not trouble to explain how the amendment would guard against the ills he spoke of; he apparently assumed that all would understand this; and this again indicates that it must have been a very common view, among those to whom he spoke, that the Privileges and Immunities Clause of the Fourteenth Amendment would make the Bill of Rights effective as against the states.

Another Republican speaker, after alluding to the prior practices in the South and insisting that these were "still to be found there," called upon the Democrats to join in ratifying the amendment. He said:

Stand by us in demanding from the South that our citizens and loyal men everywhere be protected by their laws in the enjoyment of all their constitutional rights. It will be well for you, as a party, and a happy day for the country, when your leaders have enough of patriotism and love of country in them to place your party in this position. We demand the freedom of speech and of the press; we demand, sir, a Union reconstructed upon the principles of universal justice to all men, whether they be white or black. . . .¹⁸⁸

The references to "freedom of speech and the press" and to "all constitutional rights" can certainly leave no doubt as to how this particular speaker was taking the amendment and, particularly, the Privileges and Immunities Clause thereof. And, again, it seems to have been assumed that all would understand *how* the amendment would protect the rights to which the speaker alluded.

Still another Republican speaker denied the Democratic charge that the amendment would secure complete social and political equality for the Negro. The amendment "[e]very person the right to choose his own associates," he said, "and d[id] not say whether they sh[ould] be white or black." And as for Negro suffrage it was simply not true that, under the amendment, "the States must amend their constitution to allow negroes to vote." What the amendment would do for the Negro he indicated in stating his reasons for voting for it, as follows:

I want to do to those colored men what I want to do to any honest, deserving men. I want to give them the right of the protection of the law, the right to hold property, all the rights which the Constitution provides for men—all the rights which this amendment indicates—in full.¹⁸⁹

¹⁸⁸ *Ibid.*, at App. lvi, col. 3.

¹⁸⁹ *Ibid.*, at App. xcix, col. 3.

Here, again, though the magic words, "Amendments I to VIII," were absent, the meaning was perfectly clear; and Mr. Fairman's statement that there was no evidence in the Pennsylvania debates to support the view of the amendment taken in Congress is seen to have been untrue.

There remains the evidence from Massachusetts. It appears that, in that state, there was a good deal of dissatisfaction because the amendment did not confer the right of suffrage on the Negro. Persons of this point of view apparently dominated the legislative committee to which the amendment was referred in the General Court; for the majority of the committee reported unfavorably on the amendment. It is in this majority report that the evidence of the understanding of the first section of the amendment is found. "Two questions," the report said, "present themselves at the outset: First. Does [the amendment] give any additional guarantees to human rights? Second. Does the proposed amendment impair or endanger any rights now recognized by the Constitution?" The first section of the amendment was then quoted with this comment: "It is difficult to see how these provisions differ from those now existing in the Constitution." The Preamble of the Constitution was next quoted, presumably to emphasize the governmental object, therein declared, of "secur[ing] the Blessings of Liberty to [the People of the United States'] and [their] Posterity." It was next stated that "many of our ablest jurists agree[d] with the opinion of the late Attorney-General Bates, that all native-born inhabitants and naturalized aliens, without distinction of color or sex, are citizens of the United States." The Privileges and Immunities Clause of Article IV of the original Constitution was then quoted, together with various provisions from the Bill of Rights, including the Due Process Clause of the Fifth Amendment. Thereupon the following comment was offered:

Nearly every one of the amendments to the Constitution grew out of a jealousy for the rights of the people, and is in the direction, more or less direct, of a guarantee of human rights.

It seems difficult to conceive how the provisions above quoted, taken in connection with the whole tenor of the instrument, could have been put in clearer language; and, upon any fair rule of interpretation, these provisions cover the whole ground of section first of the proposed amendment.

To examine the first section critically, "All persons &c are citizens of the United States and of the State in which they reside." This definition of citizenship of the United States, as we have said, is practically settled quite as authoritatively as an amendment could do; indeed, probably more conclusively; for there is reason to

fear that, if this matter should come before the present supreme court as a new question under this amendment, there would be danger of an adverse decision.

Just why this should be was not explained. Of the remainder of section 1, the report had the following to say:

The remainder of the first section, possibly excepting the last clause, is covered in terms by the provisions of the Constitution as it now stands, illustrated, as these express provisions are, by the whole tenor and spirit of the amendments. The last clause, no State shall "deny to any person within its jurisdiction the equal protection of the Laws," though not found in these precise words in the Constitution, is inevitably inferable from its whole scope and true interpretation. The denial by any State to any person within its jurisdiction, of the equal protection of the laws, would be a flagrant perversion of the guarantees of personal rights which we have quoted. If it should be said that such denial has existed heretofore in spite of these guarantees, we answer that such denial would be equally possible and probable hereafter, in spite of an indefinite reiteration of these guarantees by new amendments.

We are brought to the conclusion, therefore, that this first section is, at best, mere surplusage; and that it is mischievous, inasmuch as it is an admission, either that the same guarantees do not exist in the present Constitution, or that if they are there, they have been disregarded, and by long usage or acquiescence, this disregard has hardened into constitutional right; and no security can be given that similar guarantees will not be disregarded hereafter.

The report therefore recommended "that the subject be referred to the next general court." There was also a minority report, which urged ratification, and this minority recommendation the General Court eventually followed.¹⁹⁰

Now, in the foregoing, we have simply encountered, once more, those old, forgotten Republican constitutional ideas which we have met so many times already, and which were outlined in the second section of this paper. The Privileges and Immunities Clause of the original document was being taken as if it read: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens [of the United States] in the several States," understanding by "the several States" "all the states." The Due Process Clause of the Fifth Amendment was being taken, in its literal terms, as applying to the states, as well as to the nation. These two general provisions were then taken as "illustrated" by the more specific guaranties the first eight amendments contain. A denial of equal protection of the laws was, moreover, being treated "as a flagrant perversion of the guarantees of personal rights"—"life, liberty, and property"—in the "due-

¹⁹⁰ Doc. of House of Rep. Mass., House Doc. No. 149, pp. 1 and 25 (1867).

process" guaranty of the Fifth Amendment, just as John A. Bingham had treated it in his speech of 1859. Finally, too, all the reasoning was in plain disregard of the doctrines of *Barron v. Baltimore* and the *Dred Scott Case*. And, as in the other similar cases we have noted, it is perfectly clear that the majority members of this legislative committee were taking the Privileges and Immunities Clause of the Fourteenth Amendment as forbidding state violations of the privileges and immunities under the first eight amendments.

Mr. Fairman admitted in his article that this was what, "on a superficial view," the evidence from Massachusetts "might appear" to show.¹⁹¹ So, how did he go about it to demonstrate that, unsuperficially considered, the evidence did not show this? Here is his demonstration:

The majority say: The Preamble and Amendments I, II, V, VI, and VII, have already established human rights; Section I of the proposed Amendment goes over the same ground: therefore it is needless. In their major premise they were completely wrong on a matter that had long been well established [citing *Barron v. Baltimore*]. Are we readily to believe that in their minor premise they were right in an opinion which, so far as has been discovered, was expressed by no other state legislators, in Massachusetts or elsewhere? [How far from the truth this "which" clause was, we have just seen.] Zeal for Negro suffrage dominates the majority report, in its comment on Section 1 and on all the rest of the proposal. The drafting is not marked by precise statement, or by a critical interest in any other aspect of the problem. From the point of view of our inquiry its weight is negligible.¹⁹²

This, then, was the "unsuperficial" view of the matter: just another of Mr. Fairman's refusals to recognize evidence contradictive of his conclusions.

9

We come now to the last of Mr. Fairman's "mountain of evidence." According to his report, there were seven states having constitutions, in 1866-68, which, in some detail or other, were inconsistent with the Bill of Rights in the Constitution of the United States. These states were New Jersey, Nebraska, Nevada, Connecticut, Kansas, Michigan, and Indiana. Mr. Fairman argued that, if the legislatures of these states had thought the Fourteenth Amendment would make the national Bill of Rights applicable to the states, they would have paused to consider its effect upon their own established practices; and that,

¹⁹¹ Fairman I, at 116.

¹⁹² *Ibid.*, at 120.

since none of them did this, the conclusion follows that they did not understand the Fourteenth Amendment would have such an effect.¹⁹³

For a number of reasons, this conclusion is not nearly as certain as Mr. Fairman would have his readers believe. In the first place, it has to be remembered that section 2 of the amendment, relating to the representation of the states in Congress, was the means by which the Republican party hoped to hold on to control of the national government after the late rebel states should be readmitted to representation in Congress. It was this section, more than any other, that secured for the amendment the solid Republican support, as well as the solid Democratic opposition, that the amendment everywhere received. The politically necessary character of the amendment, from the Republicans' point of view, also accounts for the summary manner in which, according to Mr. Fairman's account, it was almost everywhere adopted, where the Republicans had the necessary votes. In addition to the foregoing factors, there is the way the amendment was thought of, so far as the Privileges and Immunities Clause was concerned. For the Bill of Rights, we have seen, was thought of as being made good against the states in order to secure freedom of speech and the press in the southern states, where, in the years before the war, these had been denied; and in order, further, to provide Negroes and loyal whites in the South with rights against the distrusted southern state governments that could be enforced in the national courts or in some other way by acts of Congress. The change was not generally thought of as directed against the northern states at all, because it was not deemed to be needed against them. So, unless a legislator were an expert on the Bill of Rights—as, it is safe to say, few of them were—he might very easily have understood the amendment as making the Bill of Rights good against the states without being at all aware that some one of its provisions conflicted with some detail in the local constitution.

But Mr. Fairman carried his argument far beyond the ratifying legislatures. He cited later state acts, both of state legislatures and state constitutional conventions, having to do, in the main, with the use of informations, rather than grand-jury indictments, in criminal cases. These were undoubtedly inconsistent with the Bill of Rights in the Constitution of the United States;¹⁹⁴ but since when has it become legitimate to cite the unconstitutional acts of our states as reasons for not enforcing the Constitution of the United States in its true import

¹⁹³ *Ibid.*, at 81-84, 88, 101, 102, 106, 115-16, and 122-24.

¹⁹⁴ *Ibid.*, at 97-100, 103, 107-10, and 122-25.

against them? The various unconstitutional state acts upon which Mr. Fairman relied—acts taking place in the states of California, Wisconsin, Illinois, Ohio, Missouri, and Nebraska at various times between 1868 and 1885—undoubtedly indicate that, in those states, in the years in question, there were a good many men who, having had no occasion to direct their minds to the question, were unaware of the true tenor of the Fourteenth Amendment. But that fact is totally irrelevant to what the amendment means.

Of the same character are certain cases Mr. Fairman cited from the period before the Supreme Court of the United States began its well-known destruction of the amendment, in the *Slaughter-House Cases*, of 1873. The cases Mr. Fairman cited were cases in which counsel and courts should have given heed to the fact, but did not, that the Fourteenth Amendment had made the Bill of Rights good against the states.¹⁹⁵ Instead, the Fourteenth Amendment was totally ignored: nothing at all was said about it. These cases, which include one in the Supreme Court of the United States, in 1869,¹⁹⁶ undoubtedly indicate that there were some people in the country, in the years when these cases were decided, who were unaware of the true tenor of the new amendment. The case in the Supreme Court indicates that the Justices of the Court were among this number: a rather shocking, but by no means unique, indication of the inalertness of the men who composed the Court of the period. But there is nothing in either of these facts, which Mr. Fairman's evidence did undoubtedly evince, that has any bearing on the meaning of the Fourteenth Amendment.

It is likewise to be observed that it is clear there were other men in the country who were aware, and agreed, that the Fourteenth Amendment did make the first eight amendments good against the states. This is shown by the evidence in the records of the ratification proceedings of the only three state legislatures—Ohio, Pennsylvania, and Massachusetts—in which Mr. Fairman was able to find any evidence of that kind relevant to his subject. It is shown, too, by the fact that Justice Joseph Bradley held for himself and Justice Swayne, in the *Slaughter-House Cases*, of 1873, that the Fourteenth Amendment did make the Bill of Rights good against the states.¹⁹⁷ And there

¹⁹⁵ *Ibid.*, at 86, 116, and 132-33.

¹⁹⁶ *Twitchell v. Pennsylvania*, 7 Wall. (U.S.) 321 (1869). Mr. Fairman also cited *Justices of the Supreme Court of New York v. United States ex rel. Murray*, 9 Wall. (U.S.) 274 (1870); but that case was not really of the character described above in the text.

¹⁹⁷ 16 Wall. (U.S.) 36, 118-19 (1873).

is finally the fact, which we have plainly seen, that this was the prevailing view in Congress during the Ku Klux debates of 1871. These views of men whose minds were actually directed to the subject are worth a thousand of Mr. Fairman's silent, absent-minded witnesses. And in contradiction of these views, Mr. Fairman could find only the case of *Rowan v. State*, in which, in 1872, the Supreme Court of Wisconsin refused to recognize that the Fourteenth Amendment had made the first eight amendments good against the states and, instead, held that the amendment had been made for the benefit of Negroes only.¹⁹⁸ This is the one piece of evidence on the negative side of the question that Mr. Fairman found.

10

In view of the fact pointed out at the end of the last section, the question naturally arises how Mr. Fairman could convince himself—to say nothing of his supposing he could also convince others—that he had “a mountain of evidence” to show that, in the understanding of the men of 1866–68 and the years immediately thereafter, the Fourteenth Amendment did not make the first eight amendments good against the states. The answer, apparent from his remarks at various points in his article, is that to apply the Bill of Rights to the states seems so outrageous to Mr. Fairman that he thinks a public outcry would surely have occurred, in 1866–68, had it then been understood that a proposal so to apply the Bill of Rights was being made. It was this state of mind that led him to count all his null results as evidence supporting the negative side of the question. And it was this, in turn, that led him to parade the ratification proceedings in thirty-seven state legislatures before his readers, in spite of the fact that none of these contained any relevant evidence, except those of Ohio, Pennsylvania, and Massachusetts, wherein, as already seen, the evidence was against Mr. Fairman's thesis.¹⁹⁹

¹⁹⁸ 30 Wis. 129 (1872).

¹⁹⁹ As evidence for what is said in the paragraph to which this note is attached, consider the following paragraph from near the end of Mr. Fairman's article: “The freedom that the states traditionally have exercised to develop their own systems for administering justice, repels any thought that the federal provisions on grand jury, criminal jury, and civil jury were fastened upon them in 1868. Congress would not have attempted such a thing, the country would not have stood for it, the legislatures would not have ratified. The electoral campaign of 1866 was fought over the proposed Amendment: but the debates never took the turn of suggesting that ratification would involve major change in the administration of justice in the Northern States. Recall how the legislatures in many Northern States, obedient to the autumn mandate, had trooped to ratify the Amendment—even suspending rules, refusing to refer to committee,

Mr. Fairman's opposition to the Bill of Rights, where the states are concerned, is apparently based chiefly on three things: (1) the provision in the Fifth Amendment that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."; (2) the provision in the Sixth Amendment that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ."; and (3) the civil-jury provision of the Seventh Amendment, which, as it has long been interpreted, requires the use of a jury of twelve men in trying all civil cases at law (as distinct from equity or admiralty) wherein the value in controversy exceeds twenty dollars.²⁰⁰

Now, I shall not undertake to defend the wisdom of the third of these provisions. To use the time of twelve men, in addition to a judge, to try the many petty causes falling within the Seventh Amendment, as ordinarily understood, is, in my judgment, an atrocious waste of manpower. In addition to this, a jury is very far, indeed, from being an efficient and desirable agency of trial in most civil cases, especially those of a complicated commercial character; yet the Seventh Amendment has wholly precluded all legislative reforms to rationalize the use of juries in civil cases. It has, moreover, as ordinarily interpreted, complicated needlessly all reforms in civil procedure; and it has complicated, or prevented, the extension of equitable remedies into new fields. The Seventh Amendment, as ordinarily interpreted,²⁰¹ is a thor-

cutting off debate: surely all this haste was not to make Amendments V, VI, and VII the Constitution's rule for every state. As one ponders the matter, this consideration seems far more substantial than a few words uttered by Bingham and Howard in the debates of 1866—especially since we have found that their conduct denied their words."

²⁰⁰ Cf. Fairman I, at 137-38.

²⁰¹ The Seventh Amendment reads as follows: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The accepted interpretation is achieved by giving to the term "common law" one sense—"law," whether statutory or customary, as distinct from equity and admiralty—in its first use, in the amendment, and a different sense—"law," still as distinct from equity and admiralty, but *strictly customary*—in its second use therein. *Parsons v. Bedford*, 3 Pet. (U.S.) 433 (1830). The sense is fixed in the second use by the substance of what was being said, and the probability would seem to be that the sense in the first use was the same; or, in other words, that the amendment was intended merely to guaranty jury trial in the common-law forms of action; that is, "in Suits at common law," in the literal sense. After all, if this was not what was meant, good draftsmanship required that "common" be stricken out from the phrase last quoted.

This view of the subject would make this civil-jury guaranty a comprehensible provision. For the common-law system of pleading was intended to produce, and it did produce, rela-

oughly bad provision and ought to be repealed, as against both the nation and the states; but this fact has nothing to do with what the Privileges and Immunities Clause of the Fourteenth Amendment means.

As for the rest of the provisions in the Bill of Rights, they are, it seems to me, what they ought to be, and what, it seems certain, the overwhelming majority of Americans, if they were consulted, would want them to be. The average lay American would undoubtedly be shocked in the extreme—and rightly shocked—to learn that, as against the states, the Constitution of the United States is held not to secure to the citizen the right of jury trial in criminal cases; not even in cases of murder and other most heinous offenses. And he would probably be equally shocked to know that the Constitution is held to permit a system of accusation and prosecution in the states under which the decision to accuse and prosecute for such serious offenses as those just mentioned may be that of a single officer of government; an officer, moreover, who is always a politician and usually one “on the make,” whose further political progress depends, as a rule, upon the zeal he displays as a prosecuting officer. That the liberties of the citizen require some check upon such an officer seems manifest; and that the use of the grand jury is an effective check is shown by the fact that grand juries, where they are in use, frequently refuse indictments that are pressed upon them by over-zealous prosecuting attorneys.

Besides the grand-jury and petit-jury guaranties in criminal cases, there are various other privileges and immunities under the Bill of Rights, not now enforced as against the states, which it is eminently desirable should be enforced against them. It is, after all, a plain anomaly that the Bill of Rights is not applied to the states. Mere inspection of its provisions shows that most of them relate to the administration of the criminal law; the overwhelming bulk of that law is still administered by the states; yet, though the Bill of Rights is constantly praised as the very palladium of American liberties, it is held inapplicable to the states, which nevertheless administer the great bulk of the subject-matter to which the Bill of Rights appertains. It is hard to see how anything could be more anomalous or more absurd.

tively simple issues for submission to the jury. To require the continued use of juries to decide such issues would make sense; but it does not make sense to require their use in civil cases when the common-law system is abandoned, and there is thrown at the jury's heads a great mass of complicated issues with which they are totally unfit to cope.

To sum up this long discussion of Mr. Fairman's attack on Justice Black, it has been shown, first of all, that the real subject of it, the Privileges and Immunities Clause of the Fourteenth Amendment, is, and was in 1866-68, a clear provision; especially when read, as it ought to be, in the light of the relevant prior law. This fact made Mr. Fairman's whole effort an illegitimate one. For what Mr. Fairman sought to do was to contradict and destroy the clear text of this provision in our fundamental law, by a recurrence to its legislative history. Legislative history is legitimately employed as an aid in resolving ambiguities in a law, or as a means of corroborating a text which, for any extraneous reason, has become clouded with doubt as to its true meaning. It was for this latter purpose that Justice Black sought to employ such materials in the *Adamson* case: a very different thing from what Mr. Fairman, in his article, sought to do.

For Mr. Fairman argued, in effect, that because, as he assumed, the persons concerned in the drawing and adoption of the Fourteenth Amendment did not *know* its Privileges and Immunities Clause would make the first eight amendments good against the states, the clause ought not, despite its clarity, to be taken as having this effect. This surely was a novel argument; but, entirely apart from its novelty, Mr. Fairman wholly failed to establish the proposition of fact on which it supposedly was based: the ignorance of the men of 1866-68 as to what the Privileges and Immunities Clause would do.

Certainly there was no evidence of ignorance in Congress. The legislative history of the Fourteenth Amendment within that body amply bore out the views of Justice Black; and as the Justice himself pointed out, the views expressed in the Ku Klux debates, three years after the amendment was adopted, strongly corroborate the inferences to be drawn from the legislative history. As has been seen in the foregoing pages, it was only through a misconstruction of this evidence, and large and important omissions, that Mr. Fairman was able, in his article, to make a seemingly plausible showing to the contrary.

In his examination of the ratification proceedings in the thirty-seven state legislatures, Mr. Fairman found nothing relevant, except in the three states of Ohio, Pennsylvania, and Massachusetts. In these three states, what he found supported Justice Black: the amendment was understood as it had been understood in Congress. It is true Mr. Fairman would not admit this; but the readers of this article will be in a position to judge in this matter for themselves.

There remains, of Mr. Fairman's examination into the legislative history of the Fourteenth Amendment, only his report on the campaign before the people. He presented material culled from five out of the country's five thousand newspapers. In three of these five, he found clear notices that the amendment would make good, as against the states, all rights under the Constitution which were not already good against them. He also found one speech, printed in another of these newspapers, that took this position, too. Mr. Fairman, it is true, denied that the speech had this tenor, as, indeed, he also denied that one of the news notices did; but the readers of this article will, again, be in a position to judge for themselves. And the really important thing about this part of Mr. Fairman's effort was that he presented too small a sampling of this kind of evidence to ground any conclusions, one way or the other, as to what the campaign before the people was like, and, hence, what it was, in all probability, popularly understood the Fourteenth Amendment would do.

More work could, then, undoubtedly be done on this phase of the subject, and more could perhaps be done on the probable understandings, in fact, of the thirty-seven state legislatures. But a comprehensive view of these two matters, based on what was said in the legislatures and in the public ratification campaign, would require a very extended and laborious examination of the newspaper and periodical press of the country during the two-year period, 1866-68, that the amendment was pending adoption. And that prodigious labor seems unnecessary. For the fact that the amendment was understood in Ohio, Pennsylvania, and Massachusetts makes probable the fact that it was understood in other states, as well. Similarly, the fact that the amendment was clearly explained in four of the five newspapers from which Mr. Fairman's evidence was drawn, makes probable the fact that other newspapers explained it clearly, too. So, in view of the clarity of its Privileges and Immunities Clause, any further study of the "legislative history" of the Fourteenth Amendment seems beyond what is required.

With the exception of the Wisconsin case earlier mentioned (which constituted the one item of actual, countervailing-opinion evidence that Mr. Fairman found), the rest of his "evidence" consisted of a few unconstitutional acts, in a half-dozen states, in the years immediately after the amendment was adopted, and three or four absent-minded judicial decisions in those years, in which courts and counsel should have, but did not, take note of the change, as to the Bill of

Rights, which the Fourteenth Amendment had wrought. These phenomena do, indeed, tend to suggest that there may have been considerable inattention to the amendment at the time of its adoption and, consequently, some unawareness of the true tenor of its various provisions. This sort of thing is always true. How extensive such inattention and unawareness were in the case of the Fourteenth Amendment, there is no way of telling. That they were far from universal, the evidence here examined makes clear; but even if they had been universal, and the fact could be proved, there would still be lacking any principle of law by which such public inattention and unawareness could contradict and destroy the clear text of a provision fully and formally adopted. Mr. Fairman's apparent belief that there is such a principle, and his elaborate effort in conformity with this belief, is simply an instance—of which there have been some others in recent years—of the method of “legislative history” run wild.

II. THE FIRST EIGHT AMENDMENTS

1

I pass now to Mr. Fairman's attack on me and the opinion I expressed on the first eight amendments in my book of last year. That opinion was that, with the exception of the First Amendment and the appeals clause of the Seventh, those amendments had all been drawn to apply as well to the governments of the states as to that of the nation. This opinion was based on a variety of considerations, recapitulation of which seems unnecessary here.²⁰² Suffice it to say that, having presented the various considerations on which my conclusions were based, I added the following sentence merely to show, as I had done elsewhere throughout the book, that I was not the first person to entertain the views presented:

So, it is not in any way strange that good lawyers in the early days—Justice William Johnson, speaking for the Supreme Court itself, in 1819, and for himself alone, in 1820; the justices of the Supreme Court of New York, in that same year; and the well-known law writers, William Rawle, of Philadelphia, and Joseph K. Angell, of Providence, in 1828 and 1829—were of the opinion, before the Supreme Court's decision of *Barron v. Baltimore* had been handed down, that all such [i.e., all literally general] parts of the first eight amendments did apply, *in accordance with their plain letter*, to all governmental action, whether by the nation or by the separate states.²⁰³

²⁰² See Pol. & Con., chapter xxx.

²⁰³ *Ibid.*, at 1076.

It was at this single sentence, out of a discussion running to some fourteen thousand words, that most of Mr. Fairman's fire was directed, and in connection with which most of his charges of want of candor and of suppression of evidence were made.

He had, however, one or two other complaints, and it seems best to deal with these first. Thus, he complained very bitterly over my failure to put before my readers the demands for amendments that were made by the New Hampshire and Massachusetts ratifying conventions in 1788. These, he said, followed the same variant mode of draftsmanship as the first eight amendments, sometimes saying "Congress shall make no Laws touching" certain matters and sometimes saying, in general, unqualified terms, that "no person shall be" treated in certain specified ways; yet the conventions, Mr. Fairman believes, "clearly had in view limitations only on the United States." He based this opinion upon a declaration made by the two conventions in their acts of ratification, from which he asked his readers to "note" that the amendments proposed were "not going to be provisions New Hampshire [and Massachusetts] want[ed] to be imposed on New Hampshire [and Massachusetts] and sister states; [but] measures to quiet apprehensions about 'an undue administration of the federal Government. . . .'"²⁰⁴

The difficulty is that the Massachusetts and New Hampshire declarations did not actually say what Mr. Fairman asked his readers to "note," and, in addition, he left out an important part of what they did say. The New Hampshire declaration, which was copied verbatim from that of Massachusetts,²⁰⁵ read, in its pertinent parts, as follows:

The Convention . . . in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of Liberty to . . . [the people of the United States] and their posterity, Do in the name and in behalf of the people of the State of New Hampshire, assent to and ratify the said Constitution for the United States of America; and as it is the opinion of this Convention, that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of this State, and more effectually guard against an undue administration of the federal Government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution. . . .²⁰⁶

²⁰⁴ Fairman II, at 49-51 and 57-58.

²⁰⁵ Debates and Proceedings in the Convention of the Commonwealth of Massachusetts, Held in the Year 1788, and Which Finally Ratified the Constitution of the United States 83 (Boston, 1856).

²⁰⁶ New Hampshire Historical Society: Provincial and State Papers, Vol. X: Miscellaneous Documents and Records Relating to New Hampshire at Different Periods 19 (Concord, 1877).

It will be observed that the convention did not say the amendments it proposed were "not going to be provisions . . . imposed on New Hampshire and sister states"; these "strong words"²⁰⁷ were Mr. Fairman's. Instead, the convention declared, among other things, that it was acting to "secure the blessings of Liberty"; and since, incontestably, the constitution it was ratifying contained limitations upon the states, I do not see how a mere declared purpose "more effectually [to] guard against an undue administration of the federal Government" can be taken as excluding a purpose of securing liberty as against the states in the case of any amendment where this would be appropriate, in view of its subject matter and form. And that to do this would be appropriate in the case of the following amendment, the only one proposed by New Hampshire in general terms, seems obvious:

[N]o person shall be tried for any crime by which he may incur an infamous punishment or loss of life, until he be first indicted by a grand jury—except in such cases as may arise in the government and regulation of the land and naval forces.

And this being true, I see no reason why this proposal of New Hampshire should not be understood to mean what it literally said.

But let us assume for the purpose of the argument that the New Hampshire and Massachusetts declarations were as clear as Mr. Fairman represented them to be; that is, that they actually did say the amendments proposed were "not" to be taken as "imposed on New Hampshire [and Massachusetts] and sister states." I still fail to see why, even then, my omission to mention these declarations would have been reprehensible. As I understand Mr. Fairman, he thinks the declarations important for two reasons: (1) because he thinks they show a desire for amendments binding only on the United States, and (2) because he thinks they show that unqualified general terms might conceivably have been used in Amendments II–VIII even though the intention was to bind the United States only.

For proving the second of these two propositions, the Massachusetts and New Hampshire declarations were certainly unnecessary in my discussion of last year. They were unnecessary because this second proposition was admitted in my discussion in the most explicit manner, subject only to this qualification, that, if general terms were used in the amendments to express limitations intended to apply to the nation only, this limited intention had to be in some way manifested.²⁰⁸ For,

²⁰⁷ Cf. Pol. & Con. 366.

²⁰⁸ Cf. *ibid.*, at 1066–81.

unless the limited intention were manifested, there would be no escape from taking the amendments in their unqualified general terms.

There remains the question whether the Massachusetts and New Hampshire declarations ought to have been introduced by me to show the desire of those states—if they had such a desire—for limitations on the nation only. I referred to material from the Virginia ratifying convention alone. I was seeking to show that demand for limitations on the states was not absent from the situation. For that purpose, one state convention seemed enough, especially as the one I was going to present was that of Virginia, the state which James Madison, the proposer of the initial amendments in Congress, represented. In introducing the Virginia material, I certainly in no way implied that the situation was the same in the other states. I said merely that “at least one of the state ratifying conventions had seemed to desire the enactment of . . . a *general* bill of rights.” I added that “[t]he state convention meant [was] that of Virginia,” and I then proceeded to introduce the Virginia material.²⁰⁹ What was misleading about such a procedure, I confess I fail to see.

After all, the important question was not what the state conventions asked for, but what Congress proposed to the state legislatures; and it is a well-established fact that a purpose of limiting the states as well as the nation was entertained in the House of Representatives from the first proposal of amendments on June 8, 1789. In proposing amendments on that date, James Madison spoke as follows of the state powers he proposed to limit:

I think there is more danger of those powers being abused by the State Governments than by the Government of the United States. The same may be said of other powers which they possess, if not controlled by the general principle, that laws are unconstitutional which infringe the rights of the community.²¹⁰

At another point he had the following to say of the necessity of limitations extending to the states:

Besides, some states have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper; instead of securing some [rights?] in the full extent which republican principles would require, they limit them too much to agree with the common ideas of liberty.²¹¹

The fact which these excerpts and Madison's proposed amendments evince—that is, an initial purpose of amendments binding on the states

²⁰⁹ *Ibid.*, at 1061 et seq.

²¹⁰ 1 *Annals Cong.* 440 (1779).

²¹¹ *Ibid.*, at 439.

—cannot possibly be doubted. It appears, too, that there was sentiment in the House, from an early date, for extending all of the amendments to the states.²¹² In the end, the House proposed to extend to the states a few restrictions only.

It is the usual view that the Senate vetoed even this and compelled the House to agree to a series of amendments applying to the nation only. For reasons set forth in my book of last year, I think this view incorrect. As I read the evidence, the decision in the Senate was to extend to the states all the amendments, save those relating to a few matters as to which, because of certain conditions of the time, a compromise was necessary. These are the matters dealt with in the First Amendment.

I based the foregoing conclusions on a careful consideration of the history of the framing of the amendments in Congress. At one point, I referred to this history as “neglected.” Mr. Fairman has insisted that it was not neglected; that it was carefully considered by Chancellor Reuben H. Walworth, of New York, in 1824; and that Chancellor Walworth, on the basis of it, came to conclusions exactly the opposite of mine.²¹³ And Mr. Fairman thinks “the [Walworth] opinion should be read by any one who would form an accurate judgment of Mr. Crosskey’s account.”²¹⁴ I think so, too; for anyone who reads the Walworth opinion²¹⁵ will find that Walworth made no reference at all to the particular facts in the history of the framing of the amendments upon which I relied; the sources he cited,²¹⁶ with the exception of the Senate’s journal, were not such as would have enabled him to know any of them; and from all that appears in his opinion, he did not know them.

Walworth relied upon two things: (1) the preamble that was prefixed to the amendments when they were submitted to the states by Congress, and (2) the fact that the “amendments were introduced into Congress by Mr. Madison, in consequence of the objections which had been made in the state conventions to the unlimited powers given by the constitution to the general government.” We have just seen that

²¹² Cf. Pol. & Con. 1069.

²¹³ Fairman II, at 45 and 75.

²¹⁴ *Ibid.*, at 70 n. 114.

²¹⁵ There are really two Walworth opinions. The earlier one, of 1824, in the case of Jackson v. Wood, is reported in note (b) attached to the report of *Murphy v. The People*, 2 Cow. (N.Y.) 815, 818 (1824). The later one was in *Livingston v. The Mayor of New York*, 8 Wend. (N.Y.) 85, 100 (1831).

²¹⁶ 2 Cow. (N.Y.) 818 n. (b), at 821 (1824).

the character of these "objections" was not enough to prevent James Madison from presenting, and urgently advocating the need of, amendments limiting the powers of the states, and securing the rights of the people against them. So, there is obviously nothing in Walworth's second point. As for the preamble to the amendments, it contained nothing excluding what Madison desired to do, and what the language of the amendments and other evidence indicates Congress afterwards did do in fact.

The preamble to the amendments (which was never adopted by the states) read as follows:

The Conventions of a number of the States having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the government will best insure the beneficent ends of its institution—Resolved. . . .²¹⁷

As I indicated in my book of last year, the foregoing does not seem to me to exclude, as one of the objects of the amendments, "the beneficent End" of "secur[ing] the Blessings of Liberty" as against the states. Would not "the Ground of Public Confidence in the Government" under the Constitution have been "extended" by "securing" "the People's" liberties completely? And how can the view that Amendments II–VIII are merely "restrictive Clauses" relating to the powers of the national government only be squared with the language of the Ninth Amendment, any more than with their own form?

The Ninth Amendment runs as follows:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

The First Amendment is in the form of a series of "restrictive Clauses" relating only to the power of Congress to "make . . . Laws"; but Amendments II–VIII are in the form of a "declaration," or "enumeration," of "rights." It must, then, be to these that the Ninth Amendment refers. And these "enumerated rights," as well as the "other rights" that the amendment mentions, are, by the terms of the amendment, "retained by the people"; yet how could the people be said to "retain" these rights unless they possessed them against the states? The language of the Ninth Amendment is impossible to square with accepted views. It, too—like the history of the framing of the initial amendments—has been neglected.

²¹⁷ 1 Stat. 97 (1789).

Let us turn now to Mr. Fairman's strictures based on the single sentence from my book, first quoted above. Mr. Fairman was gracious enough to admit that the two law writers I cited—William Rawle²¹⁸ and Joseph K. Angell²¹⁹—did take the position I ascribed to them in the sentence in question; but he charged that the judicial material I cited—*People v. Goodwin*,²²⁰ *Bank of Columbia v. Okely*,²²¹ and Justice William Johnson's opinion in *Houston v. Moore*²²²—failed to support the statement in the sentence in question and, in addition, that this material was uncandidly presented.

The charge of want of candor related principally to *People v. Goodwin*. The statement in that case that I relied upon ran as follows:

The defendant's counsel rely, principally, on the 5th article of the amendments to the constitution of the United States, which contains this provision: "*Nor shall any person be subject for the same offence, to be twice put in jeopardy of life or limb.*" It has been urged by the prisoner's counsel, that this constitutional provision operates upon state courts *proprio vigore*. This has been denied on the other side. I do not consider it material whether this provision be considered as extending to the state tribunals or not; the principle is a sound and fundamental one of the common law, that no man shall be twice put in jeopardy of life or limb for the same offence. I am, however, inclined to the opinion, that the article in question does extend to all judicial tribunals in the *United States*, whether constituted by the Congress of the *United States*, or the states individually. The provision is general in its nature, and unrestricted in its terms; and the sixth article of the constitution declares, that that constitution shall be the supreme law of the land; and that the judges in every state shall be bound thereby, any thing in the constitution or laws of any state, to the contrary notwithstanding. These general and comprehensive expressions extend the provisions of the constitution of the *United States* to every article which is not confined, by the subject matter, to the national government, and is equally applicable to the states. Be this as it may, the principle is undeniable, that no person can be twice put in jeopardy of life or limb, for the same offence.²²³

Now, as can be seen, the expression of opinion on which I relied was not necessary to the decision of the case. In other words, it was a dictum; and Mr. Fairman made a great to-do because I failed to men-

²¹⁸ Rawle, *A View of the Constitution of the United States of America* (2d ed.: Philadelphia, 1829) chap. x.

²¹⁹ Angell, *Restrictions on State Power in Relation to Private Property*, 1 *United States Law Intelligencer and Review* 4, 64 (Providence, 1829).

²²⁰ 18 Johns. (N.Y.) 187 (1820).

²²¹ 4 Wheat. (U.S.) 235 (1819).

²²² 5 Wheat. (U.S.) 1, 32, 34 (1820).

²²³ 18 Johns. (N.Y.) 187, 200 (1820).

tion this circumstance in my book.²²⁴ For my own part, I cannot see what difference this circumstance made. The distinction between dictum and decision is of importance in applying the rule of *stare decisis*; but I was not engaged in applying the rule of *stare decisis*. The passage in question, whether decision or dictum, was equally an expression of opinion by the justices of the Supreme Court of New York; and it was as such an expression of opinion that I cited it.

But Mr. Fairman has insisted that it was not an expression of opinion by the justices of the Supreme Court of New York at all; that it was merely an expression of opinion by Chief Justice Ambrose Spencer, who wrote the opinion in the case. "The Chief Justice," Mr. Fairman insisted, "said 'I.'"²²⁵ By the time I first read this part of Mr. Fairman's attack upon me, I had forgotten the facts of the case; and thinking that I might, perhaps, inadvertently have cited the views of Chief Justice Spencer as those of his court, I took another look at the report. I found that a mistake had indeed been made; but the mistake was made, not by me, but by Mr. Fairman. For while it is true the Chief Justice did say "I," he said "I" all the way through the opinion and then wound up by explaining that his brethren agreed "entirely" with it.

Mr. Fairman, however, had still another leg, of sorts, to stand on. He maintained that Chief Justice Spencer later changed his mind.²²⁶ He based this opinion on an incident that occurred in the New York state constitutional convention that met at Albany in the year after the decision of *People v. Goodwin*. Here is Mr. Fairman's account of the incident and what he thinks it proves:

The matter of a bill of rights was referred to a committee composed of Chief Justice Spencer, five farmers, and one mechanic.

The chairman, Peter Sharpe (Speaker of the Assembly), in reporting, "stated, that the committee had taken up the bills of rights of other states, of the United States, and of our own state, and compressed the whole into the nine articles read." So the federal provisions were fully considered. Chief Justice Spencer ["]thought much of the bill of rights redundant—perhaps, indeed, where rights are so well understood as in this country, it is useless to have any bill setting them forth—yet upon the whole it was deemed proper to keep before the eyes of the legislature a brief and paramount declaration of rights beyond which they cannot go. There was one part of this bill of rights which he thought, however, quite useless, that restraining from cruel and unnecessary punishments—now no punishment can be inflicted but by law—and if the legislature pass laws inflicting punishment, the pun-

²²⁴ Fairman II, at 74 and 77.

²²⁵ Ibid., at 74.

²²⁶ Ibid., at 70 and 74.

ishment whatever it be, will not be considered by them as cruel. . . ."] Evidently, in the view of the Chief Justice, the Eighth Amendment [to the Constitution of the United States] did not speak to the state legislature.²²⁷

Now, what seems so very "evident" to Mr. Fairman is not, in fact, evident at all. William Rawle, who, it will be recalled, thought the Eighth Amendment applied to the states, said in his treatise that, in its application to the legislative power, the amendment, because it involved a matter of judgment, or discretion, was "rather to be considered in the light of a recommendation than as a condition on which the constitutionality of the law depend[ed]." "[For] the judicial authority," Rawle believed, "would not undertake to pronounce a law void, because"—for example—"the fine it imposed appeared to *them* excessive." The remedy, if the legislature should commit, and persist in, gross errors in this respect was to be sought at the polls.²²⁸ From what Chief Justice Spencer had to say, it would appear that he, a contemporary of Rawle's, held the same opinion as Rawle about these bills-of-rights prohibitions against "excessive" fines, "cruel and unusual" punishments, and the like. Certainly his remarks seem to assume, just as Rawle assumed, that the legislature's judgment on such matters would be final. This view, at any rate, is sufficient to account for what he had to say; and it follows that what he had to say is not evidence that he had changed his mind about the subject on which he had spoken in the Goodwin case. So, Mr. Fairman's attempt to get rid of that case as an early expression of opinion in accord with the view I presented wholly fails.

I turn to what Mr. Fairman had to say about my citing *Bank of Columbia v. Okely* as an indication that, in 1819, the Supreme Court of the United States considered the general provisions in the national Bill of Rights as applying to the states. Here is what he had to say:

Let us examine another of the author's representations: that "Justice William Johnson, speaking for the Supreme Court itself, in 1819" was of opinion that the Bill of Rights applied to the States. The citation is to *Bank of Columbia v. Okely*. Here is the case, in a nutshell. A Maryland statute of 1793 gave the bank a summary process against debtors who had expressly in writing made instruments drawn by them negotiable at the bank. Congress, by a statute of 1801, made "the laws of the state of Maryland, as they now exist," applicable to the District of Columbia. The validity of the Maryland statute of 1793 was challenged as denying the civil jury trial. One side argued, the Act of Congress of 1801 was a re-enactment of the laws of Maryland; "consequently the question of the repugnancy to the local con-

²²⁷ *Ibid.*, at 66.

²²⁸ Rawle, *op. cit.* supra note 218, at 131; cf. *Pol. & Con.* 1112-13.

stitution of Maryland could not properly arise." The other side insisted, the Act of 1801 "did not extend to such acts as are repugnant to the state and national constitutions." Of course the federal Bill of Rights prevailed; the question was, was the Maryland Constitution also applicable? Johnson, J., for a unanimous Court, wrote:

["]These words [of the Act of 1801] could only give to those laws that force which they previously had in this tract of territory under the laws of Maryland; and if this law was unconstitutional in that State, it was void there, and must be so here. . . .

["]Was this act void, as a law of Maryland? If it was, it must have become so, under the restrictions of the constitution of the State, or of the United States. . . .["]

The Court found it easy to conclude that the Constitution of Maryland was satisfied, and that "full effect" was given to the Seventh Amendment. Of course the test of the Seventh Amendment must be met; the question was as to the applicability of the Maryland Constitution to a statute to be enforced in the District of Columbia—*not* as to the applicability of the Seventh Amendment to Maryland legislation in Maryland.

On the basis of this presentation, Mr. Fairman charged me with "citing [the] decision for a proposition it does not support."²²⁹

Now, the implication of Mr. Fairman's remarks plainly was that the Seventh Amendment had "of course" been applied, in the *Bank of Columbia* case, as a test of the constitutionality of congressional legislation for the District of Columbia. The case undoubtedly could have been handled that way; but the fact is it was not. What took place will be apparent if what "Johnson, J., wrote for a unanimous Court" is given without the omission Mr. Fairman made. What Justice Johnson said was this:

These words [of the Act of 1801] could only give to those laws that force which they previously had in this tract of territory under the laws of Maryland; and if this law was unconstitutional in that State, it was void there, and must be so here. *It becomes, then, unnecessary to examine the question, whether the powers of Congress be despotic in this district, or whether there are any, and what, restrictions imposed upon it, by natural reason, the principles of the social compact, or constitutional provisions.*

Was this act void, as a law of Maryland? If it was, it must have become so under the restrictions of the constitution of the State, or of the United States. (Italics added.)²³⁰

The matter in italics, which Mr. Fairman omitted, settles absolutely that the case involved exactly what he declared, in italics, it did "*not*" involve: "the applicability of the Seventh Amendment to Maryland legislation in Maryland," before the District of Columbia was created. And of course, had Mr. Fairman not omitted the italicized statement, he could not have made his own unwarranted statement with any show of plausibility at all.

²²⁹ Fairman II, at 75-77.

²³⁰ 4 Wheat. (U.S.) 235, 242 (1819).

It may be added that Justice Johnson next proceeded to discuss the second of the two questions he had just propounded: "Was this act [of Maryland] void, *as a law of Maryland*[,] . . . *under the restrictions of the constitution . . . of the United States*[?]" He held the act had not been void under the Seventh Amendment, "as a law of Maryland," because the procedure it provided was to be followed only upon the voluntary consent of the individual concerned. In reference to this result, the Justice then made the following statement:

That this view of the subject is giving full effect to the seventh amendment of the constitution is not only deducible from the general intent, but from the express wording of the article referred to. Had the terms been, that "the *trial* by jury shall be preserved," it might have been contended that they were imperative and could not be dispensed with. But the words are that the *right* of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducta*, and the benefit of it may therefore be relinquished.²³¹

The Justice then proceeded to consider whether the law in question had been void, "as a law of Maryland," under the constitution of that state.

The excerpts quoted drew no dissenting comment from any member of the Supreme Court. It is therefore to be presumed that the whole Court membership, in 1819,²³² were of the opinion the civil-jury provision of the Seventh Amendment applied to the states as well as the nation.²³³ There is certainly nothing very remarkable in this, since the Court was merely taking the unqualified general terms of this provision as they were literally written. It would seem to follow, too, that the Court must then have read all the other unqualified general provisions in the first eight amendments in this same manner. And, so, it is not surprising to find Justice Johnson, in the following year, speaking of another of these provisions—this time the double-jeopardy provision of the Fifth Amendment—as applying to the states. This occurred in his special concurring opinion in *Houston v. Moore*.

Mr. Fairman gave the facts of that case as follows:

The Act of Congress of 1795, to provide for calling forth the militia, imposed on one who failed to obey the President's call certain penalties to be "adjudged by a court martial." Pennsylvania, by its Militia Act of 1814, imposed identical penal-

²³¹ *Ibid.*, at 244.

²³² This did not include Justice Thomas Todd, of Kentucky, who was absent the whole of the 1819 term of court, on account of illness. *Ibid.*, at iii.

²³³ Of course *Bank of Columbia v. Okely* was not a technical decision to this effect, because there was no actual application of the Seventh Amendment in the case to any state; but the reasoning in the case nevertheless plainly shows what was then the Supreme Court's opinion on the point in question.

ties for the same failure, to be adjudged by a court-martial of the state. A militiaman, convicted under the state law, claimed that the statute was invalid as an encroachment upon the authority of the United States. The Supreme Court (two Justices dissenting), said no. Justice Johnson, concurring in this holding, said he could not see why the same offense might not be denounced by both Pennsylvania and the United States.²³⁴

The foregoing all seems correct enough; and Mr. Fairman was correct, too, in his inference that I read the italicized part of the following passage from Justice Johnson's opinion, as an indication that he took the double-jeopardy provision of the Fifth Amendment as applicable, both to the nation and to the states:

It is obvious, that in those cases in which the United States may exercise the right of exclusive legislation, it will rest with Congress to determine whether the general government shall exercise the right of punishing exclusively, or leave the States at liberty to exercise their own discretion. But where the United States cannot assume, or where they have not assumed, this exclusive exercise of power, I cannot imagine a reason why the States may not also, if they feel themselves injured by the same offence; assert their right of inflicting punishment also. *In cases affecting life or member, there is an express restraint upon the exercise of the punishing power. But it is a restriction which operates equally upon both governments;* and according to a very familiar principle of construction, this exception would seem to establish the existence of the general right. (Italics added.)²³⁵

Mr. Fairman's comment on the foregoing remarks of Justice Johnson was as follows:

To the reviewer [i.e., Mr. Fairman], Justice Johnson did not make his meaning clear. It may easily have seemed to make sense to say that in a matter where Congress might exclusively occupy the field, yet has permitted the States to punish the very offense that Congress has denounced—since Congress may not expressly make the offense twice punishable—the Court will not permit congressional tolerance of State cooperation to result in the double punishment which Congress alone could not impose. Maybe one can squeeze a bit more out of those two sentences. They were used in respect of a very special situation.²³⁶

My own view is that, although "it may easily have seemed to make sense to say" *these things that Mr. Fairman has said*, Justice Johnson did not say them. And they cannot even be "squeezed out of" what he did say. He said that, "in cases affecting life or member, there [was] an express restraint upon the exercise of the punishing power," and that "it [was] a restriction which operate[d] equally upon both governments." Unlike Mr. Fairman, I assume that Justice Johnson meant what he said.

It is apparent from the foregoing excerpts, especially those from

²³⁴ Fairman II, at 76.

²³⁵ 5 Wheat. (U.S.) 1, 33, 34 (1820).

²³⁶ Fairman II, at 77.

the *Bank of Columbia* case, that the initial view of the Supreme Court was that the various general prohibitions in the first eight amendments applied to the states. This certainly was the correct view under ordinary orthodox rules of construction. For, as already indicated, the provisions in question were unqualified and general in their terms; they related to liberties of the American people; they were a part of a document that professed, as one of its express objects, to "secure the Blessings of Liberty to [this People]"; and unless the provisions in question were taken in the broad, comprehensive terms in which they were written, the liberties to which they related would, undeniably, not be "secured" by that document. In these circumstances, it would certainly require very clear and convincing reasons to justify taking the provisions as not applying to the states; and since, as was shown in my book of last year,²³⁷ the reasons given in *Barron v. Baltimore* will not bear up under examination, it is not surprising that the Court's initial view was contrary to that which it announced in that case.²³⁸

3

From what has been said, it can be seen that there was, in reality, nothing to Mr. Fairman's complaints about the inappropriateness of the judicial materials I cited, or about the manner of their presentation. But Mr. Fairman had other complaints. Thus it happens there were some state cases before *Barron v. Baltimore* that held to the view which the Supreme Court ultimately announced in that case. Mr. Fairman thinks I was unfaithful to my duties as a scholar, in not hunting

²³⁷ Pol. & Con. 1076-81.

²³⁸ As to why the Court shifted, surmise only is possible. The year before the *Barron* case, the Court abdicated all appellate jurisdiction over state written law; and the year after that case, it did the same thing as to all common law. *Green v. Neal's Lessee*, 6 Pet. (U.S.) 291 (1832); *Wheaton v. Peters*, 8 Pet. (U.S.) 591, 658 (1834). These two developments, along with the *Barron* case, cut down enormously the appellate jurisdiction of the Supreme Court over the courts of the states, as this had originally been understood. See Pol. & Con., chapters xviii-xxi and xxiii-xxv. The three developments followed a long series of threats to the Court's appellate jurisdiction over the state courts, beginning in the early 1820's. These threats had taken the form of moves in Congress to repeal the twenty-fifth section of the Judiciary Act of 1789, which related to the subject. There was a good deal of justification for these attacks on this jurisdiction; for, in the years since the Constitution was drawn, the country had literally exploded into the West, making appeals to the Supreme Court at Washington, in the then state of transportation facilities, very burdensome and expensive. It seems probable that the Court's shift of opinion in the *Barron* case, as well as those in the *Green* and *Wheaton* cases, was motivated by a desire to minimize grounds of appeal to it from the courts of the states, thus protecting its jurisdiction over the state courts for the purposes which the Court apparently thought were most essential. It probably seemed that the decision would make little difference in the actual law, because, at the time, most of what was provided in Amendments II-VIII was law in most of the states anyway, either under their own bills of rights or as common law.

up these cases and presenting them to my readers. I do not see why. The discussion relating to the first eight amendments in my book of last year did not purport to be, or to include, a review of early state cases on the subject. And why I was under any duty to pursue a subject in which I had no interest, and which had little relevancy to what I was talking about, I confess I do not see.

After all, state decisions favorable to state power under the Constitution from the early years are not very persuasive evidence, either as to the true meaning of the Constitution, or as to the then prevailing views on the subject. State judges tended to decide questions of this kind in a manner favorable to their states whenever there was any possibility of doing so. This was especially true in New York, the decisions of whose courts constituted so large a part of Mr. Fairman's showing. For, in 1819, the Supreme Court of the state, in a case arising under the Contracts Clause, announced its policy of not going a single step in advance of the Supreme Court of the United States, upon any matter involving the national unconstitutionality of any state law. This policy was also announced by the New York chancery court, a few years later. Such behavior on the part of state judges was thought to be justified, despite their oath of office, because only if they upheld a questioned state law could a review of its constitutionality, in the Supreme Court of the United States, be obtained. This was a consequence of the way the twenty-fifth section of the Judiciary Act of 1789 was drawn.²³⁹

So, Mr. Fairman's early state cases in accord with *Barron v. Baltimore* have to be taken with some reserve. It is far more significant that the first view of the Supreme Court of the United States was to the contrary, and that early state cases can be found in accord with the Supreme Court's early view. The cases to which I refer, apart from the dictum in *People v. Goodwin*, are the Massachusetts cases which Mr. Fairman presented as cases of independent decision by the Massachusetts courts at common law and, therefore, inferably as early state cases anticipating the doctrine of *Barron v. Baltimore*. The cases arose under the "double-jeopardy" provision of the Fifth Amendment. Of them, Mr. Fairman said:

The import of these cases on a second jury appears to be this: it was essentially a question of the reason and sense of the common law; the Fifth Amendment's pro-

²³⁹ *Mather v. Bush*, 16 Johns. (N.Y.) 233, 254 (1819); *Hicks v. Hotchkiss*, 7 Johns. Ch. (N.Y.) 297, 310 (1823). *People v. Goodwin* was decided after the rule of the *Mather* case was announced; but, as the court pointed out, it made no difference in the *Goodwin* case which way the national constitutional point was decided.

vision against double jeopardy was a significant expression of what already was established; it was for the Massachusetts judges, informed by such authoritative materials as seemed persuasive, themselves to lay down the rule for Massachusetts.²⁴⁰

The reader may wish to read the foregoing over a second time, pondering just what it can mean, and noting particularly the concluding thought in it, before we look at the cases.

The first of the cases, *Commonwealth v. Merrill*,²⁴¹ arose in the municipal court of Boston, in 1823. A first jury had been discharged when a juror had been taken ill and compelled to leave. After conviction by a second jury, the defendant moved in arrest of judgment, "alleg[ing], in his motion, that the [verdict] was contrary to law, and in violation of that principle of the constitution of the United States which declares 'that no person shall be subject for the same offence to be twice put in jeopardy of life or limb.'" The municipal judge, Peter Oxenbridge Thacher, in rendering judgment, spoke as follows:

I most fully respect the principle, contained in the fifth article of the amendments to the constitution of the United States, which declares . . . [He then quoted the "grand-jury" and "double-jeopardy" clauses.] I consider this provision to be binding on this court, in the administration of justice, and that by the latter clause is meant, "that no man shall be twice tried for the same offence." But it is a principle of law, well established, that on every indictment against a citizen, whether for felony or misdemeanor, there shall be one legal trial, on which a final judgment may be rendered of acquittal or conviction. In this case no such trial had taken place. The proceedings were arrested in their progress by the sudden illness of one of the jurors, before the prisoner had made his defence, and consequently before a verdict could be rendered.

The rest of the opinion is an amplification of this view of the subject. As Mr. Fairman said, Judge Thacher "discussed New York cases, English cases, what Justice Story had held in a prosecution in the [United States] circuit court, and what the Supreme Judicial Court of Massachusetts had held."²⁴²

Now, what is the explanation of Judge Thacher's behavior? Certainly not that he thought "it was for the Massachusetts judges . . . themselves to lay down the rule for Massachusetts" on the subject before him—the thought Mr. Fairman sought to leave with his readers. If this had been Judge Thacher's view, he would simply have cited "what the Supreme Judicial Court of Massachusetts had held" in *Commonwealth v. Bowden*,²⁴³ in 1813, and forthwith decided the case. Instead,

²⁴⁰ Fairman II, at 64.

²⁴² Fairman II, at 63.

²⁴¹ Thacher's Criminal Cases (Mass.) 1 (1823).

²⁴³ 9 Mass, 493, 494 (1813).

Judge Thacher plainly, and correctly, thought that the common law on the subject of double jeopardy had been made a part of the Constitution by the Fifth Amendment. To determine the common law on the subject was, then, to determine the meaning of the "double jeopardy" provision in the amendment. And this determination was made, of course—and in Judge Thacher's view—subject to ultimate correction by the Supreme Court of the United States; for that was involved in his recognition that the Fifth Amendment bound the states.

This view of the Fifth Amendment was also taken in the case of *Commonwealth v. Purchase*,²⁴⁴ decided by the Supreme Judicial Court of Massachusetts, in the year immediately following. Counsel for the defendant relied on the Fifth Amendment explicitly. The solicitor general did not dispute its relevancy. Instead, he cited a decision of Justice Story on the same point, but against the nation, in the United States circuit court; and along with that, a Massachusetts decision, two New York decisions, and an English decision. The court, speaking through its chief justice, observed that they were "satisfied" there was "no difference, in relation to th[e] question [before them], between felonies which are capital, and those which are not." It was said that "the maxim on which the objection [was] founded, as stated by Lord Coke, applie[d] equally to all felonies, whether capital or not," because Coke, it was pointed out, had used the phrase "in case of life or member." And the court then added the following:

So in the amendment to the constitution of the United States, which provides that no person shall "be subject, for the same offence, to be twice put in jeopardy of life or limb;" all felonies, whether capital or otherwise being included in that provision.

The question to be discussed therefore is, whether by the common law, or by virtue of the constitution of the United States, a second trial for the same felony is prohibited, when the first shall have failed on account of the disagreement of the jury. . . .

The court decided that no such prohibition existed. In reaching this decision, the court proceeded much as Judge Thacher had proceeded in the municipal court case in Boston, in the year before. As Mr. Fairman observed, the court "sustained the Massachusetts practice without any further mention of the Fifth Amendment." And, so, Mr. Fairman concluded the Massachusetts judges conceived that "it was for . . . themselves to lay down the rule for Massachusetts."²⁴⁵

There is not a word in the case to justify this interpretation. All con-

²⁴⁴ 2 Pick. (Mass.) 520, 522 (1824).

²⁴⁵ Fairman II, at 64.

cerned—court and counsel—were agreed that the Fifth Amendment was applicable. And the court was explicit that it was deciding the case under the Constitution of the United States, though, unavoidably, it was at the same time deciding the case at common law. When the fact is recognized that the court thought—and quite correctly—that the Fifth Amendment made the common law on double jeopardy into constitutional law, all oddity in the court's behavior disappears. And Mr. Fairman's attempt to argue away this plain recognition by the Massachusetts court that the Fifth Amendment bound the states becomes transparent.

The chief justice of Massachusetts who wrote the opinion in the foregoing case was Isaac Parker. His two associates in the case were Samuel Putnam and Samuel S. Wilde.²⁴⁶ The fact that Wilde and Parker were concerned in this case is of use in demonstrating the unreliability of a great mass of other so-called "evidence" that Mr. Fairman threw at my head last year, in his effort to demonstrate that my conclusions on the first eight amendments were erroneous. This "evidence" closely resembled much of that in Mr. Fairman's "mountain of evidence" on the Fourteenth Amendment, which was considered in Part I of this article. Mr. Fairman's procedure was to follow various prominent Americans of the late eighteenth century, and early nineteenth century, into various state constitutional conventions and state legislatures, and to present their behavior there as "evidence" that they did not think Amendments II–VIII bound the states. The behavior relied upon generally consisted of mere silence: failure to speak out in situations in which, Mr. Fairman thought, they should have spoken out if they really thought Amendments II–VIII applicable to the states; or else failure to mention these amendments while actually speaking out in such situations.

Among the gatherings Mr. Fairman used in this way was the Massachusetts constitutional convention of 1820. His account began as follows:

The Massachusetts Constitution of 1780 contained no guarantee, in its Declaration of Rights, of the grand jury—a matter to which we now turn.

At the Constitutional Convention of 1820, there were among the members ex-President John Adams (1755[sic]–1826), who had been presiding officer of the United States Senate when the federal Bill of Rights was submitted to the states; Justice Story (1779–1845) of the Supreme Court of the United States; Isaac Parker (1768–1830), Chief Justice of the Supreme Judicial Court and Professor in Harvard Law School; his brethren Justices Charles Jackson (1775–1855) and

²⁴⁶ 2 Pick. (Mass.) 466 (1824).

Samuel S. Wilde (1771–1855); Lemuel Shaw (1781–1861), who ten years later became Chief Justice; Daniel Webster (1782–1852), with the *Dartmouth College* case and *McCulloch v. Maryland* just behind him; and Levi Lincoln (1749–1820), Attorney General under Jefferson, who had declined an appointment to the Supreme Court in 1811.

Two of the Representatives from Massachusetts in the First Congress, where the Bill of Rights was framed, thereafter sat on the Supreme Judicial Court. Theodore Sedgwick (1746–1813) was a Justice from 1802 to 1813; George Thacher (1754–1824) sat from 1800 to 1824. Note that of the three Justices who were delegates to the Constitutional Convention of 1820, Chief Justice Parker sat concurrently with Sedgwick from 1806 to 1813, and with Thacher from 1800 up to the Convention and beyond. Justice Jackson had sat with Thacher since 1813; Justice Wilde had sat with him since 1815. Now—assuming that the members of the First Congress designed the Bill of Rights to operate on state as well as nation—can it be supposed that Sedgwick and Thacher would over the years have failed to impart their understanding to their associates in the course of administering justice? Surely then—still assuming, as above—we should count Parker, Jackson, and Wilde, along with old John Adams, as delegates to the Convention who really knew of the design of the First Congress.²⁴⁷

In the foregoing, Mr. Fairman brought out into the open one of the assumptions his “evidence” required: the assumption that Sedgwick and Thacher *must* have told their judicial brethren whether Amendments II–VIII bound the states. This, however, is not the only assumption necessary to Mr. Fairman’s “evidence”; for a man might know the general fact that the amendments bound the states and yet remain silent in the particular situations with which Mr. Fairman dealt, merely from ignorance of the detailed provisions that the amendments contained, or from ignorance of their application to the particular situations. So, it is necessary to make the further assumption that the various delegates were acutely aware of all the detailed provisions of Amendments II–VIII, and, also, that they were familiar with the application of these provisions to the particular matters that arose. In short, it must be assumed that the delegates were experts on Amendments II–VIII, in order to provide any basis at all for Mr. Fairman’s inferences. And of course the possibility of other explanations of their conduct, different from that which Mr. Fairman inferred, cannot, even then, be altogether ruled out.²⁴⁸

²⁴⁷ Fairman II, at 58–59.

²⁴⁸ It is also to be observed that Mr. Fairman blithely imputes to the men of former times a knowledge of various detailed applications of Amendments II–VIII which the Supreme Court of the United States has since made. Thus, in discussing a certain New Hampshire statute of 1791, relative to the use of grand juries, Mr. Fairman observed: “It does not look much like the federal system.” Fairman II, at 49. And his discussion shows that he assumed as part of that system a principle not settled until 1884. Cf. *Ex parte Wilson*, 114 U.S. 417 (1884). The grand-jury provision of the Fifth Amendment was very ambiguous. “Infamous crimes” in it could be taken, and was repeatedly taken before the Wilson case, to mean crimes disqualifying a man as

Now, whatever may have been the probabilities in the case of the three Massachusetts justices, Parker, Jackson, and Wilde, the likelihood that John Adams was an expert on Amendments II–VIII seems very slight, indeed. So far as I know, and so far as Mr. Fairman has shown, there was nothing in John Adams' experience, in the years after 1789, that would have tended to impress the details of these amendments upon his mind. He may have had no contact with them at all after they were framed; and in 1820, thirty-one years had passed away since their framing. Adams, moreover, (who was born in 1735, not 1755), was, at the date of the Massachusetts convention of 1820, a man eighty-five years of age. Surely, in view of all these circumstances, a failure by John Adams to speak out on some technical point under Amendments II–VIII, should such a point arise, would be very scant evidence, indeed, that he thought these amendments did not apply to the states.

But let us get on with the "proof" in the case of the judicial delegates. To make a long story short, there was an attempt in the convention to supply the want of a state constitutional guaranty of the grand jury; and some things were proposed, and some things said, which Mr. Fairman thinks should have led any delegate who believed the Fifth Amendment applied to the states to speak out to this effect. Nobody did, so far as the report of the proceedings shows. And, so, Mr. Fairman concluded: "Chief Justice Parker, Justice Story, Daniel Webster, and the rest [including, of course, Justice Samuel S. Wilde] evidently supposed it was entirely a matter of state law."²⁴⁹ Yet, four years later, in *Commonwealth v. Purchase*, and four pages later, in Mr. Fairman's discussion, Parker and Wilde distinctly recognized, in their capacity as state judges, that the Fifth Amendment did apply to the states. Small wonder, then, that Mr. Fairman tried so hard to explain the *Purchase* case away.

a witness (i.e., *crimen falsi*). The expression could also be taken, though in disregard of its strict letter, as meaning crimes the punishment of which was infamous in character. And it could be taken to mean, what it strictly says, crimes which were themselves infamous. Without rejecting the third meaning as an additional test, the Court, in the Wilson case, held in favor of the second possible meaning and against the first. What the New Hampshire legislators of 1791 thought upon this subject is not known; but if they took the Fifth Amendment literally, then they must have taken it as applying to crimes which were themselves infamous. What crimes are themselves infamous is, and was in 1791, a question permitting such a wide range of opinion that I do not see how any inference at all can be drawn from the New Hampshire statute of that year as to its enactors' opinions on the applicability of the first eight amendments to the states. This is merely a sample of the kind of uncertainty with which Mr. Fairman's whole argument (both in Fairman I and Fairman II) is replete.

²⁴⁹ *Ibid.*, at 60–61.

Consider, too, the state of the "proof" concerning Justice Story. The year 1820, when the Massachusetts convention met, was the year after that in which Justice William Johnson, for a unanimous Supreme Court of the United States (including Justice Story), had decided the case of *Bank of Columbia v. Okely*. And in that case, it will be recalled, the Court had applied the "jury-trial" provision of the Seventh Amendment to determine the constitutionality of a Maryland statute in Maryland, before the District of Columbia had been created. In the light of this decision, how can Mr. Fairman's "proof" of Justice Story's supposedly contrary views possibly be accepted?²⁵⁰

What is contained in Story's *Commentaries* on this subject also seems significant. For, throughout his discussion of the amendments, Story cited Rawle with seeming approval; yet Rawle, we know, took all the various general provisions in the first eight amendments as applicable to the states. And though Story commented freely on many aspects of the amendments upon which the Supreme Court had not spoken, he had only the following to say on the question of their applicability to the states:

It has been held in the state courts, (and the point does not seem to have arisen in the courts of the United States,) that this clause [i.e., the "cruel-and-unusual-punishments" clause of the Eighth Amendment] does not apply to punishments inflicted in a state court for a crime against such state; but that the prohibition is addressed solely to the national government, and operates, as a restriction upon its powers.²⁵¹

As this passage shows, Story's *Commentaries* were written before *Barron v. Baltimore* was decided; and from such evidence as we have, it

²⁵⁰ Part of the "proof" consisted of a speech by Chief Justice Parker in which he seemed to be treating the necessity of grand juries as growing out of the common law, and of Justice Story's silence in the face of this speech. See Fairman II, at 59. But the Goodwin, Merrill, and Purchase cases, discussed in the text, show that treating as common law those parts of the common law that the first eight amendments constitutionalized was more natural to these men than treating them as constitutional law; it was more natural because they had been common law before they became constitutional law. This explains much of what Mr. Fairman thinks is evidence for his views. The same kind of thing happened in the national courts where the powers of the nation were concerned. Thus, Justice Story, both on circuit and for the Supreme Court, decided points similar to that involved in the Goodwin, Merrill, and Purchase cases, as if they were common law, without even mentioning the Fifth Amendment. See *United States v. Coolidge*, 2 Gall. 364 (C.C. 1st, 1815), and *United States v. Perez*, 9 Wheat. (U.S.) 579 (1824). Would Mr. Fairman argue that these cases prove Justice Story and the Supreme Court thought that the Fifth Amendment did not apply to the United States?

²⁵¹ 3 Joseph Story, *Commentaries on the Constitution of the United States* 751 (Boston, 1833). Though the passage cited in the text shows that the *Commentaries* were written before the decision in *Barron v. Baltimore* occurred, they apparently had not, at that date, yet gone to press. For Story was able to add "See *Barron v. Mayor of Baltimore*, 7 Peter's R. (1833.)" to a footnote to the above passage, which, apparently, had originally read: "See *Barker v. The People*, 3 Cowen's R. 686; *James v. Commonwealth*, 12 Sergeant and Rawle's R. 220."

seems inferable that, when he wrote them, he agreed with William Rawle, or, at the very least, that he considered the question that the *Barron* case ultimately decided as open.

The foregoing facts about Story and Parker and Wilde show how very unreliable evidence of this kind, that Mr. Fairman so often uses, actually is; indeed, it is so unreliable as hardly to rank as evidence at all. The same may be said of the evidence he presents of state conventions' putting into their constitutions provisions covering merely part of the ground covered by certain of the prohibitions in Amendments II–VIII, or putting in certain of these prohibitions and leaving out others. Mr. Fairman argues that this behavior shows that the men in these conventions did not think Amendments II–VIII bound the states. There is a seeming plausibility in this argument; but it is easily shown to be shaky in the extreme.

In 1790, South Carolina and Pennsylvania both adopted new constitutions. At that time, the original Constitution of the United States was already ratified and in effect; and there can, of course, be no doubt at all that every provision of the tenth section of its first article bound every state, for that section is a series of prohibitions of state action, in terms. Yet what did South Carolina and Pennsylvania do? They put into their constitutions certain of the prohibitions the section contains and left out the others.²⁵² Why they did this, I do not know; but the fact that they did it makes clear that Mr. Fairman's mode of argument is not reliable.²⁵³

4

Now, it will be apparent from what has so far been said that Mr. Fairman, in his attack upon me, was attempting the same sort of thing that he attempted in his attack on Justice Black, which was considered in the first part of this article. He was attempting to look into the minds of Americans, in the years 1789–1833, to try to find out whether *they thought* Amendments II–VIII bound the states. And he was doing this for an exactly similar purpose. For just as he sought, in his at-

²⁵² The prohibitions put in were those against bills of attainder, *ex-post-facto* laws, laws impairing the obligation of contracts, and titles of nobility. The other provisions of section 10 of Article I were totally ignored. Pa. Const. Art. IX, §§ 17 and 18 (1790); S.C. Const. Art. IX, §§ 2 and 5 (1790).

²⁵³ Mr. Fairman was anticipated in this mode of argument by Chancellor Nathan Sanford, of New York, in *Barker v. The People*, 3 Cow. (N.Y.) 686 (1824). Justice Lumpkin, of the Supreme Court of Georgia, pointed out the utter impossibility of so arguing, in *Campbell v. State*, 11 Ga. 353, 368–69 (1852).

tack on Justice Black, to contradict and destroy the clear text of the Fourteenth Amendment, so, in his attack on me, he sought to contradict and destroy the clear text of Amendments II–VIII. And his effort was as lacking in legitimacy in the one case as in the other. It is the text of the amendments, read together, and read in context with the original document, of which they were made a part, that ought to control.

But though the text ought to control, it is pleasant to have the support of recorded opinions at the time of adoption of any measure, when possible. In the case of Amendments II–VIII, this cannot be had. The initial amendments produced no public discussion such as the original Constitution did, and evidence of how men understood them at the time they were adopted is therefore lacking. There are only certain factors of probability.

Most of the provisions of Amendments II–VIII merely incorporated into the Constitution parts of the common law, and these parts of the common law had, nearly all of them, already been the law in all the states.²⁵⁴ Occasions for invoking the amendments against the states must, then, have been infrequent in this early period. Considering this fact, it seems to me that Mr. Fairman found a good many cases from this period in which an appeal to the amendments occurred. He found three such cases in Louisiana,²⁵⁵ four in New York,²⁵⁶ two in Massachusetts,²⁵⁷ and at least the tradition of one in Connecticut.²⁵⁸ And Mr. Fairman did not find all the cases. I know, by accident—having made no systematic search—of two he did not find: one in Pennsylvania and one in New York.²⁵⁹ And Esek Cowen, the New York law reporter, said, in 1824, that such cases had “repeatedly arisen at Nisi Prius [in New York] at which the decisions ha[d] not been uniform.”²⁶⁰

²⁵⁴ See Justice Story’s comments on the amendments in his Commentaries: *op. cit. supra* note 251, at 655–66 and 746–51.

²⁵⁵ *Territory v. Hattick*, 2 Mart. (O.S.) (La.) 87 (1811); *Renthorpe v. Bourg*, 4 Mart. (O.S.) (La.) 97 (1816); *Maurin v. Martinez*, 5 Mart. (O.S.) (La.) 432 (1818).

²⁵⁶ *The People v. Goodwin*, 18 Johns. (N.Y.) 187 (1820); *Murphy v. The People*, 2 Cow. (N.Y.) 815 (1824); *Jackson v. Wood*, 2 Cow. (N.Y.) 818 n. (b) (1824); *Livingston v. Mayor of New York*, 8 Wend. (N.Y.) 85 (1831).

²⁵⁷ *Commonwealth v. Merrill*, *Thacher’s Criminal Cases* (Mass.) 1 (1823); *Commonwealth v. Purchase*, 2 Pick. (Mass.) 520 (1824).

²⁵⁸ *Fairman II*, at 55.

²⁵⁹ *James v. Commonwealth*, 12 S. & R. (Pa.) 220 (1825); *Barker v. The People*, 3 Cow. (N.Y.) 686 (1824).

²⁶⁰ 2 Cow. (N.Y.) 818 n. (b) (1824).

And to the foregoing cases, *Barron v. Baltimore* and *Livingston v. Moore*, the two cases the Supreme Court decided in 1833,²⁶¹ should of course be added, to complete the list of known cases in which, before the Supreme Court's decision in the *Barron* case, provisions of Amendments II–VIII had been invoked against the states.

In all these different cases, then, some lawyer, or lawyers, conceived that the applicability of the amendments to both the states and the nation was the reasonable view of their meaning. The fact that most of the state courts decided the point in favor of state power in no way alters this fact. And there were a good many judges who agreed in considering the amendments to be applicable to the states: four in Massachusetts, including Chief Justice Isaac Parker, in 1823–24;²⁶² five in New York, including Chief Justice Ambrose Spencer, in 1820;²⁶³ and six, including Chief Justice Marshall and Justice Story, on the Supreme Court of the United States, in 1819.²⁶⁴ To these men should be added the law writers, Rawle and Angell,²⁶⁵ to complete the roster of lawyers known to have taken Amendments II–VIII as applicable to the states, in the period before the Supreme Court's contrary decision, in 1833. In view of the infrequency of the occasions in this early period for invoking the amendments against the states, the list seems a rather long one; and obviously it includes a number of highly respected names.

It is significant, too, that the *Barron* decision did not terminate this tendency of competent lawyers to take the amendments as applicable to the states. Instead, the tendency so to take them continued all through the period before the Fourteenth Amendment was drawn. The lawyers of this period were, most of them, not the products of formal legal education in law schools; and, even when they were, constitutional law was not one of the subjects in which they had been instructed. In consequence, *Barron v. Baltimore* was a little-known case; and to lawyer after lawyer, the applicability of the amendments to both state and nation must have seemed so reasonable a view that they ap-

²⁶¹ *Livingston v. Moore*, 7 Pet. (U.S.) 469 (1833), was decided in the same term of court at which the *Barron* case was decided. Justice Johnson's remark in the *Livingston* case (*ibid.*, at 551–52), that "it [was] now settled, that [the first eight] amendments d[id] not extend to the states," shows that it must have been regarded as an open question before the *Barron* decision.

²⁶² See note 257 *supra*.

²⁶³ *The People v. Goodwin*, 18 Johns. (N.Y.) 187 (1820).

²⁶⁴ *Bank of Columbia v. Okely*, 4 Wheat. (U.S.) 235 (1819).

²⁶⁵ *Op. cit. supra* notes 218 and 219.

parently did not search the Supreme Court's precedents to see whether this view was taken by the Court. And, consequently, there arose a long list of cases, in this period after the decision of the *Barron* case, in which lawyers continued to invoke various provisions of Amendments II–VIII against the states. A partial list of these cases will be found in the margin.²⁶⁶ The list could probably be lengthened, for I have made no exhaustive search.

In 1840, in *Holmes v. Jennison*,²⁶⁷ the *Barron* decision was most elaborately challenged in the Supreme Court itself, as erroneous. In 1845, the Supreme Court of Illinois, apparently in ignorance of the *Barron* case, observed, in the course of an opinion, that the Due Process Clause of the Fifth Amendment was "obligatory upon all the States."²⁶⁸ And in 1852, the Supreme Court of Georgia denounced the *Barron* decision in no uncertain terms and refused to be bound by it. "From such State rights," said the court, "good Lord deliver us!" It was then added:

The people of the several States, by adopting these amendments, have defined accurately and recorded permanently their opinion, as to the great principles which they embrace; and to make them more emphatic and enduring, have had them incorporated into the Constitution of the Union—the permanent law of the land. Admit, therefore, that the Legislature of a State may be absolute and without control over all other subjects, where its authority is not restrained by the Constitution of the State or of the United States; still, viewing these amendments as we do, as intended to establish justice—to secure the blessing of liberty—to protect person and property from violence; and that these were the very purposes for which this government was established, we hold that they constitute a limit to all legislative power, Federal or State, beyond which it cannot go; that these vital truths lie at the foundation of our free, republican institutions; that without this security for personal liberty and private property, our social compact could not exist.

And though nineteen years had passed since the decision of *Barron v. Baltimore*, the Georgia court said it was "aware" the question the case had involved was "still regarded as an unsettled one."²⁶⁹

²⁶⁶ *Boring v. Williams*, 17 Ala. 510, 516 (1850); *Noles v. State*, 24 Ala. 672, 677, 690 (1854); *Hollister v. The Union Co.*, 9 Conn. 435, 446 (1833); *Colt v. Eves*, 12 Conn. 242, 250, 252 (1837); *Boyd v. Ellis*, 11 Iowa 97, 99 (1860); *State v. Barnett*, 3 Kans. 250, 251, 253 (1865); *State v. Keyes*, 8 Vt. 57, 61, 62 (1836); *Commonwealth v. Hitchings*, 5 Gray (Mass.) 482, 483, 485 (1855); *Jones v. Robbins*, 8 Gray (Mass.) 329, 346 (1857); *State v. Schricker*, 29 Mo. 265, 266 (1860); *Raleigh & G. R. Co. v. Davis*, 19 N.C. 451, 459 (1837); *State v. Newsom*, 27 N.C. 250, 251 (1844); *State v. Glen*, 52 N.C. 321, 331 (1859); *State v. Paul*, 5 R.I. 185, 187, 196 (1858); *State v. Shumpert*, 1 S.C. 85, 86 (1868); *Woodfolk v. Nashville & C. R. Co.*, 32 Tenn. 422, 431 (1852); *Rhinehart v. Schuyler*, 2 Gil. (Ill.) 473, 522 (1845); *Campbell v. State*, 11 Ga. 353 (1852).

²⁶⁷ 14 Pet. (U.S.) 540, 555 et seq. (1840).

²⁶⁸ *Rhinehart v. Schuyler*, 2 Gil. (Ill.) 473, 523 (1845).

²⁶⁹ *Campbell v. State*, 11 Ga. 353, 367, 369, 372 (1852).

Now, all the foregoing tends to show that, in the years of our history before the Fourteenth Amendment was drawn, the view that Amendments II–VIII bound the states was a natural one, which was widely held; and there is the added fact, which we saw in Part I of this article, that practically the whole Republican party, at the date of the drawing and adoption of the Fourteenth Amendment, were of the opinion Amendments II–VIII had this effect, or, at least, had been intended to have it; and those of them who knew about the case thought *Barron v. Baltimore* was wrong. It was for this reason, among others, that they overruled the case by constitutional amendment. So, although direct evidence on the subject is wanting, it seems an entirely probable thing that this view of these amendments was also widely held in 1789–91, when the amendments were drawn and adopted. To take them as binding upon both the nation and the states was, after all, merely to take the amendments as they undeniably were written.