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Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment

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CHARLES FAIRMAN, FELIX FRANKFURTER, AND THE FOURTEENTH AMENDMENT

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"The true face even of a public man is his private face."¹

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1. Felix Frankfurter, *The Impact of Charles Evans Hughes*, N.Y. TIMES, Nov. 18, 1951, at 1 (book review).

I. INTRODUCTION

The scope of the Fourteenth Amendment determines, in large measure, the allocation of responsibility and power between the states and the government of the United States. It has been characterized as "the most significant [Amendment] in our history"² and a "second American Constitution."³ It is therefore not surprising that some of the most important disputes in the United States Supreme Court have been over the meaning of the Fourteenth Amendment and that the disputes have involved some of the most important legal thinkers of our times.

In the twentieth century, one of the most familiar articulations of differing views occurred in *Adamson v. California*,⁴ a five-four decision, in which Felix Frankfurter's concurring opinion represented the best efforts of the majority and in which Hugo Black wrote an equally powerful minority opinion. This judicial battle between competing views of the Amendment continued intermittently throughout the march to "incorporate" additional amendments or portions of amendments, becoming particularly explicit in the six-three decision of *Bartkus v. Illinois*,⁵ and the seven-two decision of *Duncan v. Louisiana*.⁶ Even today there are suggestions of a new Court debate over the incorporation doctrine.⁷

This clash in the Court was paralleled in the academic world by the work of Stanford, Washington University, and Harvard Law Professor Charles Fairman⁸ and Yale prodigy and University of Chicago

2. HAROLD HYMAN & WILLIAM WIECEK, *EQUAL JUSTICE UNDER LAW* xiv (1992). Charles Fairman considered the Fourteenth Amendment and the Commerce Clause "the two most important passages in the entire Constitution." Charles Fairman, *What Makes A Great Justice?*, 30 B.U. L. REV. 49, 50 (1950).

3. James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435 (1985).

4. 332 U.S. 46 (1947).

5. 359 U.S. 121 (1959). The incorporation features of this decision are contained principally in the majority opinion of Justice Frankfurter and the dissent of Justice Black. *Id.* at 150.

6. 391 U.S. 145 (1968). Though Justice Frankfurter was no longer living when *Duncan* was decided, his views were upheld by the second Justice Harlan. The principal dispute was set forth in Justice Black's concurring opinion and Justice Harlan's dissenting opinion. *Id.* at 162, 171.

7. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). Compare Chief Justice Rehnquist's majority opinion (takings clause applies to states through Fourteenth Amendment), *id.* at 2316 n.5, with Justice Steven's dissent in which Justice Blackmun and Justice Ginsburg joined (indicating that the majority was relying upon substantive due process cases and suggesting that the Just Compensation Clause has not been incorporated), *id.* at 2326-29.

8. Fairman's principle contributions are the following articles: *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. CHI. L. REV. 40 (1953); *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954); *RECONSTRUCTION AND REUNION, 1864-1888, PARTS I & II*; and *FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877* (1988).

Law Professor William W. Crosskey.⁹ That these were not mere academic debates is shown by the fact that Justice Frankfurter's opinion in *Bartkus* alluded to Crosskey's work,¹⁰ and the efficacy of Fairman's research was a matter of dispute in both *Bartkus* and *Duncan*.¹¹

While it appears that the work of Justice Black and Professor Crosskey was completed independently,¹² that of Justice Frankfurter and Charles Fairman was one of mutual support and encouragement. This article explores the Fairman/Frankfurter relationship against the background of the incorporation debate and its relationship to the lives of Justice Black and Professor Crosskey.

Part I discusses the shared values of Felix Frankfurter and Charles Fairman, including their admiration for James Bradley Thayer, Justice Miller, and Justice Bradley and their jaundiced view of Reconstruction. Part II summarizes the relationship between Frankfurter and Fairman during Fairman's developing career. Part III presents a chronology of Fairman's most relevant Fourteenth Amendment-related writings,¹³ developing the relationship between Fairman and Frankfurter where documentation exists to do so. Part IV discusses the last years of Justice Black, Professor Crosskey, Justice Frankfurter, and Professor Fairman. Part V concludes with a search for the meaning we can draw from this research.

II. SHARED VALUES

Both Frankfurter and Fairman were influenced by the work of Harvard Law Professor James Bradley Thayer. Under Thayer's "rule of administration," courts should defer to the judgments of the federal legislature unless they are unmistakably wrong as a matter of constitu-

9. Crosskey's principal contribution is *Charles Fairman, 'Legislative History', and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

Crosskey's academic credentials included Phi Beta Kappa and Order of the Coif. 4 WHO WAS WHO IN AMERICA 1055 (1968). John W. Davis, in whose firm Crosskey worked for several years, was "reported to have said that Crosskey's mind was the best piece of legal equipment he had ever encountered." Charles O. Gregory, *William Winslow Crosskey—As I Remember Him*, 35 U. CHI. L. REV. 243, 244 (1968).

10. *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959).

11. *Id.* at 140-49; *Duncan v. Louisiana*, 391 U.S. 145, 174-75 (1968) (Harlan, J., dissenting).

12. There is no record of any correspondence between Professor Crosskey and Justice Black in Justice Black's papers. HUGO LAFAYETTE BLACK: A REGISTER OF HIS PAPERS IN THE LIBRARY OF CONGRESS (1982).

13. Fairman's writings on international law and military law are generally outside the scope of this article, but will be cited where appropriate. See CHARLES FAIRMAN, *THE LAW OF MARTIAL RULE* (1930; rev. ed. 1943).

tional law.¹⁴ Whether Thayer's views were original, influenced by his former law partner Justice Holmes, or a codification of a tradition stretching back to Massachusetts Chief Justice Shaw,¹⁵ there can be no doubt that Thayer's views codified a core of Felix Frankfurter's views on constitutional law.¹⁶ Frankfurter himself suggested that Thayer's 1893 article entitled *The Origin and Scope of the American Doctrine of Constitutional Law*¹⁷ was the most important piece of writing on con-

14. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

15. For a discussion of James Bradley Thayer, his work, and his influence on Justice Frankfurter and others see the 468-page Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993).

In some ways, the most remarkable aspect of Thayer's "rule of administration" is that it has any potency at all. Thayer's own terminology, a "rule of administration," eschews any reliance upon the normal interpretative aids: text, structure, intent, or precedent. See Thomas C. Grey, *Thayer's Doctrine: Notes on its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28, 31 (1993) (indicating that, both in his 1894 article and in his casebooks, Thayer ignored or "downplayed" precedents contrary to his view and treated those supporting his view as if they were "well-established law."); G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 76 n.117 (1993) ("Most of Thayer's citations involved dissenting opinions, statements from his own Gilded Age contemporaries, or positions that were later repudiated by the judges who advanced them.")

Instead, Thayer crafted a theory about how the Constitution should operate, which was based upon his own personal and political views. It has been suggested that Thayer was ambivalent not just about judicial review, but about the Constitution itself. Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 244 (1993). As Lawrence Sager has noted, "Thayer never really offered persuasive reasons for the radical deference envisioned" by his rule. Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 412 (1993).

16. While Thayer's personal preferences extended deference only to federal statutes, Frankfurter's personal preferences extended deference to state statutes as well. It may be true that in some instances Frankfurter's "greater" preference for deference went against his "lesser" preference for specific results in specific cases. But in many instances, such as *Adamson v. California*, 332 U.S. 46 (1947), Frankfurter's "greater" and "lesser" preferences coincided.

Frankfurter realized that his preference for "deference" had not been applied by two Chief Justices he thought well of, Chief Justice John Marshall and Chief Justice Roger Taney. FELIX FRANKFURTER, *THE COMMERCE CLAUSE* 81 (1937). Frankfurter had to turn to Chief Justice Morrison Waite as an example of one who "preëminently belongs to the tradition of judicial self-restraint." *Id.*

In any event, it is important to point out that even Frankfurter's "greater" preference for deference was nothing more than a personal preference. That he valued it more than the results of some individual cases cannot take away the fact that Frankfurter's vote on the Court often was "unconstrained" by an external source. Frankfurter simply had different preferences than other members of the Court.

Mary Brigid McManamon has concluded that in spite of Justice Frankfurter's claims to be a practitioner of judicial restraint, "he frequently declared new law, such as abstention, disregarding legislative intent . . ." Mary B. McManamon, *Felix Frankfurter: The Architect of 'Our Federalism'*, 27 GA. L. REV. 697, 788 n.552 (1993). Ultimately Professor McManamon's study of Frankfurter's federal jurisdiction jurisprudence led her to the conclusion that: "Frankfurter's ideas . . . are one man's attempt to impose his view of the proper role of the Supreme Court on our jurisprudence . . ." *Id.* at 788. See also *id.* at 748 ("Frankfurter's rewriting of the history of pendent jurisdiction . . ."); *id.* at 788 ("[Frankfurter] implemented his ideas by rewriting history and ignoring legislative intent . . .") (footnotes omitted).

17. 7 HARV. L. REV. 129 (1893).

stitutional law.¹⁸ Indeed, Frankfurter has been termed "Thayer's most prominent judicial disciple."¹⁹

The evidence of Fairman's devotion to Thayer is not so clear. But he did rely upon Thayer in his early writings.²⁰ In 1949, Fairman indicated that Thayer's "basic conception" for his 1895 casebook²¹ was still "sound" and that Thayer's "execution attained a distinction which no one that came after has approached."²²

Frankfurter and Fairman also shared great respect for two nineteenth century Supreme Court Justices, Justice Samuel F. Miller and Justice Joseph P. Bradley. The admiration for Justice Miller may have existed, at least in part, because his opinions may have been among those upon which Thayer built his theory of judicial restraint.²³

Thayer may have admired both Justice Miller and Justice Bradley for another reason. Even in 1895, when his constitutional law casebook was issued, monetary issues and questions of legal tender loomed large for Thayer. Thayer devoted an entire chapter to, "Money—weights and measures."²⁴ This included reprinting substantial portions of Chief Justice Chase's opinion in *Hepburn v. Griswold*,²⁵ Justice Strong's opinion in the *Legal Tender Cases*,²⁶ and

18. FELIX FRANKFURTER, *FELIX FRANKFURTER REMINISCES* 299-300 (1960).

19. Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 Nw. U. L. REV. 84, 120 (1993).

As has been frequently noted, Thayer limited his "rule of administration" to the federal courts' review of federal legislation and explicitly provided for a non-deferential rule in the federal courts' review of state legislation. See Thayer, *supra* note 17, at 154-55; Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 72 n.9 (1978).

Further, Thayer himself indicated that this was limited to an undefined "legislative action" and did not apply to "questions of personal right under the Constitution, irrespective of any legislation." Letter from James B. Thayer (Apr. 3, 1884), in *THE NATION*, Apr. 10, 1884, Correspondence, at 314. The two examples Thayer gave were rights such as those discussed in *Dred Scott* and rights which might arise under the Thirteenth Amendment. In those matters Thayer indicated that the Court had the "simple duty of declaring the Court's own judgment upon the meaning of the Constitution." *Id.*

Frankfurter extended Thayer's rule to apply to state legislation and refused to apply Thayer's view on "personal rights." Whether one can so radically extend Thayer's "rule" and still be a disciple of Thayer is open to question.

20. See e.g., Charles Fairman, *The Retirement of Federal Judges*, 51 HARV. L. REV. 397, 399 (1938) [hereinafter *The Retirement of Federal Judges*]; Charles Fairman, *Justice Miller and the Mortgaged Generation*, 23 IOWA L. REV. 351, 363 n.40 (1938) [hereinafter *Mortgaged Generation*] (citing James B. Thayer, *The Case of Gelpcke v. Dubuque*, 4 HARV. L. REV. 311 (1891)).

21. JAMES B. THAYER, *CASES ON CONSTITUTIONAL LAW* (1895) [hereinafter *CASES*].

22. Charles Fairman, Book Review, 1 J. OF LEGAL EDUC. 617, 618 (1949) (reviewing HENRY ROTTSCHAEFER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (1948)).

23. White, *supra* note 15, at 54 (citing Miller's opinions in *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866), and *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870)).

24. 2 *CASES*, *supra* note 21, at 2192-2273.

25. 75 U.S. (8 Wall.) 603 (1869). 2 *CASES*, *supra* note 21, at 2222-36 (reprinting 15 pages of the opinion).

Justice Gray's opinion in *Juilliard v. Greenman*,²⁷ in addition to seven pages of his own notes.²⁸ These issues continued to have at least symbolic importance to supporters of President Franklin D. Roosevelt, like Fairman and Frankfurter, because of Roosevelt's action in taking the United States off the gold standard.²⁹

Justice Miller voted to affirm the use of greenbacks as legal tender in both *Hepburn*³⁰ and the *Legal Tender Cases*.³¹ Justice Bradley, who was appointed after *Hepburn*, upheld the constitutionality of the use of greenbacks as legal tender in the *Legal Tender Cases*.³² In addition to the fact that resolving such a question in favor of the legislative decision was congenial to Thayer's rule of administration, Thayer himself had been publicly and politically active in supporting the constitutionality of the Legal Tender Act.³³

This alone might have been enough to endear Justices Miller and Bradley to Thayer, Frankfurter, and Fairman.³⁴ But there was more.

26. 79 U.S. (12 Wall.) 457 (1870). 2 CASES, *supra* note 21, at 2237-54 (reprinting 18 pages of the opinion).

27. 110 U.S. 421 (1884). 2 CASES, *supra* note 21, at 2255-67 (reprinting 13 pages of the opinion).

28. 2 CASES, *supra* note 21, at 2267-73. The other main cases treated in this chapter were: *The Miantinomi*, 17 F. Cas. 254 (C.C.W.D. Pa. 1855) (No. 9,521) (weights and measures) (covered on pages 2192-95 of Thayer's casebook); *Craig v. Missouri*, 29 U.S. (4 Pet.) 410 (1830) (bills of credit) (covered on pages 2199-2205 of Thayer's casebook); *Briscoe v. The Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1837) (bills of credit) (covered on pages 2207-15 of Thayer's casebook); *Bronson v. Rodes*, 74 U.S. (7 Wall.) 229 (1868) (legal tender for debt) (covered on pages 2215-22 of Thayer's casebook).

29. See generally Phanor J. Eder, *The Gold Clause Cases in the Light of History, Part One*, 23 GEO. L.J. 359 (1935); Kenneth W. Dam, *From The Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. CHI. L. REV. 504 (1983); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1923-26 (1994).

30. 75 U.S. (8 Wall.) 603 (1869).

31. 79 U.S. (12 Wall.) 457 (1870). Miller supported the constitutionality of the Legal Tender Act with "undeviating pertinacity." Charles Fairman, *Justice Samuel F. Miller*, 50 POL. SCI. Q. 15, 24 (1935).

32. 79 U.S. (12 Wall.) 457 (1870).

33. White, *supra* note 15, at 65.

34. Fairman spent a considerable part of his academic life writing about Miller and Bradley.

See CHARLES FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT* (1939); Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 977, 1128 (1941); Fairman, *supra* note 2; Charles Fairman, *The So-called Granger Cases, Lord Hale, and Justice Bradley*, 5 STAN. L. REV. 578 (1953) [hereinafter *Granger Cases*]; Charles Fairman, *Mr. Justice Bradley*, in MR. JUSTICE (Allison Dunham & Philip B. Kurland eds., 1956; rev. ed. 1964) [hereinafter *Mr. Justice Bradley*]; see also CHARLES FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION, 1864-88, PART I (1971), PART II (1987) [hereinafter FAIRMAN ON RECONSTRUCTION]; FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877 (1988) [hereinafter FIVE JUSTICES].

Fairman viewed Miller as "[g]reat in spirit, in mental power, in sense of right, and in patriotism, he was indeed a strong judge." Charles Fairman, *Samuel F. Miller, Justice of the Supreme Court, 1862-1890*, 10 VAND. L. REV. 193, 208 (1957). Bradley was one of Fairman's "favorite" Justices. Fairman, *supra* note 2, at 49.

In light of the New Deal efforts to use the Commerce Clause to sustain the regulation of business and labor, Frankfurter and Fairman had a deep interest in the Interstate Commerce Clause.³⁵ To their mind, Bradley staked out a judicial position which would have sustained the New Deal legislation.³⁶

Further, Miller and Bradley were generally in favor of allowing the states to regulate railroads, grain-elevators, and other corporate entities with little or no judicial oversight through the Due Process Clause.³⁷ Again, such an approach was highly congenial to an issue of Fairman and Frankfurter's time: the New Deal attempts to solve economic problems by regulation without fear of invalidation under substantive due process doctrine of the *Lochner* era.³⁸

Moreover, both Fairman and Frankfurter applauded the actions of Justice Miller and, eventually, Justice Bradley,³⁹ in nullifying the Privileges and Immunities Clause of the Fourteenth Amendment, lim-

35. U.S. CONST. art. I, § 8.

36. In 1937, Frankfurter described the ideas underlying the Commerce Clause decisions of the Marshall, Taney, and Waite Courts as having "persisting vitality." FRANKFURTER, *supra* note 16, at 2. Waite's decision in *Munn v. Illinois*, 94 U.S. 113 (1876), was said to have "laid the foundation for Congressional entry into fields of comprehensive regulations of economic enterprise." FRANKFURTER, *supra* note 16, at 83. Fairman later showed that Bradley played a critical role in that decision.

In 1947, Frankfurter indicated that Chief Justice Hughes said Bradley was "one of the really great intellects in the history of the Court." FELIX FRANKFURTER, FROM THE DIARIES OF FELIX FRANKFURTER 312 (Joseph D. Lash ed., 1975) [hereinafter DIARIES]. According to Frankfurter, "[w]e found ourselves in entire agreement about Bradley." *Id.* See also Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 888 (1953) ("one of the keenest, profoundest intellects that ever sat on that bench").

In 1950, Fairman attributed the benefits of a "nation-wide economy" to the decisions of Justice Bradley and the decisions of the 1870s and 1880s. Fairman, *supra* note 2, at 70. Fairman identified as Bradley's last opinion a dissent in *Maine v. Grand Trunk Railway*, 142 U.S. 217, 230 (1891) (Bradley, J., dissenting), where Bradley "anticipated what was to become the view of the Court in the application of the commerce clause." *The Retirement of Federal Judges*, *supra* note 20, at 426. See also *Mr. Justice Bradley*, *supra* note 34 (Bradley was "a great figure in the law of the Commerce Clause.").

37. E.g., *Munn v. Illinois*, 94 U.S. 113 (1876).

38. E.g., *Lochner v. New York*, 198 U.S. 45 (1905).

39. Bradley initially felt that the Bill of Rights formed the core of the privileges and immunities of U.S. citizens protected by the Fourteenth Amendment. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 112 (1873) (Bradley, J., dissenting); *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649 (C.C.D. La. 1870) (No. 8,408) (Justice Bradley and Justice Wood's opinion); *United States v. Hall*, 26 F. Cas. 79, 81 (S.D. Ala. 1871) (No. 15,282) (Justice Wood's opinion). For a discussion of Justice Bradley's correspondence with Judge Wood in the *Hall* case and Bradley's influence upon the outcome of that opinion, see John P. Roche, *Civil Liberty in the Age of Enterprise*, 31 U. CHI. L. REV. 103, 108-09 (1963) and *Bell v. Maryland*, 378 U.S. 226, 310 n.31 (1964) (Goldberg, J., concurring).

But, Bradley later repudiated his initial understanding of the Fourteenth Amendment, struck down the Civil Rights Act of 1875, *The Civil Rights Cases*, 109 U.S. 3 (1883), and played a key role in the Compromise of 1876. See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 99-102 (1993) (on the change in Justice Bradley).

iting the scope of its Equal Protection Clause, and trying to limit the scope of the Due Process Clause.

Thus, Fairman and Frankfurter's personal preferences became interwoven with their respect for Professor Thayer and their admiration of Justices Miller and Bradley. Any analysis which furthered the reputations of Justices Miller and Bradley also reinforced Thayer's theory and gave legitimacy to the attempts of Fairman and Frankfurter to apply those decisions to their own era.⁴⁰

Finally, Fairman and Frankfurter were both educated while the "Dunning" school of history was predominant.⁴¹ They both had a jaundiced view of Reconstruction and of the framers of the Fourteenth Amendment.⁴²

While this "Dunning" account of the era which produced the Thirteenth, Fourteenth, and Fifteenth Amendments may not have been exceptional for the average American of the 1940s, there were other works of historical value which one might expect highly educated people like Fairman and Frankfurter to be acquainted.⁴³

40. Likewise, any criticism of those Justices weakened Thayer's theory and threatened the legitimacy of the attempts by Fairman and Frankfurter to apply those decisions to their own era.

41. William A. Dunning's books "embodied" the "mythic white view of the horrors of Reconstruction." *ENCYCLOPEDIA OF SOUTHERN CULTURE* 208 (Charles R. Wilson & William Ferris eds., 1989).

42. In 1945, Frankfurter, in conjunction with Justices Jackson and Roberts, concluded that "much . . . legislation was born of that vengeful spirit which to no small degree envenomed the Reconstruction era." *Screws v. United States*, 325 U.S. 91, 140 (Frankfurter, Jackson, Roberts, JJ., dissenting).

Fairman, noting that the Republican Party appointed members of that party to federal judgeships in the South, stated that, "Federal justice in the former Confederate states smelled of the carpetbag." *CHARLES FAIRMAN, AMERICAN CONSTITUTIONAL DECISIONS* 139 (1948).

In his introductory note to the discussion of *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), Fairman's summary of "Reconstruction" was as follows:

In the South, where these Amendments were to find their immediate application, the state of affairs was pleasing from no point of view. The Republicans, who dominated the national government, had as their adherents the Negroes, the carpetbaggers who had moved in after the war, and a few long-suffering Southern Unionists—a combination which was weak, inexperienced, often corrupt.

Id. at 308. Similarly, the Louisiana monopoly was referred to as "a particularly odious piece of carpetbag administration." *Id.* at 289.

In 1956, in writing about protecting "the people of the South against victimization by the Republican carpetbaggers," Fairman may have intended to limit his comments to the specific situation underlying the New Orleans Slaughter-House monopoly. But he did not articulate such a limitation. *Mr. Justice Bradley*, *supra* note 34. Fairman referred to the Louisiana legislature as "carpet-bag and quite malodorous." Fairman, *supra* note 2, at 77.

43. *E.g.*, JOHN R. LYNCH, *THE FACTS OF RECONSTRUCTION* (1913); John R. Lynch, *Some Historical Errors of James Ford Rhodes*, 2 J. NEGRO HIST. 345 (1917); John R. Lynch, *More About the Historical Errors of James Ford Rhodes*, 3 J. NEGRO HIST. 144 (1918); John R. Lynch, *The Tragic Era*, 16 J. NEGRO HIST. 103 (1931).

W.E.B. Du Bois, *Reconstruction and Its Benefits*, 15 AM. HIST. REV. 781 (1910); W.E.B. Du Bois, *The Freedmen's Bureau*, 87 ATLANTIC MONTHLY 354 (1901); W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (1935).

III. PROFESSOR FAIRMAN AND PROFESSOR FRANKFURTER

Felix Frankfurter joined the Harvard law faculty in 1914. He taught there until appointed to the Supreme Court in 1939. In 1938, an S.J.D. degree from Harvard was conferred upon Charles Fairman.⁴⁴

Fairman's career did not take an ordinary path. Born in 1897 in Alton, Illinois, Fairman was fifteen years younger than Frankfurter.⁴⁵ Fairman was already forty or forty-one years old when he received his Harvard law degree. He received an A.B. from the University of Illinois in 1918.⁴⁶ He received an A.M. from that same institution in 1920 and taught at a private school from 1920 to 1923.⁴⁷ He received a Penfield Traveling Fellowship from the University of Pennsylvania in 1925 and studied at the University of Paris in 1925 and 1926.⁴⁸ Harvard awarded him a Ph.D. in 1926.⁴⁹

From 1926 to 1928, he was an Assistant Professor of Government at Pomona College in California.⁵⁰ From 1928 to 1930, he was a lecturer on Government at Harvard. It is unknown whether Frankfurter and Fairman met during this time. In 1930, Fairman became an Assistant Professor of Political Science at Williams College in Massachusetts and held that position until 1936.⁵¹ In 1933 and 1934, he held a Carnegie Fellowship in International Law and studied at the University of London where he received an LL.B. in 1934.⁵²

Fairman returned to Harvard and was enrolled in the S.J.D. program from September 2, 1936 until June 24, 1937.⁵³ During this time

HENRY C. WARMOTH, *WAR, POLITICS, AND RECONSTRUCTION* (1930); JOHN M. LANGSTON, *FROM THE VIRGINIA PLANTATION TO THE NATIONAL CAPITOL* (1894); Francis B. Simkins, *New Viewpoints of Southern Reconstruction* 5 J. S. HIST. 49 (1939).

44. AALS DIRECTORY OF TEACHERS, 1987-88, at 322. Unless otherwise indicated, the biographical materials concerning Fairman are taken from the AALS DIRECTORY OF TEACHERS, 1987-88.

45. WHO'S WHO IN AMERICA 959 (39th ed. 1976-77) [hereinafter WHO'S WHO].

46. *Id.* Fairman also served as a corporal in the Illinois National Guard (1916-17) and as First Lieutenant in the U.S. Army (1918-19) while pursuing his degree. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* 373 (1967); 1 DIRECTORY OF AMERICAN SCHOLARS 201 (Jacques C. Press ed., 7th ed. 1978).

53. Letter from Annie C. Bombard, Associate Registrar, Harvard Law School, to Richard L. Aynes, Professor of Law, University of Akron School of Law (Jan. 19, 1993).

he was a Brandeis Research Fellow⁵⁴ and took a course from Professor Felix Frankfurter in Federal Jurisdiction.⁵⁵

Fairman's dissertation was entitled *Mr. Justice Miller and the Supreme Court, 1862-1890*. This was the same work and even the same title as his 1939 biography of Justice Miller. Fairman was awarded his S.J.D. on June 23, 1938.⁵⁶

By 1939, Professor Frankfurter had become Justice Frankfurter. Frankfurter and his former student continued their friendship even after they both left Harvard.⁵⁷ Beginning in 1940, the Court, often through Justice Frankfurter's opinions, cited Fairman's work on Justice Miller and military and international law with approval.⁵⁸

Upon leaving Harvard in 1938, Fairman became an Associate Professor, and later Professor of Political Science and Law, at Stanford where he served until 1952.⁵⁹ During World War II, Fairman held a variety of law related positions in the U.S. Army, rising to the rank of Colonel.⁶⁰ From 1953 to 1955, Fairman held the Charles Nagel

54. CHARLES FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT* at vi (1939) [hereinafter FAIRMAN ON MILLER].

55. *Id.* It is possible that Fairman also audited Frankfurter's seminar in Administrative Law. Letter from Annie C. Bombard, Associate Registrar, Harvard Law School, to Richard L. Aynes, Dean and Professor of Law, University of Akron School of Law (July 8, 1994). Frankfurter's classes were limited and "[o]pen only to students of high standing with the consent of the instructor." HELEN S. THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 14 (1960).

56. Letter from Annie C. Bombard, Associate Registrar, Harvard Law School, to Richard L. Aynes, Professor of Law, University of Akron School of Law (Jan. 19, 1993).

57. The Felix Frankfurter Papers held by the Harvard Library include exchanges between Fairman and Frankfurter from 1938 to 1957. The collection of Frankfurter papers held by the Library of Congress contains Frankfurter-Fairman correspondence from 1948-1957. Letter from James H. Hutson, Chief, Manuscript Division, Library of Congress (Dec. 21, 1992).

58. *Tigner v. Texas*, 310 U.S. 141, 145 n.1 (unanimous opinion by Justice Frankfurter citing FAIRMAN ON MILLER, *supra* note 54); *Federal Power Comm'n. v. Natural Gas Pipeline Co. of America*, 315 U.S. 575, 609 (1942) (concurring opinion by Justice Frankfurter citing FAIRMAN ON MILLER, *supra* note 54); *Duncan v. Kahanamoku*, 327 U.S. 304, 314 n.10, 315 n.11 (1946) (unanimous opinion by Justice Black citing FAIRMAN, *supra* note 13, 2d ed.); *In re Yamashita*, 327 U.S. 1, 67 (1946) (dissent by Justice Rutledge citing FAIRMAN, *supra* note 13, 2d ed.); *Johnson v. Eisentrager*, 339 U.S. 763, 768 n.1 (1950) (unanimous opinion by Justice Jackson citing Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949)); *United States v. Rumely*, 345 U.S. 41, 46 (1953) (unanimous opinion by Justice Frankfurter citing FAIRMAN ON MILLER, *supra* note 54); *Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484, 496 n.9 (1973) (majority opinion by Justice Brennan suggesting that Fairman's *Some New Problems of the Constitution Following the Flag*, *supra*, was contrary to the result reached by the court).

59. Fairman was an Associate Professor of Political Science (1938-41), a Professor of Political Science (1941-53), and became affiliated with the law school in 1947 where he served as a full Professor until 1953. WHO'S WHO, *supra* note 45, at 959. In 1946, Fairman listed his title as "Professor and Executive Head, Department of Political Science." Charles Fairman, Book Review, 14 U. CHI. L. REV. 135, 138 n.* (1946) (reviewing KARL LOEWENSTEIN, *POLITICAL RECONSTRUCTION* (1946)).

60. SUTHERLAND, *supra* note 52, at 373. Fairman's major assignments included the International Law Division of the Judge Advocate General's Office (1942-43), legal adviser in the Mili-

Chair at Washington University in St. Louis. Fairman went on to become a Professor of Law at the Harvard Law School where he taught American Legal History from 1955 to 1962.⁶¹

Justice Frankfurter was not the only Supreme Court Justice known by Fairman. Fairman also had direct contacts with Justice Holmes,⁶² Chief Justice Hughes,⁶³ Chief Justice Fiske Stone,⁶⁴ Justice Burton,⁶⁵ and Justice Robert Jackson.⁶⁶ But it was Frankfurter who was Fairman's teacher and mentor.

The ability to reconstruct the relationship between Fairman and Frankfurter during these years is, as one would expect, hampered by lack of complete documentation. For example, the existing letters make reference to others which are not available. There is also no accounting for the times when Fairman and Frankfurter may have met face-to-face to discuss these matters.⁶⁷

But Felix Frankfurter himself pointed the way in circumstances such as this. As he noted, "living long" with "literary forms, conveys accents and nuances which the ear misses on a single reading, and reveals meaning in silences."⁶⁸ In calling for "penetrating studies" of the Justices of the Supreme Court, Frankfurter indicated that there were sources beyond explicit words found in the Court's opinions. "[A] hint here, a phrase there, an occasional letter appearing sixty

tary Government Section of Allied Force Headquarters in the Mediterranean theater (July 1943-Oct. 1944), and Chief of the International Law Division, Office of Judge Advocate General, European Theater of Operations (Nov. 1944-Nov. 1945). *President's Page*, 1 STAN. L. REV. XI (1949); Charles Fairman, *Some Observations on Military Occupation*, 32 MINN. L. REV. 319 (1948).

61. *Charles Fairman 1891-1988*, 40 HARV. L. BULL. 28 (1989). In 1960-61, Fairman held a Guggenheim Fellowship. WHO'S WHO, *supra* note 45, at 959.

62. MARK D. HOWE, JUSTICE OLIVER WENDELL HOLMES 55 n.28 (1963) (referring to a conversation Fairman had with Holmes in 1929 about an article by James B. Thayer).

63. DIARIES, *supra* note 36, at 312 (Chief Justice Hughes and Felix Frankfurter had each been recently visited by Charles Fairman).

64. Letter from Harlan Fiske Stone to Charles Fairman (Mar. 13, 1945) *quoted in* ALPHEUS THOMAS MASON, HARLAN FISKE STONE 716 (1956).

65. Letter from Charles Fairman to Felix Frankfurter (Aug. 25, 1954) (on file with Library of Congress) (complaining that Justice Burton never remembered him).

66. Charles Fairman, *[Robert Jackson] Associate Justice of the Supreme Court*, 55 COLUM. L. REV. 445, 453-54 n.30 (1955) (referring to Fairman's conversation with Justice Jackson over *Korematsu v. United States*, 323 U.S. 214 (1944)); Mark Tushnet & Katga Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1889 n.119 (1991) (quoting letter from Justice Robert Jackson to Charles Fairman (Apr. 5, 1950)).

67. For example, Frankfurter, in an April 15, 1953 letter to Fairman, expressed his deep "disappointment" that he missed Fairman when Fairman was "about the building the other day." Frankfurter's calendar shows appointments with Professor Fairman possibly on April 21, 1954 (there is a question mark by this appointment) and on May 7, 1954; January 18, 1956; April 12, 1956; March 30, 1959; and September 23, 1964. Felix Frankfurter Collection (microfilm) (reels 1 and 2) (on file with the Library of Congress).

68. FRANKFURTER, *supra* note 16, at 9.

years later, an innuendo in a public address, a revealing characterization of a departed colleague—these are aids to understanding that may impart meaning, if not always validity, to a seemingly wooden doctrine.”⁶⁹

Fairman too, in his comments upon a presentation by Justice Frankfurter, suggested a similar approach. He indicated that Frankfurter’s comments were, “so rewarding, for what is omitted & what is suggested & what one divines as well as for what is expressed.”⁷⁰

Applying these standards to the public writings and private correspondence of Fairman and Frankfurter one can learn much about their relationship.

IV. THE FIRST HARVARD LAW REVIEW ARTICLE

In January of 1938, the *Harvard Law Review* published an article by Charles Fairman. Authored during the height of the Roosevelt “Court-packing” proposal, one suspects the hand of Felix Frankfurter in this effort.⁷¹ The article is entitled *The Retirement of Federal Judges*.⁷² This article began with the proposition that there is “general agreement that it would probably be desirable to bring about earlier retirement [of Supreme Court Justices] through a constitutional amendment,”⁷³ and proceeded to propose such an amendment and support it both historically⁷⁴ and theoretically.⁷⁵

69. *Id.*

70. Letter from Charles Fairman to Felix Frankfurter (Dec. 22, 1953) (on file with Library of Congress).

71. Roosevelt’s plan was sent to Congress on February 5, 1937, but was considered to have been defeated by mid-summer. LEO PFEFFER, *THIS HONORABLE COURT* 317, 321 (1965).

Professor Frankfurter was one of the people Roosevelt consulted on his strategy for dealing with the Court. A proposal for the mandatory retirement of Justices at age 70 had been discussed by Roosevelt’s advisors as early as January of 1936. See David E. Kyvig, *The Road Not Taken: For, the Supreme Court, and Constitutional Amendment*, 104 *POL. SCI. Q.* 463, 470-77 (1989). Whatever Frankfurter’s views upon the merits of such a proposal, Fairman’s effort may have been a “trial balloon” to test professional sentiment on the proposal.

Frankfurter is thought to have had influence with the editors of the *Harvard Law Review* on what student notes were actually published. McManamon, *supra* note 16, at 754. Thus, Frankfurter may have not only helped Fairman with his article, but also influenced the decision of the Review to publish it.

72. 51 *HARV. L. REV.* 397 (1938).

73. *Id.*

74. Fairman traced the history of Justices who were impaired or disabled while in office and the practices in half of the states which required or induced judges to retire. *Id.* at 405-33.

75. Fairman offered a theoretical basis for such a requirement even if the Justices experienced no such physical or mental decline:

Rigidity of thought and obsolescence of social outlook, though more subjective, may be no less real than the waning of bodily powers. When a majority of the Court cling to views of public policy no longer entertained by the community or shared by the political branches of government, a conflict arises which must be resolved.

Fairman's proposed amendment would have allowed compensated retirement at age sixty-five, required retirement at age seventy, and made it possible for the President and the Senate to extend the active service of a Justice to seventy-eight years.⁷⁶ To avoid disruption, it was proposed that this provision be phased in so that no more than two Justices per year would be required to retire.⁷⁷

V. JUSTICE MILLER

Fairman's next major publication was his biography of Justice Miller, published in 1939.⁷⁸ Among those to whom the biography extends thanks is Professor Felix Frankfurter for "constant encouragement and stimulation in the execution of the work."⁷⁹ Support for the biography's publication came from "the [Harvard] Law School Publication Fund."⁸⁰

Fairman suggested that his interest in "judicial biography" extended back to at least 1929, while he was a lecturer in Government at Harvard University.⁸¹ This raises the unanswered question of whether

Id. at 398. Fairman did not explain why the conflict "must" be resolved, rather than being simply viewed as a normal part of the separation of powers and checks and balances which make society's progress slower than the majority would like.

76. *Id.* at 433.

77. *Id.* at 433-34. Fairman also made a provision for "termination", i.e. forced retirement with compensation, upon proof of incapacity. *Id.* at 434.

The effect of Fairman's plan on the then-current Court is set forth in the following chart prepared by John Zanghi:

Justice	Birthdate	Date of Mandatory Retirement	Age at Mandatory Retirement
Louis D. Brandeis	11/13/1856	06/30/1938	81
James Clark McReynolds	02/03/1862	06/30/1938	76
George Sutherland*	03/25/1862	06/30/1939	77
Charles Evans Hughes	04/11/1862	06/30/1939	77
Pierce Butler	03/17/1866	06/30/1940	74
Benjamin N. Cardozo	05/24/1870	06/30/1940	70
Harlan Fiske Stone	10/11/1872	06/30/1942	70
Owen J. Roberts	05/02/1875	06/30/1945	70
Hugo L. Black	02/27/1886	06/30/1956	70

* Stanley Reed replaced George Sutherland on January 31, 1938.

78. FAIRMAN ON MILLER, *supra* note 54.

79. *Id.* at vi. Professor Thomas Reed Powell was thanked for having read and critiqued the entire manuscript. *Id.* Professor Edwin Merrick Dodd and Dean James M. Landis were thanked for having commented upon the work. *Id.*

Even after he left Harvard, Fairman mailed one of his chapters to Frankfurter to review. Letter from Charles Fairman to Felix Frankfurter (Aug. 10, 1938) (on file with Harvard Law School).

80. FAIRMAN ON MILLER, *supra* note 54, at vi.

81. *Id.* at v. Fairman's prior publications on Miller were *Justice Samuel F. Miller and the Barbourville Debating Society*, 17 MISS. VALLEY HIST. REV. 595 (1931); Fairman, *supra* note 31; *Mortgaged Generation*, *supra* note 20. The first article was substantially reprinted in Chapter I,

Frankfurter may have played a role in this interest. Fairman explained his choice of Miller as a subject in a very reasonable fashion: Chief Justice Marshall had already been treated by many people,⁸² a biography of Chief Justice Taney had recently been published,⁸³ and the period following the Civil War produced a variety of new issues, including the meaning of the Fourteenth Amendment.⁸⁴

But the logical biography to follow that of Chief Justice Marshall and Chief Justice Taney would have been Taney's successor, Chief Justice Chase.⁸⁵ There is no explicit explanation why Fairman chose not to write the biography of Salmon P. Chase. Though Fairman referred to Miller as a "towering" figure who "took a conspicuous part" in the post Civil War issues,⁸⁶ much the same could be said of Chief Justice Chase.⁸⁷

Chase had been a conspicuous national figure when Miller was a complete unknown.⁸⁸ Chase not only played a key role in formulating the legal doctrines for the antislavery movement but he also enjoyed an outstanding political career as Governor of Ohio, U.S. Senator, and Secretary of the Treasury.⁸⁹ While the Presidency eluded Chase, he was an important factor and a serious candidate in every election

"The Country Doctor." The second article constitutes part of the conclusion of Fairman's biography. The last article is the basis of Fairman's Chapter IX, "The Mortgaged Generation."

82. E.g. ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1919). One of those who had devoted "attention" to Chief Justice Marshall was JAMES B. THAYER, *JOHN MARSHALL* (1901).

83. CARL B. SWISHER, *ROGER B. TANEY* (1935).

84. FAIRMAN ON MILLER, *supra* note 54, at v. It is not clear that Fairman thought the Fourteenth Amendment was the predominate issue: it is listed first, but Commerce Clause issues, corporate management and railroad-aid bonds were part of the same sentence and termed "legal issues of tremendous economic magnitude." *Id.*

85. Ironically, Fairman was later selected to write the Holmes Devise which covered Chase's term as Chief Justice. FAIRMAN ON RECONSTRUCTION, *supra* note 34, Part I.

As Gerhard Casper noted, Fairman failed to supply a sufficiently "comprehensive assessment of a complex and difficult character." Indeed, Casper was forced to draw Fairman's "summary" of Chase from the negative implications contained in Fairman's positive assessment of Waite. Gerhard Casper, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88, Part One*, 73 COLUM. L. REV. 913, 916 (1973) (book review).

86. FAIRMAN ON MILLER, *supra* note 54, at v.

87. Indeed, many sources treating Chase find him to be a far more able and interesting Chief Justice than one would conclude from Fairman's work. See e.g., David J. Bodenhamer, *Salmon Portland Chase*, in *THE SUPREME COURT JUSTICES* 101-06 (Melvin I. Urofsky ed., 1994); STANLEY I. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* (1968); David F. Hughes, *Salmon P. Chase: Chief Justice*, 18 VAND. L. REV. 569 (1965).

88. Fairman himself recounted the fact that in 1862, Miller's "reputation as a lawyer had not even extended so far as Springfield, Illinois." *Mortgaged Generation*, *supra* note 20, at 355 (quoting Henry Strong, *Justice Samuel Freeman Miller*, 1 ANNALS OF IOWA 241, 252 (3d ser. 1894)). Fairman also suggested that Miller was unknown outside of Iowa. Charles Fairman, *supra* note 31, at 17.

89. See generally *THE OXFORD COMPANION TO THE SUPREME COURT* 136-37 (Kermit L. Hall et al. eds., 1992).

from 1860 to 1872.⁹⁰ According to G. Edward White, "Chase was by all accounts one of the most formidable legal and political figures of the antebellum, Civil War, and Reconstruction years."⁹¹

There were obvious, if unstated, reasons for Fairman's selection of Miller over Chase as a subject for his biography. Given Fairman's views on Reconstruction,⁹² he was not likely to have much respect for antislavery theorists or lawyers like Chase. Also, Chase's openness about his ambition for the Presidency was unseemly to Fairman.⁹³ Furthermore, Chief Justice Chase voted the "wrong" way on the legal tender issues.⁹⁴ Finally, Chase did not write any outstanding Commerce Clause cases or regulatory cases, thus his jurisprudence lacked any 'relevance' to the issues of the 1930s.⁹⁵ Thus, there were significant, but unstated, reasons why Fairman rejected Chase as an interesting subject for a biography and, instead, chose Miller.

In his biography of Miller, Fairman made no pretense that Miller was following a nineteenth-century view of simply "finding" the law. Indeed, he primarily praised Miller for his "statesmanship."⁹⁶ In 1938, Fairman had characterized Miller as "an exemplar of the wisdom of judicial forbearance."⁹⁷ Fairman saw the railroad bond cases

90. "[Chase was] a dominant figure in the history of the Civil War era. It is not enough to say that he was one of the most important leaders of the Republican party. He was a preeminent leader, a figure of immense proportions." Michael L. Benedict, *Salmon P. Chase as Jurist and Politician: Comment on G. Edward White, Reconstructing Chase's Jurisprudence*, 21 N. KY. L. REV. 133 (1993).

91. G. Edward White, *Reconstructing the Constitutional Jurisprudence of Salmon P. Chase*, 21 N. KY. L. REV. 41 (1993). As summarized by White:

Abraham Lincoln said that Salmon Chase was "about one and a half times bigger than any other man I ever knew." Justice Samuel Miller, Chase's colleague on the Supreme Court of the United States, told his brother-in-law that he knew of "no one against whom I should undertake to measure myself with more diffidence." Historian Allan Nevins, writing in 1936, identified "three jurists of consummate ability" who had occupied the position of chief justice of the United States from 1801 to 1873: John Marshall, Roger B. Taney, and Salmon P. Chase.

Id. at 41 (footnotes omitted).

92. See *supra* note 42.

93. Chase was a "selfish" man because he was not content to be Chief Justice. "[W]anting still more," he aspired to be President. Fairman, *supra* note 2, at 60.

94. Fairman also criticized Chase's efforts to resolve the cases before Strong and Bradley were appointed to the Court. *Id.* at 96-97.

95. Felix Frankfurter said as much when he indicated that Chase's work "consists in the main of fugitive and confused themes in the Supreme Court's symphonic evolution of the commerce clause." FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE* 74 (1937).

96. See Fairman, *supra* note 31 (Because of the choices he made, Miller was "one of the most significant makers of our constitutional law.").

Frankfurter was also attracted to "statesmanship." See FELIX FRANKFURTER ON THE SUPREME COURT 542 (Philip Kurland ed., 1970) (indicating commitment to Thayer's "statesman-like conception of the limits within which the Supreme Court should move").

97. *Mortgaged Generation*, *supra* note 20, at 356.

through New Deal eyes, as a "phase of the great struggle between farmers and taxpayers on the one hand and railroad promoters and investors on the other."⁹⁸

Indeed, Fairman's admiration was not hidden when he recounted, in his concluding chapter, that Miller had "set his face against making the Fourteenth Amendment the basis for a *Naturrecht*."⁹⁹ Reflecting the fixation of many of his generation with the *Lochner* era and the Court's obstruction of Roosevelt's New Deal legislation,¹⁰⁰ Fairman counterpoised Miller's attempt to limit what Fairman saw as natural law with the fact that a "Naturrecht" had been built "upon the dissenting opinions of Justice Field."¹⁰¹

Fairman's admiration for Miller was so great that Fairman lost his ability for critical insight where Miller was concerned. Even where Fairman recognized that Miller may have had personal views and interests which predisposed him to take one point of view, Fairman's respect for Miller's "candor and intellectual integrity preclude[d] any facile assumption that he wished to twist the law" to that point of view.¹⁰²

98. *Id.* at 351.

99. FAIRMAN ON MILLER, *supra* note 54, at 425.

Fairman's early work acknowledged Miller's use of "limitations . . . which grow out of the essential nature of all free governments [and result in] [i]mplied reservations of individual rights" was essentially part of a "natural" law concept. Fairman, *supra* note 2, at 28-29 (reviewing *Loan Assn. v. Topeka*, 87 U.S. (20 Wall.) 655 (1875)). If Miller was rejecting natural law in the *Slaughter-House Cases*, Fairman never explained why Miller utilized natural law in *Topeka* concerning the authority of a municipality to issue bonds.

One may note that Fairman praised Miller for making sound judgments in reaching decisions not spelled out by the constitution and called that activity "statesmanship", *supra* note 96, but, at the same time, condemned many of Justice Field's judgments as "natural law."

Fairman never articulated any coherent theory to account for this tension. It may be, of course, that these writings reflect nothing more than a view that anyone whose judgment differed from Fairman's was applying natural law and anyone whose judgment agreed with Fairman's was a "statesman."

It appears more likely, however, that coherence in Fairman's approach can be found in the doctrine of judicial restraint with which his mentor, Felix Frankfurter, is most identified. Fairman's writings could be read as recognizing that the Courts make policy insisting that they do so in incremental ways through a common law-like adjudication ("statesmanship") and rejecting more sweeping policy making roles ("natural law").

100. The first public instance of Fairman equating natural law with substantive due process under the Fourteenth Amendment occurred in 1935. Charles Fairman, Book Review, 49 HARV. L. REV. 166, 168 (1935) (reviewing HAROLD LASKI, *THE STATE IN THEORY AND PRACTICE*) ("Recall our experience with 'property' and 'liberty' in the Fourteenth Amendment.") (footnote omitted) ("[H]as not the doctrine of natural rights served to entrench the *privilegia* of capital?").

101. FAIRMAN ON MILLER, *supra* note 54, at 425.

102. *Id.* at 352.

Though not marshalled in this fashion, the indications of possible influence upon Miller's views in the railroad/municipal bond cases catalogued by Fairman are substantial.

Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175 (1864), arose from Miller's home state of Iowa, which was also within his Circuit, and he had, in Fairman's suggestive words, "sympathy for the

VI. JUSTICE BRADLEY

Having completed his book on Miller, Fairman began his public work on Bradley in the April 1941 and May 1941 issues of the *Harvard Law Review*.¹⁰³ While these articles contained Fairman's praise for Bradley,¹⁰⁴ their main goal was to refute the claim that "Grant had appointed Bradley on the basis of a promise to sustain the Legal Tender Act."¹⁰⁵ After reviewing the historical evidence for over ninety pages, Fairman concluded that Bradley did not himself make any promises to Grant.¹⁰⁶ "When Mr. Justice Bradley came to the

tax-burdened people of Iowa." FAIRMAN ON MILLER, *supra* note 54, at 352. Miller, though apparently disqualifying himself in a case involving his home county (Lee), dissented in a companion case deciding the same issue. *Id.* at 366 n.60.

One of Miller's dissents was in a case in which his brother-in-law, with whom he was close, was counsel for the losing party. *Id.* at 371. Shortly before his appointment to the bench, Miller himself had been retained to argue some of these same types of cases before the United States Supreme Court. Miller recognized that the outcome of some of these cases affected the value of his own property. See also Fairman, *supra* note 2, at 32. Nevertheless, Fairman concluded that "there can be no doubt that Miller's position in the bond litigation rested on far more substantial considerations." FAIRMAN ON MILLER, *supra* note 54, at 374.

In contrast, Fairman found the fact that Justice Swayne, a leading member of the majority in many of the bond cases, had been counsel for a railroad in at least one bond case in the Ohio Courts in 1858, was "worth nothing." *Id.* at 372-73.

Further, Fairman never came to grips with the seeming inconsistency between Miller's expansive reading of the Constitution in cases such as *Loan Ass'n. v. Topeka*, 87 U.S. (20 Wall.) 655 (1875), *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868), *In re Neagle*, 135 U.S. 1 (1890), *United States v. Lee*, 106 U.S. 196 (1882), and *Boyd v. United States*, 116 U.S. 616 (1886) and Miller's refusal to give any meaning to the Privileges and Immunities Clause in the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873). With respect to the former cases, as late as 1957 Fairman used that line of cases to show that Miller was a "strong" judge who had a "readiness to enforce the reason and spirit of the Constitution." Charles Fairman, *Samuel F. Miller, Justice of the Supreme Court, 1862-1890*, 10 VAND. L. REV. 193, 208 (1957) [hereinafter *Samuel F. Miller*].

The difficulty lies in Fairman's inability to subject Miller—or Bradley—to what David L. Lewis has called "sympathetic skepticism." DAVID L. LEWIS, W.E.B. DU BOIS 33 (1993). This is reflected in all of Fairman's work, but most explicitly stated in 1957: "Justice Miller knew himself. His character was not complicated. So his own writing are the best reflection of the man." *Samuel F. Miller*, *supra* at 193 n.*.

One of the few instances in which any criticism of Miller surfaced is in Fairman, *supra* note 2, at 44 (suggesting in one case that Miller's legal history was "very probably" wrong, that his "sharp" distinction between judicial and legislative power "seems doctrinaire and unrealistic" and terming his 1888 speech on the conflict between socialism and organized society "alarming").

103. Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 977-1034; 1128-55 (1941).

104. *Id.* at 977 (Bradley "had no superior as a lawyer among the members of the Supreme Court during his term of service.").

105. *Id.*

106. However, Fairman established that Bradley spoke publicly in 1868 in support of "National Legal Tender," *id.* at 989, and did not rule out the possibility that Bradley made other public or private statements more fully supporting the constitutionality of the act. Fairman concluded that Bradley's friend of more than 30 years, former New Jersey Senator Frederick Frelinghuysen, had long known "just where Bradley stood on the legal tender question" and that Frelinghuysen "doubtless" told President Grant, with whom he was "on good terms," what he knew about Bradley's views. *Id.* at 1141.

Supreme Court he brought a powerful mind, a social conscience, and complete freedom of judgment."¹⁰⁷

Fairman also quoted, from Secretary of State Hamilton Fish's diary, President Grant's response to former Attorney General Hoar's request that Grant deny the charge that Bradley had been appointed to the Court to uphold the Legal Tender Act. According to Fish, Grant indicated "it would be difficult for him to make a statement." Grant said he had not required a "declaration" from Judge Bradley on the issue, but "he had reason to believe Judge Bradley's opinion tended" to be in the direction of upholding the Constitutionality of the act. *Id.* at 1132-33.

This leaves open a range of options from the possibility that Grant had simply read or been told of Bradley's past statement and actions, to a possibility that someone like Frelinghuysen had carried oral assurances to the President directly from Bradley.

107. *Id.* at 1155. In many ways, Fairman's proof was remarkably scant and, at least in some instances, suggested that Bradley may have made such a commitment, if not to Grant, at least to members of the Senate.

Fairman documented the fact that Bradley did make a written commitment to live in the Circuit to which he was assigned if he was appointed to the Court. Fairman, *id.* at 1013-14 (quoting letter from Joseph Bradley to Senator Matthew H. Carpenter (Feb. 9, 1870)). In discussing the politics of the Senate appointment process, Fairman demonstrated that the Republican Senators were "stirred up" over the legal tender question. *Id.* at 1016.

Frelinghuysen's February 16, 1870 letter to Bradley indicated that Senator Jacob Howard had insisted upon "written evidence of how [Bradley] stood on important questions." Frelinghuysen gave that evidence to Howard in the form of a letter Bradley had written to George Harding. Howard was "well satisfied." Senator Charles D. Drake, who had been a candidate for the appointment to the Supreme Court and was apparently considered to be unreliable even though he was a Republican, also wanted written evidence. But, Drake had to rely upon Howard's assurances, because "the letter was a dangerous instrument to use with Democrats around" and Frelinghuysen refused to show it to Drake. *Id.* at 1024.

Though there is "no trace" of this "missing letter," Fairman concluded that Bradley did not make "a specific commitment on any judicial question." *Id.* at 1025. Under the circumstances, Fairman proved little more than that there was no express, written commitment to President Grant on the legal tender question. Whether, however, there was such a commitment to the Senate, or whether Grant or others relied upon commitment of Bradley's key supporters, is not given thoughtful consideration by Fairman in his article.

There are other areas which a thoughtful biographer should explore. For example, Fairman indicated that Bradley was not just the attorney, but also part of the "management" as a Director and Secretary of the allegedly corrupt Camden and Amboy Railroad. *Id.* at 982. The question of how Bradley could be part of the management team and still avoid the taint of corruption might well bear investigation.

Fairman recounted Bradley's post-appointment sale to Frelinghuysen of Bradley's stock in various railroads for \$26,748. *Id.* at 1129. Fairman apparently viewed this as an attempt by Bradley to divest himself of stock which could create a conflict of interest. But Fairman never compared Bradley's sale price to the market value of the stock. Without this information, it is impossible to determine whether it was equivalent to an arms length transaction. This information could open or close the door of investigation to a careful biographer.

Finally, there is an intriguing reference to a delay of the vote on Bradley's appointment to the Court because of a desire to press a bill, the strength of which united "with it the Southern vote and Cameron and national R.R. interests." *Id.* at 1031. The Southern vote and Cameron were opposed to Bradley's appointment to the Court. If the "national" railroad interests were also opposed to Bradley or even if there was a distinction between "national railroad interest" and the "local" Camden and Amboy interests with which Bradley was associated, then Fairman's celebration of Bradley's later voting against what seemed to be the railroad interests, e.g. FAIRMAN ON RECONSTRUCTION, *supra* note 34, at 359, may have been misplaced.

VII. *ADAMSON V. CALIFORNIA*

While Fairman was working on biographical studies of Justice Bradley, Justice Frankfurter confronted a major crisis in the Court. In 1947, the United States Supreme Court was called upon to decide the case of *Adamson v. California*.¹⁰⁸ This case involved the question of whether the Fourteenth Amendment prohibited the state from implementing state constitutional and statutory provisions allowing a prosecutor or a court to comment upon a criminal defendant's failure to testify. The majority of the Court, acting through Justice Stanley F. Reed, focused upon the right against self-incrimination itself—rather than the question of whether such a comment infringed upon it—and concluded that it was “settled law” that the Fifth Amendment protection did not apply to the states.¹⁰⁹

Justice Black dissented and was joined by Justices Douglas, Murphy and Rutledge.¹¹⁰ Black's dissent was based upon a historical reading of the intent of the Fourteenth Amendment. Black recognized that *Twining v. New Jersey*¹¹¹ was precedent for rejecting the Fifth Amendment/Fourteenth Amendment claim.¹¹² But he was not prepared to give deference to that case or ones related to it, because the historical purpose of the Fourteenth Amendment to overturn *Baron v. Baltimore*¹¹³ had “never received full consideration or exposition in any opinion of this Court interpreting the Amendment.”¹¹⁴

108. 332 U.S. 46 (1947).

109. *Id.* at 50. In 1965, in *Griffin v. California*, 380 U.S. 609 (1965), the Court held that the Due Process Clause of the Fourteenth Amendment applied the Fifth Amendment protection against self-incrimination to the states.

110. *Adamson*, 332 U.S. at 68 (Black, J., with whom Justice Douglas concurs), 123 (Murphy, J., with whom Justice Rutledge concurs). While Murphy dissented separately, he indicated that he was in “substantial agreement” with Justice Black. The “one reservation and addition” offered by Murphy was that the privileges and immunities of the Fourteenth Amendment not only included the Bill of Rights, but could also include other rights as well. *Id.* at 123-24.

According to Justice Black's wife, Elizabeth Black, the Justice considered the *Adamson* dissent his “most powerful—and the one that had the most effect.” HUGO L. BLACK & ELIZABETH BLACK, *MR. JUSTICE AND MRS. BLACK* 73 (1986).

111. 211 U.S. 78 (1908).

112. *Adamson*, 332 U.S. at 69-70.

113. 32 U.S. (7 Pet.) 243 (1833).

114. *Adamson*, 332 U.S. at 72. In addition to *Twining*, Black also referred to *Maxwell v. Dow*, 176 U.S. 581 (1900), *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), and *Palko v. Connecticut*, 302 U.S. 319 (1937).

Black traced the history of the attempts to use the Fourteenth Amendment to invalidate state action. *Adamson*, 332 U.S. at 78-79. Exemplifying the same fears of unrestrained judicial action as Justice Frankfurter, Black related a history in which the Fourteenth Amendment was interpreted to avoid its intended enforcement of the Bill of Rights against the states and, at the same time, its due process clause was expanded to give the Court the ability to use a “natural law” to invalidate regulatory legislation. *Id.* at 82-83.

Black's historical evidence was contained largely in the thirty-page Appendix to his dissenting opinion.¹¹⁵ Black found that the author of the Fourteenth Amendment and its "floor manager" in the House of Representatives, John Bingham, indicated that it was designed to overrule *Barron* and provide for the enforcement of the Bill of Rights against the states.¹¹⁶ Similarly, Senator Jacob Howard, a member of the Joint Committee which reported the amendment out and the "floor manager" for the amendment in the Senate, specifically stated that it was designed to enforce the Bill of Rights against the states.¹¹⁷

Justice Black provided the first comprehensive judicial survey of the Congressional debate, the interrelationship with other legislation such as the Freedman's Bureau Bill and the Civil Rights Bill,¹¹⁸ the views of other relevant members of Congress¹¹⁹ and President Johnson,¹²⁰ cases in which Justices of the United States Supreme Court had individually held that the Bill of Rights applied to the states,¹²¹ and relevant secondary sources.¹²²

Black argued that the majority's due process position was nothing more than the Justices's view of "natural law." *Id.* at 70.

115. *Id.* at 92-123.

116. Almost every page of Justice Black's Appendix contains some reference to or quotation from John Bingham.

For biographical information on Bingham see Richard L. Aynes, *The Anti-slavery and Abolitionist Background of John A. Bingham*, 37 CATH. U. L. REV. 881 (1987); Richard L. Aynes, *The Impeachment and Removal of Tennessee Judge West Humphries: John Bingham's Prologue to the Johnson Impeachment Trial*, 2 GA. J. S. LEGAL HIST. 71 (1993).

117. References to Senator Howard are found in *Adamson*, 332 U.S. at 104-07.

118. *Id.* at 99-102, 107-08.

119. Representative Hale, *id.* at 98; Senator Trumbull, *id.* at 99; Representative Raymond, *id.* at 56; House Judiciary Committee Chairman Wilson, *id.* at 100, 102-03; Representative Thaddeus Stevens, *id.* at 103-04; Rep. Shanklin, *id.* at 108; Representative Garfield, *id.* at 110-11; and Representative Dawes, *id.* at 118-20.

120. *Id.* at 103.

121. By Black's count, at least six Justices concluded, prior to the four dissenters in *Adamson*, that the Fourteenth Amendment was designed to apply the Bill of Rights to the states. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (Bradley and Swayne, JJ., dissenting); *Walker v. Sauvinet*, 92 U.S. 90 (1875) (Field and Clifford, JJ., dissenting); *O'Neil v. Vermont*, 144 U.S. 323 (1892) (Field, Harlan, and Brewer, JJ., dissenting); *Hurtado v. California*, 110 U.S. 516 (1884); *Maxwell v. Dow*, 176 U.S. 581 (1900); *Twining v. New Jersey*, 211 U.S. 78 (1908) (Harlan, J., dissenting).

For an intriguing suggestion that the majority in the *Slaughter-House Cases* also held that the Fourteenth Amendment made the Bill of Rights applicable against the states, see Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1994 U. ILL. L. REV. 739. My reasons for rejecting this reading of Justice Miller's opinion are set forth in Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627 (1995).

122. See *Adamson*, 332 U.S. at 109 (citing BENJAMIN KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1914)); *id.* at 72, 110 (citing HORACE FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908)).

Justice Reed's majority opinion dealt directly with Justice Black's position by invoking precedent from *Barron* to *Twining* and indicating that the reading that the Bill of Rights was not a privilege or immunity against the states "has heretofore found favor with the majority of this Court as a natural and logical interpretation."¹²³ With respect to the due process claim, Justice Reed invoked *Palko v. Connecticut*¹²⁴ as a precedent which still made sense.¹²⁵

In spite of the majority's rejection of Black's claim on both privileges and immunities and due process grounds, Justice Frankfurter felt constrained to write a concurring opinion.¹²⁶ Mark Tushnet has suggested that Frankfurter's concurrence was "[p]rovoked by Black's confidence in original intent" and an apparent belief that Reed's opinion was an inadequate response to Black.¹²⁷

Because Frankfurter's concurrence is central to some of the shared values of Fairman and Frankfurter, and because it provided the seeds for Fairman's 1949 article, it merits extended discussion.

A. Frankfurter's Personal Preferences with Respect to the Fourteenth Amendment

To understand Frankfurter's concurring opinion in *Adamson*, one must first understand his views of the Fourteenth Amendment. Frankfurter's interpretation of the Fourteenth Amendment began with the belief that the amendment should have never been adopted.

In 1924, in an unsigned article in *The New Republic*, Frankfurter took the position that the Fifth and Fourteenth Amendment Due Process Clauses gave the courts power which they could not safely exercise and that "[t]he due process clauses ought to go."¹²⁸ Four years

123. *Adamson*, 332 U.S. at 53.

124. 302 U.S. 319 (1937).

125. *Adamson*, 332 U.S. at 54. In addition, the majority indicated that "[n]othing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted [it] intended its due process clause to draw within its scope the earlier amendments to the Constitution." *Id.*

126. *Id.* at 59. (Frankfurter, J., concurring).

127. Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 753 (1992).

128. *The Red Terror of Judicial Reform*, THE NEW REPUBLIC, Oct. 1, 1924, at 110, 113. In the body of the essay Frankfurter linked "due process" and "equal protection" together as clauses which produced "judicial nullification" and raised barriers "against utilizing the inherent flexibilities of our Constitution for the adaption of our traditional legal system to modern needs." *Id.* at 111. He did not, however, explicitly call for the repeal of the equal protection clause of the Fourteenth Amendment.

For Frankfurter's authorship of this article see FELIX FRANKFURTER ON THE SUPREME COURT—EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 158 (Philip B. Kurland ed., 1970).

later, the landmark book, *The Business of the Supreme Court*, which Frankfurter co-authored, referred to Reconstruction as having added “drastic limitations against the states [which] were written into the Federal Constitution.”¹²⁹ Later, Frankfurter wrote that, “I once shocked Cardozo by saying that I would favor the repeal of that Amendment—and had wished that only the XIII and XV had issued from the Civil War.”¹³⁰

Given the existence of an amendment he disliked, Frankfurter expressed the desire to avoid giving the amendment any meaning. “I wished that when the Amendment first came before the Court it had concluded that it was too vague, too much open to subjective interpretation for judicial enforceability.”¹³¹ In Morton Horwitz’s words, Frankfurter treated the whole Fourteenth Amendment “as one undifferentiated ‘misfortune.’”¹³²

Thus, the beginning of Frankfurter’s Fourteenth Amendment jurisprudence was a contempt for the framers of the amendment,¹³³ a belief that the amendment was not necessary, and a hope that it could be judicially construed so as to have no enforceable effect. This is not an auspicious beginning for a fair attempt to give meaning to the amendment. But this background explains why Frankfurter celebrated

129. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 58-59 (1928) (emphasis added).

130. Letter from Felix Frankfurter to Learned Hand (June 25, 1954) (Hand papers on file with Harvard Law School Library), *quoted in* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 259 (1992).

131. Letter from Felix Frankfurter to Learned Hand (Feb. 13, 1958), *quoted in* HORWITZ, *supra* note 130, at 259-60. This is consistent with Frankfurter’s November 13, 1943 letter to Justice Black:

Once you go beyond a procedural content [to the Fourteenth Amendment] and pour into the generality of the language substantive guarantees it is to me inconceivable that any kind of definition of the substantive rights of the guarantee will not repeat in the future the history of the past, namely will according to the makeup of the Court give varying scope to the substantive rights that are protected.

Letter from Felix Frankfurter to Hugo Black (Nov. 13, 1943) (Frankfurter collection on file with Harvard), *quoted in* JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* 174 (1989). Black’s total incorporation view did, however, set limits which Frankfurter claimed were impossible.

132. HORWITZ, *supra* note 130, at 340 n.83.

133. *See supra* note 42. This sentiment was apparently shared by Frankfurter’s friend and ally Justice Robert Jackson. According to Tinsley Yarbrough’s summary of Justice Murphy’s conference notes on *Betts v. Brady*, 316 U.S. 455 (1942), Jackson stated that he “had no feeling for the sanctity of the fourteenth amendment, a constitutional provision adopted during what he termed the ‘most scandalous and lousy period in’ the nation’s history.” Tinsley E. Yarbrough, *Justice Black, The Fourteenth Amendment, and Incorporation*, 30 U. MIAMI L. REV. 231, 243 (1976) (referring to Justice Murphy’s conference notes on *Betts* (Frank Murphy papers on file with Michigan Historical Collection, University of Michigan)).

the fact that the *Slaughter-House Cases* had made the Privileges and Immunities Clause of the Fourteenth Amendment a nullity.¹³⁴

B. Frankfurter's Concurring Opinion

Though not first chronologically, the foundation of Frankfurter's entire opinion was his refusal to discuss the Fourteenth Amendment's Privileges and Immunities Clause. Black was careful to draw upon the provisions of Section One "separately, and as a whole" so as to claim a result under either the Privileges and Immunities Clause or Due Process Clause.¹³⁵ Yet it is clear from reading Black's Appendix that his legislative history dealt almost exclusively with the Privileges and Immunities Clause.

Frankfurter's response was to avoid any discussion of that clause. In a parenthetical he said that his opinion focused "solely" on the Due Process Clause. "I put to one side the Privileges or Immunities Clause of that Amendment."¹³⁶

By limiting his discussion to the Due Process Clause, Frankfurter avoided any direct confrontation with the bulk of Justice Black's evidence. This approach also allowed Frankfurter to make his argument that of forty-three judges who had passed upon questions concerning the application of the Fourteenth Amendment to the states, only one "eccentric exception", Justice Harlan, had suggested that the Due Process Clause had incorporated the Bill of Rights.¹³⁷ While Frankfurter's statement was technically correct when limited to the Due Process Clause, if those Justices who reached the same result under

134. In contrast, the Court's decision is currently viewed far more negatively. "The decision mocks congressional efforts to nationalize protection of the basic civil rights of former slaves." Bryan K. Fair, *The Acontextual Illusion of a Color-Blind Constitution*, 28 U.S.F. L. REV. 343, 359 (1994) (reviewing ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992)).

135. *Adamson v. California*, 332 U.S. 46, 71 (1947).

136. *Id.* at 61-62. "For the mischievous uses to which that clause would lend itself if its scope were not confined to that given it by all but one of the decisions beginning with the *Slaughter-House Cases*" *Id.*

The one exception cited was *Colgate v. Harvey*, 296 U.S. 404 (1935), which Frankfurter noted was overruled in *Madden v. Kentucky*, 309 U.S. 83 (1940). Of course, as Frankfurter well-knew, the effect of this line of cases was to render the clause a nullity. But this was consistent with his personal desire that the entire amendment not exist.

137. *Adamson*, 332 U.S. at 62. Frankfurter had used this same tactic in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 664-65 (1943) (Frankfurter, J., dissenting) (indicating that in five previous flag salute cases, 44 of the 45 votes had been cast in favor of upholding the requirement, and invoking the names of Chief Justice Hughes, Justice Brandeis, and Justice Cardozo).

Barnette was an exemplar of Frankfurter's plea for judicial deference to the legislative process and included a quote of almost three pages from James Bradley Thayer. *Id.* at 667-70.

the Privileges and Immunities Clause, eschewed by Frankfurter, were added, that number would rise to at least six.¹³⁸

Similarly, Frankfurter's well-known statement that the Fourteenth Amendment is "a strange way of saying" the Bill of Rights applies to the states¹³⁹ is true only if one focuses, as he did, upon the Due Process Clause. It is quite natural to think of the Bill of Rights as outlining the "rights" (privileges and immunities) of U.S. citizens.¹⁴⁰ Frankfurter could use that rhetorical device only by limiting his argument to the Due Process Clause.

Furthermore, Frankfurter's use of the term "mischief" is revealing. He never suggested in any persuasive fashion that the *Slaughter-House* Court was "correct" in any textual, intentional, originalist, precedential or even moral sense. He only suggested that his personal feeling was that some unidentified "mischief" would have happened if they had not held the Privileges and Immunities Clause to be a nullity and that the Court's result therefore met with his personal preferences.¹⁴¹

After attacking an argument not made—that there was a "hidden" meaning to the amendment¹⁴²—Frankfurter turned to analysis which revealed some of his real reasons for adopting his view. Frank-

138. Minnesota Judge Edward F. Waite found Frankfurter's reference to Harlan "extremely distasteful" because it amounted to a personal criticism of Justice Harlan. Edward F. Waite, *How "Eccentric" Was Mr. Justice Harlan*, 37 MINN. L. REV. 173, 173 (1953). Judge Waite's article suggested that Justice Frankfurter mischaracterized Harlan's views and counted Chief Justice Chase, Justices Field, Bradley, Swayne, and Brewer as Justices who had historically articulated views "similar" to Harlan. *Id.* at 180.

Frankfurter's strained attempt to imply eccentricity to Harlan (and to the Justice Black Minority) is more suggestive of his role of an advocate than that of a scholar or impartial member of the judiciary.

139. *Adamson*, 332 U.S. at 63.

140. Even Justice Cardozo, in *Palko v. Connecticut*, 302 U.S. 319 (1937), spoke of the rights protected by the Bill of Rights as "privileges and immunities." 302 U.S. at 324-25.

In 1891, Charles R. Pence thought the "natural" construction of the privileges and immunities of the Fourteenth Amendment was that they referred to the Bill of Rights. Charles R. Pence, *The Construction of the Fourteenth Amendment*, 25 AM. U. L. REV. 536, 540 (1891).

During the pendency of the Fourteenth Amendment's ratification, John Norton Pomeroy, Dean of the Law School and Professor of Political Science at the University of New York authored AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES (1868). Pomeroy urged the ratification of the Fourteenth Amendment as a way to make the Bill of Rights enforceable against the States. *Id.* at 149-51. Pomeroy referred to "the privileges and immunities contained in the Bill of Rights." *Id.* at 147. See also JOHN W. BURGESS, 1 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 184 (1891) (describing the Bill of Rights as "a bill of immunities") and *Hawaii v. Mankichi*, 190 U.S. 197, 217-18 (1903) ("the privileges and immunities contained in the Bill of Rights.").

141. Frankfurter distorted the issues before the Court by taking arguments which naturally flowed from the privileges and immunities clause and demonstrating their inapplicability to the due process clause. *Adamson*, 332 U.S. at 62-64.

142. *Id.* at 63-64.

furter disavowed any search for the intent of Congress¹⁴³ and claimed that the best reading of the intent of the amendment was the view of “judges at the time.”¹⁴⁴

This was not a philosophical view or a tenet of Frankfurterian construction, but rather a tactic to achieve a desired result. In a dissenting opinion in 1951, Frankfurter indicated that “[i]t has never been questioned in this Court that committee reports, as well as statements by those in charge of a bill . . . are authoritative elucidations of the scope of a measure.”¹⁴⁵ He relied upon statements upon the floor of Congress in his other opinions.¹⁴⁶ His later reliance upon Charles Fairman’s study of the legislative history of the Fourteenth Amendment¹⁴⁷ suggests that it was the result of Black’s legislative history, and not the use of legislative history itself, to which Frankfurter objected.

Without citation, Frankfurter claimed that half of the states at the time of ratification did not have “the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury.”¹⁴⁸ Frankfurter could not imagine that these states would ratify the amendment if it meant having to use a grand jury.¹⁴⁹

143. *Id.* at 64.

144. *Id.* Frankfurter’s approach is illustrated by his exchange with Spottswood Robinson in the December 7, 1953 argument in *Briggs v. Elliott*:

MR. JUSTICE FRANKFURTER: Do you think we can get out of the debates anything more than Mr. Justice Miller got out of them at the time of the *Slaughter-House Cases*?

MR. ROBINSON: Yes, I think so, Mr. Justice Frankfurter. . . .

MR. JUSTICE FRANKFURTER: And the understanding you get or you think we ought to get goes beyond the terms which Justice Miller put it in the *Slaughter-House Cases*.

49A LANDMARK BRIEFS AND ARGUMENTS 458-59 (Philip Kurland & Gerhard Casper eds., 1975).

Even Frankfurter’s former law clerk and disciple, Alexander Bickel, determined that the Congressional debates had a presumption of giving the best view of the intent of the Fourteenth Amendment. ALEXANDER M. BICKEL, *POLITICS AND THE WARREN COURT* 214 (1965).

145. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 399-400 (1951).

146. *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 447 (1955) (quoting Senator Robert Taft on the purpose of an amendment to the Labor Management Relations Act); *Palermo v. United States*, 300 U.S. 343, 350 (1959) (indicating that committee reports and “the floor debates” clearly showed intent).

147. *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959).

148. *Adamson*, 332 U.S. at 64.

149. Frankfurter’s underlying concern may have been his own disdain for the protection claimed by a grand jury of the Fifth Amendment and the civil trial by jury of the Seventh Amendment. *See id.* at 64-65. Indeed, Frankfurter referred to the Bill of Rights, or at least the jury provisions, as mere “legal forms” from the Eighteenth Century. *Id.* at 66.

Frankfurter also argued that the Due Process Clause of the Fifth Amendment could not include all the Bill of Rights or the other Amendment would be unnecessary. This being the case, and observing that the Due Process Clause of the Fourteenth Amendment is worded the

Frankfurter also invoked the precedent of *Palko v. Connecticut*¹⁵⁰ with far more eloquence and respect than Reed, counting the numerous and great names in support of that precedent.¹⁵¹

Finally, Frankfurter revealed what might have been his primary motivation in his discussion of the rights at issue as a "technical rule of law" which is contrary to common sense: it prevented jurors from doing what "[s]ensible and right-minded men" do in "important affairs of life" and that is to take silence into consideration.¹⁵²

C. Frankfurter's Frustration

But Frankfurter did not dispute, and perhaps could not dispute, Black's powerful originalist argument. This must have been particularly frustrating for Frankfurter. He viewed Black as an evil person who was unfit to be upon the Court,¹⁵³ in part because of what Frankfurter viewed as Black's being "undisciplined by adequate professional learning and cultivated understanding."¹⁵⁴

same as the Due Process Clause of the Fifth Amendment, he argued that the Due Process Clause of the Fourteenth Amendment does not include all the Bill of Rights. *Id.*

This argument has no force if one looks to the Privileges and Immunities Clause. It "incorporates" the Fifth Amendment Due Process Clause applicable to citizens only, while the Fourteenth Amendment Due Process Clause redundantly applies to citizens, but also extends due process protection to aliens. *See also Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1855) (Fifth Amendment due process includes the procedures of Amendments IV through VIII).

150. 302 U.S. 319 (1937).

151. Frankfurter noted that *Palko* was announced by Justice Cardozo speaking for Chief Justice Hughes and Justices McReynolds, Brandeis, Sutherland, Stone, Roberts and Black. Only Justice Butler dissented. *Adamson*, 332 U.S. at 59. Frankfurter also praised Judge Moody's opinion in *Twining* as showing "judicial process at its best", claiming the opinion to be "one of the outstanding opinions in the history of the Court." *Id.* Similarly, in depreciating the significance of the variation between *Adamson* and *Twining*, Justice Frankfurter took the unusual step of invoking the name of the author of the opinion below, "Mr. Justice Traynor." *Id.* at 60.

Later, Frankfurter invoked the names of Miller, Davis, Bradley, Waite, Matthews, Gray, Fuller, Holmes, Brandeis, Stone and Cardozo as judges "who were alert in safeguarding and promoting the interests of liberty and human dignity through law" and who had not held that the Due Process Clause applied the Bill of Rights to the states. *Id.* at 62. Again, this is technically correct with respect to Bradley only by eliminating his early views under the Privileges and Immunities Clause.

152. *Id.* at 60-61. Frankfurter's disdain for the right against self-incrimination was shared by Charles Fairman and Justice Miller. In his biography of Miller, Fairman related an incident in which Miller "charged the jury so furiously that a conviction seemed almost certain." The defense counsel requested that Miller instruct that the defendant was not obliged to take the stand, to which Miller's countenance indicated that he was "annoyed." He proceeded to give the charge but at the end "added in a distinctly audible stage whisper—it is a mighty strange rule of law, isn't it?" FAIRMAN ON MILLER, *supra* note 54, at 419.

153. James Simon summarized Frankfurter's 1946 views as believing that Black was "the epitomical demonic judge, sly, sinister, and bent on wholesale destruction of the law." SIMON, *supra* note 131, at 171.

154. In 1957, Frankfurter wrote to Learned Hand that Douglas, Black, and Earl Warren were all "undisciplined by adequate professional learning and cultivated understanding." G. EDWARD

The dispute between Frankfurter and Black on this issue had been simmering since at least 1943.¹⁵⁵ When trying to influence Black's view, Frankfurter had indicated that his own conclusions were based on over twenty years of study.¹⁵⁶ By 1952 Frankfurter would claim to have read "all" of the debates concerning the Fourteenth Amendment.¹⁵⁷ Yet he was obviously unable to counter Black's legislative history on its own terms, and had to resort to arguing that it was not relevant.

One indication of that frustration can be seen in Justice Frankfurter's treatment of Louis Oberdorfer, one of Justice Black's law clerks and now a United States District Court Judge. Oberdorfer was instructed by Black to hand-deliver the *Adamson* dissent. Frankfurter "bid" Oberdorfer, a Yale Law School graduate, to stay in his chambers while he read the dissent. When he finished, Frankfurter threw the dissent across the desk to Oberdorfer, scattering the pages on the floor and dismissing Oberdorfer with the words, "At Yale they call this scholarship?"¹⁵⁸

WHITE, EARL WARREN: A PUBLIC LIFE 181 (1982) (quoting a letter from Felix Frankfurter to Learned Hand (June 30, 1957)).

One of the reasons Frankfurter valued Chief Justice Fuller was because he was "an extremely cultivated man, which is important." Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 887 (1953).

See also Letter from Charles Fairman to Felix Frankfurter (Jan. 13, 1952) (on file with Harvard Law School) (indicating that Fairman had once thought that blame for the *Adamson* dissent "should be allocated in proportion as academic and professional training afforded the basis for discriminating judgment.").

155. See *supra* note 131.

156. SIMON, *supra* note 131, at 175.

157. According to Justice Douglas' Conference notes, in 1952, Frankfurter claimed that he had personally read "all" of the history on the Fourteenth Amendment. See Tushnet, *supra* note 127, at 755 (citing William O. Douglas, Conference Notes on Segregation Cases (Dec. 13, 1954) (William Douglas Papers, Library of Congress, Box 1149, Case File: Original Conference Notes of Segregation Cases)).

Roger Newman has suggested that Frankfurter dealt only with secondary sources and that Frankfurter never worked directly with the congressional debates. ROGER K. NEWMAN, HUGO BLACK 355 (1994). There is no evidence of a detailed familiarity with the Fourteenth Amendment debates in any of Frankfurter's incorporation opinions. Frankfurter's *Memorandum on 'Incorporation' of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965), is interesting because its author was an Associate Justice of the Supreme Court. But, compared to the Fairman and Crosskey efforts, it has little intrinsic scholarly value. In his court opinions, Frankfurter relied upon Fairman rather than original sources.

158. Telephone interview with Judge Louis Oberdorfer (Jan. 1995); NEWMAN, *supra* note 157, at 354. Nine years later, Frankfurter wrote Learned Hand that one of Black's goals, like that of Douglas and Earl Warren, was to "have the avant-garde of the Yale Law School . . . praise [him]." Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas, and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 105.

Frankfurter's narrow five-four victory in *Adamson* was the last "major" victory he won on the Court.¹⁵⁹

VIII. AMERICAN CONSTITUTIONAL LAW DECISIONS

While Frankfurter was working on his opinion in *Adamson*, Fairman was no doubt busy with his *American Constitutional Law Decisions*,¹⁶⁰ first published in 1948. Part of Fairman's goal was to bring legal history to the student, which he did by including pictures and a table showing judicial succession.¹⁶¹ Fairman wanted people to realize that the "authoritative" constitutional principles "bear the mark" of the Justices and with the text he attempted "to identify Justices whose influence has been outstanding in the history of the Court."¹⁶²

There were striking evidences of the Thayer/Frankfurter philosophy.¹⁶³ Fairman also referred to Justice Bradley as "one of the greatest" Supreme Court Justices.¹⁶⁴ This was done in the introductory notes to *Wickard v. Filburn*,¹⁶⁵ quoting from Bradley's account of his days as a boy on the farm to give students insight into what farm life was like in the 1940s. This was done even though Fairman did not expose the reader to any principal case in which Bradley authored an opinion.¹⁶⁶

159. Urofsky, *supra* note 158, at 105.

160. CHARLES FAIRMAN, *AMERICAN CONSTITUTIONAL LAW DECISIONS* (1948). The preface is dated April 16, 1948.

161. *Id.* at iii.

162. *Id.*

163. For example, in the notes which follow *Colegrove v. Green*, 328 U.S. 549 (1946), Fairman asked what, for him, appeared to be rhetorical questions:

Would American democracy be strengthened if equality in representation were secured to the voters by judicial action, regardless of their own lethargy? Would the Court do well to correct an old evil over which the legislative branch has always had full power but which it has consistently failed to remedy?

FAIRMAN, *supra* note 160, at 56.

The answer to the modern reader is likely to be that most malproportioned legislatures would not reapportion themselves to reduce the power of the constituents who elected them. But there is an air of Thayerian triumph in the note, entitled "The sequel," which followed Fairman questions:

By an Act of June 26, 1947—scarcely more than a year after the decision of *Colegrove v. Green*—the Illinois Legislature repealed the Act of 1901 and made a new and fairer apportionment [citation omitted]. Evidently the normal forces of democratic government had not become inoperative in Illinois.

Id.

Similarly, through a contrast between the views of Justice Sutherland and Justice Brandeis on "experimentation," Fairman made the case for deference to experimentation in social and economic matters. *Id.* at 321.

164. *Id.* at 237.

165. 317 U.S. 111 (1942).

166. Fairman did quote Bradley from *Ex Parte Siebold*, 100 U.S. 371, 417-18 (1879).

The first case in the chapter entitled *Constitutional Limitations*, was the *Slaughter-House Cases*.¹⁶⁷ The *Slaughter-House Cases*¹⁶⁸ was given a prominence by Fairman not shared by any other case in *American Constitutional Law Decisions*. "A full comprehension of this case yields the key to perhaps a good third of the entire constitutional law of the United States."¹⁶⁹

Viewing *Slaughter-House* through the lens of the *Lochner* era, Fairman identified Miller and the majority with the "liberals" of the Court during the Chief Justiceships of Taft and Hughes, finding it "essentially true that Miller anticipated" Holmes, Brandeis, Stone and Cardozo.¹⁷⁰ Miller was introduced as "the strongest man" on the Court and as a man whose personal letters indicated that "passion" governed the President and the Congress and that Miller feared this would result in "the eventual destruction of some of the best principles of our existing Constitution."¹⁷¹

Fairman's editorial note discussed *Barron v. Baltimore*.¹⁷² Even though Fairman himself recognized the significance of the split in the Court over *Adamson*,¹⁷³ and was working on his article on incorporation as he worked on *American Constitutional Law Decisions*,¹⁷⁴ no connection was made between the *Slaughter-House Cases* and those issues. At the same time Fairman protected the image of Justice Bradley and reduced the focus on the enforcement of the Bill of Rights by omitting the separate dissenting opinion of Justice Bradley cited by Justice Black in *Adamson*.¹⁷⁵

167. FAIRMAN, *supra* note 160, at 286.

168. 83 U.S. (16 Wall.) 36 (1873).

169. FAIRMAN, *supra* note 160, at 286.

170. *Id.*

Though doubtlessly known by Fairman, there is no acknowledgement that Miller's majority depended upon having the votes of the relatively unknown William Strong and Ward Hunt, the conservative, David Davis, and the arch conservative, Democrat Nathan Clifford. For sketches of each see THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit Hall et al. eds., 1992) and THE JUSTICES OF THE SUPREME COURT (Leon Friedman & Fred Isreal eds., 1986). For the conservatism of Clifford see his grandson's biography, PHILIP G. CLIFFORD, NATHAN CLIFFORD, DEMOCRAT (1922).

Whatever Miller's deserved level of esteem, it is hardly likely that anyone would mistake the work of Strong, Hunt, Davis, or Clifford for that of Holmes, Brandeis, Stone, or Cardozo.

171. FAIRMAN, *supra* note 160, at 288-89 (quoting letters of Miller from Fairman's biography of Miller).

172. 32 U.S. (7 Pet.) 243 (1833).

173. 332 U.S. 46 (1947).

174. Fairman indicated that he began working on the article in the summer of 1947 and "the research and writing was done in 1949." Letter from Charles Fairman to Felix Frankfurter (Jan. 17, 1950) (on file with Harvard Law School).

175. FAIRMAN, *supra* note 160, at 301.

Fairman did note the Privileges and Immunities Clause in his Comment following the case, but did not draw any relationship between the clause and the Bill of Rights or the incorporation

Writing in 1949, Fairman suggested that instead of trying to cover all possible areas of constitutional law, an editor should focus upon "those sectors where controversies are nowadays most likely to be centered."¹⁷⁶ Yet, instead of focusing upon the then current issue, incorporation, Fairman focused upon the issues of his younger days, substantive due process.

Fairman counterbalanced Miller's opinion in *Slaughter-House*¹⁷⁷ with that of Field.¹⁷⁸ Fairman likened Field to the "conservatives" on the Court during the tenure of Taft and Hughes, and indicated that Field "laid the ground for Sutherland and Butler and those who stood with them."¹⁷⁹ Thus, in Fairman's presentation, the *Slaughter-House Cases* became a contest over the question of whether the Fourteenth Amendment would become "a charter for the freedom of economic enterprise from public control."¹⁸⁰

In the comment following the case, Fairman utilized the title, "Justice Field wins the campaign."¹⁸¹ In this note Fairman indicated that "[b]it by bit" the Court moved to Field's view until his ultimate triumph in *Lochner v. New York*.¹⁸² Indeed, the principal cases which follow *Slaughter-House* are *Lochner*¹⁸³ and *West Coast Hotel v. Parrish*.¹⁸⁴

Not until several pages later did Fairman consider the application of the Bill of Rights through the Due Process Clause in connection

doctrine. Instead, he quoted a portion of Justice Stone's dissent in *Colgate v. Harvey*, 296 U.S. 404, 443 (1935) (Stone, J., dissenting), describing the clause as the "almost forgotten" provision and Justice Jackson's statement in *Edwards v. California*, 314 U.S. 160, 183 (1941), indicating that the Court had "always hesitated to give any real meaning to the privileges and immunities clause lest it improvidently give too much."

176. Fairman, *supra* note 22, at 619.

177. FAIRMAN, *supra* note 160, at 291-99.

178. *Id.* at 299-301.

179. *Id.* at 286. This, of course, ignored the fact that Field was joined by Chief Justice Chase, Justice Bradley, and Justice Swayne. While Bradley may have been viewed as moderately conservative in his time, no one would have accused Chase or Swayne of such views in *Slaughter-House*. See generally THE JUSTICES OF THE SUPREME COURT, *supra* note 170; THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 170.

180. FAIRMAN, *supra* note 160, at 290. Indeed, in the monologue Fairman imagined for Field and Miller in his comments which follow the case, Fairman attributed to Field a concern for "inalienable rights" and "the laws of Nature." *Id.* at 301. In contrast, Miller was thought to be concerned with the strain upon the government imposed by the political feelings of the times and the Thayerian concept that if the Court acted as a "perpetual censor," "it would undermine . . . the responsibility of the people of the state for securing their well-being through their own political and constitutional processes." *Id.* at 302-03.

181. *Id.* at 304.

182. *Id.* (citing 198 U.S. 45 (1905)).

183. 198 U.S. 45 (1905).

184. 300 U.S. 379 (1937).

with the First Amendment and *Near v. Minnesota*.¹⁸⁵ Even here Fairman suggested that a "mere logical analysis" of *Barron v. Baltimore*¹⁸⁶ precluded the application of the Bill of Rights to the states, and yet suggested that under the "liberty" provision of the Due Process Clause, and a "larger and more philosophical view," the protection of free speech may be justified.¹⁸⁷

Shortly after its publication Fairman sent this work to Justice Frankfurter. Frankfurter, having waited to reply until he had read the book, praised Fairman for having accomplished his goal "with distinction."¹⁸⁸ "Your introduction and comment on the cases you have chosen make your compact book the best [one volume] collection of constitutional cases"¹⁸⁹

Frankfurter also had personal reasons to be pleased with the book. In addition to praising Bradley, Miller, and the *Slaughter-House Cases*, Fairman frequently quoted Felix Frankfurter.¹⁹⁰

185. 283 U.S. 697 (1931); FAIRMAN, *supra* note 160, at 366-70.

186. 32 U.S. (7 Pet.) 243 (1833)

187. FAIRMAN, *supra* note 160, at 369-70.

188. Letter from Felix Frankfurter to Charles Fairman (Dec. 8, 1948) (on file with Library of Congress).

189. *Id.* Even in praising Fairman's accomplishment, Frankfurter, while admitting that Fairman's goals were different than those of Thayer, insensitively diminished his praise by his reference to Thayer. "Mr. Thayer's two volumes remain a thesaurus with the student of constitutional law and make all other casebooks, that pretend to be as comprehensive as Thayer's was for his time, pretty meager by comparison." Letter from Felix Frankfurter to Charles Fairman (Dec. 8, 1948) (on file with Library of Congress).

The following year, in a review of another constitutional law casebook, Fairman made what almost seems to be a reply to Frankfurter's praise of Thayer. Fairman also praised Thayer. But, he suggested that even Thayer did not cover the 2420 pages of his own casebook and that in 1949, when Fairman published his book, so much space could not be devoted, because editors had to make "hard choices." Thus, constitutional law casebooks could be selective in trying to teach "the method of constitutional adjudication" by selecting cases from "those sectors where the controversies are nowadays most likely to be centered" or which "present a panorama of the entire range of existing constitutional law," resulting in "severely trimmed" cases. Though the book under review chose the latter, it seems clear that Fairman sought to choose the former in his own 1948 work. See Fairman, *supra* note 22, at 618-19.

190. *Colegrove v. Green*, 328 U.S. 549 (1946), was used as a principle case in FAIRMAN, *supra* note 160, at 49. A paragraph of Justice Frankfurter's majority opinion in *Freeman v. Hewitt*, 329 U.S. 249 (1946), was quoted in the notes introducing *United States v. Darby*, 312 U.S. 100 (1941). Fairman, *supra* note 160, at 221. Fairman included Frankfurter's concurring opinions in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), FAIRMAN, *supra* note 160, at 158-60, *Pennekamp v. Florida*, 328 U.S. 331 (1946), FAIRMAN, *supra* note 160, at 395-96, and his dissenting opinion in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), FAIRMAN, *supra* note 160, at 410-12.

See also Justice Burton's dissenting opinion with which Justice Frankfurter concurred in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), FAIRMAN, *supra* note 160, at 282-83, and a quotation in the introductory notes, *id.* at 388, from Frankfurter's concurring opinion in *Pennekamp v. Florida*, 328 U.S. 331 (1946). In discussing *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), Fairman quoted Felix Frankfurter, "The Supreme Court," in 14 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 476 (1934). FAIRMAN, *supra* note 160, at 34.

In that same letter, Frankfurter asked what was to become a recurring question: "What progress are you making on your Bradley?"¹⁹¹ Fairman assured Frankfurter he was "pursuing Justice Bradley as persistently as possible in a busy post-war academic life."¹⁹²

IX. THE JUDICIAL BIOGRAPHY ROUNDTABLE

Fairman could not have devoted all of his time to Bradley in 1948. In addition to completing his casebook and collecting materials on *Adamson*, Fairman organized the Round Table on Judicial Biography at the Annual Meeting of the American Political Science Association held in Chicago in December.¹⁹³ Papers were presented by a number of scholars in legal history, including people who had published or were writing judicial biographies.¹⁹⁴ Included in the published proceedings was a letter from Felix Frankfurter to Charles Fairman with thoughts on the importance of the task of writing judicial biographies.¹⁹⁵

As one would expect, Fairman's introduction of the Frankfurter letter was filled with praise. In thinking about the roundtable, Fairman's thoughts "naturally" turned to Justice Frankfurter who had set an example, "by exemplifying the most refined and discriminating standards in the study of judicial action, by stressing at the same time the enlarged view that puts each instance in its perspective, [and] by fostering the traditions of our highest Court."¹⁹⁶

Frankfurter's letter is most interesting for purposes of this article because of its reference to Fairman's work on Justice Bradley. "Perhaps you [Fairman] will tell us in your Life of Bradley why that 'corporation lawyer' should have entertained such drastic but wise views

191. Letter from Felix Frankfurter to Charles Fairman (Dec. 8, 1948) (on file with the Library of Congress).

192. Letter from Charles Fairman to Felix Frankfurter (Dec. 18, 1947) (on file with Harvard Law School).

193. The Annual Meeting was held on December 28-30, 1948. Charles Fairman, *Introduction: The Writing of Judicial Biography*, 24 IND. L. REV. 363, n.* (1949).

194. John P. Frank, *Ingredients of Judicial Biography*, 14 IND. L. REV. 374 (1949); Willard Hurst, *Who is the "Great" Appellate Judge?*, 24 IND. L. REV. 394 (1949); Willard L. King, *The Quest for Material*, 24 IND. L. REV. 391 (1949); Lynford A. Lardner, *Judges As Students of American Society*, 24 IND. L. REV. 386 (1949); Arnaud B. Leavelle, *Types of Judicial Biography*, 24 IND. L. REV. 369 (1949); Carl B. Swisher, *The Judge in Historical Perspective*, 14 IND. L. REV. 381 (1949).

195. Fairman, *supra* note 193, at 367-69. Fairman had requested this letter. Letter from Charles Fairman to Felix Frankfurter (Dec. 18, 1948) (on file with Harvard Law School).

196. Fairman, *supra* note 193, at 366.

of constitutional law.”¹⁹⁷ Shortly thereafter, Fairman assured Frankfurter that he was making progress on Bradley and promised to forward Frankfurter a reprint of his article *The Education of a Justice: Mr. Justice Bradley and Some of his Colleagues*.¹⁹⁸ Frankfurter replied that he was “looking forward with eagerness” to the Bradley piece.¹⁹⁹

X. “THE” STANFORD ARTICLE

Fairman’s 1949 Stanford article is legendary. The effect of Fairman’s work is illustrated by the fact that as late as 1985 it was the nineteenth most cited article in the preceding forty years.²⁰⁰ While I have suggested elsewhere that Fairman was incorrect in his understanding of the Fourteenth Amendment,²⁰¹ the accuracy or inaccuracy of Professor Fairman’s Fourteenth Amendment views is beyond the scope of this article.

The decision in *Adamson* was announced on June 23, 1947, a time when Stanford did not yet have a law review. But plans were underway to establish a law review and “[t]he Review planners,” who undoubtedly included Charles Fairman among their numbers, “read with more than casual interest the dissent of Mr. Justice Black.”²⁰² Because the disagreement in *Adamson* “reached to the very heart of constitutional law” and considering the “zeal with which Mr. Justice Black pursue[d] his beliefs,” it was “highly desirable to publish a fully documented study of the historical origins” of the Fourteenth Amendment.²⁰³

197. *Id.* at 368.

198. Letter from Charles Fairman to Felix Frankfurter (Feb. 10, 1949) (on file with Library of Congress).

199. Letter from Felix Frankfurter to Charles Fairman (Feb. 15, 1949) (on file with Library of Congress).

200. Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1550 (1985).

201. Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993).

It seems clear, however, that adherence to Thayer’s methodology does not necessarily produce Fairman’s results. The copy of volume I of Thayer’s case book to which I had access belongs to the Case Western Reserve Law School Library. From the marginal handwritten notes concerning assignments for certain dates made at pp. 623, 673, and 774, it appears that the book was being used in the fall of 1904.

Following *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), which was a just compensation case (not a due process case), an anonymous student wrote that the Fifth Amendment applied to the U.S. government and not to the states. Immediately thereafter is the following handwritten entry: “see amendment XIV making this apply to states.” 1 CASES, *supra* note 21, at 452.

202. *President’s Page*, 2 STAN. L. REV. 1, 2-3 (1949).

203. *Id.* at 3.

Charles Fairman was "invited" to undertake that study.²⁰⁴ Consequently, "[l]etters went out to libraries and depositories throughout the country. Microfilm, books, and documents came back."²⁰⁵ Fairman began with a sketch of the chronology of important matters facing the thirty-ninth Congress,²⁰⁶ an exegesis of Article IV, Section 2, and Justice Bushrod Washington's opinion in *Corfield v. Coryell*.²⁰⁷ The result of the latter was to conclude that one could not look to *Corfield* as a reliable guide on the meaning of the Fourteenth Amendment Privileges and Immunities Clause even when it was cited or quoted in the debates.²⁰⁸

Next, Fairman devoted fifty-three pages to a summary, with frequent quotations, of the relevant Congressional debates beginning with the debate over the Civil Rights Bill on January 29, 1866, debates over the Fourteenth Amendment, and a short critique of Horace Flack's account of the debates.²⁰⁹ This was followed by a consideration of "what the country understood to be the import" of the amendment.²¹⁰ The next fifty-one pages covered the ratification by the states.²¹¹

204. *Id.* At the same time, Professor Stanley Morrison of the Stanford faculty was also invited to work on the project which included "the judicial construction of the Amendment." *Id.* A "natural" division of the project led to Fairman undertaking the study of the origins of the amendment and Morrison the judicial history. *Id.* at 3-4.

Years later, Fairman indicated that Warren Christopher, the President of the Stanford Law Review, "suggested" that he write the article. NEWMAN, *supra* note 157, at 681 n.5. Warren Christopher speculates that the idea to write on *Adamson* may have originated from Stanley Morrison, in whose constitutional law class Christopher was enrolled. Telephone Interview with Warren Christopher (Feb. 13, 1995).

205. *Presidents Page*, *supra* note 202, at 4. Fairman began the research in the summer of 1947, but "the actual research and writing were done between June and September '49." Letter from Charles Fairman to Felix Frankfurter (Jan. 17, 1950) (on file with Harvard Law School).

206. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 5-9 (1949).

207. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,236).

208. Fairman, *supra* note 206, at 12-15. For a criticism of Fairman's analysis and an entirely different view, see Richard L. Aynes, *Justice Bushrod Washington's Contribution to the Framing of the Fourteenth Amendment: Corfield v. Coryell* (forthcoming).

209. Fairman, *supra* note 206, at 15-68. In his *Adamson* dissent, Justice Black cited Horace Flack, *Adamson v. California*, 332 U.S. 46, 72 n.5, (1947) (Black, J., dissenting), and Fairman introduced this discussion by reference to "one of Justice Black's footnotes." Fairman, *supra* note 206, at 65.

210. Fairman, *supra* note 206, at 68-81. Again, a reference to Justice Black was made, quoting, in parallel columns, Justice Black's citation of Flack on Senator Howard's speech, what Flack actually said, and Fairman's analysis criticizing both. *Id.* at 79-81.

211. *Id.* at 81. In this section, Fairman drew upon evidence which he argued supported the view that there were many inconsistencies between the Bill of Rights and state constitutions, especially with respect to the grand jury, civil jury, and criminal jury requirements of the Bill of Rights. Five years later, William Crosskey argued that most of these claims of conflicts were non-existent. Justice Frankfurter ignored Crosskey, relied upon Fairman, and utilized Fairman's

Ignoring the early decision by Judge (later Justice) Woods and Justice Bradley indicating that the Fourteenth Amendment was designed to enforce the Bill of Rights against the states,²¹² and virtually ignoring the *Slaughter-House* decision itself, Fairman examined *Twitchell v. Pennsylvania*²¹³ and *Justices of the Supreme Court of New York v. United States ex rel. Murray*,²¹⁴ and concluded that the contemporary understanding of the Court would not support Justice Black's view.²¹⁵

Fairman ultimately concluded that the framers of the Privileges and Immunities Clause "[e]vidently . . . had no clear idea as to the confines of the clause, and in the main no awareness either of their own want of understanding."²¹⁶ Their thinking was "hazy" and they never indicated "the basis or measure" of a citizen's privileges or immunities.²¹⁷

After "[b]rooding" over the meaning of the clause while writing this article, Fairman "slowly" came to the conclusion that, "Justice Cardozo's gloss on the due process clause—what is 'implicit in the concept of ordered liberty'—comes as close as one can to catching the vague aspirations that were hung upon the privileges and immunities clause."²¹⁸ This led Fairman to imply that the *Slaughter-House Cases* were properly decided and to chide Justice Black, who had "rebelled" against selective incorporation, claiming that "the record of history is overwhelmingly against him."²¹⁹

One telling aspect of Fairman's approach was a lack of even-handedness toward the framers. He frequently, though not inevitably, offered biographical information to aid the reader in assessing the weight to be given to the statements of the Congressmen he quoted. For example, in introducing the members of the Joint Committee on Reconstruction, Fairman indicated that Maryland Senator Reverdy Johnson was a Democrat, that he had argued cases before the United

research to produce a chart showing the claimed conflicts as part of his opinion in *Bartkus v. Illinois*, 359 U.S. 121, 140-49 (1959).

212. See *supra* note 39.

213. 74 U.S. (7 Wall.) 321 (1869).

214. 76 U.S. (9 Wall.) 274 (1870).

215. Fairman, *supra* note 206, at 132-34.

216. *Id.* at 138.

217. *Id.* at 138-39.

218. *Id.* at 139. Fairman thought that one of the virtues of this was that it allowed protection of freedom of speech, which he admitted was part of the 1866 discussion, and yet did not include any of the "federal requirements as to juries." *Id.*

This, of course, meant that either the Privileges and Immunities Clause or the Due Process Clause was redundant.

219. *Id.*

States Supreme Court for forty years, and that he made thoughtful judgments on constitutional questions.²²⁰ Similarly, Representative Henry J. Raymond was identified as an "old line Whig, original Republican, publisher of the New York Times" who was "responsibly related to the major developments in government and politics."²²¹ Even with individuals not so prominent, Fairman found it important to identify the fact that they were lawyers.²²²

Yet Fairman is curiously silent about the experience and background of Fourteenth Amendment author John Bingham, who he acknowledged as a "key figure" in his inquiry concerning the meaning of the Fourteenth Amendment.²²³ This was so, in spite of the fact that contemporary sources available to Fairman indicated Bingham's prominence as a lawyer, a county prosecutor, a judge-advocate of the Union Army, Solicitor of the United States Court of Claims, Chairman of the Managers in the 1862 impeachment of Judge West Humphreys, special judge advocate in the Court Martial of the Surgeon General of the United States, a special judge advocate in the trial of the Lincoln murder conspirators and Chairman of the Managers in the impeachment trial of Andrew Johnson.²²⁴

Beyond this lack of even-handedness, it appears that Fairman shared Frankfurter's disdain for the jury provisions of the Fifth, Sixth, and Seventh Amendments. "The freedom that the states traditionally have exercised to develop their own systems for administering justice, *repels* any thought the federal provisions on grand jury, criminal jury, and civil jury were *fastened* upon them in 1868."²²⁵

220. *Id.* at 19. As Crosskey noted, "it is always the critics and opponents of what was being done who were the able lawyers and men of competence." Crosskey, *supra* note 9, at 22.

221. Fairman, *supra* note 206, at 47.

222. *E.g.*, Representative William Higby of California, *id.* at 27, and Representative John F. Farnsworth of Illinois, *id.* at 50.

223. *Id.* at 25.

224. *See e.g.*, 4 DICTIONARY OF AMERICAN BIOGRAPHY 277-78 (Allen Johnson ed., 1929); BEN. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 183-84 (1914); CARRINGTON T. MARSHALL, 3 A HISTORY OF THE COURTS AND LAWYERS OF OHIO 860 (1934); 9 THE NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 375-76 (1907).

These same sources would have told Fairman that Bingham was an active campaigner for the Whig Party beginning in 1840; that he called national attention to himself when he attempted to have the Whig Party adopt an antislavery resolution as its platform in its 1848 Convention; that he was one of early leaders of the Republican Party in Ohio; and that having served in Congress as a Republican from 1854-1862 and 1865-1872 he was intimately involved in most of the important national developments leading to the adoption of the Fourteenth Amendment.

225. Fairman, *supra* note 206, at 137 (emphasis added). It is interesting to note that Crosskey himself thought the Seventh Amendment should be repealed. Crosskey, *supra* note 9, at 115-16.

Justice Miller apparently shared both Fairman and Frankfurter's lack of respect for at least the civil jury. Fairman quoted the following statement from Justice Miller's 1879 speech to the

This article also evidenced a noticeable change in Fairman's writing style. While bold and clear in his prior articles, there was a perceptible change in his Stanford piece.²²⁶ There is substantial truth in Crosskey's claim that:

[Fairman's] method was to let drop, here and there, throughout his discussion, derogatory hints and comments which gave the impression that the framers of the amendment, and Bingham in particular, were not very bright; that they held the strangest ideas about the Constitution; knew little about it, or about the decisions of the Supreme Court under it; . . . and that it was not to be expected anything intelligible could come from their hands.²²⁷

Mark Tushnet has suggested that Frankfurter's judicial philosophy was that if there was no clear legislative intent, then the Justices were free to make their own decision.²²⁸ If this is so, then the critics who found Fairman's "proof" to be largely negative evidence²²⁹ miss the point. Under Tushnet's view of Frankfurter's theory, Fairman was not required to prove anything. It was enough to create doubt or cause confusion. Indeed, after reviewing the Congressional debates themselves, one cannot read Fairman's Stanford article without recalling Fairman's own quotation from a letter of Justice Miller:

A skillful lawyer in opening a case will often be able to throw so much doubt around a clear matter, or give so much importance to

New York Bar Association with seeming approval. "It requires all the veneration which age inspires in this mode of dispensing justice, and all that eminent men have said of its value in practice, to prevent our natural reason from revolting against the system, and especially some of its incidents." *Samuel F. Miller*, *supra* note 102, at 205. *See also* FAIRMAN ON MILLER, *supra* note 54, at 409-11 (indicating that in civil trials Miller preferred three judge panels to juries and in criminal proceedings he preferred the French system of preliminary examination of the accused in Court).

226. There is some hint of this same style in Fairman's volume of the Holmes Devise. In the reviews of Part I, for example, Fairman was criticized for not making his own views known and marshaling evidence which supported his views. *E.g.*, Benedict, *supra* note 90, at 134; Casper, *supra* note 85, at 919. This goes beyond general conclusions and summaries. For example, Casper finds that the "most straightforward summary" of Fairman's assessment of Chase can be gleaned from the negative implications one draws from Fairman's praise of Waite. Casper, *supra* note 85, at 916. Similarly, Benedict relies on what Fairman "implies" about the origins of Radical Reconstruction and in another instance indicates that with respect to a certain point in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), "Professor Fairman implies, in a somewhat overly coy manner, I think, that the Court majority knew the actual circumstances of those congressional pronouncements and intentionally blurred them." Benedict, *supra* note 90, at 864, 868.

Thus, it is possible that Fairman's 1949 article reflected an evolution in style from his earlier work. However, his later writings on Bradley have the same forthright style as his pre-1949 articles. *E.g.*, FIVE JUSTICES, *supra* note 34; Charles Fairman, *Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83 (1956); Fairman, *supra* note 2.

227. Crosskey, *supra* note 9, at 11.

228. Tushnet, *supra* note 127, at 755.

229. *E.g.*, JOHN H. ELY, DEMOCRACY AND DISTRUST 195 n.56 (1980) (Fairman's work simply concludes that Black's view is "not proven."); LEONARD LEVY, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS XV (1970) ("Fairman's findings were basically negative.").

an immaterial one, that his unwary opponent follows him into the web of sophistry, when he could have stood secure on ground of his own selection.²³⁰

Stanford published a companion piece by Stanley Morrison entitled, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, simultaneously with Fairman's 1949 article.²³¹ Though articulated as a piece concerning precedent, Morrison relied heavily upon Fairman's legislative history. An interesting point appeared at page 162 where Morrison condescendingly indicated that Justice Black's history was incorrect.²³² Morrison provided what one might, on a first reading, regard as Morrison's view of the source of what he saw as Justice Black's errors. "Perhaps it is not surprising that in [Black's] historical study he did not get an accurate picture. Obviously a Justice of the Supreme Court, even with the aid of a capable secretary, does not have the time for exhaustive historical research" ²³³

But, without acknowledging any inconsistency, Morrison proceeded with a harsher critique of what he viewed as Black's errors. After accusing Justice Black of relying on statements taken out of context, Morrison lamented that, "four of the judges are willing to distort history, as well as the language of the framers, in order to read into the Constitution provisions which they think ought to be there. It is particularly regrettable that the great talents of Mr. Justice Black should be so misdirected."²³⁴

Yet, if Black was reading his own views into the Constitution, then inadequate historical research was not the real problem. One possibility is that what seems like a criticism of Justice Black's historical research was really an apology for Justice Frankfurter's failure to respond with any critique of Justice Black's history.

Frankfurter sent Fairman an apparently complimentary letter on the Fourteenth Amendment articles, which Fairman "promptly

230. Samuel F. Miller, *supra* note 102, at 204 (quoting letter from Justice Miller, in DANIEL F. MILLER, *RHETORIC AS AN ART OF PERSUASION. FROM THE STANDPOINT OF A LAWYER* 38-40 (1880)).

231. Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949). Morrison was a 1919 graduate of Harvard Law School and served as Justice Holmes' law clerk in 1919 and 1920. 4 WHO'S WHO IN AMERICA, 1961-1968, 681 (1968).

232. Morrison, *supra* note 231, at 162.

233. *Id.*

234. *Id.*

showed" to Stanley Morrison.²³⁵ Fairman's reply suggested that he was acting on his own initiative. He indicated that he had not sent Justice Frankfurter a copy of the volume, but that he knew Frankfurter was "a reader of [the] Stanford Law Review, & I hoped [he] would approve."²³⁶

Fairman wrote Frankfurter that he had been reading as-of-yet unpublished works by Howard J. Graham and Jacobus tenBroek.²³⁷ Fairman related that much of the material consisted of accounts of anti-slavery propaganda and pamphlets which might shed light on the popular understanding of the Fourteenth Amendment.²³⁸ Though Fairman did not find any direct relationship between these discussions and the debates in Congress or in most of the state legislatures, he did indicate that it helped him gain "a better appreciation" of the thoughts of the majority of the committee considering the amendment in the Massachusetts legislature.²³⁹

Writing to Fairman on January 27, 1950, Frankfurter expressed skepticism about Graham and tenBroek's methodology. "[T]his business of trying to find the scope of the Fourteenth Amendment in this or that pamphlet or this or that individual expression of hope of what was accomplished by the Amendment . . . is not way of dealing with 'a constituent act' like the Fourteenth Amendment."²⁴⁰

Frankfurter "long ago" determined that the "fact" that the Bill of Rights would have required "half the states to uproot their whole system of criminal justice or require every \$20.00 case to be tried before a jury" was "decisive."²⁴¹

235. Letter from Charles Fairman to Felix Frankfurter (Jan. 17, 1950) (on file with Harvard Law School). The letter from Frankfurter to Fairman is not included in either of the Collections of Frankfurter's papers.

236. *Id.*

237. *Id.* It is possible that Fairman was reading a draft of tenBroek's book *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951), which was republished in 1965 in an enlarged edition under the title *EQUAL UNDER LAW*.

238. Letter from Charles Fairman to Felix Frankfurter (Jan. 17, 1950) (on file with Harvard Law School).

239. *Id.* (referencing Fairman, *supra* note 206, at 118-21).

240. Letter from Felix Frankfurter to Charles Fairman (Jan. 27, 1950) (on file with Harvard Law School).

241. *Id.* Frankfurter's position, however, ignores the political realities of the amendment process. Each of the four major sections of the Fourteenth Amendment involves a separate and distinct subject matter. Had the framers of the Amendment followed the example of James Madison and the First Congress in submitting proposals for the Bill of Rights to the states, they would have submitted four separate amendments and allowed the states to pick and choose which of the four "amendments" they wanted to accept and which they wanted to reject. Indeed, with the original Bill of Rights, twelve amendments were originally presented, ten of which were initially accepted and two of which were initially rejected.

Frankfurter's March 10, 1950 letter again commended Fairman for his Fourteenth Amendment article. "Your study of the Fourteenth Amendment deserves the engaging format given to it in the reprint from the Stanford Law Review. I am grateful to have it as a separate."²⁴²

As one might expect, Justice Black had a much different reaction. He was greatly disappointed in the article and questioned Fairman's detachment. "I now think of Mr. Fairman as an advocate, not a historian, and I would not rank him at the top of advocates of the world."²⁴³

XI. JUSTICE BRADLEY AGAIN

Fairman did not abandon Justice Bradley while working on his Stanford article. In apparent response to Fairman's indication that he was going to examine Bradley's role in the 1877 Electoral Commission, Frankfurter indicated that his "interest in that has been stirred by Allan Nevins's contemptuous attitude toward Bradley."²⁴⁴ Frankfurter's response to that view was not only one of interest but certi-

Instead, the framers chose to link the entire package together in an "omnibus" provision which required voters to accept or reject the entire package. Frankfurter's theory assumes that if the legislators in each state were given a choice between resolving monumental problems facing the country (citizenship, the enforcement of the rights of citizens, the enforcement of the rights of persons, the basis on which voters were to be apportioned, the ability of those in rebellion to participate in government, and the security of the Union debt) and rejecting of traditional civil rights protections (grand jury, petit jury, and civil jury trial), that they would have rejected the Amendment in order to preserve their right *not* to have jury protections. This conclusion is not self-evident.

242. Letter from Felix Frankfurter to Charles Fairman (Mar. 10, 1950) (on file with Library of Congress). At the same time, Fairman sent Frankfurter a reprint of his *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949). Frankfurter indicated that he was glad to have a reprint, but he had already read it "last year." This, together with his reference to being "grateful" to have the Fourteenth Amendment article "as a separate," suggests that Frankfurter had read that article before as well.

243. Newman, *supra* note 157, at 356 (quoting letter from Justice Black to John P. Frank (Feb. 28, 1950)).

244. Letter from Felix Frankfurter to Charles Fairman (Mar. 10, 1950) (on file with Library of Congress). This was a reference to ALLAN NEVINS, ABRAM S. HEWITT (1935).

Abraham S. Hewitt made a fortune in iron, steel, and railroad development. With the exception of one term, Hewitt served in Congress from 1874-1886. He served as Chairman of the Democratic National Committee and directed Tilden's presidential campaign in 1876. THE COLUMBIA ENCYCLOPEDIA (William Bridgwater & Seymour Kurtz eds., 3d ed. 1963).

As such, Hewitt was intimately involved in the negotiations over the electoral commission which ultimately lead to Hayes's election. While Nevins gave a favorable account of the assessment of Bradley's integrity prior to the decision of the Electoral Commission, Nevins ultimately concluded that on the night before the decision of the Commission, around midnight, Justice Bradley indicated to his "intimate friend," John G. Stevens, that he would cast a vote which would result in the election of Tilden. Nevins claimed that Bradley showed his written opinion to Stevens. Nevins concluded that a post-midnight visit from Bradley's long-time friend, Republican Senator Frederick T. Frelinghuysen and George M. Robeson "in all probability" convinced

tude: "Of course [Nevins] isn't entitled to value the juristic quality of Bradley."²⁴⁵

What also disturbed Frankfurter was that Nevins had, according to Frankfurter, attempted to "persuade [Willard] King to play down Bradley in his *Life of Fuller*."²⁴⁶ Frankfurter reported that King refused to do this because he "realized" that on the subject of Bradley, Nevins was not "one speaking with authority."²⁴⁷

In the June 1950 correspondence, Frankfurter discussed Fairman's discovery that Bradley had written substantial parts of Waite's opinion in *Munn v. Illinois* and expressed his "eagerness" in "looking forward" to Fairman's book on Bradley.²⁴⁸

Fairman sent Frankfurter his revised, second edition of *American Constitutional Law Decisions*,²⁴⁹ which Frankfurter

Bradley to change his vote on grounds other than the merits, though he also indicated "the full truth will never be known." NEVINS, *supra*, at 368-73.

Fairman's supplement to his Holmes Devise Volumes, FIVE JUSTICES, *supra* note 34, at xiv, sought to vindicate Bradley's decision (Foreword by Paul A. Freund). But there is no consensus on Bradley's role. E.g., John V. Orth, *Joseph P. Bradley*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit L. Hall et al. eds., 1992) ("Although apparently pulled in both directions, [Bradley] closed ranks with his fellow Republicans and declared Rutherford B. Hayes president-elect.").

245. Letter from Felix Frankfurter to Charles Fairman (Mar. 10, 1950) (on file with Library of Congress).

246. *Id.*

247. *Id.*

Frankfurter was referring to WILLARD L. KING, MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES, 1888-1910 (1950). The Library of Congress has 5 folders of correspondence between Frankfurter and King between 1947 and 1956.

King did nothing to hurt the reputation of Bradley. Indeed, he referred to Bradley as the "Justice Holmes of that Court." *Id.* at 129. On the matter of Bradley's appointment, King indicated that it was rumored that Bradley had "been put on the Court by President Grant to reverse the first legal-tender decision, but this charge was unjust to Bradley in light of the evidence since produced." *Id.* at 130.

Though King's bibliography listed Nevins' THE EMERGENCE OF MODERN AMERICA (1927), GROVER CLEVELAND: A STUDY IN COURAGE (1932) and LETTERS OF GROVER CLEVELAND (1933), it did not include ABRAM S. HEWITT. *Id.* at 346. His bibliography also included Fairman's biography of Justice Miller and two works by Justice Frankfurter. *Id.* at 344. Further, while King's acknowledgements included W. W. Crosskey and Nevins, it also included Justice Felix Frankfurter, Charles Fairman, Mark De Wolfe Howe, and Carl Brent Swisher. *Id.* at ix.

248. Letter from Charles Fairman to Felix Frankfurter (June 8, 1950) (on file with Harvard Law School); Letter from Felix Frankfurter to Charles Fairman (June 24, 1950) (on file with Harvard Law School).

249. Fairman reissued this book in 1950 adding *Sweatt v. Painter*, 339 U.S. 629 (1950) and seven pages of notes concerning other cases relating to racial discrimination. See CHARLES FAIRMAN, AMERICAN CONSTITUTIONAL LAW DECISIONS 460-470 (2d ed. 1950). Among the cases discussed in the notes were *Henderson v. United States*, 339 U.S. 816 (1950); *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Hurd v. Hodge*, 334 U.S. 24 (1948); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Fisher v. Hurst*, 333 U.S. 147 (1948); *Sipuel v. Board of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Harmon v. Tyler*, 273 U.S. 668 (1927); *Corrigan v. Buckley*, 271 U.S. 323 (1926); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Plessy v. Ferguson*, 163 U.S. 537 (1896); and a variety of lower court cases.

praised.²⁵⁰ The question of Bradley persisted: "Am I right in assuming that you will let no major undertaking deflect you from completing the Bradley?"²⁵¹

Fairman assured Frankfurter that he was proceeding as deliberately as was reasonable. He wanted Bradley's biography to be even better than Miller's.²⁵² One of the difficulties was that to deal with the "Affairs of '76-'77" and "to meet the allegations & insinuations left by Allan Nevins" was a task for Scotland Yard.²⁵³

Frankfurter was still concerned with Nevins in October of 1950 when Frankfurter was reading Nevins's *Emergence of Lincoln*.²⁵⁴ While conceding that Nevins's "bulky volumes" had "worth," Frankfurter nevertheless complained that "the praise that is bestowed upon them is, from my point of view, plain silly."²⁵⁵

In that same letter Frankfurter praised the newly established *Stanford Law Review*. "Distinction is not something that can be established overnight, but the *Stanford Law Review* seems to have accomplished that feat."²⁵⁶ As of that date, the journal had only published two volumes consisting of six issues. One of the issues included Fairman's 1949 article on the Fourteenth Amendment²⁵⁷ and Stanley Morrison's less enduring *Does the Fourteenth Amendment In-*

Fairman also quoted an amicus brief by A Committee of Law Teachers Against Segregation in Legal Education calling for *Plessy v. Ferguson* to be overruled. FAIRMAN, *supra*, at 462. This was the first time that the issue of "civil rights" appears to have played any important role in Fairman's writings. The Amicus Brief, filed on January 20, 1950, contains the names of 178 law Professors, including Charles E. Corker and Carl Spaeth of Stanford and eight members of the faculty at Harvard. Fairman's name was not on the brief.

Though some other editorial changes were made to account for new developments in foreign affairs and criminal procedure, *see id.* at 376-383, there is no reference to *Adamson*. *Id.* at vii (Table of Cases Cited). The portions concerning Justice Bradley, Justice Miller, and the *Slaughter-House Cases* remained the same.

250. Letter from Felix Frankfurter to Charles Fairman (Oct. 9, 1950) (on file with Harvard Law School). This time there was no reference to Thayer.

251. *Id.*

252. Letter from Charles Fairman to Felix Frankfurter (Oct. 21, 1950) (on file with Library of Congress).

253. *Id.* In his FIVE JUSTICES, *supra* note 34, Fairman treated the analysis of Nevins and others. He titled part four of his book "Nevins' Hewitt and the 'Secret History.'" *Id.* at 159. In his preface, Fairman raised "[n]o question" of the "high quality" of Nevins' book "until it comes to Hewitt's account of the election of 1876 and the Electoral Commission." *Id.* at xviii.

254. ALLAN NEVINS, *THE EMERGENCE OF LINCOLN* (1950).

255. *Id.*

256. *Id.*

257. Fairman, *supra* note 206.

corporate the Bill of Rights? *The Judicial Interpretation*.²⁵⁸ Fairman also contributed two articles and a book review to the other issue.²⁵⁹

In that same mailing Fairman sent Frankfurter the results of a series of lectures he presented at Boston entitled *What Makes a Great Justice? Mr. Justice Bradley and the Supreme Court, 1870-1892*.²⁶⁰ Frankfurter termed the work "admirable" and indicated that this early work made him "impatient for the final volume."²⁶¹

In many ways those lectures presented an overview of Bradley's career. Fairman set forth a goal of tracing the "main lines" of constitutional litigation, cases involving the Commerce Clause, due process, and equal protection.²⁶² Fairman suggested that while the Court decided specific cases, they were really "at work on the all-embracing question, What sort of country is America to be—what shall be the characteristics of its economy, what shall be the qualities of the people's liberty, where within this federal system shall various responsibilities be exercised?" Rather than suggesting that the Constitution in some manner restrained the Justices, Fairman declared that "[o]n these, the ultimate problems, the Constitution speaks with Delphic reticence; it is actually the Justices that pronounce the responses."²⁶³

In his discussion of the Fourteenth Amendment, Fairman referred to the *Adamson* dispute and his own Stanford article²⁶⁴ where he found that "the members of Congress really had no clearly under-

258. Morrison, *supra* note 231.

259. In Volume 1, Fairman was the author of two articles totaling 105 pages and a book review. Charles Fairman, *The Education of a Justice: Justice Bradley and Some of His Colleagues*, 1 STAN. L. REV. 217 (1949); Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949); Charles Fairman, Book Review, 1 STAN. L. REV. 581 (1949) (reviewing PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* (1948)).

In Volume 2, Fairman's Fourteenth Amendment article accounted for 135 pages and Stanley Morrison's Fourteenth Amendment article added another 33 pages. Fairman, *supra* note 206, at 5-139; Morrison, *supra* note 231, at 140-73.

In addition, volume 1 contained a review of John P. Frank's biography of Justice Black. Samuel D. Thurman, Jr., Book Review, 1 STAN. L. REV. 578-81 (1949) (reviewing JOHN P. FRANK, *MR. JUSTICE BLACK* 1949)). Thurman was highly critical of Justice Black, indicating that "many intelligent observers of the Supreme Court fail to find in [Black] . . . the *sine qua non* for judicial greatness—objectivity." *Id.* at 579. In the areas of patents and monopolies, Black had "the zeal of the legislator or the prosecutor rather than the detachment of the judge." *Id.* at 580. One "gap" in the book is the failure to "analyze the extent to which [Black's] personal views have properly or improperly entered into the decision of Supreme Court cases . . ." *Id.* at 581.

260. Fairman, *supra* note 2. See letter from Felix Frankfurter to Charles Fairman (Mar. 10, 1950) (on file with Library of Congress).

261. Letter from Felix Frankfurter to Charles Fairman (Mar. 10, 1950) (on file with Library of Congress).

262. Fairman, *supra* note 2, at 69.

263. *Id.* at 68.

264. Fairman, *supra* note 206.

stood purpose.”²⁶⁵ Fairman suggested, perhaps for the first time in his writings, that “Congress, no doubt, meant . . . to establish some substantial rights even though the State might not itself have established them for its own citizens. These were the ‘privileges and immunities of citizens of the United States.’”²⁶⁶ But because Congress did not make “clear what their content should be, [i]t left that to the Justices when actual cases required answers.”²⁶⁷

In explaining how the Court provided those answers, within the context of reviewing the *Slaughter-House Cases*, Fairman concluded that the Court “virtually scratched [the privileges and immunities clause] from the Constitution.”²⁶⁸ The Court’s decision-making process, in the words of Fairman, involved choice. “The words meant too much, or almost nothing. The majority chose the latter alternative.”²⁶⁹

In discussing the *Civil Rights Cases*,²⁷⁰ Fairman implicitly, but gently, criticized Bradley by suggesting that Harlan’s dissent had “points of real strength,” suggesting that the Supreme Court was moving toward the abolition of the “color line,” and calling for civil rights legislation which would “avoid the pitfalls” of the 1870s and 1880s.²⁷¹

XII. THE EFFECTS OF THE STANFORD ARTICLE

On January 2, 1952, the Supreme Court unanimously reversed the conviction in *Rochin v. California*.²⁷² Justice Frankfurter wrote the majority opinion, holding that it violated the Due Process Clause of the Fourteenth Amendment for the state to forcibly administer an emetic and then to use the contents from the accused’s stomach to convict him of possession of morphine.²⁷³ Justice Black concurred in

265. Fairman, *supra* note 2, at 77 (footnote omitted).

266. *Id.*

267. *Id.* Though not cited by Fairman, the Court indicated that it would interpret art. IV, § 2 of the Privileges and Immunities Clause by using this case-by-case approach. *Conner v. Elliott*, 59 U.S. (18 How.) 591, 593 (1855).

268. Fairman, *supra* note 2, at 78.

269. *Id.* Compare the words of Justice Robert Jackson in *Edwards v. California*, 314 U.S. 160, 183 (1941) (the Court “always hesitated to give any real meaning to the privileges and immunities clause lest it providently give too much.”).

270. 109 U.S. 3 (1883).

271. Fairman, *supra* note 2, at 82-83. Two years later Fairman suggested that the “current of decisions in the Court is steadily against all discrimination based on race or color.” Charles Fairman, *Editorial Comment, Finis to Fujii*, 46 AM. J. INT’L LAW 682, 686 (1952).

272. 342 U.S. 165 (1952). The issue in *Rochin* was whether it violated the accused’s rights to force an emetic solution through a tube into the accused’s stomach against his will, thereby inducing vomiting, and then to use the contents of the vomit to convict the accused of the possession of morphine. *Id.* at 166.

273. *Id.* at 173.

judgment, finding that this action violated the accused's Fifth Amendment rights and relying upon his dissent in *Adamson* to enforce those provisions against the state.²⁷⁴ Black accused the majority of adopting "evanescent standards" which, in the past, had "been used to nullify state legislative programs passed to suppress evil economic practices."²⁷⁵

Frankfurter sent a copy of the slip opinion to Fairman.²⁷⁶ Fairman, apparently viewing his Stanford article as conclusive, was surprised "[t]hat the historical part of the *Adamson* dissent should now be reaffirmed."²⁷⁷ Indeed, Fairman had expected Black's dissent to "sink without trace."²⁷⁸ Fairman had previously been willing to attribute Black's dissent to "ardor," "want of scholarly discipline," and "uncritical haste in jumping to a desired conclusion."²⁷⁹ Indeed, Fairman thought that the blame for the dissent "should be allocated in proportion as academic and professional training afforded the basis for discriminating judgment."²⁸⁰

Obviously wanting to respond to Black's new opinion, Fairman was taken aback when a member of the Vanderbilt symposium referred to Fairman's Stanford article as a "brief."²⁸¹ Apparently sensitized by this conversation, Fairman told Frankfurter that "anything more now from me would do more harm than good—would look like the expression of some personal feeling."²⁸²

Frankfurter agreed that Fairman ought not to make a further attempt to write on the this question, referring to his "historic and not

274. *Id.* at 174-75.

275. *Id.* at 177. Justice Douglas also filed a concurring opinion. His opinion indicated that these types of practices had been upheld by a majority of the courts which had considered them and these judges were "as sensitive as we are to the proper standards for law administration." *Id.* at 178. This demonstrated, in Douglas's view, that this practice could not violate the "decencies of civilized conduct" as Frankfurter suggested. *Id.*

Instead, Douglas concurred on due process grounds, suggesting that because the right against self-incrimination was required in federal trials it should be required in state trials as well. *Id.* at 179.

276. Letter from Felix Frankfurter to Charles Fairman (Jan. 12, 1952) (on file with Harvard Law School).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* Though Fairman's letter does not make his intent clear, in the context of the times this might be read to suggest that Justice Douglas, who was thought to be well-educated and have more significant professional experience, should be held to a higher standard than Justice Black to whom Frankfurter looked with condescension.

281. *Id.*

282. *Id.*

merely historical" article in Stanford.²⁸³ Frankfurter heard "the good news", which turned out to be untrue, that Fairman had completed "the Bradley."²⁸⁴ He repeated what Fairman well knew: "For the appearance of few books have I been eagerly anticipating, as I have your Bradley."²⁸⁵ But Fairman's reply indicated that Bradley was "still far from complete."²⁸⁶

In the meantime, Fairman's Stanford article was making an impression upon other Supreme Court Justices. Ironically, the Supreme Court first used Fairman's Fourteenth Amendment findings in Justice Jackson's dissent from Frankfurter's opinion in *Beauharnais v. Illinois*.²⁸⁷ Jackson, another Supreme Court friend of Fairman's, argued for deference to state libel laws in the face of First Amendment attack.²⁸⁸ In doing so, he relied upon both the Fairman and the Morrison articles, terming them "the most comprehensive and objective studies of the origin and adoption of the Fourteenth Amendment."²⁸⁹

In 1952, Charles Fairman left Stanford to become the Charles Nagel Professor of Law at Washington University of St. Louis. Frankfurter congratulated Fairman on the "transfer" and indicated that this would "mean the early completion of your Bradley makes me very happy."²⁹⁰

Fairman returned to Bradley in his July 1953 publication, *The So-called Granger Cases, Lord Hale, and Justice Bradley*.²⁹¹ *Munn v. Illinois*²⁹² was an important case for those dedicated to the New Deal. It provided an account of an earlier era, prior to the "fall" from grace into *Lochner*, when the Court deferred to state legislative judgments and allowed the states to regulate economic interests with little or no

283. Letter from Felix Frankfurter to Charles Fairman (Feb. 12, 1952) (on file with Harvard Law School).

284. *Id.*

285. *Id.*

286. Letter from Charles Fairman to Felix Frankfurter (Mar. 19, 1952) (on file with Harvard Law School). In that same letter Fairman indicated that in order to complete the Bradley biography, "[a]ll I need is time - lots of it." *Id.*

287. 343 U.S. 250, 294 (1952).

288. *Id.* at 295.

289. *Id.* at 294.

290. Letter from Felix Frankfurter to Charles Fairman (Apr. 15, 1953) (on file with Library of Congress). Frankfurter assumed that Fairman's position at St. Louis would allow him more time to work on his book. Letter from Felix Frankfurter to Charles Fairman (May 18, 1953) (on file with Harvard Law School).

291. Granger Cases, *supra* note 34.

292. 94 U.S. 113 (1877).

oversight.²⁹³ Chief Judge Waite, who authored *Munn*, was singled out for praise by people like Felix Frankfurter.²⁹⁴

The burden of Fairman's article was not only to establish the context of the *Munn* decision and to analyze it in such a way as to support its result, but also to demonstrate that critical portions of Waite's opinion were taken from a memorandum written by Justice Bradley.²⁹⁵ This added to the attractiveness of Bradley for Fairman and Frankfurter. Perhaps because he was actively considering work on his book about Bradley,²⁹⁶ Fairman did not take the occasion to examine Bradley's life critically.²⁹⁷

XIII. "CROSSKEY IS VERY MUCH WITH ME."²⁹⁸

In 1953, William W. Crosskey's controversial *The Constitution in the History of the United States* was published. At the time, its publi-

293. Hints of this are also seen in Fairman's article citing cases from the 1930s and 1940s. *Granger Cases*, *supra* note 34, at 659, 661 n.337, 670 n.382.

294. FRANKFURTER, *supra* note 16, at 81.

295. *Granger Cases*, *supra* note 34, at 587. Bradley termed this document an "Outline of my views on the subject of the Granger Cases." Fairman reproduced this document. *Id.* at 670-78.

296. *Id.* at 587 n.1, indicating that the article was "incident to work on a forthcoming book, MR. JUSTICE BRADLEY AND THE SUPREME COURT, 1870-1892." Fairman's private comment to Frankfurter that the article was too long to be a chapter and would have to be made shorter, suggests the contrary. Letter from Charles Fairman to Felix Frankfurter (Apr. 23, 1953) (on file with Harvard Law School).

297. Fairman had no critical analysis of the fact that Frederick T. Frelinghuysen argued before Justice Bradley in the *Granger Cases*. While Fairman noted that Frelinghuysen had been Bradley's "classmate at Rutgers, and his associate at the bar," *Granger Cases*, *supra* note 34, at 644, he apparently did not deem it important to note the critical role Frelinghuysen played in Bradley's appointment to the Court. See Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 977, 1128 (1941). Even though Frelinghuysen did not prevail in the *Granger Cases*, the question of whether Bradley should have participated in a case in which Frelinghuysen played such a prominent role either did not occur to Fairman or was deferred until his book should be published.

Fairman uncritically praised Bradley's majority opinion upholding Congress's act declaring all of the property of the Mormon Church forfeit. Charles Fairman, *The Education of a Justice*, 1 STAN. L. REV. 217, 218 (1949). Yet Fuller's biographer termed Fuller's dissent to that decision "short and devastating" and "one of the greatest glories of Fuller's career." WILLARD L. KING, MELVILLE WESTON FULLER 147 (1967). See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890). Congress later acknowledged its error and returned the property to the Mormon Church.

This was one of the few times that Fairman acknowledged that Miller, even "at a moment when Bradley had disappointed him as to a recommendation or a judicial appointment," had been critical of Bradley or that a quote attributed to Justice Strong might be interpreted as being critical of Bradley. *Granger Cases*, *supra* note 34, at 653 n.306.

While Fairman refused to credit John Bingham for his 1872 explanation of the steps in his reasoning in drafting the Fourteenth Amendment in 1866 because it was not contemporaneous, Fairman, *supra* note 206, at 137, Fairman uncritically accepted Justice Bradley's October 28, 1882 letter explaining his role in the Electoral Commission of 1877. *Mr. Justice Bradley*, *supra* note 34, at 79-80 (reprinting letter).

298. Letter from Charles Fairman to Felix Frankfurter (May 20, 1953) (on file with Harvard Law School).

cation was "the major event in constitutional scholarship."²⁹⁹ Crosskey's research led him to envision a constitution in which judicial review was limited and the power of Congress' power over commerce was omnipotent. As a commentator later wrote, Crosskey's view was "in short, the Constitution Franklin Roosevelt would have written in 1935."³⁰⁰

In the autumn of that year the *University of Chicago Law Review* published a symposium reviewing Crosskey's work.³⁰¹ Three of the reviews were quite favorable.

Fairman, having apparently been asked to limit his review to Part V of Crosskey's work, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*,³⁰² reached a completely different judgment. He concluded that the book was "not candid and objective" and that it results had to be viewed with "the greatest skepticism and reserve."³⁰³

Part of Fairman's disagreement with Crosskey was over how the Constitution should be interpreted. Fairman was far more willing than Crosskey to depart from the text and allow a judicial development of the meaning of the text through adjudication.³⁰⁴ Crosskey insisted on looking to contemporary sources to determine the original meaning of the text.³⁰⁵ Fairman devoted most of his thirty-eight page review of Crosskey's work to the single question of whether *Barron v.*

299. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 17 (1982).

300. *Id.* at 15.

301. Abe Krash, *A More Perfect Union: The Constitutional World of William Winslow Crosskey*, 21 U. CHI. L. REV. 1 (1953); Charles E. Clark, *Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins*, 21 U. CHI. L. REV. 24 (1953); Charles Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. CHI. L. REV. 40 (1953); Walton H. Hamilton, *The Constitution—Apropos of Crosskey*, 21 U. CHI. L. REV. 79 (1953).

In addition to these four reviews, the INDEX TO LEGAL PERIODICALS, AUGUST 1952 TO JULY 1955, at 849 (Dorothea A. Flaherty ed., 1955), lists thirty reviews of Crosskey's work. Abe Krash, who studied under Crosskey at the University of Chicago, returned to this subject in 1984, noting that it was "difficult to recall any book . . . on a legal subject . . . published in the last fifty years which occasioned such rancorous controversy and which evoked such profoundly divergent views." Abe Krash, *The Legacy of William Crosskey*, 93 YALE L.J. 959, 960 (1984) (book review) [hereinafter *The Legacy of William Crosskey*].

302. Fairman, *supra* note 301, at 41. Fairman was writing his review as early as May 1953. As if Crosskey's book was a matter they had discussed before, Fairman wrote Frankfurter about the Chicago Symposium: "Crosskey is very much with me." Letter from Charles Fairman to Felix Frankfurter (May 20, 1953) (on file with Harvard Law School).

303. Fairman, *supra* note 301, at 78.

304. *Id.* at 40-41.

305. But Crosskey rejected the Federalist Papers and Madison's notes of the Constitutional Convention as reliable sources. Indeed, he accused Madison of falsifying his notes. WILLIAM W. CROSSKEY, *THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1012 (1953).

Baltimore,³⁰⁶ which held that the Bill of Rights did not apply to the states, was incorrectly decided as Crosskey claimed.³⁰⁷

Following a procedure similar to that used in his Stanford article on the Fourteenth Amendment,³⁰⁸ Fairman examined the state ratification conventions of the United States Constitution, the provisions of the Bill of Rights, and post-Bill of Rights actions by various states, concentrating upon instances in which they did not honor the Bill of Rights in their own state proceedings. This is one of Fairman's most powerful writings and, when read in conjunction with Chief Justice Marshall's opinion in *Barron* and the legislative history,³⁰⁹ is persuasive as to the correctness of the *Barron* decision.

While most of Fairman's article was written in the same scholarly, temperate tone as his 1949 Stanford piece, at times it is surprisingly harsh.³¹⁰ In the course of his review, Fairman accused Crosskey of "lacking candor" and failing to act with "fundamental fairness,"³¹¹ not being "frank,"³¹² "suppressing" evidence contrary to his views,³¹³ and

306. 32 U.S. (7 Pet.) 243 (1833).

307. It is not entirely clear why Fairman chose to focus upon this largely settled claim. He stated only that "[i]t seemed wise to select" this aspect for discussion. Fairman, *supra* note 301, at 43. It may be that Fairman felt that the Fourteenth Amendment debate was "moot" after his "definitive" work in Stanford's Law Review, and therefore Crosskey's claim could prevail, if at all, only by a reversal of *Barron*. But, in the modern reader's eye, the *Barron* argument is the weaker of Crosskey's views. Read in this light, it is possible that Fairman focussed upon the *Barron* argument because he viewed it as Crosskey's most vulnerable point.

It may also have been that Crosskey's conclusion on *Barron v. Baltimore* was an anathema to Fairman because of Fairman's dislike of the jury-related provisions themselves and because it would strengthen Justice Black's views in *Adamson*.

308. Compare Fairman, *supra* note 301 with Fairman, *supra* note 206 (Stanford article).

309. See Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301.

310. This may be in response to Crosskey's harsh words. Crosskey treated Fairman's 1949 Stanford article only in a footnote. WILLIAM W. CROSSKEY, II POLITICS AND THE CONSTITUTION 1381 n.11 (1953). Crosskey questioned the "adequacy" and the "handling" of evidence by Fairman. Crosskey termed Fairman's evidence "illegitimate" and then, later, "doubly illegitimate." *Id.*

Even one of Crosskey's admirers commented upon his own language stating that [Crosskey] "has seemingly courted opposition by the truculence with which he presents his views and the virulence of his condemnation of the politicians." Clark, *supra* note 301, at 27; see also *id.* at 28 (speaking of Crosskey's "combateness" and his making the disputes between different historic actors "so personal").

The *London Times Literary Supplement* described Crosskey's work as "contentious and pugnacious." *The American Constitution*, THE TIMES LITERARY SUPPLEMENT (London) Jan. 8, 1954, at 27.

311. Fairman, *supra* note 301, at 75.

312. *Id.* at 50.

313. *Id.* at 51; see also *id.* at 58 (implying suppression).

not being "candid and objective."³¹⁴ Further, there are a number of passages in which Fairman is strikingly condescending.³¹⁵

Though the substance of Fairman's critique is beyond the scope of this inquiry, two matters on the manner in which Fairman made his critique merit comment. First, following Frankfurter's lead in claiming that the Fourteenth Amendment application of the Bill of Rights had been supported in the Supreme Court only by Justice Harlan, Fairman wrote, "either the Justices from 1873 on down—the whole lot of them, except Harlan, J.—or else Mr. Crosskey, will be found to have fallen into error that is 'remarkable in the highest degree.'"³¹⁶

Of course, by limiting his consideration to the year of the *Slaughter-House Cases*³¹⁷ and to Supreme Court cases, Fairman was able to avoid acknowledging that the two earliest cases interpreting the Fourteenth Amendment held that it incorporated the Bill of Rights³¹⁸ and to keep from emphasizing Justice Bradley's change in position on that issue.

However, Frankfurter was able to state that claim with accuracy only because he excluded any discussion of the Privileges and Immunities Clause and focused exclusively on the Due Process Clause.³¹⁹ Fairman's claim was clearly erroneous because he articulated no due process limit in his claim.³²⁰

Second, Fairman was unforgiving in his insistence that *Barron* was not only the correct decision, but also the only rational possibility.

314. *Id.* at 72.

315. "What others have found obscure, Mr. Crosskey may suddenly pronounce crystal clear, so that all aids to interpretation are cut off." *Id.* at 44. "He who would keep up with Mr. Crosskey's argument would better be sharp." *Id.* "These New Hampshire statesmen . . . evidently didn't know Mr. Crosskey's 'eighteenth century constructionary rules.'" *Id.* at 50. "One might escape [the circularity of the argument found by Fairman] by saying, as an act of faith, that Mr. Crosskey and such as may agree with him are the only ones who know what the Bill of Rights really means!" *Id.* at 72.

316. *Id.* at 43 (footnote omitted).

317. 83 U.S. (16 Wall.) 36 (1873).

318. See *supra* note 39.

319. *Adamson v. California*, 332 U.S. 46, 59-68 (1947) (Frankfurter, J., concurring).

320. It is ironic that in an article where Fairman takes Crosskey to task for the omission of items which may or may not have been known to Crosskey, Fairman makes such an obvious mistake on a matter with which he should have been so familiar. On the other hand, those matters with which we are most familiar are those we are least likely to read to confirm our recollection and it is entirely possible Fairman simply remembered Frankfurter's point, without remembering the context well-known to both Frankfurter and Fairman. It is also possible that Fairman was so exasperated by having to address Crosskey's research that he simply was not at his best. Further, Fairman may have been writing under a deadline set for the Symposium. On another occasion, Fairman complained to Frankfurter that he did not like to write under the pressure of a deadline. Letter from Charles Fairman to Felix Frankfurter (Feb. 7, 1955) (on file with Library of Congress).

In reaching this conclusion, Fairman ignored the opinion of William Rawle, a respected authority relied upon by Crosskey.

Rawle was a significant and respected lawyer in his own time.³²¹ He was sought out by President Washington to be the first Attorney General, a position he declined.³²² He later served as the U.S. District Attorney for Philadelphia for eight years.³²³ Justice Story wrote favorably of Rawle's ability as an advocate.³²⁴ Rawle's treatise was the first one on the Constitution of the United States and was adopted as a textbook by many "institutions of learning."³²⁵ Thus, Crosskey was not relying upon the interpretation of an obscure or eccentric person. The fact that such an eminent practitioner, scholar and intellectual as Rawle should have believed that amendments two through eight applied to the states supports the plausibility of the argument, even if one ultimately rejects it as incorrect.

Further, the plausibility of Crosskey's claim had been supported by Fairman's own prior research which indicated that many lawyers, judges, and other prominent people in the 1860s were unaware of *Barron* and thought that the Bill of Rights applied to the states.³²⁶ For one who was concerned about offering an "objective" study to the

321. Rawle was educated in the Middle Temple in London and admitted to the bar in Philadelphia in 1783. WHO WAS WHO IN AMERICA, HISTORICAL VOLUME, 1607-1896, at 504 (1967). In addition to serving in the Pennsylvania legislature (1789), Rawle was active in a number of intellectually oriented organizations. *Id.* Rawle was a Trustee of the University of Pennsylvania (1795-1835); a member of Philadelphia Society for Promoting Agriculture (1805-?); a founder of the Pennsylvania Academy of Fine Arts (1805); a director of the Library Company of Philadelphia; a founder of the Society for the Promotion of Legal Knowledge and Forensic Elegance (1820); Chancellor of the Society Association of Members of the Bar (1822); and 1st President of the Historical Society of Pennsylvania. *Id.* In 1833, Rawle was appointed to a 3-person Commission to revise the Pennsylvania civil code. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 528 (1912).

322. DAVID P. BROWN, EULOGIUM UPON WILLIAM RAWLE 15 (1837).

323. WHO WAS WHO IN AMERICA, *supra* note 321, at 504.

324. WILLIAM W. STORY, THE LIFE AND LETTERS OF JOSEPH STORY 163 (1971).

325. *Id.* at 38.

326. For example, Fairman quoted an exchange between Representative and former Judge Robert S. Hale indicating that while Fourteenth Amendment author John Bingham was aware of *Barron* and its effect, Judge Hale was unaware of *Barron's* existence and thought the Bill of Rights applied to the states. Fairman, *supra* note 206, at 29-34. Further, in analyzing the debates at the Nevada Constitutional Convention of 1864, Fairman noted that an individual delegate had acted as if the Fifth and Seventh Amendments applied to the states. According to Fairman, "[h]ere is a reminder, at a moment when the Fourteenth Amendment was not even conceived, that men might never have heard of *Barron v. Baltimore* and might read the federal Bill of Rights as applying to the state as well as the Federal Government." *Id.* at 102 (footnote omitted).

One year before Fairman's Chicago article, Howard Graham publicly identified a case in Illinois which indicated that "the whole Illinois Supreme Court [was] apparently unaware" of *Barron* and indicated that the Bill of Rights was applicable to the states. Howard J. Graham, *Procedure to Substance, Extra-Judicial Rise of Due Process, 1830-1860*, 40 CAL. L. REV. 483, 487 (1952) (citing and quoting *Rhinehart v. Schuyler*, 7 Ill. 375, 414 (1845)).

public, and not "a brief,"³²⁷ Fairman's certitude on this question is puzzling.

Though Frankfurter read Fairman's review of Crosskey's work in the original issue of the *University of Chicago Law Journal*, it was not until after he had received a reprint of Fairman's critique that he expressed his "deep appreciation for this new manifestation by you of scholarship at its best."³²⁸ While Frankfurter was "edified" by Fairman's performance, he was "depressed by some of the arrogant dogmatism and intellectual cowardice of the other reviewers."³²⁹ Frankfurter's letter ended with the hope "that your Bradley is progressing."³³⁰

An intriguing aspect of the Crosskey/Fairman debate was the view of this dispute as part of a larger dispute between Harvard and Yale.³³¹ Fairman, with his close connections to Harvard, was the only critical reviewer of Crosskey in the Chicago symposium, while favorable reviews came from Judge Charles E. Clark, the former Dean of Yale School of Law,³³² and Walton H. Hamilton, the Southmayd Professor Emeritus of Law at Yale.³³³

Even at Crosskey's death in 1968, his former colleague on the University of Chicago faculty, Malcolm P. Sharp, claimed that Crosskey's book "annoyed" Harvard and Columbia because the professors there "could not understand it" and that Crosskey's findings were "so startling, at least at Harvard, that they apparently elude the unsophis-

For a modern summary of the extent to which others reached conclusions contrary to *Baron*, both before and after it was issued, see Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1203-12 (1992).

327. Fairman, *supra* note 301, at 51; see also letter from Charles Fairman to Felix Frankfurter (Jan. 13, 1952) (on file with Harvard Law School) (lamenting that an unidentified speaker at the Vanderbilt symposium had accused Fairman's Stanford article of being a "brief").

328. Letter from Felix Frankfurter to Charles Fairman (Nov. 3, 1953) (on file with Harvard Law School).

329. *Id.* Earlier Frankfurter wrote to Paul Freund concerning Fairman's review, concluding that "[i]f the world of scholarship had a rigorous code of honor, that book would . . . find a permanent place on the scrap-heap." Letter from Felix Frankfurter to Paul A. Freund (Oct. 14, 1953) (on file with Library of Congress).

330. Letter from Felix Frankfurter to Charles Fairman (Nov. 3, 1953) (on file with Harvard Law School).

331. Stanley Katz quoted Henry Hart's review, *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456 (1954), in his review of the Harvard/Yale situation for the first Crosskey lecture. Stanley H. Katz, *William Winslow Crosskey*, 19 LAW SCH. REC. 20, 21 (1972).

332. 4 WHO'S WHO IN AMERICA, 1961-1968, at 174 (1968).

333. Hamilton, *supra* note 301, at 79, n.+.

The third favorable reviewer, Abe Krash, had been Crosskey's student at the University of Chicago.

ticated reader.”³³⁴ In contrast, Sharp indicated that the book’s publication “delighted” Yale.³³⁵

By November 18, 1953, Fairman received the entire issue of the Chicago symposium. Apparently upset by the praise for Crosskey, Fairman complained to Frankfurter that this was “exactly what I had foreseen.”³³⁶

In response to the fact that Crosskey’s undergraduate and law degrees were from Yale,³³⁷ Fairman resurrected a slur on Yale which he indicated he was told thirty years prior. He noted that Harvard had “veritas” on its seal and Yale had “lux et veritas.” Translating the Latin into French and then into English,³³⁸ Fairman stated Harvard was dedicated to truth but that at Yale truth was a luxury.³³⁹ “So far as Yale Law School is concerned, that, to me, seems true. For years the place has fostered gutter urchins, exhibitionists, slight of hand performers—in my humble opinion.”³⁴⁰

In a December 28, 1953 letter, Frankfurter asked if there had been any “aftermath” to Fairman’s review of Crosskey’s book.³⁴¹ Fairman related that while at the AALS Conference in Chicago he asked Professor Philip Kurland if he should expect hostility from the University of Chicago law faculty and was told no. According to Fairman this appeared to be true.³⁴²

Fairman related that during the course of the convention he saw Professor Crosskey once or twice, recognized his name on his name tag and assumed that Crosskey recognized Fairman’s name on his

334. Malcolm P. Sharp, *The Master*, 35 U. CHI. L. REV. 238, 242 (1968); see also Charles O. Gregory, *William Winslow Crosskey—As I Remember Him*, 35 U. CHI. L. REV. 243, 245 (1968) (“so cold-shouldered as he was by the Harvard people”).

The reference to Columbia was probably a response to Columbia Law School Professor Julius Goebel’s critical review of Crosskey’s work. See Julius Goebel, Jr., *Ex Parte Clio*, 54 COLUM. L. REV. 450 (1954).

335. Sharp, *supra* note 334, at 238.

336. Letter from Charles Fairman to Felix Frankfurter (Nov. 18, 1953) (on file with Library of Congress).

337. AALS DIRECTORY OF LAW TEACHERS 110 (1961) (A.B. 1923; LL.B. 1926).

338. Letter from Charles Fairman to Felix Frankfurter (Nov. 18, 1953) (on file with Library of Congress) (“la verité c’est une affaire de luxe!”).

339. I am grateful to David C. Jamison, Sr. Vice President and Provost of The University of Akron and a member of the adjunct faculty of the School of Law, for his assistance in reading Fairman’s handwriting and translating Fairman’s French.

340. Letter from Charles Fairman to Felix Frankfurter (Nov. 18, 1953) (on file with Library of Congress).

341. Letter from Felix Frankfurter to Charles Fairman (Dec. 28, 1953) (on file with Harvard Law School).

342. Letter from Charles Fairman to Felix Frankfurter (Jan. 23, 1954) (on file with Library of Congress) (“& so it appeared”).

name tag, "but there seemed no purpose in seeking personal acquaintance."³⁴³

Fairman indicated that *Stanford Law Review* had offered Crosskey an opportunity to reply to Fairman and concluded, "I believe he can't better his position by any further explanation."³⁴⁴ Still, Fairman could not help but relate to Frankfurter the following account of Fairman, Thomas Reed Powell and Second Circuit Judge Charles E. Clark in a lounge at the AALS gathering. "Reed made quite a crack at the Crosskey book. Judge Clark seemed to wince, but didn't offer battle."³⁴⁵

Continuing their mutual fascination with Crosskey, Frankfurter responded by making sure that Fairman had noted *The Times Literary Supplement's* "penetrating" review of Crosskey.³⁴⁶ He also praised Fairman's review of W. Shiras's biography of Justice George Shiras, Jr.³⁴⁷

In spite of Fairman's belief that Crosskey would not reply, Crosskey was not one to take Fairman's critique in silence. The autumn 1954 issue of the *Chicago Law Review* brought a 143-page reply to Fairman's book review and also to Fairman's 1949 Stanford article.³⁴⁸ This article was divided into two parts. Part I consisted of 119 pages supporting Crosskey's views on the incorporation of the Fourteenth Amendment and Part II contained twenty-five pages on *Barron*.³⁴⁹

Crosskey indicated that much of Part I was the result of research which he had done for the legislative history of the Fourteenth Amendment, but decided not to include in his book.³⁵⁰ In many ways, Crosskey met Fairman on his own ground. He placed the views of Congressman Bingham³⁵¹ and Senator Howard³⁵² in context, sug-

343. *Id.*

344. *Id.*

345. *Id.*

346. Letter from Felix Frankfurter to Charles Fairman (Jan. 29, 1954) (on file with Library of Congress). This review was apparently *The American Constitution*, THE TIMES LITERARY SUPPLEMENT (London), Jan. 8, 1954, at 27.

347. Letter from Felix Frankfurter to Charles Fairman (Jan. 29, 1954) (on file with Library of Congress). See Charles Fairman, Book Review, 63 YALE L.J. 431 (1954) (reviewing GEORGE SHIRAS, III, JUSTICE GEORGE SHIRAS, JR., OF PITTSBURGH, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, 1892-1903; A CHRONICLE OF HIS FAMILY, LIFE, AND TIMES (1953)).

Fairman indicated that Shiras was neither a "great" nor a "colorful" Justice, but that "[w]e are the wiser for this biography which treats him respectfully and affectionately, but without any excessive claim." *Id.* at 431, 434.

348. William W. Crosskey, *Charles Fairman, 'Legislative History,' and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

349. *Id.*

350. *Id.* at 2 n.6.

351. *Id.* at 11-20, 66-69, 88-100.

gested that Fairman's survey of newspapers had been inadequate and was far more favorable than Fairman suggested,³⁵³ and argued that many of the conflicts which Fairman found between state constitutions or statutes and the Bills of Rights did not exist or did not have the interpretative power Fairman claimed for them.³⁵⁴ On the question of *Barron*, Crosskey responded point-by-point to Fairman's critique.³⁵⁵

Crosskey's article was, for the most part, written in a temperate and scholarly manner. But, just as Fairman had harsh words for Crosskey, Crosskey had harsh words for Fairman. These included references to "[t]he illegitimacy of Mr. Fairman's whole effort",³⁵⁶ his "mishandling of the evidence,"³⁵⁷ his misconstruction of evidence,³⁵⁸ the "patent absurdity of the proposition he sought to establish,"³⁵⁹ as well as rather contemptuous statement that he had originally felt no need to counter Fairman's 1949 Stanford article because "Mr. Fairman's article was its own refutation."³⁶⁰

Though the Crosskey/Fairman writings on *Barron* have been largely ignored, Fairman's 1949 Stanford article and Crosskey's 1954 University of Chicago article were considered, as late as 1968, to be "the only full-dress discussion[s] of [the incorporation debate] in legal periodicals" and "far more comprehensive than any of the United States Supreme Court cases on this point."³⁶¹

Fairman apparently made a trip to Washington and visited with Justice Frankfurter in early May 1954. Frankfurter probably gave him a copy of the Court's opinion in *Barsky v. Board of Regents*³⁶² in

352. *Id.* at 77-84.

353. *Id.* at 100-04.

354. *Id.* at 104-14.

355. The exchange was fairly evenly balanced in terms of length. Fairman's initial article contained thirty-eight pages on *Barron*. Crosskey's reply on this point was twenty-five pages. The same is true on the Fourteenth Amendment question. Fairman's Stanford article was 139 pages, while Crosskey's reply devoted 119 pages to the Fourteenth Amendment question.

356. Crosskey, *supra* note 348, at 10; *see also id.* at 117.

357. *Id.* at 10.

358. *Id.*

359. *Id.* at 54.

360. *Id.* at 2 n.6. Crosskey criticized Fairman in a footnote in his book. CROSSKEY, *supra* note 305, at 1381 n.11.

361. Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1, 3 (1968).

Avins himself was intimately familiar with the debates from this era, having written many articles on the Thirteenth, Fourteenth, and Fifteenth Amendments and compiled the invaluable THE RECONSTRUCTION AMENDMENTS' DEBATES (1967). In surveying the evidence on the incorporation debate, Avins found Crosskey to have had the better part of the argument. *Id.* at 11.

362. 347 U.S. 442 (1954). Dr. Barsky's medical license was suspended for six months because he refused to produce certain papers subpoenaed by a Congressional Committee.

which Justice Black and Justice Frankfurter wrote separate dissents on due process grounds.³⁶³

Frankfurter apparently asked Fairman to read his dissent to see if there were any additional legal grounds upon which Barsky's conviction could be attacked.³⁶⁴ Fairman found none, but was disturbed by Black's dissent which he apparently interpreted as a substantive due process argument. "To be willing to sit under an oak and to do what seems right and just, case by case, as complaint is made and then to repudiate Palko as an invocation of the law of nature—surely a reflective view would see that here is inconsistency."³⁶⁵ But the discussion of *Barsky* provided only an interlude from Crosskey.

Fairman was given an opportunity to reply to Crosskey's article. Fairman's response to Crosskey's reply began even before Crosskey's official publication and provides an interesting window into Fairman's relationship with Justice Frankfurter and his views of the Fourteenth Amendment.

In an August 16, 1954 letter to Frankfurter, Fairman discussed what he found in Justice Miller's papers and then moved on to a "[n]ew and less interesting topic."³⁶⁶ Fairman now acknowledged that "Crosskey was bound to make an attempted reply," because "[t]he glove has been so conspicuously left on the ground."³⁶⁷ Fairman was given an opportunity to reply to Crosskey and sent a copy of his acceptance of the invitation to Frankfurter.³⁶⁸ In sending carbon copies of part of Crosskey's reply to Frankfurter, Fairman indicated it would "spoil a day of your life."³⁶⁹

Fairman, sounding much like he was preparing the "brief" which he had previously condemned,³⁷⁰ outlined for Frankfurter the strategy

363. Justice Black's dissent seems to focus upon the lack of procedures ("not a tribunal operating within the ordinary safeguards of law"). *Id.* at 459 (Black J., dissenting). Justice Frankfurter's dissent was based more upon arbitrariness. *Id.* at 470 (Frankfurter J., dissenting) (grounds for loss of medical license must have "some relation to the qualifications," and not be based upon "grounds having no possible relation to fitness"). Thus, Black's dissent was based more upon what we would term procedural due process, while Frankfurter's was based more upon what we would term substantive due process.

Black also argued that the action was based upon an unlawful attainder published by the United State Attorney General and improperly used in the New York proceeding.

364. Letter from Charles Fairman to Felix Frankfurter (May 16, 1954) (on file with Library of Congress).

365. *Id.*

366. Letter from Charles Fairman to Felix Frankfurter (Aug. 16, 1954) (on file with Library of Congress).

367. *Id.*

368. *Id.*

369. *Id.*

370. Fairman, *supra* note 302, at 51.

of his reply to Crosskey. Fairman did not want to "leave [Crosskey] in possession of the field because so many people had been emotionally drawn to his thesis" and this "seeming flight would be hailed by many as a surrender."³⁷¹ On the other hand, Fairman concluded "[i]t would be a sad error to follow [Crosskey] once more into the bog of Congressional debates of '66."

Instead, Fairman planned to make general observations of methodology, reflect on the problems of applying the jury provisions to the states, and leave "the case, on the present record, to thoughtful readers."³⁷² Fairman asked Frankfurter for "[a]ny comments" he might have on Fairman's strategy in dealing with Crosskey.³⁷³

By August 25, 1954, Fairman had received the galleys of Crosskey's Part II and was therefore able to send a carbon copy of Part II to Frankfurter. In doing so, he indicated that he would "inflict some more unhappiness" upon Frankfurter.³⁷⁴ A note at the bottom of the August 25th letter indicated Fairman's awkwardness about sharing his ideas with Frankfurter and seeking his advice: "Destroy the papers when you've no further use for them."³⁷⁵

Again, Fairman revealed his approach to the disagreements about the Fourteenth Amendment. "It seems to me rather a matter of *public relations* than of law. I felt that to become too deeply committed would be an error. To let myself be put on the defense would be an error."³⁷⁶

Fairman appears to have followed his "public relations" plan. In the first part of his reply, Fairman responded somewhat specifically to Crosskey's view of *Barron*.³⁷⁷ But, with rare exception, he avoided the "bog" of the 1866 Congressional debates and did not confront the direct citations to the record which Crosskey provided. Instead, he summarized portions of his prior Stanford piece, which were often non-responsive.³⁷⁸ Where Fairman did make specific responses, he went too far.

371. *Id.*

372. Letter from Charles Fairman to Felix Frankfurter (Aug. 16, 1954) (on file with Library of Congress). This same letter indicated that Fairman was in Washington D.C. for a fifteen-day special assignment for the Judge Advocate General Corps and that he would work on his reply to Crosskey in the evening. *Id.*

373. *Id.*

374. Letter from Charles Fairman to Felix Frankfurter (Aug. 25, 1954) (on file with Library of Congress).

375. *Id.*

376. *Id.* (emphasis added).

377. Charles Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954).

378. *Id.* at 151-54.

For example, to help clarify the meaning of Bingham's shortest speech upon any of his Fourteenth Amendment proposals, Crosskey suggested that Bingham "may very well simply have held the document up."³⁷⁹ While that was a possible action, Fairman was absolutely correct when he noted that Crosskey had no evidence this actually happened.

Not satisfied with that point, Fairman tried to make it appear that Crosskey's hypothetical was improbable: "Did so intelligent a man have to keep the Constitution with him in order to quote its phrases?"³⁸⁰ This reflected the lack of breadth of Fairman's reading. At least in the early days of the Republic every Congressman had a printed copy of the Constitution on his desk in the House.³⁸¹ A source available to Fairman indicated that, at least in the 1840s, Bingham did carry a "pocket edition" of the Constitution with him to use in his speeches.³⁸² Reading from constitutional treatises in Congress was not uncommon.³⁸³ The balanced point to be made was that we simply do not know what, if anything, Bingham held in his hand dur-

379. Crosskey, *supra* note 348, at 28. Much of Fairman's Fourteenth Amendment interpretation turned upon Fairman's claim that when John Bingham referred to the Bill of Rights, he was not referring to the first eight or the first ten amendments to the Constitution. Rather, Fairman claimed Bingham was referring only to the Fifth Amendment and Article IV, Section 2 of the Constitution as "the" Bill of Rights. This was based upon a short speech on February 26, 1866, where Bingham, after discussing the Fifth Amendment and Article IV, Section 2, proceeded to talk about "this" (rather than "the") Bill of Rights.

As Crosskey pointed out, if Bingham had held a copy of the Constitution in his hand and was referring to it, then Fairman's interpretation would not stand, just as it would not if there was an error of speech or transcription which rendered the word "the" as "that." See Aynes, *supra* note 39, at 68 n.61.

In any event, it is difficult to understand how Fairman could have held this view if he read the debates of Congress for the next two days. On February 27, 1866, in an exchange with Bingham, Representative Robert S. Hale indicated that the first ten amendments "constitute the bill of rights." CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866). The following day, Bingham gave his much quoted speech about overruling *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (just compensation clause, Fifth Amendment), and *Livingston v. Moore*, 32 U.S. (7 Pet.) 469 (1833) (Seventh Amendment jury case). This was a speech which was carried in its title when it was published for mass distributions "in support of the proposed amendment to enforce the [B]ill of [R]ights." Aynes, *supra* note 39, at 72.

Bingham's other speeches make it unmistakable either that Fairman's reading of this speech was wrong or Bingham changed his views in later speeches. For my own analysis of the most reasonable reading of this speech and its context see Aynes, *supra* note 39, at 68 n.61.

380. Fairman, *supra* note 377, at 152. This may have been a subtle reference to Justice Black who has been to carry the Constitution with him. NEWMAN, *supra* note 157, at 568.

381. 22 ANNALS OF CONGRESS 627 (1853).

382. WALTER G. SHOTWELL, DRIFTWOOD 81 (1927) (giving these words as Bingham's: "Almost everything was reduced to a Constitutional question, in those days [1840s]. I read from a pocket edition I carried . . .").

383. CONG. GLOBE, 42nd Cong., 1st Sess. 152 (1871) (Representative Garfield: "I hold in my hand Paschal's annotated edition of the Constitution . . ."); see also CONG. GLOBE, 41st Cong., 2d Sess. 1363 (1870) (Senator Trumbull: "I read from Pomeroy's Constitutional Law, a recent and valuable work.").

ing that speech. But Fairman was overreaching when he tried to assert that it was improbable that Bingham held a copy of the Constitution.³⁸⁴

A similar difficulty is evident in Fairman's charge that Crosskey "cheerfully goes along with rewriting Article IV, Section 2," without recognizing that he, Fairman, was doing the same.³⁸⁵ Again, Fairman returned Crosskey's harsh language in kind.³⁸⁶

384. Ultimately, of course, Fairman was simply wrong in his statement of Bingham's views. Aynes, *supra* note 39.

The question of how Crosskey could be generally correct on his Fourteenth Amendment research and generally wrong on his Commerce Clause/judicial review research is an intriguing one.

Crosskey rejected the plain meaning of the Constitution and denied the authenticity and authority of Madison's account of the history of the Constitutional Convention. While Crosskey extensively used contemporary sources, he did so only in an attempt to contradict the plain meaning of the Constitution and its legislative history.

When he examined the Fourteenth Amendment, however, Crosskey took a completely different approach. He accepted the plain meaning of the amendment and relied upon the legislative history in the *Congressional Globe*. In accepting these traditional sources of authority, Crosskey worked in a normal legal tradition and reached a reasonable conclusion.

It is ironic that even though Fairman and Crosskey were each other's nemesis, Fairman's work was the mirror image of Crosskey's work. On the question of *Barron v. Baltimore*, for example, Fairman was successful because he accepted the logic of the *Barron* decision, reached a conclusion consistent with the language of the Constitution, and did not challenge conventional sources of legislative history.

On the other hand, Fairman seems to have adopted much of Crosskey's Commerce Clause approach in his own Fourteenth Amendment research. Rather than looking to the plain language of the amendment and relying upon a reasonable reading of the Congressional debates, Fairman attempted to discredit traditional sources of legislative history (the views of the author of the amendment in the House and its Floor Manager in the Senate), creating a confused and incoherent account of the debates which allowed him to undermine the plain meaning of the amendment.

Thus, the enduring portions of Fairman's and Crosskey's works can be identified by the instances in which they used traditional sources of legislative history to create a coherent reading of the purpose of portions of the Constitution which is consistent with the plain meaning of the text. They failed when they attempted to defeat the plain meaning of the text by undermining traditional sources of legislative history.

385. Article IV, Section 2 reads, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2.

Bingham treated the clause as if there was an ellipsis to explain the meaning of "citizens" the second time it appears. The first time it appears, it is modified by "of each State." The second time, it stands alone. Bingham specifically said that there was an ellipsis and read the words "of the United States" into the clause. CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859). Crosskey endorsed that view as Bingham's view and that of Howard and other framers. Crosskey, *supra* note 348, at 12-13.

Fairman read the clause as "Citizens OF the several states" as Justice Miller read it in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), rather than as "Citizens IN the several states." It is revealing that Fairman acted as if he were reading Article IV, Section 2 without any changes and fails to acknowledge his change of the word "of" to "in."

386. "[T]his prepossessed obtuseness to the elementary requirements of scholarly candor is the most significant feature of [Crosskey's] work." Fairman, *supra* note 377, at 145. "If nothing of real moment were involved in all this, one would gladly avoid irritating Mr. Crosskey, as Polonius humored Hamlet: the cloud is indeed like a camel . . . backed like a weasel . . . and very like a whale. But this is a *constitution* we are expounding." *Id.* at 152.

Having to think about these matters again, to deal with one whom Fairman thought was clearly wrong, and to be confronted on his own evidence, was something which Fairman did not enjoy. Indeed, it is difficult to read the Fairman/Frankfurter correspondence of this period without recalling Fairman's own words concerning Justice Miller and wondering whether they did not apply to Fairman as well. "We seek to remake the world after our own mental images. When a man is confident of his intellectual processes and ambitious to see his conclusions materialized he is impatient with narrow-visioned opposition."³⁸⁷

Fairman's exasperation was illustrated in the conclusion of his August 25, 1954 letter to Frankfurter where he indicated that he mailed his reply "and shall put it out of mind, to get on with more interesting things."³⁸⁸ Though the letter is apparently unavailable, it appears that Frankfurter responded with encouraging words to Fairman. In Fairman's October 19, 1954 letter he thanked Frankfurter for his note in reference to "the sorry Crosskey business. It gave me real comfort"³⁸⁹

XIV. LIFE AFTER CROSSKEY

Fairman was able to move beyond Crosskey and work on other projects. Frankfurter was no doubt pleased to see Fairman's sketch of Justice Bradley as part of a collection of biographical sketches which was published in 1956.³⁹⁰ In this work, Fairman had only high praise for Justice Bradley.³⁹¹ The question of what earned Bradley that

387. FAIRMAN ON MILLER, *supra* note 54, at 425; *see also* Fairman, *supra* note 31, at 41.

388. FAIRMAN ON MILLER, *supra* note 54, at 425

389. Letter from Charles Fairman to Felix Frankfurter (Oct. 19, 1954) (on file with Library of Congress). The same letter indicated that a "thought" Frankfurter sent to Fairman was not received in time for use in the response to Crosskey, but was used by Fairman in a later speech on Justice Bradley. *Id.*

390. MR. JUSTICE (Allison Dunham & Philip B. Kurland eds., 1956; rev. ed. 1964). The sketches were of John Marshall, Roger B. Taney, Joseph P. Bradley, John Marshall Harlan, Oliver Wendell Holmes, Charles Evans Hughes, Louis D. Brandeis, George Sutherland, Harlan F. Stone, Benjamin N. Cardozo, Frank Murphy, and Wiley Rutledge. The sketch of Marshall was written by W. W. Crosskey.

391. *Mr. Justice Bradley*, *supra* note 34, at 70 (Bradley was a "great jurist", "wise counselor," and a "great figure in the law of the Commerce Clause."). "In the vigor of his intellect, in his complete mastery of his profession, and in the wide range of his thought, Bradley was a great Justice. There have been few from whom one can learn so much." *Id.* at 71. "Bradley [was] a skeptical, tough, relentless person, pushing to the very truth and reason of things" *Id.* at 73. "[E]very period of his life was a season of greatness" *Id.* at 92. "[Bradley] ranks high among the exemplars of the Court's best wisdom." *Id.* at 93. Bradley, along with Miller and Field, was "one of the three most important figures in a crucial period of the Supreme Court's history. They were the giants of those days." *Id.* at 70.

praise provides insight into Fairman's view and, perhaps, Frankfurter's.

Though Fairman was not explicit about the basis of his judgment, his article suggested that he valued Bradley's personal traits: a Horatio Alger type of growth from apparent poverty,³⁹² a strong desire for an education,³⁹³ and an ability to act with judicial detachment—to decide cases against the interest of railroads even though he had been a railroad lawyer.³⁹⁴ It was these cases, Bradley's recognition of the public's right to regulate corporations, and Bradley's Commerce Clause cases which Fairman valued most.³⁹⁵

While Fairman gave an account of Justice Bradley's lower court opinion in the *Slaughter-House Cases* and even quoted a portion in response to his own question, "[w]hat were the essential privileges guaranteed by the new amendment?,"³⁹⁶ he omitted any reference to Bradley's support in that very opinion for the proposition that the Fourteenth Amendment made the Bill of Rights enforceable against the states.³⁹⁷

Given his recent dispute with Crosskey, and the unresolved nature of the incorporation issue before the Supreme Court, discussion of this aspect of Bradley's opinion would have been particularly relevant. But perhaps the most important clue to Fairman's thinking is his conclusion that the greatest quality "to be expected" of a Justice of the United States Supreme Court is "statesmanship" because this is its

392. Fairman implies a comparison between Bradley's ascent and Abraham Lincoln's ascent. *Id.* at 69.

393. *Id.* at 73.

394. *Id.* at 88-89. But note the intriguing reference in John P. Stockton's letter to Bradley, March 16, 1870, which can be read to imply that some of the "national" railroad interests were opposed to Bradley and raised the possibility that the interests of certain "national" railroads may have been different than that of the Amboy and Camden railroad for which Bradley worked. Charles Fairman, *Mr. Justice Bradley*, 54 HARV. L. REV. 977 (1941).

395. *Mr. Justice Bradley*, *supra* note 34, at 70. (Bradley was a "great figure in the law of the Commerce Clause.")

396. *Id.* at 82.

397. See *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 652 (C.C.D. La. 1870) (No. 8,408) (police regulations "cannot [interfere with liberty of conscience, or with the entire equality of all creeds and religions before the law. Nor can they] . . . interfere with the fundamental privileges and immunities of American citizens."). In his Supreme Court dissent, Bradley wrote that the privileges and immunities of U.S. citizens were "specified in the original Constitution, or in the early amendments of it." *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 118 (1873) (Bradley, J., dissenting). Bradley specifically listed trial by jury, free exercise of religious worship, free speech, free press, the right of assembly, the prohibition against unreasonable searches and seizures, and due process as privileges and immunities. *Id.*

"highest" function.³⁹⁸ Bradley ranked so high in Fairman's estimation because he was an exemplar of "the Court's best wisdom."³⁹⁹

In what appears to be an irrelevant paragraph, but may, in fact, be a veiled reference to Crosskey, Fairman praised the "severe tests" the law imposed upon "the most reliable evidence" and then complained about how "credulous" lawyers are in other contexts. "One writes a book, and lo, he becomes an authority. How often a court is invited to accept some professor's statement about the past, based, perhaps, upon shaky evidence that would never stand up against rigorous examination."⁴⁰⁰

On October 9, 1954, Justice Robert Jackson, a friend of both Fairman and Frankfurter, died. On February 7, 1955, Fairman sent Frankfurter an advanced copy of his memorial piece on Justice Jackson⁴⁰¹ and asked for Frankfurter comments on that article.⁴⁰² Frankfurter apparently replied, resulting in at least one correction to Fairman's manuscript.⁴⁰³

Properly eschewing any "critical appraisal" of Justice Jackson,⁴⁰⁴ Fairman's memorial was a fitting and appropriate tribute to an Associate Justice of the Supreme Court who had passed away. For purposes of this article, the most interesting note in the tribute is found on a single page where Fairman likened Justice Jackson to Justice Miller—great lawyers who "developed [their] powers in a small town"—and to Justice Bradley, in that his commerce power cases made him "pre-eminent in his day."⁴⁰⁵ This was the highest praise Fairman could give.

In 1955, Fairman accepted an offer to teach at Harvard Law School. Justice Black later told biographer Roger K. Newman that he "believed Frankfurter 'got' Fairman to write [his 1949 Stanford] article and that Fairman did it 'to get the job at Harvard.'"⁴⁰⁶

398. *Mr. Justice Bradley*, *supra* note 34, at 92.

399. *Id.* at 93.

400. *Id.* at 72.

401. Letter from Charles Fairman to Felix Frankfurter (Feb. 7, 1955) (on file with Library of Congress); *see* Fairman, *supra* note 66.

402. Letter from Charles Fairman to Felix Frankfurter (Feb. 7, 1955) (on file with Library of Congress).

403. *See* letter from Charles Fairman to Felix Frankfurter (Mar. 6, 1955) (on file with Library of Congress) ("Of course I'm very grateful for your reaction to the piece on Jackson, J. I have corrected the slip on my reference to Screws . . .").

404. Fairman, *supra* note 401, at 445.

405. *Id.* at 464.

406. NEWMAN, *supra* note 157, at 356-57.

It was natural for Justice Black to have suspected that Frankfurter prodded Fairman to write his rebuttal to Black's *Adamson* dissent,⁴⁰⁷ but it now appears that Fairman wrote the article on his own initiative. While Fairman may have been ambitious and it is true that authoring such a successful article may well have assisted him in obtaining his position at Harvard, there is nothing to suggest that when he wrote this particular article, it would have advanced his career any more than any of his other articles.⁴⁰⁸

On June 15, 1956, Fairman wrote about his writing of the foreword to the *Harvard Law Review*.⁴⁰⁹ The idea he wanted to convey was that "if we will only relax [and] listen, the history of this country will show the values that have proved of enduring validity—[and] that doubtless will continue to be valued, notably, equal protection."⁴¹⁰ Though Fairman admitted that there was nothing "profound" about the idea, he nevertheless found it hard to elaborate upon it. "The long view is not familiar to the run of people. I think so much of the problem of Miller, Bradley, etc., that now and then I catch myself dating letters in the 19th Century!"⁴¹¹

Frankfurter's response showed him taking the initiative to try to help Fairman on his Harvard piece. "Why don't you try out on me, with some particularity, the thought with which you are carrying your-

407. Such a view could begin, of course, with a simple knowledge of the relationship between Justice Frankfurter and Charles Fairman. This could have logically led Justice Black to be suspicious about any work of Fairman's which supported Frankfurter and criticized Black. Moreover, as noted previously, there was a decided change in Fairman's writing style in the Stanford piece, an air of ambiguity and innuendo in contrast to his clear and forthright style in previous writings. Fairman was not shy about mentioning Justice Black's name in his article. But even though citations to Justice Frankfurter's opinion would have bolstered his own article and even though he used some of the same arguments as previously advanced by Justice Frankfurter, Frankfurter's name does not appear in Fairman's 1949 article. It would appear that Fairman was deliberately attempting to distance himself from Frankfurter in order to make his argument more effective.

Indeed, it was these circumstances which prompted me to look at the Fairman/Frankfurter correspondence. But, Black's *Adamson* dissent threatened Fairman's own view of the Constitution, the reputation of Justice Miller, who he held in high regard, and the reputation of his friend Justice Frankfurter. Beyond mere historical interest, these factors may well have produced the same results set forth above.

408. See Letter from Charles Fairman to Felix Frankfurter (Jan. 27, 1950) (on file with Harvard Law School) (this letter suggests to me that Fairman conceived of and implemented his 1949 Fourteenth Amendment article without any prompting from Justice Frankfurter).

409. Letter from Charles Fairman to Felix Frankfurter (June 15, 1956) (on file with Library of Congress); see Charles Fairman, *The Supreme Court, 1955 term—Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83 (1956).

410. Letter from Charles Fairman to Felix Frankfurter (June 15, 1956) (on file with Library of Congress).

411. *Id.* Taking "the long view" was a recurring theme of Fairman's. E.g., Granger Cases, *supra* note 34, at 657; Charles Fairman, Book Review, 49 HARV. L. REV. 166, 168 (1935).

self for the introductory little essay of H.L.R.'s review of the Supreme Court next fall."⁴¹² Frankfurter added that there was "all too little needed critique" of the Court's performance and "all too much judgment merely of the 'end-result'—a loathsome word, I suppose, because the concept behind it is loathsome."⁴¹³

Fairman's article took a somewhat different course than that outlined in his letter to Frankfurter. But this does not appear to be the result of suggestions from Frankfurter, who decided to "abstain" from comment on the draft.⁴¹⁴ Fairman referred to his work on this article in a September 16, 1956 letter to Frankfurter in which he wrote that his last two months' work had kept him "in an abnormally low state of mind—depressed by the reading" and "somewhat dispirited at the difficulty of deciding what thought to express."⁴¹⁵ Nevertheless, by the 16th Fairman had completed the project.⁴¹⁶

Frankfurter shared the view presented in Fairman's Foreword that the Court had encountered a "storm of protest" as a result of its opinion in *Brown v. Board of Education*.⁴¹⁷ Because these protests were "unjust" they were doing "enormous public harm."⁴¹⁸ Unlike Herbert Wechsler's famous article,⁴¹⁹ Fairman did not focus on the process of the court or the legal arguments directly before the Court. Rather, his attention was to the underlying source of the protests themselves. Consequently, he responded to the public criticism by political leaders as expressed on the floor of Congress, in the news media, and in resolutions from the legislatures of five Southern states.⁴²⁰ Because these criticisms were couched in legal terms, Fair-

412. Letter from Felix Frankfurter to Charles Fairman (June 21, 1956) (on file with Library of Congress).

413. *Id.*

414. Letter from Felix Frankfurter to Charles Fairman (Aug. 23, 1956) (on file with Harvard Law School). Not surprisingly, Frankfurter added, "get on with your Bradley and you will find me more articulate." *Id.*

415. Letter from Charles Fairman to Felix Frankfurter (Sept. 16, 1956) (on file with Library of Congress).

416. *Id.*; see also letter from Felix Frankfurter to Charles Fairman (Sept. 18, 1956) (on file with Library of Congress).

417. 347 U.S. 483 (1954).

418. Fairman, *supra* note 409, at 83. One of the manifestations of the harm was "a clamor to make judicial service a qualification for appointments to the Court." *Id.* (footnote omitted). This would have precluded the service of most of the Justices of the time, including Justice Frankfurter. See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit Hall et al. eds., 1992).

419. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

420. Fairman, *supra* note 409, at 83.

man's response may be properly characterized as a response in law, but the overriding purpose was political.

One of Fairman's most interesting responses was his claim that section one of the Fourteenth Amendment did not contemplate a prohibition on desegregated schools. Fairman did not make fine distinctions about what the amendment did and did not contemplate.⁴²¹ The burden of his argument was much different.

Fairman pointed to section two, which provided for the reduction of representation in the House when adult males were excluded from the ballot, and to the common knowledge that African Americans were at that time excluded from the right to vote without having the state's representation reduced.⁴²² Though not put in these words, Fairman argued that if the Southern Congressmen were unwilling to follow the intent of section two by reducing their own representation, then they were estopped from arguing that the Court could follow the intent of section one in school desegregation.⁴²³

That argument appeared in a slightly different form in response to the claim that the determination of these types of matters should be left to the Congress and not judicial legislation.⁴²⁴ "[I]t would be utterly out of accord with the purpose of the 39th Congress, which framed the amendment, that the rights of Negroes should be left to the mercy of a Congress organized in disregard of section 2."⁴²⁵

In discussing the effect of past practices of segregation upon intent, the very type of argument which Fairman found so persuasive in his 1949 article on the Bill of Rights and his 1954 argument on *Barron v. Baltimore*, Fairman echoed words which Frankfurter wrote to him. "This business of going back to seek the original understanding at the

421. *Id.* at 85.

422. *Id.* at 84.

423. *Id.* at 84-85.

424. *Id.* at 84.

425. *Id.* at 85. As part of his claim that it is more appropriate to have Fourteenth Amendment rights vindicated by the Courts rather than by the "fluctuating views" of Congress, Fairman included the following statement: "As our experience with the [F]ourteenth [A]mendment has unfolded it has been the Court to which the country has looked for authentic interpretation." *Id.*

In the context of the discussion, this may be nothing more than an argument for enforcement by the Court, as opposed to by the Congress. But the terms "authentic interpretation" have a broader meaning. Especially in light of the Court's observation that the legislative history of the Fourteenth Amendment was inconclusive, see *Brown v. Board of Educ.*, 347 U.S. 483, 489 (1954) and Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955), this may have been a refinement of Justice Frankfurter's argument in *Adamson*, i.e., that legislative history is always inadequate and we can look only to "the Court" to determine the meaning of the Amendment.

time the fourteenth amendment was framed is very delicate and difficult. . . ."⁴²⁶

Fairman refined an idea expressed by the Court in *Brown* and, more recently, utilized by William Nelson.⁴²⁷ "[I]n the main, the framers did not speak to the questions we now want answered. They were concerned with their own problems as they saw them; they were not looking straight at ours of today."⁴²⁸

In responding to the precedent of *Plessy v. Ferguson*,⁴²⁹ Fairman distinguished the arguments made in *Plessy*, quoted portions of Harlan's dissent, questioned whether society would be satisfied with Booker Washington's 1895 Atlanta Exposition aspirations "for all time," and traced the Supreme Court's segregation cases up through *McLaurin v. Oklahoma*.⁴³⁰ These cases led "[e]veryone who had eyes" to know that "a quickened national conscience was being reflected in the decisions of the Supreme Court, and that *Plessy v. Ferguson* had become a very shaky precedent."⁴³¹

Finally, invoking principles articulated by the Supreme Court of North Carolina in 1949⁴³² and the example of a United States Supreme Court opinion authored by South Carolinian Justice James F. Brynes,⁴³³ Fairman argued for not being bound by "an old decision that now seemed out of accord with the enduring purpose of the Constitution."⁴³⁴ "There is nothing unusual in overruling precedents

426. Fairman, *supra* note 409, at 87; cf. Letter from Felix Frankfurter to Charles Fairman (Jan. 27, 1950) (on file with Harvard Law School).

427. WILLIAM NELSON, *THE FOURTEENTH AMENDMENT* 6 (1988).

428. Fairman, *supra* note 409, at 87. In depreciating legislative history, Fairman was rejecting Justice Black's argument that the term "person" in the Fourteenth Amendment did not include corporations, *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 83 (1938) (Black, J., dissenting), Black's incorporation argument in *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting), and the then current political attack upon the Court's decision in *Brown*.

429. 163 U.S. 537 (1896).

430. 339 U.S. 637 (1950).

431. Fairman, *supra* note 409, at 91.

432. *State v. Ballance*, 51 S.E.2d 731, 733 (1949) (quoting *Sidney Spitzer & Co. v. Commissioners*, 123 S.E. 636, 638 (1924)).

433. *Edwards v. California*, 314 U.S. 160 (1941). A portion of the *Edwards* opinion bears a close relationship to that later used in *Brown*. In overruling an 1837 decision, Justice Brynes dealt with the change in attitude. "Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.'" *Id.* at 177. In *Brown*, the Court used similar language in referring to the changes in sociology. *Brown v. Board of Educ.* 347 U.S. 483, 494 (1954) ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson* . . .").

434. Fairman, *supra* note 409, at 92. This was part of Fairman's summary of Brynes's approach to the problem in *Edwards v. California*, 314 U.S. 160 (1941), but was undoubtedly intended to apply to *Brown* as well.

in light of further study, deeper reflection, or change in circumstances.”⁴³⁵

Fairman ended with an account of those condemning segregation, beginning with President Truman’s 1948 executive order desegregating the armed forces⁴³⁶ and progressing to more recent resolutions and actions of various Christian churches.⁴³⁷ Recalling the language of his earlier letter to Frankfurter,⁴³⁸ Fairman concluded that “[i]n the long perspective, the path is plain.”⁴³⁹ Appearing to quote the words of Mississippi Senator Lamar in 1874, Fairman argued that this “great principle . . . must sooner or later be enforced, though institutions and constitutions should have to give way alike before it.”⁴⁴⁰

In its February 1957 Symposium issue the *Vanderbilt Law Review* published Charles Fairman’s article, *Samuel F. Miller, Justice of the Supreme Court, 1862-1890*.⁴⁴¹

The incorporation debate came into public view again in 1959 after the reargument of *Bartkus v. Illinois*.⁴⁴² The reason for this is not apparent. The question before the Court was whether an acquittal of the charge of bank robbery in the federal court would bar, under the

435. Fairman, *supra* note 409, at 91.

436. Exec. Order No. 9,981, 13 Fed. Reg. 4,313 (1948).

437. Fairman, *supra* note 409, at 93.

438. Letter from Charles Fairman to Felix Frankfurter (June 15, 1956) (on file with Library of Congress).

439. Fairman, *supra* note 409, at 93.

440. *Id.* at 94 (quoting 2 CONG. REC. 3411 (1874)). Fairman took great liberties in indicating that “[t]hese are the words of Senator Lamar.” *Id.* The occasion of Lamar’s speech was the death of Massachusetts Senator Charles Sumner. Fairman isolated the quotes from passages suggesting, albeit in mild, polite language, Lamar’s own disagreement with Sumner and then edited the quoted sentences themselves to remove the references indicating that Lamar was speaking of Sumner’s beliefs (“Behind all that lay for him [Sumner] . . .” and “his great principle, he held”). In this way Fairman made it appear that the ideas Lamar actually attributed to Sumner were Lamar’s own beliefs. See 2 CONG. REC. 3411 (1874).

441. Charles Fairman, *Samuel F. Miller, Justice of the Supreme Court, 1862-1890*, 10 VAND. L. REV. 193 (1957). Fairman indicated that much of what was printed here had already been published in his biography of Miller.

Other articles in that issue were: Alfred O. Canon, *Mr. Justice Rutledge and the Roosevelt Court*, 10 VAND. L. REV. 167 (1957); David G. Farrelly, *A Sketch of John Marshall Harlan’s Pre-Court Career*, 10 VAND. L. REV. 209 (1957); Robert J. Harris, *Chief Justice Taney: Prophet of Reform and Reaction*, 10 VAND. L. REV. 227 (1957); Samuel Hendel, *The ‘Liberalism’ of Chief Justice Hughes*, 10 VAND. L. REV. 259 (1957); Samuel J. Konefsky, *Holmes and Brandeis: Companions in Dissent*, 10 VAND. L. REV. 269 (1957); Robert S. Lancaster, *Judge Hand’s Views on the Free Speech Problem*, 10 VAND. L. REV. 301 (1957); Wallace Mendelson, *Mr. Justice Frankfurter—Law and Choice*, 10 VAND. L. REV. 333 (1957); F. William O’Brien, S.J., *Justice William Cushing and the Treaty-Making Power*, 10 VAND. L. REV. 351 (1957); John P. Roche, *The Utopian Pilgrimage of Mr. Justice Murphy*, 10 VAND. L. REV. 369 (1957); Howard J. Graham, *The Supreme Court of History*, 10 VAND. L. REV. 395 (1957); and Otis P. Dobie, *Recent Judicial Biographies: A Composite Review*, 10 VAND. L. REV. 403 (1957).

442. 359 U.S. 121 (1959).

double jeopardy doctrine, a new trial and conviction in the state court on the same charge.⁴⁴³

It was entirely possible for Justice Frankfurter to have resolved the question in the government's favor without any reference to whether the Due Process Clause "incorporated" double jeopardy against the state.⁴⁴⁴ But Frankfurter began with the incorporation question.⁴⁴⁵ After invoking precedent,⁴⁴⁶ Frankfurter turned to history, stating that "[t]he relevant historical materials have been canvassed by this Court and by legal scholars."⁴⁴⁷ The only scholar referred to was Charles Fairman and Frankfurter's footnote cited only Fairman's 1949 Stanford article.⁴⁴⁸ According to Frankfurter, Fairman's article demonstrated "conclusively" that neither the Congress nor the ratifying state legislature contemplated that the Fourteenth Amendment would apply the Bill of Rights to the states.⁴⁴⁹

Frankfurter then summarized Fairman's research indicating supposed inconsistencies between state provisions and those in the Bill of Rights,⁴⁵⁰ and reproduced Fairman's findings in chart form as an Appendix to his majority opinion.⁴⁵¹ Later, in what was an obvious reference to Crosskey, but without citation, Frankfurter wrote that "[s]ome recent suggestions that the Constitution was in reality a deft device for establishing a centralized government are not only without factual justification but fly in the face of history."⁴⁵²

In *Poe v. Ullman*,⁴⁵³ Harlan dissented from a Frankfurter opinion, citing Fairman as authority⁴⁵⁴ and in *School District of Abington*

443. Justice Brennan, in a dissent joined by Chief Justice Warren and Justice Douglas, stated that the state was really a proxy and agent of the Federal government in what amounted to a second federal prosecution. *Id.* at 164 (Brennan, J., dissenting).

444. Indeed, Black and Brennan's dissents each rested on alternative grounds. *Id.* at 150 (Black, J., dissenting), 164 (Brennan, J., dissenting).

445. *Id.* at 124.

446. *Id.* ("We have held from the beginning and uniformly" that there is no incorporation of the Bill of Rights.).

447. *Id.* (footnote omitted). Only a definition of "relevance" excluding the Fourteenth Amendment Congressional debates would suggest that the opponents of incorporation on the Court had ever publicly "canvassed" the "relevant historical materials."

448. *Id.* at 124 n.3.

449. *Id.* at 124.

450. *Id.* at 124-26.

451. *Id.* at 140-49. Frankfurter did not acknowledge the existence of Crosskey's work or indicate that he took Crosskey's criticism of the conflicts Frankfurter reproduced into account.

452. *Id.* at 137. I am grateful to Professor Akhil Amar for calling my attention to this paragraph.

453. 367 U.S. 497 (1961).

454. *Id.* at 540 (citing Fairman's Stanford article for the proposition that the legislative history shed "little light" on the meaning of the Fourteenth Amendment).

Township, Pennsylvania v. Schempp, Justice Brennan cited Fairman's Fourteenth Amendment study in his concurring opinion.⁴⁵⁵

By 1965, the Court had "incorporated" much of the Bill of Rights through the Due Process Clause. On April 5, 1965, less than two months after Frankfurter's death, Justice Black announced the unanimous decision in *Pointer v. Texas*⁴⁵⁶ in which the Court used the Due Process Clause to enforce the Confrontation Clause of the Sixth Amendment against the states. Elizabeth Black wrote in her diary that *Pointer*'s effect was to give Justice Black's *Adamson* dissent "the virtue of becoming the law."⁴⁵⁷

Almost as if in response to the suggestions of Morrison's 1949 article, Justice Black indicated in his 1967 opinion in *Duncan v. Louisiana*⁴⁵⁸ that what he wrote in his 1947 *Adamson* dissent was "the product of years of study and research."⁴⁵⁹ In his own Frankfortian dissent in *Duncan*, Justice Harlan relied upon Fairman, finding that the "overwhelming historical evidence" he marshalled demonstrated "conclusively" that the framers of the Fourteenth Amendment did not intend to enforce the Bill of Rights against the states.⁴⁶⁰ Black rejected Fairman's account because it was largely negative and because it ignored the realities of the legislative process:

My appraisal of the legislative history followed 10 years of legislative experience as a Senator of the United States, not a bad way, I suspect, to learn the value of what is said in legislative debates. . . . I know from my years in the United States Senate that it is to men like Congressman Bingham, who steered the Amendment through the House, and Senator Howard, who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered. . . .⁴⁶¹

The conflict arose once more in 1970 in *In re Winship* where the Court held that due process required proof of guilt beyond a reason-

455. 374 U.S. 203, 256 (1963) (citing Fairman for the contention that the Establishment Clause did not apply to the states).

456. 380 U.S. 400 (1965).

457. BLACK & BLACK, *supra* note 110, at 109. Fairman's Stanford article was also cited in a list of other authorities setting forth the "arguments" on incorporation in Justice Goldberg's concurring opinion. *Pointer*, 380 U.S. at 411 n.1.

458. 391 U.S. 145 (1968).

459. *Id.* at 164 (Black, J., concurring).

460. *Id.* at 174-75. Harlan also cited Fairman's Fourteenth Amendment article in his dissent in *Reynolds v. Sims*, 377 U.S. 533, 602 n.30 (1963), his concurrence in *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Black and Stewart's dissent did "not rest on historical reasons, which are of course wholly lacking"), and his dissenting opinion in *Afroyim v. Rusk*, 387 U.S. 253, 285 n.44 (1967) (on Fourteenth Amendment debates on citizenship).

461. *Duncan*, 391 U.S. at 164-65 (Black, J., concurring).

able doubt to support a criminal conviction.⁴⁶² In his concurring opinion, Justice Harlan expressed "continued bafflement" at Black's approach to due process.⁴⁶³ According to Harlan, Black's "thesis flies in the face of the course of judicial history . . . as well as the uncontroverted scholarship."⁴⁶⁴ Discounting Horace Flack's 1908 study and ignoring Crosskey's work, Harlan relied solely on Fairman's 1949 Stanford article to support his historical claims.⁴⁶⁵

Black defended Flack's work as being "equally scholarly" in comparison to Fairman's work, noted that "almost all the provisions of the Bill of Rights" had been held applicable to the states and, in what was undoubtedly the use of Fairman as a surrogate for Harlan, concluded, "to me this history indicates that in the end Mr. Flack's thesis has fared much better than Mr. Fairman's 'uncontroverted' scholarship."⁴⁶⁶ Within the context of decisions of the United States Supreme Court, Justice Black's observation is as valid today as it was in 1970.

XV. LAST YEARS

The existing collection of Fairman/Frankfurter correspondence ends on November 4, 1957,⁴⁶⁷ though Fairman and Frankfurter saw each other on at least two subsequent occasions.⁴⁶⁸ After suffering a stroke, Justice Frankfurter resigned from the Court in 1962, the same year Fairman retired from the Harvard Law faculty. Fairman "retired" to work on his volume of the Holmes Devise.⁴⁶⁹

462. 397 U.S. 358 (1970).

463. *Id.* at 373.

464. *Id.* It is unfortunate that neither Black nor Harlan were apparently aware of Alfred Avins's 1968 article on incorporation, Avins, *supra* note 361, which was an even-handed effort to assess the contributions of both Fairman and Crosskey to our understanding of the Fourteenth Amendment.

465. *In re Winship*, 397 U.S. at 373; HORACE E. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908), was cited by Black in *Adamson*.

Nine months later, Harlan relied on Fairman's admonition that contemporaries "know so much more about the constitutional law of the Fourteenth Amendment than the men who adopted it . . ." in his opinion in *Oregon v. Mitchell*, 400 U.S. 112, 162-63 n.14 (1970).

466. *In re Winship*, 397 U.S. at 382-83 n.11. In that same note Black made it clear that he was not relying solely upon the Due Process Clause, but on "the entire first section of the Fourteenth Amendment. . . ." *Id.*

467. Letter from Charles Fairman to Felix Frankfurter (Nov. 4, 1957) (on file with Harvard Law School).

468. Frankfurter's calendar shows appointments with Fairman on March 30, 1959 and September 23, 1964 (on file with Library of Congress).

469. When Justice Oliver Wendell Holmes died, he left most of his estate to the United States government. Eventually the Holmes Devise fund was created with the primary purpose of creating a Supreme Court history. *E.g.*, David Margolick, *Justice Holmes's 1935 Bequest Remains Unfulfilled*, N.Y. TIMES, May 3, 1983, at 26; Sanford Levinson, Book Review, 75 VA. L. REV.

Felix Frankfurter had been instrumental in the first proposals concerning the use of the Holmes Devise⁴⁷⁰ and may have been influential in the 1956 selection of Harvard Law Professor Paul Freund as the project's editor-in-chief.⁴⁷¹

Fairman and Freund were two of the five people initially asked to submit an "Advisory Memorandum" to the Committee for the Holmes Devise.⁴⁷² The Librarian of Congress, L. Quincy Mumford, Paul Freund, and Fairman agreed that Fairman's memorandum would give "special attention" to the eras in which Taney, Chase, and Waite had been Chief Justices.⁴⁷³ In a separate "Supplementary Memorandum" concerning procedures and personnel, Fairman suggested that the "director" of the entire "enterprise" be "a man of intellectual and professional distinction, well qualified to lead a group of scholars."⁴⁷⁴ Fairman recommended his colleague on the Harvard Law Faculty as "incomparable."⁴⁷⁵ Indeed, Fairman indicated he could "think of no other appointment that would give such universal satisfaction or inspire such confidence."⁴⁷⁶

Within a month after Fairman submitted his memorandum, the committee decided to extend an offer to Paul Freund to serve as the project's editor-in-chief.⁴⁷⁷ But if Freund was not available, then Charles Fairman was the Committee's second choice for editor-in-chief.⁴⁷⁸ In the midst of a disagreement with Frankfurter in 1957,

1429, 1429-30 n.2 (1989) (reviewing G. EDWARD WHITE, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35* (1988)).

470. Margolick, *supra* note 469.

471. *Professor to Edit History of Court*, N.Y. TIMES, Sept. 8, 1956, at 15.

Frankfurter encouraged Freund to accept "the call" to direct the Holmes Devise history some three months before Freund's appointment was announced to the public. Letter from Felix Frankfurter to Paul Freund (May 31, 1956) (on file with Library of Congress). When Freund did accept, Frankfurter referred to him as "the Historian-in-Chief" of the Court's history and later as "*The* historian of the Supreme Court." Letter from Felix Frankfurter to Paul Freund (Sept. 11, 1956) (on file with Library of Congress); *see also* Letter from Felix Frankfurter to Paul Freund (July 16, 1958) (on file with Library of Congress).

472. Letter from Charles Fairman to L. Quincy Mumford (Apr. 24, 1956) (on file with Library of Congress); SUMMARY REPORT OF THE FIRST MEETING OF THE PERMANENT COMMITTEE FOR THE OLIVER WENDELL HOLMES DEVISE 3, 11 (1956). Julius Goebel, Robert E. Cushman, and Carl Swisher were also asked to help. *Id.* at 11.

473. SUMMARY REPORT OF THE FIRST MEETING OF THE PERMANENT COMMITTEE FOR THE OLIVER WENDELL HOLMES DEVISE 11 (1956).

474. SUPPLEMENTARY MEMORANDUM FOR THE PERMANENT COMMITTEE FOR THE OLIVER WENDELL HOLMES DEVISE SUGGESTIONS ON PROCEDURE AND PERSONNEL (1956).

475. *Id.*

476. *Id.*

477. SUMMARY REPORT OF THE SECOND MEETING OF THE PERMANENT COMMITTEE FOR THE OLIVER WENDELL HOLMES DEVISE (1956).

478. *Id.*

Fairman wrote that, "[f]or the first time in a long while, I see a clear road ahead for working on Bradley."⁴⁷⁹

Just six months later, on June 16, 1957, Fairman was named to write a volume of the history.⁴⁸⁰ Freund was on the Harvard Law School faculty all the years in which Fairman taught there.⁴⁸¹ Given the consideration to Fairman as editor-in-chief of the project if Freund declined and his extensive work on Justices Bradley⁴⁸² and Miller,⁴⁸³ Fairman was a natural choice.

By August, Fairman decided to concurrently bring out his book on Bradley and his volume of the Holmes Devise.⁴⁸⁴ Frankfurter passed away in 1965 and did not live to see the fruition of Fairman's work.

479. Letter from Charles Fairman to Felix Frankfurter (Jan. 18, 1957) (on file with Library of Congress). At times Frankfurter seemed to take advantage of Fairman's friendship. He displayed insensitivity by refusing to allow Fairman to fully enjoy the publication of his 1948 Constitutional Law casebook by balancing his praise of Fairman with ever greater praise of James Bradley Thayer. Letter from Felix Frankfurter to Charles Fairman (Dec. 8, 1948) (on file with Library of Congress). Knowing that Fairman was having difficulty with an article on which he was working, Letter from Charles Fairman to Felix Frankfurter (Sept. 16, 1956) (on file with Library of Congress), Frankfurter nevertheless complained about Fairman's use of an orchestra director as an analogy to the Chief Justice, *id.* (a "dangerous figure of speech"), even though he had used that analogy himself in *Chief Justices I Have Known*, 39 VA. L. REV. 883, 900 (1953). See also Letter from Felix Frankfurter to Charles Fairman (Sept. 11, 1956) (on file with Harvard Law School).

In 1957 Frankfurter wrote to "My dear Harvard Legal Historians", Charles Fairman, Samuel Thorne and Mark DeWolfe Howe, about a project involving Judge Learned Hand's trial notes from his service as U.S. District Judge for the Southern District of New York. Letter from Felix Frankfurter to Charles Fairman, Mark DeWolfe Howe, & Samuel Thorne (Jan. 2, 1957) (on file with Library of Congress). Fairman wrote a response which recognized the importance of the papers and indicated that they needed to find someone like "Alex Bickel" to undertake the project. Letter from Charles Fairman to Felix Frankfurter (Jan. 18, 1957) (on file with Library of Congress). Frankfurter, apparently finding his project more important than others Harvard was encouraging, found the response upsetting. Letter from Felix Frankfurter to Charles Fairman (Jan. 22, 1957) (on file with Library of Congress) ("[S]eldom have I received a more unsatisfactory reply to a letter of mine.").

480. *5 Named to Write History of Court*, N.Y. TIMES, June 16, 1956, at 50. Fairman was formally invited to write this volume on December 13, 1956. Letter from L. Quincy Mumford to Charles Fairman (Dec. 13, 1956) (on file with Library of Congress). Fairman accepted the offer by a letter dated January 4, 1957. Letter from Charles Fairman to L. Quincy Mumford (Jan. 4, 1957) (on file with Library of Congress).

481. Freund taught at Harvard from 1940-1976. AALS DIRECTORY OF LAW TEACHERS, 1980-81, at 382.

482. See *supra* note 34.

483. See *supra* note 34.

484. Letter from Charles Fairman to Felix Frankfurter (Aug. 20, 1957) (on file with Harvard Law School). Fairman added that Bradley certainly got himself into some situations that have to be explained with infinite care, and he did virtually nothing to make plain the path of one who might seek to follow. He told Frankfurter that he counted on "longevity" to be able to finish Bradley.

Fairman's FIVE JUSTICES, *supra* note 34, at 176-96, contained a sketch of Bradley's life. But this was not the type of biography which Fairman contemplated.

Crosskey continued on the faculty of the University of Chicago. His 1954 law review article critiquing Fairman was his last significant publication.⁴⁸⁵ He retired from Chicago in 1963 and spent the last years of his life suffering from crippling arthritis.⁴⁸⁶ He died in 1968.⁴⁸⁷

Death claimed Justice Black on September 25, 1971, the same year Charles Fairman published Part I, *Reconstruction and Reunion, 1864-1888*. It turned out to be a 1981-page volume with more than one thousand cases cited in its table of cases. Though criticized in later years⁴⁸⁸ the initial reviews of the book provided the type of accolades which one would expect for a prominent scholar completing the "capstone" of his academic efforts.⁴⁸⁹ Part II was published in 1987.

Finally, in 1988, Fairman published his Supplement to his volumes of the Devises, an account of the Election of 1876 and the Electoral Commission of 1877.⁴⁹⁰ There were no reviews of Part II and *Five Justices and the Electoral Commission*, but they were almost immediately criticized.⁴⁹¹

485. *The Legacy of William Crosskey*, *supra* note 301, at 960.

486. Gregory, *supra* note 9, at 246. He did teach one year at Howard Law School.

487. Krash, *supra* note 301, at 960; WHO WAS WHO IN AMERICA, *supra* note 9.

488. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 257 n.53 (1988) (criticizing RECONSTRUCTION I for resting on an "outdated interpretation of Reconstruction").

489. See e.g., Willard Hurst, Book Review, 58 A.B.A. J. 955 (1972) ("The volume sets a new model and standard in telling the Court's story."); William Gangi, Book Review, 8 NEW ENG. L. REV. 123, 127 (1972) ("Fairman unfolds the dramatic story with the rare ability to integrate the various political cross currents and personalities while at the same time isolating the legal issues."); Morton Keller, Book Review, 85 HARV. L. REV. 1082, 1082-83 (1972) (Fairman's research is "unparalleled in the literature" of the Court. He tells the story of the Court with "breathtaking skill", and he has set "an Olympian standard" with his volume.)

At the same time there were those who, while praising the volume, still made substantial criticisms. Gerhard Casper, Book Review, 73 COLUM. L. REV. 913, 915 (1973) ("all too often [Fairman] leaves [the] chronology involved, interspersing it with short evaluative comments but rarely offering the reader the sum of his own evaluation."); John Semonche, Book Review, 51 N.C. L. REV. 375, 382-83 (1972) (ignoring "the body of literature" on reconstruction and, finding the volume "too long, too disjointed, and too casually organized," thinking it cried out for a "ruthless" editor); Harry N. Scheiber & Michael E. Parrish, Book Review, 17 AM. J. OF LEGAL HIST. 303, 307-08 (1973) (Fairman "disdains direct confrontations with the historiography of his subject" and his "presentism" is a "leading characteristic" of his approach, which "reaches an extreme in his analysis of Justice Bradley's dissenting opinion in the Slaughterhouse Cases.") (footnote omitted).

One of the most thoughtful critiques of Fairman's work was Michael L. Benedict, Book Review, 39 U. CHI. L. REV. 862 (1972) (criticizing the failure to state and support conclusions and expressing a "feeling of disappointment, an oppressive sense of opportunity lost.").

490. This work was initially 400 pages. See Margolick, *supra* note 469.

491. Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521, 522 n.8 (1989) (criticizing RECONSTRUCTION II and FIVE JUSTICES AND THE ELECTORAL COMMISSION for "ignor[ing] much of the best work done in Reconstruction studies over the past twenty years.")

In 1988, the same year as the publication of *Five Justices and the Electoral Commission*, death claimed Charles Fairman, bringing to a close the last life of these four remarkable men. Of course, their professional work lives on.

Justice Black and Justice Frankfurter loom large in the history of the Supreme Court. Their opinions continue to be cited and biographical work on both men is ongoing. Though Crosskey's book was apparently too controversial to be cited by his contemporaries,⁴⁹² the passage of time has seen the citation of his work in both dissenting and majority opinions of the Supreme Court.⁴⁹³

Crosskey's former colleagues and students continue to uphold his accomplishments in the written records of their school.⁴⁹⁴ William Jeffrey, Jr., one of Crosskey's students, published a third volume of Crosskey's research in 1980,⁴⁹⁵ and the University of Chicago Law School has preserved his memory with the William Crosskey Lecture in Legal History.⁴⁹⁶

As Paul Freund wrote in his Editor's Foreword, Fairman's work was thought to "vindicate" Justice Bradley. *FIVE JUSTICES*, *supra* note 34, at *iv*. Yet while bringing new information to bear and subjecting the work of others to critical examination, Fairman appears to have been unable to subject any matter which might touch Justice Bradley to even sympathetic skepticism. A striking example is his account of the private one-hour meeting between Bradley and two Democratic lawyers supporting Tilden during the proceeding of the Electoral Commission. Fairman concluded that the two lawyers "were counsel of standing and understanding; it is not to be supposed that they called upon the Justice with any thought of applying pressure but only to inquire whether a line of argument might be useful." *Id.* at 112.

492. One may surmise this from the fact that, with the exception of Justice Douglas's dissent in *Marcello v. Bonds*, 349 U.S. 302, 319 (1955) (Douglas, J., dissenting), his work was not relied upon by any Supreme Court Justice's during the contemporary debate over Crosskey's work.

493. See *Solorio v. United States*, 483 U.S. 435, 446 n.12 (1987) (majority opinion by Chief Justice Rehnquist); *Department of Revenue of the State of Wash. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 760 n.26 (1978) (majority opinion by Justice Powell rejecting Crosskey's interpretation that the word "duties" encompasses excises); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 290-91 (1976) (majority opinion by Justice Brennan indicating, in the text, that Crosskey's interpretation of the words in the Import-Export Clause was "persuasive"); *Flast v. Cohen*, 392 U.S. 83, 129 n.18 (1968) (Harlan, J., dissenting); *Commissioner v. Estate of Bosch*, 387 U.S. 456, 476 n.6 (1967) (majority opinion by Justice Clark).

494. See e.g., Gregory, *supra* note 334; Harry Kalven, Jr., *Our Man from Wall Street*, 35 U. CHI. L. REV. 229 (1968); Stanley N. Katz, *William Crosskey's Politics and the Constitution*, Volume 3, 28 THE LAW SCH. REC. 9 (1982); Katz, *supra* note 331; Abe Krash, *William Winslow Crosskey*, 35 U. CHI. L. REV. 232 (1968); Abe Krash, *William Winslow Crosskey and the Constitution*, 33 THE LAW SCH. REC. 12 (1987); Sharp, *supra* note 334.

495. WILLIAM W. CROSSKEY & WILLIAM JEFFREY, JR., *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, VOLUME III: THE POLITICAL BACKGROUND OF THE FEDERAL CONVENTION* (1980). This book was reviewed by, among others, one of Crosskey's former students, Abe Krash. See *The Legacy of William Crosskey*, *supra* note 301.

496. Katz, *supra* note 331.

Fairman's work on Miller and Bradley continues to dominate the field, his 1949 Stanford article is considered a "classic,"⁴⁹⁷ and he continues to be cited by Justices of the Supreme Court.⁴⁹⁸ His first volume of *Reconstruction and Reunion* is also still cited by the Justices.⁴⁹⁹

XVI. CONCLUSION

This narrative takes one on a roller coaster ride in intellectual history. Fairman's pioneering efforts at examining and perhaps helping to preserve the private papers of Justice Bradley and Justice Miller are invaluable. His biography of Justice Miller remains the only full-length biography in the field.⁵⁰⁰

His articles on Justice Bradley remain our primary source of information on the Justice. One can only regret that Fairman did not complete his plan to publish a biography of Bradley.⁵⁰¹

One also has a sense of intellectual curiosity and exhilaration in Fairman's discovery of the role Bradley played in Waite's *Munn* decision⁵⁰² and intellectual excitement in Fairman's ability to privately share these matters with Justice Frankfurter and Chief Justice Hughes.⁵⁰³ One can smile at Hughes and Frankfurter sharing Fairman's discovery of what Hughes termed "that delicious remark" of Justice Miller about Justice Bradley: "[t]he trouble with Bradley is that he does not recognize my intellectual preeminence."⁵⁰⁴

One may even turn a blind eye to the preoccupation of Fairman and Frankfurter with economic regulation and the danger of *Lochner*

497. William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1253 (1986).

498. See e.g., *Codispoti v. Pennsylvania*, 418 U.S. 506, 535 (1974) (Rehnquist, J., dissenting).

499. *Patterson v. McLean Credit Union*, 491 U.S. 164, 193 (1989) (majority opinion by Justice Brennan); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 672 n.2 (1987) (majority opinion by Justice Brennan); *Fullilove v. Klutznick*, 448 U.S. 448, 509 (1980) (Powell, J., concurring); *Monell v. Department of Social Serv. of the City of N.Y.*, 436 U.S. 658, 673 n.28 (1978) (majority opinion by Justice Brennan).

500. The fact that it is the most recent biography may reflect that the quality of his work, rather than a lack of interest, has discouraged other scholars from trying to improve upon it.

501. CONTEMPORARY AUTHORS 45-48 (Clare D. Kinsman) lists, with Fairman's books, an entry entitled "Mr. Justice Bradley and the Supreme Court 1870-1892, Boston University Press 1953." This is simply Fairman's 1949 lecture "*What Makes A Great Justice?*," *supra* note 36, with a hard cover.

Besides beginning anew and writing a biography of Bradley, one of the services which some scholar could perform for legal historians is to gather Fairman's writings together in one edited volume.

502. *Granger Cases*, *supra* note 34.

503. See *Diary of Felix Frankfurter* (Mar. 25, 1947) (on file with Library of Congress); Letter from Charles Fairman to Felix Frankfurter (June 8, 1950) (on file with Harvard Law School).

504. *Diary of Felix Frankfurter* (Mar. 25, 1947) (on file with Library of Congress); see also DIARIES, *supra* note 36, at 312.

even after the triumph of the New Deal⁵⁰⁵ and overlook the lack of critical analysis of both Bradley and Miller as part of the genre of a less exacting period of scholarship or as a natural result of people absorbed with the subject of their writing.

But there is a less palatable side of this story as well. Fairman's entry into the adversary process with his 1949 Stanford article causes considerable pause as to whether he was then the disinterested scholar or the self-appointed surrogate of Justice Frankfurter in combatting the views of Justice Black. However one may resolve that question, the evolution of Fairman's position by 1954 of treating the question of the intent of the framers of the Fourteenth Amendment not as a matter of history or of law, but a "public relations" effort to ensure that the view he wanted to prevail would prevail, is a sad chapter in the history of academia. Further, given their close relationship, one wonders about the appropriateness of Frankfurter's reliance upon Fairman without public acknowledgment of that relationship.⁵⁰⁶

In his 1956 essay on Justice Bradley,⁵⁰⁷ Fairman spoke of Willard Hurst's complaint that lawyers talking about "great" judges always came up with one of the ten names on Dean Pound's list. Hurst had expressed a suspicion that this was because they relied upon Pound rather than upon their own reading and judgment.⁵⁰⁸ In Fairman's view Willard Hurst was "chiding . . . lawyers for not interpreting such history and biography anew."⁵⁰⁹ Fairman himself indicated that it was "important to reinterpret [the] history [of influential jurists] in a contemporary context."⁵¹⁰

505. Thomas C. Grey has referred to "the obsession of the later Progressives and New Dealers with the *Lochner* line of cases." Thomas C. Grey, *Thayer's Doctrine: Notes on Its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28, 29 (1993).

Crosskey too, was mired in the problems of the 1930s. While a series of critical reviews by scholars like Julius Goebel and Henry Hart discredited much of Crosskey's work, it has been suggested that lack of continuing interest in the problems which Crosskey discussed was because they had been solved and new problems, like *Brown v. Board of Education*, had emerged. BOBBITT, *supra* note 299, at 21.

Indeed, as noted by Philip Bobbitt "the frustration of the New Deal Congress by the Court was largely solved by the very methods which Crosskey despised and by the institution whose role he wished to limit." *Id.*

506. I realize our traditions are to the contrary. But what would have been wrong if Frankfurter had written, in *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959) (Frankfurter, J.): "The work of my former student and friend Charles Fairman has demonstrated conclusively that. . ."

507. *Mr. Justice Bradley*, *supra* note 34, at 65.

508. *Id.* (citing Willard Hurst, *Who is the "Great" Appellate Judge?*, 24 IND. L.J. 394, 397 (1949)).

509. *Id.*

510. *Id.*

As important as Fairman's work was for his own generation, our task is to follow Fairman's admonition and interpret the history of the Fourteenth Amendment and the Court "anew."