



## THE "CONSPIRACY THEORY" OF THE FOURTEENTH AMENDMENT: Part 2

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In 1866, Roscoe Conkling was a member of the Joint Committee which drafted the 14th Amendment. In 1882, during the course of an argument before the Supreme Court of the United States, Conkling produced for the first time the manuscript journal of the Committee, and by means of extensive quotations and pointed comment conveyed the impression that he and his colleagues, in drafting the due process and equal protection clauses, intentionally used the word "person" in order to include corporations. A lively controversy has since been waged over the historical foundation for Conkling's statement. Social historians have contended that the equal protection and due process clauses were designed to take in "the whole range of national economy;" that John A. Bingham, the member of the Joint Committee chiefly responsible for the phraseology of Section One, "smuggled" these "cabalistic" clauses into a measure ostensibly drafted to protect the Negro race. Others have been skeptical of this view, and have pointed out that it is pyramided on three propositions: (1) that the framers had a substantive conception of due process, (2) that as early as 1866 there existed a number of constitutional cases in which due process had been invoked in a substantive sense by corporations, (3) that the framers knew of these early cases and realized the corporate potentialities of their draft, which were not suspected by the ratifiers.

In an earlier article,<sup>1</sup> the writer demonstrated the essentially false and misleading character of Conkling's argument insofar as it was based on the Journal of the Joint Committee. And although it was shown that Bingham, as early as 1856, had employed due process of law as a substantive restraint upon the legislatures, no indication was found that Bingham in these early usages ever employed the guarantee to protect other than rights of "natural persons". It was therefore concluded that the so-called "Conspiracy Theory" of the 14th Amendment could henceforth be maintained only if it were proved "that some force or influence caused Bingham to broaden his application of the due process clause to include corporations—either sometime prior to 1866, or while the Fourteenth Amendment was before the Joint Committee." In this article the writer proposes to complete the study, reviewing first the development of corporate personality down to the Civil War, and then considering whether in the light of extant cases, the framers could have regarded corporations within the terms of Section One.

### I.

Due process of law underwent a phenomenal development in the early and mid-fifties; it was occasionally, though as yet unsuccessfully, employed by corporations; and it was

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<sup>1</sup> *The "Conspiracy Theory" of the Fourteenth Amendment* (1938) 47 Yale L. J. 371.

for a time reduced to a state of extreme debility after 1857 largely as a result of its own excesses and false popularity. For an understanding of these developments, it needs to be borne in mind that as early as 1805, the University of North Carolina, a public corporation, had in effect been held a “freeman” within the “law of the land” clause of the State constitution;<sup>2</sup> and in the years prior to the *Dartmouth College* decision<sup>3</sup> the law of the land clauses of the states generally seemed destined to become bulwarks for vested corporate rights.<sup>4</sup> Superseded in this respect after 1820 by the neater contract clause formula, the law of the land nevertheless continued to be invoked in the class of cases involving charter changes of public institutions.<sup>5</sup> Eventually, in 1847, after due process of law had developed full-fledged substantive appendages,<sup>6</sup> and after the contract clause had begun to suffer the limitations of the *Charles River Bridge* decision,<sup>7</sup> a Pennsylvania court, in the case of *Brown v. Hummel*,<sup>8</sup> laid the foundations for renewed corporate

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2 Trustees v. Foy, 5 N. C. 58 (1805). The constitutional text read “no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or in any manner... deprived of his life, liberty or property but by the law of the land,” and Justice Locke reasoned “that this clause was intended to secure to corporations as well as individuals the rights therein enumerated, seems clear from the word ‘*liberties*,’ which peculiarly signifies privileges and rights which corporations have by virtue of the instruments which incorporate them, and is certainly used in this clause in contradistinction to the word ‘*liberty*,’ which refers to the personal liberty of the citizen.” *Id.* at 62.

3 4 Wheat. 518 (U. S. 1819).

4 Trustees v. Foy N. C. 58 (1805), cited *supra* note 2, however, was not the first public corporation case under a State Bill of Rights: its staunch Federalist dogma may well have been aimed, in part at least, at the majority decision, rendered the year previously, by a Republican-controlled Virginia court in the case of Turpin V. Lockett, 6 Call 113 (1804). Here, upholding an act disestablishing the Church of England and depriving it of certain lands, Justice Tucker had reasoned “if the legislature... grant lands to a private person, in his natural capacity... such donation” would be irrevocable; but where the legislature had created “an artificial person, and endows that... person with certain rights and privileges” such action “must be intended as having some relation to the community at large” and therefore if subsequently the legislature deemed the vesting act “unconstitutional, or merely impolite and unadvised,” it might amend or repeal its own act. *Id.* at 150. But note in considering the early importance of the law of the land clause in such cases, that except for the sudden death of Chief Justice Pendleton the Turpin decision would have gone against the legislature. See *id.* at 187, “memorandum,” and MOTT, DUE PROCESS OF LAW (1926) 196. N. 15.

It is well known, of course, that the law of the land clause was relied on most heavily in the *Dartmouth College Case* in the state court [I. N. H. III (1817)], and while the argument was rejected by Justice Richardson on the fundamental grounds of the historic meaning of the law of the land, the argument on corporate personality was nevertheless explicitly made. See SHIRLEY, DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES (1879) 158-159.

5 State v. Heyward, 3 Rich. L. 389 (S. C. 1832), holding unconstitutional a statute depriving the faculty of a medical school of the right to grant degrees. “A body... corporate is not, it is true, a *freeman*, ... yet it is composed of freemen... ; and of course the corporation can only be... deprived of any of its privileges in the same way as a natural person. *Id.* at 411-412; Regents of the University of Maryland v. Williams, 9 Gill and J. 365 (Md. 1838).

See also Vanzant v. Waddell. 10 Tenn. 260 270 (1829), holding that the law of the land means a general and public law, which binds every individual equally. “Were this otherwise, odious individuals *and corporate bodies* [italics added] would be governed by one rule, and the mass of the community who makes the law, by another.

6 See particularly, Hoke v. Henderson, 15 N. C. 1 (1833); Taylor v. Porter, 4 Hill 140 (N. Y. 1843).

7 11 Pet. 420 (U. S. 1837).

8 6 Barr 80 (Pa. 1806). Voiding certain statutory changes in the charter of an orphanage, the Court applied the due *course* of law clause of the Pennsylvania Constitution [“All Courts shall be open; and

usage. Less than two years later, in the case of *White v. White*,<sup>9</sup> a New York Supreme Court upheld the arguments of counsel who cited the dicta of *Taylor v. Porter*<sup>10</sup> as a basis for invalidating that section of the Married Woman's Property Act which applied to existing rights under prior marriages. And beginning in the Fifties, as a result of the expanding sphere of legislative action and more frequent collision between vested rights and various movements for economic and humanitarian reform,<sup>11</sup> due process of law was warped into play by corporate interests in New York, Pennsylvania, and Illinois.<sup>12</sup> Foremost among the corporate contenders for an expanded interpretation of due process in New York were numerous foreign insurance companies. A fascinating story will some day be written of the struggles of these corporations to escape discriminatory and retaliatory laws relating to licenses, taxes, and bonds.<sup>13</sup> Far back in the Twenties and Thirties Jacksonian legislatures had precipitated conflict by passage of measures designed to make insurance, like banking, a protected franchise, subject to drastic state control. Against these attempts to restrict what otherwise was a national market in a field ideally suited to exploitation by large scale enterprise, insurance companies had sought judicial approval for a system of constitutional protection, which, while it was in perfect harmony with earlier court decisions and with American "natural rights" concepts, was still fundamentally at odds with the Jacksonian era's philosophy of States' Rights and the prevailing antagonism to corporations. The last companies argued in effect that since foreign corporations—or at least the shareholders of foreign corporations—had long

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*every man* for an injury done him in his lands, goods, person or reputation shall have remedy by the due course of law. . ." Art. I § 11] to protect the interests of the original trustees, and seems even to have assumed a corporation to have been a "man" within its meaning.

Strictly construed neither this clause nor the text of the State Bill of Rights [*"In all criminal prosecutions the accused hath a right to be heard... ; nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land."* Article I, § 9.] would have afforded protection even to corporate shareholders or trustees, yet in practice they early came to do so. This fact suggests caution when reasoning from a purely textual basis as to the *meaning* which the due process clause had in the minds of, say, the framers of the Fourteenth Amendment. Cumulative evidence indicates that all such clauses were used as often in their natural rights as in their literal sense; and that "property," not "due process" or "person," was the key word.

9 5 Barb, 474 (N. Y. 1849); see particularly 481-484.

10 4 Hill 140 (N. Y. 1843).

11 The intimate connection between the early use of due process and judicial predilections against such reform movements as Abolitionism, Women's Rights, and Prohibition has been noted by so conservative an historian as A. C. McLaughlin in A CONSTITUTIONAL HISTORY OF THE UNITED STATES (1935) 461-462. There is need, however, for a thorough integration of social and constitutional history in these particulars. For a suggestive treatment of the social backgrounds of constitutional developments in New York during the Fifties see 6 HISTORY OF THE STATE OF NEW YORK, THE AGE OF REFORM, (1934) c. 8. For insight into the interrelations between the movement for state prohibition laws and the growth of due process, see COLVIN, PROHIBITION IN THE UNITED STATES (1926) c. 2.

12 It is possible that the first use of due process by a private corporation may have occurred in Ohio in 1852-54, just as Bingham was making his entrance into national politics. After years of bitter partisan warfare, Democrats had in 1851 repealed all tax exemptions granted (chiefly by Whigs) to banks and other corporations. No arguments of counsel are printed in any of the text cases in 1 Ohio

13 Unfortunately there is yet no adequate history of the insurance industry in the United States, nor of two closely-allied subjects, inter-state commercial retaliation and anti-corporate movements and legislation. See, however, HENDERSON, THE POSITION OF THE FOREIGN CORPORATION IN AMERICAN CONSTITUTIONAL LAW (1919) 50-63, 101-102; Whitney, *Commercial Retaliation Between the States* (1885) 19 AM. L. REV. 62.

been treated as “citizens” under the diversity of citizenship clause for purposes of suit in the Federal courts,<sup>14</sup> the same parties should also be treated as “citizens” under the Comity clause.<sup>15</sup> It was hoped of course that “corporations [or shareholders]<sup>16</sup> of each state” might thus eventually be held entitled in all States, to the “right to trade”, the right “to acquire and possess property”, and above all, to the right “to exemption from higher taxes and other unequal impositions”, which Justice Washington had declared in *Corfield v. Coryell* to be among the “privileges and immunities of citizens in the several States”.<sup>17</sup>

However, ingenious as a formula for *laissez-faire*, and as a means for virtually abolishing state lines and state control over corporations, these arguments necessarily gained little headway in Federal courts presided over by Jacksonian judges.<sup>18</sup> From the date of their first defeat in 1837,<sup>19</sup> the plight of the insurance companies grew steadily more anomalous and more acute—more anomalous because as foreign corporations the companies were in fact treated as “citizens” within the meaning of one clause of the Constitution, yet were not so treated within the meaning of another;<sup>20</sup> more acute because this understandable lack of consistency in judicial construction eventually gave license to new and more alarming forms of discrimination. Beginning in the Forties and Fifties State legislatures not only undertook to raise the license fees and premium taxes formerly collected, but also began experimenting with provisions that required deposit of large cash bonds—taxable in most cases—as security for resident policy holders.<sup>21</sup> Legitimate in principle, these requirements naturally provoked retaliation, tied up

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14 *Bank of United States v. Deveaux*, 5 Cranch 61 (U. S. 1809); see *Louisville, C. & C. R. R. v. Letson*, 2 How. 497, 558 (U. S. 1844) (presumed all shareholders to be citizens of the chartering state); HENDERSEN, *op. cit. supra* note 13 at 54-63.

15 See *Warren Manufacturing Co. v. Etna Insurance Co.*, 29 Fed. Cas. No. 17, 206 (C. C. D. Conn. 1837); *Bank of America v. Earle* 13 Pet. 519, 585 (U. S. 1839); and particularly Webster’s argument printed more fully in 11 WRITINGS AND SPEECHES OF DANIEL WEBSTER (1903) 106, 112-115; HENDERSON, *op. cit. supra* note 13 at 54-63.

16 Webster only argued that the *shareholders*, having gained the right to sue in the corporate name, should be granted the right to do business in the corporate name. But the broader proposition was of course the ultimate goal.

17 6 Fed. Cas. No. 3, 230 (E. D. Pa. 1823). Counsel failed to note that Justice Washington had himself qualified these broad rights by saying that they were “subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.”

18 It is interesting to note in retrospect how fundamentally at odds the corporations’ strategy was with the dominant sentiments of the period – how completely States’ Rights arguments cancelled out Natural Rights arguments. In the abstract, the principles of the *Corfield* dictums were clear to the heart of every American: but as applied in behalf of corporations in the Thirties and Fifties they led to consequences abhorrent to all but the most doctrinaire nationalists. The logic and simplicity of the formula together with encouragement which the Supreme Court seemed to offer from time to time by its wavering interpretations of the diverse citizenship clause, doubtless account for the arguments’ vitality, but it is plain today that since no Court could have declared a corporation a “citizen” under the comity clause for success. It is significant that foreign corporations eventually attained protection under clauses of Constitution that permitted more readily of judicial discretion, and involved no such universal and automatic system of *laissez faire* as the insurance companies long tried to establish.

19 *Warren Manufacturing Company v. Etna Insurance Co.*, 29 Fed. Cas. No. 17, 206 (C. C. D. Conn. 1837).

20 HENDERSON, *op. cit. supra* note 13, at 50-76, presents the classic analysis of this paradox.

21 See *id.* at 101-102; Whitney, *supra* note 13. Recodescence of the ancient commercial feud between New York and New Jersey, quiescent since the Twenties, seems to have led to the bonding requirement, which soon spread to other States and found most drastic and ingenious use in the Far West during the Civil War. See *infra* note 63.

progressively larger amounts of capital, restricted and at times demoralized the entire insurance business.<sup>22</sup>

To combat these tendencies, established companies in the Fifties turned to the State courts, using a wide range of constitutional weapons, but relying most heavily on the Comity clause, and on the hope of gaining a decision which might eventually be employed to overturn Chief Justice Tancy's opinion in *Bank of Augusta v. Earle*.<sup>23</sup> Failing in at least three attempts in Kentucky,<sup>24</sup> Illinois<sup>25</sup> and New Jersey,<sup>26</sup> counsel finally selected a test case in the New York Court of Common Pleas. Elaborate arguments were made under the Comity and the just compensation clauses,<sup>27</sup> though no mention appears to have been made of due process.<sup>28</sup> But before decision could be rendered in the test case, the Court of Appeals decided *Westervelt v. Gregg*,<sup>29</sup> which voided married woman's Property Act as a denial of due process. Encouraged by this expansion, counsel for the insurance companies abandoned their Comity clause and just

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22 It is difficult today to disentangle the motives that led to these enactments, and even more difficult to pass on the merits. In general one can say that like all such enterprises at the time, insurance companies were economically undertaxed, and real property owners were campaigning for equalization through licenses and premium taxes. Insolvencies and fly-by-night agencies were cited to justify the bonding requirements. Local promoters and ambitious capitalists stepped in, organized "wild cat mutuals" without actuarial knowledge or distribution of risks, and appealed for stiff discriminations to further their schemes. Old line companies thus suffered not merely the restriction of the market, but the discredit which failure of the "wild cats" eventually brought to the still novel principle of insurance. Caught thus between the upper and the nether stones, conservatives Eastern companies had good reason for alarm, particularly since retaliation proved scarcely better than suicide.

23 13 Pet. 519 (U. S. 1839) (corporations not citizens under comity clause). For the companies' strategy see assembled arguments and briefs. *The Fire Department v. Noble*. *The Fire Department v. Wright*, 3 E. D. Smith 440 ff. 453 ff, particularly 458-468, 472-486 (C. P. N. Y. 1854). For evidence of how quick the southern agrarians on the United States Supreme Court were to sense and spike the companies' move, see Justice Campbell's opinion in *Marshall v. Baltimore and Ohio R. R.*, 16 How. 314, 353 (U. S. 1853). Apprehension that a tendency to liberalize interpretations of corporate citizenship under Art. III Sec. 2, might favor the companies strategy caused the Court in this case virtually to repudiate the Leson dictum, note 14 *supra*; *ef.* Also *Rundle v. Delaware and Raritan Canal Co.*, 14 How. 80 (U. S. 1852), particularly Daniels' dissent at 95; see HENDERSEN, *op. cit. supra* note 13, at 60-63.

24 *Comwlth v. Milton*, 12 B. Mon. 212 (Ky. July, 1851) (overruling favorable decision in lower court).

25 *People v. Thurber*, 13 Ill. 554 (June, 1852) (rejecting arguments that a law licensing agents of foreign companies violated the Commerce clause). Immediately following this decision, the Illinois Legislature, currently in session, passed a statute modeled on that New York levying a tax of two per cent on all premiums collected by the agents for outside companies, the tax going to the Chicago firemen, who at this date of course were as fearless in politics as at fires. See note 42. *Infra*.

26 *Tatem v. Wright*, 3 Zab. 429 (N. J. Law, November, 1852).

27 *New York Fire Dept. v. Noble*, 3 E. D. Smith 440 (N. Y. November, 1854) (validity of tax of two per cent on all fire premiums collected by outside companies levied in support of the New York Fire Department, at that time a chartered corporation).

28 Possible because in 1851, lawyers for individual private property owners in Brooklyn had been unsuccessful in an attempt to employ the earlier due process dicta of *Taylor v. Porter* and *White v. White* to contest the validity of certain special assessments for street improvements. See *People v. Mayor of Brooklyn*, 4 Comst. 419 (N. Y. April 1851) [overruling decision which had invalidated the assessments as violations of the just compensation clause, 6 Barb. 209. (1849)]. No arguments of counsel are given in 4 Comstock but the due process point is covered obliquely in the opinion at 423 and 438.

29 2 N. Y. 202 (1854).

compensation attack in favor of a new test suit, commenced in elaborately argued on the due process grounds.<sup>30</sup> Yet the subsequent opinion of the Court of Common Pleas tool: no notice of the insurance companies' new argument; and it is possible that the "law of the land" might again have undergone eclipse had it not been for passage, in April 1855, of the New York anti-liquor law applying even to liquor on hand at the time of passage.<sup>31</sup> This law, held void, as a denial of due process to private persons, by several judges of the State Supreme Court as early as July,<sup>32</sup> remained a center of controversy throughout the year.<sup>33</sup> In March, 1856, following presentation of due process arguments by a former colleague<sup>34</sup> who had concurred in *Westervelt v. Gregg*, members of the Court of Appeals handed down the celebrated decision in *Wynchamer v. The People*.<sup>35</sup> Alarmed at the spread of anti-slavery, anti-liquor, and Women's Rights agitation,<sup>36</sup> four concurring judges, by dicta reminiscent of stump speeches, undertook to rally conservative opinion and to erect judicial barriers for the protection of property rights.<sup>37</sup> Naturally this step proved a signal for further attack on the New York insurance laws by counsel who cited the various dicta to prove that local agents for foreign companies had been denied the right to pursue a lawful calling in violation of due process.<sup>38</sup> But the Court of Appeals, already subject to bitter criticism for the *Wynchamer* decision, declined to intervene in favor of the corporations.<sup>39</sup>

While there is abundant reason to believe the Court of Appeals dicta had temporarily excited the hopes of companies' counsel, and caused the due process clause later to be

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30 *New York Fire Dept. v. Wright*, 3 E. D. Smith 453 (N. Y. 1854).

31 COLVIN, *op. cit. supra* note 11, c. 2.

32 *People v. Toynbee*, *People v. Berberich*, 20 Barb. 168 (N. Y. 1855).

33 *Cf. Wynchamer v. The People*, 20 Barb. 567 (N. Y. Sup. Ct. Sept. 1865) (law sustained). The argument of F. J. Fithian in this case, pp. 569-588, is a landmark in the development of due process of law. It shows how far the guarantee was explored prior to the Civil War and helps to explain the elaborate dicta in the Court of Appeals opinions delivered six months later.

34 Amasa J. Parker, who later in the same year was the unsuccessful Democratic candidate for Governor of New York.

35 13 N. Y. 378 (1856). Strictly speaking, certain of the opinions here reported cover the case of *The People v. Toynbee*; see pp. 486-488 for the manner in which the eight Judges, six of whom concurred in voiding the law as it applied to liquor on hand, divided on the over lapping cases.

36 See particularly the opinion of Justice Comstock, alluding to "the danger" of "theories alleged to be founded in natural reason or inalienable rights, but subversive of the just and necessary powers of government, [which now] attract the belief of considerable classes of men," and declaiming that "too much reverence for government and law is certainly among the least of the perils to which our institutions are exposed." *Id.* at 391-392. Professor Corwin has regarded these words as aimed at the Abolitionists. *The Doctrine of Due Process of Law Before the Civil War* (1911) 24 HARV. L. REV. 460, 469-471. But the target seems likely to have been broader. Comstock's attitude is the more striking because he saw plainly that judicial delimitation of legislative powers contained "germs of great mischief to society by giving to private opinion and speculation a license to oppose themselves to the just and legitimate powers of government."

37 Justice Selden included "all vested rights to [corporate?] franchises." Which otherwise might be left "entirely at the mercy of the legislature." 13 N. Y. 378, 434 (1856).

38 See the arguments of William Curtis Noyes, 3 E. D. Smith 458-468 (N.Y. 1854), who cited particularly the *Wynchamer* opinions of Comstock and Johnson, J. J., 13 N.Y. 378, 392-393, 416-421.

39 The opinions in 3 E. D. Smith 440, note 27 *supra*, are reported as "unanimously affirmed" by the Court of Appeals. For facts bearing on failure to appeal to U. S. Supreme Court, see note 42, *infra*.

argued extensively in cases before the Court of Appeals,<sup>40</sup> it was nevertheless on the Comity clause that chief reliance continued to be made. In Virginia in 1856,<sup>41</sup> again in Illinois in 1859,<sup>42</sup> and in Wisconsin in the first year of the Civil War,<sup>43</sup> the battle went on, yet wholly without tangible results. The way was definitely blocked.

It was in Pennsylvania therefore, and not in New York, that the doctrine of corporate personality made its farthest advance. And it was a railroad, not an insurance company, which led the charge. Following a long struggle between the State and the Erie and North East Railroad, many of whose acts were cited as *ultra vires*, the Pennsylvania legislature in 1855 repealed the franchises of the corporation.<sup>44</sup> Since no provision had been made in the repealing statute for judicial proceedings to determine the fact of franchise abuse, lawyers for the company challenged the law both as an impairment of contract and as denial of due process.<sup>45</sup> The majority of the Court, speaking through Justice S. Black on January 9, 1856, took no notice of the latter point. Chief Justice Lewis however, in a dissenting opinion,<sup>46</sup> accepted the view that these were judicial, not legislative questions, and held that the *property of the stockholders* had been taken “without the judgment of their peers, and contrary to the law of the land established by the constitution”<sup>47</sup>—held in short, that whether or not they were “men” or “the accused in

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40 The date of arguments and decision by the high court is unknown, but since Noyes’ revised brief makes effective use of the opinions in *Wynehamer v. People*, the date was sometime after March, 1856.

41 *Slaughter v. Commonwealth*, 13 Grat. 767 (Va. 1856).

42 *Firemen’s Benevolent Ass’n v. Lounsbury*, 21 Ill. 511 (1859) (sustaining the tax mentioned note 25 *supra*). No indication here that due process was raised, although the statute at issue was the one which had inspired Mark Skinner’s brief printed in 3 E. D. Smith. See note 23 *supra*. Possibly the adverse criticism of the Dred Scott decisions accounts for failure to use the argument.

43 *Milwaukee Fire Dept. v. Helfenstein*, 16 Wis. 136 (1862) (due process used by counsel at 138).

44 See 6 GREAT AMERICAN LAWYERS (1907) 1-74; KLINGE\_\_\_\_ JEREMIAH S. BLACK -.

45 *Erie and North East Railroad v. Casey*, Pa. 287, 293 (1856). Counsel quoted this striking dictum from *Brown v. Hammel*, 6 Barb. 86, 91: “*It is against the principles of liberty and common right to deprive a man of his property or franchise while he is within the pale of the constitution, and with his hands on the altar, and give it to another, without hearing or trial by due course and process of law.*” [Italics added].

46 1 Grant’s Cases (Pa. 1856) 274.

47 *Id.* at 290, in the conclusion of his opinion Justice Lewis seems to have relied on Article I, Section 9 (“In all criminal prosecutions *the accused*”) yet in the body (at p. 276) he was intent on showing that “the stockholders” were “tangible individuals”, i.e. “men” – within the meaning of Article 1, Section 11. Once concludes therefore that the judge was quite aware the text was hardly suited to his purposes, and that even the fiction of “looking through” to the stockholders left certain rough edges to the argument. See note 8 *supra* for texts of these clauses.

Perhaps the best illustration of the Pennsylvania Courts’ tendency to disregard constitutional texts is found in *Reiser v. Willaim Tell Savings Fund Association*. 39 Pa. 137 (1861). Justice Lowrie, in voiding a special statute which had legalized usurious interest rates of building and loan associations, wrestled with the phraseology of Article 1, Section 9 (*supra* note 8), and by sheer force of will made it apply to *civil* as well as *criminal* proceedings. The phraseology meant, he declared, paraphrasing to suit his argument, “no *person* shall be deprived of life, liberty, or property except by the legal judgment of his peers, or other due course of process of law. *Here, civil and criminal law, rights of property, and of life and liberty, are put in the same class. Rights of property* (and money possessed and owned is property) and the rights of life and liberty, *have the same guarantee* that they are to be tried by due course of law. But they have not the same guarantee, if the legislature may direct the Court, after *civil cases* arise, or after contracts or other transaction are complete, how we shall interpret the law under which they arise; *which it is admitted they cannot do in criminal cases. This section of*

criminal prosecutions”, corporations were nevertheless to be granted such protection against legislatures as the judiciary might believe compatible with sound public policy.

Simultaneously with these parallel (and outwardly independent) corporate invocations of due process of law in New York and Pennsylvania, a third use occurred in Illinois which was clearly inspired by example. On February 23, 1856, just six weeks after the decision in *Erie Railroad v. Casey*, (and while the insurance and liquor act cases were still pending in New York Courts) Mark Skinner, a former judge of the Illinois Supreme Court now retained by insurance interests, wrote a brief<sup>48</sup> arguing that an Illinois insurance statute modeled on that currently challenged in the East was invalid as a denial of due process.<sup>49</sup>

Judge Skinner’s brief is a striking symbol of developments that overtook due process of law in the ensuing twelve months. During this period substantive and political use of the clause broke all bounds and culminated in a costly and tragic blunder. On March 6<sup>th</sup>—within two weeks from the date of Judge Skinner’s brief, within two months from the decision in *Erie Railroad v. Casey*, and almost simultaneously with the Court of Appeals decision in *Wynchamer v. The People*—Bingham delivered his maiden speech in Congress, citing the Kansas slave code as a violation of due process.<sup>50</sup> On April 4<sup>th</sup>, Representative Granger of New York spoke similarly,<sup>51</sup> followed on May 22 by Bingham’s colleague, Representative Bliss.<sup>52</sup> In June, Joshua Giddings, the veteran Ohio Abolitionist, drafted the Kansas-du process planks which were adopted by the first Republican National Convention at Philadelphia.<sup>53</sup> In the ensuing campaign, “Bleeding Kansas” and “due process of law” were the twin catch phrases of Republican orators. In November a concurring minority of the Indiana Supreme Court *assumed* a corporation to be a “man” entitled to the protection of due course of law.<sup>54</sup> In January, 1857, Bingham and Bliss<sup>55</sup> once again employed the clause—this time to bolster Congress’ power over slavery in the Territories. And less than six weeks later, Chief Justice Taney, succumbing to a year of provocation, drafted the dictum in the case of *Dred Scott*<sup>56</sup> which hastened the Civil War and destruction of everything his opinion had been designed to preserve.

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the Bill of Rights is violated when civil and criminal rights are not both alike tried by due course of law.” (Italics added). Edgar W. Camp errs in listing this as a corporate personality case. See *Corporations and the Fourteenth Amendment* (1938) 13 STATE BAR JOURNAL (Calif.) 12. 18n. 25. Justice Lowrie’s ingenuity was directed solely in behalf of natural persons; his decision being in favor of Reiser, the plaintiff in error.

48 Printed in 3 E. D. Smith, 472-478 (N. Y. 1854); reprinted in a CIRCULAR TO THE INSURANCE AGENTS OF THE UNITED STATES, See note 66, *infra*.

49 See note 25, *supra*, for history of the Illinois law.

50 See *First Article*, (1938) 47 YALE L. J. 371, 393-395, particularly notes 73, 78.

51 *Ibid.*, particularly n. 83.

52 *Ibid.*

53 *Id.*, at N. 79, 80.

54 *Madison & Indianapolis R. R. v. Whiteneck*, 9 Tanner 217 (Ind. 1856).

55 *First Article*, (1938) 47 YALE L. J. 371, at 395 n. 83, 86, 87.

56 19 How. 393, 450 (U.S. 1856). See SWISHER, ROGER, BROOKE, TANEY (1936) 476-523. Relevant here is Professor Botchard’s conclusion: “If the due process decisions on substantive law prove anything, they demonstrate that the Court’s judgment is the product of the will. It is the social and economic predilection which speaks.” *The Supreme Court and Private Rights* (1938) 47 YALE L. J. 1051, 1078.



## II.

We may now consider the implications of these discoveries. Manifestly, the foregoing facts, while in no way altering our conclusion that Bingham was concerned primarily with protecting free Negroes and mulattos—that he was an idealist, in short, and an opportunist, not a schemer—nevertheless do suggest certain important secondary considerations.

The first is that so far as due process of law is concerned, Bingham's original use of the phrase in 1856 could easily have derived from, and thus have been made with full knowledge of, one or more of several earlier corporate usages. It is idle, without knowing more of Bingham's early attitude toward corporations, to speculate on the full significance of this discovery; yet it seems obvious that one cannot categorically reject the thesis that Bingham in 1866 at least regarded corporations as *included* along with natural persons, so long as there exists the possibility that he first used the clause (ten years earlier) as a result of a number of uses by corporations.

A second consideration is that the entire battery of constitutional clauses which Bingham had by 1859 evolved for the protection of free Negroes and mulattos was virtually identical with the battery which insurance company lawyers evolved in the New York courts between 1854-1856 for the protection of foreign corporations. Due process of law, just compensation, and interstate privileges and immunities were the components of both systems. The point in this connection is not that Bingham's entire system was consciously based on that of the corporations—one can be reasonably certain that it was not.<sup>57</sup> It is, rather, that we are confronted with two separate lines of usage of the same set of constitutional clauses—the set that eventually finds its way in Section One. The crucial question therefore, is not what minor cross-pollinations may have influenced the early development of the two systems, but what relations existed between the two in 1866? At that time we are certain at least that idealists intent on securing Negro rights undertook to use constitutional phraseology and concepts which corporations had already been using for a generation. Did the idealists proceed to do this without awakening the interest and participation of the business group? Was the Fourteenth Amendment a sheer windfall for Business—a product of unsolicited aid? Or was it somehow the product of joint interest and joint participation? Was it framed with reference to the needs of both Negroes and corporations? Or was it simply made up of clauses which had been *used in behalf* of both Negroes and corporations? Did Bingham, assuming now that he originally had been indifferent to, if not wholly oblivious of the use of his "system" by corporations, remain so during the months the Amendment was before the Joint Committee?<sup>58</sup> Did insurance company lawyers, who had proved so

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57 If only for the reason that use of the comity clause to protect free Negroes and mulattos dated back to the Missouri Compromise [See GEORGE, THE POLITICAL HISTORY OF SLAVERY IN THE UNITED STATES (1915) 38-39, 48-51]: and that virtually every constitutional argument conceivable was employed by both sides in the Slavery debates. Recognition of the ingenuity of even the amateur constitutional lawyer throughout American history makes unnecessary the assumption that Bingham was incapable of choosing his own weapons.

58 It must be emphasized that three months elapsed between Bingham's first speech in the House outlining in general terms the character of the Amendment, and adoption of the final draft by the Joint Committee on April 28, 1866. CONG. GLOBE 39th Cong. 1st Sess. 429. Bingham's original positively-worded draft. "The Congress shall have power to make all laws... necessary and proper to secure to all citizens of each State all privileges and immunities of citizens of the several States; and to all persons in the several States equal protection in the rights of life, liberty and property," reached the floor of the House February 13, 1866. Even as early as December 15, 1865, the New York World had

quick to capitalize the dicta of *Westervelt v. Gregg* and *Wynchamer v. The People* in the State courts, and who had fought stubbornly but without success for a decision holding a corporation to be a “citizen” under the Comity clause, manifest no interest when the due process-comity clause phraseology was proposed in Section One? Did foreign corporations, suffering from what they regarded as discriminatory taxation and “class legislation,”<sup>59</sup> exhibit any interest when Bingham on January 25, 1866, sounded out sentiment for an Amendment to limit the taxing power of the States and to prohibit “class legislation”? Finally—and we arrive now at the heart of the matter—can there be shown to have been any significant relation between the corporate activity which might be expected from the foregoing circumstances, and that which was implied to have taken place by Roscoe Conkling’s remarks in 1882?<sup>60</sup>

Conkling’s it will be recalled, at the climax of his 1882 argument before the Supreme Court, declared “At the time the Fourteenth Amendment was ratified.<sup>61</sup>,” as *the records of the two houses will show*, individuals and joint stock companies were appealing for congressional and administrative protection against Invidious and discriminating state and local taxes. One instance was that of an express company, whose stock was owned largely by citizens of the State of New York who came with petitions and bills seeking acts of Congress to aid them in resisting what they deemed oppressive taxation in two States, and oppressive and ruinous rules of damages applied under State laws.”<sup>62</sup>

Careful search of the *Congressional Globe* provides the material for a partial answer to the above questions. It appears that while Bingham and his colleagues were at work drafting the phraseology of Section One, two different groups of corporations whose lawyers had earlier made use of the component clauses, “came with petitions and bills” designed to secure “congressional and administrative protection” against adverse forms of State action.

First to arrive—and in such form, and under such circumstances as could hardly have failed to attract interest on their part of the framers- were petitions from insurance companies, mobilized now for an attempt to suppress and circumvent the type of legislation from which they had long suffered, and which, notwithstanding the strongly ascendant nationalism and the discredit of localistic policies as a result of Sessions, had recently made alarming headway on the Pacific Coast.<sup>63</sup> Between March 2, 1866—two

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called unfavorable attention to Bingham’s original draft (at that time pending merely as a resolution) “Congress shall have power... to secure to all person in every State... equal protection in their rights of life, liberty and property.” See FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908) 140. It can be said confidently therefore, that from December on, corporations and their counsel had reason to be interested in the trend of events.

59 One of the arguments used by William Curtis Noyes in 1854 had been that the New York Act was “entirely unequal in effect and operates only upon a certain class of persons” [see 3 E. D. Smith 462], whereas to prohibit “class legislation” was of course an avowed object of the framers of the Amendment. See particularly, CONG. GLOBE 39th Cong., 1st Sess., 1064, for the debate between Thaddeus Stevens and Rep. Hale.

60 See *First Article*, 47 YALE L. J. 371, 375-385.

61 Obviously, Conkling meant “At the time the Fourteenth was *drafted*” not “ratified;” else his whole case would have fallen.

62 Conkling’s Argument, *First Article*, 47 YALE L. J. 371. [Italics added].

63 As reconstructed chiefly from a pamphlet-circular TO THE INSURANCE AGENTS OF THE UNITED STATES (Note 66, *infra*) published February 1, 1866, it appears that while the Civil War brought a phenomenal prosperity to the industry as a whole, and a vast increase in outstanding insurance, this prosperity was marred after 1864 by enactment, first in California, then in Nevada and

days after the virtual defeat in the House of Bingham's positively worded draft<sup>64</sup>—and June 8, 1866—the date of final passage of the Amendment by the Senate—more than two hundred of these petitions were received in Congress “praying for enactment of just, equal and uniform laws pertaining to interstate insurances, and for the creation also of a Federal Bureau of Insurance”.<sup>65</sup> This influx was given force by a specially-prepared

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Oregon, of flaws which had the effect not only of “cinching” Wells Fargo Express Company but of sponsoring the growth on the Pacific Coast of powerful insurance companies which – (or at least so the Eastern firms feared) – might draw their capital from the bonanza mines of Nevada.

In 1862-63 San Francisco capitalists had begun to organize home companies, and in 1864 had succeeded in inducing the Legislature to boost the cash bond required of outside concerns from \$50,000 to \$75,000 *in gold*, and to require *in addition to*, not in lieu of, as before, a premium tax of two per cent, etc. To catch Wells Fargo Express, a New York corporation, foreign “insurance companies” were so defined as to include “all express companies... engaged in the carriage of treasure or merchandise... and insuring the same...” STATS. CALIF (1863-1864) 131-134. As in all such matters, California's statute promptly served as a model in Oregon, [ORE. GEN. LAWS (Deady & Lane, 1843-1872) 447, 616] and in Nevada [NEV. STAT. (1864-1865) 104-9].

These developments on the Pacific Coast, together with passage of similar troublesome legislation in the Midwest, and the prospect that the Southern States would shortly begin reenactment of non-intercourse laws, prompted the Eastern companies to meet in the autumn of 1865 and organize for mutual protection. For almost a year, insurance journals had been discussing the prospect of “nationalizing insurance” in the manner of the banks; and in many respects conditions were favorable. At length, steering committees formed by both the life and the fire companies decided to work for a Federal Bureau of Insurance. For supplementary sources see KNIGHT & HISTORY OF LIFE INSURANCE IN THE UNITED STATES TO 1870 (1920) 134-141; COMMERCIAL AND FINANCIAL CHRONICLE (1866) 265, 292.

While no petitions are on record, the writer has wondered if perhaps Wells Fargo was not the New York Company alluded to by Conkling, has suggested the counter possibility that the reference may have been to the United States Express Company, whose head was Thomas C. Platt, Conkling's political associate (and later) colleague in the Senate. In either event, it seems probable that legislation of the type enacted in California was the source of the express companies' troubles. This part of Conkling's statement, therefore, may be concluded to have had some basis in fact.

- 64 Conservatives feared destruction of the States and Federal centralization; Radicals the prospect of Democratic control of Congress and the almost certain repeal, in that event, of all Reconstruction measures. For the conservative viewpoint, see speech of Rep. Hale of New York, CONG. GLOBE on Feb. 27, 39th Cong., 1st Sess. (1866) 1064-1065. Hotchkiss, in closing the debate, objected that Bingham's views were “not sufficiently radical.” He wanted the Amendment redrafted to secure *constitutional*-not merely *congressional* protection – “we may pass laws here today and the next Congress may wipe them out-where is your guarantee then?” The writer suggests that this speech by Hotchkiss probably impressed Bingham with the expediency of adopting the negative form “No State shall...” In later years Bingham inferred that study of John Marshall's opinion in *Barron v. Baltimore* had prompted him to make the change [see CONG. REC., March 28, 1871, Appendix pp. 83, 85.] but it seems improbably in the light of the foregoing that the influences were entirely academic.

By what the writer, in the absence of any evidence to the contrary, concludes to have been merely a coincidence. Rep. Hotchkiss on March 2nd two days after making the above quoted speech – submitted the first insurance company petition found in the GLOBE.

- 65 Of a total of 208 petitions, some bearing as many as 500 signatures, and practically all of which were submitted by Republicans in the House, nearly three-fourths are found to have been received prior to final action by the Joint Committee on Section One- in fact, the peak was reached in mid-April just prior to such action. Only petitions relating to the tariff and freemen's rights appear to have been received in greater numbers. The petitions dropped off suddenly in mid-June, but probably only because the campaign organized in February had run its course.

pamphlet<sup>66</sup> which pointed out the “Necessity”, the “Desirableness”, and the “Equity” of congressional relief, and which quoted in full (in addition to the stock commerce and Comity clause arguments) Judge Skinner’s brief arguing that an Illinois insurance law was a violation of due process. Insurance company petitions are known to have been received by at least six members of the Joint Committee<sup>67</sup> and were referred in the House to the Committee on Commerce, whose chairman at this session was Elihu Washburne, himself a member of the Joint Committee.

In summary, one can say that these petitions were independently motivated, and merely an extension and culmination of earlier trends. It is also to be distinctly noted that a statute,<sup>68</sup> not a constitutional amendment,<sup>69</sup> was the companies real objective. It would seem to be established, however, that the petitions came to the attention of the framers while they were engaged in drafting the Amendment. On this basis, and in the light of Conkling’s remarks, a tentative conclusion may be drawn. It cannot be inferred that the Amendment was deliberately or consciously framed to assist the insurance companies or other corporations, but everything about the petitions—their source, incidence,

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66 CIRCULAR: TO THE INSURANCE AGENTS OF THE UNITED STATES (Feb. 1, 1866) [only known copy is in the Library of the Insurance Association of Boston]. Prepared under the direction of C. C. Hine, secretary of companies’ steering committee, and one of the leading insurance publicists of the post-Civil War period, the pamphlet leaves no doubt of the origin and character of the petitions. Elaborate instructions were provided for a “write-your-Congressman” campaign; petitions and memorials (on prepared forms) were to be circulated among influential business men: conventions of agents were proposed for each congressional district. *Id.* at 7-9.

The body of the pamphlet consisted chiefly of arguments and briefs against the constitutionality of foreign corporation and non-intercourse laws; the most notable of which were those of William Barnes, Superintendent of the Insurance Department of the State of New York, (pp. 15-20); extracts from the argument of William Curtis Noyes taken from 3 E. D. Smith (pp. 26); emphasis that under New York laws “the term *person*... shall be construed to include *corporations* as well as individuals” (p. 27); the entire brief of Judge Mark Skinner of Chicago, holding the Illinois law of 1852 to be violation of due process (pp. 27-30). Pages 33-52 were made up of selected articles from insurance journals in 1864-1865 proposing a National bureau of Insurance and a National Insurance Law.

67 Conkling submitted five, CONG. GLOBE, 39th Cong., 1st Sess. 1662, March 26; p. 1727. April 2; p. 1979, April 16; P. 2049; p. 2442, May 7 (1866). Washburne, two; Morrill, one; Fessenden, one; Grimes, one; Harris, one; Bingham appears to have submitted no petitions.

68 See CIRCULAR, *op. cit. supra* note 66 at 6. Just when the bill for a National Bureau of Insurance was presented before Congress is unknown: but such a proposal was reported by the House Judiciary Committee, June 29, 1866 [CONG. GLOBE 3490]. And previously, on June 14, the day following final passage of the Fourteenth Amendment by Congress Rep. Lawrence of Pennsylvania, had introduced a similar bill [*Id.* at 3162] which received no attention on the floor of Congress. It appears that Rep. J. K. Moorhead, brother of Jay Cooke’s brother-in-law and partner, was the co-sponsor (with Lawrence) of the latter bill. Here again one is struck by a unique harmony of interests, for a funding bill lay at the heart of the Cookes’ entire enterprise at this date [LARSON, JAY COOKE, PRIVATE BANKER (1936) 207-214, 239-240]; and one can readily understand how a proposal to “nationalize” the insurance companies (after the manner of the national banks) by investment of a certain share of capital in United States bonds, impressed the Cookes as sound financial statesmanship.

69 For evidence that insurance men had nevertheless considered the prospects for a constitutional amendment, see William Barnes, Superintendent of the Department of Insurance of the State of New York, Annual Report for 1864, quoted in CIRCULAR, *op. cit. supra* note 66 at 10. Speaking of possible relief by interstate compacts, Barnes added “Such a proceeding would ... be undesirable and might be more troublesome... than a direct effort to produce an amendment of the Constitution, making the [comity clause] expressly applicable to *corporations* as well as to citizens.”

chronology and substance—suggests that they would have been likely to raise the question of corporate status while the framers were at work.<sup>70</sup>

Arriving almost simultaneously with the petitions of the insurance companies—yet addressed in this instance only to members of the Ohio and Pennsylvania delegations—were several petitions from the “Cleveland and Mahoning Railroad... asking Congress to restore” certain franchises which “had been taken away by the ...State of Pennsylvania, thus impairing vested rights of the citizens of Ohio.”<sup>71</sup> These petitions sought redress for repeal of charter privileges by the same State which numbered among its constitutional opinions *Brown v. Hummel* and *Erie Railroad v. Casey*. Not unexpectedly, therefore, these petitions are likewise found suffused with due process of law. They serve to corroborate our tentative hypothesis regarding the character and effect of the insurance company petitions, and the likely relations that existed between the corporate and Negro rights usages of due process in 1866. In this instance, however, it is to be emphasized that the evidence goes considerably farther: by reason of certain of its ramifications, it not only injects new life into the possibility that Bingham, in 1866, *may have prepared* all his drafts with a definite intent to aid corporations as well as natural persons; but it indicates that at least one of Bingham’s colleagues, and perhaps three of the members of the Joint Committee who voted in favor of his equal protection-due process phraseology, may have done so with the understanding that its wording might prove useful to corporations that found themselves in such straits as the Cleveland and Mahoning Railroad.

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70 If Bingham is ever revealed to have had insurance company connections, one might attach significance to the fact that he submitted his revised draft, made up (as he emphasized) of the comity clause and the Fifth Amendment, on February 3rd, just two days after the imprint date of the CIRCULAR: TO THE INSURANCE AGENTS OF THE UNITED STATES. It must be borne in mind, however, that an *adequate* explanation for Bingham’s adoption of this phraseology is found in his own earlier speeches; and in the further fact that the Joint Committee had itself been moving in that direction. For the obviously laborious evolution of the phraseology in sub-committees January 12 to 27, 1866, see KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1914) 46-58. In either case of course it is obvious that February 1 to 3 marks the focal point of two independent but historically—converging lines of usage. The question is: what sort of relations prevailed at the historical intersection?

71 The basic facts with reference to these petitions are that in the early Fifties, Ohio promoters, led by David Tod, later war Governor of Ohio, had projected a railroad from Cleveland to Pittsburgh through the then largely undeveloped Youngstown district. Franchises were obtained from both Ohio and Pennsylvania, and by the end of the decade the road was complete to the Ohio line. For some reason, construction lagged in Pennsylvania, and it was not until the early Sixties, when English capital became interested, and plans were laid for a unified line through to Washington under direction of the Baltimore and Ohio, that the Cleveland and Mahoning and Pittsburgh and Connellesville charters threatened to serve as means for breaking the monopoly of the Pennsylvania Railroad in the region of Pittsburgh.

By May, 1864, this threat was no longer merely apparent; and at the dictation of the Pennsylvania managers the state legislature summarily repealed the franchises of both roads, charging failure to fulfill time clauses. Whereupon the victims resorted to the Federal courts, secured a decision in July, 1865, holding the repealer void, and commenced negotiations with Tom Scott and J. Edgar Thomson of the monopoly – only to be harassed in the state courts by a host of vexatious suits. At length, construction stalled, the Ohio promoters resorted to flank attack in Congress, stressing with great shrewdness their rival’s contumacy of Federal authority. See CONG. GLOBE, 39th Cong., 1st Sess., 2282, 2366, 2902-2903, 2922-2925 (1866); HANEY, CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES 1850-1887 (1910) 222-223.

Keystone of this hypothetical structure is the fact that Reverdy Johnson, the leading minority member on the Joint Committee, (who nevertheless voted fairly consistently in favor of Bingham's drafts<sup>72</sup>) had in June, 1865, served as counsel for the Cleveland and Mahoning Railroad in its cases in the Federal courts.<sup>73</sup> In that capacity, Johnson appears to have made such effective use of Chief Justice Lewis' dissenting opinion in *Erie Railroad v. Casey* that Justice Grier, in voiding the repeal of the Cleveland and Mahoning franchises, did so on the ground that the company and its affiliates had been denied the due course of law guaranteed by the Pennsylvania Constitution.<sup>74</sup> It therefore seems likely that Reverdy Johnson, at least, must have understood that to add a due process clause to the Federal Constitution as an express restraint upon the States was to add a source of valuable protection to corporate interests. Indeed, if one assumes that Johnson recalled the gingerly manner in which Justice Grier had been obliged to apply the "due course of law" clause of the Pennsylvania Constitution,<sup>75</sup> some special significance might be attached to the inference of Johnson's cryptic remark, made in Senate debate, that he favored the due process clause because he knew what its effect would be.<sup>76</sup>

Reverdy Johnson was not the only member of the Joint Committee who had close relations with the Cleveland and Mahoning Railroad. On May 30, 1866, a month after final adoption of the present form of Section One, Thaddeus Stevens, whose narrow Negro Race draft had finally been abandoned (with his own approving vote) in favor of Bingham's broader drafts,<sup>77</sup> undertook to jam through the House, without debate, bills for

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72 Johnson even voted in favor of adding the just compensation clause [KENDRICK, *OP. CIT. SUPRA* NOTE 70 AT 85], ALTHOUGH HE OPPOSED THE PRIVILEGES OR IMMUNITIES CLAUSE AND MOVED TO STRIKE IT OUT IN Senate debate (see *infra* note 76).

73 *Baltimore v. Pittsburgh and Connellesville Railroad*. 2 Fed. Cas. No. 827, 570 (C. C. W. D. Pa. 1865). For Johnson's connection with the case see CONG. GLOBE, 39th Cong., 1st Sess., 2925; STEINER, *THE LIFE OF REVERDY JOHNSON* (1914) 141. Technically Johnson was counsel for the city of Baltimore, a bondholder; but the case was moot. Actually the Baltimore and Ohio monopoly, for which Johnson had been counsel for forty years, stood behind both the Cleveland and Mahoning and the Pittsburgh and Connellesville roads.

74 *Id.* at 13. Declaring the object and effect of the repealer to be to "transfer the franchises and property of one corporation, anxious... to complete a valuable public improvement, to another [the Pennsylvania monopoly] whose interest is not to complete the road," the Justice held the act to be first a violation of the contract clause, then of due course of law. Due process, he implied, required that the Attorney General should have instituted judicial proceedings to ascertain the facts, etc. This was precisely the point on which the Pennsylvania State Court had ruled to the contrary in *Erie R. R. v. Casey*, cited note 45, *supra*. Justice Grier made no mention of due course of law in his opinion, but said merely "The principles of law... are... clearly and tersely stated by Chief Justice Lewis in his opinion to be found in 1 Grant's Cases 274 with a review of the cases and a proper appreciation of that from Iowa"—the latter of course dealing with the "law of the land."

75 See note 8 *supra*.

76 "I am in favor of that part of the section which denies to a State the right to deprive any person of life, liberty or property without due process of law, but I think it is quite objectionable to provide that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United states,' simply because I don't understand what will be the effect of that." CONG. GLOBE, 39th Cong., 1st Sess. 3041, June 8 1866.

77 Steven's course in these matters excites speculation. After announcing [see KENDRICK, *op. cit. supra* note 70 at 83], that he sponsored an amendment whose first Section provided "No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or precious condition of servitude" he thereupon proceeded to vote (1) in favor of Bingham's move to add the just compensation clause [*id.* at 85]; (2) in favor of adding what is now Section One as [a

relief of the Cleveland and Mahoning and affiliated companies.<sup>78</sup> Failing in his immediate objective, Stevens nevertheless succeeded the following day in securing full approval of the bills by the House, after a debate in which Justice Grier's opinion had been read into the record. And voting in favor of passage on May 31, 1866—while the Fourteenth Amendment was still being debated in the Senate—were, in addition to Stevens himself, Roscoe Conkling and John A. Bingham.

### III.

Many matters, of course, remain to be investigated.<sup>79</sup> Yet with even these shadowy glimpses into the relations existing between the framers of the Fourteenth Amendment and the corporate interests farther along in the use of the due process and Comity clauses, one is no longer at loss to suggest plausible explanations for the statements Conkling made in the motives of Bingham and his associates. It is perhaps too much to expect that any of these hypotheses can ever be proved, but each possesses the dubious merit of being consistent with the known fragments of evidence. Disregarding such problems as the burden of proof, and interpreting matters most favorably to the idea of corporate inclusion, four major possibilities may be noted, any one of which lends support to the view that the constitutional status of corporations probably was considered by the framers.

1. Wholly apart from Bingham's personal understanding of his phraseology, his original intentions in drafting it, or the relations existing between the Cleveland and Mahoning Railroad and other members of the Joint Committee, it is possible that Reverdy Johnson, in the course of the Committee's deliberations, or perhaps even in private

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redundant?] Section Five [*id.* at 87] (3) against striking out the same Section in place of his own [*id.* at 106]. Stevens was thus the sponsor of the narrowest sort of Negro Race draft and at the same time the most consistent supporter of Bingham's ["economic?"] drafts; and ultimately, when forced to choose between Bingham's and his own, he chose Bingham's. Why? Was it to afford *double or triple* protection to free Negroes/mulattos? Or was it to protect corporations? Or was it, perhaps, to do both?

78 See CONG. GLOBE, 39th Cong., 1st Sess. (1866) 2902-2903. Strictly speaking, Stevens sponsored the Pittsburgh and Connellesville bill, while Garfield sponsored the Cleveland and Mahoning's. The latter had been introduced in the House April 30, a fortnight after the first petitions, and just two days after final and unexpected substitution of Bingham's for Stevens' draft of Section One.

79 *Id.* at 2922-2925. The vote in the House on the Cleveland and Mahoning bill was 77 to 41, with 65 not voting. Prior to the vote, Garfield, who was in charge of debate, made plain that the Pennsylvania legislature had acted "without a hearing, without any legal process in the courts... by the mere force of votes..." whereupon a waspish Pennsylvania sympathizer correctly anticipated a reciprocal treatment by Congress!

Despite this strong reception in the House, however, the Garfield-Stevens bills were killed by the Senate Committee on Commerce. And here, too, hangs a circumstance, Senator Edmunds of Vermont reported the adverse action of the Senate Committee; and made clear that he in no way concurred in the result. *Id.* at 3333; see also 4288. This of itself would excite no interest, except that sixteen years later, in the *San Mateo Case*, [146 U. S. 138 (1882)] Senator Edmunds appeared as counsel for the Southern Pacific Railroad. While he made no argument as explicit as Conkling's, he nevertheless did appear as one who had served in Congress in 1866 and who was presumed to speak with authority when he declared: "There is not one word in it: [the Fourteenth Amendment] that did not undergo the completest scrutiny." In his peroration he extolled the "broad and \_\_\_\_\_ provision for universal security resting upon citizenship as it regarded political rights and resting upon humanity as it regarded private rights." See p. 8 of "*Argument of Mr. George F. Edmunds*" before the Supreme Court of the United States in *San Mateo County v. Southern Pacific R. R.*, 116 U. S. 138 (1882).

conversation with Conkling,<sup>80</sup> mentioned Justice Grier's decision as among the most recent involving the due process clause, and in this manner precipitated a frank discussion of the entire problem of corporate rights. Such a discussion would in likelihood have turned on the social ends which Grier's opinion had served; and we can be reasonably certain that in this respect the leading members of both parties on the Committee were in substantial agreement as to the merits: monopoly had been frustrated, bondholders protected, "vested rights" rendered secure, and the way reopened for the economic development of important sections of the country.<sup>81</sup> When it is realized that framers considering the subject in this light would have been unlikely to have pursued matters further, or to have pondered the abstract problem of discretionary due process as a means for frustrating social reforms and legislation, an entirely new face is put upon the problem of "conspiracy".<sup>82</sup> Not only is it plain

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80 Conkling's voting record on Section One is scarcely less remarkable than Stevens'. Not only did he vote repeatedly in the Committee against Bingham's drafts down to April 28th [KENDRICK, *op. cit. supra* note 70, at 61, 62, 98, 99], and not only did he vote for the motion tabling the draft in the House Feb. 28th, [CONG. GLOBE, 39th Cong., 1st Sess. 1094] but on January 22, he had even gone on record in debate as opposing an amendment which would "prohibit States from denying civil or political rights to *any class of persons*." [Italics added]. Such a plan, he declared, "encounters a great objection on the threshold. It trenches upon the principle of existing local sovereignty. It denies to the people of the several States the right to regulate their own affairs in their own way." *Id.* at 358. Yet on April 28 Conkling voted in favor of substitution Bingham's for Steven's draft. KENDRICK, *op. cit. supra*, at 106. How is one to explain his reversal? Merely as another product of the early confusion and uncertainty over Reconstruction policy which historians have noted in the minds of many leading Radicals – uncertainty which disappeared when partisan advantage became clearer? *Id.* at cc. 4, 5, ; BEALE, THE CRITICAL YEAR (1930) *passim*. Or is one to regard it as having some more concrete and specific base? Future research should make this clear.

81 It is interesting to note that Congress at this session finally passed the amended Interstate Communications bill which Garfield and other Republicans had been sponsoring since 1864 in an attempt to break the power of such State monopolies as the Camden and Amboy of New Jersey. In its original form the bill would have declared competing lines military and post roads and have given Federal authority to build in disregard of State charters. See HANEY. *Op. cit. supra* note 71, at 157-224, *passim*. See also Congressional debate on the measure, May 5, 1866 [CONG. GLOBE. 39th Cong., 1st Sess. (1866) 2365-66] wherein Senator Sherman cites Ohio's "demand" for the Mahoning and Connellesville roads as justifying passage; and wherein Reverdy Johnson implies that "the controversy [between these roads and the Pennsylvania monopoly] is not yet settled."

In 1866, opposition to such measures as the interstate Communications Act came chiefly from Democrats and conservatives fearful for "States' Rights" and alarmed at the trend toward "centralization." *Id.* at 1857; 2197-2199. Reverdy Johnson himself had scruples in this regard, explained in part perhaps by the fact that the Baltimore and Ohio monopoly, while endeavoring to gain a route through Pennsylvania, was resisting attempts of rival roads to break into Maryland.

Rep. Jack Rogers, the second most influential *minority* member of the Joint Committee – who also voted consistently in favor of Bingham's drafts, including the rejected just compensation clause – was during these years counsel and Congressional advocate for the Camden and Amboy monopoly in New Jersey. In the latter capacity in 1864 Rogers had even argued that an early draft of the Interstate Communications bill threatened to deprive the Camden and Amboy of its property without just compensation! CONG. GLOBE., 38th Cong., 1st Sess. (1865) 1238-1241.

82 Inevitably, in *a priori* analysis, students of constitutional history have tended to assume that the Conklin –Beard theses requires (1) that intent to include corporations was the primary or decisive fact operating in the selection of the phraseology, (2) that it was accordingly necessary for the framers to have *foreseen* the substantive potentialities inherent in the clause. It is now plain of course that neither point is essential to the proposition; and that the second is itself the product of serious misconceptions concerning use of due process prior to the Civil War.



that the status of corporations under the Amendment could have been raised incidentally, and in good faith, without regard for anti-democratic or reactionary purposes;<sup>83</sup> but it would seem to be necessary, if one is to escape an anachronistic fallacy, to make due allowance for the character of this early usage by Justice Grier and the manner in which it would have determined the attitude toward corporate personality *if* the question were raised.

2. It is not unreasonable to suppose that Bingham, an Ohioan, and the Congressional representative of a section of the State interested in the completion of the Cleveland and Mahoning Railroad,<sup>84</sup> knew of the company's difficulties from the first, and watched with mounting apprehension the tactics employed by its Pennsylvania rival. Thus it is possible to argue that even if Bingham originally knew nothing of Reverdy Johnson's arguments (or Justice Grier's opinion) predicated upon the due process, his personal sense of justice was offended by the charter repeal,<sup>85</sup> and accordingly he later drafted his constitutional amendment with the definite intention of covering such cases—an intention of which Conkling somehow became aware. It is to be emphasized that additional evidence is required to *establish* the proposition in this form; yet one feels warranted in pointing out that circumstances, so far as they are known, are not inconsistent with this interpretation of Conkling's inference.
3. Another possibility is that while Bingham may have known nothing of the railroads' use of due process when he first submitted his drafts, and while he originally had no thought of aiding any one but Negroes and natural persons, and while the corporation on its part originally intended to do no more than appeal for Congressional aid at a time when circumstances were peculiarly favorable to such aid, the presentation of the petitions and bills, and the lobby arguments incident thereto, nevertheless did make clear that the due process-equal protection phraseology was comprehensive enough to include corporations. It is quite possible therefore that a full and free discussion ensued in the Committee, or among some of its members, regarding the expediency of a draft which offered prospective benefits of this type.

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It should be said, therefore, in tribute to the Beards, that whatever the shortcomings of the circumstantial evidence upon which they appear to have based their conclusions, their *fundamental assumptions* were far sounder than those of constitutional historians who often have criticized them.

- 83 Even if it develops that Bingham was aware of the Cleveland and Mahoning's troubles, or that he had knowledge of effective corporate use of due process *at the time he phrased his original drafts*, it by no means follows that intent to aid corporations was primary – least of all that Section One was a mere plot to aid certain Ohio promoters. No one reading the speeches of the idealist who in 1859 sought to safeguard the rights of free Negroes to travel and to make and enforce contracts, and to earn a decent living in the North as well as in the South, will be likely to argue that Bingham's primary – or even his incidental purpose was ever to protect hotel corporations and factory owners from paying workers a minimum wage. Our thinking on these subjects has been too much confused by the unfortunate connotations of the word "conspiracy."
- 84 Defeated in 1862, but reelected in 1864, Bingham represented the east-central constituency adjoining that passed through by the Cleveland and Mahoning. The road then terminated at Youngstown, leaving parts of this rich coal district without direct connections to Pittsburgh.
- 85 In view of Bingham's apparent readiness to apply the due process clause wherever needed to protect or advance interests he approved of, this possibility is obviously of more than academic importance. Since we know (from his vote) his reaction to the major issue, it is largely a question of whether sufficient publicity was given to the controversy in its early stages in 1864-65 to assure that Bingham, a lawyer and politician whose business was to keep informed regarding such matters, would have been likely to have learned of it.

4. the final possibility is that petitions and bills of the insurance or express companies—or perhaps the remarks of an importunate counsel or lobbyist in charge of the companies' campaign in Congress—served to direct attention not merely to the potentialities of the due process-equal protection phraseology, but also to the privileges or immunities clause. It therefore involves no strain on credulity to believe that corporate citizenship as well as corporate personality was considered by the Joint Committee; yet one wonders—if this happened to be the case—whether the framers may not have concluded, in view of repeated interpretations of the Comity clause, that there was no likelihood corporations would ever be treated as “citizens” within the meaning of Section One.<sup>86</sup>

All these possibilities, of course, leave a doubter with his doubts. The striking thing in this article, as in the previous one, is the paradoxical and indecisive character of the evidence. Just as discovery of the Negro rights sense in which Bingham first used due process tended to eclipse what had been regarded as his economic motivation, so now a survey of the pre-war use of due process by corporations suggests that the framers may have proceeded with greater understanding than constitutional historians have been willing to acknowledge. The impressive thing, indeed, is the cantilever nicety of the balance.

It is now plain not only that a development of corporate personality took place prior to 1866, but that Reverdy Johnson, at least, and perhaps several of his colleagues, had knowledge of certain phrases of that development. Yet when this is said it must be remembered (1) that Bingham's speeches and drafts in 1866 were modeled on earlier speeches which were preoccupied with the problem of protecting *natural* persons; (2) that Conkling's misquotations from the Journal are difficult to reconcile with a clean-cut case, particularly in view of the absence of corroborating statements by other members

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86 It is an ironic fact, suggestive in certain of its implications, that the insurance companies, which down to 1866 pioneered in the use of phraseology employed in Section One, were almost the last to gain protection under its terms. This paradox is the more striking because these companies were naturally the first to employ the improved weapons. As early as February 1871, the Continental Life Insurance Company of New York attacked a New Orleans agency-license ordinance which discriminated against outside corporations, counsel apparently contending that corporations were “*persons*” within the meaning of both Section One and Civil Rights Act passed in enforcement thereof. United States Circuit Judge Woods flatly rejected this view, reasoning much as did Mr. Justice Black in his recent dissent in *Connecticut General Life Insurance Co. v. Johnson*, 58 Sup. Ct. 436 (1938), i.e. that since only natural persons can be “born and naturalized,” a double standard of interpretation of the word “person” is required to sustain the argument from the present text. *Insurance Co. v. New Orleans*, 1 Woods 85 (U. S. C. C. La. 1870). (Inquire of the clerk of the United States District Court for New Orleans reveals that the official record of this important case has been lost).

The Continental Life Insurance Company began its attack on this New Orleans ordinance just two weeks after the United States Supreme Court, in *Liverpool Insurance Company v. Oliver*, 77 U. S. 566 (February 6, 1871) gave counsel to understand, as clearly as a court ever could, that nothing was to be gained by continued reliance on the comity clause to attack legislation of this type. Beginning with *Paul v. Virginia*, 75 U. S. 168 (argued in October, 1869), and continuing with *Ducat v. Chicago*, 77 U. S. 410 (submitted December 21, 1870), former Justice Benjamin R. Curtis, as chief counsel for the companies, had relied almost entirely on the commerce and comity clause in making the long delayed appeals to the Supreme Court. This fact of itself suggests what might be assumed from Curtis' past connections with *Murray v. Hoboken*, 18 How. 272 (U. S. 1855), and *Dred Scott v. Sanford*, (*supra* note 56) – namely, that Curtis' preferred strategy was to get corporations declared “citizens” rather than “persons”: and to do so, first under the comity clause, then under Section One. Apparent failure to stress the due process, equal protection, and privileges or immunities clauses in these early test cases may therefore have been simply a tactical maneuver.

of the Joint Committee, and since Conkling himself appears to have said nothing publicly for sixteen years.

Heightening the uncertainty and confusion inherent in the foregoing circumstances is the further fact that Reverdy Johnson, the one member of the Joint Committee who had used corporate personality prior to 1866, nevertheless failed to invoke the due process clause of the Fifth Amendment when he argued for the plaintiffs in the hard-fought case of *Veazie Bank v. Fenno*, in 1869.<sup>87</sup>

Obviously the foregoing evidence can be woven into different patters. Ignoring or minimizing the first set of factors, Conkling can be portrayed as a shrewd lawyer who in his argument in 1882 capitalized earlier coincidence. Ignoring or minimizing the second set, he can be portrayed as a drafter who in 1866 figured in something akin to a “plot”.

After considering the matter for two years, the writer’s personal conclusion is that as long as all major conditions are fulfilled, Conkling perhaps ought to be given the benefit of the doubt, even though few courts would be inclined to accept him as a disinterested or even honorable witness. Yet this acknowledges no more than that the corporation problem probably did come up incidentally in the discussions, and that no special significance was at that time attached to it one way or the other. From a study of the evolution of the phraseology in the Joint Committee the writer feels confident that Section One was not designed to aid corporations, nor was the distinction between “citizens” and “persons” conceived for their benefit. But the outstanding conclusion warranted by the present evidence is concerned with the irrelevancy rather than with the character of the Joint Committee’s intentions. It is now plain that corporate personality, as a constitutional doctrine, antedated the 14th Amendment, and was within the framework of due process, that its postwar development was assured, whatever may have been the original objectives of the framers. The two great classes of petitions<sup>88</sup> in the Congressional *Globe* foreshadow and explain this result: Having simultaneously fostered the growth of corporate enterprise as well as a mighty upsurge of popular idealism: the Civil War of *itself* consummated a marriage of idealistic and economic elements in American constitutional theory.<sup>89</sup> In the words of Max Ascoli,<sup>90</sup> the 14th Amendment was the “supreme celebration” of this union. It would appear largely immaterial whether those who presided at the rites were conscious of their function.

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87 8 Wall. 533, 19 L. ed. 482 (1869). See the summary of Johnson’s argument in the Lawyers’ Edition, at page 483.

88 These petitions present an insight into the unique harmony of ideas and interests between petitioners seeking added protection for property for property rights and those seeking to secure Freedmen’s rights. Side by side, and often submitted on the same day by the same members of Congress, are appeals from “Western citizens... for the greater protection of interstate securities,” from “Iowa Quakers asking perfect equality before the law for all regardless of color,” from “citizens... of Pennsylvania asking for amendments giving *all classes* of citizens their natural rights,” from “citizens of Pennsylvania asking just and equal laws relating to interstate insurances to protect the interests of the policies.”

89 Between Radicals and racial equalitarians on one hand, and representatives of business enterprise on the other, existed not only harmony in such general objectives as the need for expanding Federal and contracting State power, but in the very details of constitutional theory—as evidenced by the natural rights usage by *both* groups of *both* the comity and the due process clauses. Such harmonies, essentially products of the Secession and defeat of the slave interest, and of the determination of both humanitarians and northern capitalists to let nothing jeopardize the fruits of the war, stand sharply in contrast to the weakness and isolation of these same groups in the 30’s and 40’s. See note 18, *supra*.

90 INTELLIGENCE IN POLITICS (1936) 160-161.