

governmental immunities lecture although his remarks as to this latter are probably definitive.

A note of regret is not the proper one with which to conclude this review, however. Rejoicing is more appropriate—rejoicing that we have this final statement to preserve in readily accessible form the contribution of the premier American constitutional scholar. That contribution is not essentially a body of doctrines as to particular issues. It is a working model of how to find probable judicial attributions of meaning, which any lawyer or student may usefully apply to any issue.

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THE FRAMING OF THE FOURTEENTH AMENDMENT. By Joseph B. James. Urbana: University of Illinois Press, 1956. Pp. vii, 220. \$4.00.

Like many hardy themes, the fourteenth amendment loses in novelty, but gains in interest. Not that one dare say the amendment is, or has been, *all* things to *all* historians or judges. But, upon what other law text, at least since the days of the Schoolmen, has more been written, and that more vehemently and industriously, by so many, about less?

Readers looking to Dr. James' monograph for a synthesis, or even for a leavening, of this mountainous literature, are likely to be disappointed. He has not written a summary or critique, even of the extensive recent research on the origins and draftsmanship of the key sections. His aim and contribution rather are to fit the entire amendment into context, "to integrate," as he says, "the various known facts of the period as a whole with a complete narrative of the evolution of the amendment." However, no examination is made of the movements prior to December, 1865, which directly influenced the 39th Congress in framing its joint resolution. Furthermore, the long and intricate ratification process has been reserved for separate treatment.

Within these limits, James' title is architecturally precise; treatment is mainly confined to the months December, 1865 to July, 1866; organization is almost starkly chronological.

The primary difficulty of course is that the fourteenth amendment was an omnibus measure. Textually, historically, it constitutes the heart and body of Reconstruction. It was at once the keystone of the sectional settlement, a "constitutionalization" of the war's outcome, and, in its

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first and fifth sections, the essence of two generations of antislavery debate and constitutional theory. In the course of enactment the theory got entangled with schemes for partisan advantage. The whole became a wedge driven between President Johnson and Congress and between both and the country, a time-buyer, and a buffer. It was, in short, a compound of noble idealism and humanitarianism with sordid partisanship; it was altogether perhaps the most complex, controversial, and extraordinary measure ever framed and passed by an American Congress, certainly one of the most enduringly important. Add to this, that the due process and equal protection clauses, which are of such paramount importance today, went all but undiscussed in 1866, whereas sections two and four, on the rebel debt, disenfranchisement, and the basis of representation, deemed so crucial then, are deadier than "Old Thad" Stevens now, and have been for many years.

It is plain enough that to reduce all this to order, especially to attempt to force such complex, refractory material into a narrative chronicle, is to risk frustration like that of the novice for whom Gibbon's superlative lucidity simply demonstrated the advantage of having to treat but two themes or subjects. Given the curious modern inversion of interest and emphasis, the overpowering organizational handicap, it is a tribute that James still has managed to produce a readable and interesting work. That he breaks less new ground than might be expected from the thoroughness of his manuscript research, that his bibliography cites numerous recent studies whose bearing rarely is even suggested, is the price he and we must pay for the chronicler's organization which reduces critical analysis to the few asides or digressions permitted in such a narrative.

These limitations are readily accounted for by the fifteen-year interval between James' original research and final revision. The main text was prepared and submitted as a doctoral thesis in the late 30's under direction of the distinguished Lincoln scholar, James G. Randall, at the University of Illinois. This was just as the Roosevelt Court began refurbishing and reorienting the amendment, and equally important, just as "preferred position," incorporation of the Bill of Rights, and the Conkling-Beard thesis on the corporate "person," began to excite judges, students, and commentators. During the 40's, due process, which had been applied so long and dogmatically to the defense of "liberty to contract" and "reasonable return," finally began to receive application in the jury, speech, picketing, and religion cases, and above all, long-overdue use as a weapon against racial discrimination, culminating in the Democratic primary, restrictive covenant, and segregation decisions. These

later developments, and the interest they bespoke and generated, fortunately prompted Dr. James to prepare the monograph for the publisher, but without materially altering original organization. Aside from minor elaboration, only a concluding chapter, "In Perspective," was added to draw threads together and summarize shifts and developments that had occurred between the 30's and 50's.

The book's fourteen chapters are organized in three groups. Part One: "Origins," makes no attempt to survey the antislavery constitutional theory and backgrounds, even though these manifestly are indispensable to a clear understanding of the form and purpose of the amendment. Instead, James dives at once into murky political and congressional history. Assiduous in manuscript, newspaper, and biographic research, he pieces together two short introductory mosaics of fact, paraphrase and quotation, entitled "The Radical Focus," and "Diverging Rays." These alone set the stage for the opening of the 39th Congress. Part Two: "Development," proceeds in similar fashion, taking up the evolving strategy and programs of the Radicals, Moderates, and other factions; the intricate maneuvering in Congress and out; the growing breach with the President; the obsession with immediate Negro suffrage as a panacea; the partisan and sectional complexities inherent in a changed basis of representation to prevent Southern, *i.e.*, "Rebel," control of the House; the securing of freedmen's civil rights; the readmission of reformed state governments, and above all, the intricate story of the draftsmanship of the text of the amendment itself. These matters are all touched on, but helter-skelter, kaleidoscopically, without any pattern other than time and popularly chosen chapter headings.

In this second section, James is fortunate to have had the advantage of Flack's earlier monograph, *The Drafting of the Fourteenth Amendment* (1908), of the late Professor Kendrick's study and editing of *The Journal of the Joint Committee of Fifteen on Reconstruction* (1914) and, above all, of one of the classics of American political history, Howard K. Beale's study of the breach between Johnson and Congress, entitled *The Critical Year* [1866] and published in 1930. The consummate character of Beale's work, in particular, is evident in the fact that a generation of manuscript research, including James', has added very little of importance to the record, and almost nothing to reinterpretation. Nor are Kendrick or Flack in any way superseded. James' work is, in the main, a chronological recasting of the basic story. The pity is that where his materials do round out the picture, they generally are so obscured in the mosaic flatwork, the significance is easily lost. This certainly is true of his use of the letter from the Sumner Papers in which

Justin S. Morrill of Vermont, soon to be one of the Republican members of the Joint Committee that drafted the amendment, proposed a strategy and draft which throws light on that later put forward by Bingham. Both James' treatment and the letter are well worth quoting:

"One of the more significant suggestions concerning an amendment guaranteeing civil rights is found in a communication of Justin Morrill. This future framer of the Fourteenth Amendment, in writing Sumner shortly before Congress convened, stressed the need of defining the rights of freedmen and of forcing the South to recognize them. As an alternative, he favored prohibiting state legislation against these declared rights, and empowering Congress to interfere in case any state should enact discriminatory laws. In hastily written language, he added:

"Then as to apt phrases, can you [leave] all in a jural phrase. Say—all citizens (?) of the U. S. resident [in] said States, are equal in their civil rights immunities & privileges *and* equally entitled to protection in life liberty & property [;] in granting the elective franchise no distinction shall be made on account of race, des[c]ent, or color [;] & all laws in contravention of these rights, immunities & privileges are null and void. Have the words, civil rights, immunities, privileges[,] such precise & definite meaning as to be practicable[;] or must we specify, rights of citizenship, residence in the state—to hold property, be a party and witness in [court?] [Morrill to Sumner, undated (probably Oct. or Nov., 1865), Sumner MSS (Harvard)].

"Though Morrill is not believed actually to have written the first section of the Fourteenth Amendment, which he significantly foreshadows even in phraseology, he did serve on the committee which [was] responsible for it. In that capacity, his suggestions perhaps strongly influenced its author [Bingham]. His words indicate the views of at least one member of that group not many months before the drafting took place. These thoughts must have constituted the background of his consideration and approval of the first section before it was reported to Congress. They were also in his mind when he wrote: 'We must not go to Congress thinking to head off

restoration without some plan of our own.' Whatever 'plan' he contemplated must have included these ideas. They are especially important because they specify procedural [and certainly *substantive* (HJG)] rights as one framer's understanding of 'immunities' and 'privileges.'"¹

This is true enough as far as it goes. What Dr. James might also have emphasized is that such materials as these are evidence that the tripartite form of section one and the enforcement clause of section five, along with the numerous drafts which preceded them in the Committee, were not spontaneous creations of the Committee, or of Bingham and Morrill. Rather they were the essence of the old antislavery theory of a paramount national citizenship derived from many clauses of the Constitution and guaranteed and protected by the comity clause-equal protection-due process phraseology. This theory and rhetoric had become common currency as early as 1833, and was broadcast ceaselessly during the Antislavery Crusade and by the various party platforms between 1840 and 1860.² In 1866, it naturally emerged as the common denominator and basis for sections one and five, for a majority of the Committee, like Bingham and Morrill, were men who had absorbed this theory from boyhood.

Another typical outcropping (and telescoping!) was Garfield's speech on the Freedmen's Bureau Bill in the House, February 1, 1866, the full significance of which is also unemphasized by James:³

"In reference to *persons*, we must see to it, that hereafter, personal liberty and personal rights are placed in the keeping of the nation; that the right to life, liberty and property shall be guaranteed to the citizen in reality as they now are in the words of the Constitution, and no longer left to the caprice of mobs or the contingencies of local legislation. If our constitution does not now afford all the powers necessary to that end, we must ask the people to add them. We must give full force and effect to the provision that 'no citizen shall be deprived of life, liberty, or property without due process of law.' We must make it as true in fact as it is in law, that 'the citizens of each State shall be entitled to all the privileges and immunities in the several States.' We must make American citizenship the shield that

1. P. 30.

2. See Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479, 610; TEN BROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951).

3. P. 79.

protects every citizen, on every foot of our soil.”⁴

Obviously, it was to remove any and every doubt about federal power to do this, that the fourteenth amendment was drafted and ratified. Yet, abridged and buried beneath chronological rubble, such evidence is too often allowed to pass almost unnoticed, even though it holds the key to the form and meaning of sections one and five. Section one simply was a two-belt-and-suspenders proposition in 1866. And presently, in the *Slaughter-House* cases, the belt and suspender loops got entangled. Eighty years elapsed before the Court and nation finally cut the Gordian knot, and, with more gratitude than intuition, employed the second precautionary belt—equal protection.

The mystery and controversy that have surrounded the amendment are dissipated the moment one grasps these facts and sees that the old Whig and antislavery theory of a paramount national citizenship derived from and protected by the comity, due process, equal protection concepts and clauses really is the heart, not only of the amendment, but of the whole American creed—the glory and conscience of the American Constitution, then, now, and always!

James' work as a whole moves one to further reflections. The first relates to the value and limitation of the chronological method. Every historian or biographer must approach his subject with meticulous regard for the time element, with abhorrence for anachronisms, whether of observation or analysis. But once the sequence of events is established, and the causal or historical relationships are clarified, time has served us about as well as it can. It becomes a tyrant, an impossible master and fetish, when arbitrarily applied as the skeletal organization of any intricate subject. This is not to say that a chronological view has no place or merit; simply that the mind, like the eye, can see unaided only to a certain point.

Equally tantalizing is the question of how far “history” and “framer intent” can or should be the decisive element in constitutional construction. Immense labor and research have gone into studies seeking to determine, or to clarify, “original understanding” or intentions. This is all to the good for we do need to know, so far as we can, what the Fathers or the framers had in mind when they employed specific drafts. But all drafts are not specific, and probably few will go so far as Professor Crosskey, and hold that this is all we need to know—given a little help from his 18th century “glossaries”—even for phraseology like the commerce and due process clauses. *Historical* psychoanalysis hardly ap-

4. CONG. GLOBE, 39th Cong., 1st Sess., app. 67 (1866).

pears a promising field. Until we break what the young science fiction addicts call "Our Time Barrier," and can hook coded electronic computers directly to the Fathers' ghosts, and to Senator Bricker's and Miss Kellem's amendments, one suspects even Professor Crosskey may be kidding. There simply is no recourse in many cases but to history pretty gingerly and selectively applied. Who can doubt today that the Court's choice in grounding the segregation decisions on the modern, common sense, ethical and sociological interpretation of "equal protection of the laws" is the only statesmanlike approach to such a problem? Even had the 1866 intent sanctioned segregation—which it certainly did not—the dead past could not be allowed to control the living present. History often can illuminate, like Santayana's "torch of smoky pine"; but it is neither oracle nor electric brain. The past is not the most important part of most equations.

The more one considers the fourteenth amendment—and we speak now of the enduring essence—the more he realizes how much its form and substance, or, as pessimists and cynics would have it, its "failure," or, as we should rather think of it, its always imperfect realization, is due to the magnitude and complexity of the task those framers faced—the task we still face, and must always face. Let us therefore cease talking about "poor draftsmanship" and "muddled country lawyers." What other draftsmen or nations have ever sought, by imperfect words or phrases, to lift themselves by ethical bootstraps out of the morass and vestiges of slavery and race discrimination? Name them! Were there not few enough volunteers from the Bench and Bar to help Professor Chafee and Mrs. Roosevelt those sleepless nights spent drafting an *international* Charter of Human Rights? Yet, *that* is the type of task Bingham and his colleagues faced, translated into modern terms. How much easier it is to mock history, or be mocked by it, than to learn from it. Slow and agonizing as progress has been racially in the national field, it still is our hope and guide in analogous fields internationally.

It has become fashionable of late to speak condescendingly of Bingham's standing and abilities as a lawyer. Dr. James is not so patronizing as some, but he notes the trend, and perhaps furthers it.⁵ Admit at once that Bingham lacked the legal training, mind and polish of Reverdy Johnson. But since when has legal pre-eminence become a fitting or established norm? Not even all Supreme Court Justices have been Stones, Frankfurters, or Douglasses. Yet, we still accept their product for what it is, not for what we wish it were or what it might have been.

This much is certain, the House filled whenever Bingham spoke on

5. P. 190.

constitutional matters. Judicial supremacy hardly yet existed *in fact*. He had studied the law of citizenship, perhaps *too* well, for he lapsed naturally into the declaratory mood that bedeviled so much thinking about an amendment in 1866.⁶ He was one of the few in the House familiar with *Barron v. Baltimore*,⁷ one of the few who perceived its significance, recognized its force, and above all, proposed to do—and did—something about it, something clear and understandable. That is the heart of the matter. Never mind his flowery rhetoric and *extempore* lapses. Read the current Congressional Record.

The main trouble for us today is that Bingham, like most of his generation, thought and spoke in natural law terms. We generally do not, except when we have to face and deal with the same type of problem, as witness our current condemnation of the rape of men's inalienable rights and the denials of justice and equal protection in Hungary. Because of these differences, and this failure of communication, which patently rests on our shoulders, and not his, *we* dismiss *him* as confused. Yet as James has noted, Bingham and Morrill were among the few who did have a plan. Moreover, they knew how to defend it, and they carried the Joint Committee and Congress with them.

Our trouble, again, is that Bingham and Congress and the country at large were naturally far more exercised about the dangers and lessons of secession, about the position and rights of the Southern loyalists as "citizens" and "persons," during and immediately after the war, about the old and current statutes which had exposed such individuals and free Negroes to "banishment," than they were about the various issues that have come to plague and beguile us today. When we fail to find a clearcut answer to our immediate question or problems, we too often lack the patience to study and understand theirs. Maitland once observed that while an understanding of feudal tenures clarified a vast amount of modern property law, modern property lawyers made the worst possible historians of feudalism. Something of this sort plainly has been involved in our understanding and misunderstanding of the theory and purpose of the fourteenth amendment.

Finally, perhaps it is well to be reminded from time to time that this amendment was not entirely a charter of liberty, not all lofty idealism. Dr. James' kaleidoscope succeeds admirably in this respect. The cynicism and partisanship were there, are clearly shown, and are not to be denied. But let us not jump to false conclusions from this. *Magna*

6. See Graham, *Our "Declaratory" Fourteenth Amendment*, 7 *STAN. L. REV.* 3 (1954).

7. 29 U.S. (7 Pet.) 672 (1833).

Charta is remembered today only for its 29th article, not for its barbarous bargains and clauses. It matters not at all that the barons were feudal lords, as cunning and treacherous as John himself. We need no longer picture them as high-minded modern democrats. Coke himself was something less than a hero to his valet, or to Bacon and Raleigh. Even our Declaration of Independence is not all of a piece with the "self-evident truths" of the Preamble. These facts we easily can face, even find hope and comfort and honor in. Civil liberty and freedom are priceless; they never were perfect. One reason they are priceless is because this is true. Our ultimate basis for hope is that in matters of law and government the dross does melt away; crises are the matrix; "*per legem terrae*" and "equal protection of the laws" are the gold remaining in the crucible.

Dr. James has helped us to realize what our fourteenth amendment means, and so what it means to be an American.

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