

## THE VARIOLA VARIATION

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Modern civil liberties law is the result of a virus. I mean that literally, and with the aid of the time machine we can perceive the truth of my assertion. Suppose that on a certain sunny afternoon in the Spring of 1823, a Bowdoin College student named Pitt Fessenden<sup>1</sup> strolled a few miles into the countryside to investigate rumors of the strange machine some folks claimed to have seen—one moment there, one moment not. Of the strange machine, Fessenden found no material evidence but many varied and obviously fantastic accounts. Well, that was the country for you.

Of greater interest to young Fessenden, and of imponderable consequences for the future of the Republic, on the way back from this excursion he chanced to encounter an attractive milkmaid, carrying two heavy pails from the barn to the farmhouse. An exchange of glances was followed by a courtly offer to assist her with her burdens, and after the milk was deposited at the house the pair retired to the barn. What happened inside history does not record;<sup>2</sup> but it is known that in the course of the proceedings Fessenden contracted cowpox.

This episode would be of small consequence were it not for the variola—a mild form of smallpox (a phrase not wholly dissimilar to “small caliber handgun” or “minor surgery”). Forty-three years later, Senator William Pitt Fessenden could not contract the variola during the promulgation of the Fourteenth Amendment, for exposure to cowpox confers immunity against smallpox. As a result, the Joint Committee on Reconstruction

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1. Fessenden indeed attended Bowdoin, see Charles A. Jellison, *Fessenden of Maine: Civil War Senator* 8-11 (Syracuse U. Press, 1962), although he was obliged to take his degree late on account of carousing, impudence, and “his general character and the bad influence of his example,” see Jellison, *Fessenden of Maine* at 10-11.

2. Fessenden was himself born out of wedlock and suffered accordingly (although Daniel Webster stood as his godfather). See Jellison, *Fessenden of Maine* at chs. 4-5 (cited in note 1). It seems unlikely that he would have run the risk of siring an illegitimate child of his own, but cowpox can be communicated without sexual contact.

would have reported out the proposal of former congressman Robert Dale Owen.<sup>3</sup> The Owen plan required black suffrage, but not for another ten years. Even Owen's ten-year time frame would have been too radical, however, and the measure would likely have failed to gain the necessary majority in the Senate. The Joint Committee would withdraw the Owen proposal and reconsidered the whole matter.

The Committee, cajoled by Congressman Bingham, would eventually adopt the very same constitutional language that we see in our timeline when we read the second sentence of Section One of the Fourteenth Amendment. But without the variola, the legislative history is slightly different. On May 23, 1866, when the Amendment was introduced on the floor of the Senate, Fessenden, the chairman of the Joint Committee on Reconstruction, and not the Radical Senator Jacob Howard, would speak.<sup>4</sup>

Scholars have of course long since exhaustively parsed the debates in the 39th Congress, so I will not bore you with the full text of Fessenden's well-known remarks, most of which are directed to Section Three of the Amendment. Of Section One, Fessenden said that the measure was intended to guarantee the civil rights of all citizens of the United States, but that the Amendment neither added nor detracted from whatever political rights were then enjoyed by citizens of the states. According to Fessenden, the privileges or immunities clause meant that the states could not abridge the fundamental rights of national citizenship—the rights that belong to the citizens of all free governments. These included those mentioned in the Civil Rights Act, but were not exhausted by its terms. The full scope of fundamental rights could not be stated definitively, but Justice Washington's opinion on circuit in *Corfield v. Coryell*<sup>5</sup> provided a very judicious survey of the matter.

3. The parliamentary history of the Fourteenth Amendment has been told often. See, e.g., William E. Nelson, *The Fourteenth Amendment* ch. 3 (Harvard U. Press, 1988). The Joint Committee had approved the Owen plan but delayed reporting it to the floor for a few days as a courtesy to Fessenden, who was laid up with the variola. By the time he recovered, opposition to the plan had grown so strong that the committee rewrote the amendment in much its present form—causing Thad Stevens to fulminate “Damn the varioloid.” See Jellison, *Fessenden of Maine* at 207-08 (cited in note 1). But it seems likely that even if the Owen proposal had been reported to the floor opposition would have forced the Joint Committee to reconsider. As the members of the committee recognized, in 1866 the electorate simply was not ready for black suffrage. See, e.g., Nelson, *The Fourteenth Amendment* at 125-26.

4. In our timeline, Howard's speech appears in Cong. Globe, 39th Cong., 1st Sess. 2764-67 (May 23, 1866).

5. 6 F. 546 (C.C.E.D. Pa. 1823).

From the perspective of the time machine we can see that Fessenden's cowpox did not change the constitutional development of the United States one whit until the 1940s. For in *our* timeline we know that Howard's speech—which explicitly declared that the privileges or immunities of citizens of the United States included the protections of the first eight amendments—was not called to the attention of the Supreme Court until *Maxwell v. Dow*,<sup>6</sup> at which time the views of the sponsoring senator were dismissed as irrelevant to the meaning of a measure that was proposed by Congress but made law by the country at large.

But Howard's speech was not lost on Horace Flack,<sup>7</sup> or on William Guthrie,<sup>8</sup> whose histories of the Fourteenth Amendment were read with care during the late 1930s or early 1940s by Justice Hugo Black. Without the variola, it is Fessenden's speech rather than Howard's that these early scholars read. In this altered timeline their books do not take the view that the Fourteenth Amendment was intended to incorporate the Bill of Rights. And so, in the late 1930s, when Justice Black delved into the history of the Fourteenth Amendment, nursing a bourbon<sup>9</sup> and cursing *Lochner*, he found no scholarly support for the incorporation thesis. Indeed, given Fessenden's speech instead of Howard's, there is not even Tucker's argument in *Spies v. Illinois*<sup>10</sup>—for Tucker had to get the argument from somewhere, and the most likely source was Howard's speech.

Now Black was nothing if not indefatigable, and he still learned a lot about John Bingham's view that *Barron*<sup>11</sup> was erroneous.<sup>12</sup> But Black could not bring himself to rely solely on Bingham. By the time of *Betts v. Brady*<sup>13</sup> a long line of precedents rejected incorporation.<sup>14</sup> Maybe clear historical evidence

6. For the argument, see Brief for the Plaintiff in Error at 10-12, *Maxwell v. Dow*, 176 U.S. 581 (1900). For the Court's response, see *Maxwell*, 176 U.S. at 601-02. Not even Harlan, the first, the lone dissenter, relied on the legislative history.

7. Horace Edgar Flack, *The Adoption of the Fourteenth Amendment* 84-85 (Johns Hopkins Press, 1908).

8. William D. Guthrie, *Lectures on the Fourteenth Article of Amendment to the Constitution of the United States* 60-61 (Little, Brown and Co., 1898).

9. Cf. *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 348-49 (1964) (Black, J., dissenting).

10. 123 U.S. 131 (1887).

11. *Barron v. Baltimore*, 32 U.S. 243 (1833).

12. See Cong. Globe 39th Cong., 1st Sess. 2542 (May 10, 1866) (statement of Rep. Bingham); Cong. Globe, 39th Cong., 1st Sess. 1089-90 (Feb. 28, 1866) (statement of Rep. Bingham).

13. 316 U.S. 455 (1942).

14. See, e.g., *Palko v. Connecticut*, 302 U.S. 319 (1937); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Maxwell v. Dow*, 176 U.S. 581 (1900); *O'Neil v. Vermont*, 144 U.S. 323

could trump even well-settled judge-made law. But throwing out hundreds of pages from the U.S. Reports on the authority of Bingham's speeches was something Black could not bring himself to do. It was legislative history from the sponsors, not the ratifiers, and it was not echoed in the Senate.

Perhaps more fundamentally, Black could not escape the conclusion that Bingham was wrong about *Barron v. Baltimore*. Chief Justice Marshall had first-hand knowledge of the intentions of the framers of the Constitution of 1789, and the structural reasoning in the *Barron* opinion was at least as strong as the structural reasoning in *Marbury* and *McCulloch*. Bingham's view that *Barron* meant that the Bill of Rights applied to the states, but without any federal remedy, flew in the face of that compelling structural reasoning. Fairly read, *Barron* meant that state citizens had no federal rights against state governments under the first eight amendments, not that they had such rights but the national government was powerless to enforce them. Only months after the Fourteenth Amendment was declared effective, the Supreme Court unanimously reaffirmed *Barron*.<sup>15</sup> On Bingham's view the new amendment only made the old constitution enforceable against the states, and if the old constitution did not apply the Bill of Rights to the states, the old order would be essentially undisturbed.

Unlike Bingham's theory, which relied on the incorrect assumption that *Barron* was either wrong or limited to remedies rather than rights, Howard's theory is consistent, both internally and with the text of Section One. "Privileges or immunities" means fundamental rights, and these include, but are not limited to, those in the Bill of Rights. Surely this is the most logical argument in support of total incorporation, but without Fessenden's variola it would never have been made. Justice Black would have to follow Bingham or give up on incorporation.

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(1892); *Hurtado v. California*, 110 U.S. 516 (1884); *Walker v. Sauvinet*, 92 U.S. 90 (1875).

15. See *Twitchell v. Commonwealth*, 74 U.S. 321 (1868). In *Twitchell* a state defendant invoked the Sixth Amendment fair-notice requirement, and the Court denied the petition for a writ of error, relying on and quoting from *Barron*. *Twitchell* is a problem for any theory of incorporation, but a bigger hurdle for Bingham's theory than for Howard's fundamental-rights theory. Defenders of Howard's theory can say that *Twitchell* simply pleaded the wrong amendment (the Sixth, rather than the Fourteenth). Bingham thought the Sixth Amendment applied to the states and was made enforceable by the Fourteenth. Cong. Globe 39th Cong., 1st Sess. 2542-43 (May 10, 1866) (statement of Rep. Bingham); Cong. Globe, 39th Cong., 1st Sess. 1089-90 (Feb. 28, 1866) (statement of Rep. Bingham). Obviously Bingham's views about *Barron* were not shared by the justices.

Given that choice, our counter-factual Justice Black joined the majority, not the dissent of Douglas, Rutledge, and Murphy in *Adamson v. California*.<sup>16</sup> There never was any criminal procedure revolution in the 1960s—no *Mapp*, no *Gideon*, no *Malloy*, and so no *Miranda*. Shunned at Stanford, and passed over at Harvard, because of his arcane and trivial research interests, Charles Fairman retired early to write historical fiction. Although Black denounced the fundamental fairness theory of substantive due process relied on by Frankfurter and Harlan, the three agreed on the result in most major cases, becoming, as one progressive legal scholar put it, “the three musketeers of reaction.”<sup>17</sup>

The consequences of Fessenden’s cowpox did not, of course, end there. Without the criminal procedure revolution, the only people convinced that the Court had run amok in the 1960s were die-hard segregationists. In practical terms, this meant that about one percent of additional voters in the election of 1968—mostly conservative democrats in the South and in southern California—closed the curtain and pulled the lever for Hubert Humphrey, tempted as they were to vote for George Wallace or Richard Nixon. In our timeline, Nixon won by just over 500,000 votes out of 72 million cast. Without *Miranda*, Humphrey won by a scant but decisive quarter of a million.

The four Humphrey justices joined Brennan and Marshall to stage a *real* revolution during the 1970s, in criminal justice and in countless other areas of the law. The reaction to their program finally triumphed with the election of Ronald Reagan in 1980. President Cuomo saw the writing on the wall long before the election, however, and persuaded Justice Brennan to retire early, enabling the confirmation of Justice Tribe, who had served as Solicitor General in the Cuomo administration. Lewis Powell is known to history as a minor figure in the Allied signals intelligence project in World War II. Richard Nixon is a bit of a joke, like Harold Stassen.

Legal scholarship, of course, looks very different as a result of the cowpox. Dean Posner at Harvard and Dean Scalia at Virginia, for instance, have openly cultivated conservative faculties, dedicated to rehabilitating the reputations of the “three musket-

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16. 332 U.S. 46 (1947).

17. Cf. Roger K. Newman, *Hugo Black* 353 (Pantheon Books, 1994) (“If I didn’t find that [incorporation] was [the framers’] view, my career on the Court would have been entirely different . . . I would not have gone with due process and I’d be considered the most reactionary judge on the Court.”) (quoting Black).

eers” and bitterly critical of the Bazelon Court. But the Bazelon Court has its academic defenders, including such mainstream scholars as Duncan Kennedy and Mark Tushnet.

The Bazelon Court’s work can be measured by some of the cases pending in the coming term. The Court, for instance, must decide whether white defendants, as well as blacks, can exercise the automatic right to an all-black jury; whether, in complying with court-ordered remedial affirmative action quotas, the military should be allowed a statistical estimate for non-self-identifying homosexuals; and whether doctors who refuse to provide late-term abortions are, on account of licensing and regulation, state actors subject to damage awards or injunctions.

When President Reagan faced the opportunity to appoint his first Supreme Court justice, many were surprised when he passed over Chief Justice Rehnquist of the California Supreme Court. The nomination instead went to Robert Bork, who sailed through the Senate by voice vote. Joseph Biden, in explaining his support, said that Bork was “a distinguished and thoughtful voice for a view I disagree with, a view which thankfully has no foreseeable prospect of altering the balance of the Supreme Court.” Biden has thus far proved correct, with Justice Bork’s increasingly shrill dissenting opinions winning praise in the tonier law reviews but no converts among his colleagues.

There is no end to such speculations. Eventually, of course, reality always reasserts itself:

... this  
*Annus* is not *mirabilis*;  
 Day breaks upon the world we know  
 Of war and wastefulness and woe.<sup>18</sup>

If our intellectual parlor game has a point, it must be to emphasize how easily we treat as inevitable events that turn on unlikely accidents. What could be more inconsequential than a case of cowpox in the 1820s, or even a few words spoken in debate and stored for posterity in the yellowing pages of the Congressional Globe? Compared to Booth’s bullet, let alone Princep’s, Fessenden’s variola is less than trivial. Yet in law and in history, as in life at large, on the broad currents of causation, everything is connected to everything else.

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18. W. H. Auden, *New Year Letter* (Letter to Elizabeth Mayer, Jan. 1, 1940), in Edward Mendelson, ed., *W.H. Auden Collected Poems* 161, 191 (Random House, 1976). This essay was written during the late war between NATO and Yugoslavia.