

EVERYMAN'S CONSTITUTION

HISTORICAL ESSAYS ON
THE FOURTEENTH AMENDMENT,
THE "CONSPIRACY THEORY",
AND AMERICAN CONSTITUTIONALISM

By *Howard Jay Graham*

WITH A FOREWORD BY

Leonard W. Levy

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For
MARY WILSON GRAHAM
and in memory of
LOREN MILLER
1903-1967
and
HELEN GRAHAM LEMING
1908-1953

Foreword

THE YEAR 1968 marks the one hundredth anniversary of the ratification of the Fourteenth Amendment. A most fitting commemoration of that centennial is this collection of essays by Howard Jay Graham, who is surely the greatest authority on the history of the amendment. He is its Maitland, and perhaps our foremost living historian of American constitutional law as well.

The Fourteenth Amendment is the American mini-Constitution, the Magna Carta of our federal system, and the instrumentality for nationalizing civil rights. Its stirring phrases—life, liberty, and property; due process of law; equal protection of the laws; privileges and immunities of citizenship—are talismanic symbols of our constitutional democracy. Yet the amendment has had a melancholy and ironic history. Originating as the constitutional embodiment of abolitionist ideology, the amendment was primarily meant to secure the rights of man without distinctions based on race; nevertheless, for many decades the principal beneficiary of the amendment was corporate capitalism. Only in our own time has the Supreme Court construed the amendment as its framers intended.

Excepting the commerce clause, which is the basis for so much congressional legislation, modern constitutional law is very much made up of Fourteenth Amendment cases. No part of the Constitution has given rise to more cases than its due process clause alone, and its various clauses taken together account for about half of the work of the Supreme Court. The states in our federal system can scarcely act without raising a Fourteenth Amendment question. The vast majority of all cases which concern our precious constitutional freedoms—from freedom of speech to separation of church and state, from racial equality to the many elements of criminal justice—turn on the Fourteenth Amendment. The history of its interpretation is, at bottom, the story of the two great subjects that bulk largest in our constitutional law: government regulation of the economy and individual rights.

Howard Jay Graham has played an important part in the developing history of the Fourteenth Amendment. Even as he chronicled its origins and purposes, he influenced its interpretation. By no coincidence, substantive due process of law as the mainstay of decisions against the constitutionality of government regulation came to an end when Graham provided the scholarly proof that the

amendment was not designed to benefit business enterprise. Similarly, when he showed that the amendment emerged from the efforts of its framers to ensure that Negroes should have the same rights as other citizens, he provided the historical basis for decisions, which rapidly followed, in support of equal rights regardless of race.

Graham's work has always reflected a sensitivity to democratic values and democratic public policy. He is a scholar whose conscience matches his scrupulous regard for historical facts. His critical intelligence is both rigorous and humane, making his study of the history of the amendment a means of unfolding its promise. In depth and precision of scholarship, he may be equalled by a few but excelled by none in the field of constitutional history. His achievement may be appreciated by considering how very little we would know about the amendment without his contribution. It consists not merely in what he has added to our knowledge by his prodigious and original research and by his superbly crafted essays; his contribution consists, too, in spurring awareness that so much new and significant can be said about an old subject, and in the sheer incitement to excellence that his fellow scholars relish from models such as Graham's.

For three decades he has published his work in law journals from coast to coast. Unfortunately, too few historians even in the field of constitutional history read the law journals. As a result Graham has not had the recognition that he deserves from the profession. He has been a scholar's scholar, operating on the fringes of the academy. A shy and modest man, handicapped by deafness, he earned his bread as a law librarian until his recent retirement. Yet he has taught a generation of teachers who have been fortunate enough to know his work. It has appeared in scattered places, and the individual essays, considered separately, have had an episodic character. They needed to be gathered together within the covers of a single volume to reveal their rare insights, their unity, and their elegance. Predictably, this book will give Graham's work the means of widening the impact that he has already made on the initiate. He is, like Lord Acton, the author of great books never written. Here, at least, is a selection of his essays in the field of American constitutional history. The Society Press does itself honor by bringing Graham's work to the larger audience that he deserves.

LEONARD W. LEVY
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Author's Preface

THE FOURTEENTH AMENDMENT of the Constitution of the United States stands first in all but name. First in jurisdictional, jurisprudential, historical, and litigational significance. Its privileges and immunities, due process, and equal protection clauses, together with the due process clause of the Fifth Amendment, and the antecedent and related clauses of the original colonial charters and of the now-fifty state constitutions, have been the sources and the bases of at least one-third, and during certain critical periods, possibly more than one-half of our aggregate constitutional litigation. From the very start, American constitutional law has been, and in our day continues to be, a gloss on these antecedent, continuing, quintessential texts. Not since the days of the Schoolmen, in likelihood, has more been written about less, by so few (and by so many!), more authoritatively, with so much "in process," in doubt, and in limbo.

Why all this is true, what the past has held, where we stand at present, and why, are the themes and subjects of these essays.

My thesis is simply that what the United States, under these guarantees, did for itself, and for corporations, in curbing manifest and latent hostility and antagonism to corporate enterprise, 1880-1940, the United States can and must do for itself, and for still disadvantaged minorities, using the same techniques and weapons, supplying similar, and, in this case, *intended* process and protection. Our giant corporations, moreover—now rivals of the states, and in this matter, potential auxiliaries and allies of government—must also seize the initiative, and, in sheer gratitude and enlightened self interest, provide for others what others provided for them—economic opportunity, the protection of law, and the opportunity to realize to the full their inherent capacity and potential.

* * *

Constitutional history is history of a special and fascinating sort. Any book on the subject thirty-five years in the writing becomes a study in the "process" and the processes it describes. Twice or more, these essays have figured peripherally in major cases and trends. During and after this centennial year, the elaborated statements, findings, and hypotheses may be helpful again. Not only the Introduction and the Epilogue, which together provide a summary and

overall view, but also Chapters 11 and 12 are here published for the first time. In the case of the other chapters, except for the correction of factual, grammatical, and citational errors, and for necessary revision of cross references, the original texts of the law review essays have been retained and reprinted in full, as follows:

Chapter 1. "The 'Conspiracy Theory' of the Fourteenth Amendment. Part I." 47 YALE LAW JOURNAL, pp. 371-403. January, 1938. Reprinted by permission of the Yale Law Journal Company and Fred B. Rothman & Company from the Yale Law Journal.

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Chapter 3. [Part I.] "Four Letters of Mr. Justice Field." 47 YALE LAW JOURNAL, pp. 1100-1108. May, 1938. [Part II.] "Justice Field and the Fourteenth Amendment." 52 YALE LAW JOURNAL, pp. 851-889. September, 1943. Both reprinted by permission of the Yale Law Journal Company and Fred B. Rothman & Company from the Yale Law Journal.

Chapter 4. "The Early Antislavery Backgrounds of the Fourteenth Amendment." 1950 WISCONSIN LAW REVIEW, pp. 479-507, 610-661. May, July, 1950. Reprinted by permission of the Wisconsin Law Review.

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Chapter 10. "Builded Better Than They Knew: The Framers,

the Railroads and the Fourteenth Amendment." 17 UNIVERSITY OF PITTSBURGH LAW REVIEW, pp. 537-584. Summer, 1956. Reprinted by permission of the University of Pittsburgh Law Review.

Chapter 13. "The Waite Court and the Fourteenth Amendment." 17 VANDERBILT LAW REVIEW, pp. 525-547. March, 1964. Reprinted by permission of the Vanderbilt Law Review.

Editorial notes have been added to revise and update, and sometimes to qualify or extend statements and interpretations. My own "then" and "now" views and judgments thus are as identifiable as those which are frequently criticized. This is embarrassing, yet altogether proper: the critic of anachronism must not spare nor ignore his own. In the case of the Conspiracy Theory at least, the humbled are in numerous and excellent company.

The editorial notes, including those at the foot of the page identified by 1968, are an integral part of the book. They tell a research story, motivate and connect the chapters, and make for a more rigorous separation of research, hypotheses, and interpretation than sometimes has been the case with Fourteenth Amendment history.

At this point a word about bibliography may not be amiss. General readers and citizens long annoyed and handicapped by inadequate documentation of the history, enforcement, and nonenforcement of the Fourteenth Amendment are handicapped no longer. *Political and Civil Rights in the United States* (Emerson, Haber, and Dorsen, eds. Boston: Little, Brown, 1967. 3d edition. 2 vols., 2274 pp.), one of the distinguished and enlightened reference works of our time, surveys, analyzes, and documents this immense field with elaborate and well-indexed bibliographic, sociological, legal-constitutional, and chronological coverage throughout. Volume 2, furthermore, is devoted wholly to Discrimination. Treated seriatim and systematically are discrimination in protection of the person, voting, education (North and South), administration of justice, employment, housing, public accommodations, transportation, health, and welfare. The period since 1950 (since Myrdal's *An American Dilemma*); the Civil Rights Acts, 1957-1966; federal, state, and local policies and action: all are admirably covered. A compendium in the best sense, this book integrates, for each topic and major field, the history, law, literature, and social experience, with authority and references (both popular and professional) provided at each point. Everyman seldom has been so well served, and never at a more crucial time.

This volume updates and documents, far better than selective

referencing possibly could do, the judicial, congressional, and administrative sides of problems here mentioned and treated. Readers are urged to make the most of this extraordinary work.

* * *

For a librarian and lipreader—a member of both groups that understand best how corporate and sociological modern research and communication are—to attempt to thank his friends and benefactors for aid extending over a lifetime is a pleasant yet nearly impossible task. Those blessed with hearing will perceive as readily as those not that *Everyman's Constitution* is a composite: a product of Law, Teaching, and Bibliography, that trinity we have so often celebrated. And because "Every man is indebted to his profession," this is doubly so. One's first thanks accordingly go to those fellow librarians, researchers, and archivists from coast to coast, who have shared, often anonymously but no less devotedly, in the larger mutual endeavor. I am proud and thankful to have served in and with this group, and to have seen and stressed, in consequence, the pluralistic, professional, even extraprofessional sides of our law and constitutionalism—of due process-equal protection constitutionalism in particular.

To the respective law reviews and publishers who have kindly granted permission to republish the materials cited above, I tender grateful thanks.

It is a further privilege to acknowledge these ineluctable obligations:

To members of the Graham-Wilson family, foremost and reverently to Anna Johnson, Roderick Morrison, and Lorena N. Graham, my deceased parents and aunt, whose love and sacrifices assured college education for five children, made scholarship precious and teaching the noblest of professions. To my sister Helen, whose life and spirit beautifully expressed and re-exemplify this.

To all my teachers, individually; especially to Emily Reed Hooper, for wakening and quickening adolescent interest in history and constitutional history; to the faculties of Whitman College and the University of Washington, for broadening and deepening undergraduate interests; to President C. C. Maxey of Whitman for an early and happy introduction to the Fourteenth Amendment.

To the University of California, Berkeley and Los Angeles, and to all who made Berkeley "home," and that wonderfully exciting place it was to work and study, 1927-1939. Specifically, to the late Professor Frank L. Kleeberger, for a clerkship-readership which

made possible not only graduate research and completion of library training, but also personal acquaintance with many of that distinguished faculty. To the late Professors P. O. Ray, Felix Flugel, Stuart Daggett, Max Radin, D. O. McGovney, and Henry Ballantine, who (with others from old Boalt and South Halls) so generously helped an inquisitive (and sometimes unregistered) student on his special projects; to Professors Charles Aikin, Lawrence A. Harper, and George R. Stewart, Samaritans all, for doing much, even more, of the same; to the faculty of the School of Librarianship, 1938-1939, for further professional preparation, often under mutual difficulties—bridged in this instance, as always, by my wife Mary's faithful assistance.

To the late Thomas S. Dabagh, Librarian, and to the Board of Trustees of the Los Angeles County Law Library for opportunities as Order Librarian, 1939-1950, and to Forrest S. Drummond, Librarian since 1950, for reassignment as Bibliographer, assuring opportunity to re-examine and catalog more fully the large rare book, constitutional, treatise, and social science collections earlier acquired, "building better" again than either of us then knew, or even could imagine.

Again, most especially, to the John Simon Guggenheim Memorial Foundation, and to Dr. Henry Allen Moe, then Secretary, for two Memorial Fellowships, the recognition and opportunities of which assured the continuance of research which otherwise might have lapsed.

To these long-standing friends: Professor Franklin Walker of Mills College and Alfred H. Kelly of Wayne State University, for counsel, recognition, and encouragement at crucial stages; to my childhood friend, Anna Lou Rosenquist, and to Professors Franklin Henry and Jacobus tenBroek, all of Berkeley, for devoted friendship and proof that handicap generally is a state of mind; to Allan M. Carson, Esq., and to my sometime colleague and collaborator, John W. Heckel of San Francisco, for patient assistance, and note-and-oral "conversations" that have meant more than they can ever know; to the late G. A. Nuernberger and his wife, Ruth K. Nuernberger, historians and friends from library school days, for counsel and happy times in Washington and Berkeley.

To these distinguished Americanists and teachers who have inspired, counseled, encouraged, and sometimes goaded, principally by their writing, reviews, and correspondence: the late Charles A. Beard, Edward S. Corwin, Loren Miller, and Mark de Wolfe Howe, master constitutionalists; Professors Dwight L. Dumond of Ann

Arbor, Willard Hurst of Madison, Charles Fairman of Harvard, John P. Roche and Leonard W. Levy of Brandeis, and C. Peter Magrath of Brown University. To Professor Levy I am further indebted for suggesting the re-publication of these essays.

To Dr. Donald Gleason, my physician, for good health.

Finally, above all: To my wife, Mary Wilson Graham—librarian, teacher, mother, homemaker—who for thirty-eight years has shared the joys of marriage and research, her teaching, our travel and home, and at last the dedication of this "family book" with two whose lives touched ours and the America we have wanted to see, most poignantly. To our daughter Anna Graham Snively, reference librarian, and our son, Dr. Donald W. Graham, research chemist, who have lived with *Everyman's Constitution* from birth, and who often took precocious delight in the stacks of "little white slips" which so long were its constituent forms.

To all, and again, I extend deepest heartfelt thanks and appreciation.

Happy and heartening to us in these days of national and human travail are these lines of Robert Frost, America's poet-mentor, and *Everyman's* especially since that memorable January day in 1961:

*Only where love and need are one,
And the work is play for mortal stakes,
Is the deed ever really done
For Heaven and the future's sakes.*

The way of understanding is partly mirth.

*When I was young my teachers were the old.
I gave up fire for form till I was cold.
I suffered like a metal being cast.
I went to school to age to learn the past.*

*Now I am old my teachers are the young.
What can't be moulded must be cracked and sprung.
I strain at lessons fit to start a suture.
I go to school to youth to learn the future.*

HOWARD JAY GRAHAM
Los Angeles, California
December, 1967

[CHAPTER 1]

FRAMINGHAM, MASS.

*The "Conspiracy Theory" of the
Fourteenth Amendment: Part I*

EDITORIAL NOTE. "Publish or perish" is a veritable campus dirge today. During the Great Depression it had a livelier beat. For a freelance writer-clerk, learning while collecting rejection slips at the University of California (after a first-prize start), the excitement of the chase soon provided the richest returns. By 1934, after receiving three-fifths of a cent a word for a longish serial on the Argonauts' Bay Bridges, 1849-1860,¹ I was encouraged to research an economic-entrepreneurial-great-law-case-history of California, 1860-1890, "The Golden Pageant." The impact of the corporation—the railroad in particular—would be the core theme. I spent two exciting years in working out the cost and construction profits of the Central Pacific-Southern Pacific promoters, covering the Big Four's correspondence at Stanford, revelling in Collis P. Huntington's letters to his associates telling of the financial and legal battles.

The *San Mateo* and related *California Railroad Tax Cases* of the 1880's were of course equally relevant to this story and to the Fourteenth Amendment. Events, furthermore, were moving to conjunction and climax. *The Rise of American Civilization* now had immense appeal and prestige. "Triumphant Business Enterprise" had faltered, and the Civil War, treated as "The Second American Revolution," had ironic bearings and overtones. Only a few skeptics, however, Zechariah Chafee² and Walton Hamilton³ among them, had even questioned the Beards' thesis. Hamilton, though he soon came to regret having tagged it "the conspiracy theory," most neatly and wryly hit the mark: the Beardian account, he observed in 1932, "endows . . . captains of a rising industry with a capacity for forward plan . . . they are not usually understood to possess."

Could the Beards have been naïve, have nodded perhaps? What of

¹ *When the Bay Bridge Was a Joke*, SAN FRANCISCO NEWS, Aug. 27-Sept. 15, 1934.

² Book review, 41 HARV. L. REV., 265, 267 (1927).

³ See Chapter 1, *infra*, n. 13.

Conkling? Bingham? *Were* these clauses an *intended* sanctuary for corporations? Or had they, perhaps, simply got taken over, misappropriated as such?

Fatefully, I first investigated, not the use which Conkling had made of the Joint Committee journal, but his and the Beards' statements which were most easily checked in the pages, and particularly in the petition columns, of the *Congressional Globe* and debates. Thus I discovered first those insurance and express company "petitions and bills" which *seemingly* corroborated the inferences Conkling *seemingly* had drawn and which the Beards, even more tautly, ambiguously, and significantly, *seemingly* had redrawn, in their accounts! (The "seeminglys," needless to say, are retrospective insights and wisdom!)

I also found, about this same time, but merely scanned, Bingham's main speeches of 1866, and, if I remember correctly, his speech on the Admission of Oregon, of 1859. But before either the petitions or these speeches could be assayed, I had also encountered, and run down, while "citation-chasing" in Charles Warren's *The Supreme Court in United States History*,⁴ some equally fascinating leads and references. These suggested that Mr. Justice Field had seized on certain cases he had decided at circuit in 1874-1879 to advance his then-minority views on the scope of the Fourteenth Amendment. Later in 1882-1883 Field's opinions in these nonappealable or nonappealed Chinese habeas corpus cases had served as almost the only "precedent" and support for his circuit opinions in the *San Mateo* and *Santa Clara* cases, which extended the protection of the Fourteenth Amendment to corporations. California bigots, it appeared, had lit and held the candle for the American corporate bar. Field's "Ninth Circuit law," in any event, was timely and germane, for everyone knew, and now declared the corporate "person" to be, the linchpin of judicially-sanctioned "liberty to contract" and laissez faire.

Right at this point, and almost simultaneously, two more grappling hooks caught hold. During his last years Justice Field had systematically collected and destroyed his correspondence. Two collections, however, survived, unknown to Carl B. Swisher and most earlier biographers. Four letters written to Professor John Norton Pomeroy, and reproduced in Chapter 3, *infra*, first were recovered from Pomeroy heirs. Then at Portland, voluminously and faithfully preserved in the library of the Oregon Historical Society, I located the professional papers—the lifetime correspondence indeed—of

⁴ Vol. 3, p. 409, n. 1.

Field's friend and subordinate, Matthew P. Deady, United States District Judge for Oregon, 1859-1893.

This was treasure beyond all reckoning: intimate personal correspondence that shortly was found to cover four episodes and matters now of vital current interest: first, the details of those Chinese habeas corpus cases, and hence of the genesis and proliferation of the Ninth Circuit Law; then Field's role in the various *California Railroad Tax Cases*; finally, and above all, the secret of Field's presidential aspirations, and the continued activity of friends in his behalf, in the campaigns of 1880 and 1884: his often-declared intent—if only he might have been nominated and elected—to enlarge the Supreme Court to twenty-one members, to pack it with twelve staunch conservatives. In this way, Field planned to reverse the *Granger*, the *Sinking Fund* and other obnoxious decisions, and make the due process clauses of the Fifth and the Fourteenth Amendments a bastion of laissez faire.

Coincidence often sharpens history and memory, and it did and does here: The day I began hauling up this treasure was "the day the Old Court went too far"! June 1, 1936: *Morehead v. Tipaldo*,⁵ decided by 5 to 4 vote, with Mr. Justice Roberts as "swingman," of course held bad, as a violation of due process and as an infringement of laundryowners' and laundry workers' liberty to contract, the New York Womens' Minimum Wage Law. Earlier in the term, Court majorities had knocked out, in whole or in part, thirteen acts of Congress, much of the New Deal program. Constitutional impasse now was absolute. *Neither* Congress nor the states had power to govern. Field's Circuit Law had reblossomed, and gone utterly to seed. Almost immediately, therefore, critics were clamoring for the very nostrum which Field, in these letters spread before me, had urged and anticipated: "Pack the Supreme Court of the United States!"

Before I even could finish a three-article draft, President Roosevelt, on February 5, 1937, presented *his* Court Plan to Congress. As hurriedly, and as fully as possible, I reworked the story and submitted it first to *Harpers'*, then to the *New Republic*. . . . But it still was too dense, overtechnical: "Unbelievable without documentation." Not for Everyman.

Certainly not many free lances have had and muffed such a chance as this, or sat silent and frustrated in a hurricane's eye. To the friends who have asked, or wondered, *this* is the reason that I "gave away such treasure to law reviews."

More material now, neither was needed nor wanted. Yet more ma-

⁵ 298 U. S. 587.

terial—the final breathtaking discovery, and a wholly fresh start—it had to be. For presently, routinely checking Conkling's *San Mateo* argument against B. B. Kendrick's edition of the Joint Committee journal, I came upon that amazing, that still almost incredible, misquotation and forgery.

By the mid-1930's, of course, the Conspiracy Theory had become daily gossip, an article of national faith and popular enlightenment. The Constitution, Due Process, Equal Protection—now were Everyman's business without doubt. *People* were "persons" too, even though sometimes not quite the "persons" corporations were. Everyone was reading, citing, quoting, *The Rise*: "Bingham, you know, and Conkling *planned* it that way . . . slipped in the corporations' joker!"

Fantasy! we should say soon enough, and warrantably, today. Any constitutional amendment, which must be passed by two-thirds majorities, ratified by three-fourths of the states, and *then* interpreted judicially case by case, is an unlikely enough attraction, and no shortcut at all, for schemers or cozeners. Constitutional meaning is sociological, not just verbal. Intuitive draftsmanship is apt to be duped draftsmanship. (The Electoral College, for example.) Devious draftsmanship is an absurdity. Constitutional meaning develops in "cases and controversies," and to impute foresight is to ignore this, to invert the order, to mistake result for design.

All this skeptics hinted and suggested in the 1930's, but without success. The Supreme Court had simply *made* foresight look too easy!

The Beards' hypothesis, it can be seen today, was a mirror and reflex of the times. Eventually also, it was an ingenious, intuitive, blessed corrective. Economic determinism, as Eric Goldman⁶ and Douglass Adair⁷ have pointed out, often served as the Progressive era's answer to a sterile, legal determinism. Economic interpretation of the Constitution countered economic *misinterpretation*.

The Beards' *prima facie* case was essentially a reduced, reversed facsimile of Conkling's—minus his misquotations. What the Beards really did was cram the whole "due process revolution," and by implication America's failure to pursue and realize the avowed racial objectives of the Civil War Amendments—sixty years of constitutional history—into this one word, "person," misreading result as a kind of perverse intent, but thereby focusing all the more mercilessly

⁶ GOLDMAN, *RENDEZVOUS WITH DESTINY: A HISTORY OF MODERN AMERICAN REFORM* (rev. Vintage ed., 1959), Chapter 7.

⁷ Adair, *The Tenth Federalist Revisited*, 8 WILLIAM & MARY QTLY., 48-67 (1951).

on gross and growing miscarriages. Details were left open and conjectural; law and history were compressed and oversimplified beyond reason. Not, however, beyond precedent; for Conkling and the Supreme Court both had invited this very result.

So not since Montesquieu has a misapprehension proved richer in irony or benefits. Mark well this feat and fluke, this same corporate innocent that had ushered in judicialized laissez faire, returning now to usher it out. The same legal fiction, word play, spurious presumptions, silences, and semantic confusion that so often had helped Conkling, and later the whole corporate bar and High Court, so easily to treat complex problems of business taxation, classification, and regulation as exercises in nothing but formal logic—now a Nemesis indeed. Conkling's own daring "law office history"—misread and boiled down—now the antidote-emetic for that judicially-developed, judicially-impacted laissez faire which, while not implicit in the corporate "person," had come to rest jurisdictionally, and very vulnerably, upon it. To a degree, in a manner never excelled, and none too soon, Charles and Mary Beard made Everyman his own constitutional lawyer.

This first part of the "Conspiracy Theory" thus was written easily and quickly in June–July of 1937, submitted to the *Yale Law Journal* in October, accepted in December, and published in the January, 1938, number. One week after publication, on January 31, 1938, Mr. Justice Black delivered his lone, dramatic dissent,⁸ attacking the constitutional corporate "person," citing the *Yale Law Journal* and this article.

After seven years, a footnote in history!

* * * *

Four pages of Olympian prose institute and project our inquiry. In the climactic section of their climactic chapter on the Civil War as "The Second American Revolution," the Beards wrote as follows of the Fourteenth Amendment, its purposes, interpretation, and draftsmanship:⁹

"While winning its essential economic demands in the federal sphere, the party of industrial progress and sound money devoted fine calculation to another great desideratum—the restoration and extension of federal judicial supremacy over the local legislatures

⁸ *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77, 83, 87 (1938).

⁹ Charles A. Beard and Mary R. Beard, *The Rise of American Civilization*, Volume II, pages 111–114. Copyright, 1927, by The Macmillan Company, New York. Reprinted by permission.

which had been so troublesome since the age of Daniel Shays. Restoration was heartily desired because the original limitations imposed by the Constitution on the power of the state to issue money and impair contracts had been practically destroyed by adroit federal judges imbued with the spirit of Jacksonian Democracy. An extension of federal control was perhaps more heartily desired because, for nationalists of the Federalist and Whig tradition, those limitations had been pitifully inadequate even when applied strictly by Chief Justice Marshall—inadequate to meet the requirements of individuals and corporations that wanted to carry on their business in their own way, immune from legislative interference.

"In all this there was nothing esoteric. Among conservative adepts in federal jurisprudence the need for more efficient judicial protection had been keenly felt for some time; and when the problem of defining the rights of Negroes came before Congress in the form of a constitutional amendment, experts in such mysteries took advantage of the occasion to enlarge the sphere of national control over the states, by including among the safeguards devised for Negroes a broad provision for the rights of all 'persons,' natural and artificial, individual and corporate.

"Their project was embodied in the second part of the Fourteenth Amendment in the form of a short sentence intended by the man who penned it to make a revolution in the federal Constitution. The sentence reads: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"Just how this provision got into the draft of the Fourteenth Amendment was not generally known at the time of its adoption but in after years the method was fully revealed by participants in the process. By the end of the century an authentic record, open to all, made the operation as plain as day. According to the evidence now available, there were two factions in the congressional committee which framed the Amendment—one bent on establishing the rights of Negroes; the other determined to take in the whole range of national economy. Among the latter was a shrewd member of the House of Representatives, John A. Bingham, a prominent Republican and a successful railroad lawyer from Ohio familiar with the possibilities of jurisprudence; it was he who wrote the mysterious sentence containing the 'due process' clause in the form in which it now stands; it was he who finally forced it upon the committee by persistent efforts.

"In a speech delivered in Congress a few years later, Bingham explained his purpose in writing it. He had read, he said, in the

case of *Barron versus* the Mayor and Council of Baltimore, how the city had taken private property for public use, as alleged without compensation, and how Chief Justice Marshall had been compelled to hold that there was no redress in the Supreme Court of the United States—no redress simply because the first ten Amendments to the Constitution were limitations on Congress, not on the states. Deeming this hiatus a grave legal defect in the work of the Fathers, Bingham designed 'word for word and syllable for syllable' the cabalistic clause of the Fourteenth Amendment in order, he asserted, that 'the poorest man in his hovel . . . may be as secure in his person and property as the prince in his palace or the king upon his throne.' Hence the provision was to apply not merely to former slaves struggling for civil rights but to all persons, rich and poor, individuals and corporations, under the national flag.

"Long afterward Roscoe Conkling, the eminent corporation lawyer of New York, a colleague of Bingham on the congressional committee, confirmed this view. While arguing a tax case for a railway company before the Supreme Court in 1882, he declared that the protection of freedmen was by no means the sole purpose of the Fourteenth Amendment. 'At the time the Fourteenth Amendment was ratified,' he said, 'individuals and joint stock companies were appealing for congressional and administrative protection against invidious and discriminating state and local taxes. . . . That complaints of oppression in respect of property and other rights made by citizens of northern states who took up residence in the South were rife in and out of Congress, none of us can forget. . . . Those who devised the Fourteenth Amendment wrought in grave sincerity. . . . They planted in the Constitution a monumental truth to stand four square to whatever wind might blow. That truth is but the golden rule, so entrenched as to curb the many who would do to the few as they would not have the few do to them.'

"In this spirit, Republican lawmakers restored to the Constitution the protection for property which Jacksonian judges had whittled away and made it more sweeping in its scope by forbidding states, in blanket terms, to deprive any person of life, liberty, or property without due process of law. By a few words skillfully chosen every act of every state and local government which touched adversely the rights of persons and property was made subject to review and liable to annulment by the Supreme Court at Washington, appointed by the President and Senate for life and far removed from local feelings and prejudices.

"Although the country at large did not grasp the full meaning of the Fourteenth Amendment while its adoption was pending, some far-sighted editors and politicians realized at the time that

it implied a fundamental revolution in the Constitution, at least as interpreted by Chief Justice Taney. Ohio and New Jersey Democrats, reckoning that it would make the Supreme Court at Washington the final arbiter in all controversies over the powers of local governments, waged war on it, carrying the fight into the state legislatures and forcing the repeal of resolutions approving the Amendment even after they had been duly sealed. As a matter of course all the southern states were still more fiercely opposed to the Amendment but they were compelled to ratify it under federal military authority as the price of restoration to the Union. Thus the triumphant Republican minority, in possession of the federal government and the military power, under the sanction of constitutional forms, subdued the states for all time to the unlimited jurisdiction of the federal Supreme Court."

[CHAPTER 1]

"No state shall . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person . . . the equal protection of the laws."

SECTION 1, FOURTEENTH AMENDMENT

IN AN ARGUMENT before the Supreme Court of the United States in 1882¹ Roscoe Conkling, a former member of the Joint Congressional Committee which in 1866 drafted the Fourteenth Amendment, produced for the first time the manuscript journal of the Committee, and by means of extensive quotations and pointed comment conveyed the impression that he and his colleagues in drafting the due process and equal protection clauses intentionally used the word "person" in order to include corporations. "At the time the Fourteenth Amendment was ratified," he declared, "individuals and joint stock companies were appealing for congressional and administrative protection against invidious and discriminating State and local taxes. One instance was that of an express company, whose stock was owned largely by citizens of the State of New York . . ." The unmistakable inference was that the Joint Committee had taken cog-

¹ See *San Mateo County v. Southern Pacific R.R.*, 116 U. S. 138. A printed copy of the *Oral Argument of Roscoe Conkling* is preserved in a volume entitled *SAN MATEO CASE, ARGUMENTS AND DECISIONS*, in the Hopkins Railroad Collection of the Library of Stanford University. It is this copy which I have used and cite hereafter as *CONKLING'S ARGUMENT*; see Appendix I for a paged reprint of the constitutional portions of this ARGUMENT.

nizance of these appeals and had drafted its text with particular regard for corporations.

Coming from a man who had twice declined a seat on the Supreme Bench,² who spoke from first-hand knowledge, and who submitted a manuscript record in support of his stand, so dramatic an argument could not fail to make a profound impression. Within the next few years the Supreme Court began broadening its interpretation of the Fourteenth Amendment, and early in 1886 it unanimously affirmed Conkling's proposition, namely that corporations were "persons" within the meaning of the equal protection clause.³ It is literally true therefore that Roscoe Conkling's argument sounded the death knell of the narrow "Negro-race theory" of the Fourteenth Amendment expounded by Justice Miller in the *Slaughter-House* cases. By doing this it cleared the way for the modern development of due process of law and the corresponding expansion of the Court's discretionary powers over social and economic legislation. Viewed in perspective, the argument is one of the landmarks in American constitutional history, an important turning point in our social and economic development.

Conkling's argument has figured prominently in historical writing since 1914 when B. B. Kendrick unearthed and edited the manuscript copy of the Journal which Conkling used in court.⁴ Checking the record in the light of his major propositions, historians became convinced of the fundamental truth of Conkling's story. Repeatedly, it appeared from the Journal, the Joint Committee had distinguished

² Once as Chief Justice, *vice* Chase, in 1873; again as Associate Justice, *vice* Hunt, in 1882. Chief Justice Waite and Justice Blatchford thus both occupied seats which had been declined by Conkling.

³ See Waite, J., in *Santa Clara County v. Southern Pacific R.R.*, 118 U. S. 394, 396 (1886). This case involved the same questions as the *San Mateo* case argued three years before.

⁴ THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1914). The Journal itself is printed in Part I, pp. 37-129. The "Introduction," pp. 17-36, gives an interesting account of its history and the circumstances of discovery. It is revealed that 6,000 copies of the Journal were printed by the order of the Senate in February, 1884 (while the *San Mateo* case was still before the Supreme Court). For some unexplained reason these copies never circulated, a single printed copy of the edition being preserved in the Government Printing Office. This copy was used by Horace E. Flack in the preparation of his monograph, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1903). But it was not until 1911 and the publication of Hannis Taylor's THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION (1911), wherein attention was directed to Conkling's argument, that the full historical importance of the manuscript was noted. It should be added that Professor Kendrick was concerned with the bearing of the Journal on matters pertaining to Reconstruction, and referred only incidentally to the later use made by Conkling. This fact explains the failure to note the discrepancies in Conkling's quotations from the Journal.

in its drafts in the use of the words "person" and "citizen."⁵ Under no circumstances could the terms have been confused. Moreover, as the Committee had persistently used the term "person" in those clauses which applied to property rights and the term "citizen" in those clauses which applied to political rights, the force of this distinction seemed plain: corporations as artificial persons, had indeed been among the intended beneficiaries of the Fourteenth Amendment. Convinced on this point, historians developed an interesting theory: the drafting of the Fourteenth Amendment had assumed something of the character of a conspiracy, with the due process and equal protection clauses inserted as *double entendres*. Laboring ostensibly in the interests of the freedmen and of the "loyal white citizens of the South," the astute Republican lawyers who made up the majority of the Committee had intentionally used language which gave corporations and business interests generally increased judicial protection as against State legislatures.

What appeared to be corroboration for this viewpoint was presently found in the speeches⁶ of Representative John A. Bingham, the Ohio Congressman and railroad lawyer who almost alone of the members of the Joint Committee had been responsible for the phraseology of Section One. Bingham, it appeared both from the Journal and the debates on the floor of the House, had at all times shown a zealous determination to secure to "all persons" everywhere "equal protection in the rights of property."⁷ Moreover, he had evinced an extraordinary preference for the due process clause and had developed and defended its phraseology in most vigorous fashion. As no other member of the Joint Committee, or of Congress, gave evidence of a similar desire to protect property rights, and none manifested his partiality for the due process clause, it seemed logical to conclude that Bingham's purposes had in fact been far more subtle and comprehensive than was ever appreciated at the time. Bingham had been the master-mind who "put over" this draft upon

⁵ KENDRICK, *op. cit. supra* note 4, at 50-51, 56, 60-61 for striking examples.

⁶ CONG. GLOBE, 39th Cong., 1st Sess. (1866), 429, 1034, 1064-1065, 1089-1095, 1292.

⁷ Originally Bingham's draft was phrased in the positive form: "Congress shall have power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty and property." Later, a clause was added giving Congress power to "secure to all citizens the same immunities and also equal political rights and privileges." These clauses were the embryonic forms out of which the later phraseology developed. Early drafts made no mention of "due process of law." Not until the House had virtually rejected the Amendment on the grounds that it gave Congress too sweeping powers—thus compelling a change from the early positive to the present negative form ("no State shall . . .")—was the due process phraseology inserted. Bingham's early speeches reveal, however, that he had had due process of law in mind from the very beginning.

an unsuspecting country. The fact that he had tried and failed to secure the inclusion of a "just compensation" clause in Section One as still another restraint upon the States' powers over property,⁸ and the fact that in 1871,⁹ five years after the event, he declared he had framed the section "letter for letter and syllable for syllable" merely served to strengthen these suspicions.

Impressed by this cumulative evidence, and alive to its historical implications, Charles A. and Mary R. Beard, in 1927, developed in their *Rise of American Civilization* what is still, a decade later, the most precise statement of the conspiracy theory. Undocumented, and with conclusions implicit rather than explicit, the Beards' thesis was this: Bingham, "a shrewd . . . and successful railroad lawyer, . . . familiar with the possibilities of jurisprudence," had had much broader purposes than his colleagues. Whereas they were "bent on establishing the rights of Negroes," he was "determined to take in the whole range of national economy." Toward this end he had drafted the due process and equal protection clauses and forced them upon the Committee by persistent efforts. Quoting Bingham's speeches and Conkling's argument in support of the view that corporations had been among the intended beneficiaries of the draft, the authors concluded:¹⁰

"In this spirit, Republican lawmakers restored to the Constitution the protection for property which Jacksonian judges had whittled away and made it more sweeping in its scope by forbidding states, in blanket terms, to deprive any person of life, liberty, or property without due process of law. By a few words *skillfully chosen* every act of every state and local government which touched adversely the rights of persons and property was made subject to review and liable to annulment by the Supreme Court at Washington."

Thus, while the Beards nowhere expressly state that Bingham was guilty of a form of conspiracy, this is none the less a fair inference from their account, and it is one which has repeatedly been drawn. Numerous writers,¹¹ accepting the Beards' account and popularizing it, have supplied more explicit interpretations. Thus, E. S. Bates, in

⁸ KENDRICK, *op. cit. supra* note 4, at 85. Bingham made this attempt at the meeting of the Committee on April 21, 1866. The adverse vote was 7 to 5, with three members absent.

⁹ CONG. RECORD, 42nd Cong., 1st Sess. (1871) Appendix, at 83-85.

¹⁰ Vol. II, p. 111-113 (italics added).

¹¹ See, e.g., Lerner, *The Supreme Court and American Capitalism* (1933) 42 YALE L. J. 668, 691; DAGGETT, *PRINCIPLES OF INLAND TRANSPORTATION* (1934) 436-437; JOSEPHSON, *THE ROBBER BARONS* (1934) 52.

his *Story of Congress*, declares that Bingham and Conkling in inserting the due process phraseology, "smuggled" into the Fourteenth Amendment "a capitalist joker."¹²

Despite widespread acceptance and a prestige which derives from the Beards' sponsorship, the conspiracy theory has not gone unchallenged. Numerous writers have expressed varying degrees of disapproval and skepticism.¹³ Constitutional historians in particular appear reluctant to accept its implications, although they, any more than the sponsoring school of social historians, have not as yet presented their case in documented detail. One thus observes the curious paradox of a theory which cuts across the whole realm of American constitutional and economic history and which is itself a subject for increasing speculation and controversy, yet which has developed piecemeal, without systematic formulation or criticism.

How extraordinary certain aspects of this situation are may be judged from the fact that one is now left wholly in the dark as to the nature and degree of conspiratorial intent imputed to Bingham and his colleagues. Is one to believe, for example, that these men determined from the first to devise phraseology which included corporations? Or simply that they later perceived it possible, or advantageous, to do so? Again, what type of protection did the framers contemplate within the meanings of the due process phrase? Protection in the modern substantive sense? Or simply protection against arbitrary procedure? If simply the latter was intended, the "conspiracy" was scarcely worthy of the name, for to have used "person" and "due process" in this manner would have been natural for any well informed lawyer of 1866, whatever may be said of the understanding of the layman. On the other hand, to have applied due process substantively with regard to corporations in 1866 would have been a thoroughly revolutionary step, even for a lawyer. For this reason it is a substantive usage that is most consistent with the theory. In both of these issues the implied difference in motive is great; and likewise

¹² At 233-234.

¹³ Louis Boudin has referred with obvious irritation to the "legendary history of the Fourteenth Amendment" and has threatened a monograph in disproof of "pseudo history" sponsored by certain "eminent historians." 2 GOVERNMENT BY JUDICIARY (1932) 404. More precise and dispassionate, Walton H. Hamilton has objected that the theory "endows the captains of a rising industry with a capacity for forward plan and deep plot which they are not usually understood to possess." *Property—According to Locke* (1932) 41 YALE L. J. 864, 875. Finally, E. R. Lewis, the most recent writer to examine the matter in the light of both the published Journal and the Congressional debates, has emerged frankly skeptical of Conkling's whole story and inclined to demand more convincing evidence. A HISTORY OF AMERICAN POLITICAL THOUGHT FROM THE CIVIL WAR TO THE WORLD WAR (1937) 28 ff.

the implied ambiguity in the theory. The matter of motive and intent would seem to be too fundamental an element of conspiracy to leave in so unsatisfactory a state.

It is the purpose of this article to re-examine the conspiracy theory and to determine, insofar as possible, the extent to which it meets certain essential conditions.

I. CONKLING'S ARGUMENT RE-EXAMINED

A priori, there are two major reasons for being skeptical of a declaration that the framers of the Fourteenth Amendment aimed to aid business interests when they devised the due process and equal protection clauses. First, as we have just seen, such a declaration virtually demands as its major condition that John A. Bingham and the other members of the Joint Committee regarded due process of law as a restraint upon the substance of legislation at the early date of 1866, whereas due process was at this time, with a few striking exceptions,¹⁴ merely a limitation upon procedure. The theory thus presupposes that the drafters assumed what was really an extraordinary viewpoint: it endows them with remarkable insight and perspicacity. The second objection is that, as an apparent explanation of the Committee's choice of the word "person" in preference to "citizen," the theory ignores the fact that "person" was really the term employed in the Fifth Amendment, the phraseology of which Bingham simply copied. Further, in line with this last point is the fact that "persons," as a generic term and as a device employed in the original Constitution to refer to Negro slaves,¹⁵ clearly included "persons" of the Negro race and may logically have been preferred for this reason, since grave doubt existed as to whether Negroes were "citizens," and troublesome problems of definition arose if one tried to speak of them in still more precise terms.

The obstacles which these facts throw in the way of the conspiracy theory are at once apparent. Granted that Bingham's speeches reveal a solicitude for property rights not found in the speeches of his colleagues, granted that his drafts of the Amendment were couched in much broader language than those of his associates—in language which today "takes in the whole range of national economy"—still,

¹⁴ The two most conspicuous were Chief Justice Taney's dictum in the *Dred Scott* case [19 Howard 393 (U. S., 1856)] and the various dicta in the New York liquor case of *Wynhamer v. People* [13 N. Y. 378 (1856)]. For the development of due process of law before the Civil War, see Howe, *The Meaning of Due Process Prior to the Adoption of the 14th Amendment* (1930) 18 CALIF. L. REV. 583; Corwin, *The Doctrine of Due Process of Law Before the Civil War* (1911) 24 HARV. L. REV. 366, 460.

¹⁵ Art. I, § 2, par. 3; Art. IV, § 2, par. 3.

it hardly follows that Bingham in 1866 was thinking of corporations as the beneficiaries of his drafts, nor that he regarded due process in the modern substantive sense. He may, conceivably, have used the words "any person" merely as a sure means of including Negroes as well as whites; he may also have used "due process of law" as a sure means of guaranteeing fair trial and fair procedure to all natural persons. In fact, so long as these were the prevailing usages down to 1866 one is hardly warranted in attributing a more subtle or comprehensive purpose to Bingham without definite, positive evidence. To do otherwise is to risk interpreting Bingham's purposes in the light of subsequent events.

So long as these fundamental objections place serious obstacles in the path of the theory, the question at once arises whether the direct statements made by Conkling in 1882 are alone sufficient to sustain it. If they are not, search must be made for new evidence, and the whole problem of the circumstantial materials in Bingham's speeches must be thoroughly canvassed.

An examination of Conkling's argument properly becomes the starting point of our inquiry. To facilitate later discussion, an analytical abstract of his argument will be presented:

1. Conkling's basic proposition, inferred at the outset, was that the Committee had had two distinct and clearly defined purposes. The first of these "related chiefly to the freedmen of the South" and dealt with the "subject of suffrage, the ballot, and representation in Congress." The second was broader and far more important, namely, to frame an amendment which would secure universal protection in the rights of life, liberty, and property.¹⁶

2. Having drawn this division in the agenda, he now declared, and offered extensive quotations from the Journal designed to show, that before the Committee undertook the second of these tasks—*i.e.*, the task of framing what later became the due process and equal protection clauses—it had in fact "completely disposed of" and "lost all jurisdiction and power over" the first, *i.e.*, "the portion which did in truth chiefly relate to the freedmen of the South."¹⁷

3. His quotations from the Journal were also designed to show that the Committee had throughout its deliberations repeatedly distinguished between "citizens" and "persons," and that it had in general used "citizens" in the clauses designed to secure political rights

¹⁶ CONKLING'S ARGUMENT, *op. cit. supra* note 1, at 13-15.

¹⁷ *Id.*, at 15, 19, 20. Note the inference of the modifier "which did in truth chiefly relate." Conkling's argument abounds with such subtle suggestions of a broader and undeclared purpose.

and privileges (*i.e.*, in what later became the privileges and immunities clause) and had used "persons" in the clause designed to secure "equal protection in the rights of life, liberty, and property."¹⁸

4. He even quoted from the minutes to show that on one occasion he himself had moved to strike out of a draft "citizens" and substitute "persons."¹⁹

5. Most important of all, he gave his listeners to understand—even emphasized the fact—that the draft of the equal protection clause as originally reported by a sub-committee had itself specified "citizens," and it is questionable, from a close reading of the argument, whether his listeners may not have gained the impression that it was he, Conkling, who had been responsible (by the previously mentioned motion) for the substitution of "persons" for "citizens" in this clause.²⁰

6. Without laboring his point, and relying on his listeners to recall that in the final draft of the Amendment the privileges and immunities clause applied to "citizens," and the due process and equal protection clauses to "persons," Conkling asked in conclusion if this record did not show that "the Committee understood what was meant" when it used these different terms.²¹

7. Apparently to remove all doubt on this score, Conkling casually added, "At the time the Fourteenth Amendment was ratified . . . individuals and joint stock companies were appealing for congressional and administrative protection against invidious and discriminating State and local taxes"—inferring that the Committee had taken cognizance of this situation and that a desire to protect corporations had been the real explanation for maintaining the distinction between "citizens" and "persons."²²

Two features of Conkling's argument, which in many respects is a masterpiece of inference and suggestion, are now to be stressed. First, nowhere does Conkling explicitly say that the Committee regarded corporations as "persons"; nowhere does he say that the members framed the due process and equal protection clauses with corporations definitely in mind. These are simply the casual yet unmistakable impressions gained from dozens of hints, intimations, and distinctions made throughout his argument. The second feature, somewhat surprising in the light of the first, is that in his conclusion Conkling not only failed to press his points but, on the contrary, now

¹⁸ *Id.*, at 17-19, 23, 24.

¹⁹ *Id.*, at 18, 19.

²⁰ *Id.*, at 17-19.

²¹ *Id.*, at 24, 25.

²² *Id.*, at 25.

substantially waived them. "I have sought to convince your honors," he said, "that the men who framed . . . the Fourteenth Amendment *must have known* the meaning and force of the term 'person,'" and in the next sentence he spoke significantly of "this surmise."²³ Later, in his peroration, he freely admitted the difficulties of the proposition he had maintained. "The statesman," he declared, "has no horoscope which maps the measureless spaces of a nation's life, and lays down in advance all the bearings of its career." Finally, he concluded in this vein, "Those who devised the Fourteenth Amendment *may have builded better than they knew . . . To some of them, the sunset of life may have given mystical lore.*"²⁴

These quotations reveal an equivocal and indecisive element in Conkling's argument, and they provoke various questions. Why, if he had definite knowledge that the Joint Committee really framed the Amendment to include corporations, did he adopt this peculiar, tenuous, and indirect means of saying so? Why, after laboring to give the impression of intent, did he himself at times seem to belie that impression by use of such indecisive language? Was this simply a lawyer's caution, a desire for understatement? Was it because he felt that suggestion might here prove a stronger weapon than detail? Was it because he feared too concrete an account of unwritten history might harm his cause? Or was it because of some inherent weakness—even absence—of fact in his argument? A critical reader must puzzle over these questions and a cautious one will seek for tangible answers. In this connection several tests come to mind. Does Conkling's argument bear evidence of a scrupulous regard for facts, first in its major propositions, second in its essential details? Is it inherently consistent? Does it bear evidence of care and good faith in quotation from the Journal?

Application of these tests to the more than twenty pages of Conkling's argument leads to some startling discoveries. Not only does it appear as a result of such an inquiry that Conkling suppressed pertinent facts and misrepresented others, but it is hard to avoid the conclusion that he deliberately misquoted the Journal and even so arranged his excerpts as to give listeners a false impression of the record and of his own relation thereto. In framing a bill of particulars, the following may be set down in refutation of his major points:

1. With regard to his fundamental proposition that the Joint Committee had been charged with two distinct, clearly defined purposes and that these two purposes had at all times been kept separate

²³ *Id.*, at 31 (italics added).

²⁴ *Id.*, at 33, 34 (italics added).

and distinct, it is sufficient to say that Conkling himself quoted²⁵ a resolution in the Journal which effectively disposed of his point. This resolution, introduced in the Joint Committee by Senator Fessenden on January 12, 1866, reads as follows:²⁶

"Resolved that . . . the *insurgent States* cannot . . . be allowed to participate in the Government until the basis of representation shall have been modified, and the rights of all persons amply secured . . ."

Obviously this resolution specified two tasks for the Joint Committee. But the important fact, not mentioned by Conkling and even disguised by him, was that it specified both tasks with regard to the "insurgent States." This being the case, it is hard to see how the two purposes could ever have been "separate and distinct" in the sense which Conkling contended, and harder still to believe that only those portions of the Fourteenth Amendment relating to "representation, the suffrage," etc., dealt exclusively with conditions in the South. The "insurgent States" reference practically destroys Conkling's case at the outset. His argument is rendered suspect by one of his own citations from the Journal. Only by laying emphasis upon Fessenden's use of the word "persons" in this resolution did Conkling steer listeners past this flaw in his case.

2. Auxiliary to his main proposition, Conkling was at great pains to show²⁷ that the text of Bingham's Amendment, which originally read "Congress shall have power . . . to secure to all persons equal protection in the enjoyment of life, liberty and property," had been dealt with by the Committee as if members had at all times regarded it as distinct in both subject matter and purpose from the other amendments dealing with suffrage and representation. His particular point in this connection was that on January 24, 1866 the Bingham Amendment had been referred to a different sub-committee than the one that had considered the other drafts. What Conkling neglected to say was that when Bingham originally introduced this draft on January 12, 1866, it had been referred, at Bingham's own motion, to "the sub-committee on the basis of representation"—the same sub-committee, in short, which received the other drafts.²⁸ This appears to be a damaging omission, for it suggests that Bingham himself may have regarded his draft merely as one which,

²⁵ *Id.*, at 16.

²⁶ KENDRICK, *op. cit. supra* note 4, at 42 (italics added). Cited hereafter as the Fessenden resolution.

²⁷ See note 17, *supra*.

²⁸ KENDRICK, *op. cit. supra* note 4, at 46.

applying to "the insurgent States," "amply secured the rights of all persons," thus, perhaps, effectuating the second purpose outlined in the Fessenden resolution.

Whether this last interpretation is warranted or not, failure to mention the fact that Bingham's draft had originally been referred to the "subcommittee on the basis of representation" led Conkling into embarrassing difficulties—difficulties from which he extricated himself only by stratagem. We need here say no more than that at one point in his argument²⁹ Conkling quoted this passage from the Journal:³⁰ "The Committee proceeded to the consideration of the following [*i.e.*, Bingham] amendment . . . *proposed by the sub-committee on the basis of representation.*" Obviously, to have read the text in this form would have been to risk wiping out the very impression which he was laboring to establish, namely that the Bingham Amendment was a thing apart, and one dealt with by a separate sub-committee—the "sub-committee on the powers of Congress." If we judge by his printed argument, Conkling extricated himself from this hole by pausing after the word "sub-committee"—*i.e.*, by inserting a comma in the written text—so that the reported passage reads as follows:³¹

"The Committee proceeded to the consideration of the following amendment . . . proposed by the sub-committee, on the basis of representation: 'Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States in each State the same political rights and privileges, and to all persons in every State equal protection in the enjoyment of life, liberty, and property'."

By thus splitting off the final phrase, and relating it not to its proper antecedent "sub-committee" but to the text of the Amendment which followed, Conkling salvaged his case. The fact that intrinsically the Bingham Amendment had nothing whatever to do with "the basis of representation," that it thus belied Conkling's motivating phrase, was probably not perceived by his listeners for the reason that this point was inconsequential to his main argument, and that in the reading of the text he laid great stress on Bingham's use of the word "persons," thus directing thought in other channels.

3. Turning now to Conkling's second proposition, one finds the evidence almost as damaging. Again and again Conkling intimated

²⁹ CONKLING'S ARGUMENT, *op. cit. supra* note 1, at 20.

³⁰ KENDRICK, *op. cit. supra* note 4, at 54 (*italics added*).

³¹ See note 29, *supra* (*italics in original*).

that the real reason Bingham and the Joint Committee used the terms "persons" instead of "citizens" had been to include corporations. Close examination not only fails to substantiate this statement but even provides an alternative explanation. One discovers the word "persons" used in numerous contexts which suggest that the real reason for preferring the term to "citizens" was that the freedmen, as natural beings and former slaves, were unquestionably to be regarded as "persons," whereas numerous complications arose whenever one attempted to speak of them, or even to define them, as "citizens."³²

Nowhere is this shown to better advantage than in a draft of an amendment which Conkling himself sponsored,³³ and from which, with rare audacity, he quoted in argument.³⁴ "Whenever in any State," he read, making clear that the text was his own, "civil or political rights or privileges shall be denied or abridged on account of race or color, *all persons of such race or color shall be excluded from the basis of representation.*" One naturally wonders whether we do not have here a clue to the intended scope of the term "persons," and to the fundamental reason for choosing it.³⁵ Surely the reference to "all persons of such race or color" suggests an explanation quite as plausible as Conkling's. It does not preclude the possibility of mixed or compound motives in determining the use of the term; it simply cautions against assuming that a single explanation is necessarily adequate and that other possibilities may be ignored.³⁶

³² Passages in the Journal (KENDRICK, *op. cit. supra* note 4, at 42-44, resolution of Mr. Williams and Mr. Conkling; at 50-51, report of sub-committee) indicate that the Joint Committee, confronted early in its deliberations with the problem of how best to refer to the Negroes, divided into two groups. The first group, led by Conkling and Bingham, preferred to use the inclusive term "persons" throughout. The second group, led by Stevens, preferred the narrower term "citizens" with an added clause defining citizenship in such manner as to include Negroes. The dangers of ambiguity in definition apparently weighed heavily in the minds of all, for when the question finally came to a vote, the Bingham-Conkling form was adopted and Stevens withdrew his motion. *Id.*, at 52-53. It was not until much later, when the final draft of the amendment was before the Senate, that the first sentence of Section 1, which now defines citizenship, was added.

³³ KENDRICK, *op. cit. supra* note 4, at 44.

³⁴ CONKLING'S ARGUMENT, *op. cit. supra* note 1, at 16.

³⁵ This view is strengthened when one discovers that on April 21, 1866, the Joint Committee approved the following phraseology as a final draft of Section 1: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of *persons* because of race, color, or previous condition of servitude." KENDRICK, *op. cit. supra* note 4, at 83-85. Bingham's phraseology was finally substituted on April 28, 1866, after some surprising reversals in voting. *Id.*, at 106.

³⁶ Further evidence which suggests that the word "persons" may not originally have been used with any subtle or devious intent is found in the text of the Fessenden

4. Doubtless the most impressive point made by Conkling, so far as the Justices of the Supreme Court were concerned, was to the effect that Bingham's Amendment, as originally reported by the sub-committee, used the word "citizens" throughout; "persons," he emphasized by implication, appeared nowhere in the text.³⁷ What gave real significance to this point was that Conkling had earlier emphasized that the text as originally introduced by Bingham, and ordered referred to the sub-committee, read, "Congress shall have power . . . to secure to all *persons* equal protection in the enjoyment of life, liberty and property." Recalling this emphasis, listeners could hardly have failed to have been impressed. For not only did it follow that the sub-committee had stricken out "persons" and substituted "citizens" in this early draft of what eventually developed into the equal protection and due process clauses, but it followed further, since in the ultimate form both clauses applied to "persons," that at some stage or other—Conkling did not say when, or touch directly upon this point—the broader of the two terms had been reinstated. Obviously the mere fact of these successive deletions and insertions justified a view that the Committee had framed these clauses carefully, with utmost discrimination. And Conkling's statement regarding the joint stock companies provided a plausible reason.

To remove the underpinning from this part of the argument—and virtually from Conkling's entire case—one has to say merely that neither the sub-committee, nor anyone, at any time or under any circumstances, so far as the historical record indicates, ever used the word "citizen" in any draft of the equal protection or due process clauses. "Persons" was the term used by Bingham;³⁸ "persons" was the term reported by the sub-committee;³⁹ "persons" was the term discussed and approved by the Committee as a whole.⁴⁰ Conkling misquoted the Journal in his argument, and it is almost impossible to believe that he did not do this intentionally. The reason is that

resolution, *supra* note 26. It will be recalled that this resolution specified that "the rights of all persons" must be "amply secured," but that it so specified only with regard to the "insurgent States." This being the case, and in view of the advantages of referring to Negroes as "persons," it seems gratuitous for Conkling to have asked with regard to this resolution, why, if Fessenden intended only to "bespeak protection for the black man of the South, he should choose these general, sweeping, if not inapt words." One can never know with certainty whether Fessenden regarded corporations as "persons" within the meaning of this resolution, but one rather marvels at Conkling's audacity in intimating that Fessenden did.

³⁷ See *supra*, note 20.

³⁸ KENDRICK, *op. cit.* *supra* note 4, at 46.

³⁹ *Id.*, at 51, 56.

⁴⁰ *Id.*, at 60-61, 82-107.

he paused, repeated, and rhetorically underscored the misquoted word "citizen" so that the passage, as it appears in the printed argument,⁴¹ reads as follows:

"Now comes the independent article:

'Article —. Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all citizens in every State'.

"I beg your Honors to remark that the term here employed was 'all citizens in every State' . . . '*equal protection in the enjoyment of life, liberty, and property*'."⁴²

So long as the presumption must be strongly against a mere lapse on Conkling's part, the question necessarily arises what he could obtain by so bold a move. The reader must remember in this connection that Conkling predicated his entire case on the distinction between the meaning of the terms "citizen" and "person," and that the effect therefore was immeasurably to strengthen his hand. Another aspect of the matter is that it is questionable from a reading of the argument, particularly from the standpoint of one hearing it delivered orally for the first time, whether, in the passage immediately following, listeners may not have received the impression that Conkling himself was responsible for the substitution of the word "persons" for "citizens" in this embryo equal protection-due process clause. The reason for this belief is that Conkling went on to quote excerpts from the Journal which showed that he had himself moved to substitute "persons" for "citizens" in one draft,⁴³ and that he stated, but did not emphasize, that this motion to substitute was really with reference to one of the earlier quoted articles relating to representation and suffrage.⁴⁴ The question, therefore, is whether

⁴¹ P. 18.

⁴² It is sufficient to point out that the emphasis and underscoring eliminate the possibility of a mere verbal slip on Conkling's part in substituting "citizens" for "persons." And this appears to leave but one alternative, the possibility that Conkling really intended to emphasize the use of the word "citizens" in the first clause rather than in the second. Yet a rereading of his text with this object in mind reveals the unlikelihood of such an explanation—if for no other reason than that it requires his making not one verbal slip, but two, and that together these would have so altered his meaning as to make their delivery and oversight appear improbable.

⁴³ See *supra* note 19.

⁴⁴ Article B as reported in the Journal. KENDRICK, *op. cit. supra* note 4, at 50-51. Conkling had quoted Article B, and its alternative form, Article A, on pages 17-18 of his argument, but immediately after doing this he had also quoted Bingham's "independent article." Confusion might very easily arise from failure to make clear that his motion to substitute thus applied to Article B, particularly since its phraseology was of little apparent interest.

his listeners—who must have been highly impressed by his dramatic underscoring of the misquoted word “citizens,” and who were probably still wondering when the word “persons” had eventually been reinstated—did not jump to the conclusion, unwarranted by a close reading of the argument, that Conkling was himself the man responsible for this change. In view of these circumstances, it can be seen that Conkling undoubtedly gained a great deal from this part of his argument. Whether, and to what extent, his gains were the result of deliberate plan and artifice can never be known with certainty—and one must recognize some of the same pitfalls in imputing plot and design to Conkling as we have already mentioned in the case of Bingham⁴⁵—but the present writer is convinced that the foregoing evidence is most reasonably explained as a deliberate misuse of facts. To say this is not to say that the Joint Committee may not have regarded corporations as “persons”; that, indeed, is a question which depends upon many things. It is simply to say that Conkling could not prove his proposition from the Journal itself. In making the attempt, therefore, he resorted to misquotation and unfair arrangement of facts. He made free use of inference and conjecture, and above all he imposed upon the good faith of listeners who undoubtedly had a high regard for his veracity.

In summing up, it appears that the portions of Conkling's argument which rest upon quotations from the Journal of the Joint Committee by no means sustain the impressions he drew. The whole argument, in fact, is found to be little better than a shell of inference built up in the course of attempted proof of inconsequential points. Not one but both of his major propositions collapse under weight of facts which he himself cited. Misquotation, equivocal statements, and specious distinctions suggest an inherently weak case—even point toward deliberate fabrication of arguments. All in all, the showing is so poor that one is forced to consider whether Conkling's personal reputation, and the advantage which he enjoyed as the first member of the Joint Committee to produce and make use of the Journal, did not account to large extent for his contemporary success, whereas the continued credence given his argument has been the result of these factors plus the natural tendency for us today to assume foresight in those matters which are reasonably clear to hindsight, it being forgotten that as applied to historical interpretation this is often an unwarranted—even dangerous—assumption.

⁴⁵ There is the important difference, however, that Conkling undoubtedly had a strong motive for misleading the Supreme Court, whereas the chief question must always be whether Bingham had any motive for desiring to aid corporations.

Practically, the only point in Conkling's argument not so far discredited is his statement that "at the time the Fourteenth Amendment was ratified, joint stock companies were appealing for congressional and administrative protection against invidious and discriminating State and local taxes. One instance was that of an express company whose stock was owned largely by citizens of the State of New York . . ."⁴⁶ This is an explicit statement, and one which merits thorough investigation, but it must be stressed that by itself it is scarcely adequate proof of Conkling's point. Corporations may indeed have petitioned the Thirty-ninth Congress for relief, but alone this fact proves little. Without direct, contemporaneous evidence that the drafters of the Fourteenth Amendment devised its phraseology with corporations in mind, or at least without evidence that they regarded it as benefiting corporations, once drafted, the existence of these parallel occurrences may have been simply coincidence—a coincidence which Conkling, arguing long after the event and at a time when corporations were moving heaven and earth to broaden judicial interpretation of "persons" and "due process of law," may have shrewdly determined to capitalize. In view of the liberties he appears to have taken with other facts, in view of his temptations to stretch the record⁴⁷ and of his unique opportunities for doing so,⁴⁸ above all, in view of the dangers of relying upon purely circumstantial evidence to establish intent in cases where intent presumes an exceptional viewpoint and perspicacity, one is warranted, at least until it is proved that Bingham had a substantive conception of due process, in regarding this portion of Conkling's argument as essentially immaterial.

II. THE EVIDENCE IN THE CONGRESSIONAL DEBATES

It becomes increasingly apparent that the conspiracy theory can hardly attain satisfactory status until precise knowledge is had of what the framers themselves conceived to be the meaning of the language they employed. Conkling's argument and the circumstantial record of the Journal prove inconclusive and therefore inadequate on this point. It remains to assay the evidence which is found in the congressional debates of 1866.

⁴⁶ See *supra* note 22.

⁴⁷ I.e., as a lawyer anxious to see the Supreme Court "liberalize" the Fourteenth Amendment, particularly to the extent of declaring corporations "persons."

⁴⁸ I.e., as a man high in public life relating inside history for the first time, and bolstering his case—or shall we say his inferences—by citations from a manuscript journal not heretofore known to exist.

The impressive thing here, of course, is the utter lack of contemporaneous discussion of these clauses which are today considered all-important. Hundreds of pages of speeches in the *Congressional Globe* contain only the scantest reference to due process and equal protection.⁴⁹ Two opposing explanations will perhaps be offered in this connection. Critics of the conspiracy theory will doubtless hold that dearth of discussion indicates a universal understanding that these clauses were to protect the freedmen in their civil rights. Sponsors, on the other hand, may argue that silence indicates a universal misunderstanding of what were in fact the "real" purposes of the framers.

It is desirable because of this double-edged character of the argument from silence, and because of the peculiar dangers inherent in its use as a proof of "conspiracy," that we digress a moment at this point in order to avoid later confusion.

So long as intent or design is one major element in any conspiracy, and so long as silence or secrecy is the other, it readily follows that if the framers of the Fourteenth Amendment intended to benefit corporations, and yet failed to make known their intentions—which otherwise were not suspected—then the framers were guilty of conspiracy. In short, intent plus silence in a situation of this kind equals

⁴⁹ Aside from the Bingham speeches cited *supra* in note 6, the most important references to these clauses were in speeches by Reverdy Johnson, Democratic Senator from Maryland and minority member of the Joint Committee [CONG. GLOBE, 39th Cong., 1st Sess. (1866) 3041]; J. B. Henderson, Republican Senator from Missouri [*Id.*, at 3035-3036]; Jacob M. Howard, Republican Senator from Michigan and majority member of the Joint Committee [*Id.*, at 2766]. However, even these references are so brief as to settle nothing. Reverdy Johnson favored the due process clause but opposed the privileges and immunities clause "simply because I do not understand what will be the effect of that," inferring, of course, that he thought he understood what was to be the effect of due process. The only fragment of evidence in the *Globe* suggesting that Johnson may have had a substantive conception of due process is that on one occasion when debating the constitutionality of test oaths—*i.e.*, not when discussing due process—[CONG. GLOBE, 39th Cong., 1st Sess. (1866) 2916] he alluded to the Alabama case *In re Dorsey* [7 Port. 293 at 296 (1838)] in which Justice Ormond had held a dueling test oath to be a violation of the due course of law clause of the Alabama Constitution. This would seem to be too slender a reference to serve to link these two concepts.

The speech of Senator Henderson is more suggestive, particularly in the light of our later discoveries regarding Bingham's views. Henderson obviously regarded the whole of Section 1 as applying only to Negroes, for he criticized it as unnecessarily prolix and declared that the whole problem would have been solved by a draft prohibiting the States from discriminating against Negroes because of race or color. However, he did regard "life, liberty, and property as absolute inalienable rights" and was thus probably prepared to read into the clause his personal conceptions of justice—even though his discussion implied that he regarded the due process phrase as properly securing only notice and hearing, etc.

Howard's speech is consistent with a "Negro race interpretation" of Section 1.

conspiracy. When this formula is applied to the present case, it follows further, since the fact of silence is not questioned,⁵⁰ that the actual intent of the drafters to afford corporations relief is the only point at issue. To prove intent is to prove the conspiracy theory. But it is precisely at this point that confusion arises. Since silence, along with intent, is one of the major elements of conspiracy, there is a natural tendency to use it not only to prove the theory, but also, by a confusion of purposes and ideas, to prove intent. This is done generally in the roundabout fashion of assuming that silence is evidence of secrecy, and that secrecy in turn is evidence of intent. It is hardly necessary to point out that this is a chronic form of circular reasoning which amounts practically to using the argument from silence as a screen to mask the assumption of what one is really trying to prove. Logically, it is a pitfall which one must take particular care to avoid. Intent to aid corporations must be proved by satisfactory evidence and not derived or assumed from the mere fact of silence.

Turning now to an examination of the evidence in the *Globe*, it can be said that the speeches of Bingham⁵¹ alone are really suggestive and worthy of analysis, although even they are found deficient in essential particulars. Stripping Bingham's arguments down to their vital points, one may list the following, particularly in their cumulative effect, as more or less favorable to the conspiracy theory:

1. Bingham deemed it to be a grave weakness that the entire Bill of Rights of the Federal Constitution and more particularly the due process clause of the Fifth Amendment applied only as a restraint upon Congress. Holding citizenship to be national and denying, therefore, that the States had ever rightfully been able to interfere

⁵⁰ That is, one searches the debates in Congress and in the ratifying legislatures in vain for any intimation to the effect that the Fourteenth Amendment afforded prospective relief to corporations.

⁵¹ See *supra* note 6. It should be stated at this point that Bingham nowhere defined what he meant by "due process of law." However, the following exchange took place in the course of one of his speeches:

Mr. Rogers . . . "A question. I . . . wish to know what you mean by 'due process of law'."

Mr. Bingham, "I reply to the gentleman, the Courts have settled that long ago; and the gentleman can go and read their decisions."

CONG. GLOBE, 39th Cong. 1st Sess. (1866) 1089.

One might say in 1937 that Bingham was somewhat deceived as to the "settled" character of his doctrine.

In the peroration of this same speech Bingham spoke of "due process of law—law in the highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice which requires that every man shall have his right; that justice which is the highest duty of nations as it is the imperishable attribute of the God of nations."

with the privileges of national citizenship—among which were the fundamental rights of life, liberty and property⁵²—Bingham's first consideration was to devise an amendment which would remedy this defect.⁵³ It can be said with assurance that to do this was the general purpose of all his various drafts, including the early forms which provided "Congress shall have power to . . . secure to all persons in every State equal protection in the rights of life, liberty and property." A desire to curb the States, to nationalize fundamental rights, and to do this using the phraseology of the Fifth Amendment, were the hubs around which Bingham's thinking revolved.⁵⁴

2. Bingham was emphatic at times in pointing out that the Fourteenth Amendment did not apply merely to the Southern States and to the Negroes. "It is due to the Committee," he declared on one occasion⁵⁵ when asked whether his draft "aimed simply and purely toward the protection of American citizens of African descent," "that I say it is proposed as well to protect the thousands and tens of thousands and hundreds of thousands of loyal white citizens of the United States whose property, by State legislation, has been wrested from them by confiscation, and to protect them also against banishment . . . It is to apply to other States also that have in their constitutions and laws today provisions in direct violation of every principle of our Constitution." Asked at this point whether he referred to "the State of Indiana,"⁵⁶ Bingham replied,⁵⁷ "I do not know; it may be so. It applies unquestionably to the State of Oregon." These allusions are obviously in harmony with some explicit and definite purpose.

3. Likewise suggestive of catholic motive, and of one somewhat in line with Conkling's claims, is the fact that Bingham on one occasion⁵⁸ sounded out congressional sentiment in favor of an "added . . . provision that no State in this Union shall ever lay one cent of tax upon the property or head of any loyal man for the purpose of paying tribute and pensions to those who rendered service in the . . . atrocious rebellion . . . I ask the gentlemen to consider that,

⁵² A view which derived from Justice Washington's dictum in *Corfield v. Coryell*, 6 Fed. Cas. No. 3, 230 (E. D. Pa. 1823). See HOWELL, PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP (1918) 19.

⁵³ This point, which recurs in Bingham's speeches, is best developed in that of Feb. 28, 1866, CONG. GLOBE, 39th Cong., 1st Sess. (1866) 1089-1090.

⁵⁴ For a more detailed analysis of the framers' purposes, see FLACK, *op. cit. supra* note 4, at 68-69, 81-82, 94-97.

⁵⁵ Speech of Feb. 27, 1866, CONG. GLOBE (1866) 1064-1065.

⁵⁶ *Ibid.* The question was put by Rep. Hale, Republican, New York.

⁵⁷ *Ibid.*

⁵⁸ CONG. GLOBE, 39th Cong., 1st Sess. (1866) 429.

as your Constitution stands today, there is no power, express or implied, in this Government to limit or restrain the general power of taxation in the States."

4. At one point in his argument Bingham referred,⁵⁹ though very casually, to the decision of the United States Supreme Court in "the great Mississippi case of *Slaughter* and another." Unquestionably this reference was to the slavery case of *Groves v. Slaughter*,⁶⁰ decided by the Court in 1841. As such, it is a reference of great potential importance for the reason that Justice Baldwin, an ardent defender of slavery, anxious to place that institution beyond the control of both the States and the Federal Government, had here, for the first time, used the due process clause of the Fifth Amendment as a means of restraining Congress' power over slaves in interstate commerce.⁶¹ Baldwin's opinion thus applied due process in a definitely substantive sense, and it anticipated by fifteen years Chief Justice Taney's similar application in the case of *Dred Scott*.

A fact which seems to heighten the importance of Bingham's mention of *Groves v. Slaughter* is that in a later part of his dictum Justice Baldwin had used the comity clause (Article IV, Section 2) as the means of withdrawing the slave traffic from State control.⁶² In short, Baldwin used both of the identical clauses which Bingham and the Joint Committee eventually included in Section One. The question necessarily arises, therefore, whether Bingham may not have taken his cue from Baldwin—whether, as a means of protecting all property, including of course the property of (former) slaves, he did not deliberately build upon and strengthen the No Man's Land which Baldwin originally had created for the protection of property in slaves. For a Radical Republican to have done this would have constituted a great tactical triumph, in any event, and one can readily see how, if Bingham actually sought to protect foreign corporations in the manner Conkling intimated, the stroke would have amounted to positive genius. For, clearly, in addition to strengthening the barriers of that No Man's Land which—according to Justice Baldwin at least—existed in the original Constitution with regard to property *per se*, Bingham created still another No Man's Land which surrounded and protected the "persons" who owned property. He did this simply by making the due process clause—one half of Baldwin's original system of protection—itsself a restraint upon both

⁵⁹ Speech of Feb. 28, 1866, *id.*, at 1094.

⁶⁰ 15 Pet. 449 (U.S. 1841).

⁶¹ *Id.*, at 514. For the historical importance of this dictum, see CORWIN, *COMMERCE POWER VERSUS STATES' RIGHTS* (1936) 70-71.

⁶² 15 Pet. 514-516 (U. S. 1841).

the Federal Government and the States. "Persons" in consequence were thus secured in their rights of property, against both Congress and local legislatures.

What is one to conclude from the discovery that John A. Bingham, author and sponsor of the equal protection-due process phraseology, (1) aimed to secure greater protection in the fundamental rights of property; (2) intended to curb all states, including Oregon; (3) desired an "added provision" limiting the taxing power; (4) cited a case wherein substantive use had been made of due process to protect property rights; (5) even used the identical clauses in Section One which Justice Baldwin had used in this early substantive opinion?

The first point to note in answering this question is that only when one places the most favorable interpretation upon each individual part of the evidence does the whole, taken collectively, suggest that Bingham may have had the purpose which Conkling intimated in his argument. A moment's examination, however, reveals numerous points at which the evidence is inadequate to support these separate conclusions. Three in particular may be cited:

1. Bingham simply declared himself in favor of an additional provision limiting the taxing power. One cannot determine from his speeches whether he regarded his own draft as having the effect of limitation or whether he simply meant to sound out sentiment in favor of a draft which would have this effect.⁶³ Obviously one must not infer the former motive from silence alone, without other evidence.

2. Bingham mentioned no particular opinion when referring to *Groves v. Slaughter*;⁶⁴ he simply inferred that the case had decided that "under the Constitution the personal property of a citizen follows its owner, and is entitled to be protected in the State into

⁶³ Bingham's only reference to the need for a curb on the taxing power was made in a speech delivered January 25, 1866. CONG. GLOBE, 39th Cong., 1st Sess. (1866) 429. The day previous the Joint Committee had voted to remove the injunction of secrecy [KENDRICK, *op. cit. supra* note 4, at 56] in order that members might "announce the substance and nature of the proposed amendment" in their speeches on the floor. When this fact is kept in mind, the order and substance of Bingham's remarks suggest that his speech was in the nature of a trial balloon designed to test the sentiment in the House. 1968: For evidence and discussion of the *apparent* (and spurious) significance of this circumstance in recent research, and for the final rationale, see editorial headnote, Chapter 13, *infra*, notes 8, 18, 19.

⁶⁴ Failure to mention an opinion is important for the reason that the Court in this case split six ways, with four opinions. Baldwin alone mentioned due process. See SWISHER, ROGER BROOKE TANEY (1936) 396-399 and 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1923) 340-347, for details of this case which in many respects was prophetic of the *Dred Scott* decision.

which he goes." While these words might be construed as a reference to the comity clause portion of the Baldwin dictum,⁶⁵ the conservative course is to draw no conclusion from such meager circumstances.

3. It will be noted that Bingham justified his draft on the grounds that it protected "loyal white citizens" and "any loyal man" as well as Negroes. In short, his references are all to natural "persons," never to artificial ones.⁶⁶ Granted that a hidden motive would undoubtedly have impelled secrecy with reference to corporations, it is still true, as we have already pointed out, that secrecy is not here admissible as a proof of intent.

The chain of circumstances from which intent might be deduced thus being broken at several points, it is plain that the evidence in Bingham's speeches is not adequate proof of the conspiracy theory. It remains to linger a moment at this point, however, in order to note several features of his argument.

First of these features is a very important implication of his statement that his phraseology was designed to protect, not merely Negroes, but "the thousands . . . of loyal white citizens of the United States whose property, by State legislation, has been wrested from them by confiscation, and to protect them also against banishment. It is to apply to other States also that have in their constitutions and laws today provisions in direct violation of every principle of our Constitution."⁶⁷

The fact that intrinsically this statement suggests that natural persons were the only objects of Bingham's solicitude must not be

⁶⁵ 15 Pet. 449, 515 (U. S. 1841).

⁶⁶ Bingham's most explicit statement pertaining to the word "person" was made in the course of a speech on the Civil Rights bill on March 9, 1866 [CONG. GLOBE, 39th Cong., 1st Sess. (1866) 1292]. Objecting that the bill as then drafted applied only to "citizens," and therefore discriminated against aliens, Bingham declared: "The great men who made that instrument, [the United States Constitution] when they undertook to make provision, by limitations upon the power of this Government, for the security of the universal rights of man, abolished the narrow and limited phrase of the old Magna Carta of 500 years ago, which gave the protection of the laws only to 'free men' and inserted in its stead the more comprehensive words 'no person'; thereby obeying the higher law given by a voice out of heaven: 'Ye shall have the same law for the stranger as for one of your own country'. Thus in respect to life and liberty and property, the people by their Constitution declared the equality of all men, and by express limitation forbade the Government of the United States from making any discrimination.

"This bill, sir, . . . departs from that great law. The alien is not a citizen. You propose to enact this law . . . in the interests of the freedmen. But do you propose to allow these discriminations to be made in States against the alien and stranger? Can such legislation be sustained by reason or conscience? . . . Is it not as unjust as the unjust State legislation you seek to remedy? Your Constitution says 'no person,' not 'no citizen,' 'shall be deprived of life, liberty, or property,' without due process of law."

⁶⁷ See *supra* note 55.

permitted to obscure the significance of the type of legislation which had offended him. Laws enacted before, during, and after the Rebellion by the eleven "rebel" and apparently by a few "other States," laws which inflicted "banishment" and "confiscation" upon "loyal white citizens" were the particular objects of his ire. Such laws, in his judgment, violated "every principle of our Constitution" and in giving Congress power to "secure to all persons equal protection in the rights of life, liberty and property," he doubtless meant to extirpate these abuses.

The point which we here wish to stress is that this motivation practically assures—so long as Bingham appears to have associated "equal protection" with "due process of law"—that he had a substantive conception of due process. It is hardly conceivable, at any rate, that a Radical Republican, outraged by acts of rebel confiscation—which he regarded simultaneously as denials of equal protection and due process of law—objected to this confiscatory legislation simply because it denied such traditional requirements of due process as fair notice and hearing. Inherently the circumstances suggest that it was the substance of such legislation, not merely its effects upon the procedural rights of the accused, that one invoking the clause would have attacked. Stated otherwise, circumstances point to a "natural rights" usage, and a natural rights usage is here obviously a substantive one.⁶⁸

By a somewhat indirect and unexpected turn, one thus discovers evidence which indicates that Bingham in 1866 probably did have a substantive conception of due process of law, and did, therefore, regard the guarantee in a manner which was potentially of benefit to corporations. Paradoxically, however, the importance of this discovery is minimized, so far as its bearing on the conspiracy theory is concerned, by its own implications. Bingham used due process in a natural rights sense. He read into the clause his personal conceptions of right and justice. But the very circumstances under which he did this point to the existence of an intense and specific motivation which may very well have so absorbed his energies and interests that he gave little or no thought to the auxiliary uses of his phraseology. If one adopts this view, Bingham was a Radical Republican consumed by a determination to thwart those "rebels" and Democrats who were inclined to vent their animosity by discriminating against Negroes, loyalists, "carpetbaggers," etc. He was a crusad-

⁶⁸ Confirmation of Bingham's substantive conception of due process is found in his speech of March 9, 1866, on the Civil Rights Bill [see *supra* note 66] and in his speech of Feb. 28, 1866 [see *supra* note 51].

ing idealist, and it is an open question whether he was not, for this reason alone, one of the persons least likely to ponder the needs and constitutional status of corporations. A zealot is rarely so ambidextrous.

It is a merit of this simple discovery relating to Bingham's purposes that it leads to an hypothesis which can be readily and profitably checked. If Bingham regarded due process of law in a natural rights-substantive sense; if he conceived certain laws enacted by rebel and "other States" as violating "every principle of our Constitution," then conceivably, he may have outlined his views in earlier speeches in Congress. Particularly so long as the problems dealt with in these Reconstruction debates are known to have extended far back in the pre-war controversies over slavery, it is logical to expect that Bingham, a highly articulate leader who served in Congress almost continuously beginning in 1854, expressed himself freely on these matters, and that his speeches thus record the evolution and content of his thinking. Obviously it is an easy matter to inspect his speeches with an eye for clues to the origin, development, and significance of his concepts of due process and equal protection.

Bearing in mind the mystery of the declaration that his draft applied "unquestionably to the State of Oregon," and bearing in mind also the ambiguity of his allusions to the "great Mississippi case of Slaughter and another," and to the need for curbing the taxing power of the States, we can now make an investigation of this kind.

III. BINGHAM'S CONCEPTION OF DUE PROCESS OF LAW, 1856-1866

Three major speeches are found which shed light on these important matters. In 1856,⁶⁹ in 1857,⁷⁰ and again in 1859,⁷¹ Bingham outlined views which not only clear up the obscurities we have noted in his later speeches but which go far toward solving the deeper problems of his motivation. Carefully checked, these three speeches reveal that Bingham did in truth conceive of due process as a limitation upon the substance of legislation—that he so conceived it as early as 1856. Yet they give no indication that he regarded corporations as "persons," nor do they indicate that his use of the due process clause was inspired by any solicitude for corporate rights. On the contrary, it appears that Bingham in his third speech in 1859 cited the due process clause of both the Fifth Amendment and the

⁶⁹ CONG. GLOBE, 34th Cong., 1st Sess. (1856) Appendix, at 124.

⁷⁰ CONG. GLOBE, 34th Cong., 3rd Sess. (1857) Appendix, at 135-140.

⁷¹ CONG. GLOBE, 35th Cong., 2nd Sess. (1859) 981-985.

Northwest Ordinance, together with the comity clause—in short, the very clauses which seven years later he used in his final draft of Section One—as having been violated by a section in the Oregon Constitution⁷² which provided:

"No free negro or mulatto not residing in the State at the time of the adoption of this Constitution, shall ever come, reside, or be within this State, or hold any real estate, or make any contract, or maintain any suit therein"

This evidence obviously suggests that free Negroes and mulattoes—natural "persons," rather than corporations—were the original objects of Bingham's solicitude. As his speeches and drafts in 1866 give evidence of having been based upon his speech of 1859, the question necessarily arises whether Negroes rather than corporations were still the sole objects of his concern at the later date.

Read in their social and historical context, Bingham's speeches not only reveal how he came to focus upon the due process clause, but how he came to read into it this revolutionary substantive meaning. It was on March 6, 1856—exactly one year before Chief Justice Taney's opinion in the *Dred Scott* case—that Bingham, making his maiden speech in the House,⁷³ argued that laws recently enacted by the Kansas (Shawnee Village) legislature, declaring it a felony even to agitate against slavery, deprived "persons of liberty without due process of law, or any process but that of brute force." As this speech was delivered just two weeks after the Supreme Court's decision in the major case of *Murray v. Hoboken Land and Improvement Company*,⁷⁴ wherein counsel in arguing procedural questions had cited such germinal substantive cases as *Hoke v. Henderson*⁷⁵ and *Taylor v. Porter*,⁷⁶ and wherein Justice Curtis had distinguished in

⁷² Article I, Section 35, Constitution of Sept. 18, 1857.

⁷³ See *supra* note 69. The Kansas Territorial Legislature, dominated by the pro-slavery forces and acting under a pro-slavery Constitution, had adopted verbatim the drastic Missouri slave code which *inter alia* (quoting Bingham) made it a felony "for any free person, by speaking or writing, to assert that persons have not the right to hold slaves in said Territory." Bingham contended that these provisions abridged "the freedom of speech and of the press as well as deprived persons of liberty without due process of law." The text of the Kansas law is given in SEN. EXEC. DOC., No. 23, 34th Cong., 1st Sess. (1856) 604-606.

⁷⁴ 59 U. S. 272 (1856). This case was argued Jan. 30, 31, Feb. 1, 4, 1856, and decided Feb. 19, 1856.

⁷⁵ 15 N. C. 1 (1833). Professor Corwin stresses the significance of this case in his article cited *supra* note 14, at 383.

⁷⁶ 4 Hill 140, 146 (N.Y. 1843). This case is famous as the first in which the New York Courts began employing the due process clause of the State constitution as a means for absorbing the doctrine of vested rights. See Corwin, *Growth of Judicial Review in New York* (1917) 15 MICH. L. REV. 297.

his opinion between legal process and due process with regard to procedure,⁷⁷ the presumption is that Bingham, seeking for a constitutional clause on which to hang his political and ethical opinions, appropriated Curtis' distinction and carried it over from procedure to substance. The fact that the Kansas laws had simply defined the felonies, and had not interfered with the procedural rights of the accused, makes it plain that Bingham's citation could have been made only in a substantive sense.⁷⁸

The character and circumstances of Bingham's original application of the due process clause raise the question of whether he could have been the first—or among the first—to employ it as a weapon in the slavery debates, and whether, accordingly, his action did not in some manner determine the Republican Party's heavy reliance upon "due process of law" just three months later in its platform of 1856.⁷⁹ Satisfactory answers to these two questions must necessarily wait a careful search of voluminous records, but meanwhile several fragments of evidence point in Bingham's direction: (1) Bingham was colleague and protégé of Joshua Giddings, abolitionist Congressman from Ohio who in 1856 served as an influential member of the Republican platform committee, and who drafted the planks in which the due process clause appeared.⁸⁰ (2) While Giddings is known to have made use of due process in his speeches after 1856,⁸¹ the writer has found no instance of his having done so earlier,⁸² thus suggesting that Bingham's usage antedated Giddings', and that it

⁷⁷ 59 U. S. 272, at 276 (1856).

⁷⁸ See Bingham's own paraphrasing of these in his speech. CONG. GLOBE, 34th Cong., 1st Sess. (1856) Appendix, at 124. See *supra* note 73 for one example.

⁷⁹ The plank on Slavery in the Territories, drafted with particular reference to Kansas, declared that "our Republican Fathers, when they . . . abolished slavery in all . . . national Territory, ordained that no person shall be deprived of life, liberty, or property without due process of law; it becomes our duty to maintain this provision against all attempts to violate it for the purpose of establishing Slavery in the Territories of the United States by positive legislation . . ." In a later passage the people of Kansas were cited as having been "deprived of life, liberty and property without due process of law." See PROCEEDINGS OF THE FIRST THREE REPUBLICAN CONVENTIONS OF 1856, 1860, AND 1864 (1893) 43.

⁸⁰ *Id.* at 22. Julian states, [THE LIFE OF JOSHUA R. GIDDINGS (1892) 335-6] "By far the most important part of the platform was written by Giddings in his library at Jefferson and is here copied," and then quotes the entire plank relating to Slavery in the Territories.

⁸¹ See CONG. GLOBE, 35th Congress, 2d Sess., 346 (1859).

⁸² Giddings' SPEECHES IN CONGRESS, published in 1853, reveal that throughout his long career as an Abolitionist leader in the House he relied on the Declaration of Independence as a secondary constitution, citing the phrase "inalienable rights of life, liberty and the pursuit of happiness" again and again. Yet no mention is found of due process of law either in these speeches or in those between 1852 and 1856 in the *Congressional Globe*.

may, therefore, even have inspired it. (3) Philomen Bliss, another Republican and Ohio colleague of Bingham in the 34th Congress, is known to have used the due process clause in several speeches in 1856 and 1857,⁸³ but in each instance it was after a similar usage by Bingham. Bingham therefore is the earliest known user, and this fact, together with his persistence, and the apparent tendency for the early usage to center in the Ohio delegation, suggests that he may well have been the evangel of due process in the modern substantive sense.

Evidence indicates that Bingham, having discovered due process of law, explored it thoroughly, perceived something of its rhetorical possibilities as a weapon in the anti-slavery debates, noted that it had been included in the Northwest Ordinance of 1787,⁸⁴ and read into the vague outlines of the phrase all the fervent idealism of a natural rights philosophy. Thus, in his second speech,⁸⁵ delivered on January 13, 1857, (still six weeks before the *Dred Scott* decision) one finds him emphasizing repeatedly that the clause applies to all "persons," not merely to all "citizens"; that "it protects not only life and liberty, but also property, the product of labor"; that "it contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than his life." In this speech also, Bingham alludes to the case of *Groves v. Slaughter*—albeit to McLean's, not Baldwin's opinion;⁸⁶ and in it too he makes clear that the "absolute

⁸³ CONG. GLOBE, 34th Cong., 1st Sess. (1856) Appendix, at 553-7. Speaking two and a half months after Bingham, and on the eve of the Republican convention, Bliss leaned heavily on stock natural rights arguments, and cited the due process clause in several places. Even more suggestive of Bingham's influence is Bliss' speech of Jan. 15, 1857 (two days after Bingham's speech of Jan. 13). CONG. GLOBE, 34th Cong., 3d Sess. (1857) Appendix, at 145, 149. Here Bliss cited constitutional history and emphasized that the framers of the Bill of Rights substituted "person" for "freemen," etc.

See the speech of Rep. A. P. Granger of New York, [CONG. GLOBE, 34th Cong., 1st Sess. (1856) Appendix, at 295-7] April 4, 1856, four weeks after Bingham's first speech. This is the earliest known speech, aside from Bingham's, that employs due process of law in argument and the only one which the writer has been able to find made by a non-member of the Ohio delegation.

⁸⁴ The significance of this fact is that Congress in organizing Territories and passing enabling acts for the creation of new States frequently stipulated that these new local constitutions be "not repugnant to the Northwest Ordinance of 1787." Thus one could argue that while the due process clause of the Fifth Amendment applied only as a restraint upon Congress, the law of the land clause of the Northwest Ordinance had nevertheless been made a restraint upon these particular States. This idea seems to have been implicit (if not always clearly stated) in Bingham's arguments, and it was apparently one means of his getting round the embarrassing features of John Marshall's opinion in *Barron v. Baltimore* [7 Pet. 243 (U. S. 1833)]. The speech on the President's Message in 1857 lays considerable stress on the Northwest Ordinance, even quoting Taney's opinion in *Strader v. Graham* [10 How. 82 (U.S. 1850)].

⁸⁵ See *supra* note 70.

⁸⁶ Bingham's use of Justice McLean's opinion deserves comment. Having argued

equality of all and the equal protection of each" are the great constitutional ideals of American government and as such "ought to be observed and enforced in the organization and admission of new states." In point of fact, Bingham declared they were enforced: It was for this very reason that "the Constitution . . . provides that no person shall be deprived of life, liberty or property without due process of law," and that it made "no distinction either on account of complexion or birth."

In short, this second speech, likewise made with reference to the power of Congress to regulate slavery in the Territories, reveals a progressive development of ideas and a more thorough study of Constitutional history.⁸⁷ One concludes that while Bingham still applied the due process clause only with reference to natural "persons," he none the less increasingly thought of it as extending protection in accordance with his views of right and justice. Moreover, his political idealism, expressed in the "equal protection" concept, and strongly infused with natural rights philosophy, provided a reservoir of ethical and moral judgments which one might logically expect to find their outlet through the due process phrase.

It is exactly this tendency that one notes in Bingham's third speech,⁸⁸ delivered February 11, 1859, with reference to the above-quoted "no free Negro or mulatto" clause in the Oregon Constitution. Seeking constitutional sanction for his anti-slavery views, Bingham again and again relied upon "natural and inherent rights," on "sacred rights . . . as universal and indestructible as the human race," on "equality of natural rights," etc., as the cornerstone of his

that due process "contemplates that no man shall be *wrongfully* deprived of the fruit of his toil." Bingham had obviously laid himself open to exactly such use of the clause as Chief Justice Taney (then engaged in writing his opinion) was presently to make in the *Dred Scott* case. There is reason to believe that Bingham was conscious of this weakness, for it was in this connection that he quoted McLean's opinion: slaves were not property under the Constitution; "The character of property is given them by the local law . . . the Constitution acts upon slaves as persons, and not as property." One must immerse himself deeply in anti-slavery polemics to follow the logic of this distinction, but once the premises are granted, it is plain how due process was to be made a bulwark for slaves and abolitionists, but not for their masters. The sole difficulty, apparently, was that Chief Justice Taney was not convinced.

⁸⁷ Specifically it shows (1) a growing awareness that the due process clause specified (a) "no person" and (b) "property" in addition to "life and liberty," (2) a conviction that this meant "no man shall be wrongfully deprived of the fruits of his toil," (3) a formulated concept of "equal protection"—the very phrase which Bingham was later to use in the Fourteenth Amendment—as the lofty ideal of American government, and as the corollary, if not merely the equivalent, of due process of law. The genesis of the equal protection concept is of extraordinary interest, particularly in view of its association with due process of law.

⁸⁸ See *supra* note 71.

argument. Nor was this reliance without profound significance. Again and again he maintained that "these *natural* and *inherent* rights which belong to all men irrespective of all conventional regulations are by this Constitution guaranteed by the broad and comprehensive word 'person,' as contradistinguished from the limited term 'citizen,' as in the Fifth Article of Amendments."⁸⁹ The due process clause, in short, was the repository of natural rights.

Adding to the significance of this natural rights usage of due process, and illuminating the pressures that inspired it, is the fact that while no other member of Congress appears to have used the clause as Bingham did, a number nevertheless relied heavily on extra-Constitutional natural rights arguments in defending or condemning the provision in the Oregon Constitution,⁹⁰ and at least one member attempted to use the "Republican form of government" clause in exactly the manner which Bingham used due process.⁹¹ Obviously these circumstances suggest that Bingham's tendencies were in no way exceptional or extreme; he had simply made a happier choice in his selection of weapons. Whereas the "Republican form of government" wording was probably too ambiguous to invite usage in such cases, the due process phraseology, containing the all-embracing terms "life," "liberty," and "property," and containing also the word "due," one synonym of which is "just," was ideally suited both for application and expansion.

One finds in this third speech also an explicit and significant clue to the type of protection which Bingham conceived. Who would be "bold enough to deny," he demanded, "that all persons are equally entitled to the enjoyment of the rights of life, liberty and property;

⁸⁹ (Italics not in the original.) It is impossible to determine from Bingham's speech whether he was aware as yet of the decision in the case of *Barron v. Baltimore* [7 Pet. 243 (U. S. 1833)] wherein John Marshall had declared the first eight amendments to be restraints on the Federal Government, not on the States. In 1866 this decision served as the cornerstone for Bingham's whole argument, and he cited Marshall's opinion again and again. However, the fact that his speeches in the fifties all concerned the constitutional rights of persons in the Territories, not in the States, and the further fact that the Northwest Ordinance (with its law of the land clause) had generally been made binding on the Territories at the time of their organization, may partially explain Bingham's silence regarding the *Barron* decision at the earlier date. He may simply have assumed that whatever the status of due process in the States, the Northwest Ordinance clauses applied in the Territories.

⁹⁰ See, e.g., the very interesting speech of Rep. Hoard [CONG. GLOBE, 35th Cong., 2d Sess. (1859) 987] in which he said, "Is it not manifestly unjust to deny any free-born American, guilty of no crime, the right of home in the land of his fathers? If it is admitted, as I think it must be, that such denial is unjust, then it is unconstitutional." Here surely is evidence of how strongly in need men were of some clause to give constitutional sanction to their ethical and political opinions.

⁹¹ *Id.*, at 952 (Rep. Granger).

that no one should be deprived of life or liberty but by punishment for crime; nor his property, against his consent and without due compensation."⁹²

This telescoping and virtual rewriting of the due process and just compensation clauses necessarily affords valuable insight into Bingham's mind. It is probably to be expected that anyone using these clauses in a natural rights sense will use them loosely; yet three aspects of the constitutional status of property as viewed by Bingham must be noted. First, he deems it axiomatic that a man's property must not be taken "without his consent"; property rights by his view are thus virtually absolute. Second, and not altogether surprising in the light of this first proposition, he omits all reference to the qualifying phrase that it is really "for public use . . ." that property is not to be "taken without just compensation." Third, in using "due" as a synonym for "just" in the just compensation clause, it is reasonable to suppose that conversely he may have used "just" as a synonym for "due" in the due process clause; and very likely it was in this manner that a textual factor reinforced the natural rights factor in furthering his substantive conception of due process. Stated somewhat differently, according to Bingham's view, due process probably meant just process, and inherently, therefore, it could never be limited simply to its procedural elements.

All in all, when one considers the scope and possible applications of the phraseology construed in this manner, it is apparent that Bingham from 1859 onward held views—whether he actually applied them or not—which were potentially capable, to use the Beards' phrase, of "taking in the whole range of national economy." Indeed his views are in many respects so much like those expressed by the Justices of the New York court in the revolutionary case of *Wynehamer v. People* in 1856⁹³ that one is led to speculate whether Bingham may not have been familiar with the dicta of those opinions. It seems significant at any rate that his own views should so closely parallel those which others, elsewhere, were applying to the defense of business interests then contending against legislative regulation.

⁹² *Id.* at 985. (Italics not in original.) Here it will be noted that Bingham is thinking (1) only of natural persons, who are, however, to be "equally" protected; (2) of liberty in the physical rather than in the present-day sense.

⁹³ 13 N. Y. 378, 391 (1856). To quote Professor Corwin's analysis: "The main proposition of the decision in the *Wynehamer* case is that the legislature cannot destroy by any method whatever, what by previous law was property." *Op. cit. supra* note 14, at 468. Bingham obviously regarded this proposition as axiomatic; for who would deny that "no one should be deprived of . . . his property against his consent and without due compensation?"

Two additional points must now be noted. The first is that judging by the similarity of numerous passages of rhetoric and statements of fact, the Oregon speech of 1859 appears to have served as an important source and reference in the preparation of his arguments and drafts in 1866.⁹⁴ This fact alone suggests a close link between the Fourteenth Amendment phraseology and the Oregon "no free Negro and mulatto" provision.

The second point, more or less implicit in foregoing quotations, is that several times in the course of this argument in 1859 Bingham made clear that he regarded the just compensation clause, no less than the due process clause, as a bulwark of natural and "sacred rights which are as universal and indestructible as the human race." The significance of this fact will be apparent when one recalls that Bingham's attempt to secure inclusion of a just compensation clause in the Fourteenth Amendment in 1866 has always been regarded as one of the strongest indications of an intent to aid business and corporations and thus to "take in the whole range of national economy." Now, however, it develops that he cited this same clause seven years earlier in the speech which, as we have just pointed out, appears to have been an important source of his later remarks, and which was indubitably inspired by discriminations against free Negroes and mulattoes.

Finally, perhaps the most significant thing about Bingham's Oregon speech is that he here made use, in addition, of the comity clause in order to guarantee the rights of the free Negroes and mulattoes.⁹⁵ He was able to do this because native-born Negroes and mulattoes, by his comprehensive anti-slavery definitions of citizenship, were "citizens" as well as "persons."⁹⁶

There were two important corollaries of this proposition so far

⁹⁴ Thus, in his Oregon speech in 1859 [CONG. GLOBE, 35th Cong., 2d Sess. 982] Bingham quoted from Story, Rawle, Kent, and the *Dred Scott* opinions to bolster his definitions of citizenship. In his first speech delivered on Jan. 25, 1866, he quoted these identical references in the same order and connection, CONG. GLOBE, 39th Cong., 1st Sess. (1866) at 430.

⁹⁵ CONG. GLOBE, 35th Cong., 2d Sess. (1859) 984-5. Republicans used this clause to attack the Oregon constitutional provisions. See, e.g., speeches by Reps. Granger and Dawes. *Id.*, at 952, 974.

⁹⁶ Bingham protected free Negroes with the shield of citizenship, but like Lincoln and others of his party he did not at this date approve of granting Negroes equality of social and political privileges. He upheld the right of States to deny free Negroes the franchise, but disclaimed the right to deny them residence, etc. The difference in Bingham's mind was between political and natural rights: "All free persons . . . born or domiciled in any free state of the Union are citizens of the United States; and although not equal in respect of political rights, are equal in respect of natural rights." *Id.*, at 985.

as Bingham was concerned. First was that those privileges and immunities to which "citizens of each state" were entitled under the comity clause of the Constitution, Bingham interpreted to be the "privileges and immunities of citizens of the United States;" so that the clause read: "Citizens of each State shall be entitled to all privileges and immunities of citizens (of the United States) in the several states."⁹⁷ This of course was the very view which he held in 1866 and which is known to have prompted insertion of the privileges and immunities clause in Section One.⁹⁸ Second, and more revealing as a clue to his later purpose in drafting Section One, was that according to his view "amongst these privileges and immunities of citizens of the United States" were "the rights of life and liberty and property and . . . due protection in the enjoyment thereof."⁹⁹ Thus the due process clause and the comity clause really guaranteed the same rights, but one applied to "citizens," the other to "persons." By using both clauses in this argument, and likewise by using the phraseology of both clauses in the text of the Fourteenth Amendment in 1866, Bingham undoubtedly conceived that he was affording double protection to the "800,000" free Negroes and mulattoes from such discriminations as Oregon had put in her State Constitution. The due process clause being the repository of the natural rights of all "persons," and the comity clause the special repository of the natural rights of certain "persons" who were also "citizens," it can readily be seen that in theory Bingham had worked out an ingenious though rather complex system of constitutional protection.¹⁰⁰

With these facts at hand it is now possible to formulate conclusions regarding Bingham's purposes and to note their bearing on the conspiracy theory. The striking thing is of course that in laying the foundation for conspiracy we have apparently destroyed the superstructure. Seeking confirmation for the substantive character

⁹⁷ *Ibid.* As pointed out *supra* [note 52], Bingham's views derived from one possible reading of Justice Washington's dictum in *Corfield v. Coryell*, 6 Fed. Cas. No. 3, 230 (E. D. Pa. 1823).

⁹⁸ FLACK, *op. cit.* *supra* note 4, at 84-87. See also speech of Senator Howard, a member of the Joint Committee, CONG. GLOBE, 39th Cong., 1st Sess. (1866) 2765-66.

⁹⁹ CONG. GLOBE, 35th Cong., 2d Sess. (1866), 984.

¹⁰⁰ With this insight into Bingham's reasoning, and into early Republican constitutional theory in general, one inclines to moderate the view recently expressed by Professor Grant [*The Natural Law Background of Due Process* (1931) 31 COL. L. REV. 56, at 66] that Section One was "miserably drafted." "Too zealously drafted," would seem the juster phrase; like many before and since, Bingham reckoned without the Supreme Court. 1968: My bibliography of Bingham's speeches in Congress, in campaigns, and elsewhere, 1856-1875, now numbers twenty-five items (besides newspaper reportage of others). The views stressed and detailed here often were repeated.

of Bingham's conception of due process, we have really found confirmation—or apparent confirmation—of Justice Miller's "one pervading purpose—Negro race" theory of the phraseology of Section One.

We have found this by discovering that every clause which Bingham used in his drafts in 1866 really dated back from seven to ten years in his speeches,¹⁰¹ and was identified, originally, with the problem of slavery in the Territories and with the controversial question of the citizenship of free Negroes and mulattoes. State and territorial provisions denying these last-mentioned "persons" the privileges of residence, and of acquiring property and making contracts, provided Bingham with what may have been merely an apparent economic motivation.

An anti-slavery polemist of the natural rights school, a man who held thoroughly Lockian views concerning the sanctity of property and the rights of all men to acquire it, Bingham hit fortuitously upon due process in 1856 and used the weapon first to protect the "liberty" of abolitionists, then to bolster Congress' power over slavery in the Territories. Chief Justice Taney's application of the same clause with reverse effect in the case of Dred Scott presumably intensified Bingham's convictions and led him farther afield. Eventually the Oregon discriminations caused him to use due process to guarantee to free Negroes as "persons" the very rights which Taney had guaranteed to slave holders as "persons." To clinch this protection, and doubtless to pay his respects to the aged Chief Justice, Bingham maintained that native born Negroes were not only "persons," but "citizens," and not only "citizens," but "citizens of the United States," and as such entitled to be protected by Congress in the enjoyment of their rights of life, liberty and property.

Four observations may now be listed:

1. Apart from its direct bearing on the conspiracy theory, this evidence illuminates the forces which brought about a revolutionary expansion of due process in America. The strong natural rights strain in our political thinking,¹⁰² and the Lockian view of property as sacred and absolute,¹⁰³ have often been emphasized in this connection. To these, apparently, should be added the intrinsic advantages of the due process phraseology itself and the role of the slavery

¹⁰¹ That is, the comity, due process, equal protection, and just compensation forms were all employed in these early debates. They were likewise employed in the various drafts of Section One, the just compensation clause, unsuccessfully. See *supra* note 8.

¹⁰² See particularly Grant, *loc. cit. supra* note 100; and for an exhaustive general treatment see HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930).

¹⁰³ Hamilton, *Property—According to Locke* (1932) 41 *YALE L. J.* 864.

debates in acting as a powerful flux in welding together these diverse elements. The irresistible urge to find constitutional sanction for ethical and political opinions relating to slavery led both sides to employ the clause in a substantive sense. Perhaps but for the boomerang effect of Taney's usage in the *Dred Scott* case, due process might have undergone a much earlier and more rapid expansion.

2. A natural rights philosophy and an aversion to the spread of slavery, rather than any profound insight into the potentialities of due process, apparently provided the driving force in Bingham's usage. So far as one can judge he was originally a zealot, not a schemer, an antagonist of slavery, not a protagonist of due process and judicial review. The indications are even that like many polemicists he was singularly blind to the broader implications of his stand; for during these years he was one of the sternest critics of the Supreme Court¹⁰⁴ and at the same time the advocate of doctrines which implied a tremendous expansion of its powers. Taken alone, this fact is obviously hard to reconcile with the view that an anti-democratic philosophy and a desire to curb popular control of property in general lay deep in Bingham's consciousness.

3. Section One of the Fourteenth Amendment may be explained in its entirety by assuming that Bingham's purposes in 1866 were similar to his purposes in 1859. Phraseology which has heretofore been abstruse, mysterious, "cabalistic," is thus rendered plausible without imputing to Bingham a desire to include corporations or to "take in the whole range of national economy."

4. While this is true, one must recognize that Bingham's views of "property" and "due process of law" were such that it would have been perfectly natural for him, had occasion ever arisen, to have applied that guarantee to protect the property of corporations. The fact that as a lawyer he spoke and thought of corporations as legal "persons" and that in professional practice he was concerned with their protection, only makes this possibility the more real.

CONCLUSION

If these facts point to no positive conclusion, they do at least permit one to define more accurately the possible limits of "conspiracy" and to restate its essential conditions.

Stated as concisely as possible, the question henceforth would seem to be whether Bingham in the seven years between 1859 and

¹⁰⁴ See his speech on President Buchanan's Message, wherein he denied that the Supreme Court was "the final arbiter on all questions of political power." [CONG. GLOBE, 36th Cong., 1st Sess. (1860) 1839]. See also 3 Warren, *op. cit. supra* note 64, at 171, 189.

1866 came to realize the full potentialities of his doctrine or whether he continued merely to apply it in defense of free Negroes and mulattoes. Phraseologically the system of constitutional protection he had invoked with reference to the property rights and earning power of Negroes was equally applicable to the protection of the property rights and earning power of corporations.¹⁰⁵ Did his zeal as an enemy of slavery and as a defender of the Union prevent him from seeing this fact? Did it blind him to the needs and interests of corporations? Or did his neo-Lockian fervor in behalf of the rights of property—all property, excepting that in slaves—awaken him to the possibility that corporations, since they were “persons” in common legal parlance, might also be “persons” within the meaning of the due process clause? Did Bingham come to extend to corporations—or to shareholders—the same substantive protection he extended to Negroes? In short, did Bingham’s views remain static during these years? Or did they prove as flexible and dynamic as during the Fifties? Did the Civil War, which raised a host of problems relating to business and corporations, direct attention to such matters; or did it obscure and crowd out their consideration? The alternative possibilities here balance one another so nicely that even speculation is difficult; yet obviously these are the terms upon which future decision must rest. The charge of “conspiracy” can eventually be maintained only if it is shown that some force or influence caused Bingham to broaden his application of the clause to include corporations—either sometime prior to 1866, or while the Fourteenth Amendment was before the Joint Committee. Evidence bearing upon these possibilities the writer proposes to review at a later date.

EDITORIAL NOTE. Triumphant arches are often built of and on rubble, overdecorated, and accepted on faith or favor. So it was with this one, so long attributed, so often rededicated, to Roscoe Conkling. No one troubled to examine his statements, or their pedigree. No one checked his claims or quotations. No one bothered to ask what evidence there was that judges had been influenced or persuaded by his advocacy. The corporate person was then an *accomplished fact*. The corporate person had *followed* Conkling’s argument. Therefore,

¹⁰⁵ It is of particular interest to note how the chance provisions of the Oregon Constitution barring Negroes from owning property and making contracts led Bingham into a fundamentally laissez faire usage of due process which anticipated the decisions in *Allgeyer v. Louisiana* [165 U. S. 578 (1897)] and *Smyth v. Ames* [169 U. S. 466 (1898)] by nearly forty years.

the corporate person had in fact *been accomplished* by Conkling! This twisted, macaronic syllogism is no mere caricature, but rather an illuminating analogy, the more pointed for all who have tended to see only *framer* or *judicial* error in the history and interpretation of the Fourteenth Amendment!

The Conspiracy Theory thus still has interest today as a classic study in academic and popular illusion compounded of anachronism, ambiguity, social and constitutional needs, and, above all, professional surmise and assumptions.¹ Sociological "context" and "presentist" pressures² are seen to have weighed heavily throughout, nudging and coloring scholarship and thinking, yet also acting correctively and affirmatively in the long run.

"Prima facie cases," of course, easily and frequently become prima facie problems. "Conspiracy," moreover, is notoriously and inherently an issue which begs and fogs the processes of law and thought—too often or too easily "proved," as Mr. Justice Jackson observed,³ by "evidence that is admissible only upon the assumption that conspiracy existed." And in this case, the Beards themselves were credited (or "tarred"⁴ as Charles Beard wrote the editors of the *Yale Law Journal*) with a "conspiracy theory" they had neither specified nor named—had not, indeed, precisely formulated, much less documented. Nor had Conkling initially, for his part, done more to detail or substantiate what he really *meant* in 1882, still less what he knew or meant actually had *happened* in the Joint Committee, or in Congress, in 1866–1868. Time problems and differences—especially in the use and status of due process at these crucial dates, and as related to framer intent and judicial understanding and motivation, and hence as sustaining proof (and the burden of proof) of Bingham's or Conkling's or the Court's understanding and intent—thus were easily, and in fact continually ignored and confused.⁵ Capping and

¹ Note simply that historians, too, projected backward to 1856–1866 and beyond the highly sophisticated modern procedural-substantive cleavage of due process, ignoring the implications of natural rights usage entirely. See, for example, my discussion *supra* p. 34, par. 2.

² For classic and embarrassing example, note that in the discussion of *Groves v. Slaughter* (1841), *supra* p. 49, Taney Court justices already were anticipating the Hughes Court's "No Man's Land!"

³ Concurring in *Krulwich v. U. S.*, 336 U. S. 440 at 453 (1948). For evidence of the unfortunate associations and connotations of the word "conspiracy," see *supra* pp. 38, 44. The dash-enclosed caveat in the latter passage shows general awareness of the problem, but general awareness was not enough.

⁴ Charles Beard to Martin Goldstein, Jan. 15, 1938.

⁵ For my own disregard of time values as related to due process development and burden of proof, see *supra* p. 36 (sentence ending at footnote signal 16). "Universal protection in the rights of life, liberty and property" was the way it looked in 1937; but

compounding all of this was the Supreme Court's own initial silence, and, therefore, its almost standing invitation to conjecture: no opinions whatever had got written on the crucial point, or on the merits, of the corporate "person" as such.

Little wonder, then, that hypothesis and presumption, inference and conjecture, got pyramided here, and literally ran riot; little wonder that this was such an intriguing, popular and professional skeleton (yet just whose, and in whose closet?); and little wonder that this vague murkiness remained heavy still in 1937, as is evident at various points in this essay as already noted.

The overall effect of these influences was to hide the fact that Conkling's argument had been *only incidentally* a plea for the corporate "person" as such; *primarily* it had been a plea for a curbed state taxing power.⁶ But once the *Santa Clara* dictum had established and sanctioned the corporate "person" (1886), the "person" *appeared to have been* Conkling's chief objective. Solution of both the historical and the historiographical problems was long stymied by this simple disguise and illusion.

Hardly less striking is evidence of the extent of America's loss and ignorance, 1937-1938, of the antislavery backgrounds and origins of the Fourteenth Amendment. Note especially the distressing naïveté of the statements above, made with reference to Bingham's due-process usage (1856-1859): "the earliest known user,"⁷ "the evangel,"⁸ "hit fortuitously upon due process."⁹ Real howlers, these, and written four years after Gilbert H. Barnes's *The Anti-Slavery Impulse, 1833-1843* had refocused on the abolitionists, and had shown that the organized movement had centered in Ohio—had *begun*, in fact, in Bingham's own congressional district. Yet not one of many letters received on the "Conspiracy Theory" article pointed this matter, nor did anyone else, seemingly, pursue it.¹⁰ Such facts speak

query: 1882? or 1866? Note also my reference to (*i.e.*, assumption of) Conkling's "contemporary success" (p. 44). This in a paragraph stressing the dangers of contemporary assumptions! The short of it is that what Conkling said and did in 1865-1866, what he said and meant in 1882, and what he himself may have wanted or led listeners to believe he said or meant—these are different, elusive, and still very easily confused matters. For a shocking example of failure to update research and thinking on such matters, see Harvey Wish, *A Historian Looks at School Segregation*, in *DE FACTO SEGREGATION AND CIVIL RIGHTS* (1965), pp. 81-98 at 87, where the discussion of Bingham's draftsmanship and motivation is still hopelessly confused.

⁶ See Introduction, *supra* p. 17, and *infra* Chapters 9, 13, and 14.

⁷ See *supra* p. 56.

⁸ *Id.*

⁹ See *supra* p. 62.

¹⁰ Note, for example, how largely even Louis Boudin, in combatting the Conspiracy Theory (*Truth and Fiction About the Fourteenth Amendment*, 16 N.Y.U.L.Q.

volumes on the national mind and the public interests of even the late 1930's.¹¹ In retrospect, the chief contribution of this essay, obviously, was that it *did* link, however casually and fortuitously, the Fourteenth Amendment with its antislavery backgrounds. World War II doubtless interrupted and delayed academic research. Yet the war also soon refocused and catalyzed this whole problem.

REV. 19-82, Nov., 1938), concentrated his attack on economic-corporate *misuse* of due process and equal protection, rather than on racial *disuse*.

Equally impressive and significant was the failure of A. C. McLaughlin in *CONSTITUTIONAL HISTORY OF THE UNITED STATES* (1935) even to mention *antislavery* use of due process. His account mentioned the *Wynehamer* and *Dred Scott* cases in discussing the 1850's, but ignored all the originating usage—usage of which he (and such contemporaries as A. B. Hart and T. C. Smith) certainly had been well aware.

¹¹ Not merely the law review literature, but even the *JOURNAL OF NEGRO HISTORY* reflects the national paucity of constitutional research and discussion at this period. Such was the price and impact of the 1877-1897 constitutional and sectional "settlement." All honor therefore to the work of the NAACP, and to the Carnegie Corporation and President F. P. Keppel for launching, in 1937, the foundation study which culminated in *AN AMERICAN DILEMMA* (1944, 2 vols.).

[CHAPTER 2]

The "Conspiracy Theory" of the Fourteenth Amendment: Part II

EDITORIAL NOTE. Mr. Justice Black's dissent dramatized and focused issues as never before. Both historically and doctrinally, the situation was without precedent: Fraud and misquotation had been employed in briefs and arguments addressed to the Supreme Court of the United States, in a major constitutional case, by an advocate who himself had twice declined a seat on the Court he addressed, and had gone undetected for fifty-five years; yet this same fraudulent *San Mateo* argument *reputedly* was the one on which "modern" interpretation of the Fourteenth Amendment had turned, and on which a half century of economic-corporate due process and equal protection still rested. Incredulity and consternation were mutual, general, almost palpable.

And my own predicament now was as anomalous, as vexing, as could be: Barely half the case had been presented—the negative, the sensational half (discovered last), the half that *discredited*, if it did not utterly demolish, the Conkling-Beard thesis. Yet there now remained the original half, the affirmative evidence—those "petitions and bills" (discovered first)—which "seemingly" half-corroborated Conkling, and, in the shambles of "conspiracy," conjecture, and circumstance, "seemingly" left the Beards with the last word!

An "over-circumstanced," "misleading" case this second half was, and ultimately proved to be; just as Dean Charles E. Clark and Professor Walton Hamilton advised the editors of the *Yale Law Journal*, and they in turn argued when the article was submitted and in process. My nets had indeed got "cast too wide," the research had been "too thorough, too conscientious," and too lucky-unlucky, for my

or any good use! The basic difficulty, of course, was that while the weight of the evidence was unmistakably, overwhelmingly adverse, those still-unexplained circumstances—vestiges—remained incorrigibly, almost inherently suggestive of "conspiracy." Those insurance and express company "petitions and bills" not only *were there*; one kept encountering *others*—the various railroad petitions, for example—and these, too, involved the leading framers. And just what did one make of this fact: In July, 1871, the newly-passed Ku Klux Act enforcing the equal protection clause got editorially invoked by the San Francisco *Daily Alta* to protect corporate mining properties then threatened by strikers and sabotage. Barnstorming for his party in San Francisco at that moment was draftsman John A. Bingham. And Roscoe Conkling had been out there often before!

Coincidence and circumstance, in short, played hard and dirty all the way.

Part of the trouble, obviously, stemmed from the restricted character of previous research. Few "nets" of any kind had been cast for years into the antebellum backgrounds of either economic or humanitarian due process, especially since the Corwin-Haines research, and no attempt ever had been made to explore either the congressional usage and "understanding" with reference to the corporate and economic sides, nor to integrate congressional and judicial history, either before, during, or after the draftsmanship.

Lawyers, rightly enough, called their great books "Digests." But study of the digestive process as such, of the legal physiology—of the digestive side of due process-equal protection in particular—had got badly neglected and shortcircuited; so completely limited in fact to Supreme Court and to *post*-Civil War cases, with little or no attention to briefs, or to the bar's or the public's roles, that *any* wider approach at once ran into these difficulties, and hence clouded some matters in the course of explaining and clarifying others.

Everyone agreed, of course, that the affirmative evidence must be presented, analyzed, and interpreted, as best it might. Historical integrity demanded no less. But an *author*, unable as yet to explain such details, was under heavier constraints than were law review editors and faculty, willing simply to dismiss or ignore them.

Historiographic problems thus loomed ever larger and larger. The complexity of what so long and often had been mistaken for, and treated as, a *prima facie* case, now was clear, and was increasingly the challenge.

[CHAPTER 2]

IN 1866, Roscoe Conkling was a member of the Joint Committee which drafted the Fourteenth Amendment. In 1882, during the course of an argument before the Supreme Court of the United States, Conkling produced for the first time the manuscript journal of the Committee, and by means of extensive quotations and pointed comment conveyed the impression that he and his colleagues, in drafting the due process and equal protection clauses, intentionally used the word "person" in order to include corporations. A lively controversy has since been waged over the historical foundation for Conkling's statement.

Social historians have contended that the equal protection and due process clauses were designed to take in "the whole range of national economy"; that John A. Bingham, the member of the Joint Committee chiefly responsible for the phraseology of Section One, "smuggled" these "cabalistic" clauses into a measure ostensibly drafted to protect the Negro race. Others have been skeptical of this view, and have pointed out that it is pyramided on three propositions: (1) that the framers had a substantive conception of due process, (2) that as early as 1866 there existed a number of constitutional cases in which due process had been invoked in a substantive sense by corporations, (3) that the framers knew of these early cases and realized the corporate potentialities of their draft, which were not suspected by the ratifiers.

In an earlier essay,¹ the writer demonstrated the essentially false and misleading character of Conkling's argument insofar as it was based on the Journal of the Joint Committee. And although it was shown that Bingham, as early as 1856, had employed due process of law as a substantive restraint upon the legislatures, no indication was found that Bingham in these early usages ever employed the guarantee to protect other than rights of "natural persons." It was therefore concluded that the so-called "Conspiracy Theory" of the

The writer wishes to express his gratitude to Mr. Milton Ronsheim of Cadiz, Ohio, for answering numerous inquiries regarding the career of John A. Bingham; to Mr. D. N. Handy of Boston, for assistance in locating the rare pamphlet cited in note 66; to Professors D. O. McGovney and J. A. C. Grant, of the University of California, for a critical reading of the manuscript of the first article; above all, to Professor Charles Aikin of the University of California, for counsel and encouragement at all stages of this and other research.

¹ See Chapter 1, *supra*.

Fourteenth Amendment could henceforth be maintained only if it were proved "that some force or influence caused Bingham to broaden his application of the due process clause to include corporations—either sometime prior to 1866, or while the Fourteenth Amendment was before the Joint Committee." In this essay the writer proposes to complete the study, reviewing first the development of corporate personality down to the Civil War, and then considering whether in the light of extant cases, the framers could have regarded corporations within the terms of Section One.

I.

Due process of law underwent a phenomenal development in the early and mid-fifties; it was occasionally, though as yet unsuccessfully, employed by corporations; and it was for a time reduced to a state of extreme debility after 1857 largely as a result of its own excesses and false popularity. For an understanding of these developments, it needs to be borne in mind that as early as 1805, the University of North Carolina, a public corporation, had in effect been held a "freeman" within the "law of the land" clause of the State constitution;² and in the years prior to the *Dartmouth College* decision³ the law of the land clauses of the states generally seemed destined to become bulwarks for vested corporate rights.⁴ Superseded

² *Trustees v. Foy*, 5 N. C. 58 (1805). The constitutional text read "no freeman ought to be taken, imprisoned, or dis seized of his freehold, liberties or privileges, or outlawed, or in any manner . . . deprived of his life, liberty or property but by the law of the land," and Justice Locke reasoned "that this clause was intended to secure to corporations as well as individuals the rights therein enumerated, seems clear from the word 'liberties,' which peculiarly signifies privileges and rights which corporations have by virtue of the instruments which incorporate them, and is certainly used in this clause in contradistinction to the word 'liberty,' which refers to the personal liberty of the citizen." *Id.* at 62.

But more important than logic for understanding of this opinion is the fact that the entire controversy was a part of the intense conflict between Jeffersonians, who were in control of the Legislature, and Federalists entrenched in the courts. See BATTLE, *HISTORY OF THE UNIVERSITY OF NORTH CAROLINA*, I (1912) c. 2. It would be difficult otherwise to explain why the law of the land clause was here declared a limitation "on the legislature alone."

³ 4 Wheat. 518 (U. S. 1819).

⁴ *Trustees v. Foy*, 5 N. C. 58 (1805), cited *supra* note 2, however, was not the first public corporation case under a State Bill of Rights; its staunch Federalist dogma may well have been aimed, in part at least, at the majority decision, rendered the year previously, by a Republican-controlled Virginia court in the case of *Turpin v. Lockett*, 6 Call 113 (1804). Here, upholding an act disestablishing the Church of England and depriving it of certain lands, Justice Tucker had reasoned "if the legislature . . . grant lands to a private person, in his natural capacity . . . such donation" would be irrevocable; but where the legislature had created "an artificial person, and endows that . . . person with certain rights and privileges" such action "must be intended

in this respect after 1820 by the neater contract clause formula, the law of the land nevertheless continued to be invoked in the class of cases involving charter changes of public institutions.⁵ Eventually, in 1847, after due process of law had developed full-fledged substantive appendages,⁶ and after the contract clause had begun to suffer the limitations of the *Charles River Bridge* decision,⁷ a Pennsylvania court, in the case of *Brown v. Hummel*,⁸ laid the foundations for renewed corporate usage. Less than two years later, in the case of *White v. White*,⁹ a New York Supreme Court upheld the arguments

as having some relation to the community at large" and therefore if subsequently the legislature deemed the vesting act "unconstitutional, or merely impolitic and unadvised," it might amend or repeal its own act. *Id.* at 156. But note in considering the early importance of the law of the land clause in such cases, that except for the sudden death of Chief Justice Pendleton the Turpin decision would have gone against the Legislature. See *id.* at 187, "memorandum," and MOTT, *DUE PROCESS OF LAW* (1926) 196, n. 15.

It is well known, of course, that the law of the land clause was relied on most heavily in the *Dartmouth College Case* in the state court [1 N. H. 111 (1817)], and while the argument was rejected by Justice Richardson on the fundamental grounds of the historic meaning of the law of the land, the argument on corporate personality was nevertheless explicitly made. See SHIRLEY, *DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES* (1879) 158-159.

⁵ *State v. Heyward*, 3 Rich. L. 389 (S. C. 1832), holding unconstitutional a statute depriving the faculty of a medical school of the right to grant degrees. "A body . . . corporate is not, it is true, a freeman, . . . ; yet it is composed of freemen . . . ; and of course the corporation can only be . . . deprived of any of its privileges in the same way" as a natural person. *Id.* at 411-412; *Regents of the University of Maryland v. Williams*, 9 Gill and J. 365 (Md. 1838).

See also *Vanzant v. Waddell*, 10 Tenn. 260, 270 (1829), holding that the law of the land means a general and public law, which binds every individual equally. "Were this otherwise, odious individuals and corporate bodies [italics added] would be governed by one rule, and the mass of the community who makes the law, by another."

⁶ See particularly, *Hoke v. Henderson*, 15 N. C. 1 (1833); *Taylor v. Porter*, 4 Hill 140 (N. Y. 1843).

⁷ 11 Pet. 420 (U. S. 1837).

⁸ 6 Barr 86 (Pa. 1847). Voiding certain statutory changes in the charter of an orphanage, the Court applied the due course of law clause of the Pennsylvania Constitution ["All Courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by the due course of law . . ."] Art. 1, § 11] to protect the interests of the original trustees, and seems even to have assumed a corporation to have been a "man" within its meaning.

Strictly construed neither this clause nor the text of the State Bill of Rights ["In all criminal prosecutions the accused hath a right to be heard . . . ; nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land." Article 1, § 9.] would have afforded protection even to corporate shareholders or trustees, yet in practice they early came to do so. This fact suggests caution when reasoning from a purely textual basis as to the meaning which the due process clause had in the minds of, say, the framers of the Fourteenth Amendment. Cumulative evidence indicates that all such clauses were used as often in their natural rights as in their literal sense; and that "property," not "due process" or "person," was the key word.

⁹ 5 Barb. 474 (N. Y. 1849); see particularly 481-484.

of counsel who cited the dicta of *Taylor v. Porter*¹⁰ as a basis for invalidating that section of the Married Woman's Property Act which applied to existing rights under prior marriages. And beginning in the Fifties, as a result of the expanding sphere of legislative action and more frequent collision between vested rights and various movements for economic and humanitarian reform,¹¹ due process of law was warped into play by corporate interests in New York, Pennsylvania, and Illinois.¹²

Foremost among the corporate contenders for an expanded interpretation of due process in New York were numerous foreign insurance companies. A fascinating story will some day be written of the struggles of these corporations to escape discriminatory and retaliatory laws relating to licenses, taxes and bonds.¹³ Far back in the Twenties and Thirties Jacksonian legislatures had precipitated conflict by passage of measures designed to make insurance, like banking, a protected franchise, subject to drastic state control. Against these attempts to restrict what otherwise was a national market in a field ideally suited to exploitation by large scale enterprise, insurance companies had sought judicial approval for a system of constitutional protection, which, while it was in perfect harmony with earlier court decisions and with American "natural rights" concepts,

¹⁰ 4 Hill 140 (N. Y. 1843).

¹¹ The intimate connection between the early use of due process and judicial predictions against such reform movements as Abolitionism, Women's Rights, and Prohibition has been noted by so conservative an historian as A. C. McLaughlin in *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* (1935) 461-462. There is need, however, for a thorough integration of social and constitutional history in these particulars. For a suggestive treatment of the social backgrounds of constitutional developments in New York during the Fifties see 6 *HISTORY OF THE STATE OF NEW YORK, THE AGE OF REFORM* (1934) c. 8. For insight into the interrelations between the movement for state prohibition laws and the growth of due process, see COLVIN, *PROHIBITION IN THE UNITED STATES* (1926) c. 2.

¹² It is possible that the first use of due process by a private corporation may have occurred in Ohio in 1852-54, just as Bingham was making his entrance into national politics. After years of bitter partisan warfare, Democrats had in 1851 repealed all tax exemptions granted (chiefly by Whigs) to banks and other corporations. No arguments of counsel are printed in any of the test cases in 1 Ohio State Reports, but it appears from the opinions of the Democratic judges upholding repeal of the exemptions, that *Taylor v. Porter* [*supra* note 6] and *Regents of the University of Maryland v. Williams* [*supra* note 5] figured prominently in the arguments. 1 Ohio St. 622, 633-634 (1853). The general character of the cases makes it seem probable that the *due course* of law clause of the Ohio Constitution was heavily relied on by Henry Stanbery in his arguments for the companies. 1968: See Chapter 13 *infra*, notes 39, 64, 69.

¹³ Unfortunately there is yet no adequate history of the insurance industry in the United States, nor of two closely-allied subjects, inter-state commercial retaliation and anti-corporate movements and legislation. See, however, HENDERSON, *THE POSITION OF THE FOREIGN CORPORATION IN AMERICAN CONSTITUTIONAL LAW* (1919) 50-63, 101-102; Whitney, *Commercial Retaliation Between the States* (1885) 19 AM. L. REV. 62.

was still fundamentally at odds with the Jacksonian era's philosophy of States' Rights and the prevailing antagonism to corporations. The companies argued in effect that since foreign corporations—or at least the shareholders of foreign corporations—had long been treated as "citizens" under the diversity of citizenship clause for purposes of suit in the Federal courts,¹⁴ the same parties should also be treated as "citizens" under the comity clause.¹⁵ It was hoped of course that "corporations [or shareholders]¹⁶ of each state" might thus eventually be held entitled in all States, to the "right to trade," the right "to acquire and possess property", and above all, to the right "to exemption from higher taxes and other unequal impositions," which Justice Washington had declared in *Corfield v. Coryell* to be among the "privileges and immunities of citizens in the several States."¹⁷

However ingenious as a formula for laissez faire, and as a means for virtually abolishing state lines and state control over corporations, these arguments necessarily gained little headway in Federal courts presided over by Jacksonian judges.¹⁸ From the date of their first defeat in 1837,¹⁹ the plight of the insurance companies grew

¹⁴ *Bank of United States v. Deveaux*, 5 Cranch 61 (U. S. 1809); see *Louisville, C. & C. R. R. v. Letson*, 2 How. 497, 558 (U. S. 1844) (presumed all shareholders to be citizens of the chartering state); HENDERSON, *op. cit. supra* note 13 at 54-63.

¹⁵ See *Warren Manufacturing Co. v. Etna Insurance Co.*, 29 Fed. Cas. No. 17,206 (C. C. D. Conn. 1837); *Bank of Augusta v. Earle*, 13 Pet. 519, 585 (U.S. 1839); and particularly Webster's argument, printed more fully in 11 WRITINGS AND SPEECHES OF DANIEL WEBSTER (1903) 106, 112-115; HENDERSON, *op. cit. supra* note 13, at 54-63.

¹⁶ Webster only argued that the *shareholders*, having gained the right to sue in the corporate name, should be granted the right to do business in the corporate name. But the broader proposition was of course the ultimate goal.

¹⁷ 6 Fed. Cas. No. 3,230 (E. D. Pa. 1823). Counsel failed to note that Justice Washington had himself qualified these broad rights by saying that they were "subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."

¹⁸ It is interesting to note in retrospect how fundamentally at odds the corporations' strategy was with the dominant sentiments of the period—how completely States' Rights arguments cancelled out Natural Rights arguments. In the abstract, the principles of the *Corfield* dictum were dear to the heart of every American; but as applied in behalf of corporations in the Thirties and Fifties they led to consequences abhorrent to all but the most doctrinaire nationalists. The logic and simplicity of the formula, together with the encouragement which the Supreme Court seemed to offer from time to time by its wavering interpretations of the diverse citizenship clause, doubtless account for the arguments' vitality, but it is plain today that since no Court could have declared a corporation a "citizen" under the comity clause without in practice vitiating all State control over corporations, there was little chance for success. It is significant that foreign corporations eventually attained protection under clauses of the Constitution that permitted more readily of judicial discretion, and involved no such universal and automatic system of *laissez faire* as the insurance companies long tried to establish.

¹⁹ *Warren Manufacturing Company v. Etna Insurance Company*, 29 Fed. Cas. No. 17,206 (C. C. D. Conn. 1837).

steadily more anomalous and more acute—more anomalous because as foreign corporations the companies were in fact treated as "citizens" within the meaning of one clause of the Constitution, yet were not so treated within the meaning of another,²⁰ more acute because this understandable lack of consistency in judicial construction eventually gave license to new and more alarming forms of discrimination. Beginning in the Forties and Fifties State legislatures not only undertook to raise the license fees and premium taxes formerly collected, but also began experimenting with provisions that required deposit of large cash bonds—taxable in most cases—as security for resident policy holders.²¹ Legitimate in principle, these requirements naturally provoked retaliation, tied up progressively large amounts of capital, restricted and at times demoralized the entire insurance business.²²

To combat these tendencies, established companies in the Fifties turned to the State courts, using a wide range of constitutional weapons, but relying most heavily on the Comity clause, and on the hope of gaining a decision which might eventually be employed to overturn Chief Justice Taney's opinion in *Bank of Augusta v. Earle*.²³

²⁰ HENDERSON, *op. cit. supra* note 13, at 50-76, presents the classic analysis of this paradox.

²¹ See *id.* at 101-102; Whitney, *supra* note 13. Recrudescence of the ancient commercial feud between New York and New Jersey, quiescent since the Twenties, seems to have led to the bonding requirement, which soon spread to other States and found most drastic and ingenious use in the Far West during the Civil War. See *infra* note 63.

²² It is difficult today to disentangle the motives that led to these enactments, and even more difficult to pass on the merits. In general one can say that like all such enterprises at the time, insurance companies were economically undertaxed, and real property owners were campaigning for equalization through licenses and premium taxes. Insolvencies and fly-by-night agencies were cited to justify the bonding requirements. Local promoters and ambitious capitalists stepped in, organized "wild cat mutuals" without actuarial knowledge or distribution of risks, and appealed for stiff discriminations to further their schemes. Old line companies thus suffered not merely the restriction of the market, but the discredit which failure of the "wild cats" eventually brought to the still novel principle of insurance. Caught thus between the upper and the nether stones, conservative Eastern companies had good reason for alarm, particularly since retaliation proved scarcely better than suicide.

²³ 13 Pet. 519 (U. S. 1839) (corporations not citizens under comity clause). For the companies' strategy see assembled arguments and briefs, *The Fire Department v. Noble*, *The Fire Department v. Wright*, 3 E. D. Smith 440 ff, 453 ff, particularly 458-468, 472-486 (C. P. N. Y. 1854). For evidence of how quick the Southern agrarians on the United States Supreme Court were to sense and spike the companies' move, see Justice Campbell's opinion in *Marshall v. Baltimore and Ohio R. R.*, 16 How. 314, 352 (U. S. 1853). Apprehension that a tendency to liberalize interpretations of corporate citizenship under Art. III, Sec. 2, might favor the companies' strategy caused the Court in this case virtually to repudiate the Letson dictum, note 14 *supra*; cf. also *Rundle v. Delaware and Raritan Canal Co.*, 14 How. 80 (U. S. 1852), particularly Daniels' dissent at 95; see HENDERSON, *op. cit. supra* note 13, at 60-63.

Failing in at least three attempts in Kentucky,²⁴ Illinois²⁵ and New Jersey,²⁶ counsel finally selected a test case in the New York Court of Common Pleas. Elaborate arguments were made under the Comity and the just compensation clauses,²⁷ though no mention appears to have been made of due process.²⁸ But before decision could be rendered in the test case, the Court of Appeals decided *Westervelt v. Gregg*,²⁹ which voided the Married Woman's Property Act as a denial of due process. Encouraged by this expansion, counsel for the insurance companies abandoned their Comity clause and just compensation attack in favor of a new test suit, commenced and elaborately argued on due process grounds.³⁰ Yet the subsequent opinion of the Court of Common Pleas took no notice of the insurance companies' new argument; and it is possible that the "law of the land" might again have undergone eclipse had it not been for passage, in April, 1855, of the New York anti-liquor law applying even to liquor on hand at the time of passage.³¹ This law, held void, as a denial of due process to private persons, by several judges of the State Supreme Court as early as July,³² remained a center of controversy throughout the year.³³ In March, 1856, following presentation of due

²⁴ *Commonwealth v. Milton*, 12 B. Mon. 212 (Ky. July, 1851) (overruling a favorable decision in the lower court).

²⁵ *People v. Thurber*, 13 Ill. 554 (June, 1852) (rejecting arguments that a law licensing agents of foreign companies violated the Commerce clause). Immediately following this decision, the Illinois Legislature, currently in session, passed a statute modelled on that of New York levying a tax of two per cent on all premiums collected by the agents for outside companies, the tax going to the Chicago firemen, who at this date of course were as fearless in politics as at fires. See note 42, *infra*.

²⁶ *Tatem v. Wright*, 3 Zab. 429 (N. J. Law, November, 1852).

²⁷ *New York Fire Dept. v. Noble*, 3 E. D. Smith 440 (N. Y. November, 1854) (validity of tax of two per cent on all fire premiums collected by outside companies levied in support of the New York Fire Department, at that time a chartered corporation).

²⁸ Possibly because in 1851, lawyers for individual private property owners in Brooklyn had been unsuccessful in an attempt to employ the earlier due process dicta of *Taylor v. Porter* and *White v. White* to contest the validity of certain special assessments for street improvements. See *People v. Mayor of Brooklyn*, 4 Comst. 419 (N. Y. April, 1851) [overruling decision which had invalidated the assessments as violations of the just compensation clause, 6 Barb. 209, (1849)]. No arguments of counsel are given in 4 Comstock but the due process point is covered obliquely in the opinion at 423 and 438.

²⁹ 2 N. Y. 202 (1854).

³⁰ *New York Fire Dept. v. Wright*, 3 E. D. Smith 453 (N. Y. 1854).

³¹ COLVIN, *op. cit. supra* note 11, c. 2.

³² *People v. Toynbee*, *People v. Berberich*, 20 Barb. 168 (N. Y. 1855).

³³ *Cf. Wynehamer v. The People*, 20 Barb. 567 (N. Y. Sup. Ct. Sept. 1856) (law sustained). The argument of F. J. Fithian in this case, pp. 569-588, is a landmark in the development of due process of law. It shows how far the guarantee was explored prior to the Civil War and helps to explain the elaborate dicta in the Court of Appeals opinions delivered six months later.

process arguments by a former colleague³⁴ who had concurred in *Westervelt v. Gregg*, members of the Court of Appeals handed down the celebrated decision in *Wynehamer v. The People*.³⁵ Alarmed at the spread of anti-slavery, anti-liquor, and Women's Rights agitation,³⁶ four of the concurring judges, by dicta reminiscent of stump speeches, undertook to rally conservative opinion and to erect judicial barriers for the protection of property rights.³⁷ Naturally this step proved a signal for further attack on the New York insurance laws by counsel who cited the various dicta to prove that local agents for foreign companies had been denied the right to pursue a lawful calling in violation of due process.³⁸ But the Court of Appeals, already subject to bitter criticism for the *Wynehamer* decision, declined to intervene in favor of the corporations.³⁹

While there is abundant reason to believe the Court of Appeals dicta had temporarily excited the hopes of companies' counsel, and caused the due process clause later to be argued extensively in cases before the Court of Appeals,⁴⁰ it was nevertheless on the Comity clause that chief reliance continued to be made. In Virginia in

³⁴ Amasa J. Parker, who later in the same year was the unsuccessful Democratic candidate for Governor of New York.

³⁵ 13 N. Y. 378 (1856). Strictly speaking, certain of the opinions here reported cover the case of *The People v. Toynbee*; see pp. 486-488 for the manner in which the eight Judges, six of whom concurred in voiding the law as it applied to liquor on hand, divided on the overlapping cases.

³⁶ See particularly the opinion of Justice Comstock, alluding to "the danger" of "theories alleged to be founded in natural reason or inalienable rights, but subversive of the just and necessary powers of government, [which now] attract the belief of considerable classes of men," and declaiming that "too much reverence for government and law is certainly among the least of the perils to which our institutions are exposed." *Id.* at 391-392. Professor Corwin has regarded these words as aimed at the Abolitionists. *The Doctrine of Due Process of Law Before the Civil War* (1911) 24 HARV. L. REV. 460, 469-471. But the target seems likely to have been broader. Comstock's attitude is the more striking because he saw plainly that judicial delimitation of legislative powers contained "germs of great mischief to society by giving to private opinion and speculation a license to oppose themselves to the just and legitimate powers of government."

³⁷ Justice Selden included "all vested rights to [corporate?] franchises," which otherwise might be left "entirely at the mercy of the legislature." 13 N. Y. 378, 434 (1856).

³⁸ See the arguments of William Curtis Noyes, 3 E. D. Smith 458-468 (N. Y. 1854), who cited particularly the *Wynehamer* opinions of Comstock and Johnson, J. J., 13 N. Y. 378, 392-393, 416-421.

³⁹ The opinions in 3 E. D. Smith 440, note 27 *supra*, are reported as "unanimously affirmed" by the Court of Appeals. For facts bearing on failure to appeal to U. S. Supreme Court, see note 42, *infra*.

⁴⁰ The date of arguments and decision by the high court is unknown, but since Noyes' revised brief makes effective use of the opinions in *Wynehamer v. People*, the date was sometime after March, 1856.

1856,⁴¹ again in Illinois in 1859,⁴² and in Wisconsin in the first year of the Civil War,⁴³ the battle went on, yet wholly without tangible results. The way was definitely blocked.

It was in Pennsylvania therefore, and not in New York, that the doctrine of corporate personality made its farthest advance. And it was a railroad, not an insurance company, which led the charge. Following a long struggle between the State and the Erie and North East Railroad, many of whose acts were cited as *ultra vires*, the Pennsylvania legislature in 1855 repealed the franchises of the corporation.⁴⁴ Since no provision had been made in the repealing statute for judicial proceedings to determine the fact of franchise abuse, lawyers for the company challenged the law both as an impairment of contract and as denial of due process.⁴⁵ The majority of the Court, speaking through Justice Jeremiah S. Black on January 9, 1856, took no notice of the latter point. Chief Justice Lewis however, in a dissenting opinion,⁴⁶ accepted the view that these were judicial, not legislative questions, and held that the *property of the stockholders* had been taken "without the judgment of their peers, and contrary to the law of the land established by the constitution"⁴⁷—held in

⁴¹ *Slaughter v. Commonwealth*, 13 Grat. 767 (Va. 1856).

⁴² *Firemen's Benevolent Ass'n v. Lounsbury*, 21 Ill. 511 (1859) (sustaining the tax mentioned note 25 *supra*). No indication here that due process was raised, although the statute at issue was the one which had inspired Mark Skinner's brief printed in 3 E. D. Smith. See note 23 *supra*. Possibly the adverse criticism of the Dred Scott decisions accounts for failure to use the argument.

⁴³ *Milwaukee Fire Dept. v. Helfenstein*, 16 Wis. 136 (1862) (due process used by counsel at 138).

⁴⁴ See 6 GREAT AMERICAN LAWYERS (1907) 1-74; KLINGELSMITH, JEREMIAH S. BLACK 20-25.

⁴⁵ *Erie and North East Railroad v. Casey*, 26 Pa. 287, 293 (1856). Counsel quoted this striking dictum from *Brown v. Hummel*, 6 Barr. 86, 91: "It is against the principles of liberty and common right to deprive a man of his property or franchise while he is within the pale of the constitution, and with his hands on the altar, and give it to another, without hearing or trial by due course and process of law." [Italics added].

⁴⁶ 1 Grant's Cases (Pa. 1856) 274.

⁴⁷ *Id.* at 290. In the conclusion of his opinion Justice Lewis seems to have relied on Article I, Section 9—"In all criminal prosecutions *the accused*") yet in the body (at p. 276) he was intent on showing that "the stockholders" were "tangible individuals"—i.e., "men"—within the meaning of Article I, Section 11. One concludes therefore that the judge was quite aware the text was hardly suited to his purposes, and that even the fiction of "looking through" to the stockholders left certain rough edges to the argument. See note 8 *supra* for texts of these clauses.

Perhaps the best illustration of the Pennsylvania Courts' tendency to disregard constitutional texts is found in *Reiser v. William Tell Savings Fund Association*, 39 Pa. 137, 146 (1861). Justice Lowrie, in voiding a special statute which had legalized usurious interest rates of building and loan associations, wrestled with the phrasology of Article I, Section 9 (*supra* note 8), and by sheer force of will made it apply to *civil* as well

short, that whether or not they were "men" or "the accused in criminal prosecutions," corporations were nevertheless to be granted such protection against legislatures as the judiciary might believe compatible with sound public policy.

Simultaneously with these parallel (and outwardly independent) corporate invocations of due process of law in New York and Pennsylvania, a third use occurred in Illinois which was clearly inspired by example. On February 23, 1856, just six weeks after the decision in *Erie Railroad v. Casey* (and while the insurance and liquor act cases were still pending in the New York Courts), Mark Skinner, a former judge of the Illinois Supreme Court now retained by insurance interests, wrote a brief⁴⁸ arguing that an Illinois insurance statute modelled on that currently challenged in the East was invalid as a denial of due process.⁴⁹

Judge Skinner's brief is a striking symbol of developments that overtook due process of law in the ensuing twelve months. During this period substantive and political use of the clause broke all bounds and culminated in a costly and tragic blunder. On March 6th—within two weeks from the date of Judge Skinner's brief, within two months from the decision in *Erie Railroad v. Casey*, and almost simultaneously with the Court of Appeals decision in *Wynehamer v. The People*—Bingham delivered his maiden speech in Congress, citing the Kansas slave code as a violation of due process.⁵⁰ On April 4th, Representative Granger of New York spoke similarly,⁵¹ followed on May 22 by Bingham's colleague, Representative Bliss.⁵²

as criminal proceedings. The phraseology meant, he declared, paraphrasing to suit his argument, "no person shall be deprived of life, liberty, or property except by the legal judgment of his peers, or other due course or process of law. Here, civil and criminal law, rights of property, and of life and liberty, are put in the same class. Rights of property (and money possessed and owned is property) and the rights of life and liberty, have the same guaranty that they are to be tried by due course of law. But they have not the same guaranty, if the legislature may direct the court, after civil cases arise, or after contracts or other transactions are complete, how we shall . . . interpret the law under which they arise; which it is admitted they cannot do in criminal cases. This section of the Bill of Rights is violated when civil and criminal rights are not both alike tried by due course of law." (Italics added).

Edgar W. Camp errs in listing this as a corporate personality case. See *Corporations and the Fourteenth Amendment* (1938) 13 STATE BAR JOURNAL (Calif.) 12, 18 n. 25. Justice Lowrie's ingenuity was directed solely in behalf of natural persons; his decision being in favor of Reiser, the plaintiff in error.

⁴⁸ Printed in 3 E. D. Smith, 472-478 (N. Y. 1854); reprinted in a CIRCULAR TO THE INSURANCE AGENTS OF THE UNITED STATES. See note 66, *infra*.

⁴⁹ See note 25, *supra*, for history of the Illinois law.

⁵⁰ See Chapter I, *supra*, particularly notes 73, 78.

⁵¹ *Ibid.*, particularly n. 83.

⁵² *Ibid.*

In June, Joshua Giddings, the veteran Ohio Abolitionist, drafted the Kansas-due process planks which were adopted by the first Republican National Convention at Philadelphia.⁵³ In the ensuing campaign, "Bleeding Kansas" and "due process of law" were the twin catch phrases of Republican orators. In November a concurring minority of the Indiana Supreme Court *assumed* a corporation to be a "man" entitled to the protection of due course of law.⁵⁴ In January, 1857, Bingham and Bliss⁵⁵ once again employed the clause—this time to bolster Congress' power over slavery in the Territories. And less than six weeks later, Chief Justice Taney, succumbing to a year of provocation, drafted the dictum in the case of *Dred Scott*⁵⁶ which hastened the Civil War and destruction of everything his opinion had been designed to preserve.

II.

We may now consider the implications of these discoveries. Manifestly, the foregoing facts, while in no way altering our conclusion that Bingham was concerned primarily with protecting free Negroes and mulattoes—that he was an idealist, in short, and an opportunist, not a schemer—nevertheless do suggest certain important secondary considerations.

The first is that so far as due process of law is concerned, Bingham's original use of the phrase in 1856 could easily have derived from, and thus have been made with full knowledge of, one or more of several earlier corporate usages. It is idle, without knowing more of Bingham's early attitude toward corporations, to speculate on the full significance of this discovery; yet it seems obvious that one cannot categorically reject the thesis that Bingham in 1866 at least regarded corporations as *included* along with natural persons, so long as there exists the possibility that he first used the clause (ten years earlier) as a result of a number of uses by corporations.^{56a}

A second consideration is that the entire battery of constitutional

⁵³ *Id.* at n. 79, 80.

⁵⁴ *Madison & Indianapolis R. R. v. Whiteneck*, 8 Tanner 217 (Ind. 1856).

⁵⁵ See Chapter 1, *supra*, n. 83, 86, 87.

⁵⁶ 19 How. 393, 450 (U. S. 1856). See SWISHER, ROGER BROOKE TANEY (1936) 476-523. Relevant here is Professor Borchard's conclusion: "If the due process decisions on substantive law prove anything, they demonstrate that the Court's judgment is the product of the will. It is the social and economic predilection which speaks." *The Supreme Court and Private Rights* (1938) 47 YALE L. J. 1051, 1078.

^{56a} 1968: The naïveté, presumptions, and conjecture of this paragraph are conspicuous and embarrassing today. See the editorial note following Chapter 1, *supra*, especially footnotes 7-9, and the editorial note following this chapter, for basic fallacies and disclaimers.

clauses which Bingham had by 1859 evolved for the protection of free Negroes and mulattoes was virtually identical with the battery which insurance company lawyers evolved in the New York courts between 1854-1856 for the protection of foreign corporations. Due process of law, just compensation, and interstate privileges and immunities were the components of both systems. The point in this connection is not that Bingham's entire system was consciously based on that of the corporations—one can be reasonably certain that it was not.⁶⁷ It is, rather, that we are confronted with two separate lines of usage of the same set of constitutional clauses—the set that eventually finds its way into Section One. The crucial question therefore, is not what minor cross-pollinations may have influenced the early development of the two systems, but what relations existed between the two in 1866? At that time we are certain at least that idealists intent on securing Negro rights undertook to use constitutional phraseology and concepts which corporations had already been using for a generation. Did the idealists proceed to do this without awakening the interest and participation of the business group? Was the Fourteenth Amendment a sheer windfall for Business—a product of unsolicited aid? Or was it somehow the product of joint interest and joint participation? Was it framed with reference to the needs of both Negroes and corporations? Or was it simply made up of clauses which had been *used in behalf* of both Negroes and corporations? Did Bingham, assuming now that he originally had been indifferent to, if not wholly oblivious of the use of his "system" by corporations, remain so during the months the Amendment was before the Joint Committee?⁶⁸ Did insurance company lawyers, who had proved so quick to capitalize the dicta of *Westervelt v. Gregg* and *Wynehamer v. The People* in the State courts, and who had fought stubbornly

⁶⁷ If only for the reason that use of the comity clause to protect free Negroes and mulattoes dated back to the Missouri Compromise [see GEORGE, *THE POLITICAL HISTORY OF SLAVERY IN THE UNITED STATES* (1915) 38-39, 48-51]; and that virtually every constitutional argument conceivable was employed by both sides in the Slavery debates. Recognition of the ingenuity of even the amateur constitutional lawyer throughout American history makes unnecessary the assumption that Bingham was incapable of choosing his own weapons.

⁶⁸ It must be emphasized that three months elapsed between Bingham's first speech in the House outlining in general terms the character of the Amendment, and adoption of the final draft by the Joint Committee on April 28, 1866. *CONG. GLOBE*, 39th Cong. 1st Sess. 429. Bingham's original positively-worded draft, "The Congress shall have power to make all laws . . . necessary and proper to secure to all citizens of each State all privileges and immunities of citizens of the several States; and to all persons in the several States equal protection in the rights of life, liberty and property," reached the floor of the House February 13, 1866. Even as early as December 15, 1865, the New York World had called unfavorable attention to Bingham's original draft (at

but without success for a decision holding a corporation to be a "citizen" under the Comity clause, manifest no interest when the due process-comity clause phraseology was proposed in Section One? Did foreign corporations, suffering from what they regarded as discriminatory taxation and "class legislation,"⁶⁰ exhibit any interest when Bingham on January 25, 1866, sounded out sentiment for an Amendment to limit the taxing power of the States and to prohibit "class legislation"? Finally—and we arrive now at the heart of the matter—can there be shown to have been any significant relation between the corporate activity which might be expected from the foregoing circumstances, and that which was implied to have taken place by Roscoe Conkling's remarks in 1882?⁶¹

Conkling, it will be recalled, at the climax of his 1882 argument before the Supreme Court, declared "At the time the Fourteenth Amendment was ratified,⁶² as the records of the two houses will show, individuals and joint stock companies were appealing for congressional and administrative protection against invidious and discriminating state and local taxes. One instance was that of an express company, whose stock was owned largely by citizens of the State of New York who came with petitions and bills seeking acts of Congress to aid them in resisting what they deemed oppressive taxation in two States, and oppressive and ruinous rules of damages applied under State laws."⁶³

Careful search of the *Congressional Globe* provides the material for a partial answer to the above questions. It appears that while Bingham and his colleagues were at work drafting the phraseology of Section One, two different groups of corporations whose lawyers had earlier made use of the component clauses "came with petitions and bills" designed to secure "congressional and administrative protection" against adverse forms of State action.

that time pending merely as a resolution) "Congress shall have power . . . to secure to all persons in every State . . . equal protection in their rights of life, liberty and property." See FLAGG, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908) 140. It can be said confidently therefore, that from December on, corporations and their counsel had reason to be interested in the trend of events.

⁶⁰ One of the arguments used by William Curtis Noyes in 1854 had been that the New York Act was "entirely unequal in effect and operates only upon a certain class of persons" [see 3 E. D. Smith 462], whereas to prohibit "class legislation" was of course an avowed object of the framers of the Amendment. See particularly, *CONG. GLOBE*, 39th Cong., 1st Sess., 1064, for the debate between Thaddeus Stevens and Rep. Hale.

⁶¹ See Chapter 1, *supra*.

⁶² Obviously, Conkling meant "At the time the Fourteenth Amendment was drafted," not "ratified;" else his whole case would have fallen.

⁶³ CONKLING'S ARGUMENT, Chapter 1, *supra*. [Italics added.]

First to arrive—and in such form, and under such circumstances as could hardly have failed to attract interest on the part of the framers—were petitions from insurance companies, mobilized now for an attempt to suppress and circumvent the type of legislation from which they had long suffered, and which, notwithstanding the strongly ascendant nationalism and the discredit of localistic policies as a result of Secession, had recently made alarming headway on the Pacific Coast.⁶³ Between March 2, 1866—two days after the virtual defeat in the House of Bingham's positively worded draft⁶⁴—and June 8, 1866

⁶³ As reconstructed chiefly from a pamphlet-circular *TO THE INSURANCE AGENTS OF THE UNITED STATES* (note 66, *infra*) published February 1, 1866, it appears that while the Civil War brought a phenomenal prosperity to the industry as a whole, and a vast increase in outstanding insurance, this prosperity was marred after 1864 by enactment, first in California, then in Nevada and Oregon, of laws which had the effect not only of "cinching" Wells Fargo Express Company but of sponsoring the growth on the Pacific Coast of powerful insurance companies which—(or at least so the Eastern firms feared)—might draw their capital from the bonanza mines of Nevada.

In 1862-63 San Francisco capitalists had begun to organize home companies, and in 1864 had succeeded in inducing the Legislature to boost the cash bond required of outside concerns from \$50,000 to \$75,000 *in gold*, and to require *in addition to*, not in lieu of, as before, a premium tax of two per cent, etc. To catch Wells Fargo Express, a New York corporation, foreign "insurance companies" were so defined as to include "all express companies . . . engaged in the carriage of treasure or merchandise . . . and insuring the same . . ." *STATS. CALIF.* (1863-1864) 131-134. As in all such matters, California's statute promptly served as a model in Oregon, [*ORE. GEN. LAWS* (Deady & Lane, 1843-1872) 447, 616] and in Nevada [*NEV. STAT.* (1864-1865) 104-9].

These developments on the Pacific Coast, together with passage of similar troublesome legislation in the Midwest, and the prospect that the Southern States would shortly begin reenactment of non-intercourse laws, prompted the Eastern companies to meet in the autumn of 1865 and organize for mutual protection. For almost a year, insurance journals had been discussing the prospect of "nationalizing insurance" in the manner of the banks; and in many respects conditions were favorable. At length, steering committees formed by both the life and the fire companies decided to work for a Federal Bureau of Insurance. For supplementary sources see KNIGHT, *HISTORY OF LIFE INSURANCE IN THE UNITED STATES TO 1870* (1920) 134-141; *COMMERCIAL AND FINANCIAL CHRONICLE* (1866) 265, 292.

While no petitions are on record, the writer has wondered if perhaps Wells Fargo was not the New York company alluded to by Conkling in argument. Mr. Harold Jonas of New York, who is completing a biography of Conkling, has suggested the counter possibility that the reference may have been to the United States Express Company, whose head was Thomas C. Platt, Conkling's political associate (and later) colleague in the Senate. In either event, it seems probable that legislation of the type enacted in California was the source of the express companies' troubles. This part of Conkling's statement, therefore, may be concluded to have had some basis in fact.

⁶⁴ Conservatives feared destruction of the States and Federal centralization; Radicals the prospect of Democratic control of Congress and the almost certain repeal, in that event, of all Reconstruction measures. For the Conservative viewpoint, see speech of Rep. Hale of New York, *CONG. GLOBE* on Feb. 27, 39th Cong., 1st Sess. (1866) 1064-65. Hotchkiss, in closing the debate, objected that Bingham's views were "not sufficiently radical." He wanted the Amendment redrafted to secure *constitutional*—not merely *congressional* protection—"we may pass laws here today and the next Congress may wipe them out—where is your guarantee then?" The writer suggests that this speech

—the date of final passage of the Amendment by the Senate—more than two hundred of these petitions were received in Congress “praying for enactment of just, equal and uniform laws pertaining to interstate insurances, and for the creation also of a Federal Bureau of Insurance.”⁶⁵ This influx was given force by a specially-prepared pamphlet⁶⁶ which pointed out the “Necessity,” the “Desirableness,” and the “Equity” of congressional relief, and which quoted in full (in addition to the stock commerce and Comity clause arguments) Judge Skinner’s brief arguing that an Illinois insurance law was a violation of due process. Insurance company petitions are known to have been received by at least six members of the Joint Committee,⁶⁷ and were referred in the House to the Committee on Commerce,

by Hotchkiss probably impressed Bingham with the expediency of adopting the negative form “No State shall . . .” In later years Bingham inferred that study of John Marshall’s opinion in *Barron v. Baltimore* had prompted him to make the change [see CONG. REC., March 28, 1871, Appendix pp. 83–85.] but it seems improbable in the light of the foregoing that the influences were entirely academic.

By what the writer, in the absence of any evidence to the contrary, concludes to have been merely a coincidence, Rep. Hotchkiss on March 2nd—two days after making the above-quoted speech—submitted the first insurance company petition found in the *GLOBE*.

⁶⁵ Of a total of 208 petitions, some bearing as many as 500 signatures, and practically all of which were submitted by Republicans in the House, nearly three-fourths are found to have been received prior to final action by the Joint Committee on Section One—in fact, the peak was reached in mid-April just prior to such action. Only petitions relating to the tariff and freedmen’s rights appear to have been received in greater numbers. The petitions dropped off suddenly in mid-June, but probably only because the campaign organized in February had run its course.

⁶⁶ CIRCULAR: TO THE INSURANCE AGENTS OF THE UNITED STATES (Feb. 1, 1866) [only known copy is in the Library of the Insurance Library Association of Boston]. Prepared under the direction of C. C. Hine, secretary of companies’ steering committee, and one of the leading insurance publicists of the post-Civil War period, the pamphlet leaves no doubt of the origin and character of the petitions. Elaborate instructions were provided for a “write-your-Congressman” campaign; petitions and memorials (on prepared forms) were to be circulated among influential business men; conventions of agents were proposed for each congressional district. *Id.* at 7–9.

The body of the pamphlet consisted chiefly of arguments and briefs against the constitutionality of foreign corporation and non-intercourse laws; the most notable of which were those of William Barnes, Superintendent of the Insurance Department of the State of New York, (pp. 15–20); extracts from the argument of William Curtis Noyes taken from 3 E. D. Smith (pp. 26); emphasis that under New York laws “the term *person* . . . shall be construed to include *corporations* as well as individuals” (p. 27); the entire brief of Judge Mark Skinner of Chicago, holding the Illinois law of 1852 to be a violation of due process (pp. 27–30). Pages 33–52 were made up of selected articles from insurance journals in 1864–1865 proposing a National Bureau of Insurance and a National Insurance Law.

⁶⁷ Conkling submitted five. CONG. GLOBE, 39th Cong., 1st Sess. 1662, March 26; p. 1727, April 2; p. 1979, April 16; p. 2049, April 19; p. 2442, May 7 (1866). Washburne, two; Morrill, one; Fessenden, one; Grimes, one; Harris, one. Bingham appears to have submitted no petitions.

whose chairman at this session was Elihu Washburne, himself a member of the Joint Committee.

In summary, one can say that these petitions were independently motivated, and merely an extension and culmination of earlier trends. It is also to be distinctly noted that a statute,⁶⁸ not a constitutional amendment,⁶⁹ was the companies' real objective. It would seem to be established, however, that the petitions came to the attention of the framers while they were engaged in drafting the Amendment. On this basis, and in the light of Conkling's remarks, a tentative conclusion may be drawn. It cannot be inferred that the Amendment was deliberately or consciously framed to assist the insurance companies or other corporations, but everything about the petitions—their source, incidence, chronology and substance—suggests that they would have been likely to raise the question of corporate status while the framers were at work.⁷⁰

Arriving almost simultaneously with the petitions of the insurance companies—yet addressed in this instance only to members of the

⁶⁸ See CIRCULAR, *op. cit.* *supra* note 66, at 6. Just when the bill for a National Bureau of Insurance was presented before Congress is unknown; but such a proposal was reported by the House Judiciary Committee, June 29, 1866 [CONG. GLOBE 3490]. And previously, on June 14, the day following final passage of the Fourteenth Amendment by Congress, Rep. Lawrence of Pennsylvania, had introduced a similar bill [*Id.* at 3162] which received no attention on the floor of Congress. It appears that Rep. J. K. Moorhead, brother of Jay Cooke's brother-in-law and partner, was the co-sponsor (with Lawrence) of the latter bill. Here again one is struck by a unique harmony of interests, for a funding bill lay at the heart of the Cooke's entire enterprise at this date [LARSON, JAY COOKE, PRIVATE BANKER (1936) 207-214, 239-240]; and one can readily understand how a proposal to "nationalize" the insurance companies (after the manner of the national banks) by investment of a certain share of capital in United States bonds, impressed the Cookes as sound financial statesmanship.

⁶⁹ For evidence that insurance men had nevertheless considered the prospects for a constitutional amendment, see William Barnes, Superintendent of the Department of Insurance of the State of New York, Annual Report for 1864, quoted in CIRCULAR, *op. cit.* *supra* note 66 at 19. Speaking of possible relief by interstate compacts, Barnes added "Such a proceeding would . . . be undesirable and might be more troublesome . . . than a direct effort to produce an amendment of the Constitution, making the [comity clause] expressly applicable to corporations as well as to citizens."

⁷⁰ If Bingham is ever revealed to have had insurance company connections, one might attach significance to the fact that he submitted his revised draft, made up (as he emphasized) of the comity clause and the Fifth Amendment, on February 3rd, just two days after the imprint date of the CIRCULAR: TO THE INSURANCE AGENTS OF THE UNITED STATES. It must be borne in mind, however, that an adequate explanation for Bingham's adoption of this phraseology is found in his own earlier speeches; and in the further fact that the Joint Committee had itself been moving in that direction. For the obviously laborious evolution of the phraseology in sub-committees January 12 to 27, 1866, see KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1914) 46-58. In either case of course it is obvious that February 1 to 3 marks the focal point of two independent but historically-converging lines of usage. The question is: what sort of relations prevailed at the historical intersection?

Ohio and Pennsylvania delegations—were several petitions from the “Cleveland and Mahoning Railroad . . . asking Congress to restore” certain franchises which “had been taken away by the . . . State of Pennsylvania, thus impairing vested rights of the citizens of Ohio.”⁷¹ These petitions sought redress for repeal of charter privileges by the same State which numbered among its constitutional opinions *Brown v. Hummel* and *Erie Railroad v. Casey*. Not unexpectedly, therefore, these petitions are likewise found suffused with due process of law. They serve to corroborate our tentative hypothesis regarding the character and effect of the insurance company petitions, and the likely relations that existed between the corporate and Negro rights usages of due process in 1866. In this instance, however, it is to be emphasized that the evidence goes considerably farther: by reason of certain of its ramifications, it not only injects new life into the possibility that Bingham, in 1866, *may have prepared* all his drafts with a definite intent to aid corporations as well as natural persons; but it indicates that at least one of Bingham’s colleagues, and perhaps three of the members of the Joint Committee who voted in favor of his equal protection-due process phraseology, may have done so with the understanding that its wording might prove useful to corporations that found themselves in such straits as the Cleveland and Mahoning Railroad.

Keystone of this hypothetical structure is the fact that Reverdy Johnson, the leading minority member on the Joint Committee, (who nevertheless voted fairly consistently in favor of Bingham’s

⁷¹ The basic facts with reference to these petitions are that in the early Fifties, Ohio promoters, led by David Tod, later war Governor of Ohio, had projected a railroad from Cleveland to Pittsburgh, through the then largely undeveloped Youngstown district. Franchises were obtained from both Ohio and Pennsylvania, and by the end of the decade the road was complete to the Ohio line. For some reason, construction lagged in Pennsylvania, and it was not until the early Sixties, when English capital became interested, and plans were laid for a unified line through to Washington under direction of the Baltimore and Ohio, that the Cleveland and Mahoning and Pittsburgh and Connellesville charters threatened to serve as means for breaking the monopoly of the Pennsylvania Railroad in the region of Pittsburgh.

By May, 1864, this threat was no longer merely apparent; and at the dictation of the Pennsylvania’s managers the state legislature summarily repealed the franchises of both roads, charging failure to fulfill time clauses. Whereupon the victims resorted to the Federal courts, secured a decision in July, 1865, holding the repealer void, and commenced negotiations with Tom Scott and J. Edgar Thomson of the monopoly—only to be harassed in the state courts by a host of vexatious suits. At length, construction stalled, the Ohio promoters resorted to flank attack in Congress, stressing with great shrewdness their rival’s contumacy of Federal authority. See CONG. GLOBE, 39th Cong., 1st Sess., petitions at 1905 (Moorhead), 1925 (Garfield), 2634-5; and debates at 2282, 2365-2366, 2902-2903, 2922-2925 (1866); HANEY, CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES 1850-1887 (1910) 222-223.

drafts⁷²) had in June, 1865, served as counsel for the Cleveland and Mahoning Railroad and affiliates in the cases in the Federal courts.⁷³ In that capacity Johnson appears to have made such effective use of Chief Justice Lewis' dissenting opinion in *Erie Railroad v. Casey* that Justice Grier, in voiding the repealers, did so on the ground that the company and its affiliates had been denied the due course of law guaranteed by the Pennsylvania Constitution.⁷⁴ It therefore seems likely that Reverdy Johnson, at least, must have understood that to add a due process clause to the Federal Constitution as an express restraint upon the States was to add a source of valuable protection to corporate interests. Indeed, if one assumes that Johnson recalled the gingerly manner in which Justice Grier had been obliged to apply the "due course of law" clause of the Pennsylvania Constitution,⁷⁵ some special significance might be attached to the inference of Johnson's cryptic remark, made in Senate debate, that he favored the due process clause because he knew what its effect would be.⁷⁶

Reverdy Johnson was not the only member of the Joint Committee who had close relations with the Cleveland and Mahoning Railroad. On May 30, 1866, a month after final adoption of the present form

⁷² Johnson even voted in favor of adding the just compensation clause [KENDRICK, *op. cit. supra* note 70, at 85], although he opposed the privileges or immunities clause and moved to strike it out in Senate debate (see *infra* note 76).

⁷³ *Baltimore v. Pittsburgh and Connellesville Railroad*, 2 Fed. Cas. No. 570 and 827 (C. C. W. D. Pa. 1865). For Johnson's connection with the case see CONG. GLOBE, 39th Cong., 1st Sess., 2925; STEINER, *THE LIFE OF REVERDY JOHNSON* (1914) 141. Technically Johnson was counsel for the city of Baltimore, a bondholder; but the case was moot. Actually the Baltimore and Ohio monopoly, for which Johnson had been counsel for forty years, stood behind both the Cleveland and Mahoning and the Pittsburgh and Connellesville roads.

⁷⁴ *Id.* at 13. Declaring the object and effect of the repealer to be to "transfer the franchises and property of one corporation, anxious . . . to complete a valuable public improvement, to another [the Pennsylvania monopoly] whose interest is not to complete the road," the Justice held the act to be first a violation of the contract clause, then of due course of law. Due process, he implied, required that the Attorney General should have instituted judicial proceedings to ascertain the facts, etc. This was precisely the point on which the Pennsylvania State Court had ruled to the contrary in *Erie R. v. Casey*, cited note 45, *supra*.

Justice Grier made no mention of due course of law in his opinion, but said merely "The principles of law . . . are . . . clearly and tersely stated by Chief Justice Lewis in his opinion to be found in 1 Grant's Cases 274 with a review of the cases and a proper appreciation of that from Iowa"—the latter of course dealing with the "law of the land."

⁷⁵ See note 8, *supra*.

⁷⁶ "I am in favor of that part of the section which denies to a State the right to deprive any person of life, liberty or property without due process of law, but I think it is quite objectionable to provide that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' simply because I don't understand what will be the effect of that." CONG. GLOBE, 39th Cong., 1st Sess. 3041, June 8, 1866.

of Section One, Thaddeus Stevens, whose narrow Negro Race draft had finally been abandoned (with his own approving vote) in favor of Bingham's broader drafts,⁷⁷ undertook to jam through the House, without debate, bills for relief of the Cleveland and Mahoning and affiliated companies.⁷⁸ Failing in his immediate objective, Stevens nevertheless succeeded the following day in securing full approval of the bills by the House, after a debate in which Justice Grier's opinion had been read into the record. And voting in favor of passage on May 31, 1866—while the Fourteenth Amendment was still being debated in the Senate—were, in addition to Stevens himself, Roscoe Conkling and John A. Bingham.

III.

Many matters, of course, remain to be investigated.⁷⁹ Yet with even these shadowy glimpses into the relations existing between the framers of the Fourteenth Amendment and the corporate interests farther along in the use of the due process and Comity clauses, one is no longer at loss to suggest plausible explanations for the statements Conkling made in his argument in 1882, nor is it very rash

⁷⁷ Stevens' course in these matters excites speculation. After announcing [see KENDRICK, *op. cit.* *supra* note 70, at 83], that he sponsored an amendment whose first Section provided "No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color or previous condition of servitude" he thereupon proceeded to vote (1) in favor of Bingham's move to add the just compensation clause [*id.* at 85]; (2) in favor of adding what is now Section One as [a redundant?] Section Five [*id.* at 87] (3) against striking out the same Section [*id.* at 99]; (4) in favor of substituting Bingham's draft (stricken out as Section Five) in place of his own [*id.* at 106]. Stevens was thus the sponsor of the narrowest sort of Negro Race draft and at the same time the most consistent supporter of Bingham's ["economic?"] drafts; and ultimately, when forced to choose between Bingham's and his own, he chose Bingham's. Why? Was it to afford *double* or *triple* protection to free Negroes and mulattoes? Or was it to protect corporations? Or was it, perhaps, to do both?

⁷⁸ See CONG. GLOBE, 39th Cong., 1st Sess. (1866) 2902-2903. Strictly speaking, Stevens sponsored the Pittsburgh and Connellesville bill, while Garfield sponsored the Cleveland and Mahoning's. The latter had been introduced in the House April 30, a fortnight after the first petitions, and just two days after final and unexpected substitution of Bingham's for Stevens' draft of Section One.

⁷⁹ *Id.* at 2922-2925. The vote in the House on the Cleveland and Mahoning bill was 77 to 41, with 65 not voting. Prior to the vote, Garfield, who was in charge of debate, made plain that the Pennsylvania legislature had acted "without a hearing, without any legal process in the courts . . . by the mere force of votes . . ." Whereupon a waspish Pennsylvania sympathizer correctly anticipated a reciprocal treatment by Congress!

Despite this strong reception in the House, however, the Garfield-Stevens bills were killed by the Senate Committee on Commerce. And here, too, hangs a circumstance. Senator Edmunds of Vermont reported the adverse action of the Senate Committee; and made clear that he in no way concurred in the result. *Id.* at 3333; see also 4288. This of itself would excite no interest, except that sixteen years later, in the *San Mateo*

to venture hypotheses regarding the motives of Bingham and his associates. It is perhaps too much to expect that any of these hypotheses can ever be proved, but each possesses the dubious merit of being consistent with the known fragments of evidence. Disregarding such problems as the burden of proof, and interpreting matters most favorably to the idea of corporate inclusion, four major possibilities may be noted, any one of which lends support to the view that the constitutional status of corporations probably was considered by the framers.

1. Wholly apart from Bingham's personal understanding of his phraseology, his original intentions in drafting it, or the relations existing between the Cleveland and Mahoning Railroad and other members of the Joint Committee, it is possible that Reverdy Johnson, in the course of the Committee's deliberations, or perhaps even in private conversation with Conkling,⁸⁰ mentioned Justice Grier's decision as among the most recent involving the due process clause, and in this manner precipitated a frank discussion of the entire problem of corporate rights. Such a discussion would in likelihood have turned on the social ends which Grier's opinion had served; and we can be reasonably certain that in this respect the leading members of both parties on the Committee were in substantial agreement as to the merits: monopoly had been frustrated, bondholders protected,

Case, [116 U. S. 138 (1882)] Senator Edmunds appeared as counsel for the Southern Pacific Railroad. While he made no argument as explicit as Conkling's, he nevertheless did appear as one who had served in Congress in 1866 and who was presumed to speak with authority when he declared: "There is not one word in it [the Fourteenth Amendment] that did not undergo the completest scrutiny." In his peroration he extolled the "broad and catholic provision for universal security resting upon citizenship as it regarded political rights and resting upon humanity as it regarded private rights." See p. 8 of "*Argument of Mr. George F. Edmunds*" before the Supreme Court of the United States in *San Mateo County v. Southern Pacific R. R.*, 116 U. S. 138 (1882).

⁸⁰ Conkling's voting record on Section One is scarcely less remarkable than Stevens'. Not only did he vote repeatedly in the Committee against Bingham's drafts down to April 28th [KENDRICK, *op. cit. supra* note 70, at 61, 62, 98, 99], and not only did he vote for the motion tabling the draft in the House Feb. 28th, [CONG. GLOBE, 39th Cong., 1st Sess. 1094] but on January 22, he had even gone on record in debate as opposing an amendment which would "prohibit States from denying civil or political rights to *any class of persons*." [Italics added.] Such a plan, he declared, "encounters a great objection on the threshold. It trenches upon the principle of existing local sovereignty. It denies to the people of the several States the right to regulate their own affairs in their own way." *Id.* at 358. Yet on April 28 Conkling voted in favor of substituting Bingham's for Stevens' draft. KENDRICK, *op. cit. supra*, at 106. How is one to explain his reversal? Merely as another product of the early confusion and uncertainty over Reconstruction policy which historians have noted in the minds of many leading Radicals—uncertainty which disappeared when partisan advantage became clearer? *Id.* at cc. 4, 5, 6; BEALE, *THE CRITICAL YEAR* (1930) *passim*. Or is one to regard it as having some more concrete and specific base? Future research should make this clear.

"vested rights" rendered secure, and the way reopened for the economic development of important sections of the country.⁸¹ When it is realized that framers considering the subject in this light would have been unlikely to have pursued matters further, or to have pondered the abstract problem of discretionary due process as a means for frustrating social reforms and legislation, an entirely new face is put upon the problem of "conspiracy."⁸² Not only is it plain that the status of corporations under the Amendment could have been raised incidentally, and in good faith, without regard for anti-democratic or reactionary purposes;⁸³ but it would seem to be necessary, if one is to escape an anachronistic fallacy, to make due allowance for the character of this early usage by Justice Grier and the manner in

⁸¹ It is interesting to note that Congress at this session finally passed the amended Interstate Communications bill which Garfield and other Republicans had been sponsoring since 1864 in an attempt to break the power of such State monopolies as the Camden and Amboy of New Jersey. In its original form the bill would have declared competing lines military and post roads and have given Federal authority to build in disregard of State charters. See HANEY, *op. cit. supra* note 71, at 157-224, *passim*. See also Congressional debate on the measure, May 5, 1866 [CONG. GLOBE, 39th Cong., 1st Sess. (1866) 2365-66] wherein Senator Sherman cites Ohio's "demand" for the Mahoning and Connellesville roads as justifying passage; and wherein Reverdy Johnson implies that "the controversy [between these roads and the Pennsylvania monopoly] is not yet settled."

In 1866, opposition to such measures as the Interstate Communications Act came chiefly from Democrats and conservatives fearful for "States' Rights" and alarmed at the trend toward "centralization." *Id.* at 1857; 2197-2199. Reverdy Johnson himself had scruples in this regard, explained in part perhaps by the fact that the Baltimore and Ohio monopoly, while endeavoring to gain a route through Pennsylvania, was resisting attempts of rival roads to break into Maryland.

Rep. Jack Rogers, the second most influential minority member of the Joint Committee—who also voted consistently in favor of Bingham's drafts, including the rejected just compensation clause—was during these years counsel and Congressional advocate for the Camden and Amboy monopoly in New Jersey. In the latter capacity in 1864 Rogers had even argued that an early draft of the Interstate Communications bill threatened to deprive the Camden and Amboy of its property without just compensation! CONG. GLOBE, 38th Cong., 1st Sess. (1865) 1238-1241.

⁸² Inevitably, in a *priori* analysis, students of constitutional history have tended to assume that the Conkling-Beard thesis requires (1) that intent to include corporations was the primary or decisive fact operating in the selection of the phraseology, (2) that it was accordingly necessary for the framers to have foreseen the substantive potentialities inherent in the clause. It is now plain of course that neither point is essential to the proposition; and that the second is itself the product of serious misconceptions concerning use of due process prior to the Civil War.

It should be said, therefore, in tribute to the Beards, that whatever the shortcomings of the circumstantial evidence upon which they appear to have based their conclusions, their fundamental assumptions were far sounder than those of constitutional historians who often have criticized them.

⁸³ Even if it develops that Bingham was aware of the Cleveland and Mahoning's troubles, or that he had knowledge of effective corporate use of due process at the time he phrased his original drafts, it by no means follows that intent to aid corporations was primary—least of all that Section One was a mere plot to aid certain Ohio pro-

which it would have determined the attitude toward corporate personality *if* the question were raised.

2. It is not unreasonable to suppose that Bingham, an Ohioan, and the Congressional representative of a section of the State interested in the completion of the Cleveland and Mahoning Railroad,⁸⁴ knew of the company's difficulties from the first, and watched with mounting apprehension the tactics employed by its Pennsylvania rival. Thus it is possible to argue that even if Bingham originally knew nothing of Reverdy Johnson's arguments (or Justice Grier's opinion) predicated upon due process, his personal sense of justice was offended by the charter repeal,⁸⁵ and accordingly he later drafted his constitutional amendment with the definite intention of covering such cases—an intention of which Conkling somehow became aware. It is to be emphasized that additional evidence is required to *establish* the proposition in this form; yet one feels warranted in pointing out that circumstances, so far as they are known, are not inconsistent with this interpretation of Conkling's inference.

3. Another possibility is that while Bingham may have known nothing of the railroads' use of due process when he first submitted his drafts, and while he originally had no thought of aiding anyone but Negroes and natural persons, and while the corporation on its part originally intended to do no more than appeal for Congressional aid at a time when circumstances were peculiarly favorable to such aid, the presentation of the petitions and bills, and the lobby arguments incident thereto, nevertheless did make clear that the due process-equal protection phraseology was comprehensive enough to include corporations. It is quite possible therefore that a full and free discussion ensued in the Committee, or among some of its mem-

oters. No one reading the speeches of the idealist who in 1859 sought to safeguard the rights of free Negroes to travel and to make and enforce contracts, and to earn a decent living in the North as well as in the South, will be likely to argue that Bingham's primary—or even his incidental—purpose was ever to protect hotel corporations and factory owners from paying workers a minimum wage. Our thinking on these subjects has been too much confused by the unfortunate connotations of the word "conspiracy."

⁸⁴ Defeated in 1862, but re-elected in 1864, Bingham represented the east-central constituency adjoining that passed through by the Cleveland and Mahoning. The road then terminated at Youngstown, leaving parts of this rich coal district without direct connections with Pittsburgh.

⁸⁵ In view of Bingham's apparent readiness to apply the due process clause wherever needed to protect or advance interests he approved of, this possibility is obviously of more than academic importance. Since we know (from his vote) his reaction to the major issue, it is largely a question of whether sufficient publicity was given to the controversy in its early stages in 1864-65 to assure that Bingham, a lawyer and politician whose business was to keep informed regarding such matters, would have been likely to have learned of it.

bers, regarding the expediency of a draft which offered prospective benefits of this type.

4. The final possibility is that petitions and bills of the insurance or express companies—or perhaps the remarks of an importunate counsel or lobbyist in charge of the companies' campaign in Congress—served to direct attention not merely to the potentialities of the due process-equal protection phraseology, but also to the privileges or immunities clause. It therefore involves no strain on credulity to believe that corporate citizenship as well as corporate personality was considered by the Joint Committee; yet one wonders—if this happened to be the case—whether the framers may not have concluded, in view of repeated interpretations of the Comity clause, that there was no likelihood corporations would ever be treated as "citizens" within the meaning of Section One.⁸⁰

All these possibilities, of course, leave a doubter with his doubts. The striking thing in this essay, as in the previous one, is the paradoxical and indecisive character of the evidence. Just as discovery of

⁸⁰ It is an ironic fact, suggestive in certain of its implications, that the insurance companies, which down to 1866 pioneered in the use of the phraseology employed in Section One, were almost the last to gain protection under its terms. This paradox is the more striking because these companies were naturally the first to employ the improved weapons. As early as February, 1871, the Continental Life Insurance Company of New York attacked a New Orleans agency-license ordinance which discriminated against outside corporations, counsel apparently contending that corporations were "persons" within the meaning of both Section One and the Civil Rights Act passed in enforcement thereof. United States Circuit Judge Woods flatly rejected this view, reasoning much as did Mr. Justice Black in his recent dissent in *Connecticut General Life Insurance Co. v. Johnson*, 58 Sup. Ct. 436 (U.S. 1938), i.e., that since only natural persons can be "born and naturalized," a double standard of interpretation of the word "person" is required to sustain the argument from the present text. *Insurance Co. v. New Orleans*, 1 Woods 85 (U. S. C. C. La. 1870). (Inquiry of the clerk of the United States District Court for New Orleans reveals that the official record of this important case has been lost.)

The Continental Life Insurance Company began its attack on this New Orleans ordinance just two weeks after the United States Supreme Court, in *Liverpool Insurance Company v. Oliver*, 77 U. S. 566 (February 6, 1871) gave counsel to understand, as clearly as a court ever could, that nothing was to be gained by continued reliance on the comity clause to attack legislation of this type. Beginning with *Paul v. Virginia*, 75 U. S. 168 (argued in October, 1869), and continuing with *Ducat v. Chicago*, 77 U. S. 410 (submitted December 21, 1870, decided January 9, 1871), former Justice Benjamin R. Curtis, as chief counsel for the companies, had relied almost entirely on the commerce and comity clauses in making the long delayed appeals to the Supreme Court. This fact of itself suggests what might be assumed from Curtis' past connections with *Murray v. Hoboken*, 18 How. 272 (U. S. 1855), and *Dred Scott v. Sandford* (*supra* note 56)—namely, that Curtis' preferred strategy was to get corporations declared "citizens" rather than "persons"; and to do so, first under the comity clause, then under Section One. Apparent failure to stress the due process, equal protection, and privileges or immunities clauses in these early test cases may therefore have been simply a tactical maneuver.

the Negro rights sense in which Bingham first used due process tended to eclipse what had been regarded as his economic motivation, so now a survey of the pre-war use of due process by corporations suggests that the framers may have proceeded with greater understanding than constitutional historians have been willing to acknowledge. The impressive thing, indeed, is the cantilever nicety of the balance.

It is now plain not only that a development of corporate personality took place prior to 1866 but that Reverdy Johnson, at least, and perhaps several of his colleagues, had knowledge of certain phases of that development. Yet when this is said it must be remembered (1) that Bingham's speeches and drafts in 1866 were modelled on earlier speeches which were preoccupied with the problem of protecting *natural* persons; (2) that Conkling's misquotations from the Journal are difficult to reconcile with a clean-cut case, particularly in view of the absence of corroborating statements by other members of the Joint Committee, and since Conkling himself appears to have said nothing publicly for sixteen years.

Heightening the uncertainty and confusion inherent in the foregoing circumstances is the further fact that Reverdy Johnson, the one member of the Joint Committee who had used corporate personality prior to 1866, nevertheless failed to invoke the due process clause of the Fifth Amendment when he argued for the plaintiffs in the hard-fought case of *Veazie Bank v. Fenno*, in 1869.⁸⁷

Obviously the foregoing evidence can be woven into different patterns. Ignoring or minimizing the first set of factors, Conkling can be portrayed as a shrewd lawyer who in his argument in 1882 capitalized earlier coincidence. Ignoring or minimizing the second set, he can be portrayed as a drafter who in 1866 figured in something akin to a "plot."

After considering the matter for two years, the writer's personal conclusion is that as long as all major conditions are fulfilled, Conkling perhaps ought to be given benefit of the doubt, even though few courts would be inclined to accept him as a disinterested or even honorable witness. Yet this acknowledges no more than that the corporation problem probably did come up incidentally in the discussions, and that no special significance was at that time attached to it one way or the other. From a study of the evolution of the phraseology in the Joint Committee the writer feels confident that Section

⁸⁷ 8 Wall. 533, 19 L. ed. 482 (1869). See the summary of Johnson's argument in the Lawyers' Edition, at page 483.

One was not *designed* to aid corporations, nor was the distinction between "citizens" and "persons" conceived for their benefit.

But the outstanding conclusion warranted by the present evidence is concerned with the irrelevancy rather than with the character of the Joint Committee's intentions. It is now plain that corporate personality, as a constitutional doctrine, antedated the Fourteenth Amendment, and was in fact so vital and natural a part of the self-expansion of judicial power within the framework of due process, that its postwar development was assured, whatever may have been the original objectives of the framers. The two great classes of petitions⁸⁸ in the *Congressional Globe* foreshadow and explain this result: Having simultaneously fostered the growth of corporate enterprise as well as a mighty upsurge of popular idealism, the Civil War *of itself* consummated a marriage of idealistic and economic elements in American constitutional theory.⁸⁹ In the words of Max Ascoli,⁹⁰ the Fourteenth Amendment was the "supreme celebration" of this union. It would appear largely immaterial whether those who presided at the rites were conscious of their function.

EDITORIAL NOTE. The concluding paragraph, with its metaphor, obviously begged the question, as surely as it weighted the "affirmative" evidence. Worse still, it was both misleading and erroneous to say that "corporate personality, *as a constitutional doctrine*, antedated the Fourteenth Amendment." Actually, all that *antedated* the Amendment were some scattered cases, arguments, and dicta in

⁸⁸ These petitions present an insight into the unique harmony of ideas and interests between petitioners seeking added protection for property rights and those seeking to secure Freedmen's rights. Side by side, and often submitted on the same day by the same members of Congress, are appeals from "Western citizens . . . for the greater protection of interstate securities," from "Iowa Quakers asking perfect equality before the law for all regardless of color," from "citizens . . . of Pennsylvania asking for amendments giving *all classes* of citizens their natural rights," from "citizens of Pennsylvania asking just and equal laws relating to interstate insurances to protect the interests of the policies."

⁸⁹ Between Radicals and racial equalitarians on the one hand, and representatives of business enterprise on the other, existed not only harmony in such general objectives as the need for expanding Federal and contracting State power, but in the very details of constitutional theory—as evidenced by the natural rights usage by *both* groups of *both* the comity and the due process clauses. Such harmonics, essentially products of the Secession and defeat of the slave interest, and of the determination of both humanitarians and northern capitalists to let nothing jeopardize the fruits of the war, stand sharply in contrast to the weakness and isolation of these same groups in the Thirties and Forties. See note 18, *supra*.

⁹⁰ INTELLIGENCE IN POLITICS (1936) 160-161.

which members of the bench and bar had relied on a due process clause to protect corporate property or rights. Cases and usage of this sort,¹ and the constitutional *doctrine* of corporate personality, are two different, two separate things entirely, as eventually became clear when the railroad and the insurance company usage was re-canvassed.² But in 1938 this point remained clouded, and neither Yale critics and skeptics,³ nor other reviewers and commentators, pinpointed this flaw.

This period, 1866–1868, in short *appeared* to be, and in fact was, the chronological point at which the antebellum and the postbellum developments intersected historically, hence perhaps the time that ideas and usage had begun to interact and percolate. But this was far from meaning there yet had been, much less there yet had been found, or could be, an overt or articulate corporate "person" as a *constitutional doctrine*. The latter of course presumes and requires a judicial holding, not simply a hypothetical chance or prospect of one.

Those blind spots and other weaknesses are glaring, embarrassing enough today:⁴ possibilities upgraded to probabilities—proof thus waived or begged; inference mistaken for fact, or equated with it; verification of *one* detail, fact, or time, accepted as corroboration of far more—all these are evident, and at several points. And once again my naïveté was characteristic of others'.

Yet the essay as a whole, and the broadening case study, did clarify and advance research, disintegrating on the one side, re-integrating on the other. The ramifying, interlocking, circular complexity of a once-simple, ambiguous hypothesis now became starkly clear, especially as I drafted and redrafted sections II and III in the effort to cover widening, or incongruous fact or circumstance. Fuzziness, gaps, flaws, and conflicts in the basic statements of Bingham and Conkling, as relied on by Hannis Taylor, Kendrick, and the Beards; a consequent unravelling of their original premises and inferences, and

¹ *I.e.*, as discussed *supra*, sections I and II.

² See *infra*, Chapter 10, and editorial note preceding Chapter 13.

³ No one, it appears from the correspondence, really cut through the ambiguous-controversial inferences, or broke down the "seeminglys" into their divergent values and potentials, with reference to the three crucial periods 1866–1868, 1882–1886, and 1927–1937.

⁴ The discussion at pp. 79–81, obviously was forced, weak, and naïf; the text at footnote 57 shows awareness of the complexity and the hazards, but the various "open" circumstances and time values still are not appreciated and not differentiated, either as applied to Conkling's argument or to the Beards'. The discussion at p. 90, notes 82–83, barely approaches a "then" and "now" contrast. Conkling is given the benefit of both doubt and credence-credulity.

hence also of my own; an ever-lengthening and broadening search for evidence: all this put matters in context and in question.

Beardian determinisms—"Ideas and interests"—with the latter distinctly "up"—were riding almost as high as ever; most of the "presentist pressures" earlier noted, prevailed still, and the frightened concern of conservatives as evidenced by E. W. Camp's article⁵ was beginning to show just how diverse these pressures were and would be.

Therefore, a Scottish verdict, "Unproved"—in this case perhaps "unprovable"—was all that presently could be returned in the premises.

The corollary was that both corporate and humanitarian usage had to be re-explored, and a great deal more learned of each. And there now was the possibility, too, that the "conspiracy"—how that idea lingered and befogged—really had been congressional and statutory, not judicial; nothing Conkling had said or not said precluded this interpretation, and various details favored it. Senator Reverdy Johnson now, not Bingham nor Conkling, clearly seemed the pivotal figure. But Johnson himself had not used due process, neither Fifth Amendment due process in *Veazie v. Fenno*, nor (apparently) Fourteenth Amendment due process after 1868.⁶ Insurance and express company interests, however, definitely had not waited sixteen years as so long presumed by the skeptics, before "exercising the corporate person." Rather, both interests had continued active in both Congress and the courts during and after ratification. As chairman of the House Judiciary Committee, Bingham had sponsored key insurance company bills, 1869-1871.⁷ (This might well be the rationale?) Implications of expanded congressional power certainly had to be probed, for these were the years in which *interstate* business really had made its debut in Congress and in the courts. So far as framer understanding and intent were concerned, a secondary-intention hypothesis was the rationale that seemed best to fit the "facts" as they stood in 1938-1939.

Articles and commentaries by Louis Boudin,⁸ Willard Hurst,⁹ and

⁵ See *supra* at note 47.

⁶ See *supra* at note 87. Reverdy Johnson's "use" of due process, like that of the various railroads (cf. *supra* p. 91) turns out to have been insignificant indeed; see *infra*, Chapter 10.

⁷ See *infra*, Chapter 3, at notes 54 and 57.

⁸ See *supra*, editorial note following Chapter 1, footnote 10.

⁹ Book review, 52 HARV. L. REV. 851-860 (March, 1939).

Mark Howe¹⁰ sharpened and focused the issues; Professor Hurst's analysis was especially acute and suggestive. Interesting progress was made in pursuing these leads in May and June, 1939, but on July 1, having completed graduate library training, I entered law librarianship. A much broadened, sustained attack now became possible. Process and protection no longer were abstractions, but matters of daily interest, observation, and insight.

¹⁰ As cited *supra*, Chapter 1, note 14.