The Bill of Rights, the Fourteenth Amendment, and the Seven Deadly Sins of Legal Scholarship

Richard L. Aynes
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Richard L. Aynes*

INTRODUCTION

The publication of *The Bill of Rights: Creation and Reconstruction* by one of the nation’s most prominent scholars from one of the nation’s most prominent law schools was bound to be a major event in academia. *The Bill of Rights* has been selected as an offering for the History Book of the Month Club, favorably profiled in a two-page interview in the *American Bar Association Journal*, and was the subject of a two-page excerpt in the *American Lawyer*. It also has been favorably reviewed on electronic discussion lists and in traditional law journals.

While the enduring quality of such work is to be judged not by months but by decades, this Article considers why the work of Professor Amar has been so well

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6 One is reminded of WILLIAM W. CROSSKEY & WILLIAM JEFFREY, JR., 3 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1980), whose publication was a “major event in constitutional scholarship.” PHILIP BOBBIT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 17 (1982). Though most of the initial reviews were quite favorable, ultimately the work was the subject of great controversy. See Richard L. Aynes, Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment, 70 CHI.-KENT L. REV. 1197, 1244-50 (1995) [hereinafter Aynes, Fairman & Frankfurter].

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received thus far. In examining this question, this Article will focus upon examples from the second portion of Professor Amar's work and his doctrine of refined incorporation. In doing so, this Article suggests that there are "seven deadly sins" in the field of legal history:

1. Disrespect for historical figures and legal historians;
2. Abandonment of traditionally tested methods of interpretation without a sufficient basis for their replacement;
3. Failure to examine matters in context;
4. Anachronistic analysis;
5. Substitution of quotations for analysis;
6. Inconsistency; and
7. The false impasse.

Of course, each of these may be stated more positively, as "seven heavenly virtues":

1. Take people seriously;
2. Work with time-proven methods and build a firm foundation for innovations;
3. In judging the text, context is important;
4. Guard against anachronisms;
5. Only quote what you know to be the truth or likely to be the truth (avoid the "if two people said it, it must be true" approach);
6. Strive for scholarly consistency; and
7. Recognize that not every disagreement results in an impasse.

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7 I have previously expressed my own reservations about the use of the term "incorporation" with respect to the Fourteenth Amendment. See Richard L. Aynes, Refined Incorporation and the Fourteenth Amendment, 33 U. RICH. L. REV. 289 (1999) [hereinafter Aynes, Refined Incorporation].

8 The original seven deadly sins were said to be pride, envy, anger, sloth, covetousness, gluttony, and lust. The theme has been used many times before. See, e.g., Seven Deadly Sins (visited Jan. 1998) <http://www.deadlysins.com/isle.html> (suggesting that each of the seven characters in the 1960s TV program Gilligan's Island represented one of the seven deadly sins).

9 For a useful view of common errors in the writing of history, see generally DAVID H. FISCHER, HISTORIANS' FALLACIES, TOWARD A LOGIC OF HISTORICAL THOUGHT (1970).

10 The original seven heavenly virtues are faith, hope, charity, fortitude, justice, temperance, and prudence. See Seven Deadly Sins—Seven Heavenly Virtues (visited Mar. 29, 1999) <http://www.deadlysins.com/heavenlyvirtues.html>.
This Article will provide examples of the "sins" in the history of the debate over the meaning and effect of the Fourteenth Amendment and then test Professor Amar's work against the same standard.

I. TAKING PEOPLE SERIOUSLY

Scholars stand upon one another's shoulders. One cannot conduct original research upon every aspect of one's work. All academics rely upon the work and effort of others. We build not only upon the "facts" they collect, but also upon the insights they contribute. We all make judgments upon matters that demand our own original research as well as matters in which we rely upon the work of others.

Legal research often requires scholars to analyze the reasoning and arguments of a past generation of actors. We sometimes know (or think we know) a historical celebrity when we encounter the words of people like Abraham Lincoln, Frederick Douglass, or Susan B. Anthony. When we come upon a puzzling speech or letter from someone whom we know well, we judge the content in the context of other knowledge we have about that person. A lawyer-like distinction from Lincoln would not take us by surprise. If it made sense to our legal minds, we would accept it as unexceptional for Lincoln. An apparent un-lawyer-like analysis from Lincoln would give us pause. Yet, we would work hard to resolve any dissonance by determining whether Lincoln was a good lawyer, whether he was familiar with this area of the law, whether logic led Lincoln to make such a statement, and so on.

Yet, we must determine what is our obligation when we encounter someone whose name is not likely to be well-known to a whole generation of scholars. What if we are reading the letters or speeches of Kate Chase, George Washington

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11 Part III amplifies the importance of context in interpreting a text. See infra notes 82-89 and accompanying text.

12 Catherine Chase was the eldest surviving daughter of Salmon P. Chase, who was the Governor of Ohio, a U.S. Senator, the Secretary of the Treasury, and the Chief Justice of the U.S. Supreme Court. Kate Chase was said to be one of the most beautiful women and the most intelligent of her generation. She functioned as her father's press secretary and was his campaign manager at the 1868 Democratic Convention. See generally ALICE HUNT SOKOLOFF, KATE CHASE FOR THE DEFENSE (1971) (biography of Kate Chase); Richard L. Aynes, Bradwell v. Illinois: Chief Justice Chase's Dissent and the "Sphere of Women's Work," 59 La. L. REV. 521 (1999) (analysis of Kate Chase's influence upon her father's views of women's rights).
Paschal,\(^{13}\) or Albert Gallatin Riddle?\(^{14}\) If their words resonate well with us, if their ideas fit our own view of the world, if we can “make sense” of their views, then we accept them as our intellectual colleagues. However, if we have not encountered such individuals before and if their arguments do not immediately make sense to us, then it is an all too human trait to engage in the first deadly sin of scholarship: to assume that the problem is with the historic actor and not with ourselves.

This is a phenomenon that all humans experience. We “tend to see and hear only those messages that are congruent with our interests and attitudes.”\(^{15}\)

We avoid exposing ourselves to information with which we disagree—a process called selective exposure. If exposed to such information, we will either reinterpret it so that it fits nicely with our interests and attitudes—a process called selective perceptions—or we will forget it, a process called selective retention.\(^{16}\)

In the study of constitutional history, the incongruence of a historic actor’s words with our own view of the world naturally causes us to suspect the person is illogical, lacks ability, or is somehow a person on the fringe of intellectual society or cultural history. All too often, we not only disagree with such people, we also treat them with disdain. If they do not make sense to us, they must not be people worthy of respect. Indeed, in discussing the Barron Contrarians, Professor Amar notes, “[I]t is tempting to dismiss all of these folks as dolts . . . .”\(^{17}\)

When we encounter the speech of someone with whom we are unfamiliar, we have lost our context. We are like travelers in unfamiliar territory without a map. Thus, this Article suggests that this situation is one to which scholars should be alert: the combination of the seemingly illogical speech with the unknown person. This situation should also activate our “warning lights” and cause us to slow down. It should encourage us to find out who this person was and how he or she was thought

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\(^{13}\) George Washington Paschal was a Supreme Court Justice in Arkansas, a unionist leader in Texas during the Civil War, a reporter for the Texas Supreme Court, counsel for Texas in *White v. Texas*, a leading treatise writer in the 1860s and 1870s, and one of the early faculty members of the Georgetown Law School. See generally Richard L. Aynes, *George Washington Paschal*, in *17 AM. NAT’L BIOGRAPHY*, 107-08 (John A. Garraty & Mark C. Carnes eds., 1999).

\(^{14}\) Albert Gallatin Riddle was an Ohio anti-slavery Whig legislator who helped repeal Ohio’s black laws, helped articulate anti-slavery legal theory, and served as a one-term congresswoman and U.S. Counsel at Matanzas, Cuba. Riddle became a prominent Washington, D.C. lawyer and served on the faculty of Howard Law School. See generally ALBERT G. RIDDLE, *RECOLLECTIONS OF WAR TIMES* (New York, G.P. Putnam’s Sons 1895).


\(^{16}\) *Id.*

\(^{17}\) *AMAR, supra* note 1, at 147. He continues, “but we must resist.” *Id.*
of by his or her contemporaries. We should work hard to understand and to check ourselves. We should ask whether the problem of finding a logical point of view lies with the writer (or speaker) or with the reader.

This Article does not mean to suggest that the historic figure is always a thoughtful and reasonable person. It counsels, however, that a cautious scholar must look carefully at the person. The more that person seems to be a well-regarded, soundly analytical person, the harder the scholar should work to try to understand the historical figure’s point of view. Again, understanding does not mean agreeing. It does mean avoiding dismissive, disrespectful conclusions.

An example of the confluence of an unknown historical actor with a seemingly unintelligible viewpoint is found in the work of one of our most respected constitutional law scholars, Charles Fairman. June 23, 1947, was the date of the Court’s opinion in Adamson v. California. In Adamson, a five-member majority concluded that the Fourteenth Amendment did not require the enforcement of the Bill of Rights against the states. Justice Black, in a dissenting opinion joined by the other three members of the minority, concluded that the adoption of the Fourteenth Amendment did result in the enforcement of the first eight amendments against the states.

Though Stanford did not yet have a law review, preparations were underway for such a journal and Professor Charles Fairman was one of the moving forces behind it. Fairman began research the same year on his seminal article that ultimately supported Justice Frankfurter’s concurring opinion in Adamson. It was a busy time in Fairman’s life. By 1948, his new casebook, American Constitutional Law Decisions, had been published. In December of that same year, Fairman’s “Round Table on Judicial Biography” was held at the Annual Meeting of the American Political Science Association.

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18 Charles Fairman was a protégé of Felix Frankfurter and taught at Stanford, Washington (St. Louis), and Harvard. Fairman’s 1949 Stanford article on the incorporation of the Bill of Rights by the Fourteenth Amendment has been judged as one of the most cited articles in the last 50 years. His Holmes’ Debase—while criticized by some—has nevertheless been judged as one of the “classics” in Reconstruction-era legal history. See Richard L. Aynes, Charles Fairman, in 7 AM. NAT’L. BIOGRAPHY (John A. Garraty & Mark C. Carnes eds., 1999) [hereinafter Aynes, Charles Fairman]; see also Aynes, Fairman & Frankfurter, supra note 6.

19 332 U.S. 46 (1947).

20 See id. at 51.

21 See id. at 71-72.

22 See Aynes, Charles Fairman, supra note 18, at 1229.

23 See Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 STAN. L. REV. 5 (1949) [hereinafter Fairman, Fourteenth Amendment]; see also Adamson, 332 U.S. at 59 (Frankfurter, J., concurring).

24 See Aynes, Charles Fairman, supra note 18, at 689.

25 See Aynes, Fairman & Frankfurter, supra note 6, at 1224, 1228.
Nevertheless, by sometime after September 1949, Fairman had published his pathbreaking study.\textsuperscript{26} This account brought him face-to-face, at least intellectually, with the author of Section 1 of the Fourteenth Amendment, Ohio Congressman John A. Bingham.\textsuperscript{27} Though Fairman was an accomplished scholar,\textsuperscript{28} he had been educated in the traditions of the Dunning School of Reconstruction\textsuperscript{29} and did not seem to have kept pace with revisionist historians.\textsuperscript{30}

This also appears to be the first time Fairman encountered Bingham in print. Fairman’s lack of familiarity with Bingham is suggested by the fact that Fairman gave biographical information about several other individuals who participated in the debate over the Fourteenth Amendment and even identified some as lawyers,\textsuperscript{31} yet he provided absolutely no biographical data concerning Bingham, not even the simple fact that Bingham was also a lawyer.\textsuperscript{32}

Looking at Bingham’s first and shortest speech on an early version of the proposed Fourteenth Amendment,\textsuperscript{33} Fairman concluded that when Bingham referred to the “immortal bill of rights,”\textsuperscript{34} Bingham was referring not to the first eight

\textsuperscript{26} See \textit{id.} at 1230 n.205. Prior to Fairman’s work, there was virtual unanimity on the idea that the Court’s interpretation of the Fourteenth Amendment was inconsistent with the legislative intent of the framers of the amendment. Some people praised this inconsistency as having saved the nation from a great mistake and others condemned it as a breach of faith, but all agreed upon the inconsistency. \textit{See} Richard L. Aynes, \textit{Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases}, 70 CHI.-KENT L. REV. 627, 681-86 (1994). Fairman’s great contribution was to sketch a theory under which the New Deal Court’s approach in \textit{Adamson} was thought to be congruent with the legislative intent.

\textsuperscript{27} \textit{See} Aynes, \textit{Fairman & Frankfurter, supra} note 6, at 1232.

\textsuperscript{28} \textit{See} \textit{id.} at 1205-08.

\textsuperscript{29} \textit{See} \textit{id.} at 1204. William A. Dunning and his students embraced the “mythic white view of the horrors of Reconstruction.” John Herbert Roper, \textit{John Hope Franklin, in Encyclopedia of Southern Culture} 208 (Charles Reagan Wilson & William Ferris eds., 1989). Pamela Brandwein has suggested that Fairman’s adherence to the Dunning School of history “helped channel his perception away from materials that suggested the existence of an antebellum constitutional dispute over the structure of federalism.” Pamela Brandwein, \textit{Dueling Histories: Charles Fairman and William Crosskey Reconstruct “Original Understanding”}, 30 L. & SOC’Y REV. 289, 309. (1996). She also notes that “Fairman was locked into his view of \textit{Barron} as the only authoritative source of the meaning of the antebellum Constitution . . . .” \textit{Id.} at 305.

\textsuperscript{30} \textit{See} Aynes, \textit{Fairman & Frankfurter, supra} note 6, at 1269 n.489 (collecting and summarizing positive and negative reviews).

\textsuperscript{31} \textit{See} \textit{id.} at 1231-32.

\textsuperscript{32} \textit{See} \textit{id.} at 1232.

\textsuperscript{33} \textit{See} CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

\textsuperscript{34} \textit{Id.}
amendments to the U.S. Constitution, but rather to a combination of Article IV Section 2 and the Due Process Clause of the Fifth Amendment.35

Fairman's idiosyncratic reading of Bingham's speech36 led Fairman to conclude that Bingham's views were marginal and idiosyncratic. By 1971, Fairman would conclude that Bingham was "confused"37 and held "peculiar conceptions."38 Fairman suggested that Bingham was "not a man of exact knowledge or clear conceptions or accurate language,"39 but rather was "distinguished for elocution but not for hard thinking."40

Evidence from Bingham's other speeches, the court cases cited in those speeches, an understanding of the theories that underlie Bingham's constitutional views, and the views of his contemporaries suggest that it was Fairman, not Bingham, who was confused.41 Bingham's Bill of Rights, like Fairman's, consisted of the first eight amendments to the U.S. Constitution.42 Yet, the important point here is not the correctness or incorrectness of Fairman's analysis, but his lack of caution in reaching that analysis. If the views Fairman thought he had found had been attributed to someone with whom he was familiar and respected—such as President Lincoln—Fairman undoubtedly would have worked harder to discover a cogent meaning.

What could Fairman have learned about Bingham that would have informed his reading of Bingham's Fourteenth Amendment speeches? Even in 1949, a cursory search of biographic information about Bingham would have thrown light upon the

36 Fairman's interpretation depended entirely upon the accuracy of the Globe's reporter indicating that Bingham said "this immortal bill of rights" as opposed to "the immortal bill of rights." See id.
38 Id. at 461.
39 Id. at 462.
41 See generally, AMAR, supra note 1, at 181-214 (giving a coherent account of Bingham's views); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) [hereinafter CURTIS, NO STATE SHALL ABRIDGE] (same); Aynes, Misreading Bingham, supra note 40 (explaining how Fairman was confused in his reading of Bingham's speeches, which can be read to articulate a consistent, coherent, and traditional view of the Bill of Rights).
42 See Aynes, Misreading Bingham, supra note 40, at 66-74.
man that Fairman termed a "key" figure in the drafting of the Fourteenth Amendment. A barebones account of Bingham's career would show that he was an experienced lawyer and raise the possibility that he was also a quality lawyer, thought to be good at "hard thinking." A search would have included the following information: lawyer; Tuscarawas County, Ohio Prosecutor for four years; Member of Congress for nine years prior to the proposal of the Fourteenth Amendment; Chairman of the Judiciary Committee for at least two sessions of Congress; Chairman of the Managers in the successful impeachment of Judge West Humphreys for treason; Special Judge Advocate General appointed by President Lincoln to court-martial the Surgeon General of the United States; Solicitor of the United States Court of Claims appointed by President Lincoln; Special Judge Advocate General in the prosecution of those charged with President Lincoln's assassination; and Chairman of the Managers in President Andrew Johnson's impeachment trial.

These facts, in and of themselves, might have given Professor Fairman pause to consider how a man, chosen by his contemporaries to hold these law-related positions, could seemingly be so confused. Asking that question should drive a careful scholar to dig deeply into Bingham's thinking. Fairman failed to do this.

43 See Fairman, Fourteenth Amendment, supra note 23, at 25.
44 See generally Richard L. Aynes, The Impeachment and Removal of Tennessee Judge West Humphreys: John Bingham's Prologue to the Johnson Impeachment Trial, 2 J. S. LEGAL HIST. 71 (1993) [hereinafter Aynes, Impeachment and Removal] (giving an account of Bingham's role in the Humphreys impeachment trial).
45 All of this information was readily available in public sources easily accessible to Fairman in 1949. See, e.g., 2 DICTIONARY OF AMERICAN BIOGRAPHY 277-78 (Allen Johnson ed., 1929); BENJ. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 183-84 (1914); CARRINGTON T. MARSHALL, 2 A HISTORY OF THE COURTS AND LAWYERS OF OHIO 860 (1934); 9 THE NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 375-76 (1899). These same sources would have told Fairman several things about Bingham. First, he was an active campaigner for the Whig Party beginning in 1840. Second, 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. Third, Bingham was one of the early leaders of the Republican Party in Ohio. Finally, having served in Congress as a Republican from 1854-1862 and 1865-1872, Bingham was intimately involved in most of the important national developments leading to the adoption of the Fourteenth Amendment.
46 One scholar who, to his credit, ferreted out this type of biographic data and asked these questions was Paul Dimond. See Paul Dimond, Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds, 80 MICH. L. REV. 462, 481-94 (1982). Yet others, often relying upon Fairman, have followed him in "running" the caution light. See, e.g., Bret Boyce, Originalism and the Fourteenth Amendment, 33 WAKE FOREST L. REV. 909, 1017 n.599 (1998).
47 One difficulty in writing an article like this is living up to one's own standards. As Abigail Adams said to Royall Tyler, "Who of us my dear Sir practise [sic] as well as we know?" PHYLLIS LEE LEVIN, ABIGAIL ADAMS 163 (1987). Have I been respectful, for
Thus, Fairman committed the "sin" of disrespecting a significant figure in legal history—John A. Bingham. Fairman's failing was not in disagreeing with Bingham. Disagreement and even negative assessment is every scholar's right and sometime his or her duty. However, Fairman failed to take Bingham seriously. This was a "sin" against scholarship because it meant that Fairman did not maximize his insight into the era and did not optimize the facts available in reaching his best judgment.

Like Charles Fairman, Professor Amar has many disagreements with the views of John Bingham. Bingham's February 28, 1866 speech, a portion of which is reprinted in the inside of the back cover of The Bill of Rights, was subtitled, "In support of the proposed amendment to enforce the bill of rights." The speech was not subtitled, as one might expect if Professor Amar's refined incorporation had been contemplated, "In support of the proposed amendment to enforce some portions of some of the bill of rights." Indeed, in that specific speech, Bingham indicated that the effect of adopting the amendment would be to overrule Livingston v. Moore, which held that the Seventh Amendment jury trial provisions were not enforceable against the states. This statement directly contradicts Professor Amar's refined incorporation theory that justifies the non-enforcement of the Seventh Amendment against the states. Moreover, Bingham's 1871 speech, in which he defined the privileges and immunities of the Fourteenth Amendment as being comprised "chiefly" example, of Charles Fairman? My writings make clear that I think Fairman took generations of scholars on a wrong turn with respect to Bingham and the Fourteenth Amendment. See Aynes, Misreading Bingham, supra note 40, at 103-04; see also AMAR supra note 1, at 188. I also think, however, that we all stand upon his shoulders and owe him a tremendous scholarly debt.

Having read through much of Fairman's correspondence with Felix Frankfurter, one is convinced that Fairman, to borrow Akhil Amar's play on words, was trying to be a "fairman." I think Fairman was diligent in his scholarship and as thorough as he thought he needed to be. As I have tried to make clear in my biographical sketch of Fairman for Oxford University Press' American National Biography, I do not think Fairman was deliberately un-even-handed. See Aynes, Charles Fairman, supra note 18.

A colleague, noting how I have used Charles Fairman as a point of departure in much of my research, has jokingly suggested that if Charles Fairman did not exist, I would have to invent him. Yet, in a real sense, Charles Fairman challenges me in the same way that I think John Bingham should have challenged Charles Fairman. I must puzzle through the problem of how someone of Fairman's background and ability could reach the conclusions he did. I must continue to put myself in Fairman's shoes to make sure where the legitimate disagreements lie and where I am not working hard enough to understand how and why Fairman reached different conclusions than mine.

48 CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).
49 32 U.S. (7 Pet.) 469 (1833).
50 See id. at 551-52; CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866).
51 See AMAR, supra note 1, at 276.
of the first eight amendments, which he quoted verbatim, would seem to contradict Professor Amar's entire theory of refined incorporation.

Yet, in contrast to Fairman, Professor Amar makes sense of Bingham's analysis, even when it directly contradicts Amar's own conclusions. He takes Bingham seriously and reads his speeches empathetically. There are over twenty references to Bingham in the index to *The Bill of Rights: Creation and Reconstruction*. When a section of Professor Amar's book was excerpted in *The American Lawyer*, a picture of Bingham was printed in the center of the first page. The article's title was *Hero Worship and The Bill of Rights*, with a subtitle *Let us now praise John Bingham*. Even though Professor Amar's selective incorporation is directly at odds with the literal readings of several of Bingham's speeches, he treats Bingham's views with respect.

There are other examples of Professor Amar's respect for those with whom he disagrees. The early portions of his section on reconstruction treat antebellum ideas respectfully, especially those on the enforceability of the Bill of Rights and John Marshall's decision in *Barron v. Baltimore* and its progeny. *Barron* was one of the bases of a prior major scholarly conflict between William W. Crosskey of Chicago and Charles Fairman, then at Stanford. Fairman's research concluded that Chief Justice Marshall had been correct in *Barron* and rejected both Crosskey's analysis and that of the people to whom Amar refers as the *Barron Contrarians*, people who interpreted some or all of the Bill of Rights to apply to the state both before and after *Barron*. Fairman was "unforgiving in his insistence that *Barron*

52 See CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871).
53 See AMAR, supra note 1, at 398.
55 Id.
56 One might suggest that the comparison between Amar and Fairman is not an apt one. After all, Fairman read Bingham's speeches and was confused. Amar read the speeches in a way that made sense to Amar and in a way that supported his general reading of the Fourteenth Amendment. There are two points to be made here. First, it is entirely possible that had Fairman read with empathy and in context, he too would have "made sense" of Bingham's views—whether he agreed with them or not. Second, though the principle of empathetical reading undoubtedly applies to everyone, the danger is the greatest when we are dismissive of historical actors whose views are incongruent with our own.
58 See AMAR, supra note 1, at 137-62.
60 See Fairman, *Supreme Court*, supra note 59, at 44-78 (arguing the correctness of
was not only the correct decision, but also the only rational possibility.\textsuperscript{61} Indeed, Pamela Brandwein suggests that, given his approach, "Fairman was ill-equipped to even imagine that the legitimacy of Barron might be challenged."\textsuperscript{62} Similarly, in articulating a distinction between "law" and "true law," Brandwein concludes that Fairman "was conceptually ill equipped to even imagine that Bingham and the Republicans could hold such a distinction, much less act on it."\textsuperscript{63} In contrast, Crosskey championed the Contrarians as the true interpreters of the Constitution and rejected Barron and the mainstream legal arguments about its correctness.\textsuperscript{64}

Professor Amar follows the path of neither Fairman nor Crosskey. Like Crosskey, on the Fourteenth Amendment Framers, Amar reads and researches empathetically.\textsuperscript{65} For example, Professor Amar begins this section of his book with the following: "Having worked hard to understand Barron, we now must work equally hard to understand the contrary view ...."\textsuperscript{66} He tried to put himself in the shoes of the Contarians to understand, if not to agree. One is reminded of Walt Whitman’s account of empathy: "Agonies are one of my changes of garments. I do not ask the wounded person how he feels, I myself become the wounded person ...."\textsuperscript{67} Unlike Fairman, Professor Amar does not denigrate these people by treating their ideas as unworthy of serious consideration. By treating the Contrarians with respect, by taking them seriously as people and as thinkers, Professor Amar develops a cogent explanation of their views and how they could reasonably have held those views.\textsuperscript{68} Yet, unlike Crosskey, Professor Amar’s empathy does not lead to endorsement. For all of his empathy, Professor Amar reaches the same conclusion as Fairman—supporting Barron as the correct decision.\textsuperscript{69}

One of the reasons Amar’s book has been initially well-received is that he has not committed the "sin" of disrespect. He researches and writes empathetically. He tries to understand even if—and maybe especially if—he does not agree. As Steven Calabresi notes, "Professor Amar’s ability to put himself in the shoes of members of

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\textsuperscript{61} Aynes, Fairman & Frankfurter, supra note 6, at 1246; see also Brandwein, supra note 29, at 305 ("Fairman was locked into his view of Barron as the only authoritative source of the meaning of the antebellum Constitution ....").

\textsuperscript{62} Brandwein, supra note 29, at 305.

\textsuperscript{63} Id. at 311 (emphasis added).

\textsuperscript{64} See Crosskey, supra note 59, at 119-43. The reasons why two such intelligent scholars could reach such opposite conclusions while looking at largely the same data will be discussed. See infra notes 71-80 and accompanying text.

\textsuperscript{65} See generally AMAR, supra note 1, at 145-62.

\textsuperscript{66} Id. at 145.

\textsuperscript{67} WHITMAN’S ‘SONG OF MYSELF’—ORIGIN, GROWTH, MEANING 61 (James E. Miller, Jr. ed., 1964).

\textsuperscript{68} See AMAR, supra note 1, at 145-56.

\textsuperscript{69} See id. at 144-45.
a particular generation of lawyers and to read texts as they would have read them... is quite extraordinary." He has practiced the virtue of taking people seriously.

II. METHODS OF INTERPRETATION

As one reads the Fairman/Crosskey debates on the application of the Bill of Rights to the states through the Fourteenth Amendment, it appears that Crosskey came closer to the truth. One must question how two leading scholars came to such opposite conclusions.

The "rule" about reading empathetically and taking people seriously, applies when reading both Fairman and Crosskey. The answer is that Crosskey—and not Fairman—worked within the accepted canons of construction. When it came time to look to the meaning of the Fourteenth Amendment, Crosskey utilized conventional sources for determining the meaning of the Amendment and Fairman eschewed those conventional sources.

For example, like Amar, Crosskey utilized a highly empathetic reading of the Reconstruction debates. Whatever one concludes concerning the merits of his work on these issues, Crosskey was working well within the conventions of legal scholarship. He examined the language used in the drafting of the various proposed amendments and the legislative history as contained in the Congressional Globe. He relied largely upon the key speeches of the drafter of the Fourteenth Amendment in the House, John Bingham, and the floor manager in the Senate, Jacob Howard. Crosskey was able to parse the text of the Amendment and its legislative history in a way that presented a coherent reading of the Framers' intent and the plain meaning of the text. His focus was primarily upon the pre-ratification debates.

70 Calabresi, supra note 5, at 2279.

71 Early in my own work on the Fourteenth Amendment, I knew that Crosskey was a largely discredited scholar. In early discussions of their critique of an article published in 1993, Michael Kent Curtis and Akhil Amar convinced me that, even if I supported my views independently, I needed to take Crosskey seriously. Further, I would suggest that in spite of the spirited responses Raoul Berger has made to Michael Kent Curtis's work, Professor Curtis has set a good example for all of us in continuing to respect and take seriously the views of Raoul Berger.

72 See Ayres, Fairman & Frankfurter, supra note 6, at 1244-50.

73 See Crosskey, supra note 59, at 10-100.

74 See id.

75 See id.

76 Normally, we might think that the views of the ratifiers would have more effect than those of the Framers. However, when we think about the original Constitution, we often consult Framers' views. This is so for three key reasons. First, they are the ones whose views are preserved in a coherent form (e.g., the Convention debates and the Federalist Papers). Second, for a Constitution that was ultimately ratified by 13 different states, the attempt to discern a "consensus" among so many actors is a daunting, and at times,
Fairman took a very different approach. In Fairman’s interpretation of the Fourteenth Amendment, he rejected the conventional sources of determining the meaning of the Amendment — statements by the legislative leaders and the plain reading of the text. Indeed, because of his inability to read the debates empathetically, Fairman could not make sense of Fourteenth Amendment author John Bingham’s fairly straightforward statements. Faced with legislative debates that left him in confusion, Fairman resorted to post-ratification actions of the states to try to explain the meaning of the text. Ultimately, both Crosskey and Fairman were good scholars with powerful insights. However, those insights triumphed only when they worked within the normal conventions of scholarship.

One of the reasons that Amar’s The Bill of Rights has enjoyed such a strong initial reception is that, like Crosskey reading of the Fourteenth Amendment, Amar works within the conventions of scholarly interpretation. Indeed, as Professor Lockland Bloom writes, Professor Amar “capably employs virtually all accepted forms of constitutional analysis.”

impossible task. See Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 6 (1996). Finally, in a document with many dissimilar proposals that had to be voted up or down as a whole, there were no doubt shifting coalitions that might have voted for ratification even though they were adamantly opposed to some provisions.

These factors all apply to the multifaceted five sections of the Fourteenth Amendment. As David Kyvig notes:

To combine a number of proposals into a single measure subtly but perceptibly shifted critical decision making from the ratifiers to the initial adopters of an amendment resolution. Unlike the 1790s experience [when the Bill of Rights was proposed], states would confront a take-it-or-leave-it, all-or-nothing choice.

David E. Kyvig, Explicit & Authentic Acts, Amending the U.S. Constitution, 1776-1995, at 166-67 (1996). As I have tried to develop elsewhere, the Fourteenth Amendment deliberately contained multiple provisions so that the voters would not have had a choice. They would have had to accept the portions they detested in order to obtain the benefits of the portions they thought necessary for the survival of the country. See Richard L. Aynes, The Unintended Consequences of the Fourteenth Amendment, in The Unintended Consequences of Constitutional Amendment (David E. Kyvig ed., forthcoming 2000) [hereinafter Aynes, Unintended Consequences].

77 See Fairman, Supreme Court, supra note 59, at 40-44.
78 See Aynes, Misreading Bingham, supra note 40, at 66-74.
79 See id. at 96-103.
80 One other difference between the approaches of Crosskey and Fairman is their treatment of judicial precedent. Fairman had a greater interest in the precedents established by the Court, while Crosskey had a greater respect for the text and legislative history. See Aynes, Fairman & Frankfurter, supra note 6, at 1244; Brandwein, supra note 29, at 312.
81 Lackland H. Bloom, Jr., Long Live the Bill of Rights! Long Live Akhil Reed Amar’s The Bill of Rights!, 33 U. Rich. L. Rev. 313, 315 (1999) (emphasis added). Professor Bloom also points out that Professor Amar’s creativity is in building upon and enriching “the conventional devices of constitutional analysis.” Id. at 317. I do not mean to suggest
III. GOOD JUDGMENT ABOUT CONTEXT

Professor Amar's special gift is to see interrelationships between various parts of the Constitution and, even more so, between the text and matters outside of it.\(^\text{82}\)

To return to Charles Fairman, his failure to make sense from the debates of the thirty-ninth Congress may have been due, in large part, to the fact that he began with the debates of the thirty-ninth Congress.\(^\text{83}\) For example, in his classic and still frequently cited 1949 article on incorporation, not one of Fairman's 392 footnotes makes reference to any Congressional speech prior to the thirty-ninth Congress.\(^\text{84}\) Yet, by all modern accounts, the adoption of the Fourteenth Amendment came about as part of the process of the battle against slave power, much of which was played out in earlier Congresses.\(^\text{85}\) One may well have difficulty understanding the nature of the debates of the thirty-ninth Congress without some references to the history that led to those debates.

Similarly, Fairman was educated under the reactionary Dunning School of history.\(^\text{86}\) It appears that Fairman did not seek out historical sources available to him that would have presented a more balanced view of Reconstruction.\(^\text{87}\) Moreover, he had simply not utilized the new information and new insights produced by a new generation of scholars when preparing his later works.\(^\text{88}\)

These failures of context—the failure to understand the history underlying a certain period of time and the failure to place one's own work in the context of contemporary scholars—may well limit the enduring nature of Fairman's work. Happily, we see no such limitations in the work of Professor Amar. Amar has properly identified the context for his refined incorporation theory by beginning with that we cannot develop new and better methods of problem solving. Yet, we do so at our peril, unless we build a firm foundation for such methods that will gain them widespread acceptance.

\(^\text{82}\) See AMAR, supra note 1, at xi-xv.
\(^\text{83}\) See Fairman, Fourteenth Amendment, supra note 23, at 6.
\(^\text{84}\) See generally id.
\(^\text{85}\) See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988); Aynes, Refined Incorporation, supra note 7, at 290-97; Paul Finkelman, Affirmative Action for the Master Class, 32 AKRON L. REV. 423 (1999) (describing the ways in which the Constitution favored slaveholders). In contrast to Fairman, William W. Crosskey constructed "a narrative with wider boundaries" because he saw the link between the anti-slavery movement and the Republican Congressmen who proposed the Fourteenth Amendment. Brandwein, supra note 29, at 312.
\(^\text{86}\) See Aynes, Fairman & Frankfurter, supra note 6, at 1204.
\(^\text{87}\) See id. at 1204 n.43.
\(^\text{88}\) See id. at 1269 n.489; see also Randall Kennedy, Reconstruction and the Politics of Scholarship, 98 YALE L.J. 521, 522 n.8 (1989) (indicating that Fairman had ignored "much of the best work done in Reconstruction studies over the past twenty years").
the initial drafts of the Bill of Rights. Indeed, it is the interaction between text and context that may be the strongest aspect of The Bill of Rights.

IV. ANACHRONISTIC ANALYSIS

Another strength of Professor Amar's book is that he does not confuse his own views with those of his historical subjects. He can provide empathetic readings of the Barron Contrarians, without adopting their point of view. He works hard to avoid anachronism and, according to Robert Spoo, considers anachronistic arguments "one of the gravest criticisms" one can level at a scholar. In contrast, both Charles Fairman and Felix Frankfurter transposed their own values with those of the Fourteenth Amendment framers or ratifiers.

For example, Professor Amar provides a fresh look at how important the Seventh Amendment right to jury trial was to those who adopted the Bill of Rights. He does so, in spite of the fact that he does not deem the Seventh Amendment to be enforceable against the states.

Similarly, the American grand jury can trace its ancestors back to the tenth century and its protective "modern" function to 1681. The grand jury was seen by the Revolutionary Framers as a necessary ingredient in the exercise of republican rights and was seen as being so important as to require specific protection in the Fifth Amendment. Professor Amar is attuned to these views in his own discussions

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89 See AMAR, supra note 1, at 3. Other issues of context have been raised with respect to The Bill of Rights. Mark Graber has suggested that Professor Amar has not plumbed the depths of political science in fashioning his view of the Bill of Rights and the Constitution. See Mark A. Graber, The Constitution as a Whole: A Partial Political Science Perspective, 33 U. RICH. L. REV. 343, 343 (1999). But see Akhil Amar, Continuing the Conversation, 33 U. RICH. L. REV. 579, 583-85 (1999) [hereinafter Amar, Continuing]. Wythe Holt argues that Professor Amar has paid too much attention to the legal elite and insufficient attention to workers. See Wythe Holt, We Some of the People: Akhil Amar and the Original Intent of the Bill of Rights, 33 U. RICH. L. REV. 377, 378 (1999). But see Amar, Continuing, supra, at 593-95. Jack Rakove suggests that Amar's work does not quite measure up to the norms of historians. See Rakove, supra note 5, at 195.

90 See AMAR, supra note 1, at 145-62.

91 Robert Spoo, "No Word is an Island:" Textualism and Aesthetics in Akhil Reed Amar's The Bill of Rights, 33 U. RICH. L. REV. 537, 566 (1999); see also Calabresi, supra note 5, at 2282 (referring to Professor Amar's "almost archaeological excavation and restoration of the Bill of Rights").

92 See Aynes, Fairman & Frankfurter, supra note 6, at 1217-24.

93 See AMAR, supra note 1, at 83-86.

94 See id. at 92.

95 See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 344 (Kermit L. Hall et al. eds., 1992).

96 See id.

97 See U.S. CONST. amend. V.
of the grand jury. Whether the grand jury was entitled to enjoy that degree of respect in 1866-1868 is open to debate. It is clear that at least some states had begun to experiment with forms of prosecution without the "protection" of grand juries by the time of the Fourteenth Amendment's adoption. However, the vast majority of states at that time continued to require grand juries in criminal matters involving felonies. There is also nothing in the debates of the thirty-ninth Congress to suggest that it lacked respect for the grand jury.

From a policy standpoint, reasonable people can disagree as to the efficacy of grand juries. However, it is very different to argue that it is not a good idea to require grand juries than it is to say that the Fourteenth Amendment Framers did not think it was a good idea to require grand juries.

Professor Fairman and Justice Frankfurter could not reach the conclusion that the Framers did not value the grand jury based upon the text of the Amendment or anything found in the legislative history. Yet, they each began with great disdain for the Seventh Amendment and grand jury provisions. When they considered the question of whether the Framers could have intended to apply these antiquated provisions to the states, they could only command disbelief. Their anachronism in reading their own current beliefs back into history was their failing.

Separating one's views from historical views will not inevitably lead one to conclude that the jury provisions of the Fifth and Seventh Amendments should apply against the states. Indeed, while Professor Amar finds it "hard to justify" the failure to enforce the grand jury requirement against the states, he seems to accept the

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98 See AMAR, supra note 1, at 84-87.
100 See Fairman, Fourteenth Amendment, supra note 23, at 98-100.
101 See id.
102 See Fairman, Fourteenth Amendment, supra note 23, at 83; see also Aynes, Fairman & Frankfurter, supra note 6, at 1222-23.
103 See AMAR, supra note 1, at 200 (referring to "Fairman's anachronistic hostility to grand juries"); Aynes, Fairman & Frankfurter, supra note 6, at 1221-35.
104 What Professor Brandwein writes of Fairman's views on Barron seem equally applicable here: "Fairman projected contemporary orthodoxy backward. In other words, he universalized his present. He dehistoricized current orthodoxy, treating it as a 'natural' object." Brandwein, supra note 29, at 306. Professor Fairman and Justice Frankfurter also failed to place the choice in context. They considered the question of whether grand jury provisions were describable in isolation. In doing so, they failed to consider whether the benefits from one or more of the sections of the Amendment would outweigh their view of the "detriment" of the grand jury requirements. See generally Aynes, Unintended Consequences, supra note 76 (discussing the choices faced by the Fourteenth Amendment ratifiers and why provisions in Sections 2, 3, and 4 of the Amendment would outweigh any desire to avoid grand jury requirements).
105 AMAR, supra note 1, at 307.
conclusion not to apply the civil jury requirement to the states. In doing so, however, Professor Amar avoids the sin of anachronism.

V. QUOTATION

Scholars writing legal history frequently quote other sources. Sometimes quotation is a method of citing others as authority. Sometimes quotation is an effort to give attribution to an apt expression that the author is unlikely to be able to match independently. Sometimes a quotation is used as a form of persuasion. We all quote and the current genre of legal scholarship requires one to quote frequently. Yet, there are perils coupled with all of the positive benefits of quotation. One may find one or even two sources for almost any proposition, no matter how absurd. For example, during the thirty-ninth Congress, one congressman juxtaposed two Biblical quotations that jointly read: “Judas went out and hanged himself. Go and do thou likewise.” Empathetic reading and context should help prevent such misuse of quotations. Judgment and a commitment to a search for truth helps as well.

Equally as important, when we rely upon the conclusions of others, as we necessarily must, we run the risk of being led astray. Consider, for example, a recent article that cites Charles Fairman as authority and paraphrases Fairman’s work. It concludes, “As several of his colleagues’ remarks suggested, Bingham was esteemed more for his rhetorical exuberance than for his analytical perspicacity.” This quotation accurately reflects Fairman’s conclusions. Yet, upon what are those conclusions based?

Twenty-two years after Fairman’s first encounter with Bingham, Fairman continued to ignore many of Bingham’s accomplishments that could imply legal ability. Instead, Fairman concluded that Bingham had a “peculiar mode of thought.” Fairman called on the recollection of four of Bingham’s contemporaries to “establish his standing.” The four were former Republican Representative, and later U.S. Senator, James Blaine; former Republican Representative, U.S. Senator, and Secretary of the Treasury John Sherman; former Republican Representative, U.S.

106 See id. at 276-307.
107 See any random page of this Article or any other article in this volume.
109 Bret Boyce, Originalism and the Fourteenth Amendment, 33 WAKE FOREST L. REV. 909, 1017 n.599, citing 6 FAIRMAN, HISTORY OF THE SUPREME COURT, supra note 37, at 1270. This is similar to Justice Frankfurter, who indicated that “the relevant historical materials” had been canvassed “by legal scholars” and then cited only Charles Fairman’s 1949 article. Bartkus v. Illinois, 359 U.S. 121, 124 & n.3 (1959).
110 See 7 FAIRMAN, HISTORY OF THE SUPREME COURT, supra note 40, at 133.
111 6 FAIRMAN, HISTORY OF THE SUPREME COURT, supra note 37, at 1270.
112 Id.
Senator, and Secretary of the Treasury George S. Boutwell; and Democratic Congressman from Ohio and New York Samuel S. Cox.  

Fairman interpreted the statements quoted from Blaine, Sherman, and Cox praising Bingham’s speaking ability, but implied one could be a good speaker without being good at analysis. Yet Albert G. Riddle, drawing on his experience in Congress between 1861 and 1863, indicated that the Congress was “not a great admirer of eloquence” and that “the mere maker of speeches [was] the most useless of men.”

Sherman’s statement was more oblique. When he praised Bingham for his eloquence, it appeared to be a compliment. While he deprecated episodes of “flights of oratory,” he also indicated that Bingham “took a leading part in all the debates of Congress.” It is unlikely that the dominant party in Congress would have allowed a “confused” and “illogical person” to take a leading part in “all” of the important debates.

The third Republican upon whom Fairman relied was George Boutwell. It is at least open to question whether Boutwell’s statement concerning Bingham was really negative at all. After attributing the Privileges or Immunities Clause of the Fourteenth Amendment to Bingham, Boutwell said the Clause’s “euphony and indefiniteness of meaning were a charm” to Bingham. Given Fairman’s New Deal philosophy, the specter of an “indefinite” clause giving rise to Lochner would certainly have been anathema to Fairman. Yet, a logical person with values different from Fairman might well want the clause written in a general way, in much the same way that many parts of the original Constitution used general terms. Whatever the
accuracy of Boutwell’s report, it implied nothing negative about Bingham’s logical ability.

If Boutwell’s comments were negative, then one would have to consider the fact that he was a political enemy of Bingham. By 1866, Bingham was the leader of the moderate Republicans in the House. When the conservative Democrats were willing to support the moderate Republicans, the moderates were able to defeat the radicals led by Thaddeus Stevens. One of Stevens’ key supporters was George Boutwell of Massachusetts.

When the Johnson impeachment managers were elected, Bingham received more votes than any member of the managers, including Thaddeus Stevens. Thinking that the managers had the right to select their own chairman, Stevens engineered the Impeachment Committee’s election of his protégé, George Boutwell, as chairman. Yet, Bingham insisted that he was entitled to be chairman because the House gave him the largest number of votes. In the end, Bingham was too important to the impeachment effort for Stevens and Boutwell to allow him to leave the Committee. They gave in, and Bingham chaired the managers. An angry Thaddeus Stevens called Bingham names and said that Bingham “was Lord again.”

Life-long Democrat Samuel S. Cox was the only one of the four whose comments directly supported Fairman’s conclusion. While Cox praised Bingham’s

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121 See 6 FAIRMAN, HISTORY OF THE SUPREME COURT, supra note 37, at 293.
122 Newspapers edited by one’s allies or one’s enemies need to be viewed with caution. Recognizing that the Cadiz Republican had been an ally of Bingham, its 1878 retrospective still bears investigation. Referring to events in 1868, the newspaper noted conflicts between Stevens and Bingham. It claimed that Bingham “was the one man in Congress that old Thad couldn’t control.” About Thad Stevens and John A. Bingham, THE CADIZ REPUBLICAN, Apr. 11, 1878, at 2, col. 2. Further, it claimed that Bingham “was the leader of the dominate party in Congress. Stevens was his rival . . . .” Id.
123 See 6 FAIRMAN, HISTORY OF THE SUPREME COURT, supra note 37, at 293.
124 See 2 GEORGE S. BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 119 (1902).
125 See id. at 119-20.
126 See id.
127 See id.
128 Id. This account is taken largely from Boutwell’s memoirs. See id. The Stevens quote is from About Thad Stevens and John A. Bingham, supra note 122, at 2, col. 2.

Fairman could have also mined Stevens’ speech for negative comments concerning Bingham. Stevens called Bingham “conceited, dogmatic, overbearing, exceedingly offensive,” a “mad bull,” and an “arrogant fool.” Id. Yet, except for possibly his use of the term “fool,” none of these are inconsistent with being logical. Given the struggle for leadership between Stevens and Bingham, and Stevens’ reputation for using “invective” to try to keep straying Republican members in line, a careful scholar would use Stevens’ words with caution.

129 See supra notes 114-28 and accompanying text and infra notes 130-38 and accompanying text; see also 6 FAIRMAN, HISTORY OF THE SUPREME COURT, supra note 37,
“elocution,” he claimed that Bingham lacked “reasoning faculty.” Yet, Cox had only harsh words for the Fourteenth Amendment itself:

This amendment introduced into the organic law a principle so abhorrent to liberty and justice that from time immemorial it had been regarded by the American people and their ancestors as one of the vilest which could be resorted to, under the worst forms of tyranny. It was thought that no free people could submit to it, under any circumstances. But there it stands. It is to-day [sic] a monument to the satanic malice of the radical party.

Cox’s views of the author of that Amendment cannot have been much higher.

Cox was also a harsh racist. As late as 1888, Cox was still defending his own conduct in opposing the war measures of the Lincoln Administration and voting against the Thirteenth Amendment. While refusing in 1888 to defend slavery of the 1860s, Cox nevertheless referred to slavery as “harmless bondage two or three hundred years ago.” He argued that slavery should have been allowed to die a natural death. Even in 1888, he did not believe the exclusion of African-Americans as witnesses in cases involving only whites was “an oppressive regulation.” Given Cox’s own moral and logical lapses, he is not the most credible source for the claim that Bingham “lacked the reasoning faculty.”

at 1270-71.

130 SAMUEL S. COX, THREE DECADES OF FEDERAL LEGISLATION 585 (Providence, R.I., J.A. & R.A. Reid 1888).
131 Id. at 257. It is unclear about which “principle” Cox was writing. The paragraph immediately before the one quoted made specific references to Section 3 and then Section 2 of the Fourteenth Amendment. Yet, the remaining portion of the quoted paragraph praises Democratic opposition to the Force Act, which was designed to enforce Section 1.
133 See COX, supra note 130, at 327.
134 Id. at 37.
135 See id. at 220-21.
136 Id. at 388.
137 In order to avoid the “sin” of using an anachronism, this Article compares Congressman Cox to the majority of people in his own generation, not to modern standards.
138 COX, supra note 130, at 585. Fairman also relied upon “the discriminating article on Bingham in the [Dictionary of American Biography].” 6 FAIRMAN, HISTORY OF THE SUPREME COURT, supra note 37, at 1271 n.213. Yet, that biographical sketch stated that Bingham and his wife had three children. See 1 DICTIONARY OF AMERICAN BIOGRAPHY 278 (Allen Johnson ed., 1964). In fact, they had seven children. See ERVING E. BEAUREGARD, BINGHAM OF THE HILLS, at xii-xiii (1989). It also claims that Bingham did not introduce the antislavery resolution attributed to him at the 1848 Whig national convention, see DICTIONARY, supra, at 278, when an examination of the very sources cited in the biography indicate that Bingham did introduce that resolution. See Richard L. Aynes,
From these four comments, Fairman constructed his dichotomy: Bingham was a good speaker but not a sound thinker. It is ironic that Fairman, who eschewed the use of Bingham's 1871 speech because it was three years after the ratification of the Fourteenth Amendment, would rely so heavily on *recollections* of Cox that were written approximately fourteen years after Bingham and Cox served together in Congress. Nevertheless, had he dug deeper, Fairman would have found that, while not unanimous, many of Bingham's *contemporaries* thought well of his analytical abilities and, contrary to Fairman's conclusion that Bingham was confused, thought that he spoke with clarity.

An exhaustive account is not necessary here. Yet, this is what one finds if one scratches the surface. Mrs. Laura Searing, writing in 1862 under the pseudonym Glyndom Howard, indicated that Bingham was often spoken of as "the ablest man of the House" of Representatives. She also indicated that Bingham was such a "clear and able [lawyer] that everybody approves the judgment of Mr. Speaker Grow in placing him at the head of the Judiciary Committee of the present Congress." In 1866, the *New York Times* counted Bingham "among the most learned and talented" of the members of the House of Representatives. In 1868, Bingham was regarded as an able lawyer and especially "skilled in cross-examining witnesses." Former Congressman Albert G. Riddle called Bingham "one of our most effective speakers," who the Republicans "usually put forward as [their] champion" in the House of Representatives.

In 1869, Dr. John B. Ellis' *The Sights and Secrets of the National Capital* gave descriptions of many members in Congress. While Ellis condemned the whole Congress, including Bingham, for excessive partisanship, there is no trace of doubt

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*John A. Bingham, in 2 AM. NAT'L BIOGRAPHY 792 (John A. Garraty & Mark C. Carnes eds., 1999).*


140 See 6 FAIRMAN, HISTORY OF THE SUPREME COURT, *supra* note 37, at 1270 & n.211.


142 See infra notes 143-57 and accompanying text.

143 GLYNDOM HOWARD, NOTABLE MEN IN "THE HOUSE" 69-70 (New York, Baker & Godwin 1862).

144 *Id.*

145 CURTIS, *NO STATE SHALL ABRIDGE, supra* note 41, at 120-21 (quoting N.Y. TIMES, Mar. 10, 1866, at 1).


about Ellis' view of Bingham's reasoning ability; Ellis counted Bingham as "one of the most learned men in the House" and termed him a "profound lawyer." 149

In July of 1871, Bingham took a trip across the country. Stopping in Portland, Oregon, he gave a speech on the meaning of the Fourteenth Amendment. 150 The local newspaper characterized the speech as "an able and intellectual effort" that was "received with great satisfaction by the audience." 151 One member of the audience was U.S. District Judge Matthew P. Deady, who described Bingham's address as "logical, eloquent and grand." 152

There are other indications that Bingham was well-regarded by his contemporaries. At times, he was the Chairman of the House Judiciary Committee. 153 He received the most votes of any member of the House to serve on the Board of Managers to prosecute the impeachment of President Andrew Johnson. 154 During the term when Bingham was out of Congress, President Lincoln sought to give Bingham responsible positions. The President tried to appoint Bingham to an important federal judgeship in Florida, but he declined. 155 President Lincoln did appoint Bingham, with his reluctant consent, to be a Major and Judge Advocate General, specifically for the prosecution of the Surgeon General of the United States. 156 Lincoln later appointed Bingham to be Solicitor of the Court of Claims. 157

These appointments and selections do not compel the conclusion that Bingham was the leading intellectual light of his age. However, the fact that the House of Representatives, the Speaker of the House of Representatives, and a President of the United States who was known for his ability to judge people, would seek to appoint Bingham to such responsible law-related positions would support a hypothesis that Bingham was not the confused and befuddled person Fairman thought. Selection to these responsible positions suggests a man of at least average legal ability.

149 Id. at 171.
150 See id.
151 Our Visitors, THE PORTLAND OREGONIAN, July 19, 1871, at 3.
153 Bingham was Chair of the Judiciary Committee in 1860-61, see HOWARD, supra note 143, at 69-70, during the 41st Congress, see BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-1989, at 622 (U.S. Gov. Printing Office ed., 1989) (biographical note), and again in 1872-73, see Cong. Globe, 42d Cong., 3d Sess. 858 (1873) (chronicling Bingham's bill motions in Congress).
154 See Aynes, Impeachment and Removal, supra note 44, at 90.
156 See John A. Bingham, Judge Advocate, in LINCOLN TALKS 414 (Emanuel Hertz ed., Blue Ribbon Books 1941) (1939).
157 See 8 COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 155, at 242.
This Article does not argue that we can, upon this information alone, resolve the question of how Bingham’s contemporaries perceived his abilities. A more thorough search would undoubtedly produce more positive and negative statements. These views would not resolve the question of Bingham’s actual ability, but they would provide the context for such an evaluation. My point is a different one: the fact that we can string together a few quotations to make a plausible argument is not enough. As scholars, we are duty bound to make informed inquiries before advancing a judgment.

Professor Amar leads us on the path of virtue by avoiding random quotations. In the section of his book that covers the area in which I have the most familiarity, the Reconstruction Congress and the Fourteenth Amendment, his quotations are accurately made and fairly support the points he makes.  

VI. THE VIRTUE OF SCHOLARLY CONSISTENCY

It is not consistency that is “the hobgoblin of little minds,” but foolish consistency. In law, consistency is often part of what helps society aspire to be a society of laws and not of men. A rational consistency is part of what allows us to invoke concepts like equal protection of the laws. While eschewing a brittle, wooden consistency, legal scholars must live by a “practice what you preach” consistency.

When one looks at the controversy over the meaning of the Bill of Rights and the Fourteenth Amendment, the consistent application of the same approaches to similar situations helps us measure the efficacy of a conclusion. With respect to the meaning of the purpose of the Fourteenth Amendment, there is an interesting speech by Bingham, the Fourteenth Amendment’s author, in the House of Representatives in 1871. In that speech, Bingham recounted the history of the framing of the Fourteenth Amendment and noted that the first eight amendments “chiefly defined” the privileges or immunities protected by the Fourteenth Amendment.

However, because the amendment was proposed in 1866 and ratified in 1868, Charles Fairman objected to giving this after-the-fact account much credence. Thus far, no one has argued that Bingham’s speech was a fabrication or that his memory was inaccurate. We are skeptical, however, of evidence of the legislator’s
intent that arises after the fact, and Fairman and others have a right to raise the claim of lateness with respect to this speech.\textsuperscript{164}

If we are to disregard Bingham’s incontrovertibly clear post-ratification speech, consistency would seem to demand that we also disregard other post-ratification evidence. Fairman violates this plea for consistency in at least two ways. First, in his Stanford article, Fairman relied upon the post-ratification writings of treatise writer Thomas Cooley.\textsuperscript{165} Though Fairman implies that Cooley addressed Fourteenth Amendment issues in his 1868 treatise, it does not appear that Cooley treated the Fourteenth Amendment at all.\textsuperscript{166} For this same proposition, Fairman cited the 1871 and 1874 editions of Cooley’s treatise.\textsuperscript{167} The latter two volumes suggest that Cooley’s views were ambiguous in 1871 and, only in 1873, did Cooley clearly state views consistent with Fairman’s conclusion.\textsuperscript{168}

Whether this reading is correct or not, the question of scholarly consistency remains. If Cooley’s view in 1871 did suggest that the Fourteenth Amendment did not make the Bill of Rights enforceable against the states, one questions why the 1871 views of a treatise writer would be relevant, while the 1871 views of the author of the Amendment would be irrelevant. Scholarly consistency might allow us to consider either both of the 1871 views or neither of the views, but it is not self-evident why Cooley’s supposed 1871 views should have weight over Bingham’s 1871 views.

Similarly, just as Fairman sought to rely upon Cooley’s post-ratification views, many of the factors upon which he relied are post-ratification conduct by various ratifying states.\textsuperscript{169} Indeed, the primary difference between the Crosskey and Fairman approaches lies in the fact that the former looked to the ratification period while the latter focused upon post-ratification matters.\textsuperscript{170} Yet, scholarly consistency should treat post-ratification evidence the same, absent some special circumstance that merits explanation.

Professor Amar has avoided the sin of inconsistency. He applies the same rules of construction and evidence evenly to those with whom he ultimately both agrees and disagrees.

\textsuperscript{164} See Fairman, \textit{Fourteenth Amendment}, supra note 23, at 136.

\textsuperscript{165} See id. at 116 n.306.

\textsuperscript{166} See \textit{THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS} (Da Capo Press 1972) (1868).

\textsuperscript{167} See Fairman, \textit{Fourteenth Amendment}, supra note 23, at 116 n.306.

\textsuperscript{168} See Aynes, \textit{Misreading Bingham}, supra note 40, at 91-94.

\textsuperscript{169} See Fairman, \textit{Fourteenth Amendment}, supra note 23, at 68-134.

\textsuperscript{170} Compare \textit{WILLIAM W. CROSSKEY, 2 POLITICS AND THE CONSTITUTION} 1083-118 (1953) (focusing on possible reasons for the language of the Fourteenth Amendment) with Fairman, \textit{Fourteenth Amendment}, supra note 23, at 134-39 (summarizing Fairman’s views).
Disagreements are a common part of everyday life. Sometimes they are activated by different points of view, by different goals, or by different desires. There are times when there are no right or wrong answers. In constitutional debates, there are certainly many times when there are no "correct" answers.171 These are the cases in which applying differing techniques of constitutional interpretation will produce different results. Yet, we do well to recall that scholars enjoy this luxury that is not always available to courts. In the words of Judge Jack G. Day, "It is an abuse of discretion for a court to dispose of issues by concluding that they are too difficult to resolve, then leaving the issues undecided."172 One might also note that courts are constrained to resolve even difficult issues in a relatively timely manner.

In a somewhat different context, Professor Amar made the same point: "Good lawyers will often make opposing arguments using the same basic building blocks—text, history, precedent, and so on—but in many cases, well-trained interpreters will find, at the end of the day, that one side's arguments are better arguments based on text, history, and so on."173 Not every disagreement is a stalemate. If one driver insists on going through an intersection on a green light and another insists on going through the same intersection on a red light, we know that in the investigation after the crash the police officer will not say, "We have an

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171 One needs to be careful not to let the exception mislead us about the rule. For example, one might think of the law that resolves disputes as a pyramid. At the lowest level are common disputes that are resolved without any resort to law. They are resolved by custom, negotiation, or by those with the most power, economic or other. At the next level, tensions are resolved because everyone knows what the law is and obeys it. Next, we have instances in which people seek lawyers, or some other third parties and negotiate a settlement. We then move up to cases filed in courts, but ultimately compromised or settled. It is only a few disputes that are actually resolved by judges or jurors. Of that number, an even smaller number are appealed. Of the number appealed to intermediate state or federal courts, only an infinitesimal number actually seek review in the U.S. Supreme Court.

Last year, for example, a nation with a population of over 270 million people sought review in the Supreme Court of only 8083 cases. See James Kilpatrick, Slow Days at the Supreme Court, STATE JOURNAL-REGISTER, Sept. 6, 1999, at 6. This is less than one case for every 33,333 people. Of those cases, only 75 resulted in a written opinion from the Supreme Court. See id. This is less than six cases for every 3,600,000 people.

It is from this context that I have often advised my students to analogize the study of Supreme Court cases with the study of "abnormal psychology." The Court only reviews extraordinary and unusual cases. We should be cautious generating theories about the psychology of normal people based upon studies of abnormal people. Similarly, we should be cautious about generating theories of law for normal situations based on the difficult or extraordinary cases.


irreconcilable conflict between the 'green is go' theory and the 'red-is-go' theory. Let's look for a new theory to resolve the conflict." No, the police officer will write the ticket for the person advocating the red-is-go theory and move on to other work.

All too often in legal scholarship, we see the disagreement between scholars as evidence of an "impasse" and call for a new theory which will hopefully produce consensus. At times, there are legitimate disagreements about the issues that simply cannot be resolved with any sense of finality. On the other hand, there are times when there are right and wrong answers. One recalls President Lincoln's question about how many legs a sheep would have if one called its tail a leg. The answer is four, not five, because merely "calling a tail a leg doesn't make it so." By the same token, calling a disagreement an impasse does not make it so.

There are strong disagreements over the question of whether the Bill of Rights can be enforced against the states. One reason for these disagreements is that scholars have the usual disagreement about which method of interpretation can most appropriately be applied to resolving the conflict. Further, there are unusually difficult problems with evidence for those who are concerned with original intent or meaning. For example, Alfred Avins' very useful *The Reconstruction Amendments* Debates begins with the thirtieth Congress in 1849 and ends with the forty-third

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This reaction may be the result of having served on many committees where consensus is important. If two portions of a committee have differing views on the solution to a problem, an easy solution would be to take a vote and let the majority prevail. This solution frequently results in a discontented minority, a cost that is often too great to pay. As a result, an alternative strategy develops, which finds common ground through a new and different proposal. This approach is good for people who must work or live together; however, it does not necessarily or invariably lead to good scholarship.

A contrary example is found in Justice Thomas' dissenting opinion in *Saenz v. Roe*, 526 U.S. 489, 119 S. Ct. 1518, 1535 (1999) (Thomas, J., dissenting). Citing the disparate opinions of nine scholars in the area, Justice Thomas states, "Legal scholars agree on little beyond the conclusion that the [Fourteenth Amendment Privileges and Immunities] Clause does not mean what the Court said it meant in 1873." *Id.* at 1536 n.1 (citations omitted). Though normally this might be the type of language a court would use to lay the groundwork on an "impasse" argument, Justice Thomas proceeds to outline his view on what history shows to be the meaning of the Fourteenth Amendment. *See id.* at 1536-38.

175 George R. Lamb, *Words, in LINCOLN TALKS, supra* note 156, at 328.

176 *See NELSON, supra* note 174, at 2-3; Fairman, *Fourteenth Amendment, supra* note 23, at 5.

177 *See NELSON, supra* note 174, at 1-9.
Congress in 1875.\textsuperscript{178} Even his excerpted version covers 743 pages of small print.\textsuperscript{179} Beyond the \textit{Globe}, we have the private papers of hundreds of Congressmen, records (limited as many of them are) of state ratification legislatures, and the voluminous newspaper accounts from every state then in the union.\textsuperscript{180} As frustrating as it is that some records were not created or no longer exist, the very existence of such large amounts of primary materials make a comprehensive study of the Fourteenth Amendment by any one person a daunting, and perhaps impossible, task.

Yet, it may be, like biography, that it takes many scholars working on the project to make the “break through” that would allow a more general consensus to arise. “No one would call this a team sport. However, it does sometimes seem to take all the king’s horses, and several biographers, to put a life back together again.”\textsuperscript{181} The divergent views expressed by Justice Black and Professor Fairman did not produce an impasse.\textsuperscript{182} Instead, out of that dialectic came a better appreciation for the Amendment than perhaps had ever existed since its ratification. Similar progress is seen in contrasting the works of Raoul Berger\textsuperscript{183} and Michael Kent Curtis.\textsuperscript{184} Others bring their different perspectives adding special insights into these questions.\textsuperscript{185} Whether we agree or disagree with their point of view, each new study adds to our total knowledge of this voluminous material. With each new insight, we gain more knowledge.

To his great credit, Professor Amar did not fall victim to the trap of the false impasse. Rather, he took the current status of Fourteenth Amendment scholarship as he found it, and added to our knowledge and insight.


\textsuperscript{179} See \textsc{The Reconstruction Amendments' Debates} (Alfred Avins ed., 1967).

\textsuperscript{180} See, e.g., \textsc{Boutwell}, supra note 124 (detailing Fourteenth Amendment state ratification legislature events); \textsc{Cox}, supra note 130 (same); Fairman, \textit{Fourteenth Amendment, supra} note 23, at 81-132 (same).

\textsuperscript{181} Stacy Schiff, \textit{Perpendicular Lives}, 68 \textsc{Am. Scholar} 51, 59 (1999).

\textsuperscript{182} See Fairman, \textit{Fourteenth Amendment, supra} note 23, at 5 (containing passage by Justice Black).

\textsuperscript{183} See \textsc{Raoul Berger, Government By Judiciary} (2d ed. 1997) (asserting that the Fourteenth Amendment had a very limited intended scope of application).

\textsuperscript{184} See \textsc{Curtis, No State Shall Abridge, supra note} 41.

\textsuperscript{185} See, e.g., \textsc{Chester James Antieau, The Intended Significance of the Fourteenth Amendment} (1997) (examining how the Amendment affected a variety of “rights”); \textsc{James E. Bond, No Easy Walk to Freedom: Reconstruction and Ratification of the Fourteenth Amendment} (1997) (canvassing the legislative and public discussion in the South on the ratification of the Amendment); Robert J. Kaczorowski, \textit{Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction}, 61 \textsc{N.Y.U. L. Rev.} 863 (1986) (discussing the views of U.S. Attorneys who were initially charged with enforcing the Amendment).
CONCLUSION

As much as I admire Professor Amar’s work, it is too early to know whether The Bill of Rights will become part of the canon of constitutional law. Yet, its early praise by many scholars with different views and different backgrounds is based, in part, upon the fact that Professor Amar is a skilled writer and this is a well-written book. Further, while Professor Amar has well-developed views and is prepared to defend them, he truly means what he says when he states that he is writing to “start a conversation, not end one.”

Beyond that, the initial positive reception The Bill of Rights has received is based upon the fact that Professor Amar has avoided the seven deadly sins of legal scholarship: he has taken people seriously; he has worked within conventional methods of interpretation (even if he has developed an unconventional interpretation); he has placed his research and conclusion in context; he has avoided anachronistic analysis; he has quoted judiciously and fairly; he has weighed the importance of his arguments; and he has avoided the false impasse.

In sum, whether we agree with his conclusions or not, Professor Amar has set

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186 Professor Bloom has suggested that Amar’s book “certainly has the potential to be influential long into the future.” Bloom, supra note 81, at 317; see also id. at 323 (“I do not know whether it will become a part of the canon to a somewhat wider audience.”).

187 Mark A. Graber has suggested that The Bill of Rights “may be the most well-written book on American constitutionalism published this decade.” Graber, supra note 89, at 347 n.14 (1999). Gary Lawson considers The Bill of Rights to be “one of the best law books of the twentieth century.” Gary Lawson, The Bill of Rights as an Exclamation Point, 33 U. RICH. L. REV. 511, 511 (1999); see also Bloom, supra note 81, at 313 (“[Amar’s] book builds [up]on two of the most breathtaking and important law review articles of the past decade” and “deserves to sit on every constitutional scholar and lawyer’s shelf along with... other contemporary classics.”).

188 Amar, Continuing, supra note 89, at 579; see also id. at 600 (“My aim today is not to end the conversation, but to continue it.”).

189 I have previously expressed my reservations about the doctrine of refined incorporation. See Aynes, Refined Incorporation, supra note 7. In essence, my doubts are the result of two factors. First, there is no expression of refined incorporation in the text or the legislative history. To the contrary, the author, who was both the leading proponent in the House and the floor manager in the Senate, gave public speeches widely reported in the newspapers that can be fairly read to support full incorporation and to contradict refined incorporation. See id. Second, refined incorporation seems to be based upon the assumption that Article I, Section 9 is the source of the “right” to a writ of habeas corpus. In my view, the right to habeas corpus predates the Constitution and was undoubtedly a privilege or immunity of Article IV, Section 2 of the Privileges or Immunities Clause of the Fourteenth Amendment. See C. Michael Walsh & Richard Aynes (forthcoming article on the right of habeas corpus). If this is true, then Article I, Section 9 is not the source of a right to be contrasted with the Capitation Clause in order to prove the point of refined incorporation, but rather only a “structural” right dictating when the government can suspend the clause. Because this is the lynchpin of the textual argument that The Bill of Rights puts forth for
a high example for all of us to follow in avoiding the seven deadly sins of legal scholarship and following the seven virtues.