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Book Review: The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876. by Robert J. Kaczorowski; No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights. by Michael Kent Curtis; the Fourteenth Amendment and the Bill of Rights. by Raoul Berger.

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**THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876.** By Robert J. Kaczorowski.<sup>1</sup> New York: Oceana Publications. 1985. Pp. xxiv, 241. \$32.50.

**NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS.** By Michael Kent Curtis.<sup>2</sup> Durham, N.C.: Duke University Press. 1986. Pp. xxii, 275. Cloth \$24.95.

**THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS.** By Raoul Berger.<sup>3</sup> Norman, OK.: University of Oklahoma Press. 1989. Pp. x, 169. Cloth, \$18.95.

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“Hope springs eternal”—and a good thing too. Hope is the greatest gift nature has given to humankind, for without it we would undertake nothing, and, assuming we managed to survive, we would become narrow, crabbed, and mean-spirited creatures.

Legal historians, in particular historians of the fourteenth amendment, are an enormously hopeful lot. After many years now of serious study of the amendment, of many scholars poring over the many pages of the *Congressional Globe* and the 1866 issues of the *New York Times* and the speeches of Andrew Johnson, after a large number of estimable books by generally competent and mostly disinterested scholars, can we honestly say we know what the fourteenth amendment was originally intended to mean? Judging from the three recent studies at hand, the answer is no. All three authors are more than competent; all three display knowledge of the sources and of the previous scholarship; all three are clever men, able to formulate and test hypotheses about meaning and cause. Although they all show obvious concern for the bearing of the results of their

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historical research on contemporary constitutional law, none is plainly guilty of having allowed zeal for constitutional results today to shape his study of the past. None of these studies is, in other words, a member of that dread and despicable class, "Law-office history."

Despite all these virtues, the three disagree almost entirely, thereby carrying on a tradition of long-standing in this corner of the scholarly world. Despite the failure of all their predecessors to discover an understanding of the fourteenth amendment sufficiently persuasive to create a consensus, all three display great hope and confidence. For the most part, all three base that hope on a similar thought: if the source materials are only set in the right context, then, finally, they will speak unequivocally. All meaning, these historians seem to agree, is contextual. The making of the fourteenth amendment is part of some larger story, and like an incident in a novel, the meaning of the individual event must be seen as part of that larger story.

A reasonable thought, that, but, as the three studies show, one that leads to further problems. The most obvious of the problems is that each of our authors sets the making of the fourteenth amendment into a different context, as though one of them finds it to be part of *Moby Dick*, while another locates it in *The House of Seven Gables*.

Robert J. Kaczorowski's study of *The Politics of Judicial Interpretation* finds the relevant context to be the meaning of the Civil War and the transformation that cataclysmic event wrought in the entire constitutional system. "The Civil War and Reconstruction had a far more revolutionary impact on American constitutionalism than scholars have appreciated." "The fundamental constitutional issue" at stake in the war was "whether ultimate sovereignty was constitutionally delegated to the national or to the state governments." This was "a conflict between national supremacy and union on the one side and state sovereignty and secession on the other side." The conflict was resolved on the battlefields in favor of national sovereignty and union, and after the war in Congressional Reconstruction in favor of the same.

This context supplies the key to understanding the fourteenth amendment (and other reconstruction civil rights legislation), because a corollary to the conflict about the location of sovereignty was a conflict about "where primary authority over the status and rights of individuals was located, in the nation or in the states." The victory of the North meant the triumph of the federal government as "the primary authority over the status and rights of citi-

zens, . . . for sovereignty of necessity encompasses such primary authority." Since the nation is sovereign, national citizenship is the primary citizenship, a conclusion openly trumpeted in the first sentence of the fourteenth amendment. Since the fundamental status of persons inheres in their condition as United States citizens, the federal government possesses the primary power to define and protect these rights: "Congress possessed plenary authority to protect these rights in whatever manner it deemed appropriate." This congressional "authority over civil rights" was "virtually unlimited." Although "Congress chose not to destroy the states as separate political entities" there emerged "a new federalism wherein states and nation had concurrent responsibility and authority . . . to enforce and protect the civil rights of Americans."

Having set the fourteenth amendment into this extraordinarily sweeping and dramatic interpretation of the age, Kaczorowski proceeds to tell a compelling story. Unlike most of his predecessors (and unlike the other books under review here), Kaczorowski does not rehash the old debates in Congress over the various amendments and laws that together made up the civil rights phase of reconstruction. He looks instead to the efforts by federal officials—U.S. Attorneys, members of the Justice Department, and the federal judiciary—to enforce the body of civil rights legislation. To my knowledge this story has never been told before, surely not in such detail.

The story shows an active and energetic enforcement effort, by no means always successful, but not failing for lack of legal authority. Kaczorowski insists that the new post-war constitutional order he describes at first furnished more than enough legal clout to secure civil rights. So far as there were difficulties, the causes lay elsewhere, in the very magnitude of the task of enforcing such unpopular laws over the entire South with so few practical resources. Yet the effort met with far greater success than is generally appreciated. According to Kaczorowski, the federal effort was on the brink of crushing the Ku Klux Klan in the early 1870s.

Kaczorowski believes there was widespread acceptance within the legal community—federal officials and judges—between 1866 and 1873 or so, of the legal doctrine outlined above. The post-war civil rights legislation was all deemed constitutional by the overwhelming majority of state and federal judges who considered it, and it provided the basis for large numbers of prosecutions by the Department of Justice, which also acted on the basis of the new constitutional theory. The incorporation of the Bill of Rights, and the idea that the fourteenth amendment reached private conduct—

doctrines which reappeared in the mid- or late twentieth century, as apparent innovations—were commonplace and widely accepted in the 1860s and early 1870s. These were not novelties, as historians like Charles Fairman and Raoul Berger would have us believe, but orthodox opinion in Congress, the Justice Department, and the lower federal courts. Especially telling is Kaczorowski's discovery that in cases like *U.S. v. Mitchell* (1872) even the defense conceded "that Bill of Rights guarantees were among the privileges and immunities secured by the Fourteenth Amendment."

In Kaczorowski's account, the real innovation occurred when the Court later turned against the new constitutional theory. Among the most valuable features of Kaczorowski's book is his demonstration that the judicial turn against the new Constitution and in favor of the old federalism was preceded by the Grant Administration's turn away from strenuous efforts to enforce the civil rights legislation. Kaczorowski shows how the political consensus in favor of civil rights enforcement in the South evaporated over time. He presents the Supreme Court's restrictive interpretation of the fourteenth amendment, beginning with *Slaughterhouse* in 1873, as part of this process. The political situation had changed so much that even many Republicans who had formerly been partisans of the new Constitution and of strong enforcement of civil rights came to welcome the Court's burial of their own handiwork, because it provided them with a decent way out of what had become an unpopular and hence politically embarrassing position.

*Slaughterhouse* and related decisions (e.g., *U.S. v. Reese*, *U.S. v. Cruikshank*) accelerated the process which had generated them. After 1873 lower courts began to question the constitutionality of the Civil Rights Acts of 1866, of 1870 and of 1871, and to quash indictments brought under these acts when they didn't declare them unconstitutional. The federal justice machinery also lost all zest for the business, and soon the country moved entirely on to other things. The sands closed over this episode, this effort to vindicate the rights of the newest American citizens, so thoroughly that hardly a memory of the original post-Civil War landscape remained. The post-*Slaughterhouse* innovations on behalf of the old federalism took on the appearance of original intentions. "And I, alone, am left to tell thee."

Once set in this context, it becomes relatively clear what the fourteenth amendment meant: the assignment of custody over the fundamental natural and civil rights to the Federal Government, the incorporation of the Bill of Rights, the grant of plenary power to Congress to do whatever is needed to protect and secure rights.

Valuable as Kaczorowski's study is, his version of the amendment's context fails in at least three respects. In the first place, his formulation of the issue of the Civil War—state v. national sovereignty, state v. national custody of civil rights—is too infected by Calhounian absolutism. It was Calhoun who insisted that the American federal system must be understood in terms of the iron logic of sovereignty; in following him Kaczorowski ignores the classic and, in my opinion, far sounder understanding of federalism articulated and defended by the “father of federalism” himself:

[T]hose who deny the possibility of a political system with a divided sovereignty like that of the U.S. must choose between a government purely consolidated, and an association of governments purely federal. All republics of the former character, ancient or modern, have been found ineffectual for order and justice within, and for security without . . . . In like manner, all confederacies, ancient or modern, have been either dissolved by the inadequacy of their cohesion, or, as in the modern examples, continue to be monuments of the frailties of such forms.

If, in other words, our federal system fails to conform to the abstract logic of sovereignty, then so much the worse for the abstract logic of sovereignty.

According to Madisonian orthodoxy, sovereignty was an attribute of neither the states nor the federal government. It inhered in the people who decreed both sets of governments equally. Neither the right of secession, i.e., the right of the states to dissolve the union, nor the right of the union to supercede the states follows from this orthodox theory. As the Supreme Court put it in the post-Civil War case of *Texas v. White*, the Constitution contemplates “an indestructible union of indestructible states.” The rejection of the Southern theory of union on the battlefields of the Civil War did not imply embracing the opposite extreme view of a sovereign union.

Thus, according to the sounder views of the nature of our union, the question of the allocation of powers to secure rights cannot be settled by recourse to the abstract question of the locus of sovereignty. The original Constitution gave a complex answer to the question of where power to secure rights lay, but it would be difficult to make a plausible case that this power lay principally with the general government. Most, if not all, of the architects of Reconstruction understood the Constitution in this way, and it would be very difficult to show that they intended to change that entirely to the national sovereignty-plenary power Constitution Kaczorowski claims emerged from the Civil War.

His own book provides little direct evidence on this last issue, for he neglects altogether the congressional debates on the amendments and civil rights legislation of the reconstruction era. Much in

those debates conflicts with the context into which he sets the fourteenth amendment. A particularly important instance was John Bingham's draft for an amendment, debated in February of 1866 and, after a mixed reception, postponed indefinitely. That draft would have given Congress "power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states and to all persons in the several states equal protection in the rights of life, liberty, and property." This proposal would have vested Congress more or less with the plenary power Kaczorowski believes the new Constitution promoted by the congressional Republicans contained. But the congressional Republicans did not react to the proposal as a reader of Kaczorowski's hypothesis would expect. They did not see it as expressive of the Constitution they already had, nor were they pleased with the idea of making this change in the Constitution.

Finally, Kaczorowski's version of context does not easily cohere with much of the evidence he himself presents. A U.S. attorney for Mississippi, for example, had serious uncertainties over how far the Constitution permitted the Federal Government to reach into the sphere of criminal law. "Jacobson . . . doubted that criminal violations of the rights to life, liberty, and property could be brought within Federal Jurisdiction." And Attorney-General Akerman was far from certain enough about the matter to reassure Jacobson. In another set of 1871 cases Judge Hugh Bond of the District Court in North Carolina, a man notoriously sympathetic to the aims of congressional reconstruction, vacillated mightily on the meaning of the fourteenth amendment. In one case, he went so far as to suggest that the fourth amendment remained "a mere restriction on the United States itself." That is, he seemed to believe that the fourteenth amendment had not changed the status of the Bill of Rights as laid down in *Barron v. Baltimore*. In another case from the very same year, however, Judge Bond upheld the power of Congress to protect against violations of the second amendment by private persons in the states. There seems to have been a great deal of uncertainty about the scope of the fourteenth amendment, and Kaczorowski's own evidence shows federal lawyers spending much time and effort attempting to avoid the national sovereignty/plenary power theory he attributes to them. The behavior of the actors in his story, in other words, does not conform well enough to the plot he posits for them.

Michael K. Curtis focuses his attention somewhat more narrowly on the familiar issue of whether the privileges and immunities clause of the fourteenth amendment incorporates the Bill of Rights.

He argues the affirmative, as Justice Black did many years ago; but he does so with a learning and thoroughness that far surpasses either Black or his source, Horace Flack, or any of the other scholars who have taken up this issue in the years since Black's famous 1949 appendix.

It is not Black, however, but Charles Fairman and to a lesser degree Raoul Berger who form the backdrop for Curtis's effort. They both had rejected Black's incorporation thesis, but Curtis believes, like Kaczorowski, that if one only gets the context straight, one can resolve the controversy over the fourteenth amendment and the Bill of Rights. Fairman's chief "defect" resulted from his failure to consider "the larger context out of which the fourteenth amendment grew, including the crusade against slavery and for civil liberty during the years from 1830 to 1866." Curtis differs from Kaczorowski in locating the most relevant context in anti-slavery legal and political theory rather than in the great drama of a Civil War struggle for sovereignty. Curtis's context, while less panoramic, is in several ways more persuasive and serviceable. Following pioneering work by Jacobus ten Broek and others on the role of anti-slavery thought, Curtis uses his contextual factors in a specific and controlled manner. The Republicans who drafted the amendment accepted the natural rights philosophy expressed in the Declaration of Independence, saw the evils of slavery in terms of the violation of these rights, and defined their post-war tasks in terms of securing them. Although Curtis does not deny that the Republicans retained some attachment to the old federal system and to "states' rights," he identifies the natural rights orientation as far more primary and uses it as a clue to their ultimate purposes.

Slavery was not only itself a violation of natural rights; it provoked violation of other rights, constitutional rights such as the rights of free speech and free press. These violations outraged anti-slavery forces during the ante-bellum era. Southern states, for example, attempted to prevent the circulation of any writing challenging the legitimacy of the peculiar institution. These and other violent attacks on free speech and other rights set part of the context for the Republicans during Reconstruction. They were concerned indeed with the plight of the newly freed blacks, but also with slavery-inspired misdeeds directed against whites.

More specifically, the anti-slavery partisans had worked out before the war some peculiar theories about various clauses of the Constitution, theories that were, perhaps, peculiar to themselves, but on the basis of which they drafted the fourteenth amendment. According to Curtis, Fairman missed this dimension of context al-

together and, interpreting the Constitution according to more orthodox theories, he was nearly deaf to what the drafters were saying. For this reason so many of them, especially John Bingham, the chief draftsman of the amendment, seemed to Fairman to be speaking utter nonsense most of the time. But once one has the code, the otherwise inexplicable becomes perfectly sensible.

The most important of the Republican theories construed the privileges and immunities clause of article IV, section 1 of the original Constitution as a protection of "absolute" rights in addition to or instead of "relative" rights. It was not merely a guarantee that states extend to citizens of other states the same privileges and immunities that they extend to their own citizens, but that all citizens are due certain protections as a matter of constitutional right.

There were two further peculiarities in the Republican theory of privileges and immunities which Curtis could have brought out more clearly, but which are more or less implicit in his account. Although he admits there was some ambiguity and vacillation about the content of the rights protected under this clause, the interpretation on the basis of which the amendment was drafted held that article IV protected the privileges and immunities of citizens of the U.S., not those of citizens of the states. The distinction sometimes thought to have been invented by the Supreme Court in *Slaughterhouse* in fact underlay the original theory of the amendment. The privileges and immunities of citizens of the United States were those rights specifically belonging to U.S. citizens by virtue of the Constitution or nature of the government of the United States. The Republicans believed that among those rights were those specified in the Bill of Rights.

The further peculiarity of Republican theory on the privileges and immunities of U.S. citizens, that is, on the Bill of Rights, was this: citizens of the U.S. possess these rights, but not entirely as legal rights. *Vis-a-vis* the federal government, they were full legal rights, because the Bill of Rights in clear terms forbade the federal government from infringing them and thus empowered the courts to vindicate those rights when threatened by the federal government. But *vis-a-vis* the states they were less than full rights. Although the states had a moral obligation to respect them, deriving from the oath state officers took to uphold the Constitution, there was no constitutional prohibition against the states' abridging them, and so neither the courts nor Congress could vindicate these rights, these privileges and immunities of United States citizens.

Bingham thus frequently argued that the fourteenth amendment would create no new rights, but would nonetheless make the

Bill of Rights binding against the states. The amendment was built on the reading of article IV outlined above, but was more explicit than article IV. It protected the privileges and immunities of citizens of the United States, (i.e., those rights especially derived from the Constitution or the nature of the union) against violation by the states, and thereby armed the federal courts and Congress with power to intervene against the states if they encroached on these rights.

Fairman never could understand any of this, because he read the proceedings with eyes accustomed only to the gloom of more orthodox constitutional theory. Since the Supreme Court had established in *Barron v. Baltimore* that the Bill of Rights held only against the federal government, Fairman could not understand what Bingham and others could mean when they argued that the rights in the Bill of Rights were already possessed by citizens, even against their states. He could only conclude that Bingham was extraordinarily confused, or extraordinarily ignorant, or had a private and secret meaning for the term "Bill of Rights." None of this was true: Bingham was a flowery speaker, but he was also an extraordinarily clear thinker; he was generally recognized by people in and out of Congress as a most able legislator and lawyer (witness the very high leadership responsibilities with which he was entrusted—for example, he served on the Joint Committee on Reconstruction, and was one of the House managers of the impeachment of Andrew Johnson) and, as Curtis decisively demonstrates, Fairman was certainly wrong when he speculated that Bingham had something other than the first eight amendments to the Constitution in mind when he referred to the Bill of Rights.

Curtis's interpretation of the privileges and immunities clause thus flows naturally and persuasively from his account of the context of the amendment. The broad concern with rights, a substantive concern, not just an anti-discrimination concern, the antebellum Republican worry over violations of the rights of whites as well as of blacks in the states, the special theories they developed—all converge naturally on the idea of incorporation. Curtis thus successfully rebuts, in my opinion, the main thrust of Fairman's argument.

Yet not everyone has been convinced, least of all Raoul Berger, whose new book reiterates many of the arguments he had earlier presented in *Government by Judiciary*, but with the addition of explicit, spirited (to say the least), and sometimes line by line arguments directed against Curtis. Curtis's book, he thinks, "is of the genre . . . advocacy scholarship." It is moved by "passionate dedi-

cation to a cause . . . which is apt to distort the judgement of what the facts are, to promote wishful thinking, and to result in partisan propaganda." But the disagreement between Berger and Curtis does not (in the first instance) so much concern facts as contexts. Berger opens his critique with an attempt to undermine Curtis's construct of context and to substitute one of his own in the guise of "guides to interpretation." That is, the facts do not speak for themselves, but require context to make them yield their message. "Curtis lives under the grand illusion that the fourteenth amendment was 'produced' by the 'anti-slavery crusade.'" Berger knows better: "For understanding the scope of the Fourteenth Amendment, the continued attachment of the North to States' control of internal affairs is far more important than the abolitionist authority background upon which Curtis so heavily relies." "In seeking to filter antislavery ideology into the thinking of the majority of the framers, Curtis is wildly off course."

Berger's drafters, and indeed the whole North, "remained deeply attached to the principle of states' rights," and this distinguishes them from Curtis's anti-slavery drafters who were committed to natural and civil rights above all. Berger does not deny that they had some concern for rights: "Outraged by the Black Codes, the North set out to protect a set of fundamental rights that would enable emancipated slaves to exist." But Berger believes that Northerners were uninterested in going further than this minimal kind of protection, partly because of "rampant racism in the North." Racism was the dominant force in Northern opinion and along with it went a "pervasive detestation of the abolitionists."

Berger's notion of context tells him that Reconstruction legislation must stand at the intersection of his three forces: attachment to state autonomy, racism, and a desire to offer minimal protections for the rights of the freemen. Curtis's abolitionist amendment cannot, he thinks, be an event in his novel. The first and in a way the most important manifestation of Berger's three forces was the Civil Rights Act of 1866. It had duly limited ambitions: to protect certain specified rights, such as the rights to contract, to sue, and to give evidence. It protected citizens in these rights not absolutely but only against discriminatory treatment by the states. "The bill did not postulate an indeterminate catalog of 'absolute rights.' Its face shows that it struck at discrimination with respect to enumerated particulars." The rights secured in the Bill of Rights were not among those protected by the Civil Rights Act.

The coverage of the Civil Rights Act is such an important part of Berger's story because, he says, "the framers deemed the Bill and

the Fourteenth Amendment to be *identical*,” or perhaps better put, “[t]he Amendment did not go beyond the Act; the Act was deemed to be ‘incorporated’ in the Amendment.” Since abolitionism had so little role in the drafting of the Reconstruction legislation, Berger eschews any reliance on “peculiar” Republican readings of important constitutional provisions. He refuses to read the privileges and immunities clause of article IV as Bingham did, but takes the more standard approach that Charles Fairman took. In this view, the privileges and immunities clause is the substantive core of the amendment, and it supplies exactly the coverage that section one of the Civil Rights Act had provided. “It protected ‘a limited category of rights.’ ” “The right to sue for the protection of those rights was embodied in the due process clause.” The equal protection clause “restated affirmatively the [Civil Rights] Act’s negatively framed proscription of discrimination,” although Berger concludes that this clause is superfluous, since the privileges and immunities clause already does the same.

Professor Berger deserves great credit for his intellectual independence and courage. I am unable, however, to agree with his analysis. His version of context stands at the very opposite extreme from Kaczorowski’s and has even more severe difficulties. In the first place, his insistence on the utter primacy of federalism does not fit the facts. To take but one very clear instance: the Civil Rights Act of 1866 of which Berger makes so much was itself a tremendous intrusion on the former federal system. It told the states who their citizens were; it identified certain rights, which had been within the exclusive purview of the states, and prohibited them from discriminating in the way they made those rights available to their citizens; it provided recourse in the federal courts to those who believed they had been victims of such discrimination; and it provided penalties against state officials who violated its provisions. This last was an especially great break with traditional federalism. President Johnson vetoed the bill precisely because it broke so strongly with the old federalism. So it is wrong to say that the Northern Republicans were committed to preservation of state authority above all else. They clearly accepted some change in the old federalism; the real question is how much. Berger and Kaczorowski appear to fall into the opposite sides of the same error. Kaczorowski noticed that the Republicans were willing to set aside at least some elements of the old federalism in order to secure rights; he concluded that therefore they were ready in principle to scrap it all. Berger noticed that the Republicans resisted total centralization, and concluded that therefore they were unwilling to change anything. As J.R.R. Tolkien’s Ents would say, these humans are a hasty lot.

Berger's treatment of Northern opinion regarding abolitionism also fails to ring true. Reaction to the antislavery movement shifted over time; in the immediate wake of the Civil War—that is, at the time of the drafting of the Civil Rights Act and the fourteenth amendment—public acceptance of the main elements of the anti-slavery cause was probably at its height. This is visible in the congressional leadership who led those proposals through the legislature. As Curtis makes clear, many of the leaders came from abolitionist backgrounds. Berger attempts to discredit the abolitionists by pointing out how hated Thaddeus Stevens was among moderate Republicans. But the fact remains that Stevens was a recognized leader not merely of the radicals, but of the entire House of Representatives—chairman of the House Ways and Means Committee, House Chairman of the Joint Committee on Reconstruction, director of the managers appointed by the House to conduct the impeachment of Andrew Johnson. I have already mentioned similar evidence regarding the high standing and prestige of John Bingham in Congress. One of Berger's problems in treating the role of abolitionist thought is his inability to distinguish its various shades; he pushes all anti-slavery thought into the same category. In fact, however, there was much disagreement among the former abolitionists, as evidenced by their division into radical and moderate wings. Berger, moreover, consistently proves unable to identify the marks which truly distinguished one wing from the other. But to discourse further on abolitionism would take us too far afield here.

Even if Berger's broader story about context were more persuasive than it is, the rejection of the incorporation thesis does not follow from it so clearly as he thinks. Let us say that the Republicans (and the North in general) retained a deep commitment to federalism; let us say that Northern opinion remained racist. It is still difficult to see how racism would speak one way or another to the incorporation issue. It was not a racial issue; the application of the Bill of Rights against the states does not require full racial integration or black suffrage, the two issues where racial feelings clearly did hold many Northerners back.

It is not even clear that incorporation represents such a major breach in traditional federalism as Berger consistently asserts: "Application of the Bill of Rights to the States drastically curtails the right of the Northern states to control their own internal affairs." Maybe so, maybe not. Fairman, in his effort to prove that incorporation was ridiculous, could come up with only a few (and relatively minor) instances where Northern states had provisions and procedures contrary to the Bill of Rights. Apparently, most Northerners

agreed that there was no rightful freedom in the states to violate the provisions of the Bill of Rights. We must recall what Berger often seems to forget: all this happened long before the Warren Court began to interpret the Bill of Rights in ways that did indeed challenge many of the prerogatives to which the states had become accustomed. In 1866, it was thought that the Northern states were already pretty much in conformity with the Bill of Rights, and it would, therefore, not be a major alteration of the status quo to make such conformity a constitutional requirement. Berger repeatedly makes statements like the following: "Curtis would be hard-pressed to name one Northern 'politician' who openly preferred federal to State control of criminal and civil administration in his own state." But this is to set up a straw dichotomy. Incorporation in 1866 did not mean "federal control of criminal and civil administration" in the states; it meant the prescription of certain limits and procedures which were mostly satisfied, or thought to be satisfied, even without incorporation. Berger, in other words, regularly exaggerates the implications of incorporation for federalism.

Another nearly certain indication that Berger's use of context is leading him astray is the reappearance in his book of Fairman's "arrant nonsense" approach to the leading spokesmen for the fourteenth amendment. "Bingham's remarks are rife with contradictions." Bingham spoke with "glaring inexactitude." "In truth, Bingham was utterly confused [not mistaken, but confused] as to what *Barron v. Baltimore* held." It is an almost certain tip-off that an historian is not approaching his or her materials with an accurate frame of reference if important historical actors make no sense at all to the historian. Important historical actors (and this was true for Bingham, Howard, and others involved in the drafting and adoption of the amendment) make sense to those around them; that is why they are important actors. The historian's task is to bring out their sense, not to denounce them as fools.

These problems with context in Berger are so important because context plays such a significant role in his history. It leads him to establish a very high burden of proof for the incorporation thesis to meet—something on the order at least of "beyond a reasonable doubt"; but in practice close to "near certainty." It leads him to discount much of the direct evidence supporting incorporation and to fail to notice much other such evidence. In the former category are the extraordinarily important speeches by Bingham and Howard in the House and Senate. Bingham wrote the amendment and served on the Joint Committee. Howard reported the amendment to the Senate on behalf of the Joint Committee. They

were the ones who came to their respective Houses with the specific authority to explain the meaning of the amendment as understood by the Committee which had prepared and was recommending it. All members of both houses would take these explanations as especially authoritative. All historians therefore should do the same unless persuaded by strong evidence to the contrary.

Both Bingham and Howard said as clearly as they could that the amendment would incorporate the Bill of Rights. And no one denied this either openly or by clear implication; many things were said that do not necessarily imply incorporation, but are compatible with it. There is far more evidence of a supportive kind than either Berger or Fairman concedes. Some of it appears in Kaczorowski's book, as we have already noted. Much of it even appears in Berger's book. Apparently not noticing how it bears on his own case, Berger quotes against Curtis a statement by William D. Kelley, Republican from Pennsylvania, about the evils the Republicans were attempting to remedy: "Northerners could go South but once there they could not express their thoughts as freemen and receive the protection they were entitled to as citizens of the Republic."

Kelley was complaining of the violation of the rights of whites here, and the right he spoke up for was the first amendment right of free speech. Richard Yates of Illinois asked in the Senate, along the same lines, "Do you suppose any of you can go South and express your sentiments freely and in safety?" A particularly telling passage by James Wilson: blacks "must have the same liberty of speech in any part of the South as they have always had in the North." And of course Curtis cites many other examples where Bill of Rights guarantees are listed among those requiring protection under the amendment or the Civil Rights Act.

Probably the greatest importance of Berger's study lies in his unrelenting effort to limit the scope of the fourteenth amendment by identifying it entirely with the Civil Rights Act of 1866. Berger's attempt to identify the two runs afoul of some very important facts, and thereby shows, I think, the inherent limits of the thesis. In the first place, the original Bingham draft for the amendment was introduced before the Civil Rights Act; its key language therefore predated the list of rights in the latter bill. Secondly, despite Berger's dismissal of the point, the language of the two is quite different, and it seems odd for the framers to aim at nothing other than the constitutionalization of the one in the quite different language of the other. If they merely sought to get the Civil Rights Act into the Constitution why did they not simply take its first section and use it for the amendment?

More decisively, Berger cannot make the language of the fourteenth amendment fit the Civil Rights Act. As he insists throughout, the Civil Rights Act was limited in two respects: it only mandated non-discrimination with respect to a limited set of enumerated rights. That is, it did not provide absolute protection for those rights, nor did it provide across-the-board protection from discrimination. But the fourteenth amendment, even on Berger's reading, is different. Even if Berger is correct, for example, about the meaning of "privileges or immunities" as identical to the list of rights in the Civil Rights Act, he surely must notice that the fourteenth amendment does not protect them merely against discriminatory treatment. Only if one reads this clause together with the equal protection clause does one begin to get something like Berger's identity between the two reconstruction acts. But the two clauses are obviously separate, and obviously have separate force. For one thing, the one applies to "citizens" and the other to "persons," a distinction which Berger depreciates, but which has clear textual significance. The Civil Rights Act and the fourteenth amendment obviously stand as closely related measures, and therefore the tendency of many Republicans to blend them together is perfectly intelligible, especially in polemical contexts, but Berger's attempt to show that they are simply identical does not succeed. It is Berger's great virtue that he has made the thesis of identity a very explicit theme of his book and has thus unintentionally helped his readers to reject this thesis which has always had a certain casual plausibility and attractiveness, but which is ultimately untenable.

The three books reviewed here show that the optimism of fourteenth amendment historians is not wholly misplaced. We can learn from all three, and from Curtis we have findings which in my opinion are solid and reliable. This is not to say that his book could not use some fine-tuning; occasionally he falls into a Kaczorowski-like conviction about the thorough and complete remaking of the constitutional order. And his study of the incorporation issues needs to be supplemented with equally thorough consideration of the rest of the first section of the amendment. But for the most part he has constructed a plausible version of context that he uses judiciously to render intelligible events and words that have often baffled scholars.