Dueling Histories: Charles Fairman and William Crosskey Reconstruct "Original Understanding"

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Historiography and epistemology are two subjects not often brought together in sociolegal studies. This article takes reconstructions of legal history as a subject of sociological investigation. The institutional "acceptability" of any historical representation is a complex social achievement since there are no objective criteria for verifying historical accounts. I juxtapose two competing reconstructions of Fourteenth Amendment history, by legal scholars Charles Fairman and William Crosskey, and examine how both reconstructions took place with reference to preexisting interpretive frameworks. I also examine the social and institutional settings in which these histories interacted and competed for credibility. The Fairman/Crosskey dispute served to socialize future participants in Fourteenth Amendment debate. With the Fairman/Crosskey exchanges, battle lines were drawn and topics of debate were established.

Writing legal history puts one in the midst of historiographical puzzles. In the late 1940s, Charles Fairman and William Crosskey each set out to investigate the "original understanding" of the Fourteenth Amendment. With their conceptual bags packed, they researched the question of whether the Fourteenth Amendment was originally intended to apply the Bill of Rights to the states. What sorts of materials were relevant to this search? What did evidence of "intent to incorporate the Bill of Rights" look like? How did they know it when they saw it? What point marked the beginning of the search? The absence of objective, "scientific" criteria for verifying historical accounts meant that they had to use some other criteria for distinguishing accept-

I am especially grateful to Arthur Stinchcombe for his detailed comments on several earlier drafts. I would also like to thank anonymous reviewer #2 for a close reading and a set of very helpful questions and suggestions. Kim Scheppele, Robert L. Nelson, Arthur McEvoy, and two other anonymous reviewers offered comments and advice which have contributed to the development of this essay as well. I also owe special thanks to Lisa Frohmann for a conversation that produced the idea for this article. Jacqueline Battalora has provided careful editorial assistance and has helped significantly to sharpen the ideas presented here. Very generous support for this research was provided by a Doctoral Dissertation Fellowship from the American Bar Foundation. Address correspondence to Pamela Brandwein, University of Texas at Dallas, School of Social Sciences, P.O. Box 830688, Richardson, TX 75083-0688. E-mail: pbrand@utdallas.edu.

Law & Society Review, Volume 30, Number 2 (1996)
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https://doi.org/10.2307/3053961 Published online by Cambridge University Press

able from unacceptable readings. What were these criteria? And would these criteria be consciously defended?

This article takes reconstructions of legal history as a subject of sociological investigation. I examine how legal actors reconstruct past worlds in the competition for present worlds. I juxtapose two competing reconstructions of Fourteenth Amendment history and examine historical reconstruction *as work*, that is, as interpretive work. Descriptions of events, like descriptions of facts (Scheppele 1988), have become recognized as contested ground. Legal narrative (Cover 1983; Levinson & Mailloux 1988) and legal storytelling (Bell 1989; Williams 1988, 1991; Ball 1989; Matsuda 1993) have become common themes in sociolegal scholarship. But while legal scholars now routinely emphasize the constructed nature of legal discourse, there remain few investigations of the social and historical circumstances that give rise to prevailing orthodoxies. Official versions of events are now heavily scrutinized and alternative versions are offered in their place, but the competition to tell authoritative stories has not yet come under investigation. The very existence of competition suggests the need to understand trajectories of credibility, that is, the conditions and circumstances under which the institutional "acceptability" of narratives and accounts is won and lost.

To say it generally, this article examines the social production of legal knowledge. By examining the contest to construct "credible" Fourteenth Amendment history, my goals are twofold: to examine how opposing (but overlapping) sets of interpretive assumptions shape competing "recoveries" of Fourteenth Amendment history and to examine the interaction of these competing histories in the social and institutional settings in which legal arguments meet. By engaging with a sociology of knowledge of a particular type, one that sees historical knowledge as a complex social achievement, I show how investigations of the social production of legal knowledge might fit under the "sociology of law" designation. By attending specifically to the social production of *constitutional* knowledge, I offer a way of applying sociological thought to constitutional law. I offer a conceptualization of the constitutional debate over "original understanding" that borrows from the work of Erving Goffman. The standard legal debate over the "original understanding" of the Fourteenth Amendment flattens out social phenomena. By identifying the juncture at which the modern terms of debate over this concept were established, my objective is to reinsert part of the history of this legal problem.

This analysis bears on an understanding of the way race hierarchy gets reproduced and reconstituted in constitutional law. While the debate between Fairman and Crosskey was not a debate about race policy, this debate had tacit racial dimensions. As the terms of debate over the "original understanding" of the

https://doi.org/10.2307/3053961 Published online by Cambridge University Press

Fourteenth Amendment were set, a conceptual apparatus was put into place which was abstracted from the particular power relations of Reconstruction and the post–New Deal period. This had important consequences that I only mention here. This conceptual apparatus linked the production of institutionally "credible" representations of Fourteenth Amendment history to political distributions which disadvantaged black men and women. While this apparatus did not prevent the emergence of the Warren Court majority, it enabled critics of Warren Court decisions to gain certain parts of the institutional high ground in the "culture of argument" (White 1990) that joined them with the Warren majority. Judicial and scholarly criticism of the nationalist and egalitarian decisions of the Warren Court are rooted partly in a structure of thinking about the Fourteenth Amendment. By investigating the social production of knowledge about the Fourteenth Amendment, it becomes possible to view more clearly the social roots of intellectual reaction against the Warren Court.

I begin with the problem of describing events. Building a description of any event involves interpretive work. For both the builders of "official" versions of events and the builders of distrusted or rejected versions, the process of construction is ordered, though by different mechanisms. The struggle to ascribe authority to one or another of them is a political struggle. In the competition between Fairman and Crosskey, Fairman's version of history was judged more credible by a large majority of the legal audience, which included judges, lawyers, and constitutional scholars.

Fairman's history (1949), which argued that the Fourteenth Amendment did not apply the Bill of Rights to the states, explicitly justified and rationalized the "knowledge" of the Fourteenth Amendment already developed by the Supreme Court during the Reconstruction era (*Slaughter-House Cases* 1873; *United States v. Cruikshank* 1876). Fairman's history explicitly defended knowledge which, up until that point, had not been in need of defending. Crosskey (1954) argued that Fairman "mishandled" the evidence and that the Fourteenth Amendment had in fact been intended to apply the Bill of Rights to the states.

The conflict between Fairman and Crosskey marked the emergence of an orthodox view of Reconstruction. Crosskey's version of history was a "competing possible,"[1] but it was a heterodox view. In other words, the very existence of Crosskey's history signaled that a dispute over the Court's version of the Fourteenth Amendment was possible (a question of legitimacy had been raised). Crosskey's history was widely regarded as "wrong," but this did not mean his history disappeared. Indeed, it contin-

[1] The phrase is Bourdieu's (1977:169).

https://doi.org/10.2307/3053961 Published online by Cambridge University Press

ues to attract a small following (Kaczorowski 1985; Curtis 1986; Wiecek 1988).

The institutional "acceptability" of Fairman's historical representation was a complex social and institutional product. I set out a partial method for investigating the social processes by which legal representations, historical or otherwise, are built and resisted. This method has been strongly influenced by feminist discussions of legal methods (Bartlett 1990; Crenshaw 1989) and by research in a field called "social studies of science," or science studies.[2] Researchers in this field examine such things as scientific fact-making (Latour & Woolgar 1979) and invent systematic and dialectical units of analysis for studying science (Star 1989). Susan Leigh Star, a sociologist, sums up (1988:198) the methodological directives for researchers in science studies: "Try to understand the processes of construction and persuasion entailed in producing any narrative, text or artifact. Try to understand these processes over a long period of time. . . . Understand the language and meanings of your respondents, link them with institutional patterns and commitments and, as Everett Hughes said, remember that 'it could have been otherwise.' " The goal, as she states, is to restore an account of the actual work involved in the production of scientific facts and artifacts and the organization of that work.

One of my objectives is to show that reconstructions of history are deeply patterned.[3] Picking out what is authoritative in history is never a haphazard process. Both Fairman and Crosskey sorted through history in structured ways. It was the operations of interpretive frameworks, or "frames" (Burke 1969; Goffman 1974) that structured their practices. The notion of frames has already been picked up in some law and society scholarship (Schultz 1991), and black feminist legal scholars have emphasized the interaction of multiple legal categories, e.g., gender and race (Crenshaw 1989; Williams 1991; Mahoney 1993; Harris 1990). In constitutional scholarship, Cass Sunstein (1993:773) has argued that access to facts is always mediated by "human frameworks." "Frames," though, have not yet been widely used as a unit of analysis.[4]

I examine here how Fairman's and Crosskey's historical reconstructions took place with reference to preexisting frameworks. I use the term "frameworks" to mean webs of assumptions,

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[2] Good introductions to this field are Woolgar (1988) and Star (1988).

[3] The patterned nature of fact description is central to Scheppele's (1988) thesis that judicial interpretation of facts is as much in need of scholarly attention as is the interpretation of rules.

[4] Catharine MacKinnon's (1987, 1989) critique of liberal legalism is implicitly a critique of a collection of symbolic elements. MacKinnon, however, does not offer a step-by-step analysis of how the various conceptual elements that make up liberal legalism interact to produce legal decisions that miss, for example, the harm of pornography and hate speech.

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interpretive conventions, and symbols that work together and interact. Frames are made available at cultural and institutional levels. That means, of course, that legal scholars like Fairman and Crosskey were constrained in terms of their access to interpretive tools (Fish 1980; Swidler 1986). There is a menu of various interpretive tools, as the competition between Fairman and Crosskey attests, but the choices are limited.

Goffman described frames as the basic elements that organize accounts of "what is happening." Frames also organize orientations to action. In this instance, the "action" is accessing the past, or reconstructing history. The play of symbolic structures that made up Fairman's frame and Crosskey's frame organized different definitions of "appropriate" investigative techniques and "faithful" readings. Historical reconstructions involve many operations, or practices: a situation must be defined, a story must begin,[5] and "relevances" must be established. The elements that made up Fairman's and Crosskey's interpretive frames worked to structure *where* they looked for evidence of "original understanding," *when* in history they began looking, and *how* they knew when they had found it (how they knew it when they saw it).

The divergence between Fairman's and Crosskey's frameworks is more easily observable than the convergence or overlap in their frames. Frames provide an analytic tool for discussing both what is disputed (the questions of legitimacy that are raised) and what is undisputed or assumed (the questions that cannot even be thought). The divergence between Fairman's and Crosskey's frameworks signaled the disputed status of particular questions. The overlap in their frameworks, that is, the sharing of particular assumptions and conventions, marked the taken-for-granted parameters of debate. Fairman and Crosskey debated within institutional parameters they both took as natural or self-evident. There was no recognition, from either, of the possibility that these parameters might have been differently drawn.

By standing outside these competing investigations of "original understanding," it becomes easier to see a (previously unexamined) sense in which such investigations are tricky business. As critics of originalism have already pointed out, there are many "understanders" of legislation, in this case Republican and Northern Democratic congressmen, state ratifiers, and citizens, as well as factions within each of these groups with varying motivations for the same action. The existence of multiple groups of "understanders" presents the problem of choosing which group's understanding will prevail. There is also the problem of determining the level of generality at which to conceptualize "under-

[5] Scheppele (1989:2094–97) takes up the question, When does a story begin? She discusses how the boundaries of legal narratives are shaped by "legal habits." The traditional legal strategy looks (narrowly) to when 'the trouble' began, i.e., the set of events that gave rise to the question at hand.

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standing" (Brest 1980). And of course there is the problem of applying "original understanding" (even if it is conceptualized at the level of principle) to new situations (Tushnet 1983; Horwitz 1993). But there is a more fundamental problem. It is not clear ahead of time how one might recognize "intent to incorporate the Bill of Rights" if, indeed, one saw it.

What markers indicated intent to apply the Bill of Rights to the states? Fairman's and Crosskey's interpretive frameworks generated different answers to this question. That is, their starting assumptions generated different practices for measuring and assessing what they found in the historical record. In a sense, their frames shaped how bits and pieces of historical material would be "filed."[6] Organizing the meaning of historical material and "understanding" what markers flagged the existence or nonexistence of intent to incorporate the Bill of Rights are two different ways of saying the same thing. Either way, it was the operations of frameworks that organized their (confident) "understandings" of the historical material. It is in this sense that the operations of frames "configured" the object of pursuit ("original understanding"). The success of Fairman's history meant that his frame, more than Crosskey's, had a stronger hand in establishing an institutional method for identifying the markers, or signposts, of "intention."

The general problem here is the relation between assumptions, methods, and the object of inquiry. Fairman's and Crosskey's frameworks structured different investigative methods (which can be thought of as "nets") for catching the object of pursuit (original understanding). Each net might be thought of as having a particular weave. Each net "caught" some phenomena and, correspondingly, "lost" other phenomena.[7] For both Fairman and Crosskey, I show what their nets caught and what slipped through.

In addition to examining how Fairman's and Crosskey's frames worked to organize the meaning of historical material, I explore the factors that shaped the institutional "acceptability" of their historical representations. An examination of how frames work to organize meaning does not, by itself, answer questions about symbolic power and persuasiveness. Therefore, I identify the factors and dynamics that rendered Fairman's historical narrative more credible to their institutional audiences. I ask questions drawn from science studies, especially the work of Steve

[6] Stanley Fish (1980:303–21) conceptualizes interpretation as a structure of constraints and discusses how interpreters supply "predetermined contexts." It is against these contexts that "utterances" are made meaningful.

[7] This demonstrates Fish's point (1980:356) that "within a set of interpretive assumptions, to know what you can do is, ipso facto, to know what you can't do; indeed, you can't know one without the other; they come together in a diacritical package, indissolubly wed."

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Woolgar (1988:67-82):[8] What counts as legitimate avoidance of what might otherwise be regarded as insurmountable philosophical difficulties? What tactics and devices are successful in minimizing the possibility of critical intervention by others? What argumentative strategies enable those who "recover" history to accomplish, sustain, and reinforce the "rationality" of their interpretations in the face of the ever present possibility of "better" alternative interpretations? Under what circumstances and conditions do certain definitions of significance hold sway? How are contrary views systematically diminished? By contrasting Fairman's history with Crosskey's history, I am able to identify *what it is* in these histories that rendered them more or less institutionally "acceptable" or "legitimate" at the historical juncture of the 1950s. In short, I take up the problem of understanding Fairman's "victory."

The success of Fairman's history was not a result of its intrinsic merit. The events of the 39th Congress (which passed the Fourteenth Amendment) did not determine Fairman's success. The "acceptability" of Fairman's account was a result of the interaction between Fairman's and Crosskey's histories that took place in social and institutional settings. Fairman's nonincorporation story of the Fourteenth Amendment was an object constituted within institutional and social networks.

The investigation of frames must be tightly linked to the investigation of institutional pressures of various sorts.[9] Indeed, when the production of constitutional history is located within social and institutional settings, it becomes easier to connect the analysis of legal discourse with the analysis of institutions. Forging such links is one of the more difficult tasks of social analysis and social theory.[10]

Both the production and persuasiveness of Fairman's history must be understood in institutional terms. Situated institutional players made up the audience for the Fairman/Crosskey dispute, and these actors brought a range of institutional pressures to bear on this dispute. The term "situated" conveys location and positionality (Haraway 1989). Institutional players hold institu-

[8] See also Bruno Latour's discussion (1987:45–62) on "Writing texts that withstand the assaults of a hostile environment."

[9] Goffman's study of frames made no claims to be talking about core matters of sociology—social organization and social structure. "Those matters," he said (1974:13), "have been and can continue to be quite nicely studied without reference to frame at all." Kenneth Burke, a literary critic (but claimed by at least one book series to belong to the "heritage of sociology"), does more to link the study of frames to the study of social structure. For an introduction to Burke's writings on symbols and social relations, and a discussion of Burke's influence on sociologists including Goffman, see Gusfield 1989:1–49.

[10] Nancy Fraser (1995:160) articulates this challenge as it pertains to feminist scholarship. Discussing the most fruitful way for feminists to make the linguistic turn, i.e., to accord density and weight to culturally constructed meanings, she states that the goal is to "connect discursive analyses of gender significations with structural analyses of institutions and political economy."

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tional values, commitments, and expectations that are the result of training programs, among other things (MacKenzie 1981; Scheppele 1989). Institutional actors bring institutional ways of thinking to bear on the myriad of problems and questions they encounter. They also have varying degrees of access to institutional resources, such as law review pages and prestige.

Fairman's interpretive strategies were not uniquely his. Fairman's history, enabled and constrained by a set of contestable interpretive assumptions, resonated with an institutional audience that shared these assumptions. Fairman's baseline assumptions identified him as a member of a broad-based "interpretive community."[11] The success of his history was a product of contestable interpretive assumptions that were widely shared.

Another institutional factor played a role in producing the "truth" status of Fairman's history. This was the factor of reputation. Reputation is one kind of resource, and Crosskey's reputation had been badly damaged the year prior to him presenting his account of the Fourteenth Amendment. It is highly likely that institutional audiences brought a negative assessment of Crosskey's competence as a historian to bear on their evaluation of his Fourteenth Amendment history. A year prior to the publication of his Fourteenth Amendment history, Crosskey published a lengthy book, *Politics and the Constitution in the History of the United States* (1953), which earned him the condemnation of the legal community.[12] Given that this damage was inflicted only a year prior to the publication of Crosskey's Fourteenth Amendment history, one might suspect that audiences were already skeptical about his competence (or even presumed incompetence). The damage to Crosskey's reputation, however, should not overshadow the institutional strength of Fairman's framework as a central factor explaining his "victory." Even if Crosskey's article about Fourteenth Amendment history had appeared under a different name, it is likely that the history would have been rejected. Justice Black, whose reputation had not been similarly damaged, was condemned for his incorporation thesis no less than Crosskey. Even without damage to his reputation, Crosskey would have faced substantial hurdles of credibility owing to the broad-based nature of Fairman's interpretive assumptions.[13]

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[11] See Fish's (1980:320, 331–35) discussion of institutional systems of intelligibility. The term "interpretive communities" refers to sources of systems of intelligibility that enable and delimit the operations (of thinking, seeing, reading) of extending agents.

[12] See, e.g., Goebel 1954; Hart 1954; and Brant 1954. The reasons why Crosskey's book was subjected to vigorous and harsh attack are subject to investigation along the lines I offer here. Crosskey's Congress-centered view of the original Constitution, and the damage to his reputation that this view earned him, are features to my story about the contest to construct "credible" Fourteenth Amendment history. See the discussion in text and notes 35–37 below for extended discussion on this point.

[13] Henry Hart (1954), who wrote a vigorous and damaging attack on Crosskey's 1953 book, and Justice Felix Frankfurter, who condemned the incorporation thesis when it was put forward by Justice Black in 1947, both had ties to Harvard. This, perhaps, makes

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There are important links between Fairman's and Crosskey's histories and post–New Deal shifts in political alignments. After the famous 1937 "switch in time" in which the Supreme Court suddenly reversed itself and upheld Franklin Roosevelt's federal programs, government was less in the hands of states. Post–New Deal debates about the "proper" judicial role revolved around the recent gains in national strength and the Court's role in augmenting that strength. Fairman and Crosskey constructed their histories amidst this redistribution of state-national power. Fairman's nonincorporation thesis was a defense of state autonomy (which was threatened by the recent expansion of national power), and Crosskey's incorporation thesis worked to legitimate these recent shifts. With one eye to the recent gains in national power and the other eye to the past,[14] Fairman and Crosskey built their histories in politically charged ways.[15]

A full examination of the relationship between Fairman's and Crosskey's frames (and the histories their frames generated) and social and political arrangements is well beyond the scope of this article. A complete analysis of frames would include (but is not limited to) examinations of (1) the social and historical processes by which frames are produced (i.e., the roots of frames in social and political processes); (2) how frames both enable and constrain the construction of legal/historical meaning; (3) how the meanings structured by frames are received and evaluated by institutionally situated audiences; (4) how frames, as a unit of analysis, connect various levels of the social totality (i.e., the

one wonder about the extent to which there was a "Harvard take" on constitutional analysis during this period. (Fairman was Professor of Law and Political Science at Stanford University.) The widespread rejection of Crosskey's histories of the original Constitution and the Fourteenth Amendment, however, suggests that the Hart/Frankfurter perspective was not limited, or peculiar, to Harvard. Indeed, Crosskey's reputation as a constitutional historian would not have been so damaged by Hart had many others not shared his set of assumptions. The extent to which the Hart/Frankfurter "take" on constitutional history originated or was first developed at Harvard is a question that remains. Addressing this question would require that many institutional locales (and many communications among those associated with these locales) be studied. Investigating this matter would require extensive comparison that would take me far beyond the central concern of this article. Even if communications between Frankfurter and Fairman were uncovered, this would not establish that the Hart/Frankfurter "take" on constitutional analysis was developed at Harvard. Finding such communications would not rule out the possibility that many institutional actors across many regions of the country were elaborating the same views at the same time. The widespread and contemporaneous rejection of Crosskey's work gives weight to this possibility. It is conceivable that the Harvard associations of Hart and Frankfurter increased the value and credibility of their work. But building a gauge to assess the "prestige factor" would be exceedingly difficult. The widespread use of the Hart/Frankfurter perspective would make it difficult to isolate the "extra" authorization for this perspective (on top of the authorization it enjoyed anyway) that was the result of a Harvard association.

[14] I discuss the mutual construction of past and present below, p. 327.

[15] Crosskey's history of the original Constitution was politically charged for the same reason, and this was not lost on critics of the book. Crosskey's version of the original Constitution, said Irving Brant (1954:446), "has the flavor of congressional supremacy as we know it today."

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cultural level, the institutional level, the collective level, and the individual level); and (5) the varying amounts of symbolic power stored in frames. "Powerful" frames are those that are able to impose principles of meaning (i.e., the standards by which meaning is constructed) for many if not most institutional players. To the extent that dominant (normative) symbolic structures are weakened, their ability to organize notions of "acceptable" or "legitimate" legal history is thereby eroded.

Investigations of frames intersect with investigations of agency. What is the interplay of constraint and maneuverability for the actors who use particular frameworks to accomplish particular ends? This is a question concerned with the possibility of change. Frames might be applied in situations where the results are unforeseeable (Sewell 1992). My discussion cannot cover all these bases, but it is important to identify some pieces of the analysis that are not explored here.

I. Background to the Fairman/Crosskey Dispute

Since this article is about the construction of two dueling histories of the Fourteenth Amendment, some background to the dispute over the amendment's history is in order. The history of the Fourteenth Amendment (1868)[16] is a subject around which debate has swirled for generations.[17] Dispute over the amendment's history existed among Supreme Court justices with some force in 1873[18] but dwindled quickly thereafter. In the 1880s and

[16] Section 1 of the Fourteenth Amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

[17] One central question is whether or not the Supreme Court decisions of the Reconstruction era subverted or "betrayed" Republican legislative intent. A subquestion is whether the Republicans intended to apply the Bill of Rights to the states with the Fourteenth Amendment (i.e., whether they intended to "incorporate" the Bill of Rights"). Those who argue that the Republicans had broad objectives, that the Fourteenth Amendment was most likely intended to incorporate the Bill of Rights, and that the Court subverted Republican intent include Crosskey 1954; Levy 1972; Soifer 1979; Kaczorowki 1985; Curtis 1986; and Wiecek 1988. Those who argue that Republicans had narrowly drawn intentions for the Fourteenth Amendment, that incorporation was not intended, and that the Supreme Court interpretations of the Fourteenth Amendment in the 1870s and 1880s were largely correct include Fairman 1949, 1954; Morrison 1949; Berger 1977; and Maltz 1984. William E. Nelson (1988) argues that the debate has reached an impasse and offers his own approach for transcending this stalemate. See Nelson's overview of lawyers' and historians' debates over the Fourteenth Amendment and the nature of Reconstruction (pp. 1–12).

[18] The *Slaughter-House Cases* (1873) are famous for rendering inactive (gutting, as it is often put) the privileges and immunities clause of the Fourteenth Amendment. In *Slaughter-House*, the Court declared that this clause was not intended to apply the Bill of Rights to the states. There were four dissenters and three dissenting opinions (written by Bradley, Field, and Swayne). See Nelson (1988:156–74) and Curtis (1986:176–78) for two interpretations of the dissenting opinions.

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1890s, dispute over legislative history lingered in the sole dissenting opinions of the elder Justice John Marshall Harlan.[19] This debate bubbled to the surface again in the 1940s[20] and was blown open in 1947, the year Justice Hugo Black wrote a dissenting opinion in *Adamson v. California.*

In this famous dissenting opinion, Justice Black argued that the Fourteenth Amendment had really been intended to apply the Bill of Rights to the states. This position challenged the accepted view that the Fourteenth Amendment had *not* been intended to incorporate the Bill of Rights. Justice Black claimed that section 1 of the Fourteenth Amendment was intended to make the first eight amendments (but not the ninth and tenth) secure against state infringement. Black's examination of the historical evidence produced this conclusion:

> My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states. With full knowledge of the import of the *Barron*[21] decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. (*Adamson v. California* 1947:71)

At the time Black was writing, only a select few of the Bill of Rights (only certain provisions of the First, Fifth, and Sixth Amendments) had been incorporated, that is, applied to the states. And this incorporation had been accomplished through Justice Cardozo's interpretation of the due process clause in *Palko v. Connecticut* (1937). Legislative history was *not* the vehicle by which this limited incorporation was accomplished. (Black did not like the use of the due process clause as the vehicle to accomplish incorporation. He thought Cardozo's phrase "ordered liberty" was too open-ended and permitted justices too much latitude. Black thought that the incorporation of the Bill of Rights provided clearer boundaries for justices. Whether he was correct in this assessment is a whole other question.)

[19] Harlan argued that national citizenship had been reconfigured with the Fourteenth Amendment. See his dissenting opinions in the *Civil Rights Cases* (1883:26); *Hurtado v. California* (1884:538); *Maxwell v. Dow* (1900:605); *Twining v. New Jersey* (1908). Harlan is known for his famous dissent in *Plessy v. Ferguson* (1896:552) that, like his other dissenting opinions, relied on a substantive and expansive notion of citizenship.

[20] *United States v. Classic* 1942; *Screws v. United States* 1945. Between 1936 and 1947, the Supreme Court handed down a series of cases that required states to guarantee sections of the First and Sixth Amendments.

[21] *Barron v. Baltimore* (1833) held that the Bill of Rights was not applicable to the states. This case figured prominently in the arguments of both Fairman and Crosskey, as seen below.

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Charles Fairman wrote his history of the Fourteenth Amendment in response to Justice Black. In a 139-page law review article, Fairman (1949) charged that Black was wrong. Fairman excoriated Black, to put it more exactly. Fairman argued that Black's full incorporation thesis was not supported by the historical materials. In 1954, Crosskey responded to Fairman's historical readings point by point. In his own lengthy law review article, Crosskey asserted that Justice Black's full incorporation thesis was in fact warranted by the historical evidence. Fairman, in Crosskey's view, had "mishandled" the evidence. While Crosskey's reconstructions were far more detailed than Black's, Crosskey's work earned him no more regard.

Fairman's history offered an explicit defense and explanation of the Court's nonincorporation thesis. The Court's nonincorporation thesis, and its account of Reconstruction generally, had never before been explicitly justified. This account held that Reconstruction was *not* a period in which the structure of federalism was under renegotiation. The basic state-federal relation was "settled" according to the Court in the 1870s,[22] and Reconstruction did not see a reformulation of the notion of national citizenship. This version of the Fourteenth Amendment rhetorically submerged decades of antebellum dispute and instability centering on the original Constitution. The Court's account of Reconstruction submerged the fact that disputes over the state-federal relation were centrally implicated in the Civil War.

Fairman's story of nonincorporation, which legitimated the account of Reconstruction already developed by the Court during the 1870s, became a weapon against Warren Court decisions (Berger 1977; Bork 1990). Citations to Fairman's history can be found in the *U.S. Reports*, in the pages of law reviews, and in the books of constitutional scholars (Curtis 1986:110–13 discusses the influence of Fairman on scholarship). Fairman's article was cited on more than one occasion by Justice Harlan in the 1960s.[23] Said Harlan, "overwhelming historical evidence marshaled by Professor Fairman demonstrates . . . conclusively that the framers did not apply the Bill of Rights to the States." Alexander Bickel (1962:102) regarded Black's and Crosskey's assertions as "conclusively disproved." Michael Perry (1981:286) referred to

[22] The *Slaughter-House Cases* made the first declarations of this sort, stating that such changes in the "main features of the general system" were "unthinkable." Many decisions repeated this declaration. *United States v. Cruikshank* (1875:549–50). In *Maxwell v. Dow* (1900:593), the Court stated that the Fourteenth Amendment "did not radically change the whole theory of the relationship of the states and federal government to each other." In 1945, Justice Douglas repeated that the Fourteenth Amendment "did not alter the basic relations between the states and the national government" and cited the cases *United States v Harris* (1882), *In re Kemmler* (1890:436, 438), and *Screws v. United States* (1945:109). The dissenting opinion in *Screws* also denied that fundamental change in the state-national relation was wrought with the Fourteenth Amendment (pp. 142–44).

[23] Justice Harlan cited Fairman's article in his concurring opinion to *Griswold v. Connecticut* (1965:479) and in a dissent to *Duncan v. Louisiana* (1968:174, 188).

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the nonincorporation thesis as "amply documented and widely accepted." Historian Michael Kammen (1986:345) referred to Justice Black's incorporation thesis as a "constitutional fiction" and cited Fairman's conclusion that Black did not "have history on his side." Raoul Berger (1977:413), as Michael Curtis (1986:3) notes, expressed an extreme manifestation of this view in calling for a "rollback" of Court decisions which have applied Bill of Rights guarantees to the states. Crosskey, apparently, did not produce an "acceptable" legal reading for Court justices or for most law professors. The unbelievable nature of Crosskey's history, in Fairman's view, was apparent from the tone Fairman (1954) took in his response to Crosskey.

The question of the "original understanding" of the Fourteenth Amendment was certainly not settled by the exchange between Fairman and Crosskey. The Fairman/Crosskey dispute, however, served to socialize[24] future participants in debate over the history of the Fourteenth Amendment. With the Fairman/ Crosskey exchanges, battle lines were drawn and topics of debate were delineated. The modern terms of legal debate on the incorporation question, and the nature of Reconstruction generally, were established.

The competition itself played an important role in constructing the credibility of Fairman's history and in establishing Fairman's history as a source of legitimation in legal decisionmaking. A central theme in sociolegal scholarship is how the legitimacy of law is maintained (Hunt 1993). My examination of the Fairman/ Crosskey dispute suggests that the study of Court legitimation must be closely tied to the study of interpretive work and the social conditions and institutional circumstances under which this work is accomplished and evaluated.

I do not, I should emphasize, participate in the debate over who was "right." My interest lies in showing how Fairman's and Crosskey's frames led them to organize bits of the world in different ways (i.e., how their frames/nets "caught" certain things and, correspondingly, "lost" other things). There was nothing inevitable or necessary about the accounts either offered of legislative history. I should also note, however, that readers of this essay need not be "haunted by a fear of historicism, of becoming lost in a whirl of . . . relativism" (Geertz 1973:43). As Geertz explained (p. 44), "[i]t is not whether phenomena are empirically common that is critical . . . but whether they can be made to reveal the enduring . . . processes that underlie them." Geertz's instruction was to look for the set of control mechanisms that

[24] Simmel observed years ago that conflict socializes its participants. This observation is picked up by Susan Leigh Star (1989:94–95, 121), who discusses how participation in scientific debate reflects and reproduces commitments to certain paths of action and thought.

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ordered behavior, to look for systematic relationships among diverse phenomena.

My basic imperative is to explore the limitations of knowledge claims. I bring historiography and epistemology together so as to make visible the ordered character of Fairman's and Crosskey's competing historical reconstructions. The understanding that history is malleable leads me to sociological questions about the extent and conditions of malleability. The understanding that history is a site of struggle leads to questions about the dimensions of the Fairman/Crosskey struggle and the impact of this struggle in socializing future participants in debate over Fourteenth Amendment history.

The story, of course, is not over. Fairman's history might remain durable for many more years, but the status of Fairman's history will change. This is because his history is an institutional history and because "no institution is so universally in force and so perdurable that the meanings it enables will be normal forever" (Fish 1980:309). The general point is that the credibility of Fairman's history is linked to the life of the institution. The very category "original understanding," which both Fairman and Crosskey admitted without question, has come under increasing scrutiny.[25] Understanding the careers of these dueling histories means understanding the processes by which historical meanings, and legal problems generally, are constructed, modified, and revised.

Finally, then, how did the interpretive work of Fairman and Crosskey proceed?

II. Fairman's and Crosskey's Frames

Sets of taken-for-granted, conceptual elements worked together to organize Fairman's and Crosskey's sense-making practices. Their frames constrained their pathways of perception. Fairman and Crosskey both read the statements in the *Congressional Globe* within presupplied contexts, and that is why both could cite certain meanings as "obvious."[26] The lists of symbolic elements that follow below should not be taken as a ranked or-

[25] See, e.g., Horwitz's argument (1993) that originalism is unable to cope with the crisis of legitimacy that has followed the modernist insight that meanings are fluid and historically changing. (Horwitz associates "modernism" with legal realism, Berger & Luckmann's *Social Construction of Reality* (1967), and Kuhn's *Structure of Scientific Revolutions* (1970).) While the dominant metaphor for constitutional thinking, Newtonian mechanics, has been condemned as "static" since the 1890s by those who view the constitution "as organism not a mechanism" (Kammen 1986:16–22), the tension between modernism and the desire for fundamentality has, Horwitz argues, reached a crisis point where the Court evades its legitimacy dilemma by taking refuge in highly technical formulae and reified concepts (Horwitz 1993:116–17).

[26] Fish (1980:313) explains how the imposition of context and the making of sense occur simultaneously.

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dering, for this obscures the interactive dynamic. Picture the elements as a web or as netting.

The major categories of thought that made up Fairman's framework were (1) a commitment to local democracy and state autonomy; (2) universalization of 1940s orthodoxy; (3) a model of institutional actors as "non-strategic"; (4) a view of durability (in which the durability of state practices automatically signaled a "rational" distribution of state-federal power); and (5) a version of Civil War history taken from the Dunning School (Dunning 1907; Fleming 1919). These categories of thought produced a "catholic" (Levinson 1988) or Court-centered approach to constitutional meaning on the question of incorporation. Fairman's frame limited his ability to imagine that anyone could view the Court as other than the "ultimate authority" on the incorporation question. Said differently, Fairman had a limited ability to imagine what the concerns of Republican congressmen could possibly be. Fairman's assumptions led him, at a series of points in his analysis, to ignore evidence that was arguably relevant and to discount plausible alternative conclusions.

The elements that made up Crosskey's framework included (1) a nationalist vision of the original Constitution; (2) an identification of Republican congressmen with the antislavery movement; (3) an assumption that Republican congressmen would act with a view toward abolitionist goals; (4) a social history approach to the *Congressional Globe;* and (5) a model of institutional actors as strategic actors. This set of assumptions led Crosskey to take a more "protestant" approach to constitutional meaning on the question of incorporation, an approach that bypassed hierarchical (Court) readings.

Crosskey's commitment to a Congress-centered view of the original Constitution (however much this view was condemned) played a significant though subtle role in opening his historical imagination to nontraditional perspectives on the Fourteenth Amendment. His belief that the original Constitution provided for extensive congressional power, and that the original Constitution set up restraints on states that the Supreme Court never enforced, enabled him to imagine that Republicans might want to obtain what the Court's antebellum decisions had denied, namely, restrictions of state authority. Crosskey was led to consider the political philosophy of Republicans. His understanding of Radical Republican thought and his association of congressional Republicans with antislavery goals were critically important in reinforcing and developing this imaginative ability, and hence his "protestant" view on the incorporation question.

Crosskey's framing assumptions led him to "catch" in his net broad Republican references to the "rights that attach to citizenship in all free governments." These were significant and meaningful references for Crosskey, whereas for Fairman such broad

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references were empty verbiage. What was "lost," or missed, by Crosskey's frame included the Republicans' deep commitment to local democracy. Just as Fairman's imagination and perception were limited by his frame, so too were Crosskey's, though in a different way. Crosskey's framing assumptions produced gaps in his analysis. These gaps made it easier for an (already skeptical) audience to reject his conclusions.

The workings of these opposing frames (what they capture and what they miss) can be seen most clearly, perhaps, by examining particular issues of dispute between Fairman and Crosskey. What follows is a side-by-side comparison of Fairman and Crosskey on three points of dispute: *Barron v. Baltimore* (1833), institutional action from the Reconstruction era (which includes Court decisions from the 1870s), and political tradition. While it is analytically useful to structure my presentation of Fairman's and Crosskey's histories in this way, one danger that attends this structure is that their reconstructions will not be seen as "wholes." To ward this off, and to reiterate my point about how framing assumptions work in concert, the sections that follow this comparison reintegrate Fairman's and Crosskey's positions on the three points of dispute.

A. The Matter of *Barron v. Baltimore*

1. Fairman's Perspective

Sanford Levinson (1988) identifies what he calls "catholic" and "protestant" strains in constitutional thought. "Catholic" approaches look to sources outside the text (e.g., Court interpretations and tradition) as guides to constitutional meaning. In contrast, "protestant" approaches to the Constitution give authority to the constitutional text and insist on individual access to that text. "Protestants" claim that constitutional meaning resides inside the text and not in tradition or practice. This belief enables them to bypass Court (hierarchical) interpretations.[27]

Fairman's approach to constitutional meaning was "catholic" in that he ascribed authority to Court interpretations and institu-

[27] Of course, both "catholics" and "protestants" approach the text with interpretive assumptions. Both approach the text with an imagination informed by presuppositions. The distinction between "catholics" and "protestants" is useful for mapping the different ways by which interpreters ascribe interpretive authority to other interpreters, that is, how interpreters locate sources of authority and meaning. Fairman and Crosskey used different strategies for locating sources of interpretive authority. It is important to emphasize, however, that interpreters are rarely if ever "catholic" or "protestant" on all questions. Catholic and protestant views on constitutional meaning are situational. While Fairman's approach to constitutional meaning was "catholic" on the question of incorporation, his approach turned "protestant" when he considered post–New Deal Court decisions. Crosskey took a protestant approach to the meaning of the original Constitution and the Fourteenth Amendment, but he was less disposed to reject Court cases in the 1940s that expanded national power. It was Fairman's and Crosskey's framing assumptions that shaped their "religiosity" on particular questions.

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tionally orthodox readings. This was evident in the way he made sense of Republican references to "the law" generally and the case of *Barron v. Baltimore* (1833) in particular. This antebellum case held that the Bill of Rights was not applicable to the states. According to *Barron*, the original Constitution made the Bill of Rights applicable only to the federal government. *Barron* figured prominently in the arguments of both Fairman and Crosskey (as it did in Justice Black's initial argument for full incorporation in *Adamson v. California* 1947:71–72), although it occupied a very different place in each author's reconstructions.

Fairman was locked into his view of *Barron* as the *only* authoritative source of the meaning of the antebellum Constitution regarding the incorporation question. Fairman stated several times (1949:27, 34, 35) that "the law had been clearly established in *Barron v. Baltimore* to the effect that the first eight Amendments did not bind the states" (p. 36). Fairman regarded *Barron* as a "true" reading of the antebellum Constitution. Given this, Fairman was ill-equipped to *even imagine* that the legitimacy of *Barron* might be challenged. This could happen in at least three ways. It could be argued that the Founders did not incorporate the Bill of Rights but that this was a concession to slavery which polluted the document and the Court's interpretations of it. It could be argued that the Founders did apply the Bill of Rights to the states but that political forces and the Supreme Court worked to subvert this constitutional requirement. Third, the question of whether the original Constitution applied the Bill of Rights to the states could be left unaddressed, and it could be argued that incorporation was a wise thing to do in any case after the Civil War. All three of these arguments would view an overruling of *Barron* favorably.

John Bingham, a moderate Republican and author of the Fourteenth Amendment, referred to *Barron v. Baltimore* directly on several occasions. One of those occasions occurred during an exchange between Bingham and a fellow congressman. This fellow congressman thought the federal government already possessed the power to adequately protect citizenship rights. He challenged Bingham to produce evidence that the Fourteenth Amendment was actually needed. Bingham stated:

> A gentleman on the other side interrupted me and wanted to know if I could cite a decision showing that the power of the Federal Government to enforce in the United States courts the bill of rights had been denied. I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment. Mr. Speaker, On this subject I refer the House and the country to a decision of the Supreme Court, to be found in 7 Peters, 247, in the case of *Barron vs. The Mayor and City Council of Baltimore*, involving the question whether the fifth article of the amendments to the

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> Constitution are [*sic*] binding upon the State of Maryland and to be enforced in the Federal courts. . . . I read one further decision on this subject—that case of the *Lessee of Livingstone vs. Moore.*[28]

In his article, Fairman responded (p. 34) by stating:

> Those cases never intimated that the various requirements of the first eight Amendments really extended to the states. . . . [Bingham] hailed *Barron v. Baltimore* as though it were a vindication of his position, and plunged on to worse confusion.

Fairman labeled Bingham's views "confused" because Fairman took (i.e., understood) Bingham's reference to *Barron* as a traditional use of precedent (previously decided cases). Traditionally, judges cite precedent to establish the similarities of facts and questions of law. The establishment of similarities (which is always the product of interpretive work and never self-evident) generates legitimacy for the present decision. If Bingham had cited *Barron* as a judge or lawyer traditionally cites case precedent, his citation would be obviously incorrect since precedent went squarely against application of the Bill of Rights to the states. The "obviousness" of Bingham's confusion makes sense only if certain conditions of interpretation are imposed, namely, the condition that precedent is being used in a traditional way. These conditions of interpretation, of course, are not necessary.

At the time Fairman was writing, there was disagreement about what changed after the passage of the Fourteenth Amendment. But there was consensus about the status of antebellum constitutional law on the question of incorporation. The consensus view was that the antebellum Constitution did not bind the states to the Bill of Rights.[29] The accepted view in the 1940s was that *Barron* expressed the "right," or "true," view of the antebellum Constitution. Fairman projected contemporary orthodoxy backward. In other words, he universalized his present. He dehistoricized current orthodoxy, treating it as a "natural" object.

Fairman's catholic, Court-centered understanding of the applicability of the Bill of Rights to the states during the antebellum period led him to miss (or pass over) historical materials that were arguably vital to the issue at hand. Republican speeches during the 39th Reconstruction Congress (1866) suggested that Republicans were highly critical of the Founding Fathers' concessions to slavery and believed that these concessions perverted the notion of states' rights. Republican speeches referred consist-

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[28] Quoted in Fairman (1949:34). Justice Black cited this same passage in the early pages of the Appendix he attached to his decision. Black stated: "With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the rule the case had announced" (*Adamson* 1947:95–96).

[29] Crosskey argued at the end of his 1953 book that the original Constitution applied the Bill of Rights to the states, but that political forces and the Supreme Court worked to subvert this requirement and disable congressional powers generally.

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ently to antebellum political history and the Civil War. Fairman himself cited speeches containing such references. For example, during discussion of section 1 of the Fourteenth Amendment, John Bingham (author of the amendment) stated:

> The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State. . . .
>
> Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised that power, and that without remedy. . . . [M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, "cruel and unusual punishments" have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done. (Quoted in Fairman, p. 51)

Fairman's response (p. 53) was:

> The necessity for the first Section, Bingham tells us, is a lesson taught by the past four years of conflict. Surely this is an inapt way to express the idea that the provisions of Amendments I to VIII should be made applicable to the states! What is the great want this Section will fill? Once more we are told, the absence of power in Congress to protect the privileges and immunities of citizens of the Republic and the inborn rights of man. . . . "Contrary to the express letter" of the Constitution, states have inflicted "cruel and unusual punishments." Admit, very frankly, that this necessarily implies that the first eight Amendments were already limitations—though not enforceable by congressional action—upon the states. [Chief Justice John] Marshall's

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> Court [in *Barron v. Baltimore*] had said they were not limitations on the states, Bingham somehow believes that they are.

Again, Fairman thought Bingham was confused because Fairman regarded *Barron* as the only authoritative guide to the meaning of the antebellum Constitution. And significantly, Fairman confidently asserted that a reference to the "lesson" taught by the Civil War was an "inapt way" to express intent to incorporate the Bill of Rights. Civil War references slip right through his "net." Why might these references be relevant to an investigation of Republican intent? Given that a very bloody and expensive war had just ended and that congressmen were faced with the work of reconfiguring the Union, making sense of the war was high on the political agenda (see Richards 1993:13–20). Civil War references were a persistent feature of debate over the Fourteenth Amendment.[30] In their speeches, both Republicans and Northern Democrats mobilized these references to justify their postwar legal and political reforms. This suggests that Civil War references were a form of critique of the antebellum order in that they embodied a diagnosis of the antebellum problems which produced the war and prescribed a cure for these ills. If postwar political contests over citizenship, federalism, and the reconfiguration of the Union were waged through the telling of "Civil War stories," that is, different versions of the causes and objectives of the Civil War, then understanding the structure of Republican and Northern Democratic references to the past is vital to the issue at hand (investigating "intent").

Fairman, in general, did not perceive antebellum constitutional disputes over the state-federal relation. Arthur Bestor (1964) had not yet conceptualized the Civil War as a "constitutional crisis,"[31] but the primary materials with which Bestor worked were available to Fairman. W. E. B. DuBois's history of Reconstruction (1935) discussed Republican legal philosophy and disputes over the structure of federalism, but this account was neither institutionally legitimated nor easily accessible. It is uncertain whether Fairman had knowledge of it. At the time, Dunning School histories of Reconstruction,[32] which portrayed

[30] Postwar political contests to define citizenship and federalism were waged in a particular way, namely, by constructing different versions of what the Civil War "was about." In an unpublished essay I examine the interpretive structure of congressional debate over the Fourteenth Amendment.

[31] This "constitutional crisis," according to Bestor, was the result of irreconcilable interpretations of the Constitution. The preexisting structure of the Constitution played a central role in configuring the events of the Civil War. Constitutional ambiguities in the fugitive slave clause along with ambiguities about the clause dealing with territories led to a standstill over a single question: Who had the authority to make decisions with respect to slavery in the territories? The constitutional question of legislative authority over the territories became, in Bestor's words (1964:352), "the narrow channel through which surged the torrent of ideas and interests and anxieties that flooded down from every drenched hillside upon which the storm cloud of slavery discharged its poisoned rain."

[32] Dunning School histories of Reconstruction were written in the first two decades of the 20th century. The D. W. Griffith film *Birth of a Nation* appeared at the same histori-

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Republicans in a negative light and "states' rights" in a positive, unproblematic light, were institutionally legitimated and accessible. It would be three decades before Wiecek (1977:7) would write that antislavery constitutionalism

> developed from nontechnical popular origins that lay outside courts and legislatures. Constitutional development was (and is) not a monopoly of a hierarchic caste of judges and lawyers. It has its beginnings in the American people and its first expressions are to be found in documents less formal than decisions and statutes.

My point is not to assert that Wiecek and Crosskey are "correct." My aim is to call attention to institutional forces, such as the availability of histories that challenge Dunning School histories. Crosskey was, for the most part, a lone dissenter with not even the work of academic historians to stand on.[33] This made rejection easier.

Fairman's prior acceptance of Dunning School history helped channel his perception away from materials that suggested the existence of an antebellum constitutional dispute over the structure of federalism, a dispute that would need to be settled at the war's end. The existence of this constitutional dispute, and the attempt to settle it, is evident in the patterned references to the Civil War, and political history generally, that mark Republican and Northern Democratic speeches on the Fourteenth Amendment.

Fairman's "understanding" of Bingham's references to *Barron* (that he was "confused") and Fairman's "understanding" of Bingham's reference to the Civil War (that it was an "inapt" way to express intent to incorporate) were the product of several symbolic elements and interpretive conventions working together. These included the use of (not yet delegitimated) Dunning School history, the imposition of conditions of interpretation, and the universalization of 1940s orthodoxy on *Barron* (that it was the "true" reading of the antebellum Constitution).

In sum, Fairman's frame produced a particular conception of what evidence of intent to incorporate the Bill of Rights would look like and what it would *not* look like. There were, actually, a handful of instances where Republicans did refer specifically to the first eight amendments and stated an intent to make these

cal juncture. In the 1960s, Dunning School history was delegitimated. Eric Foner (1988:xix–xxvii) outlines the history of Reconstruction historiography in the preface of his now standard account of Reconstruction, in which he acknowledges that W. E. B. DuBois's *Black Reconstruction in America* (1935) "anticipated the findings of modern scholarship. At the time, however, it was largely ignored" (Foner 1988:xxi).

[33] This historiography was made available in the 1960s and was a resource for legal scholars like Michael Curtis and Aviam Soifer who continued to challenge Fairman's historical interpretations. They used this historiography to fashion more contextualizing strategies for understanding Republican intent.

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amendments applicable to the states.[34] But against the certainties produced by Fairman's frame, these references appeared as anomalies, and Fairman discounted them.

2. Crosskey's Perspective on Barron

Crosskey rejected a Court-centered approach to the "original understanding" of the Fourteenth Amendment. As mentioned earlier, Crosskey's prior commitment to a nationalist, Congress-centered interpretation of the original Constitution played a role in shaping his perception of the *Congressional Globe* speeches generally and Republican references to *Barron* in particular.

Crosskey argued in his 1953 book that the original Constitution placed restrictions on state authority but that the Supreme Court had destroyed these restrictions. The final part of this book discussed the Supreme Court's "destruction of the constitutional limitations on state authority," and the last several chapters made reference to the standing "constitutional law" (pp. 1084, 1090, 1096, 1126, 1133). Constitutional law appeared in quotations. Crosskey's book acknowledged the nonincorporation thesis in *Barron,* but he declared that *Barron* was "incorrectly decided" (p. 1076).[35] The "true" view of the original Constitution was that states were bound to the Bill of Rights.

The main concern of Crosskey's 1953 book was congressional rights,[36] not the treatment of disenfranchised groups or the abuses black Americans had experienced under state governments. Crosskey's argument in favor of incorporation supported his complaint that the Supreme Court had favored states' rights over congressional rights. His incorporation thesis emerged in the context of (and was used to support) a claim for expanded congressional power.

This is significant for several reasons, not the least of which is that Crosskey's Congress-centered view of the original Constitution was widely condemned. Even if his critics were granted their arguments about Crosskey's incompetence and the implausibility of *all* his claims (something not all his critics were prepared to

[34] Presenting the Fourteenth Amendment to the Senate, Jacob Howard discussed the "privileges and immunities" of citizens. After quoting a passage in the case *Corfield v. Coryell* (1823), Howard stated, "To these privileges and immunities . . . should be added the personal rights guarantied and secured by the first eight amendments of the Constitution." *Cong. Globe,* 39th Cong., 1st sess., 2765 (1866).

[35] Crosskey (1953:1081) called *Barron* "one of the most extensive and indefensible of all the various failures of the Court to enforce the Constitution against the states as the document was written."

[36] Crosskey's dedication in *Politics and the Constitution* read, "To the Congress of the United States in the hope that it may be led to claim and exercise for the common good of the country the powers justly belonging to it under the Constitution." Crosskey's central idea was that congressional power fell short of what the original Constitution intended. The Court's illegitimate expansion of states rights had resulted in "cluttering" the powers of Congress "with a mass of technicalities that make their exercise difficult, expensive and in no small degree ineffectual" (p. 1082).

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do),[37] it would be ironic that Crosskey's implausible beliefs about the original Constitution seem to have enabled him to construct a plausible account of the Fourteenth Amendment. It should be noted, however, that one need not hold a Congress-centered view of the original Constitution to believe that the incorporation thesis is plausible. There are a variety of ways in which one's perceptive capacities might be opened to this possibility.

For Crosskey, a distinction between standing law and "true" law was part of his conceptual repertoire for organizing the world. In Crosskey's narrative, Bingham and the Republicans appear as reformers who wished to make the standing law "right." Bingham argued, according to Crosskey, that the Fourteenth Amendment was necessary to reverse the decision in *Barron*. Crosskey himself rejected the *Barron* decision as a wrong view of the original Constitution, and this made it easier to imagine that others might reject this decision as well.[38] This also, however, made it difficult for Crosskey to imagine that the Republicans' reasons for rejecting *Barron* might be different from his own.

Fairman did not draw a distinction between standing law and "true" law. He was conceptually ill equipped to even imagine that Bingham and the Republicans could hold such a distinction, much less act on it. Crosskey argued that there was a "law" that the courts denied, which set him apart from both Fairman (who believed the standing law was the "true" law) and somebody like Holmes, who acknowledged that others drew distinctions between standing and "true" law but would have little to do with it himself. (Cf. Holmes's famous remark (1920:173) that "[t]he prophesies of what the courts will do in fact, and nothing more pretentious" is what he means by "law.")

Crosskey's history emphasized the relevance of Republican political thought. His reading of the *Congressional Globe* was informed by an expectation that Republican congressmen would act with a view toward their abolitionist activities. In other words,

[37] Irving Brant (1954), a biographer of James Madison and one of Crosskey's critics, stated: "In spite of appalling misrepresentations, there is a vast amount of sound reasoning in Mr. Crosskey's work" (p. 450). Perhaps the most "appalling misrepresentation" Crosskey was criticized for was his portrayal of Madison. In brief, Crosskey argued that Madison falsified his notes of the Constitutional Convention. If Crosskey's charges were true, Brant observes (p. 447),

> Madison would be rated as one of the most accomplished forgers in world's history. . . . To falsify the record, it would have been necessary for Madison "either to have (1) Foresee in 1787 the issues raised in 1819 by the Missouri Compromise, and forestall them by misquoting a dozen men in his original notes or (2) Replace four pages of the original manuscript with fictitious notes written after 1819 on a blank sheet of paper with the same watermark as that used in 1787 and duplicate at about the age of 70 a youthful handwriting which had disappeared from all his other writings."

In spite of Crosskey's portrayal of Madison, Brant hoped that good in Crosskey would not be thrown away with the bad.

[38] For further discussion on the distinction between standing law and "true" law, see pp. 316–18.

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Crosskey held a predetermined idea of what Republican concerns could possibly be. This influenced where he looked for evidence of intent to incorporate and what he imagined this evidence would look like. Because Crosskey associated Republican congressmen with the antislavery movement, it made sense to him to begin his story at an earlier point in time (i.e., to construct a narrative with wider boundaries).

For Crosskey, the not-yet-overruled decision in *Dred Scott v. Sandford* (1857) offered a critical clue in assessing Republican objectives. This decision was "undeniably relevant" to an investigation of the legislative history of the Fourteenth Amendment.

> The first feature of the prior law that is relevant to this inquiry is one of the holdings of the Supreme Court in the *Dred Scott* case: that, under the Constitution of the United States, no person of African descent, whether a slave or not, was or could be a citizen of the United States. This holding was still unoverruled when the Fourteenth Amendment was drawn. A second relevant circumstance is that there were, at that time, in the local laws provisions denying local state citizenship to persons of African descent. . . . It was another of the doctrines of the *Dred Scott* case that all the various privileges and immunities recognized in the Constitution and its various amendments were privileges and immunities of citizens of the United States only; [t]he foregoing doctrine, unoverruled in 1866–68 seems undeniably relevant in considering what was the meaning of the command, in the amendment then adopted. (Crosskey 1954:4–5)

Whereas Fairman located explanatory power primarily in hierarchical interpretations of the Supreme Court, Crosskey focused on antislavery criticisms of *Dred Scott* and made relevant the political membership of congressional Republicans. He understood the Fourteenth Amendment in light of the Republican party's past activities and the party's criticisms of antebellum law.[39] Crosskey's "understanding" that congressional Republicans wanted to overrule the Court's decision in *Barron v. Baltimore* and apply the Bill of Rights to the states was dependent on a context supplied by Crosskey, which included both a commitment to a Congress-centered interpretation of the original Constitution and an association of congressional Republicans with antislavery thought.

[39] Michael Curtis (1986), some 30 years after Crosskey, offered very similar instructions for "recovering" original intent. He stated that the meaning of the Fourteenth Amendment "should be sought in the abuses that produced it and in the political and legal philosophy of those who proposed it. The congressional debates are a further guide to meaning. In evaluating the debates, one should look primarily to those who supported the amendments and not primarily to statements of opponents. The remarks of leading proponents are entitled to great weight. And the greatest weight of all should be given to the statements of members of the committee that reported the amendment to Congress" (pp. 12–13). Curtis asserts, like Crosskey, that Fairman misread the evidence. "The major fault with Professor Fairman's effort to understand the Fourteenth Amendment is that it overlooked the antislavery origins of the amendment" (p. 100).

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This presupplied context, however, also led Crosskey away from deeper examination of the *variety* of perspectives Republicans exhibited on the original constitution and *Barron.* Some Republicans appeared unaware that the Supreme Court had denied the applicability of the Bill of Rights to the states. Some, like William Kelley, asserted confidently that the Fourteenth Amendment would give effect to portions of the original Constitution that have "lain dormant." Others, like William Higby (whom Crosskey quotes) said the amendment would give life to portions of the Constitution that "*probably* were intended from the beginning" to have life (italics added). Still others, like Thaddeus Stevens, harshly condemned the Founders and argued that their concessions to slavery had produced the Civil War.[40] Stevens's statements suggest that he believed the original Constitution did not apply the Bill of Rights to the states. Finally, even if most Republicans believed that applying the Bill of Rights to the states was a practical thing to do in light of Southern intransigence, this does not necessarily lead to the conclusion that Republicans believed that the Supreme Court in *Barron* destroyed provisions in the original Constitution. Crosskey's own belief in this thesis led to a flattened-out representation of Republican perspectives on this matter.

In a move designed to delegitimate Fairman's reading of the *Congressional Globe,* Crosskey himself situated Fairman's reading. Crosskey asked his audience (which included Fairman) to imagine a particular set of circumstances in which *Globe* statements would be differently but equally clear (different, that is, from Fairman's reading). Crosskey identified Fairman's use of orthodox constitutional law in the 1940s as an interpretive baseline against which he (Fairman) read Republican statements. Crosskey explained how one could be "confused" by the historical record if one read Republican statements against the "unquestioningly accepted" views of constitutional law in the 1940s. This would result, as Crosskey explained, in a failure to recognize the "peculiar"[41] nature of Radical thought. Fairman's failure to appreciate the nature of Old Republican thought was a critical mistake which led to his "mishandling" of the evidence. Crosskey repeated the point several times:

> [I]t is quite impossible to understand aright the debates over the Fourteenth Amendment . . . unless [old, Republican constitutional views] are known and understood and kept constantly in mind. (1954:11)

[40] See, e.g., Stevens's speech that identified "a defect" in the Constitution, which was that the Constitution was not a limitation on the states with regard to matters of personal rights. Stevens represented the Civil War as springing from "the vicious principles incorporated into the institutions of our country." *Cong. Globe,* 39th Cong. 1st sess., 2459.

[41] Curtis (1986:46) relabeled Republican legal theories as "unorthodox."

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

> It is clear that minds unaware of old Republican theories might very easily take Bingham's remarks as confused, incoherent and incompetent. And it was thus that Mr. Fairman presented them. (P. 70)

> Read in the light of the Supreme Court's then past constitutional decisions and various other ideas of constitutional law which have since come to be unquestioningly accepted . . . statements by John Bingham undoubtedly seem a confused mass of untruths and impossibilities. But if we bear in mind the various constitutional theories set forth . . . if we remember that these were the common faith of the Republican Party at the time; and if we remember that Bingham himself had given the plainest proof that he entertained these theories in his speech of 1859, then there is, assuredly, not much difficulty in understanding what he had to say. (P. 25)

An understanding of "Old Republican" thought, Crosskey argued, raised doubts about the "settled" status that Fairman attributed to certain questions, including the question of incorporation under the original Constitution. Crosskey (p. 8) called attention to the fact that, in the 1860s, the meanings of article IV, section 2,[42] and the Fifth Amendment[43] were "not actually settled."

Crosskey could imagine that Republicans might assert federal oversight of certain practices that had been under (illegitimate) state control prior to the war. He appealed to many Republican statements to support this picture of Republican thought. For example, he quoted Congressman William Higby expressing his support of the Fourteenth Amendment (p. 29). In Higby's view, the Fourteenth Amendment would

[42] Art. IV, sec. 2, contains the privileges and immunities clause of the original constitution. Crosskey attributed to Republicans the belief that this section guaranteed to each individual in every state the *full* body of rights that inhered in national citizenship. The Republican view, according to Crosskey, was that it required states to guarantee the Bill of Rights. In 1940, the accepted view of art. IV, sec. 2, was that it *only* guaranteed to individuals the minimum rights each state chose to grant its own residents; it did not grant a full body of national rights.

[43] Crosskey attributed to Republicans the belief that the Fifth Amendment's due process clause had always applied to the states. In 1940, the accepted view of the antebellum Fifth Amendment was that it did not bind the states. As evidence, Crosskey reprints Henry Wilson's speech on the Fifth Amendment which suggests that the Republicans intended to apply Fifth Amendment guarantees to the states.

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> only have the effect to give vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality, but which have received such a construction that they have been entirely ignored and have become as dead matter in that instrument.

Crosskey interpreted this statement as evidence that Higby supported the view that *Barron v. Baltimore* was incorrectly decided. Crosskey then quoted (pp. 29–30) the speaker after Higby, William D. Kelley, a Republican from Pennsylvania:

> Mr. Speaker, I repeat that I hold that all the power this amendment will give is already in the Constitution. I admit it has lain dormant. I admit that there has been raised over it a superincumbent mass of State and political usage and judicial decisions that . . . is mountain high.

On the specific subject of section 1 of the Fourteenth Amendment, Crosskey quoted (p. 81) Senator Luke Poland of Vermont:

> The clause . . . secures nothing beyond what was intended by the original provision in the Constitution, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." But the radical difference in the social systems of the several States, and the great extent to which the doctrine of State rights or State sovereignty was carried, induced mainly, as I believe, by and for the protection of the peculiar system of the South, led to a practical repudiation of the existing provision [i.e., art. IV sec. 2] on this subject, and it was disregarded in many of the States. State legislation was allowed to override it, and as no express power was by the Constitution granted to Congress to enforce it, it became a dead letter. The great social and political change in the southern States wrought by the amendment of the Constitution abolishing slavery and by the overthrow of the late rebellion render it eminently proper and necessary that Congress should be invested with the power to enforce this provision throughout the country and compel its observance. . . . It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States.

These kinds of statements—that the power the Fourteenth Amendment would give was already in the Constitution (in art. IV sec. 2 and in the Fifth Amendment) but that the power had "lain dormant"—were interpreted by Crosskey as evidence that Republicans believed a corrective (the Fourteenth Amendment) was needed for antebellum practices and Court decisions.

Crosskey attempted to establish that Republican references to "the natural and personal rights of citizens" and "principles lying at the foundation of all republican government" were references to the Bill of Rights. Crosskey paid attention to Republican language. For Crosskey, broad Republican references to "rights

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that attach to citizenship in all free governments" found in conjunction with references to antebellum law and the decision in *Barron* were significant. Fairman judged this broad language as either irrelevant to his investigation because it was so imprecise or as confirming the view that full incorporation had not been intended.

Crosskey's strategy lay in showing that these broad references were more specific and relevant than Fairman realized. Crosskey cited a sequence of statements made by Senator Jacob Howard and Senator John Henderson of Missouri. Senator Howard first presented the Fourteenth Amendment to the Senate. Howard stated clearly (even according to Fairman) that section 1 would make the first eight amendments applicable to the states. Just afterward Henderson stated:

> I propose to discuss the first section only so far as citizenship is involved in it. I desire to show that this section will leave citizenship where it now is. It makes plain only what has been rendered doubtful by the past action of the Government. If I be right in that, it will be a loss of time to discuss the remaining provisions of the section, for they merely secure the rights that attach to citizenship in all free governments.

Crosskey (p. 80) quoted Fairman's response to Henderson's statement:

> Unless the first eight Amendments enumerate "rights that attach to citizenship in all free governments," Henderson's understanding is to be counted as opposed to that of Howard.

As Crosskey tells it, Fairman quoted the Henderson remark in an attempt to show that there was no consensus on Jacob Howard's statements.

> Mr. Fairman apparently thinks that such a view of the rights under the first eight amendments would be absurd, and it was his hope that his readers would think the same. But the real question is what the men in the Senate thought in 1866. (Ibid.)

For Crosskey, the Henderson remark confirms Republican support for incorporation. Jacob Howard, Crosskey pointed out (ibid.), had already described the first eight amendments as "fundamental rights lying at the basis of society and without which a people cannot exist except as slaves, subject to a despotism."

Crosskey, then, paid close attention to the vocabularies in use at the time and the structure of Republican references to antebellum decisions. Republican references to the "fundamental rights of citizenship" that had been denied in antebellum constructions of the Constitution, and Bingham's explicit references to *Barron v. Baltimore,* led Crosskey to conclude that the Republicans intended to reverse the ruling in *Barron.* For Crosskey, references to *Barron* were indeed "apt" references to express the intent to incorporate the Bill of Rights.

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Crosskey's different reading of the *Congressional Globe* statements turned on his prior commitment to a Congress-centered view of the original Constitution and the information he uncovered about Republican political thought. This led to his willingness to consider that "protestant" readings of *Barron v. Baltimore* were both possible and legitimate, even if unorthodox.

Crosskey's net also led him to "lose" pieces of evidence, which left holes in his analysis. These gaps in his narrative made it easier to reject his version of events. Crosskey failed to situate Bingham's references to *Barron* within a compelling story about when and how Republicans came to draw a distinction between "true" law and standing law. This requires some explanation.

Before the war, almost all Republicans conceded that slavery was constitutional in the South. Southern states had sovereignty over the matter. Sectional dispute was over the extension of slavery into the territories. The question was whether the right to protect slavery was a right that "pertained" to the territories. (Southern Democrats went further than Northern Democrats and argued that the federal government had a duty to protect the right to property in slaves in all the territories. Northern Democrats disagreed and a split in the Democratic party resulted.) It was only *during* the war that Southern slavery became implicated in the goals of the war.

Antebellum Republican disclaimers of Northern intent to interfere in the "established" rights of states became a major postwar problem for the Republicans. How were they to legitimate a nationalist vision if Southern states were "sovereign" as antebellum rhetoric suggested? Republicans responded to this problem by challenging the notion of "established" rights. They argued, in short, that the "Slave Power" (a dominant trope in antebellum rhetoric) had perverted the notion of states' rights. After the war ended, Republicans acknowledged that Southern states had exercised power in the antebellum years. But now, Republicans insisted that many dimensions of Southern state power were illegitimate. The exercise of (illegitimate) power did not *establish* a (legitimate) state right.

It was during the postwar period that Republicans "created" the distinction between arbitrary power and legitimate right in their efforts to manage antebellum Republican statements denying Northern intent to interfere in established states rights. Republicans used the distinction between standing law and "true" law, a distinction which was *not* widely legitimated before the war, to "manage" antebellum recognitions of Southern state sovereignty. The Republican notion of "true" law, what Jacobus tenBroeck (1951) and William Wiecek (1977) call antislavery constitutionalism, had been developed by Joel Tiffany and Alvan Stewart before the war, but it was not widely adopted. It became widely used only after the war, as Southern intransigence pro-

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duced wide popular support for Republican intervention in Southern states.

B. On Institutional Action and Political Tradition

1. Fairman's Perspective

Fairman brought with him a model of institutional action that understood causation (i.e., the causes of institutional action) in narrow terms. This led him to read institutional behavior in particular ways. Fairman's critical move was to presume that the justices' "fresh memories" of the passage of the Fourteenth Amendment lent validity to their nonincorporation thesis of the Fourteenth Amendment.[44] He assumed that since the passage of the amendment was recent, justices would have fresh knowledge of the amendment's objectives and, significantly, that possession of such knowledge would lead *only* to decisions that recognized these objectives. Since the Court denied intent to incorporate the Bill of Rights, Fairman concluded that no such intent existed. Fairman could not imagine that the institutional situatedness of Court justices might dispose them to limit the Fourteenth Amendment's effect on the structure of federalism *regardless* of any fresh information that a restructuring of federalism was what Republicans had in mind.

Fairman also assumed that if state legislators and congressmen had been aware of Republican intent to apply the Bill of Rights to the states, they also would have behaved *only* in certain ways. State legislators would have refused to pass a constitutional amendment that was said to annul their state laws, and congressmen would have refused readmittance to states that abridged Bill of Rights guarantees. Since Southern states passed the Fourteenth Amendment and continued practices that violated provisions in the Bill of Rights, and since these states were readmitted to the Union, Fairman's conclusion was that incorporation could not have been intended:

> If it was understood in the legislatures that considered the proposed Amendments, that its adoption would impose upon the state governments the provisions of the federal Bill of Rights, then almost certainly each legislature would take note of what the effect would be upon the constitutional law and practice of its own state. . . . [O]ne would expect to find a marked reaction. Measures would have to be taken to conform to the new order. Conversely if we found disparity [between the federal Bill of Rights and state practice] coupled with complete inac-

[44] The Court in *Adamson v. California* took a similar view. The court emphasized the "contemporaneous knowledge" of the judges in *Slaughter-House.* Frankfurter stated that incorporation of the Bill of Rights "was rejected by judges who were themselves witnesses of the process" and were "duly regardful of the scope of the authority that was left to the states even after the Civil War." *Adamson,* p. 62.

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tion, it would be very hard to believe the Fourteenth Amendment was understood to have that effect. (1949:82–83)

Fairman assumed state legislators would have taken measures to conform to a new order. He expected to see a "marked" response to legislation that incorporated the Bill of Rights. Fairman did not consider that passage of the Fourteenth Amendment was politically necessary for the ex-Confederate states and it was a low-cost, formal price to pay for readmittance. For a few brief years after the war's end, conservatism was briefly lifted. But political retrenchment set in quickly by the late 1860s and early 1870s as civil rights enforcement became a political liability for the Grant Administration. As Southern Democrats knew, it was not the formal law that mattered but Northern resolve to put down resistance and physically enforce the law. Fairman, however, assumed that formal law mattered most.

If institutional action is conceived as "structured improvisation" (Bourdieu 1977:73), then one might anticipate that any number of actions might follow from the possession of information that suggested intent to incorporate the Bill of Rights. Institutional actors always have ranges of choices even if those ranges are limited. Their choice of action depends on experience, training, situation, constraints, the availability of interpretive tools, etc. Supreme Court justices, state legislators, and congressmen of the Reconstruction era were all institutional actors whose behavior took place with reference to institutionally defined interests and institutionally shaped ways of thinking. All these actors were positioned within material relations.

An in-depth analysis of the organization of the identities, political positions, values, and ways of thinking of these actors is beyond my scope here. But perhaps not much evidence is required for asserting that a state-based federalism organized Court justices' commitments and ways of thinking in the 1870s. Political theories from the American Revolution held that central power was dangerous; the threat to the political system lay in broad federal power. Of course, the fact that courts are supposed to follow legislative objectives provides some basis for Fairman's assumption that they will. But "institutional duty" is a far more complex notion than Fairman acknowledges. Given his own attachment to a state-centered federalism, it would seem that he might understand why Court justices might think it "proper" (i.e., their institutional duty) to resist a program for restructuring the state-federal relation. For the Court justices of the 1870s and 1880s, adhering to a (socially and historically specific ethic of) institutional "duty" and bowing to fresh knowledge of legislative objectives are not necessarily consistent.

In short, Fairman cast institutional actors as nonstrategic. He was led away from regarding institutional action in the 1870s as "a problem" that needed explanation. In Fairman's view, institu-

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tional actors had taken the "right" track in asserting almost exclusive state control over citizenship. Therefore, digging into contextual factors which generated these actors' choice of tracks did not present itself as a need.

It was Fairman's faith in local democracy that led him in this direction. Faith in local democracy was central to Fairman's belief system. His commitment to a state-centered federalism is observable in multiple instances. For example, practices that lasted throughout the antebellum era signaled, for Fairman, a "rational" distribution of state-federal power.

> The freedom that the states traditionally have exercised to develop their own systems for administering justice repels any thought that the federal provisions on grand jury, criminal jury and civil jury were fastened upon them in 1868. Congress would not have attempted such a thing, the country would not have stood for it, the legislatures would not have ratified. (1949:137)

For Fairman, state control had stood the test of time. But, of course, the "test of time" can be extended. There are no objective determinations of the "end" point of this test. Further, the durability of a practice can also be evidence of entrenched domination. Felix Frankfurter, concurring in *Adamson v. California* (1947), also expressed his disbelief in the prospect that the Fourteenth Amendment could have imposed "the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury." This would have "uprooted their established methods for prosecuting crime and fastened upon them a new prosecutorial system" (ibid., p. 64). It is uncertain whether Frankfurter and Fairman had knowledge of the Southern abuses that took place, for example, at the trials of Northern antislavery activists, much less the trials of black men and women. Indeed, Republican distrust of state prosecutorial systems is widely evident in debates over the Civil Rights Act of 1866.[45] Fairman, significantly, did not begin his investigation of "original understanding" with debates over the Civil Rights Act. Fairman focused narrowly on debates over section 1, and he weighed events after the passage of the Amendment more heavily than events prior to its passage.

While the durability of antebellum practice indicated a "rational" distribution of power, the durability of the nonincorporation thesis in the postbellum period signaled its accuracy. In a companion piece to Fairman's article, Morrison (1949) attempted to access legislative objectives by looking to Supreme Court opinions between 1873 and 1883. Morrison viewed the durability of the nonincorporation story of the Fourteenth Amend-

[45] See, e.g, *Cong. Globe*, 39th Cong., 1st sess., 988–91, 1056, 1064–65, 1152–55, 1262–72. Republicans were concerned about the abuse of official authority and expressed great skepticism about the trustworthiness of Southern authorities.

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ment as evidence of its accuracy. He commented sarcastically, "if it was one of the chief objectives of the Fourteenth Amendment to incorporate the Bill of Rights, it is certainly surprising that it should have taken so long to find this out." Had incorporation been intended, this information would surely have been known long before 1950.[46] Morrison, apparently, could not imagine an alternative story about how the nonincorporation story could have been produced initially by a Court with an honestly held conception of "institutional duty." He could not conceive that popular acceptance of Court decisions in the 1870s could have insulated the nonincorporation story from criticism or how a line of precedent could have accumulated so that Justices could "simply" follow *stare decisis*. He could not imagine how Dunning School history could have reinforced this line of precedent and how, finally, conditions might not have been favorable for opening this account of the Fourteenth Amendment to scrutiny until the 1940s.

2. *Crosskey's Perspective on Institutional Action and Tradition*

Crosskey was more disposed to regard institutional action in the 1870s as a problem that needed explaining. This was because he thought this action was wrong. For Crosskey, the durability of antebellum arrangements was not automatic evidence of a "rational" distribution of state-national power. Further, the durability of the nonincorporation thesis, once it was put forward in the *Slaughter-House Cases*, was not evidence of its veracity.

Crosskey gave some consideration (though it was limited) to the contexts in which institutional action occurred. For example, while Fairman interpreted the absence of heated debate on section 1 as evidence supporting the nonincorporation thesis, Crosskey interpreted this silence in the opposite way. According to Crosskey, this silence was the result of the noncontroversial nature of incorporation. Later sections of the Fourteenth Amendment captured more congressional attention, Crosskey explained, since these were the devices Republicans hoped to use to push the old Southern elite out of government:

> As to why the debate should have had this [relatively silent] character, there are several obvious reasons. In the first place, section 1 was not really new to the House. The other sections of the amendment were, on the other hand, entirely novel. In addition to this, they were political: they constituted the means by

46 Frankfurter viewed the durability of precedent as a clear indicator of its acceptability. He emphasized the "unquestioned prestige the case *Twining v. New Jersey* (1908) had enjoyed for 40 years." The case rejected the claim that the Fourteenth Amendment applied the Fifth Amendment to the states. *Twining* stated that the privileges and immunities clause of the Fourteenth Amendment "did not forbid states to abridge the personal rights enumerated in the first eight amendments." *Twining*, p. 99.

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> which the Republicans hoped to hold onto control of the national government. (1954:71)

Crosskey explained how Fairman could interpret congressional silence as evidence of the absence of intent to incorporate:

> [T]o apply the Bill of Rights to the states seems so outrageous to Mr. Fairman that he thinks a public outcry would surely have occurred in 1866–68 had it then been understood that a proposal to apply the Bill of Rights was being made. It was this state of mind that led him to count all his null results as evidence supporting the negative side of the question. (P. 114)

In Crosskey's view, Fairman's expectation of a "marked" response explains his misinterpretation of the silence. Fairman's inability to bracket (or historicize) the orthodoxy of his own era produced his "mishandling" of the historical evidence.

Crosskey emphasized the point that Republican thought contained dual impulses, toward a state-centered federalism and toward a nation-centered federalism.[47] Crosskey acknowledged the state-centered elements of Republican thought when he discussed Northern Democrats' charges that the Fourteenth Amendment would destroy states. These charges struck Crosskey as absurd, and he interpreted them as a strategy to delegitimate Republican reform. Democrats frequently seized on the broad language of the Fourteenth Amendment and claimed that the amendment could be interpreted to give black citizens the vote, prohibit segregated education, and prohibit anti-miscegenation laws. Crosskey pointed to Republican responses that the amendment would do no such things. He cited Republican denials that the Fourteenth Amendment gave federal jurisdiction over voting, prohibited segregated education, or prohibited anti-miscegenation laws. (Of course, the Fourteenth Amendment today is seen to accomplish all these things.)

Crosskey emphasized that Republicans shared Democratic fears of a too-powerful federal government. In Crosskey's narrative, Republicans perceived federal jurisdiction over Bill of Rights guarantees as a *narrow* and limited grant of federal power.

Crosskey sought to make the incorporation thesis palatable to his 1950s audience. In defending the incorporation thesis and, significantly, its viability for 20th-century courts, Crosskey reined in a strand of Republican nationalism. He represented Republi-

[47] In the standard legal debate over "original understanding," debaters have typically drawn on the state-centered elements of Republican thought or the nation-centered elements of Republican thought. Battle lines have been drawn in an "either/or" fashion. Harold M. Hyman (1973) and William E. Nelson (1988) stand out from the crowd of debaters over "original understanding" because they attempt to bridge the divide between both "camps" in the debate over the Fourteenth Amendment. Nelson (p. 11) argues that judges should heed the dual Republican "command to protect rights and to leave legislatures unfettered to adopt laws for the public good." But even with equality defined as a "master concept that best gives effect to both individual rights and to legislative freedom," Nelson does not confront historiographical and hermeneutic puzzles inherent in applying this dual command.

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can nationalism more narrowly than some evidence suggested and ignored certain aspects of the speeches he cited. Crosskey also emphasized the Republican understanding of incorporation (that it was a narrow and limited grant of federal power). This was a strategy to assuage those individuals in the 1940s who worried that incorporation of the Bill of Rights would mean a huge expansion in national power. Crosskey's thinking seemed to be that if *Republicans* thought incorporation was a narrow and limited grant of power, then applying "original intent" posed little concern for those worried about state autonomy.

Crosskey, however, did not acknowledge that applying the Republican view (that incorporation was a limited, narrow grant of federal power) involved uncertainty. An emphasis on the Republican understanding of incorporation did not "close the case" on worries over local democracy. This is because Republican intent to prescribe a "narrow" role for the federal government could be interpreted in the 20th century as legitimation for broad federal oversight of state treatment of citizens. One might acknowledge the Republican perception that elimination of the racial caste system was a "narrow" federal role or duty in 1866 and *still* be able to coherently defend the view that "original understanding" legitimated broad federal power over citizenship. In 1866, it was still possible to equate a "narrow" federal role with the elimination of racial caste. Experiences (from the Black Codes to voting disenfranchisement to Jim Crow to the nonprosecution of Klan violence) had not yet piled up to suggest otherwise. Crosskey did not consider that the accumulation of state-imposed and state-sanctioned practices which subordinated black Americans could enable 20th-century interpreters of "original understanding" to draw on Republican desire to include black Americans in the polity in legitimating broad national power over citizenship.

Crosskey, as mentioned, also ignored certain aspects of the speeches he himself cited. Republican speeches referred to the Bill of Rights as *only some* of the rights included in the "privileges and immunities" of citizens of the United States. Republican intent with regard to the privileges and immunities clause was uncertain and potentially far reaching. Republican speeches in support of the Ku Klux Klan act, which Crosskey cited, speak in favor of broad federal jurisdiction. Crosskey did not explain how this was a case of narrow and limited power. "Narrow and limited" can be subject to dispute even when "narrow" means "limited to awful misuses of power." What counts as "awful" is itself subject to multiple interpretations.

Another gap in Crosskey's analysis was that he offered no explanation for the durability of the nonincorporation thesis. He might have used the contingency of Waite Court decisions in the 1870s and 1880s as a reason to justify departures from these deci-

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sions. This, at least, would have provided him with a response to Fairman's dogged use of durable state tradition as an *automatic* indication of a "rational" distribution of state and federal power.

III. Recipes for "Acceptable" Legal Readings, Or, When Meanings Are Literally Unimaginable

This section discusses the institutional reception of Fairman's and Crosskey's dueling histories. I begin by examining how Fairman and Crosskey "explained" the other's account. For Fairman, Crosskey's conclusions were unbelievable. In Fairman's view, there was simply no logic or reason behind Crosskey's arrival at his conclusions. Crosskey, on the other hand, offered an analysis of the "believability" of the nonincorporation thesis. Crosskey explained how one's logic would lead one "astray" if one held particular assumptions. Crosskey gave an argument for why evidence of intent to incorporate would take a different form than Fairman assumed. In a sense, Crosskey was better at imagining how somebody could reach a conclusion different from his own. But while Crosskey interrogated Fairman's assumptions, Crosskey was not reflexive about his own.

The unbelievability of Crosskey's history, in Fairman's view, is clear from Fairman's (1954) response to Crosskey. Fairman mocked Crosskey to make his point:

> So in Mr. Crosskey's theory the Fourteenth Amendment—by far the most important amendment to the Constitution—was framed and discussed under very special conditions. The movers acted on the assumption that their own peculiar ideas, and not the decisions of the Supreme Court, were the law. Time passed, and this special vocabulary was forgotten—and then Professor Crosskey discovered the Rosetta Stone and deciphered the ancient records. (P. 154)

> Mr. Crosskey says that [John] Bingham drafted on the theory that his own very special ideas and not the Supreme Courts decision, were the standing law. I would think it plain that anyone who acted on such a view was a purblind and bull-headed draftsman. (P. 153)

Fairman's charges against Crosskey make sense given the network of (meaning-producing) associations set up by Fairman's assumptions. Crosskey, and Justice Black before him, had suggested an alternative network of associations that crossed the path[48] of Fairman (or passed through Fairman's "net") and that of many others. Black and Crosskey were literally outside the network of meaning-producing associations made by Fairman. The

[48] "The question to raise," states Steve Woolgar (1988:206) (drawing on Garfinkel's exercises in breaching social norms), "is when and why an attack that crosses someone else's path is possible, one that generates, at the intersection, the whole gamut of accusations of irrationality."

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Black-Crosskey thesis of incorporation was not inherently unbelievable or irrational. But it was a breach that made visible the ordering commitments of Fairman's interpretive community. When we explore the angle, movement, and scale of the Black-Crosskey "breach," it becomes more clear how Fairman and those in his interpretive community were able to reassert these ordering commitments.

In explaining the success of Fairman's history, my basic argument is that Fairman constructed a history that resonated institutionally. After Fairman's article was published, his conclusion that incorporation had not been intended was quickly accepted. His article became a source of authority on the Fourteenth Amendment for those who followed. One person who followed was legal scholar Alexander Bickel. Bickel, in a well-known article (1955) offered a version of the legislative history of the Fourteenth Amendment regarding school segregation. In a footnote, Bickel addressed the issue of incorporation. Bickel mentioned the case *Maxwell v. Dow* (1900), which was the first time the Court was presented legislative statements about intent to incorporate the Bill of Rights.

In *Maxwell*, counsel presented Jacob Howard's speech, which clearly stated that the Fourteenth Amendment would make the Bill of Rights applicable to the states. The Court's opinion acknowledged that counsel had "cited from the speech of one of the Senators" but downgraded its significance:

> What individual Senators or Republicans may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it.[49]

Bickel reprinted excerpts from Howard's speech and then quickly resolved the issue against the full incorporation view. For authority, he cited Charles Fairman's article. Crosskey's history had appeared a year earlier, but for Bickel, a citation to Fairman was sufficient. The matter was closed.

What lawyers and judges "received" in Fairman's account that they did not receive in Crosskey's was, in general terms, an affirmation of state-centered federalism and a stabilization of the doctrine of *stare decisis*. The specter, raised by Justice Black, that the 70-year-old precedent might be uprooted, was put to rest. Black's incorporation thesis had created a great amount of un-

[49] *Maxwell v. Dow* 1900:601–2. Fairman deemphasized the significance of Howard's speech by attempting to show that other Republicans did not share Howard's views. Felix Frankfurter also dismissed Howard's statement: "Remarks of a particular proponent of the Amendment [i.e., Howard] no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech." *Adamson v. California* 1947:64. While Frankfurter's statement is hardly false, he succeeds in isolating Howard's speech, splitting it apart from the text of the proposal. It is this sort of isolation that Crosskey attempts to delegitimate.

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certainty and instability. If 70-year-old precedent could be wrong, then how were judges to save the doctrine of *stare decisis?* The "recipe" for producing acceptable legal readings for lawyers and judges who approved of Fairman's history included (1) creating as little disturbance as possible within existing legal fields; (2) weighing distrust of federal power heavier than distrust of local and state power; and (3) arguing for as narrow a conception of the judicial role as possible by expressing faith in the political process.

Fairman's persuasiveness, his ability to "act at a distance,"[50] was linked to his ability to mobilize symbols that had been deeply institutionalized for decades (Schudson 1989). He utilized strategies of symbolic construction to privilege a particular plot in the story of the American Republic. In his symbolic constructions, local democracy appeared as a cherished achievement won against the Kings of England and *the* reason for American success.

There are, of course, multiple traditions in American politics, local democracy being one of them. Fairman rooted a collective national identity in the tradition of decentralized politics[51] by deemphasizing nationalist traditions. Crosskey was unsuccessful in asserting his claim that "credible" Fourteenth Amendment history required attention to the nationalist traditions developed by Republicans. The success of Fairman's nonincorporation thesis meant that the institutional definition of "credibility" was congruent with his own assumptions. This became an obstacle to federal courts when judicial conceptions of citizenship and visions of federalism mandated national redress of historic practices of wrongdoing by state governments.

Fairman's account, it should also be remembered, was continuous with selected elements of the Old Republican tradition. While nationalist in certain respects, Republicans shared with Fairman a suspicion of sweeping nationalizing proposals. Republicans were not hearty enthusiasts of broad and expansive federal power. Even if they intended to incorporate the Bill of Rights to suppress the unjust aftermath of slavery and to stay in power, they wanted to do so "conservatively."

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[50] "To act at a distance," as Steve Woolgar (1988) puts it, is to successfully claim that representations emanate from the object itself, and that the production of the representation did not interfere with the "pre-existing character" of the object. "The scientist/observer has to be the trusted teller of the tale and yet his involvement in the representation must not be seen as impinging upon the object's character, i.e., his representation is not just a distortion or partial reflection of what was actually the case" (pp. 78–79).

[51] The foolhardiness (and illegitimacy) of federal intervention in traditionally local matters was generally taken as the "lesson" of the case *Lochner v. New York* (1905). This "memory" of the case was institutionalized in legal training. Knowledge of this "memory" was widespread and easily accessible. It was a powerful institutional symbol shaping ethics of proper judicial action. Cass Sunstein (1987:882–83) offers an alternative view of *Lochner*'s "error," which was to use an inappropriate "baseline" for assessing neutral action.

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IV. The Mutual Construction of Past and Present

The Fairman/Crosskey dispute was linked to an emergent (post–New Deal) debate about the "proper" judicial role. Fairman and Crosskey built their histories in politically charged ways. Historical actors of the 1860s were configured (by Charles Fairman) and reconfigured (by William Crosskey) alongside the configuration and reconfiguration of the "legitimate" judicial role in post–New Deal political arrangements. Their arguments about the past were, simultaneously, arguments about the present. Fairman, for example, opened his law review article by criticizing the Supreme Court's rulings of the 1940s which departed from the tradition of decentralized politics. These decisions were the first to apply the First Amendment and parts of the Sixth Amendment to the states.

Said generally, Fairman's and Crosskey's configurations of the events of Reconstruction stood in mutual relation with their configurations of the "proper" judicial role in the 1940s. Fairman's representations of Radical Republicans accommodated his assessment of the illegitimacy of 1940s Court decisions which expanded the power of the federal courts over citizenship. Past and present were constructed together in a dual motion. Just as the elements that made up Fairman's framework structured how he accessed the past, these same elements structured his judgments of "legitimate" Court action in 1947. These assessments of present and past stood in mutual relation. Fairman's judgments about which matters fall to the Supreme Court (to "law") and which matters fall to the states (to "political wisdom") were determined by the organizing elements that also structured Fairman's meanings of the *Congressional Globe.*

This dual construction dynamic is connected to the situational character of Fairman's "catholic" approach to constitutional meaning.[52] While Fairman could not imagine that the Supreme Court's decision in *Barron* might be legitimately criticized, and while he could not believe that the Supreme Court's nonincorporation thesis in the *Slaughter-House Cases* was wrong, Fairman could imagine that the Supreme Court was wrong when it expanded congressional power after 1937. Fairman was a "catholic" when he considered the incorporation question, but he shifted to a more "protestant" view when he considered 1940s Court decisions that chipped away at state autonomy. Fairman's "catholicism" was situational, and it was his framing assumptions that determined his Court centeredness.

[52] See the discussion of "catholic" and "protestant" approaches to constitutional meaning above, pp. 304–5.

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V. Accessing Intention

While Fairman's and Crosskey's readings of the documentary evidence diverged in many ways, they debated "original understanding" within institutional parameters they both took as natural or self-evident. Fairman and Crosskey shared some interpretive conventions. They shared a view of themselves as neutral readers and a belief that the "original understanding" of the Fourteenth Amendment has an absolute basis of recognition. These conventions were not simply enabling conditions of interpretation. Other stances on "original understanding" were possible. One might, for example, have held the view that "original understanding" is provisionally recoverable, as opposed to absolutely recoverable. Or one might have rejected the view that "original understanding" is an important concept. Enabling conditions, generally speaking, are necessary for the interpretation of "authorial intention" to proceed. An absolutist view of documentary evidence is not necessary. Fairman and Crosskey shared an institutional, positivist view of documentary evidence. The shared use of institutional conventions produced a convergence, of sorts, in their "recoveries" of original understanding. Fairman and Crosskey admitted without question a particular conception of their role as "readers" of the historical record (the text of the *Congressional Globe*). Neither questioned his role in accessing Republican "understanding." In addition, both took statements in the *Congressional Globe* as "first order" statements, which were not, themselves, interpretations.

Martin Jay (1992) has argued that statements appearing in historical texts are themselves interpretations. These statements should not be taken as "first-order" statements. Statements which are themselves interpretations are at least "second-order" interpretations. Regardless of the story of the Fourteenth Amendment the Court accepted, it would be endorsing an interpretation (of Lincoln's Unionism), which was itself an interpretation (of the Civil War), which was yet another interpretation (of the original Constitution). If debate over the Fourteenth Amendment is conceived as competing interpretations of antebellum interpretations, then the "original understanding" of the Fourteenth Amendment must be regarded as a site of interpretive dispute where neither Republicans nor Northern Democrats stand on noninterpretive ground. If the *Congressional Globe* is a record of interpretation, and if the "readers" of this historical record inevitably play a role in constructing the meaning of that record (or the understanding/intention of speakers in that record), then history can never provide objective grounds for legitimating Court action.

Fairman and Crosskey operated under the assumption that there existed an objectively discernible referent event (congres-

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sional debate over the Fourteenth Amendment) which could supply objective grounds for legitimating Court action. Referent events, in their view, supplied an independent measure of whether the "right" description of Republican intent had been given. Neither considered that "recovering" legislative intent was contingent, to any degree, on their own set of discursive and rhetorical practices.[53] Neither was aware that a question of legitimacy attached to their view that, as readers of historical texts, they played no role in constituting the meaning of the *Congressional Globe*. This was a convention that was silent about itself as a convention.

This does not mean we cannot say anything meaningful about "intentions" or the "understandings" of actors. (I am, after all, trying to say something meaningful about Fairman's and Crosskey's intentions/understandings.) Proceeding as if one can talk meaningfully about what was intended or meant is an enabling condition of much interpretation. One need not deny this to assert that a sociological task remains, which is mapping the various ways links are forged between the documentary evidence in the *Congressional Globe* (what was said) and its meaning or intention. I am not, then, suggesting that Fairman and Crosskey were deluded in believing that some kind of access to Republican intent/understanding was possible. The view that intentions (in this case, what Republicans meant to accomplish with their legislation) have *some* basis of recognition, or the view that the meaning of federal control over citizenship will emerge in time as legislative, popular, and court decisions are made, however, is different from the view that intentions or "understandings" have an absolute basis of recognition.

Crosskey, like Fairman, took the latter (absolute) view. For them "original understanding" was not conceived as a moving target of sorts. Crosskey argued the untraditional position that the Fourteenth Amendment was intended to incorporate the entire Bill of Rights, but he utilized traditional modes of historical analysis and accepted a traditional view of readers. Both Fairman and Crosskey assumed the view that referent events provide an independent measure of the "right" description of those events. Crosskey (and Michael Curtis after him) asserted that the Supreme Court (and Fairman) described Republican intent incorrectly. The possibility, however, of getting the description of intention "right" was still provided by the historical evidence if one only looked in the right way and in the right places.

The view that "original understanding" stands still, and that it has an absolute basis of recognition, maintains the submergence of historiographical and hermeneutic puzzles. Both Fairman and

[53] Of course, my own "recovery" of the Fairman/Crosskey debate is contingent, though here I bracket this issue.

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Crosskey deleted the contingencies and uncertainties that were inherent in their "recoveries" of history. In addressing themselves to the question, "Does the Fourteenth Amendment incorporate the Bill of Rights?" Crosskey accepted the assumptions about the role of the reader and the status of events that inhered in the framing of the question itself. The question, posed this way, admitted only a range of answers from "clearly" to "very likely" to "selectively" to "no." Another kind of answer exists: "not yet" or "only partly." This last answer is different in the sense that it addresses not the concept of original meaning but the question of what the courts have actually done or might do. Other answers to the question of original understanding exist, answers which acknowledge their *provisional status.*

Judgments about Republican intention (or original understanding) flow from the local contexts of interpreters, and all interpreters suppress arguments about original meaning that their local contexts prevent them from imagining. The task is understanding which sorts of "imaginings" get institutionalized, how these institutionalized ways of imagining block access to legal resources and how these institutionalized "imaginings" are linked to distributions of various sorts.

VI. Conclusion

Fairman's history refurbished the nonincorporation story, though this story never quite regained the shine (that comes with being unassailable) it had before Black's opinion in *Adamson.* The Fairman/Crosskey exchange marked the emergence of an orthodox view on the incorporation question and Reconstruction generally. It is important to emphasize, however, that orthodoxy does not always "win" in law. It does not always gain a Court majority. However, it does provide rhetorical advantages. Warren Court decisions which took nationalist and egalitarian views of the Court's role have been vulnerable on historical grounds,[54] though this Court was not without other sources of legitimation and justification (which included historical images of periods other than Reconstruction). An institutionally credible representation of Fourteenth Amendment history is a legal resource—a source of law and legitimation—which exists within a landscape of resource arrays. The larger problem is understanding the work involved in the production of these multiple arrays of resources and the shifting tides of resource mobilization at different historical junctures.

[54] See, e.g., the legislative apportionment cases *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964). Historian Charles A. Miller (1969:119–48) discusses the flawed historical arguments of the Warren majority in these cases. According to Miller, the dissenters had the better historical arguments.

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The symbolic power of Fairman's history must always be assessed in concrete situations because it is in concrete situations that justices accomplish judicial work. Shifting variables, such as cultural ideologies, the Court's cast of characters, accumulating precedent, and the question at hand, produce differently configured legal fields.[55] Field configuration, in conjunction with judicial frameworks, shapes access to resources. The Fairman/ Crosskey conflict marked the emergence of a powerful symbol, though not powerful enough to determine outcomes.

If writing or reconstructing history inevitably involves the use of an interpretive framework, then writing history involves the imposition of the present on the past, though it should be remembered that "present-day" frames are social and historical products. This article has examined the competing ways in which links are forged between documentary evidence and meaning or intention. A sociology of legal representation must try to understand how interpretive frames generate "nets" for catching phenomena and how the positionality of institutional audiences shapes the "acceptability" of these representations. It must illuminate the structures of constraint that are in place, the circumstances under which representations become subject to revision, and the ways revisions are accomplished. Understanding both the divergences and convergences in Fairman's and Crosskey's historical reconstructions, and the trajectories of credibility that attach to both, can advance the discussion toward this end. Finally, a sociology of historical representation might ground the highly politicized work of determining criteria for distinguishing "better" from "worse" histories. Such criteria arise from within situations and not from above. A greater understanding of institutionally "credible" knowledge as a complex social achievement can aid the work of negotiating/identifying the characteristics of transgressions against the limits of "better" representations.[56]

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[55] Duncan Kennedy (1986) defines legal fields as collections of precedent, rules, policies, historic images, and social stereotypes. He first analogizes legal fields to a physical medium, bricks, which judges might manipulate. The brick analogy is meant to convey that both freedom and constraint characterize judicial work. Kennedy then rejects the brick analogy. Legal fields, he states, are more like messages from the "ancients" which guide ethically serious people about how they ought to proceed in particular instances.

[56] As Saul Friedlander (1992:3) states, when a claim to historical "truth" is imperative, when there are limits to representation that should not be but can easily be transgressed, the characteristics of such transgressions are far more intractable that contemporary definitions have been able to encompass.

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