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## Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat

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### I. INTRODUCTION

Discredited by Professor Charles Fairman<sup>1</sup> in a study with which even activists concur,<sup>2</sup> rejected by the Supreme Court,<sup>3</sup> the theory that the Bill of Rights was incorporated in the fourteenth amendment has nine lives. Now Michael Curtis attempts to revive it,<sup>4</sup> making my 22 page confirmation<sup>5</sup> of Fairman's 134 page study his whipping boy. My "historical analysis" allegedly is "so mistaken that it is entitled to little weight."<sup>6</sup> Like his activist fellows he begins with the results, "horrified" that one should impeach the extension to the states of free speech and other rights secured by the Bill of Rights against the federal government.<sup>7</sup> So he reasons back from the "right result,"<sup>8</sup> a method reminiscent of "the end justifies the means."<sup>9</sup>

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1. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). Fairman, wrote Alexander Bickel, "conclusively disproved [Justice] Black's contention; at least, such is the weight of opinion among disinterested observers." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 102 (1962).

2. Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603, 607 (1978). Professor Michael Perry concurs in my view that "the proposition that the Fourteenth Amendment incorporated the Bill of Rights constitutes an invasion of rights reserved to the States by the Tenth Amendment, an invasion of such magnitude as to demand proof that such was the framers' intention." Perry, *Essay Review*, 78 COLUM. L. REV. 685, 690 (1978).

J. ELY, *DEMOCRACY AND DISTRUST* 25 (1980), holds to the contrary, but "incorporation" is indispensable to his "theory." See Berger, *Ely's "Theory of Judicial Review"*, 42 OHIO ST. L.J. 261 (1981).

3. *Adamson v. California*, 332 U.S. 46, 54 (1947). Professor Thomas Grey commented, the Court "clearly has declined" to accept "the flimsy historical evidence" proffered by Justice Black, architect of the "incorporation" theory. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 711-12 (1975).

4. Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980) [hereinafter cited as Curtis]. Apparently, this is the first sortie into legal commentary by Curtis, a practitioner in Greensboro, North Carolina.

5. R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 134-56 (1977).

6. Curtis, *supra* note 4, at 47.

7. "Fairman was horrified at the thought that the fourteenth amendment required the states to obey all of the Bill of Rights." *Id.* at 49 (emphasis added). Professor Randall Bridwell animadvertes upon an "argument favoring expansive judicial powers . . . structured around the horrible results that will allegedly occur without it." Bridwell, *The Federal Judiciary: America's Recently Liberated Minority*, 30 S. CAR. L. REV. 467, 473 n.14 (1979). William Trotter wrote, "When . . . we find ourselves entertaining an opinion about the basis of which there is a quality of feeling which tells us that to inquire into it would be absurd, obviously unnecessary, . . . wicked, we may know that that opinion is a nonrational one, and probably, therefore, founded upon inadequate evidence." W. TROTTER, *INSTINCTS OF THE HERD* 44 (1916).

8. Curtis, *supra* note 4, at 49.

9. Professor Leonard Levy observed that "any means to a justifiable end is, in a democratic society, a noxious doctrine." L. LEVY, *THE SUPREME COURT UNDER EARL WARREN* 190 (1972). Lord Chancellor

He jumps off from William W. "Crosskey's central thesis that the privileges and immunities clause of the fourteenth amendment was designed to apply the Bill of Rights to the states,"<sup>10</sup> and reasons that the key to construction of the 1866 debates is furnished by "certain unorthodox ideas held by a number of Republicans"—never mind the vastly preponderant Republican view to the contrary—the "idea that the States were already required to obey the Bill of Rights under the privileges and immunities clause of the original Constitution."<sup>11</sup> Curtis considers that "privileges and immunities" is "a natural way to describe the rights in the Bill of Rights."<sup>12</sup> By whomsoever uttered, this is arrant nonsense. The 1787 article IV "privileges and immunities" obviously could not comprehend the as yet unborn Bill of Rights, added to quiet widespread fears of federal encroachment.<sup>13</sup> Moreover, article IV was designed to raze trade barriers between the states, to promote "trade and commerce,"<sup>14</sup> whereas the Bill of Rights was meant to erect barriers against federal interference with cherished individual rights. One greater than Crosskey, Chief Justice Marshall, said with respect to the Bill of Rights in *Barron v. Baltimore*<sup>15</sup> that, "[h]ad Congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language."<sup>16</sup> Describing this as the "iniquitous doctrine of *Barron v. Baltimore*," Crosskey asserts that it was "incorrectly decided," "without any warrant at all,"<sup>17</sup> when in fact

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Sankey stated: "It is not admissible to do a great right by doing a little wrong . . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means." Quoted by Chief Justice Warren in *Miranda v. Arizona*, 384 U.S. 436, 447 (1966).

10. Curtis, *supra* note 4, at 45.

11. *Id.*

12. *Id.* at 48. It did not seem "natural" to the Supreme Court. Close upon the adoption of the fourteenth amendment, Chief Justice Waite held respecting the first amendment right to assemble:

This . . . was not intended to limit the powers of the State government . . . but to operate upon the National government alone.

For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States. *United States v. Cruikshank*, 92 U.S. 542, 552 (1875)(emphasis added).

13. Curtis concedes that the contrary reading "may well have been incorrect." Curtis, *supra* note 4, at 86. A similar attempt by Chief Justice Warren in *Bolling v. Sharpe*, 347 U.S. 497 (1954), to read the equal protection of the fourteenth amendment back into the fifth was labelled by Professor Ely as "gibberish." J. ELY, *DEMOCRACY AND DISTRUST* 32 (1980).

14. See text accompanying notes 36-38 *infra*. Justice Jackson, dissenting in *Independent Warehouses v. Scheele*, 331 U.S. 70, 94 (1947), referred to "[t]he unedifying story of colonial rivalry in preying upon commerce, which more than any one thing made our Federal Constitution a necessity."

15. 32 U.S. (7 Pet.) 243 (1833).

16. *Id.* at 250.

17. W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1076, 1091 (1953). In his critique of Fairman, Crosskey stated, "[I]t is elementary that not even 'legislative history' properly so-called can be employed to contradict and destroy the plain letter of a clear text." Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 4 (1954). The Supreme Court held, however, that "there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.'" *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943). And it subsequently declared that the plain meaning rule "has not dominated our decisions. The contrary doctrine has prevailed." *Association of Westinghouse Salaried Em-*

Madison's proposal to extend the free speech provision to the States was rejected by the draftsmen of the Bill of Rights.<sup>18</sup>

"Curiously," Curtis writes, "Berger ignores Crosskey's article" and thus "fails to come to grips with the strongest case which has been made against his view."<sup>19</sup> There is nothing "curious" about my disregard. Professor Julius Goebel wrote that "Crosskey's performance, measured by even the least exacting of scholarly standards, is . . . without merit . . . Mr. Crosskey . . . coming to his task with a new axe to grind has seemingly forsworn all canons of objectivity to make himself a grindstone to suit his purposes."<sup>20</sup> Professors Henry Hart and Ernest Brown were equally unsparing;<sup>21</sup> and my own microscopic study of the 130 or so pages Crosskey devoted to judicial review led me to concur with Hart.<sup>22</sup> Hag-ridden by an *idée fixe*, Crosskey turned a blind eye to contradictory evidence.

Not surprisingly, Curtis exhibits the same analytical faults as Crosskey. So, he begins, "[b]y ordinary use of language, the rights set out in the Bill of Rights are literally privileges or immunities,"<sup>23</sup> forgetting that these are legal, not street terms, fraught with history hereinafter set forth. Next he turns to Justice Cardozo's statement that "some of the privileges and immunities . . . have *been taken over* from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a *process of absorption*."<sup>24</sup> This shows a process of *judicial* absorption, not a "take-over" by the framers. Since what is in issue is the constitutional authorization for Cardozo's "take-over," his statement can hardly justify self-conferred judicial power.<sup>25</sup> Moreover, much as we revere Cardozo, his "reflection" that some of the privileges and immunities set out in the Bill of Rights were not protected against state action<sup>26</sup> cannot be taken as a conclusive identification of the two (the privileges and immunities of article IV and the Bill of Rights) in

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employees v. Westinghouse Elec. Corp., 348 U.S. 437, 444 (1955). See *Wirtz v. Local 133, Bottle Blowers Assn.*, 389 U.S. 463, 468 (1968). Judge Learned Hand held that if the purpose is "manifest" it "override[s] even the explicit words used." *Cawley v. United States*, 272 F.2d 443, 445 (2d Cir. 1959). See *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

18. For citations see R. BERGER, *GOVERNMENT BY JUDICIARY* 134 n.4 (1977). Ely states: "In terms of the original understanding, *Baron* was almost certainly decided correctly." J. ELY, *DEMOCRACY AND TRUST* 196 (1980). See also note 12 *supra*.

19. Curtis, *supra* note 4, at 50. Fairman reduced Crosskey's "case" to rubble. Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954).

20. Goebel, Book Review, 54 COLUM. L. REV. 450, 451 (1954).

21. Hart, Book Review, 67 HARV. L. REV. 1456 (1954); Brown, Book Review, 67 HARV. L. REV. 1439 (1954).

22. Citations will be found in the index ("Crosskey") of R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969). For example, Crosskey charged that Daniel Call (the reporter of *Commonwealth v. Caton*, 4 Call 5 (Va. 1782)), reporting 45 years after the case was decided, "was simply manufacturing, in ex-post-facto manner, a little much needed pre-Constitutional usage" to bolster the theory of judicial review. W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 960 (1953). The historical facts disprove the charge. 2 D. MAYS, *EDMUND PENDLETON* 196 (1952).

23. Curtis, *supra* note 4, at 48.

24. *Id.*, quoting Cardozo, J., in *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (emphasis added).

25. As Professor Robert Bork said in a similar situation: "[Those] cases themselves require justification and cannot be taken to support the principle advanced to support them." Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695, 698.

26. *Palko v. Connecticut*, 302 U.S. 319, 324-26 (1937). See Curtis, *supra* note 4, at 48.

light of their clearly different provenance and purposes. In a splendid non sequitur, Curtis concludes:

Prior to the adoption of the fourteenth amendment these privileges and immunities had been held to limit the power of the federal government only and not the states. So one could reasonably conclude from the plain language of the amendment that it was intended to extend the protection of the Bill of Rights against the states.<sup>27</sup>

Curtis notices that the "absorption" culminating in Cardozo's *Palko* opinion was based on the due process clause, which Curtis considers reached "the right result for the wrong reason."<sup>28</sup> One hopes that by "wrong reason" Curtis reflects Hamilton's 1787 summary of 400 years of English and colonial history: due process applies only to judicial proceedings, never to action by a legislature<sup>29</sup>—i.e., it is procedural, not substantive. So Curtis turns to the "privileges or immunities" of the fourteenth amendment, though aware that in 1873 the Court deprived it "of any significant meaning,"<sup>30</sup> since when it has lain in death-like torpor.

Curtis taxes me with refusing "to accept Fairman's argument that a selective incorporation was intended,"<sup>31</sup> based on Fairman's conclusion, after "brooding" over the matter, that Cardozo's "implicit in the concept of ordered liberty" was about as close as one could come to the 'vague aspirations' which the framers had for the clause."<sup>32</sup> True, I made no reference to this conclusion. But if the terms "privileges or immunities" are "vague" "quite inscrutable," Professor John Hart Ely has it<sup>33</sup>—how can they justify an invasion of the rights reserved to the states by the tenth amendment. Such a purpose, Chief Justice Marshall held, had to be expressed "in plain and

27. Curtis, *supra* note 4, at 48.

28. *Id.* at 49. See note 32 *infra*. After an elaborate survey of the historical materials, Justice Moody concluded that the privilege against self-incrimination "was not conceived to be inherent in due process of law, but . . . a right separate, independent and outside of due process. Congress, in submitting the amendments to the several States, treated the two rights as exclusive of each other." *Twining v. New Jersey*, 211 U.S. 78, 110 (1908).

29. 4 PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett & J. Cooke eds. 1962); Berger, "Law of the Land" Reconsidered, 74 NW. U.L. REV. 1 (1979).

30. Curtis, *supra* note 4, at 48, 85.

31. *Id.* at 50.

32. *Id.* Professor Louis Lusk observed:

"[O]rdered liberty" is too vague to describe a national objective. It says that order and liberty are both to be sought, but provides no standard for reconciling the eternal conflict between them.

It is a vehicle for whatever meaning the Court gives it, and thus enables the Court to apply its own conceptions of public policy . . .

L. LUSKY, BY WHAT RIGHT? 105, 107 (1975).

Judge Henry Friendly wrote, "it appears undisputed that the selective incorporation theory" has no "historical support . . . And it does seem extraordinary that a theory going to the very nature of our Constitution and having such profound effects for all of us should be carrying the day without ever having been explicated in a majority opinion of the Court . . . [T]he present Justices feel that if their predecessors could arrange for the absorption of some such provisions in the due process clause, they ought to possess similar absorptive capacity toward other provisions equally important in their eyes." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 934, 935 (1965).

33. J. ELY, DEMOCRACY AND DISTRUST 98 (1980).

intelligible language,"<sup>34</sup> or as Justice Miller held in 1873, "language which expresses such a purpose too clearly to admit of doubt."<sup>35</sup>

In fact, the framers of the fourteenth amendment had a clear purpose to confer limited, enumerated privileges, and I turn to their debates in order to brush in the background against which to measure Curtis' assertions.

## II. PRIVILEGES OR IMMUNITIES

The terms "privileges" and "immunities" are first met in article IV of the Articles of Confederation. To promote "intercourse among the people of the different states in this Union," it provided that they shall be "entitled to all privileges and immunities of free citizens in the several states," specifying "free ingress and regress to and from any other state, and . . . all the privileges of trade and commerce."<sup>36</sup> For the founders, the enumerated "privileges of trade and commerce" limited the general words "privileges and immunities."<sup>37</sup> The phrase "privileges and immunities" was picked up by article IV of the Constitution, and very early the courts of Maryland and Massachusetts construed them in terms of trade and commerce.<sup>38</sup> Next came the Civil Rights Bill of 1866: "There shall be no discrimination in civil rights or immunities . . . but the inhabitants . . . shall have the same right to make and enforce contracts, to sue . . . , to hold and convey real and personal property . . . ."<sup>39</sup> Martin Thayer of Pennsylvania explained that "to avoid any misapprehension" as to what the "fundamental rights of citizenship" are, "they are stated in the bill. The same section goes on to define with particularity the civil rights and immunities which are to be protected by this bill."<sup>40</sup> Thayer adds that "when those civil rights which are first referred to in general terms are subsequently enumerated, that enumeration precludes any possi-

34. See text accompanying note 16 *supra*.

35. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1872). See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 82 (1949).

36. H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 111 (7th ed. 1963). The Court drew on the Articles of Confederation in an analogous situation. "The only allusion to imposts in the Articles of Confederation is clearly limited to duties on goods imported from foreign States." *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 136 (1869).

37. Madison wrote: "For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general terms? Nothing is more natural or common than first to use a general phrase, and then to explain and qualify it by a recital of particulars." THE FEDERALIST NO. 41 at 269 (James Madison) (Mod. Lib. ed. 1937).

38. *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. 1797); *Abbot v. Bayley*, 6 Pick. 89, 91 (Mass. 1827). Compare *Yates v. United States*, 354 U.S. 298, 319 (1957), in which the Court, per Justice Harlan said, "[W]e should not assume that Congress . . . used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation." Curtis tells us that Giles Hotchkiss of New York "agreed that the first part of the amendment, the privileges and immunities provision, 'is precisely like the present Constitution [article IV]; it confers no additional powers.'" Curtis, *supra* note 4, at 74. After stating that the privileges and immunities of article IV and the fourteenth amendment are "in each one the same," Justice Miller went on to say, "In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1872).

39. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

40. *Id.* at 1151.

bility that the general words which have been used can be extended beyond the particulars which have been enumerated."<sup>41</sup> There were other and similar restrictive explanations.<sup>42</sup>

Notwithstanding such assurances, John Bingham, draftsman of the fourteenth amendment in the very same session, protested that the "civil rights and immunities" phrase was "oppressive," that it would "embrace every right that pertains to the citizen" and strike down "every State constitution which makes a discrimination on account of race or color in *any* of the civil rights of the citizen."<sup>43</sup> At his insistence the phrase was deleted, in order, as James Wilson, chairman of the House Judiciary Committee, explained, to obviate a "construction going beyond the specific rights named in the section," "a latitudinarian construction not intended."<sup>44</sup> After reading from the several cases, Senator Lyman Trumbull, chairman of the Senate Judiciary Committee and draftsman of the bill, stated that "the great *fundamental rights set forth in this bill* [are] the right to acquire property, the right to come and go at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights set forth in this bill,"<sup>45</sup> as its text corroborates.

The fourteenth amendment in large part was enacted to prevent a subsequent repeal of the Civil Rights Act;<sup>46</sup> they were regarded as "identical." Charles Fairman wrote that they were treated as "essentially identical."<sup>47</sup> For example, George Latham of West Virginia stated that the Act "covers exactly the same ground as this amendment."<sup>48</sup> Henry Raymond said the Congress

41. *Id.*

42. For citations see R. BERGER, *GOVERNMENT BY JUDICIARY* 27-31 (1977).

43. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866)(emphasis added).

44. *Id.* at 1361, 1366. See text accompanying note 163 *infra*. Justice Stewart encapsulated this history as follows:

The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights . . . [T]he Senate bill did contain a general provision forbidding "discrimination in civil rights or immunities" preceding the specific enumeration of rights . . . Objections were raised in the legislative debates to the breadth of the rights of racial equality that might be encompassed by a prohibition so general . . . [A]n amendment was accepted [in the House] striking the phrase from the bill.

*Georgia v. Rachel*, 384 U.S. 780, 791 (1966). In *United States v. Wheeler*, 254 U.S. 281, 294 (1920), Chief Justice White stated:

[T]he Constitution plainly intended to preserve and enforce the limitations as to discrimination imposed upon the States by Article IV of the Articles of Confederation . . . The text of Article IV, § 2 of the Constitution makes manifest that it was drawn with reference to the corresponding clause of the Article of Confederation and was intended to perpetuate its limitations.

45. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866)(emphasis added).

46. See text accompanying note 175 *infra*. See also R. BERGER, *GOVERNMENT BY JUDICIARY* 23 n.12 (1977), for additional citations. Curtis misstates my position: "[Berger suggests] that the fourteenth amendment was drafted *only* to cure lack of congressional power to pass the Civil Rights Bill. . . ." Curtis, *supra* note 4, at 97 (emphasis added). That was one ground; the other was to safeguard the Act against repeal by a subsequent Congress. R. BERGER, *GOVERNMENT BY JUDICIARY* 23 n.12 (1977). See also text accompanying notes 173-75 *infra*.

47. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

48. CONG. GLOBE, 39th Cong., 1st Sess. 2883 (1866). Thayer "approved of" Bingham's proposed amendment "in which he offers to put this protection [enumerated in the Civil Rights Bill] substantially into the Constitution." *Id.* at 1153.

proposed the Civil Rights Bill "to exercise precisely the powers which the [Bingham] amendment was intended to confer."<sup>49</sup> Harry Flack, a devotee of a broad construction of the amendment, wrote, "nearly all said it was but an incorporation of the Civil Rights Bill . . . , there was no controversy as to its purpose and meaning";<sup>50</sup> I found no contradictory remarks in the records. Flack was echoed by others.<sup>51</sup> In *Reiche v. Smythe*,<sup>52</sup> the Court held that if two acts are *in pari materia* "it will be presumed that if the same word be used in both, and a special meaning were given in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention."<sup>53</sup>

That the particularization of the Act was incorporated in the "privileges or immunities clause" was the holding of Justice Bradley in 1870: "[T]he civil rights bill was enacted at the same session, and but shortly before the presentation of the fourteenth amendment . . . . [It] was in *pari materia*; and was probably intended to reach the same object . . . . [T]he first section of the bill covers the same ground as the fourteenth amendment."<sup>54</sup> What Bradley thought "probable" was in fact the framers' view that Act and amendment were identical. Led by Justice Field, the four dissenters in the *Slaughter-House Cases*<sup>55</sup> asked, "What then are the privileges and immunities which are secured against abridgement by the States?"<sup>56</sup> They answered, "[I]n the first section of the Civil Rights Act Congress has given its interpretation to these terms . . . [including] the right 'to make and enforce contracts [etc.]'"<sup>57</sup> Although the majority of the Court took an even narrower view of the clause, concluding that it referred only to the privileges and immunities of a citizen of the United States as distinguished from those of a state citizen, it yet stated in comparing article IV and the fourteenth amendment that "[t]here can be but little question that . . . the privileges and immunities intended are the same in each [case]."<sup>58</sup> This history, to my mind, is so clear as to leave no room for

49. *Id.* at 2802.

50. H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 81 (1908).

51. Howard Jay Graham, an ardent activist, wrote that "[v]irtually every speaker in the debates on the Fourteenth Amendment—Republican and Democrat alike—said or agreed that the Amendment was designed to embody or incorporate the Civil Rights Act." H. GRAHAM, *EVERYMAN'S CONSTITUTION* 291 n.73 (1968). For similar remarks by Alexander Bickel, Jacobus tenBroek, and Benjamin Kendrick, see R. BERGER, *GOVERNMENT BY JUDICIARY* 23 n.13 (1977). See also text accompanying notes 173–76 *infra*. Against such facts compare Curtis' statement that "*Berger attempts to tie the privileges and immunities clause of the fourteenth amendment to the Civil Rights Bill and to establish their complete identity*," Curtis, *supra* note 4, at 87 (emphasis added), ignoring the unanimous view that they were identical.

52. 80 U.S. (13 Wall.) 162 (1871).

53. *Id.* at 165. In 1871 Charles Willard of Vermont said of the first section of the Civil Rights Act: "This section, it should be remembered, was enacted by the same Congress which recommended the adoption of the fourteenth amendment, and is, therefore, the best possible statement of what that amendment was intended to secure . . ." CONG. GLOBE, 42d Cong., 1st Sess., App. 189 (1871).

54. *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing Co.*, 15 F. Cas. 649, 655 (C.C.D. La. 1870)(No. 8,408).

55. 83 U.S. (16 Wall.) 36 (1872).

56. *Id.* at 96 (Field, J., dissenting).

57. *Id.*

58. *Id.* at 75.

the view that the "privileges or immunities" clause is "vague" or "inscrutable."

Curtis assails this account because "some of Berger's own quotations refute his view. He quotes Trumbull, the bill's sponsor, as saying: '[C]itizens of the United States' have 'fundamental rights' . . . *such as* the rights enumerated in this bill."<sup>59</sup> This was a compressed restatement of Trumbull's earlier explanation, when commenting on the privileges and immunities of article IV. After summarizing the Maryland and Massachusetts decisions, which Curtis ignores, and the 1827 case of *Corfield v. Coryell*, Trumbull said of the latter decision on circuit by Justice Bushrod Washington:

[H]e enumerates the very rights . . . *which are set forth* in the first section of this bill . . . . This judge *goes further* than the bill under consideration . . . . The great fundamental rights *set forth* in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. *These* are the very rights that are set forth in this bill . . . .<sup>60</sup>

The particularized "great fundamental rights" leave no crevices into which still other rights may be poured; a broader construction is foreclosed by Martin Thayer's flat assertion that the enumerated particulars preclude extension "beyond the particulars which have been enumerated."<sup>61</sup> Against this specific and limited enumeration, it is idle to dwell on Washington's rambling 1827 "dictum," which conferred the right to vote on out-of-state transients while denying them the right to dredge for oysters.<sup>62</sup> It remains to be said that in 1871 Trumbull explained that the "privileges or immunities" clause is "a repetition of a provision [article IV] as it before existed . . . . The protection which the Government affords to American citizens under the Constitution as it was originally formed is *precisely* the protection it affords to American citizens under the Constitution as it now exists. The fourteenth amendment *has not extended the rights and privileges of citizens one iota*."<sup>63</sup> Article IV, it bears reemphasis, did not of course comprehend the as yet unborn Bill of Rights. As the draftsman of the antecedent "civil rights and immunities" in the Civil Rights Bill and chairman of the Senate Judiciary Committee who

59. Curtis, *supra* note 4, at 86-87.

60. CONG. GLOBE, 39th Cong., 1st Sess. 474-75 (1866)(emphasis added). The reason, as Senator Timothy Howe of Wisconsin, a "pronounced radical," 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1297 (1971), emphasized, was that the South denied "the plainest and most necessary rights of citizenship. The right to hold land . . . , the right to collect their wages by the processes of law when they had earned their wages [this shed light on what the framers had in mind by "due process"], the right to appear in the courts, as suitors for every wrong done them . . . ." CONG. GLOBE, 39th Cong., 1st Sess., S. App. 219 (1866).

61. See text accompanying notes 40-41 *supra*.

62. For a detailed analysis of *Corfield*, see R. BERGER, GOVERNMENT BY JUDICIARY 34, 35 (1977). Notwithstanding the confining Trumbull and Thayer explanations, Curtis prefers to rely on the 1827 *Corfield* dictum, saying, "The reference to specific rights includes the following sentence not quoted by Berger: 'These, and many, other rights which might be mentioned, [including the right to vote specifically rejected by Trumbull] are strictly speaking, privileges and immunities.'" Curtis, *supra* note 4, at 87. When *Corfield* was cited in 1871, Charles Willard observed, "There is, however, a far higher and better authority for a definition of the rights which belong to a citizen of the United States in the first section of the 'civil rights bill.'" CONG. GLOBE, 42d Cong., 1st Sess., App. 189 (1871).

63. CONG. GLOBE, 42d Cong., 1st Sess. 576 (1871)(emphasis added).

explained its meaning in unequivocal terms, Trumbull's views carry great weight, and as will appear, they were before long unmistakably confirmed.

Despite the foregoing evidence, Curtis refers to "Berger's premise, that a narrow understanding of the intent of the framers must set the maximum, not the minimum, scope of constitutional rights,"<sup>64</sup> oblivious to Thayer's emphasis that the enumerated particulars preclude an extension "beyond the particulars which have been enumerated."<sup>65</sup>

### III. CURTIS' AUTHORITIES

#### A. Republican Ideas

Curtis' strange theories of construction alone should suffice to shed doubt on his conclusions: The "fourteenth amendment can be best understood in light of certain *unorthodox* constitutional ideas held by a *number* of Republicans."<sup>66</sup> "Prior to the Civil War a *few* anti-slavery lawyers and other leaders developed some *remarkable* constitutional theories" which "are helpful in understanding the 'intent' of the framers of the fourteenth amendment."<sup>67</sup> The "process by which these ideas filtered from a relatively small group of anti-slavery activists to a much larger group of Republican politicians has never been fully explored. By 1866, however, modifications of these ideas were held by a number of Republican congressmen."<sup>68</sup> Let that be assumed and such pre-war abolitionism is yet not the test of "intent" of the 39th Congress. That is to be measured by what was said and happened in that Congress.

The fact is, as will appear, that the small group of radical dissentients exercised precious little influence on the framers.<sup>69</sup> Curtis seems incapable of weighing evidence, of appreciating that in evaluating legislative history, a great preponderance outweighs opposition remarks to the contrary. Thus, he charges Berger with failing "to abide by standards which he sets for interpretation of the intentions of the framers of the constitutional provision," e.g., that a commentator must not ignore "an influential body of contrary opinion," whereas "statements by opponents cannot be relied on as indicative of legislative intent."<sup>70</sup> Curtis overlooks Supreme Court holdings that opposition

64. Curtis, *supra* note 4, at 47. See Kelly's comment on Wilson in note 81 *infra*.

65. See text accompanying notes 40-41 *supra*.

66. Curtis, *supra* note 4, at 45 (emphasis added).

67. *Id.* at 54 (emphasis added).

68. *Id.* at 55 (emphasis added). Curtis notes that "[t]hese ideas were not in accordance with accepted Supreme Court doctrine." *Id.* at 55.

69. While the amendment was up for ratification, Senator John Sherman told a Cincinnati audience in September, 1866, that "we defeated every radical proposition in it." J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 167 (1956). Professor James states that it was a "rather consistent practice . . . to disavow Radical influence in the framing of the congressional proposal." *Id.* An activist apologist, Alfred Kelly, conceded that "the commitment to traditional state-federal relations meant that the *radical Negro* reform program could be *only a very limited one*." More fully quoted in R. BERGER, *GOVERNMENT BY JUDICIARY* 242 (1977).

70. Curtis, *supra* note 4, at 47 n.10.

statements are *not evidence* of the intent of the framers, for which we must look to committee reports, statements by committee members and other proponents of the enactment.<sup>71</sup> Commentators may have "contrary opinions," for example, of whether dissenters were in fact in the minority, but that cannot convert minority views into *evidence of intent*. Of the same order is Curtis' citations of opposition in 1859 by "Bingham, together with a number of his fellow Republicans," to the admission of Oregon because its Constitution barred Negroes from entry into the State,<sup>72</sup> ignoring that Oregon was admitted over their objections.<sup>73</sup> Then, too, the fire that burned in Bingham in 1859 had been dampened by July, 1866, when he led the fight for readmission of Tennessee notwithstanding its failure to provide for Negro enfranchisement. He prevailed over his radical brethren by a vote of 125 to 12,<sup>74</sup> intoning "We are all for equal and exact justice . . . [but] justice for all is not to be secured in a day."<sup>75</sup> Presumably, he sniffed what was in the wind, for in April, 1867, his own Ohio state overwhelmed a Negro suffrage amendment by a plurality of 40,000!<sup>76</sup>

Again, Curtis cites some glowing references to due process in pre-Civil War Republican platforms, but concedes that "[i]t is more *difficult to show* that Republicans read the original privileges and immunities clause to require the states to obey the Bill of Rights."<sup>77</sup> By way of exploring the issue he refers to a Bingham 1856 speech anent a Kansas territorial act:

Kansas was a federal territory. Bingham had no question that the guarantees of the Bill of Rights applied to it. Because the legislation criticized by Bingham was identical to that passed by a number of states, however, his comments also indicate how well he thought the states were protecting the basic liberties of their citizens.<sup>78</sup>

Recognition that the Bill of Rights applied to a federal territory does not facilitate incorporation of the Bill of Rights in the "privileges and immunities" clause, especially since Bingham objected in 1866 to "civil rights" as "oppressive" and an invasion of states' rights.<sup>79</sup> Curtis also summons an 1859

71. "An unsuccessful minority cannot put words into the mouths of the majority." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288 (1956). Remarks made "other than by persons responsible for the preparation or the drafting of the bill are entitled to little weight . . . This is especially so with regard to statements of legislative opponents . . ." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1976).

72. Curtis, *supra* note 4, at 58-60.

73. The Oregon Constitution of 1857, which contained a provision barring Negro immigration, article XVIII, Sec. 4(5), was approved by the Act of February 14, 1859. Its preamble recited "Whereas the people of Oregon have framed, ratified, and adopted a constitution of State government which is republican in form, and in conformity with the Constitution of the United States and have applied for admission into the Union . . ." 8 W. SWINDLER, *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 219, 221 (1979).

74. For details see R. BERGER, *GOVERNMENT BY JUDICIARY* 56, 79, 95 (1977).

75. *CONG. GLOBE*, 39th Cong., 1st Sess. 3979 (1866). Negro suffrage had to wait for the fifteenth amendment because "in 1866, Republican leaders thought that would not be practical politics." 6 C. FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 1262 (1971).

76. Woodward, *Seeds of Failure in Radical Race Policy*, in *NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION* 125, 137 (H. Hyman ed. 1966).

77. Curtis, *supra* note 4, at 57.

78. *Id.*

79. See text accompanying note 43 *supra*.

James Wilson utterance condemning Southern denials of free speech and press.<sup>80</sup> But these were conspicuously absent from his summation in 1866 of the goals of the Civil Rights Bill: "I understand civil rights to be simply the absolute rights of individuals—such as 'The right of personal security, the right of personal liberty, and the right to acquire and enjoy property!'"<sup>81</sup> This was the exclusive focus of the framers, who particularized and enumerated the protection to be offered these rights by the bill, making no provision whatsoever for free speech and the like.<sup>82</sup>

### B. Abolitionist Influence

At the heart of Curtis' analysis lies the erroneous assumption that the pre-war, anti-slavery zeal was equally influential in shaping the post-war enactments. Hence, he indicts my "faulty reading of history. Berger mistakenly concludes that Republicans in 1866 were hostile to abolitionist ideas—a puzzling conclusion since the abolition of slavery was the great achievement of the Republican party."<sup>83</sup> Curtis does not understand that the pre-Civil War speeches in the drive to abolish slavery no longer reflected the post-war feelings of the North.<sup>84</sup> William Lloyd Garrison, the indomitable abolitionist, "accurately sensed the new mood when he declared that antislavery societies served no useful purpose now that slavery was abolished and closed down the *Liberator*."<sup>85</sup> And he "came out against the forcing of Negro suffrage upon the South."<sup>86</sup> The eradication of inequality, C. Vann Woodward observed, required a "revolution in the North,"<sup>87</sup> a revolution for which most Republicans were unprepared. Least of all were they prepared to go beyond prohibition of *discrimination* with respect to the *enumerated rights* to a surrender of state control over internal affairs in the absence of discrimination, an inexplicable shift of goals. The prevailing congressional mood was voiced by

80. Curtis, *supra* note 4, at 61.

81. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866). Consider, too, Wilson's assurance that the Civil Rights Bill did not comprehend school desegregation or service on juries. *Id.* Alfred Kelly stated that Wilson "declared for a narrow interpretation of the measure in unequivocal terms." Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1066 (1956). For a more detailed discussion of Wilson's views, see text accompanying notes 148-51 *infra*.

82. See text accompanying notes 158-63, 166-67 *infra* (remarks of Lawrence and Thayer).

83. Curtis, *supra* note 4, at 100. "Whereas the Thirteenth Amendment had been generally popular among Northerners, the Civil Rights Bill [of 1866], as James G. Blaine recalled, was legislation 'of a different type,' which particularly in the Middle and Western States, touched upon deep feelings." 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1168 (1971). The suggestion that Negroes should be treated as equals of white men woke some of the deepest and ugliest fears in the American mind. D. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 202, 252 (1970).

84. Fear that the emancipated slaves would flock North in droves and compete with white labor alarmed the North. R. BERGER, GOVERNMENT BY JUDICIARY 12 (1977). The letters and diaries of Union soldiers, Woodward notes, reveal an "enormous amount of antipathy towards Negroes." *Id.* "Racism, David Donald remarked, 'ran deep in the North,' and the suggestion that 'Negroes should be treated as equals to white men woke some of the deepest and ugliest fears in the American mind.'" *Id.* A campaign for political and social equality, Senator James Doolittle of Wisconsin confessed, was "frightening" to the Republicans who "represented States containing the despised and feared negroes." *Id.* at 15.

85. D. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 233 (1970).

86. F. BRODIE, THADDEUS STEVENS: SCOURGE OF THE SOUTH 230-31 (1959).

87. C. WOODWARD, THE BURDEN OF SOUTHERN HISTORY 79 (1960).

James Patterson of New Hampshire in a discussion of the fourteenth amendment, for which he voted. "I am opposed," he said, "to any law discriminating against them [blacks] in the security and protection of life, liberty, person, property, and the proceeds of their labor . . . . Beyond this I am not prepared to go . . . ." <sup>88</sup>

Curtis' emphasis on abolitionist influence, on "anti-slavery activists," <sup>89</sup> loses sight of anti-abolitionist feeling in the North and in the 39th Congress. Professor C. Vann Woodward noted that during the war years "[t]he great majority of citizens in the North still abhorred any association with abolitionists . . .," <sup>90</sup> scarcely fertile soil for the sowing of abolitionist ideology. Senator William Fessenden, chairman of the Joint Committee on Reconstruction, and Senator James Grimes of Iowa held "the extreme radicals" in "abhorrence." <sup>91</sup> Senator Edward Cowan of Pennsylvania ridiculed the notion that the "antipathy that never sleeps, that never dies, that is inborn, down at the very foundation of our natures," is "to be swept away by half-a-dozen debates and the reading of half-a-dozen reports from certain abolitionist societies." <sup>92</sup> Thaddeus Stevens, the radical leader, was "hated" by many Republicans. In the Joint Committee "[h]is own measures were more voted against than voted for." <sup>93</sup> His Senate counterpart, Charles Sumner, was "distrust[ed]" when not "detested." <sup>94</sup> Trumbull scathingly commented in 1870 that "it has been over the idiosyncracies, over the unreasonable propositions, over the impracticable measures of . . . [Sumner] that freedom has been proclaimed and established." <sup>95</sup>

The fact is, as Professor Michael L. Benedict has shown, that a Republican conservative-moderate coalition "enacted their program with the sullen acquiescence of some radicals and over the open opposition of many." <sup>96</sup> This is disingenuously rendered by Curtis as "*Berger argues* that a Republican centrist-conservative coalition was in control of the Thirty-Ninth Congress and that abolitionist ideas were anathema to these men." <sup>97</sup> Let Curtis quarrel with Benedict, who researched the details, and who is in accord with Professor David Donald. <sup>98</sup> And Benedict is confirmed by the defeat by a vote of

88. CONG. GLOBE, 39th Cong., 1st Sess. 2699 (1866). For similar remarks see R. BERGER, GOVERNMENT BY JUDICIARY 125-26, 170 (1977).

89. Curtis, *supra* note 4, at 51, 53-55.

90. C. WOODWARD, THE BURDEN OF SOUTHERN HISTORY 73 (1960).

91. B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 257 (1914).

92. CONG. GLOBE, 39th Cong., 1st Sess. 343, 344-45 (1866). Howard Jay Graham, an activist, wrote, "the early anti-slavery usage and the racial-humanitarian expansion and coverage before the Civil War had got forgotten and eclipsed during Reconstruction." H. GRAHAM, EVERYMAN'S CONSTITUTION 264 (1968).

93. F. BRODIE, THADDEUS STEVENS: SCOURGE OF THE SOUTH 259, 268 (1959).

94. D. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 248 (1970).

95. M. BENEDICT, A COMPROMISE OF PRINCIPLE 39 (1974).

96. *Id.* at 210.

97. Curtis, *supra* note 4, at 79-80 (emphasis added). Chairman Fessenden "was unwilling to allow the process of reconstruction to be controlled by the radicals." B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 174 (1914).

98. R. BERGER, GOVERNMENT BY JUDICIARY 237 (1977). Curtis argues, "The fact that radicals and moderate Republicans were divided over black suffrage does not prove any similar division existed over the Bill of Rights." Curtis, *supra* note 4, at 93. Yet Charles Sumner stated during the debate on the fifteenth amendment

125 to 12 in the House and 34 to 4 in the Senate of radical insistence that Tennessee provide for Negro suffrage,<sup>99</sup> and this after the submission of the fourteenth amendment to the ratifiers. It is such lopsided votes, not what abolitionists had said outside the halls of Congress, that establish the framers' intent.

Notwithstanding the detailed evidence of anti-abolitionist sentiment in the 39th Congress, Curtis states, "According to Berger, not only were these Congressmen hostile to abolitionist ideas, they were influenced by 'Negrophobia.'" <sup>100</sup> This was "according" to George Julian of Indiana (and others), who lamented in the House, "[T]he real trouble is that *we hate the Negro*";<sup>101</sup> and "according" to the radical Senator from Massachusetts, Henry Wilson, who stated in the Senate in January, 1869, "There is not today a square mile in the United States where the advocacy of the equal rights and privileges of these colored men has not been in the past and is not now unpopular."<sup>102</sup> In his study of the fifteenth amendment, Professor William Gillette observed that Congressmen ran the risk of "drowning by swimming against the treacherous current of racial prejudice and opposition to Negro suffrage."<sup>103</sup> "Still," Curtis ironically remarks, "they were willing to invade states' rights, as conventionally understood, to protect blacks whom they supposedly disliked."<sup>104</sup> Having freed the slaves at the cost of a bitter war, the North was not minded to permit the South to reduce them once more to serfdom through the medium of the Black Codes, to expose them to "damnable violence," "wrong and outrage," "fiendish oppression," "barbarous cruelties."<sup>105</sup> As William Lawrence, who reiterated that blacks were entitled to personal security, personal liberty, and the right to acquire property, declared, "It is idle to say that a citizen shall have the right to life, yet to deny him the right to labor whereby alone he can live. It is a mockery to say that a citizen may have a right to live, and yet to deny him the right to make a contract to secure the privileges and rewards of labor." "These," he said, were the "necessary incidents of these absolute rights."<sup>106</sup> The aim of the framers was to secure this narrow enclave of rights in order to ensure the right to exist free, to

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that "if the clause [Fourteenth] is inadequate to protect persons in their . . . right to vote, it is inadequate to protect them in anything." CONG. GLOBE, 40th Cong., 3d Sess. 1008 (1869). Wilson assured the framers that school segregation was untouched by the Civil Rights Bill. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866). See Senator Sherman's remark in note 69 *supra*. Efforts to bar all discriminations were repeatedly rejected. R. BERGER, GOVERNMENT BY JUDICIARY 163-64 (1977). See text accompanying note 115-16 *infra*.

99. R. BERGER, GOVERNMENT BY JUDICIARY 59-60, 79, 95 (1977). Sumner's proposal "that all persons were 'equal before the law, whether in the court room or at the ballot-box' received 8 yeas to 39 nays." 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1264 (1971).

100. Curtis, *supra* note 4, at 80 (emphasis added).

101. CONG. GLOBE, 39th Cong., 1st Sess. 257 (1866). For similar statements see R. BERGER, GOVERNMENT BY JUDICIARY 13 (1977). See also text accompanying note 97 *supra*.

102. CONG. GLOBE, 40th Cong., 3d Sess. 672 (1869).

103. W. GILLETTE, THE RIGHT TO VOTE 25 (1965).

104. Curtis, *supra* note 4, at 80. This profound insight is repeated in Curtis' conclusion. *Id.* at 100.

105. R. BERGER, GOVERNMENT BY JUDICIARY 25-26 (1977).

106. CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).

prevent oppression, no more, as the unmistakable denial of suffrage<sup>107</sup> alone should demonstrate. Repeatedly, attempts to abolish *all* discriminations were rejected.<sup>108</sup> At the outset, Stevens submitted to the Joint Committee a proposal that "*all* laws, state and federal, shall operate impartially and equally on all persons . . ." But in summing up in favor of the fourteenth amendment, he sadly confessed that while he had hoped to remodel "all our institutions as to have them freed from every vestige of . . . inequality of rights . . . , that *no distinction* would be tolerated . . . , [t]his bright dream has vanished."<sup>109</sup> The Committee Chairman, Senator Fessenden, explained that "[w]e cannot put into the Constitution . . . an entire exclusion of all class distinctions."<sup>110</sup> It is characteristic of Curtis' one-sided analysis that he should ignore such statements, which are part of the legislative history of the amendment, and cite instead Fessenden's 1859 opposition to the admission of Oregon,<sup>111</sup> which his fellows overruled.

Curtis is taken in by and pins his case to Bingham's "citizens of the United States." So he states:

The debates show, however, that Bingham and other framers of the fourteenth amendment relied on a reading of the privileges and immunities clause of article IV, section 2, by which it protected a body of national privileges and immunities of citizens of the United States, including those in the Bill of Rights. This reading may well have been incorrect. It does not matter, however, because in redrafting Bingham's first proposal, the amendment was rewritten to secure privileges and immunities of a *citizen of the United States* from state abridgment.<sup>112</sup>

That revision had nothing at all to do with broadening the scope of privileges and immunities. Although the Negro had been emancipated, the *Dred Scott* decision threw a shadow over his citizenship; the matter was a source of interminable controversy. So the freedman were made "citizens of the United States" by the Civil Rights Bill because, as Senator Trumbull explained, he wished "to end that very controversy, whether the negro is a citizen or

107. Lusky, Essay Review, 6 HASTINGS CONST. L.Q. 403, 406 (1979), refers to "Justice Harlan's irrefutable and unrefuted demonstrations in dissent that the Fourteenth Amendment was not intended to protect the right to vote." See also Abraham, Essay Review, 6 HASTINGS CONST. L.Q. 467, 468 (1979); Mendelson, Essay Review, 6 HASTINGS CONST. L.Q. 437, 452-53 (1979); Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603, 606-07 (1978); Nathanson, Book Review, 56 TEX. L. REV. 579, 581 (1978).

108. R. BERGER, GOVERNMENT BY JUDICIARY 163-64 (1977).

109. B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 46 (1914); CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866) (emphasis added).

110. CONG. GLOBE, 39th Cong., 1st Sess. 705 (1866). See also statement of William Windom of Minnesota, *id.* at 1159; statement of James Patterson in text accompanying note 88 *supra*. In an analogous situation the Court, per Justice Douglas, stated, "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." *Monroe v. Pape*, 365 U.S. 167, 191 (1961). By the same token, the words "equal protection" cannot embrace all discriminations. The Court itself held that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

111. Curtis, *supra* note 4, at 60.

112. *Id.* at 86. That was not the view of the Supreme Court. See text accompanying note 58 *supra*.

not."<sup>113</sup> Very late in the consideration of the amendment, Senator Howard proposed the same formula, making one born in the United States a citizen thereof, stating that this "settles the great question of citizenship and removes all doubts as to what persons are or are not citizens of the United States."<sup>114</sup> Justice Miller likewise referred to *Dred Scott* and said, "To remove this difficulty primarily . . . the first clause of the first section was framed . . . . That its main purpose was to establish the citizenship of the negro can admit of no doubt."<sup>115</sup> Patently, settlement of *who* is entitled to the protection of the amendment sheds little light on *what rights* he is being granted.<sup>116</sup> Throughout, Curtis is hampered by his inability to grasp such distinctions.<sup>117</sup>

### C. John Bingham

Curtis relies on John Bingham, draftsman of the fourteenth amendment, to demonstrate that it "was designed to make the Bill of Rights enforceable as a limit on the states," and considers that "Bingham's remarks are a serious problem for Berger's interpretation. To meet this problem Berger sets out to prove that Bingham was a legal moron."<sup>118</sup> Such gross exaggerations vitiate Curtis' credibility. Bingham, I stated, "was a muddled thinker, given to the florid, windy rhetoric of a stump orator, liberally interspersed with invocations to the Deity, not to the careful articulation of a lawyer who addresses himself to great issues."<sup>119</sup> That view was shared by Charles Fairman and Alexander Bickel. Fairman labelled Bingham "an ardent rhetorician, not a man of exact knowledge or clear conception or accurate language."<sup>120</sup> Bickel charitably stated that Bingham was "not normally distinguished for precision of thought and statement."<sup>121</sup> Since Bingham is the linchpin of Curtis' argument, it needs to be shown that his colleagues could not have relied on his confused misstatements.

His draft provided for "equal protection in the rights of life, liberty and property," and he stated that it "stands in the very words of the Constitution," that "[e]very word of the proposed amendment is today in the Constitution, . . . exactly in the language of the Constitution."<sup>122</sup> But the words

113. CONG. GLOBE, 39th Cong., 1st Sess. 1285 (1866). For similar remarks see R. BERGER, GOVERNMENT BY JUDICIARY 44 (1977). See also text accompanying note 144 *infra*.

114. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

115. 83 U.S. (16 Wall.) 36, 73 (1972). See text accompanying note 144 *infra*.

116. Compare text accompanying note 63 *supra*.

117. Thus, to prove a claim for protection against state interference, Curtis lumps with his pre-War references to guarantees of free speech a "bill to prohibit postmasters from mailing any publication 'touching on the subject of slavery,'" which Daniel Webster opposed because "it violated the first and fourth amendments." Curtis, *supra* note 4, at 54. A postmaster unquestionably fell within the coverage of the Bill of Rights, for that applied to the federal government. See also text accompanying note 78 *supra* (Curtis' treatment of the territory of Kansas).

118. Curtis, *supra* note 4, at 88.

119. R. BERGER, GOVERNMENT BY JUDICIARY 145 (1977).

120. 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 462 (1971).

121. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 25 (1955). Bingham "used ringing rhetoric as a substitute for rational analysis." Mendelson, *Mr. Justice Black's Fourteenth Amendment*, 53 MINN. L. REV. 711, 716 (1969).

122. CONG. GLOBE, 39th Cong., 1st Sess. 1034, 1095 (1866).

“equal protection” were *not* in the Constitution, and such glaring inexactitude impeaches his testimony. Bingham was unable to discriminate, to understand what he read. He translated the provision of *article IV* that “the citizens of *each State* shall be entitled to all privileges and immunities of citizens in the several States” as “the provisions *in the bill of rights* that citizens of *the United States* shall be entitled to all the privileges and immunities of citizens of the United States . . . .”<sup>123</sup> The Bill of Rights contains no privileges and immunities provision; that is found in *article IV*. Nor did his fellows confuse the rights of citizens of a state with those of a citizen of the United States. They expressly distinguished between the two in the fourteenth amendment: “All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside.” Manifestly we cannot attribute to the framers Bingham’s obliteration of a distinction which they deliberately maintained.

Bingham veered as crazily as a rudderless ship.<sup>124</sup> On February 26th, 1866, he read the due process clause of the fifth amendment, and stressed that his own proposed “amendment does not impose upon any State . . . any obligation which is not now enjoined upon them by the very letter of the Constitution.”<sup>125</sup> On February 28th he said,

I repel the suggestion . . . that the committee . . . seek[s] in any form to . . . take away from any State any right that belongs to it . . . . The proposition . . . is simply . . . to arm the Congress . . . with the power to *enforce* the bill of rights as it stands in the Constitution today. It “hath that extent—no more.”<sup>126</sup>

Thereby he implied that the Bill of Rights already bound the states, that only a power of enforcement was lacking. Then he quoted *Barron v. Baltimore* to the effect that the fifth amendment is *not* “applicable to the States,” and asserted that “although as ruled the existing amendments are not applicable to and do not bind the States, they are nevertheless to be enforced and observed in the States by the grand utterance of that immortal man,”<sup>127</sup> Daniel Webster, whose quoted words have nothing to do with the case. Are we to conclude that the framers exalted a Webster generality over a holding by Chief Justice Marshall?

123. *Id.* at 1089, 1095 (emphasis added). Fairman cites a number of other instances where Bingham was “badly mistaken,” among them, “Bingham was deep in error in treating *Barron v. Baltimore* as a ‘decision showing that the power of the Federal Government to enforce in the United States the bill of rights . . . had been denied.’ What the Court actually held was ‘that the provision in the fifth amendment . . . is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to legislation of the States . . . .’” 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1289 n.263 (1971).

124. My remarks about Bingham are misrepresented by Curtis; “It is a mark of the weakness of Berger’s analysis that he is forced to rely repeatedly on the hypothesis that the framers did not know what they were doing.” Curtis, *supra* note 4, at 98 (emphasis added). The passages he cites deal with Bingham alone.

125. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

126. *Id.* at 1088 (emphasis added).

127. *Id.* at 1089-90. Curtis tells us that “Bingham wrote this version of the amendment on the assumption that his constitutional theories and those of a number of his colleagues, not the decisions of the Supreme Court, were the law of the land.” Curtis, *supra* note 4, at 66.

On March 9th Bingham noted that "the bill of rights, as has been solemnly ruled by the Supreme Court of the United States, does not limit the power of the States . . . ," and that

the care of the property, the liberty, and the life of the citizen . . . is in the States, and not in the federal government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to . . . punish all violations by State officers of the bill of rights.<sup>128</sup>

If the care of these rights "is in the States," how do state officers violate the Bill of Rights, which admittedly "does not limit the power of the States?" How can his statements be reconciled with the tremendous turnover of control of state criminal administration, of pornography and the like that incorporation of the Bill of Rights entails? Recall his objection that the "civil rights and immunities" of the Civil Rights Bill was "oppressive," that it would strike down "every State constitution which makes a discrimination on account of race and color in *any* of the civil rights of the citizen,"<sup>129</sup> and ask how the framers could account for Bingham's inclusion of the Bill of Rights in the "privileges or immunities" clause.

His remarks are rife with contradiction: "I do not admit . . . that any State has a right to disfranchise any portion of the citizens of the United States";<sup>130</sup> but later he stated "we all agree . . . that the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States."<sup>131</sup> If the franchise is a privilege of "a citizen of the Republic" it cannot be "exclusively under the control of the States." After the submission of the amendment to the ratifiers, he led the fight for readmission of Tennessee despite radical objections that its constitution excluded suffrage for Negroes.<sup>132</sup> Such is the evidence that Curtis dismisses as "supposed 'contradictions.'"<sup>133</sup>

In truth, as Professor Stanley Morrison, concurring with Fairman, stated, Bingham's "many statements . . . are so confused and conflicting as to be of little weight."<sup>134</sup> This goes beyond the issue of credibility, which courts test by inconsistent statements. It poses the question: upon which of his conflicting explanations did the framers rely? Legislative history cannot be erected

128. CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866).

129. See text accompanying note 43 *supra*. The North would stare uncomprehendingly at an unlimited catalog of rights that would be applicable to it, for as Senator Howe stated, "[N]o abridgment of the privileges and immunities of citizens of the United States was tolerated in any of the States represented in Congress." CONG. GLOBE, 39th Cong., 1st Sess., S. App. 219 (1866). See note 226 *infra* (statement of Trumbull).

130. CONG. GLOBE, 39th Cong., 1st Sess., App. 57 (1866).

131. *Id.* at 2542.

132. For details see R. BERGER, GOVERNMENT BY JUDICIARY 56, 79, 95 (1977).

133. Curtis, *supra* note 4, at 89. For yet other Bingham "contradictions," see text accompanying notes 202-12 *infra*.

134. Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 140, 161 (1949). Fairman concludes: "When one studies Bingham carefully one learns that many of his utterances cannot be accepted as serious propositions." 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1289 (1971).

on such shifting sands. Against this, balance the chorus of agreement as to the fact that the Civil Rights Act and Amendment were "identical,"<sup>135</sup> that the Act enumerated a narrow group of rights securing the "person and property" of the freedmen, with no reference whatever to the Bill of Rights or any one of its amendments, which enumeration, Thayer unequivocally assured the framers, was exclusive.<sup>136</sup>

To discredit my evidence of Bingham's contradictions, Curtis first states that "Bingham's reputation as a lawyer was excellent."<sup>137</sup> A lawyer who is forced to invoke evidence of good reputation confesses that his defense on the merits is inadequate. Next he points to my own alleged contradictions:

At times Professor Berger views the first version of Bingham's amendment . . . as a prototype of the amendment finally adopted. When the Bill of Rights is concerned, however, Berger's "prototype" becomes simply a rejected proposal.

The truth, of course, is that the language of the "second" proposal was more effectively designed to make the Bill of Rights limit the states than the prototype. The second version was an explicit limitation on the states and specifically secured all privileges and immunities of citizens of the United States against abridgment by a state.<sup>138</sup>

"The truth" is that Curtis utterly misreads the record. Bingham's "prototype," i.e., the primitive original, provided that "[t]he 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 . . . ."<sup>139</sup> This met sharp opposition because, as Giles Hotchkiss of New York explained, though he was ready "to provide that no State shall *discriminate* between its citizens," he was "unwilling" to "authorize Congress to *establish uniform laws* throughout the United States . . . [for] the protection of life, liberty and property."<sup>140</sup> His New York colleague, Judge Robert Hale, objected that this "is not a mere provision that when the States undertake to give protection which is unequal Congress may equalize it; it is a grant of power . . . to legislate for the protection of life, liberty and property . . . ."<sup>141</sup> Henry Raymond, an influential New York Republican who voted for the fourteenth amendment, summed up: the Bingham prototype, "encountering considerable opposition . . . , was finally postponed,"<sup>142</sup> and never resuscitated. Notwithstanding this forthright rejection of congressional authority to legislate for the protection of life, liberty, and property—the subject of the fifth amendment—Curtis would extract a general purpose to surrender state control of the broad spec-

135. See text accompanying notes 46–53 *supra* and notes 173–78 *infra*.

136. See text accompanying note 41 *supra*.

137. Curtis, *supra* note 4, at 88–89.

138. *Id.* at 90.

139. CONG. GLOBE, 39th Cong., 1st Sess. 813, 1034 (1866).

140. *Id.* at 1095 (emphasis added). For additional citations, see R. BERGER, GOVERNMENT BY JUDICIARY 186 (1977). Curtis acknowledges that "Bingham was here defending himself against the charge that his legislation was designed to allow Congress to take over all subjects of state legislation." Curtis, *supra* note 4, at 90.

141. CONG. GLOBE, 39th Cong., 1st Sess. 1063–64 (1866).

142. *Id.* at 2502.

trum of local administration by making the Bill of Rights applicable to the states. This is the more incredible because the framers' purpose was to prevent *discrimination* with respect to certain privileges, not, as we have seen, to enlarge federal power across the board, whether there was discrimination or not.<sup>143</sup>

Curtis notes that "a number of Republicans . . . rejected *Dred Scott* and instead believed that all free persons born in the United States were citizens of the United States." So "they *explicitly* wrote national citizenship . . . into the fourteenth amendment. Some believed . . . that states could not deprive *persons* of due process." So "they *wrote this limitation* into the fourteenth amendment."<sup>144</sup> Aware that an express enumeration excludes unmentioned particulars,<sup>145</sup> *why did they not "explicitly" write the Bill of Rights into the amendment?* As late as 1868 the Republican platform contented itself with seeking suffrage in the South while "handing Negro suffrage in the North over to the northern states."<sup>146</sup> Are we to conclude that the northern states, though unwilling to give the federal government control of suffrage were ready to surrender control of all matters comprehended by the Bill of Rights, which applied to their own white population?<sup>147</sup>

#### D. Wilson, Lawrence, and Thayer

Curtis also summons James Wilson to his aid, citing him for reliance on the "guarantees of the Bill of Rights, which Wilson considered binding on the states under the privileges and immunities clause."<sup>148</sup> As Curtis notes, Wilson spoke to Bingham's opposition to the Civil Rights Bill, based in part on lack of power. Commenting on Bingham's proposed amendment, Wilson referred to the due process—life, liberty, and property—clause in the Bill of Rights and stated, "[T]hese constitute the *civil rights* . . . and these are the rights to which this bill relates."<sup>149</sup> All unheeding of Wilson's explanations, Curtis cites Wilson's reference to "the great fundamental rights embraced in the bill of rights" but does not ask what were these "fundamental rights"?<sup>150</sup> Citing Kent, Wilson said:

I understand civil rights to be simply the absolute rights of individuals, such as "The right of personal security, the right of personal liberty, and the right to acquire and enjoy property." . . . [T]hese are the rights which this bill proposes to

143. William Lawrence of Ohio said the Civil Rights Bill "does not confer any civil right"; it "does provide that as to certain enumerated civil rights" whatever "may be enjoyed by any shall be shared by all." CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866). See note 226 *infra*.

144. Curtis, *supra* note 4, at 97.

145. See text accompanying note 41 *supra*.

146. W. GILLETTE, THE RIGHT TO VOTE 37 (1965).

147. Alfred Kelly, a perfervid activist, wrote that "the commitment to traditional state-federal relations meant that the radical Negro reform program could be only a very limited one." Kelly, *Comment on Harold M. Hyman's Paper*, in NEW FRONTIERS OF AMERICAN RECONSTRUCTION 40, 55 (H. Hyman ed. 1966).

148. Curtis, *supra* note 4, at 77.

149. *Id.* at 78 (emphasis added).

150. *Id.*

protect . . . . If the States would practice the constitutional declaration, that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States [article IV]," and enforce it, *as meaning* that the citizen has "The right of protection . . . of life and liberty, with the right to acquire and possess property . . . ." [the bill would be unnecessary].<sup>151</sup>

In short, Wilson (mistakenly) pointed out that Kent's absolute rights were already protected against the states by the fifth amendment's due process clause,<sup>152</sup> and he stuck closely to the rights enumerated in the Civil Rights Bill. Curtis would deduce from mention of one provision of the Bill of Rights, which was explicitly embodied in the fourteenth amendment, an intention to incorporate the entire Bill of Rights.<sup>153</sup> That was not how Bingham was understood by his fellow radicals. William Higby of California thought the article IV clause and the fifth amendment due process clause constituted "precisely what will be provided" by the Bingham amendment.<sup>154</sup> Another radical, Frederick Woodbridge of Vermont, stated: "It is intended to enable Congress by its enactments when necessary to give a citizen of the United States . . . those privileges and immunities which are guaranteed to him under the Constitution [article IV] . . . that protection *to his property* which is extended [by the due process clause]."<sup>155</sup> Then, too, the Joint Committee's rejection of Bingham's proposal to add the fifth amendment phrase "nor take private property for public use without just compensation"<sup>156</sup> alone is incompatible with blanket adoption of the Bill of Rights.

Among Curtis' pell-mell citations is William Lawrence's interpretation of the article IV "privileges and immunities" to protect "certain 'absolute rights which pertain to every citizen . . .,'" citing "the Bill of Rights due process guarantee as an example of such rights."<sup>157</sup> Lawrence spoke to the Civil Rights Bill and paraphrased its provisions: the right to contract, to sue, and to own property. And like Wilson, he followed Kent in defining "absolute rights" as "[t]he right of personal security, personal liberty, and the right to

151. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866)(emphasis added).

152. Again and again Wilson emphasized that "[t]he citizen is entitled to life, liberty and the right to property"; he rebuked Bingham for insisting that "in the protection of these rights the citizen must depend upon the 'honest purpose of the several States,' and that the General Government cannot interpose its strong right arm to defend the citizen in the enjoyment of life, liberty, and in the possession of property." CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866). He rejected Bingham's insistence that the "civil rights [of the bill] involve *all* the rights that citizens have under the government," that the bill "invades the States to enforce equality of rights in respect to those things which properly and rightfully depend upon State regulation and laws." *Id.* (emphasis added).

Curtis asserts that "Wilson's remarks, however, merely show that he thought Congress already had power under article IV, section 2 and the Bill of Rights to pass the Civil Rights Bill." Curtis, *supra* note 4, at 92. His supporting citations in note 365 are to remarks of Bingham, not Wilson. Nor does the issue of *power* expand the *content* of the Civil Rights Act, which Wilson so carefully defined.

153. Howard Jay Graham noted no one even pretended that *all* the clauses and guarantees of the Bill of Rights ever could or would be enforced against the states. H. GRAHAM, EVERYMAN'S CONSTITUTION 314-15 n.80 (1968).

154. CONG. GLOBE, 39th Cong., 1st Sess. 1054 (1866).

155. *Id.* at 1088 (emphasis added).

156. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 42 (1955).

157. Curtis, *supra* note 4, at 79.

acquire and enjoy property”<sup>158</sup>—Curtis never pauses to inquire how his speaker defined his terms. Then Lawrence directed attention to the due process provision of the Bill of Rights, and emphasized that the right to live is empty without the right to contract for the rewards of liberty.<sup>159</sup> The rights enumerated in the Civil Rights Bill, he said, were the “*necessary incidents* of these absolute rights.”<sup>160</sup> In his allusion to the privileges and immunities of article IV, Lawrence acknowledged that “the courts have by construction *limited the words* ‘all privileges’ to mean only ‘some privileges,’” noting further that they were “confined to those privileges and immunities which are in their nature fundamental . . . , the right of protection of life and liberty, and to acquire and possess property,” i.e., the “absolute rights.”<sup>161</sup> And he said, “conceding, as the courts have held, that the privileges referred to in the Constitution are such as are fundamental civil rights, not political rights, nor those dependent on local law,” they should be enjoyed by all citizens.<sup>162</sup> The “fundamental rights” to which Lawrence referred were the “absolute rights” he had earlier enumerated. That a broader construction of “civil rights” was far from Lawrence’s mind is further confirmed by his mention of the deletion from the Civil Rights Bill of the “civil rights and immunities” clause in deference to Bingham’s objection that “the constitutions of the States are to be abolished by your act,”<sup>163</sup> the effect of which was unmistakably to restrict the Act to the several enumerated categories.

Curtis’ appeal to Martin Thayer is of the same order: “For Thayer one principle of the Civil Rights Bill was the power of Congress to enforce the Bill of Rights in the states,” quoting Thayer’s statement that the fourteenth amendment “simply brings into the Constitution what is found in the bill of rights of every State . . . . [I]t is but incorporating in the Constitution . . . the principle of the Civil Rights Bill.”<sup>164</sup> By his own testimony, the bill does not incorporate the Bill of Rights. He dispensed in his short paragraph with recapitulating his earlier detailed remarks,<sup>165</sup> and these, like those of Wilson and Lawrence, disclose the narrow scope of his allusion to the Bill of Rights. There Thayer stated that the “*sole purpose* of the bill is to secure . . . the

158. CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).

159. *Id.*

160. *Id.* (emphasis added).

161. *Id.* at 1835-36 (emphasis added).

162. *Id.* at 1836. So it was understood by the Supreme Court in the Civil Rights Cases, 109 U.S. 3 (1883).

Justice Bradley declared that the Civil Rights Bill of 1866 undertook to secure those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase . . . property, as is enjoyed by white citizens . . . . [C]ongress did not assume . . . to adjust what may be called the social rights of men . . . but only to declare and vindicate those fundamental rights . . . .

*Id.* at 22. And in response to the question whether “admission to an inn, a public conveyance, a place of public amusement” is “one of those rights which the states by the Fourteenth Amendment are forbidden to deny to any person,” the Court held that “no countenance of authority” for the Civil Rights Act of 1875, which purported to convey such rights, “can be found in . . . the Fourteenth Amendment of the Constitution . . . .” *Id.* at 24, 25.

163. CONG. GLOBE, 39th Cong., 1st Sess. 1836-37 (1866).

164. Curtis, *supra* note 4, at 82-83.

165. CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866).

fundamental rights of citizenship . . . , those rights which secure life, liberty, and property." He scoffed at a "freedom" under which a man was deprived of the right of "going from one place to another," the right "to contract," to "sell or convey real or personal estate." He would have "power to pass laws which will guaranty and insure those great rights and immunities."<sup>166</sup> It was Thayer who stressed that "in order to avoid any misapprehension they [the fundamental rights of citizenship] are stated in the bill. The same section goes on to define with greater particularity the civil rights and immunities which are to be protected by the bill," reading them into the record. And, he added, "that enumeration precludes any possibility that the general words which have been used can be extended beyond the particulars which have been enumerated."<sup>167</sup> When ten weeks later Thayer spoke in the compass of a short paragraph and referred to his earlier testimony, he could rely on his carefully articulated explanation to limit the generality of his brief allusion. Curtis' reliance on Wilson-Lawrence-Thayer for incorporation of the Bill of Rights reveals how ill-digested is his analysis.<sup>168</sup>

#### E. Senator Jacob Howard

Senator Howard is, with Bingham, one of the pillars of Curtis' case, as he was of Justice Black's; he considered that to the privileges and immunities of article IV "should be added the personal rights guaranteed and secured by the first eight amendments."<sup>169</sup> Due to the sudden illness of Chairman Fessenden, it fell to Howard to act as spokesman for the Joint Committee. Up to this point his participation in the debates on the Civil Rights Bill and the several aspects of the amendment had been negligible.

166. *Id.* at 1152 (emphasis added).

167. *Id.* at 1151. Thayer's summation that freedmen are as citizens "entitled to . . . the guarantee of the Constitution which secures to every citizen the enjoyment of life, liberty and property" is juxtaposed by Curtis with Michael Kerr's (a Democrat) statement that Thayer "informs us that in effect the first eleven amendments are grants of power to Congress, and that they contain guarantees which it is the right and duty of Congress to secure and enforce in the States." Curtis asserts that "Thayer accepted the characterization as correct." Curtis, *supra* note 4, at 79. First, Kerr refused to yield unless he had "misstated" Thayer's position, and Thayer, anxious to ask of "what value [Kerr] supposed such a guarantee is, if, as he contends, there is no power to maintain it," answered equivocally, "I do not know that the gentleman has misstated my position." CONG. GLOBE, 39th Cong., 1st Sess. 1270 (1866). Curtis would regard this as a repudiation by Thayer of his carefully delineated position, rather than an attempt to pacify Kerr. Second, I found no reference by Thayer to the "first eleven amendments," so Kerr was putting words into Thayer's mouth. Third, the eleventh amendment is no part of the Bill of Rights, so the argument proves too much.

168. Despite the foregoing restrictive Wilson-Lawrence-Thayer statements, Curtis cites them for the proposition that

supporters of the Civil Rights Bill appealed to . . . the power to protect *fundamental rights* of American citizens under the privileges and immunities clause of article IV, section 2, and what was for a number of Republicans essentially *the same*, the power to enforce the guarantees set out in the Bill of Rights.

Curtis, *supra* note 4, at 76 (emphasis added). So too, he prefers to their specifics the generalities of Senator Yates, "[T]heir *rights* shall not be abridged by any State," and Senator Henderson's statement that the § 1 provisions "merely secure the *rights* that attach to citizenship in all free governments." *Id.* at 96 (emphasis added). These "rights" had been spelled out by Wilson, Lawrence, Thayer, and Trumbull.

169. Curtis, *supra* note 4, at 94.

Howard, according to [Benjamin] Kendrick, "was one of the most . . . reckless of radicals" who had "served consistently in the vanguard of the extreme Negro-philites." . . . [H]e and Elihu B. Washburne of Illinois "had been the only Republicans to hold out for black suffrage to the end, all the others proved willing to abandon it." That such a man could speak "for" a Committee in which the "non-radicals clearly outnumbered the radicals," in which, by the testimony of the co-chairmen Fessenden and Stevens, there "was very considerable difference of opinion," needs to be taken, in the words of the "immortal" Samuel Goldwyn, with a "bushel of salts."<sup>170</sup>

No one rose to criticize Howard's inclusion, in the course of a long speech, of the Bill of Rights in the privileges or immunities clause, but a Senate which had been categorically assured by the Chairman of the Judiciary Committee, Trumbull, of its limited scope, and was probably aware of similar explanations in the House, presumably felt no need to contradict Howard. But after Howard spoke, Senator Poland observed about the privileges or immunities clause that it "secures *nothing beyond* what was intended by the original [article IV] provision in the Constitution,"<sup>171</sup> which antedated and, therefore, could not comprehend the Bill of Rights. Senator Fessenden, who was the Chairman of the Joint Committee, declared that "[t]he real and *only object*" of section 1 "is to make negroes citizens, to prop the civil rights bill, and give them a more plausible, if not a valid, claim to *its provisions*." And he added, the "privileges or immunities" clause "is unnecessary, because that matter is provided for in article four . . . . This provision comprehends the *same principle* . . . ."<sup>172</sup>

He echoed similar explanations in the House only two weeks before Howard spoke. James Garfield stated that the amendment proposed to put the Civil Rights Bill "beyond the reach of the plots and machinations of any party."<sup>173</sup> Thayer considered "it is *but incorporating* in the Constitution of the United States the principle of the civil rights *bill* which has lately become a law" in order that it "shall be *forever incorporated* in the Constitution of the United States."<sup>174</sup> John Broomall of Pennsylvania remarked, "It may be

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170. To avoid cluttering citations, I quote from R. BERGER, *GOVERNMENT BY JUDICIARY* 147 (1977). Curtis renders this passage as "[w]e are told that Howard was a 'reckless . . . radical, a Negroophile' who held out for 'black suffrage' to the end . . . . As the violence of Berger's attack suggests, Howard's remarks are very damaging to his thesis." Fairness required disclosure that the quoted remarks were those of respected scholars, not my "violent" reaction.

"Howard apparently had not entered into the spirit of Bingham's drafting: three times in the committee he had voted against the author's work. Howard would have had the Section declare simply, no discrimination by State or federal government as to civil rights on account of color." 6 C. FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 1291 (1971).

171. *CONG. GLOBE*, 39th Cong., 1st Sess. 2961 (1866)(emphasis added). To counter this statement Curtis grasps at straws: "Poland's remarks suggest a difference between the intent of the provision and the construction it had received." Curtis, *supra* note 4, at 88. Poland's colleagues, we may be sure, saw no such fine spun distinctions. For them "intent" could be drawn from the legislative history, as Charles Sumner stated in the very same debates, *CONG. GLOBE*, 39th Cong., 1st Sess. 677 (1866), and judicial construction sought for that "intent." Certainly the framers' discussion of the article IV clause identified the judicial construction with the rights enumerated in the Civil Rights Act.

172. *CONG. GLOBE*, 39th Cong., 1st Sess., S. App. 240 (1866)(emphasis added).

173. *Id.* at 2462.

174. *Id.* at 2465 (emphasis added).

asked, why should we put a provision in the Constitution which is *already contained* in an act of Congress?" Because of the constitutional doubts expressed by Bingham, Broomall "wish[ed] to make assurance doubly sure" and "to prevent a mere majority from repealing the law."<sup>175</sup> Tracing the development of bill and amendment, Henry Raymond of New York stated that by the bill "Congress proposed to exercise *precisely* the powers which that amendment was intended to confer." Now that the bill "became a law," he continued, "it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it."<sup>176</sup> Thomas Eliot of Massachusetts referred to the doubts as to Congress' power to enact the Civil Rights Act, and voted for the amendment to "settle the doubt which some gentlemen entertain upon that question."<sup>177</sup> And after Howard's remarks, George Latham said in the House that "the 'civil rights bill,' which is now a law . . . , covers *exactly the same* ground as this amendment."<sup>178</sup> Such statements were designed to allay fear of undue encroachment of state powers. But for the remarks of Howard and Bingham, no one, so far as my reading goes, declared that the amendment went beyond the rights embodied in the Civil Rights Act. And the reason, earlier stated by Hale, was that "there are other liberties as important as the liberties of the individual citizen, and those are the liberties and rights of the States."<sup>179</sup>

Senator Poland observed that "[g]reat differences have existed among ourselves; many opinions have had to yield to enable us to agree upon a plan."<sup>180</sup> There are similar expressions by Fessenden and Stevens.<sup>181</sup> Now Curtis asks us to infer, after the compromise of such differences about known and debated objectives, that there was unquestioning acceptance of even more sweeping state concessions, which had received no consideration whatever! The reservation to the states by the tenth amendment of "powers not delegated to the United States" is not to be curtailed by "vague" words. So sweeping a state surrender of local administration to federal control as Howard's remarks contemplate is not, to borrow from Justice Miller, to be embraced "in the absence of language which expressed such a purpose too clearly to admit of doubt,"<sup>182</sup> the less because of a broad consensus that the amendment and Civil Rights Act were "identical," "precisely," "exactly" the same.

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175. *Id.* at 2498 (emphasis added).

176. *Id.* at 2502 (emphasis added).

177. *Id.* at 2511. "To remove any doubt was one of the reasons the fourteenth amendment was passed." Curtis, *supra* note 4, at 92. The other was to prevent repeal of the Civil Rights Act. *See* note 46 *supra*.

178. CONG. GLOBE, 39th Cong., 1st Sess. 2883 (1866)(emphasis added).

179. *Id.* at 1065. *See* Kelly, *Comment on Harold M. Hyman's Paper*, in NEW FRONTIERS OF AMERICAN RECONSTRUCTION 40 (H. Hyman ed. 1966) (quoted in note 147 *supra*). For the framers' attachment to state sovereignty, *see* R. BERGER, GOVERNMENT BY JUDICIARY 60-64 (1977).

180. CONG. GLOBE, 39th Cong., 1st Sess. 2964 (1866).

181. *Id.* at 2332, 2459, 3148.

182. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78 (1872). *See* note 110 *supra*.

## F. "Miscitations"

Like a hen which scratches and scratches and at length finds a grain of corn, Curtis at last finds several "miscitations" in Berger, which he dramatically unfolds as if to prove a malevolent design to deceive.<sup>183</sup>

Howard explicitly ran "down the list of the federal Bill of Rights," performing an operation which Berger, quoting Fairman, assures us never happens in debate.

Berger says that "no newspaper reported Howard's remarkable expansion of the privileges and immunities clause . . . ." In fact, Howard's speech was reported in detail on the front page of the *New York Times* of May 24, 1866, and elsewhere.<sup>184</sup>

Passing for the moment my own derelictions, these "miscitations" merely constitute cumulative evidence, and their subtraction in no way affects the evidence that the framers had a restrictive view of the "privileges or immunities" clause. I might plead in extenuation that I relied on Harry Flack, who, Justice Black stated, searched the newspapers quite thoroughly,<sup>185</sup> and said "the general opinion held in the North . . . was that the Amendment embodied the Civil Rights Bill . . . . 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 . . . ." Or, I might plead that to find two or three "miscitations" in a mass of several thousand citations adds up to a very slight margin of error. But no; scholarly integrity demands exactitude in every detail, and I therefore freely confess error, for no scholar worthy of the name would delude his fellows by mistaken testimony. Would that activists would as freely confess their errors.

Another charge of miscitation needs to be noticed:

In a final suggestion which would emasculate the fourteenth amendment, Professor Berger tells us that the amendment was to be enforced by Congress only, not by the courts. "Why," Berger asks us, "did Hotchkiss protest that section 5 'proposes to leave it to the caprice of Congress' whether or not to enforce antidiscrimination, if it was assumed that the courts could act in the face of congressional inaction?"

Hotchkiss did not make his protest about section 5 of the fourteenth amendment . . . . At that time no section 5 was before the House or even existed. Instead, the remark quoted by Berger occurred in the debate of *Bingham's prototype* of the fourteenth amendment—the one which gave Congress the power to secure privileges and immunities.<sup>187</sup>

My reference to section 5 was mistaken, but on the merits the mistake is inconsequential, for the "prototype" contains a parallel provision, and equally serves to make the point. In both cases, power was granted to Congress, not the courts. The prototype provided: "*The Congress shall have*

183. Compare Curtis' model, W. CROSSKEY, *POLITICS AND THE CONSTITUTION* (1953), note 22 *supra*.

184. Curtis, *supra* note 4, at 96.

185. *Adamson v. California*, 332 U.S. 46, 109 (1947) (Black, J., dissenting).

186. H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 153 (1908).

187. Curtis, *supra* note 4, at 99-100.

power to make all laws which shall be necessary and proper to secure . . . all privileges and immunities . . . ."<sup>188</sup> Section 5 provides: "The *Congress shall have power* to enforce by appropriate legislation the provisions of this article." The latter was restricted to enforcement of "the provisions" of the amendment; the former conferred a general power to make law in the premises. But in both cases, the "shall have power" phraseology left it in the discretion of Congress to act. Curtis notices that the "final version of the fourteenth amendment broke the subject into two parts with explicit restriction on the states . . . and with congressional power to enforce in section 5."<sup>189</sup> All this does not undermine my question, "Why . . . did Hotchkiss protest that [the prototype of] section 5 'proposes to leave it to the caprice of Congress' whether or not to enforce antidiscrimination, if it was assumed that the courts could act in the face of congressional inaction?" What else did Hotchkiss, to quote Curtis, mean other than "that Bingham's prototype was not self-executing and would depend on a majority of Congress." To deduce that "Hotchkiss' speech together with the change in form of the amendment to meet his objection, prove the opposite of Berger's contention—that the amendment was to be enforced by the courts as well as by Congress"<sup>190</sup> is to insist that 2 plus 2 equals 5.<sup>191</sup>

Of course I did not rely solely on Hotchkiss; his statement was but one piece in the mosaic. First, "Berger tells us" might more honestly have been framed as "The Supreme Court told us"<sup>192</sup> in 1879:

It is *not* said that the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibition by appropriate legislation. Some *legislation is contemplated* to make the amendments fully effective.<sup>193</sup>

There is no need to recapitulate the materials set forth in my book which illuminate and confirm this statement.<sup>194</sup> Here let it suffice to say that in 1872,

188. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

189. Curtis, *supra* note 4, at 100.

190. *Id.*

191. Hotchkiss was opposed to giving Congress power to legislate in the premises rather than to correct discrimination. See text accompanying note 140 *supra*.

192. Curtis employs this shoddy technique throughout: "according to Berger." see text accompanying note 100 *supra*, "Berger argues," text accompanying note 97 *supra*; see also notes 51 & 170 *supra*, cloaking that I generally quote authorities or that my views are widely shared. It is open to him to prefer the authority of "Justice Black and Professor Crosskey," Curtis, *supra* note 4, at 101, but it is a disservice to scholarship to leave unmentioned that those views are not shared by the scholarly community and were rejected by the Supreme Court, not merely by Berger.

193. *Ex parte Virginia*, 100 U.S. 339, 345 (1879)(emphasis added).

194. R. BERGER, GOVERNMENT BY JUDICIARY 221-29 (1977). For example, Senator Howard stated that § 5 constitutes

a direct affirmative delegation of power to Congress to carry out all the principles of these guarantees, a power not found in the Constitution. It . . . casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons and property. . . . I look at this clause as indispensable for the reason

Senator Oliver Morton, a member of the 39th Congress who also participated in framing the fifteenth amendment, adverted to the "great fact" that "the remedy for the violation of the fourteenth and fifteenth amendments [section 2 of the fifteenth employed the terms of section 5 of the fourteenth] was expressly *not left to the courts*. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress."<sup>195</sup>

### G. Curtis' "Bombshell"

It would be tedious and unprofitable to dwell on still other Curtis arguments; throughout he is carried away by "glittering generalities" such as were contemptuously dismissed by James Wilson;<sup>196</sup> throughout he resorts to cheap devices of advocacy that are incompatible with scholarly research, seeking to diminish my credibility by half-truths and distortions.<sup>197</sup> Instead, let me close with Curtis' bombshell, Bingham's explanation in 1871 of why he "had changed the form of the amendment of February 1866": when he reread the *Barron v. Baltimore* holding that the Bill of Rights applied solely to the federal government, not to the states, he determined to correct that deficiency, stating that "the privileges and immunities of citizens of the United States . . . are chiefly defined in the first eight amendments . . . ."<sup>198</sup> And, he continued, "These eight articles . . . never were limitations upon the powers of the States, until made so by the fourteenth amendment."<sup>199</sup> I had anticipated Curtis' discovery of, and defused, this statement in 1979.<sup>200</sup> But first let us compare these remarks with Bingham's 1866 statements in which he did not refer to the "first eight amendments."

Nowhere does Curtis sift the conflicting Bingham statements to support his statement that "Bingham merely proposed to arm Congress with power to enforce provisions of the Bill of Rights which in Bingham's view the states were already *obligated to obey* by the privileges and immunities clause of article IV, section 2."<sup>201</sup> At the risk of tedium it is necessary to collate and compare Bingham's utterances, for his references to the Bill of Rights were almost always in the context of life, liberty, and property and were so under-

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that it thus imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional amendment [i.e. statute].

CONG. GLOBE, 39th Cong., 1st Sess. 2766, 2768 (1886). Senator Luke "Poland, like the rest, contemplated action by Congress and ignored direct enforcement by the courts." 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1296 (1971).

During a visit in April, 1868, to South Carolina, Justice David Davis, an Illinoisan, wrote, "There is more repugnancy to negroes at the west than here—repugnancy I mean to any and every idea of equality." *Id.* at 482.

195. CONG. GLOBE, 42d Cong., 2d Sess. 525 (1872). For similar remarks see Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311, 351, 352 (1979).

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

197. See note 192 *supra* and note 217 *infra*.

198. Curtis, *supra* note 4, at 84-85.

199. CONG. GLOBE, 42d Cong., 1st Sess., App. 84 (1871).

200. Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U.L. REV. 311, 345-47 (1979).

201. Curtis, *supra* note 4, at 67.

stood by his fellows. In introducing his draft, he said that except for the enforcement provision, "[t]he residue" is in "the language of the second section of the fourth article, and of a portion of the fifth amendment," referring to his equal protection of life, liberty, and property.<sup>202</sup> If, however, privileges and immunities comprehended the entire Bill of Rights, his express due process—life, liberty, and property—provision was superfluous. True, Bingham stated that "this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States."<sup>203</sup> But Bingham's subsequent references repeatedly were to "protection of life, liberty, and property," asking after one such reference, for example, "Is the bill of rights to stand . . . a mere dead letter?"<sup>204</sup> Every free citizen, he stressed, may not be limited "in the rights of life, liberty, and property. Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights."<sup>205</sup> Pressed by Hale, however, he declared that it was "the *equal protection clause* that provided" that state protection "shall be equal in respect to life, liberty, and property to all persons."<sup>206</sup> Later he departed from the "equal protection" provision to speak of "the bill of rights, touching the life, liberty, and property of every citizen."<sup>207</sup> In the same speech he stated, "the care of the property, the liberty, and the life of the citizen . . . is in the States . . . I have advocated here an amendment which would arm Congress with the power to . . . punish all violations by State officers of the bill of rights."<sup>208</sup> Another "life, property" reference was to the slave states' "disregard for the bill of rights as to slaves [some abolitionists considered that "slavery violated the fifth amendment"], refusing them protection in life or property."<sup>209</sup> He maintained that no state "has any right to deny protection to any free citizen . . . in the rights of life, liberty and property. Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights."<sup>210</sup> In his final remarks he said that privileges and immunities "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,"<sup>211</sup> the subject of his equal protection clause.

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202. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866). After reading the due process clause of the fifth amendment as the source of his own proposed amendment, Bingham stated, "the proposed amendment does not impose upon any State . . . any obligation which is not now enjoined upon them by the very letter of the Constitution." *Id.*

203. *Id.* See Curtis, *supra* note 4, at 68.

204. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

205. *Id.* See also *id.* at 1093.

206. *Id.* at 1094 (emphasis added).

207. *Id.* at 1291.

208. *Id.* at 1292.

209. *Id.* at 1090. See Curtis, *supra* note 4, at 55.

210. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

211. *Id.* at 2542. Bingham's fleeting reference to the infliction of "cruel and unusual punishments," Curtis, *supra* note 4, at 91, cannot overcome his repeated emphasis on life, liberty, and property, particularly because, as Stevens explained, the amendment, like the Civil Rights Bill, provided that "[w]hatever law punishes a white man for a crime shall punish the black man precisely in the same way." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). The framer's aim was to preclude discrimination, not to embody the "cruel and unusual" clause.

The words "life, liberty, and property," as we have seen, were code words for personal security, personal freedom, and the right to own property.<sup>212</sup> Bingham's repeated association of these words with the Bill of Rights would lead his fellows to believe that his goals did not go beyond theirs, namely, the protection accorded life, liberty, and property by the rights enumerated in the Civil Rights Act. Curtis explains that "Bingham and other framers [besides Howard, who were the "others"] of the fourteenth amendment" read the article IV privileges and immunities as "including those in the Bill of Rights. This reading may well have been incorrect."<sup>213</sup> As Curtis recognizes, it was "a radically unorthodox reading of the original Constitution."<sup>214</sup> Consequently, it was incumbent on Bingham to explain his "radically unorthodox" purpose,<sup>215</sup> as he later did in 1871, in words which explained it "too clearly to admit of doubt."<sup>216</sup> So far as I could find, Bingham never alluded in the 1866 debates to the first eight amendments.<sup>217</sup> And as I showed in 1979, Bingham's 1871 view plainly was not shared by his fellows,

Fairman refers to "the disconcerting way in which Bingham would pluck a constitutional phrase and toss it in at some point to which it had no relevance." 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1289 (1971).

212. See text accompanying notes 151, 157-60, and 166-67 *supra*. Curtis writes that "[b]y 1866 the doctrine that the states could not restrict the fundamental liberties of American citizens had been accepted by many Republicans." Curtis, *supra* note 4, at 51. But he fails to notice the framers' limited catalog of the liberties they intended to protect.

213. Curtis, *supra* note 4, at 86.

214. *Id.* at 92. Curtis dismisses the view that "Bingham's references to the Bill of Rights touching life, liberty and property were understood by his fellow congressmen in the technical sense of referring to the rights secured by the Civil Rights Bill," commenting, "Before and after in American history, the Bill of Rights referred to the first eight or ten amendments to the Constitution. On this occasion, however, according to Berger [and Fairman], the phrase has a specialized meaning, never given to it before or since." *Id.* at 68. *Contra*, the testimony of Wilson, Lawrence and Thayer. See text accompanying notes 151, 157-60, and 166-67 *supra*.

215. Even Bingham's activist apologists read him restrictively. Graham observes that "no one even pretended that *all* the clauses and guarantees of the Bill or Rights ever could or would be enforced against the States." He concluded that the "odds appear heavily against" imputing to Bingham an intention to include "every clause of *each* of the eight amendments." H. GRAHAM, EVERYMAN'S CONSTITUTION, 265, 315 n.80 (1968).

216. See text accompanying note 35 *supra*.

217. Curtis refers to "Berger's edited version of what Bingham had to say . . . with liberal assistance from ellipsis dots." Curtis, *supra* note 4, at 89-90. The materials "edited" and replaced by "ellipsis" were innocuous and in no way vitiate my statement that "reservation of protection to the states is 'incompatible with state violation' of the Bill of Rights." *Id.* at 90. His example, with the omitted portions in brackets, follows:

[t]he care of the property, the liberty, and the life of the citizen, [under the solemn sanction of an oath imposed by your Federal Constitution], is in the States, and not in the Federal Government. I have sought to effect no change in that respect [in the Constitution of the country]. 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 the oath and by that Constitution].

*Id.* Curtis betrays his careless reading and recklessness by his charge that thus I "edited" and omitted in order to make a case.

He also finds it "curious" that Berger "separates his discussion of privileges and immunities from his discussion of incorporation of the Bill of Rights," *id.* at 86, stating,

Berger tells us that Senator Howard also referred to article IV, section 2 in discussing privileges and immunities. What he does not tell us for another one hundred and ten pages is that Howard . . . said explicitly that privileges and immunities of citizens of the United States protected by the fourteenth amendment included those rights set out in the first eight amendments to the Constitution.

*Id.* at 87-88. Curtis gives this "separation" a sinister cast, little recking that one might innocently conclude to treat the 1866 debates on "privileges or immunities" in one chapter, and reserve Black's 1947 incorporation doctrine for a separate chapter, just as I did with § 5, with suffrage, and with segregation.

among whom sat a considerable number of framers of the fourteenth amendment. A couple of months earlier he himself had submitted a Report of the Committee of the Judiciary, stating:

The clause of the fourteenth amendment, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," does not in the opinion of the committee, refer to the privileges and immunities of citizens of the United States other than privileges and immunities embraced in the original text of the Constitution, article IV, section 2. The fourteenth amendment, it is believed, did not add to the privileges or immunities before mentioned, but was deemed necessary for their enforcement as an express limitation upon the powers of the States.<sup>218</sup>

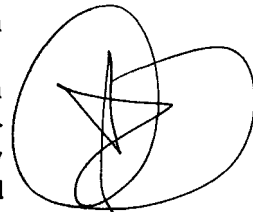
James Garfield, before long to be elected to the presidency, emphasized in 1871 that he "not only heard the whole [1866] debate at the time, but I have lately read over, with scrupulous care, every word of it as recorded in the *Globe*," read copiously therefrom into the record, and stated:

In the long debate which followed, this section [1] of the amendment was considered as equivalent to the first section of the civil rights bill, except that a new power was added [equal protection clause] . . . It was throughout the debate, with scarcely an exception, spoken of as a limitation of the power of the States to legislate unequally for the protection of life and property.<sup>219</sup>

Senator Trumbull, as we have seen, took an equally restricted view of section 1.<sup>220</sup>

The clincher is furnished by an amendment proposed by James Blaine in 1875, in a Congress which included ~~twenty-three~~ members of the 39th Congress, among them Blaine. Prior thereto he had written a letter published by the *New York Times* indicating that the fourteenth amendment did not forbid States from establishing official churches or maintaining sectarian schools. Consequently he proposed that "[n]o State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof."

Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier . . . Remarks of Randolph, Christiancy, Kernan, Whyte, Bogy, Eaton and Morton give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First.<sup>221</sup>



218. H.R. REP. NO. 22, 41st Cong., 3d Sess. 1 (1871), reprinted in A. AVINS, *THE RECONSTRUCTION AMENDMENTS DEBATES* 466 (1967).

219. CONG. GLOBE, 42 Cong., 1st Sess., App. 151 (1871). In the same session, Charles Willard said of § 1 of the Civil Rights Bill of 1866: "This section, it should be remembered, was enacted by the same Congress which recommended the adoption of the fourteenth amendment, and is, therefore, the best possible statement of what that amendment was intended to secure." *Id.* at App. 189. For similar expressions by Justices Bradley and Field, see text accompanying notes 54-55 *supra*.

220. See text accompanying note 63 *supra*.

221. F. O'BRIEN, *JUSTICE REED AND THE FIRST AMENDMENT* 116 (1958), quoted in J. MCCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 154 (1971). See also Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951).

The companion free speech discovery was first made by the Court in 1925,<sup>222</sup> just three years after it had held that the free speech provision did not govern the states.<sup>223</sup> It is sheer wishful thinking in light of these facts to cling to the Bingham-Howard remarks on which Justice Black relied.

#### IV. CONCLUSION

A generation grown accustomed to judicial rape of federalism needs to be reminded that "inscrutable" words<sup>224</sup> cannot constitute a waiver of power reserved to the states by the tenth amendment. Because such a surrender was not expressed in the Bill of Rights in "plain and intelligible language," it was rejected by Chief Justice Marshall.<sup>225</sup> No such aim could be attributed to the framers of the fourteenth amendment, Justice Miller later held in the *Slaughter-House Cases*, in the absence of "language which expresses such a purpose too clearly to admit of doubt."<sup>226</sup> The "commitment" to federalism, a leading activist, Alfred Kelly, finally admitted, "meant that the radical Negro reform program could be only a very limited one."<sup>227</sup> Much less was the North prepared to surrender control over its own internal administration in matters having nothing whatever to do with safeguarding the "fundamental rights" of Negroes.

The history of the pivotal "privileges or immunities" clause abundantly demonstrates that it responded to the framers' desire to shield blacks from violence and oppression, to secure to them the "fundamental rights" to life, to personal liberty, and to own property by furnishing the "incidents" that safeguarded those rights—namely, the right to contract, to own property, and to have access to the courts, no more. Suffrage, the right of rights, without

222. *Giblow v. New York*, 268 U.S. 652, 666 (1925).

223. *Prudential Ins. Co. v. Cheek*, 259 U.S. 538, 538 (1922). See R. BERGER, *GOVERNMENT BY JUDICIARY* 270-71 (1977).

224. See text accompanying note 33 *supra*.

225. See text accompanying note 16 *supra*.

226. See text accompanying note 35 *supra*. In the 39th Congress, Samuel Shellabarger emphasized that did the Civil Rights Bill assume to confer the rights therein enumerated, "then it would be . . . an assumption of the reserved rights of the States and the people." But, he reassured the House, it merely insured that such of the enumerated rights as the states conferred could not be restricted on the basis of color. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866). Similarly, Senator Trumbull declared that "if the State of Kentucky makes no discrimination in civil rights between its citizens, this bill has no operation whatever in the State of Kentucky." *Id.* at 600. And he reiterated that it "in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property." *Id.* at 1761 (emphasis added). For similar remarks by William Lawrence, see note 143 *supra*. It is constantly to be borne in mind that the framers regarded the Civil Rights Act and the fourteenth amendment as "identical." See text accompanying notes 46-53 *supra*. With respect to the antecedent privileges and immunities of article IV, Justice Miller stated, "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens . . . the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1872). Fairman comments, "Since Article IV promised the visiting citizen nothing more than potluck, it was faulty reasoning to say that as a consequence of that provision one reached the proposition that the Fourteenth Amendment guaranteed adequate substantive fare to every citizen of the United States in his own or in any other State." 6 C. FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 1358 (1971) (emphasis added).

227. See note 147 *supra*. Repeatedly the framers rejected attempts to prohibit all discriminations. R. BERGER, *GOVERNMENT BY JUDICIARY* 163-64 (1977). See also text accompanying note 87 *supra*.

which, Charles Sumner maintained, the fourteenth amendment "was inadequate to protect them in anything,"<sup>228</sup> incontrovertibly was excluded.

Those who, like Curtis, insist upon judicial enforcement of the Bill of Rights against the states premise that the results are so laudable that they must perforce be constitutional. In his autobiography, Justice Douglas recounts Chief Justice Hughes' advice that "90% of any [constitutional] decision is emotional. The rational part of us supplies the reason for supporting *our predilections*." Then and there Douglas admitted to himself that "the 'gut' reactions of a judge at the level of constitutional adjudication, dealing with the vagaries [?] of due process, freedom of speech and the like, was the main ingredient of his decision."<sup>229</sup> Why should millions of Americans prefer the "gut" reaction of the Justices against death penalties, for instance, to their own belief that death penalties are a deterrent to crime, as current legislation in some 35 states attests?<sup>230</sup> The judicial "gut" reaction, under democratic principles, is no substitute for the will of the people.

It is because activist theorists increasingly realize that resort to "lawyers' history" will no longer serve,<sup>231</sup> that Professor Paul Brest challenges the assumption that judges "are bound by the Constitution."<sup>232</sup> Such candor is vastly preferable to Curtis' rationalizations after the fact, sheer wishful thinking, for it brings the real issue, judicial usurpation, out into the open, so that the people can decide for themselves whether they prefer to rule their own destiny.

228. CONG. GLOBE, 40th Cong., 3rd Sess. 1008 (1869).

229. New York Times, September 21, 1980, § 6 (Magazine) at 40 (emphasis added). But when garbed in judicial robes, Justice Douglas declared, "Our individual preferences, however, are not the constitutional standard." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Law in books and law in action!

Professor Charles Black, warning against damaging judicial appointments if Ronald Reagan is elected President, writes, "The question is whether one wants a Supreme Court . . . dominated by people (whether or not they made good grades in law school) whose sense of social justice approximates that of the most reactionary justices now on the bench." New York Times, October 16, 1980, at A-30. Thus, he too makes judicial "predilections" the test of constitutionality, because prevailing predilections reflect his own. The election of Reagan may persuade him that the people prefer his predilections to those of Black. Chief Judge Cardozo wrote that "the substitution in every instance of the individual sense of justice . . . would put an end to the reign of law." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 136 (1921). Justice Jackson, in a concurring opinion, stated that

the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of the Justices . . . [T]his Court also has generated an impression in much of the judiciary . . . that words no longer mean what they have always meant to the profession, that the law knows no fixed principles.

*Brown v. Allen*, 344 U.S. 443, 535 (1953). And he sagely commented, "I know of no way we can have equal justice under law except we have some law." *Id.* at 546.

230. R. BERGER, *GOVERNMENT BY JUDICIARY* 261 n.52 (1977).

231. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Perry, Book Review, 78 COLUM. L. REV. 685, 688 (1978): "Berger effectively destroys . . . the notion that modern constitutional cases involving legislative reapportionment, school desegregation, criminal procedure, or first amendment issues, are somehow rooted (however tenuously) in the original understanding—or even the 'spirit' of the fourteenth amendment."

232. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 224 (1980). See also Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A.J. 1212, 1215 (1977).