

3-1964

The Waite Court and the Fourteenth Amendment

Howard J. Graham

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Fourteenth Amendment Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Howard J. Graham, *The Waite Court and the Fourteenth Amendment*, 17 *Vanderbilt Law Review* 525 (1964)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol17/iss2/7>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

The Waite Court and the Fourteenth Amendment*

HOWARD JAY GRAHAM**

Certainly not many lawyers could have stood it, fewer would have, and no one else has had to: Morrison R. Waite alone was "His Accidenty"—successor to the great Salmon P. Chase; President Grant's seventh choice for seventh Chief Justice; "that luckiest of all individuals known to the law, an innocent third party without notice."¹ "Dean of Toledo's Bar, A Common lawyer indeed!" Democrats chortled. "A new man that would never have been thought of for the position," Justice Field remarked, "by any person except President Grant . . . an experiment which no President has a right to make with our Court." Named and confirmed, eight-and-a-half months after Chase's death; after, in that incredible sequence, Roscoe Conkling, Hamilton Fish, and Senators Timothy O. Howe and Oliver P. Morton each had declined unsolicited proffers, and after, in the most humiliating climax imaginable, the names of George H. Williams, Grant's incompetent, if not corrupt Attorney General, and Caleb Cushing, an overage (and, opponents claimed, senile) partisan opportunist, each had gone to the Senate, then been withdrawn to escape certain rejection.

"A hard parturition," Secretary of State Fish described it in his diary; and the unfazed Williams, surveying assembled Justices and fellow disappointees at a banquet on the eve of Waite's swearing-in, muttered *sotto voce*, "Did you ever see so many corpses at one funeral!"²

"His Accidenty," "experiment" or not, Morrison R. Waite made a good, in some respects outstanding, Chief Justice; served the fourteen years 1874-1888; confounded critics and skeptics alike; won over the colleagues who at first had snubbed him; scorned talk of the Presidency; worked himself literally to death; and managed, without judicial experience, to fill the highest judicial office creditably, at times with a modest distinction.

Rugged, amiable, unpartisan, a small-town property lawyer with thirty-five years of circuit riding and general practice behind him,

*Being in part a review of Morrison R. Waite: The Triumph of Character. By C. Peter Magrath. New York: The Macmillan Company, 1963. Pp. viii, 334. \$10.

**Los Angeles, California. B.S. 1927, Whitman College; M.A. 1930, University of California. Guggenheim Fellow.

1. MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 97 (1963).

2. *Ibid.*

Waite certainly was not the tyro or the "Jonah" cynics and the public had feared. Unprepossessing, "a short, thickset person with very plain—indeed rough features," Field described him, "yet gentlemanly and dignified." "Take the place that belongs to you," he once counseled his nervous wife, "not offensively, but let everyone feel it is yours."³ Waite had in abundance precisely those qualities he needed most: stamina, poise, a sense of fitness, integrity, capacity for growth. If President Grant might have done better, he might also have done—and too often did—much worse.

Waite's public record at nomination unquestionably was "thin," yet not undistinguished. Son of a chief justice of Connecticut, well educated and studious, a Yale graduate who emigrated at once to the Toledo region, he served single terms in Ohio's House and on the Toledo council, was twice defeated as a Whig-Republican for Congress, and during the Civil War declined appointment to Ohio's court. Successful service as the United States' third lawyer at the Geneva arbitrations brought national recognition in 1873, and he was serving as President of the Ohio Constitutional Convention when the astounding news came that he was Grant's final nominee.

The big job and underachievement thus had never been problems for Morrison R. Waite. Letters written to his ailing wife during the first weeks in Washington reveal almost unbearable strain.⁴ "Judge Clifford is the martinetest of all martinets [sic]."⁵ Opinion writing came hard and always remained so. "The difficulty with me is that I cannot give the *reasons* as I wish I could," he once told Field, who suffered no such handicap.⁶ Like Beveridge, Magrath has an eye and a gift for portraiture. Glimpses such as these, winnowed by the dozen from the voluminous heretofore-unused Waite Papers at the Library of Congress, make for a striking work. Morrison R. Waite was indeed an extraordinary ordinary man. His was "the triumph of Character,"—of character over Gilded Age circumstance, the very definition of high and rewarding comedy. This is a judicial biography in every sense, and a portrait of distinction.

Waite concededly was no John Marshall. Yet he was hardly less the man and judge for his times—Chief Justice for a strong Court, as Marshall had been for a weak one; a needed balance wheel; a shrewd judge of men and character (Waite saw through Roscoe Conkling for example, mistrusting and dismissing him as an unsavory boss and "henchman"); a Chief who declined to be pressured or browbeaten

3. *Id.* at 103.

4. *Id.* ch. 6.

5. *Id.* at 103.

6. *Id.* at 185.

by Field,⁷ who made full use of Bradley's scholarship and Miller's powers, who held his Court together under the most crushing docket and arrearages of its history, who finally, during an illness in 1885, had the satisfaction of an acknowledgement from Miller that the Chief Justiceship was a far bigger job than he had realized—this from the Justice who ten years before had been more pejorative even than Field ("mediocre," "a sow's ear")⁸ yet who, presiding at conferences in Waite's absence (and none too successfully), came to the fairer estimate.⁹

Magrath avoids extended retreatment of the familiar leading cases. Instead there are concise summaries and evaluations of the Court's work in the principal fields: reconstruction, race, economic and corporate regulation. Case law, social setting, monographic literature, letters and memoranda are skillfully synthesized, with focus sharply personal and biographic. Waite and his Court relive in these pages, and there are admirable accounts of intra-Court liaison and one brilliantly researched and written chapter—"Court Packing in the Gilded Age"—details for the first time, from the Garfield and Whitelaw Reid Papers, the pressures that culminated in Stanley Matthews' renomination to the Court in 1881.

Another most significant discovery shows how unhistorical and chancy the decision in the 1883 *Civil Rights Cases*¹⁰ really was. From Mr. Justice Bradley's majority opinion (which in effect declared unconstitutional sections 1 and 5 of the fourteenth amendment)—and certainly from the pother since over the nature and limits of "state" and "private" action—one might guess that the framers of this phraseology were mere logic choppers who regarded slavery as a paper dragon. Actually they were men who knew and dealt with that institution as one which emancipation had barely touched. Slavery for them was a system of caste—of *institutionalized* race prejudice, disability, and discrimination.¹¹ Countless cultural residues—"badges, incidents and indicia" were the current tags—remained to be eradicated. Deeply rooted in thought and custom, these could be reached

7. *Id.* at 258-60.

8. *Id.* at 107, 271-72.

9. *Id.* at 273.

10. 109 U.S. 3 (1883).

11. See generally TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950); Graham, *Our "Declaratory" Fourteenth Amendment,* 7 STAN. L. REV. 3 (1954); Graham, *Procedure to Substance—Extra-Judicial Rise of Due Process, 1830-1860,* 40 CALIF. L. REV. 483 (1952); Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment,* 1950 WIS. L. REV. 479, 479-507, 610-61; Graham, *The Fourteenth Amendment and School Segregation,* 3 BUFFALO L. REV. 1 (1953); Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question,* 54 MICH. L. REV. 1049 (1956).

under the federal system only if *both* Congress and the courts were given added constitutional powers to deal with the lingering "abridgments," "denials" and "deprivations." That was the whole purpose and effect of sections 1 and 5. Many thought the thirteenth amendment already had gone the whole way, but Bingham and the moderates thought best to play it safe. Accordingly they "constitutionalized" the Civil Rights Act of 1866, which itself of course specifically reached and voided discriminations grounded in "custom" as well as in laws, statutes, etc.

All this was taken for granted and went without saying in the late 1860's and '70's. It underlay and informed Justice Miller's forceful statement in the *Slaughter-House Cases*,¹² and it repeatedly was made explicit in congressional speeches and papers. Backsliding and hedging developed later and culminated in the sectional bargain or "settlement" of 1877.¹³ Justice Bradley's *Civil Rights* opinion thus was indeed "a period piece"¹⁴—an accommodation to national inertia and letdown, to the absurd belief that if the country only would ignore vestigial racism (and the then-recent constitutional pledges) the problems might disappear.

What Magrath now brings to light is an exchange of correspondence¹⁵ showing that Mr. Justice Bradley himself, in 1871, was responsible for the wording of one of the clearest and soundest early constructions of the fourteenth amendment. Circuit Judge Woods of New Orleans had written him for guidance in the today-too-little-

12. 83 U.S. 36 (1873). See the passage quoted at note 47 *infra*.

13. Dr. Magrath's treatment of these matters, and of Waite's relation to Reconstruction and to race problems and cases generally, MAGRATH, *op. cit. supra* note 1, chs. 7-9, will seem to many perhaps the least satisfactory section of his book. The problem—even the biographic problem at this date—is not simply to show that Waite and his colleagues—all able and conscientious men, to be sure—were "men of their times." They were men of their times and of a generation who in the end guessed wrong, who abandoned and betrayed the principles and the constitutional theory which they themselves in many instances had held, understood, and approved—more, or better perhaps, than John Marshall Harlan had at first. The trouble was they did not see, as Harlan did, that to defer this problem, above all to deny Congress power to deal with it, was to aggravate it, to let the *mores* of the slave system and era harden, scatter, and consolidate under freedom. By reason of his apostasy, of his great learning, intellect, and sway over Waite and Woods, Mr. Justice Bradley is a truly tragic figure in our constitutional history; Harlan—patronized by Holmes and others as a commonplace intellect—becomes truly heroic. One must read deeply in both the proslave and antislave arguments, and in the congressional debates, to appreciate fully the soundness, scholarship, and learning of Harlan's *Civil Rights* dissent; the majesty of the prose and the wisdom of the policy judgments today are self evident. See Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637 (1957).

14. Roche, *Civil Liberty in an Age of Enterprise*, 31 U. CHI. L. REV. 103, 108 (1963).

15. Excerpted and discussed more fully in Roche, *supra* note 14 at 108-10. See also MAGRATH, *op. cit. supra* note 1, at 121. The Bradley Papers are in the custody of the New Jersey Historical Society.

studied case of *United States v. Hall*.¹⁶ A peaceful Republican gathering of Negroes engaged in political discussion had been broken up by armed whites who killed two and wounded more than fifty. Alabama's authority had been involved by the state's failure to provide protection. Perceiving that the fourteenth amendment laid an affirmative obligation on the states to protect the freedmen and to secure equality of rights in this regard, Justice Bradley advised Woods:

Congress has a right, by appropriate legislation, to enforce and protect such fundamental rights, against unfriendly or insufficient State legislation. I say unfriendly or insufficient; for the XIVth Amendment not only prohibits the *making* or enforcing of laws which shall *abridge* the privileges of the citizen; but prohibits the states from *denying* to all persons within its jurisdiction the equal protection of the laws. *Denying* includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect as well as the omission to pass laws for protection.¹⁷

In his subsequent opinion,¹⁸ Judge Woods incorporated verbatim this passage which begins "Denying includes inaction as well as action." That, in short, in 1871 was still the proper and prevalent view, as is shown by similar statements made in Congress.¹⁹ Today it strikes us as odd at first only because common sense has suffered so long under the state action syndrome. To get back to reality, to sense the mood and the urgency of 1866—to say nothing of 1964—what would we think today, what would the world think, of pleadings or decisions in German or international courts contending that the measures taken in our time against genocide and for purging of racism had no intended place, could have no permitted effect, wherever discrimination or outrage were derivative from, or were perpetrated (or perpetuated!) by, "custom," "individual prejudice," "private action"? If "the *mischief* determines and measures the remedy," must not the *evil* do likewise? Can it be supposed rational minds reason, legislators legislate, amenders amend on any other basis? Slavery and its residues were as hateful and repugnant in 1866 as Nazism has been in our time. Governments were deemed governments in 1866 precisely as now. The function, the duty of governments is to protect. The declared function, the declared duty of American governments under this phraseology was then, is now, to protect *equally*. Where, in nine centuries of Anglo-American constitutional and legal history can be found folly, failure, recalcitrance to match this? Had

16. 26 Fed. Cas. 79 (No. 15282) (C.C.S.D. Ala. 1871).

17. Letter from Bradley to Woods (draft), March 12, 1871. The correspondence began with a letter from Woods to Bradley, December 24, 1870.

18. *United States v. Hall*, *supra* note 16, at 81.

19. See, e.g., the remarks of Senator John Pool of North Carolina, CONG. GLOBE, 41st Cong., 2d Sess. 3611 (1870), and the congressional debates on the KKK Act, CONG. GLOBE, 42d Cong., 1st Sess. 575-80, 693-94 (1871).

constitutionality of civil rights enforcement been decided in 1871, think what this nation would have been spared!

Turn now to a parallel development. Nowhere in the United States Reports are there to be found words more momentous or more baffling than these:

Mr. Chief Justice Waite said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.²⁰

Measured by apparent repercussions, by generated case law, and by presumed talismanic effects and powers in Populist-Progressive-New Deal America, this oral statement—the *Santa Clara* “rule” or “dictum” of 1886—remains today, even in limbo, the outstanding “holding” of the Waite era. Here are the magic words which served to corporatize section 1 of the fourteenth amendment; which in so doing eventually made Every Businessman His Own Constitutional Lawyer, and more extraordinarily still, made Roscoe Conkling a plausible draftsman-historian in spite of himself. Here, in short, are the words which generated, almost spontaneously, that preposterous, now discredited “Conspiracy Theory”²¹ which in turn happily proved the nemesis of what it purported to explain.

For those who wonder what light the Waite Papers have shed in this area, there are two dazzling, stroboscopic flashes. Yet all that these tantalizing glimpses really make clear and certain is that even the recording of this statement was a fluke—the Court reporter’s after-thought!

Preparing text for Volume 118 of the U.S. Reports, J. C. Bancroft Davis, the Supreme Court Reporter, cautiously addressed this note to Waite:²²

20. *Santa Clara County v. So. Pac. R.R.*, 118 U.S. 394, 396 (1886).

21. See Graham, *The “Conspiracy Theory” of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938), reprinted in ASS’N OF AM. LAW SCHOOLS, *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 236-67 (1938); Graham, *The “Conspiracy Theory” of the Fourteenth Amendment: 2*, 48 YALE L.J. 171 (1938) [hereinafter cited as Graham, *Conspiracy Theory 2*]; Graham, “The Court, the Corporation and Conkling Revisited,” a paper read at the annual meeting of the American Historical Association, Washington, D.C., December 28, 1961. Other articles on the corporate “person” are: Graham, *An Innocent Abroad: The Constitutional Corporate “Person,”* 2 U.C.L.A.L. REV. 155 (1955) [hereinafter cited as Graham, *Corporate Person*]; Graham, “*Buildded Better Than They Knew*” Pt. I: *The Framers, the Railroads, and the Fourteenth Amendment*, 17 U. PITT. L. REV. 537 (1956) [hereinafter cited as Graham, “*Buildded Better Than They Knew*”].

22. Davis to Waite, May 26, 1886 (exactly four months after Waite’s announcement), Waite Papers, on file in Library of Congress. MAGRATH, *op. cit. supra* note 1, at 223-24.

I have a memorandum in the California Cases
 Santa Clara County
 v.
 Southern Pacific &c &c

as follows:

In opening the Court stated that it did not wish to hear argument on the question whether the Fourteenth Amendment applies to such corporations as are parties in these suits. All the Judges were of opinion that it does.

Please let me know whether I correctly caught your words and oblige.

Waite replied:

I think your mem. in the California Railroad Tax cases expresses with sufficient accuracy what was said before the argument began. I leave it with you to determine whether anything need be said about it in the report inasmuch as we avoided meeting the constitutional question in the decision.²³

"In other words," Magrath concludes, "to the Reporter fell the decision which enshrined the declaration in the United States Reports. Had Davis left it out, *Santa Clara County v. Southern Pac. R. Co.* would have been lost to history among thousands of uninteresting tax cases."²⁴

So here at last, "now for then," is that long-delayed birth certificate, the reason this seemingly momentous step never was justified by formal opinion. Think, in this instance too, what the United States might have been spared had events taken a slightly different turn.

Beyond that, anticlimax and bathos are palpable. Indeed, like ornithologists who have happened on skeletons, fledglings, platypus and dinosaur shells and bones, all in one immense cuckoos' nest, Dr. Magrath and I have come to realize, perhaps better than most, that luck in research sometimes is not all it seems. A series of articles²⁵ and this judicial biography are not quite the places to unravel mysteries of this order. Still less, doubtless, is a book review. Yet as the explorer who naively wandered into these parts of that Dark (colonized) Continent—Conklinia, Corporataria (as we knew them then) and at length progressed into the "underdeveloped" Antislavery and Negro Territories—yes, that route itself now is a personal and national scandal—and more recently as one who at the opening of the Waite

23. MAGRATH, *op. cit. supra* note 1, at 224. Letter from Waite to Davis, May 31, 1886, Bancroft Davis Papers, on file in Library of Congress.

24. MAGRATH, *op. cit. supra* note 1, at 224. The remainder of Dr. Magrath's statement seems to me to suffer from over-compression and from looking at the statement from too many angles and dates simultaneously. He sees and says clearly however that Waite must have regarded his statement as "a fairly routine instruction to counsel . . ." A typographical error, *id.* at 221, misdates the *San Mateo* appeal to the Supreme Court as 1883 (for 1882).

25. As listed in notes 21 & 11 *supra*, with a third series on frontier taxation, antebellum due process and equal protection being completed.

Papers in 1960²⁶ also met, and not unexpectedly, "Dr. Livingstone, I presume," in the person of this ludicrous Waite-Davis exchange, I shall here briefly set down some reflections and a hypothesis in the perhaps vain hope we may now liquidate this scandalous mystery and get on with the real business of the fourteenth amendment.

First the hypothesis. Just how are we to interpret Waite's casual, offhand expressions, "I think," "sufficient accuracy," "leave it with you to determine," as used in his reply to Davis?

One thing seems certain: these emphatically are not the words we conceive a Chief Justice of the United States ever likely to use if he has in mind what he and his associates have understood and intended to be a formally adjudicated, announced, unanimous rule prospectively applicable to corporations generally. This, to be sure, is only a conclusion, an inference; yet it is one few students of the Court, and of the judicial process, will hesitate to draw. Something decidedly less than a general *per curiam* rule is indicated as being recollected here. Furthermore, "whether anything need be said about it in the report *inasmuch as we avoided meeting the constitutional question in the decision*"—Waite's own clearly manifest doubt—not only underscores this inference, but supplies the further clue: Waite's recollection obviously is of something conditional, something minor, informal, and case-limited, something almost routine for a presiding judge directing oral argument. Waite is thinking, one ventures to suggest, not of a general prospective rule, but of an impromptu verbal instruction which he as Chief, on his own knowledge and initiative, as the Court's administrative head, had given "in opening" and "before the argument began"—an informal request to Southern Pacific counsel designed to focus and expedite argument in this one *Santa Clara* case; something perhaps to this effect: "The Court does not wish to hear further argument on whether the Fourteenth Amendment applies to these corporations. That point was elaborately covered in 1882, and has been re-covered in your briefs. We all presently are clear enough there. Our doubts run rather to the substance. *Assume* accordingly, as we do, that your clients are persons under the Equal Protection Clause. Take the cases on from there, clarifying the California statutes, the application thereof, and the merits."

Counsel at least appear to have done exactly that, and the Court, as Waite's reply indicates, once more proceeded to dispose of the cases on nonconstitutional grounds and again in a way that distressed and disappointed Justice Field. Justice Harlan's opinion for

26. Using the Waite Papers in April, 1960, I discovered the Davis-Waite exchange, learned of Magrath's forthcoming study, and deferred research and publication accordingly. Our conclusions thus have been arrived at independently.

the majority upset the taxes, but did so on a technicality that had not been argued or considered at all in the cases at circuit; namely, that the whole assessment was a nullity inasmuch as the State Board of Equalization had included therein the fences along the lines at a value of three hundred dollars per mile, whereas a very detailed statute gave the Board power to assess only "the franchise, roadway, road-bed, rails, and rolling stock."²⁷ Justice Field concurred in the judgments, but deplored the fact that the Court had not conceived it to be

its duty to decide the important constitutional questions involved, and particularly the one which was so fully considered in the Circuit Court, and elaborately argued here, that in the assessment, upon which the taxes claimed were levied, an unlawful and unjust discrimination was made between the property of the defendant and the property of individuals, to its disadvantage, thus subjecting it to an unequal share of the public burdens, and to that extent depriving it of the equal protection of the laws At the present day nearly all great enterprises are conducted by corporations . . . [a] vast portion of the wealth . . . is in their hands. It is, therefore, of the greatest interest to them whether their property is subject to the same rules of assessment and taxation as like property of natural persons . . . whether the State . . . may prescribe rules for the valuation of property for taxation which will vary according as it is held by individuals or by corporations. The question is of transcendent importance, and it will come here and continue to come until it is authoritatively decided in harmony with the great constitutional amendment which insures to every person, whatever his position or association, the equal protection of the laws; and that necessarily implies freedom from the imposition of unequal burdens under the same conditions. *Barbier v. Connolly*, 113 U.S. 27, 31.²⁸

Why the majority had declined to go along with Field is as obvious as his own distress. Dr. Magrath summarizes the evidence in part.²⁹ Field had repeatedly embarrassed Waite and the Court by close association with the Southern Pacific proprietors and by zeal and bias in their behalf. He had thought nothing of pressuring Waite for assignment of opinions in various railroad cases, of placing his friends as counsel for the road in upcoming cases, of hinting at courses he and they should take, even of passing on to such counsel in the undecided *San Mateo* case "certain memoranda which had been handed me by two of the Judges."³⁰ His decisions and opinions at

27. *Santa Clara County v. So. Pac. R.R.*, 118 U.S. 394, 412 (1886).

28. *County of San Bernardino v. So. Pac. R.R.*, 118 U.S. 417, 422-23 (1886) (concurring opinion).

29. The following summary is based primarily on Graham, *Mr. Justice Field and the Fourteenth Amendment*, 52 *YALE L.J.* 851-89 (1943) [hereinafter cited as Graham, *Field*].

30. Field to John Norton Pomeroy, Washington, D.C., March 28, 1883, published as letter III, Graham, ed., *Four Letters of Mr. Justice Field*, 47 *YALE L.J.* 1100-08 (1938) [hereinafter cited as Graham, ed., *Field Letters*].

circuit in this case moreover had been needlessly broad and economically naive. To hold, as he had, that the mortgage on the Southern Pacific "exceeds \$3,000 per mile," when in fact it exceeded \$43,000 per mile—nearly three times the contested assessed value—was damning in itself, and doubtless the reason the Court withheld decision in 1883. Later that year Field obligingly heard the second round of cases at circuit. Detailing now the facts of the mortgage situation in his opinion, he still held California's classifications to be a denial of equal protection of the laws, and even soberly advised the state to let the railroad go tax free, to simply assess the mortgages "as in the case of natural persons."³¹ Field's associates and subordinates frequently were amused, irritated, or nonplussed by such aberrations, as they were also by his disastrous ventures into Presidential politics,³² by his plan (if elected) to enlarge the Supreme Court to twenty-one members and pack it with "able and conservative men."³³

In other respects, Field had been luckier and more successful. Commencing in 1874 he had maneuvered ingeniously to give his dissents in the *Slaughter-House*, *Granger*, and *Sinking Fund* cases an independent life and statement in the law of his own Ninth Circuit.³⁴ In a series of unappealed (generally nonappealable habeas corpus) cases involving rights of the persecuted Chinese minority to employment and equal protection, Field gave much broader scope than the full Court at these dates formally had to the words "person," "liberty" and "property." Consciously or unconsciously, he also replanted and cultivated his "right to pursue the lawful callings" doctrine so that it finally emerged as an inchoate version of "liberty of contract." That Field and his circuit colleagues did all this in defense of a persecuted racial minority (one which, unlike the now deserted freedmen, had powerful steamship, mining, and railroad allies to help wage their constitutional battles) rather obscured orientations at first, may even have won him the majority's wholehearted encouragement.

What happened and mattered was that California bigots asked for and got the judicial intervention under the fourteenth amendment others currently were denied, and Field, as always, parlayed his dicta beautifully.³⁵ When in 1879-1880 the new state constitution and laws

31. On the various Railroad Tax cases at circuit, see Graham, *Corporate Person* 179-184, 204 n.208.

32. See generally Graham, *Field* 877-80, for Field as viewed especially by Judges Sawyer and Deady.

33. *Id.* at 880-82; the quotation is from Field's letter to Pomeroy, July 28, 1884, published as cited in note 30 *supra*.

34. On the "Ninth Circuit law," see Graham, *Field* 881-88, and correspondence and materials there cited.

35. See *id.* at 884 n.125 for the earlier stages of the development; and notes 43 & 48 *infra* for the later stages. Note especially Field's phrasing of the dicta in *County of San Mateo v. Southern Pac. R.R.*, 13 Fed. 145, 149-52 (C.C. Cal. 1882).

prohibited California corporations from employing Chinese, bigotry at last relit and held the candle for the American corporate bar. Timing was equally miraculous and sociological. Nearly nine years before, in 1871, Circuit Judge Woods of New Orleans had ruled, almost simultaneously with his holding in *United States v. Hall*, that foreign insurance companies (which till then had kept stubbornly trying to corporatize citizenship under the old comity clause, and had turned to the fourteenth amendment only in desperation) were not "citizens" or "persons" under the new section 1.³⁶ In passing we may note that this situation in itself of course is convincing disproof of old notions about "slick" or even "intuitive" draftsmanship.

The significant fact about Woods' holding in *Insurance Co. v. New Orleans* is that it was virtually ignored—honored mainly in the breach. Corporate counsel went right on invoking due process and equal protection, and courts—including the Waite Court—went right on permitting and hearing them, reasoning no doubt, or presuming, that if corporations were not "persons," shareholders at least were, and corporate property was "property."³⁷ Alarmists and critics including Field were repeatedly contending that legislatures and the Court alike were increasingly "hostile" to corporations. So the long-suffering Miller-Waite majority leaned backward, went on hearing arguments, deciding cases on the merits to disprove loose talk. Due process long since had become a favorite and respected weapon, a justifier of legislation. In 1856 the Supreme Court had held, unanimously, that the guarantee restrained all three branches; Congress had not been left "free to make any process 'due process of law' by its mere will."³⁸ And three years before, in 1853, Waite himself as counsel had invoked due process on behalf of the Toledo Bank³⁹ in vain to be sure, with no exploration or even mention of corporate personality as such, but like other business counsel with hard or novel cases at this time, making the plea for what it was worth.⁴⁰ No one need be surprised therefore that early in his *Sinking Fund* opinion of 1879 Waite observed that

36. *Insurance Co. v. New Orleans*, 13 Fed. Cas. 67 (No. 7,052) (C.C.La. 1871); for the background and history of this case, see Graham, *Corporate Person* 166-70.

37. *Id.* at 176-77, especially nn.89-91.

38. *Murray v. Hoboken Land & Improvement Co.*, 18 How. (59 U.S.) 272 (1856).

39. See *Bank of Toledo v. City of Toledo*, 1 Ohio St. 622, 633-34 (1853); "Waite and Young, attorneys for the plaintiff." See Graham, *Conspiracy Theory* 2 n.12; MAGRATH, *op. cit. supra* note 1, 44-45, 64, discusses the case without reference to due process; sections 1 and 16 of the Ohio Bill of Rights, Constitution of 1851, based on sections 1 and 7 of the Constitution of 1802, were not the conventional due process clause, but rather the "All courts shall be open . . . due course of law . . ." form.

40. See, *e.g.*, the arguments of William Curtis Noyes for various insurance companies in 1854, discussed in Graham, *Conspiracy Theory* 2, 178 nn.38-39; see also *id.* at 179 nn.45-47 for Pennsylvania cases of the 1850s, discussed more fully in Graham, "Built Better Than They Knew" *passim*.

while the contract clause did not apply to the Federal government, "equally with the States [the United States] are prohibited from depriving persons or corporations of property without due process of law."⁴¹

And right at this time the new California Constitution forbade corporations to employ Chinese and denied to the Stanford-Huntington railroads the privilege of deducting their mortgages.⁴² The corporate "person" thus emerged from hibernation in *Parrott's Chinese Case*,⁴³ but was fully, approvingly developed only in the *San Mateo*⁴⁴ case at circuit and only after the California court⁴⁵ had rejected the railroads' due process and equal protection pleas (citing, as a basis, *Insurance Co. v. New Orleans*). Shortly afterward the companies removed to Field's court and later retained Conkling for the show-down fight. More crucial and basic than the corporate "person" was whether the equal protection clause had curbed the state taxing power. A dictum Justice Miller had inserted—perhaps as a scarecrow—in his opinion in *Davidson v. New Orleans*⁴⁶ implied it had not. Beyond this obstacle was the equally restrictive language of Miller's opinion in the *Slaughter-House* cases: "the one pervading purpose . . ." of this amendment, and indeed of all the war amendments, had been "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman from the oppressions of those who formerly exercised unlimited dominion over him."⁴⁷

Where then, had all this left the Southern Pacific? Precariously exposed seemingly, but not high and dry: "The Ninth Circuit law" now more than proved its worth. Thankful indeed were railroad counsel—including Professor John Norton Pomeroy, who had been retained at Field's suggestion—to cite the growing line of Chinese precedents on the larger scope and "true meaning" of Section 1. Gratified indeed too was Field to be handed such persuasive authority. The circuit opinions in the *San Mateo* case make interesting reading today, but one point tends to get overlooked: Judge Sawyer expressly held corporations to be "persons" under section 1, but Field, anxious no doubt to avoid head-on collision with the now-Mr. Justice Woods, "looked through" the corporation to the individual shareholders as

41. 99 U.S. 700, 718 (1879).

42. See Graham, *Corporate Person* 175-76, 180-81, and materials therein cited.

43. *Id.* at 175-76, especially nn.87-88, for background of *In re Tiburcio Parrott*, 1 Fed. 481 (C.C. Cal. 1880); see also Graham, *Field* 884 nn.125-32.

44. See note 35 *supra*.

45. See Graham, *Corporate Person* 181 nn.115-16.

46. 96 U.S. 97, 106 (1878): "[W]e know of no provision in the Federal Constitution . . . which forbids unequal taxation by the States."

47. 16 Wall. (83 U.S.) 36, 71 (1873).

natural persons, while at the same time extolling equal protection and the Fourteenth Amendment as needed bulwarks for corporate property—"a perpetual shield against all unequal and partial legislation by the States."⁴⁸

These of course also were the themes of the celebrated *San Mateo* arguments of December 1882. Conkling in particular recycled, supplemented, and falsely buttressed Field's points.⁴⁹ The result was a forgery-riddled *tour de force*—gabled, gilt Hollywood Gothic. Yet, sixteen years after the drafting (and eleven after *Insurance Co. v. New Orleans*) even Roscoe Conkling knew better than to say or hint that he and his colleagues definitely had understood and intended that corporations were "persons" under these two clauses. His argument was primarily an attack on the narrow *Slaughter-House* rule and an appeal to the Court to regard the amendment as a curb on the state taxing power, as a bulwark against "unequal taxation." These of course were the indispensable propositions for the railroad. (The corporate "person" merely looked so to us once it had emerged as the doctrinal result of the cases.) Conkling's prime innuendo, which the Beards and all of us so long misread, was that because corporations had been petitioning for relief from discriminatory state taxes while the amendment was being drafted and ratified, the framers and Congress "must have intended" to curb the state taxing power.

Conkling's misquotations from the Joint Committee journal tied in with this argument, and at yet another point he juggled facts and texts to imply that a section which Congress in 1870 had added to the civil rights acts to kill California's discriminatory taxes against the Chinese demonstrated that Congress had understood that the fourteenth amendment had been designed to curb all unequal taxation and that the judiciary had in fact been left free to decide what was equal and what was not. This was pure fabrication—innuendo developed obliquely and directly contrary to fact; Congress repeatedly in the 1860's and 70's had refused to curb the states' taxing power, especially in matters involving corporate taxation; and the avowed, the manifest purpose of that section 16 of the act of 1870 had been to kill California's anti-Chinese miners and passenger taxes. Race discrimination, in short, had been the target in 1870, just as it had been in 1866.⁵⁰ Conkling

48. *County of San Mateo v. Southern Pac. R.R.*, 13 Fed. 722, 741 (C.C. Cal. 1882); see also the earlier opinion denying motion to remand, 13 Fed. 145 (C.C. Cal. 1882).

49. See Graham, *supra* note 12, 47 *YALE L.J.* at 375-85; Graham, *Corporate Person* 194, and the updated account in my address, "The Court, The Corporation and Conkling Revisited," *supra* note 21.

50. On this episode, ignored in the original studies, see Conkling's argument reprinted in *Proceedings of the Committee on the Judiciary Regarding Railroad Tax Suits*, California Legislature, Assembly, 28th Sess., Journal Appendix, v. 8, no. 3, at p. 94 (1889), concerning addition of the phrase "taxes, licenses, and exactions of every kind,

misrepresented these matters completely in the course of a rambling stilted attack on California's "invidious" and "despoiling" tax laws.

Justice Field thought the argument "great."⁵¹ What the other Justices thought is unknown. Certainly they saw the economic soft spots and blindspots in Field's circuit opinion, for they refused, even in the *Santa Clara* round, to uphold Field on the substantive issues. Harlan, Waite, Matthews, and perhaps others, had little or no respect for Conkling. The one sure point is that no one bothered to check his committee journal passages or even refer to the Civil Rights debates. Eventually, in 1890, the Court did hold, without hearing other argument, that section 1 had restrained the state taxing power;⁵² yet that point had frequently been assumed by the Justices—or so it appeared at least, from their readiness to hear due process and equal protection invoked in such cases. What we begin to sense now—what the Davis-Waite exchange shows—is that for this pragmatic, over-worked Waite Court these "assumptions" did not and do not signify all they once seemed to.

What really counted in the overall development was that by the mid-80's, while the California Railroad Tax cases were before the courts, the anomalies, orientation, and consequences of the "Ninth Circuit law" at last became manifest. Field and his lieutenants had literally gone to the verge. First in the *American Law Review*, then at bar conventions, "certain mischievous tendencies . . . observable in the Federal courts," particularly in those of the Ninth Circuit, gained increasing notoriety. Criticism was not yet of dicta or doctrines, rather of the sheltered and broadened jurisdiction—of one circuit going it alone—of "federal interference and meddling." (On so-called *laissez-faire* issues and formulations, Field of course had, and knew that he had, bar leaders behind him, egging him on.⁵³)

and to no other." Compare therewith the legislative history of section 16 of the Act of May 31, 1870. The Enforcement Act, ch. 114, § 16, 16 Stat. 144; section 16 derived from S. 365, 41st Cong., 2d Sess. (1870), introduced by Senator Stewart of Nevada for the steamship companies and Chinese Six Companies January 10, 1870, after the House had passed H.R. 1293, 41st Cong., 2d Sess. (1870). See CONG. GLOBE, 41st Cong., 2d Sess., 1536, 3480, 3658, 3701 (1870).

⁵¹ See Graham, *Corporate Person* 203, quoting Field's letter of Feb. 18, 1883, to Judge Deady.

⁵² See *Bell's Gap R.R. v. Pennsylvania*, 134 U.S. 232 (1890). Note that Justice Bradley here was able to restate for a unanimous Court the views he had expressed as a concurring minority in *Davidson v. New Orleans*, 96 U.S. 97, 107 (1878); the dicta are most interesting as the law was upheld.

⁵³ How swiftly and assiduously the bar seized on Field's *San Mateo* holdings at circuit is shown in the N.Y. Tribune, Sept. 16, 1882, p. 2, col. 5, "The Tax on Foreign Corporations." At a meeting called to plan an attack on New York's foreign corporation laws and taxes, George S. Harding, counsel for the Winchester Arms Co., "said that Justice Field had recently given a decision in California that corporations could not be discriminated against in the manner of which those present complained." The

Obviously responding to this criticism, the Court in 1884 partially clipped the Ninth Circuit's wings by holding the habeas corpus jurisdiction of the federal courts to be concurrent rather than exclusive.⁵⁴ Circuit Judge Sawyer declared himself "mortified and astonished," especially that Justices Field and Matthews had concurred in the unanimous decision, for both, he confided to the sympathetic Judge Deady, had expressed advance approval of a draft of his now-reversed circuit holding. "So it is now settled," he added philosophically, "that we judges on this coast have been 'elevating our horns' a little too high of late, and will have to take them down."⁵⁵ And so they did have to, for by the Act of March 3, 1885, Congress at last restored the appellate jurisdiction of the Supreme Court in habeas corpus cases.⁵⁶

By this date however Justice Field had completed his book. Another flareup of bigotry and economic discrimination, directed chiefly against Chinese laundries, provided the opportunity—and this time in the Supreme Court, while Waite was ill and absent. In the first of the two great San Francisco laundry cases, *Barbier v. Connolly*,⁵⁷ speaking for a unanimous Court, and to the surprise of San Franciscans *upholding* the ordinance, Field seized his chance to transfer the fruits of "the Ninth Circuit law" to a majority opinion, including and re-elaborating the lawful callings-liberty of contract dicta, the familiar injunctions against "arbitrary spoliation of property," and formulating the now classic private rights-police power dichotomy from which the "rule of reason" soon was to blossom.

Ten months before this, in the *Hurtado*⁵⁸ case, also from the Ninth Circuit but one in which Field took no part, Mr. Justice Matthews at last had begun to make it officially clear that the guarantee of due process of law extended to matters of substance as well as of procedure. Field's nicely phrased and balanced *Barbier* dictum thus completed and articulated what was in effect, if not in intent, a new formulary, an improved circuitry from which counsel and Court alike

reference at this date of course was to Field's decision taking jurisdiction (13 Fed. 145); the main circuit holding did not come until Sept. 25, 1882. Sawyer and Field however for a full month had made no secret of their intentions; see Graham, *Corporate Person* 192-94.

54. See *Robb v. Connolly*, 111 U.S. 624 (1884); Graham, *Field* 882 n.114.

55. *Ibid.*, quoting Sawyer's letter of May 21, 1884, to Deady; opinion by Justice Harlan.

56. On the jurisdictional bases of the "Ninth Circuit law" see Graham, *Field* nn.114-15, 117-18; Graham, *Corporate Person* n.85.

57. 113 U.S. 27 (1885). The Reporter's note, p. v, indicates that Waite was absent when this case was decided Jan. 5, 1885.

58. 110 U.S. 516 (1884). *Hurtado's* counsel was A. L. Hart, former Attorney General of California, who had represented the state against the railroad in the *San Mateo* case.

might take freer readings. The galling thing was that in these vital California Railroad Tax cases the brethren still balked. The consolation was that business counsel and the state and federal judges, more and more of whom came from the corporate bar, or hoped to land there, meanwhile had been citing the circuit opinions on the corporate "person,"⁵⁹ as they now began to use this *Barbier* dictum. Also heartening, on this same day of the *Santa Clara* decision, May 10, 1886, the full Court, speaking through Mr. Justice Matthews in *Yick Wo v. Hopkins*, the second great laundry case, struck down San Francisco's outrageous application of its fire ordinances:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.⁶⁰

Equal protection thus continued to spearhead due process and the Chinese continued to spearhead equal protection. Business wasn't yet getting what it wanted, but Justice Field finally, more nearly was. "Things really are looking up . . . Brother Matthews⁶¹ . . . a wonderful help . . . strong . . . sound, a man of parts, too close to the Chief perhaps . . . and certainly too close in '77 to 'His Fraudulency,' Hayes . . . but shrewd, astute, a born conciliator . . . Jay Gould's lawyer! . . . a bridge and a bond in our Court. . . . And how strange it is: *he* (not Brother Harlan!) a former abolitionist leader and editor—Birney's and Bailey's successor, Salmon P. Chase's lieutenant, the young Cincinnati who led the attack on Ohio's Black laws, 1846-48 . . . while I was in Europe . . . that 'Year of the Revolutions' . . . But sound as I am now . . . even on *civil rights* . . . and Brother Bradley⁶²

59. See Graham, *Corporate Person* n.216, for examples of such usage during the years 1883-1887.

60. 118 U.S. 356, 373-74 (1886).

61. Though he served only eight years, evidence points increasingly to Matthews (1824—Mar. 22, 1889) as the swing man of the late Waite Court, in fourteenth amendment matters particularly, bridging the period from the late '40's to the late '80's—from Birney, Chase, Lincoln to Grant, Hayes, Waite, Garfield and Jay Gould—a biography is long overdue. Not to be overlooked, for example, is the fact that Matthews also spoke for the Court—again a unanimous one—in the Kentucky Railroad Tax Cases, 115 U.S. 321 (1885) (involving a number of the same questions as the *California* cases, see Graham, *Corporate Person* 203-05). See also MAGRATH, *op. cit. supra* note 1, at 198-200, especially n.84, for Matthews' role in adding the limiting phrases to the Waite opinion in the Railroad Commission Cases, 116 U.S. 307, 331 (1886) (decided just three weeks before Waite's *Santa Clara* announcement). Matthews was responsible here for adding, "This power to regulate is not a power to destroy . . ." etc.

62. Evidence in the Deady collection and elsewhere indicates that relations between Field and Bradley were strained throughout the '70's. The *Legal Tender* reversal, *Granger* decisions, and "Stolen Election" of 1876, all were Bradley's work in Field's eyes, and moved him at times to fury.

too at last . . . But for that dozen years: . . . *Legal Tender* . . . *Munn v. Illinois* . . . The Electoral Commission . . . that dreadful decade . . . But we all came around. Finally. . . . All but Brother Harlan . . . The Kentucky Colonel, as he loves to say, 'is full of corn!'"

This, it hardly is necessary to add, is an imaginary soliloquy. Yet those relationships, associations, resentments, antagonisms, allusions and illusions—all are documented.⁶³ The sum of it is that the old "natural rights" precepts and Lockean rhetoric pioneered by this anti-slavery generation—literally "welded" to due process and equal protection in the 1830's—re-echoed in *Hurtado*, *Barbier*, and *Yick Wo*, but not in the *Civil Rights Cases*.

One postulates then that if in late May 1886 Reporter Davis, left to "determine whether anything need be said . . . in the report," queried Brother Field (as the Circuit Justice involved) Field's reply was affirmative. One postulates further that in these Railroad Tax cases the Supreme Court endeavored to do what it generally does and always must try to do—select and decide the crucial appeals with regard for standing law and the merits, avoiding constitutional, collateral, hypothetical questions where possible. To these judges the crucial question never had been, never could have been, simply the corporate constitutional "person" *as such*; never whether corporate "persons" or "property" were to be accorded constitutional protection *in exigent cases*; never whether due process could be applied to such cases. Waite himself, we repeat, had used Ohio's clause in behalf of the Toledo Bank in 1853.⁶⁴ The important words by that date, and increasingly for thirty years thereafter, were "liberty," "property" and "deprived"—not "person" or "due process." American due process had become something different. In the course of it, the judiciary really followed more than it led.⁶⁵ Pragmatist to the core, overwhelmed with pleas, including frivolous ones, the Miller-Waite wing went on winnowing, scrutinizing, "including and excluding," deciding on the merits, saying as little as possible. The sum of it plainly is that what the Court was doing during this transitional period didn't quite accord with what it had said, and what it was saying. In the

63. The Sawyer-Field-Deady, Waite, David Davis, Harlan and other collections are gradually shedding light on the intra-Court relations. See MAGRATH, *op. cit. supra* note 1, chs. 12-15. Harlan, for example, a friend and nominee of Hayes, and as sensitive to his prejudices and to proprieties as Field was insensitive, requested Waite not to assign him opinions in cases decided against Conkling's clients; "from some things I heard last winter" it was Harlan's "impression that Senator Conkling did not feel altogether *kindly* to me." Waite Papers, Harlan to Waite, undated, but attached to a Nov. 29, 1879, assignment slip. Field and Conkling shared a malignant consuming hatred of Hayes.

64. *Bank of Toledo v. City of Toledo*, 1 Ohio St. 622 (1853).

65. See Graham, *supra* note 11, 40 CALIF. L. REV. 483 (1952), and forthcoming articles on Blackwell and frontier taxation.

Supreme Court finally, as elsewhere, practice had got far ahead of decision in due process matters.

The truth is that we have had, as Dr. Magrath perceives but unfortunately has lacked the space to show,⁶⁶ altogether preposterous ideas about the so-called Judicial or Laissez Faire Revolution; about the conception, birth, and infancy of so-called modern or economic due process-equal protection; about who and what were responsible for this distinctive American development. Judicial and postbellum storks indeed! These guarantees were in most state constitutions; they early became among the most extensively and loosely used weapons to challenge and to justify governmental power or action—not, as our law school-trained generation has tended to think, to dissect or cleave procedure from substance. Substantive law generally over the centuries has been “secreted at the interstices of procedure.” Yet substantive due process somehow burst on us unawares, after the Civil War, with scarcely a hint beforehand!

Nonsense. Probably not one early so-called “substantive” use of due process out of a hundred ever ended up in the headnotes or *Century Digest*. Yet the sparsity there, and the curt judicial rejections, have been the *assumed* measure of usage, and of the whole antebellum development. And it is this illusion that has crippled and stultified so much research and writing in American constitutional history.

Let anyone who is skeptical of this statement and of my positions generally, anyone still convinced that the courts led and misled the bar and public, and not *vice versa*; anyone certain that no “mere” treatise could have been an important factor in these developments before Cooley’s *Constitutional Limitations* (published in 1868); everyone puzzled as to why equal protection spearheaded due process after the war, and in these very tax cases; anyone baffled why *Blackwell on Tax Titles* (of all works) appeared continually as a citation in the briefs and opinions, not merely of these postwar tax and even Chinese cases,⁶⁷ but in the earlier due process-equal protection cases (including that most important one of all, *Wynehamer v. People*,⁶⁸ where it was appropriately cited by counsel in the same breath with Solomon’s Song of Songs,⁶⁹ let everyone in short who wishes in a few hours to

66. MAGRATH, *op. cit. supra* note 1, at 192 and pages following, especially at n.66.

67. Using the manuscript records of the old United States Circuit Court in 1936, I remember laughing at the citation of *Blackwell on Tax Titles* in the briefs of a Chinese habeas corpus case! After years of stumbling over the book, I at last examined it *carefully*.

68. 13 N.Y. 378 (1856).

69. See pp. 13-14 of “Points for Plaintiff in Error,” by Amasa J. Parker, *Wynehamer v. People*, *supra* note 68, and “Additional suggestions and authorities . . .” same counsel and case, p. 1; both in New York Court of Appeals, bound briefs, N.Y. State Library, vol. 948, the latter citing on “property” protection: “Blackwell on Tax Titles,

gain a fresh insight into the forces that transformed due process and eventually judicial review—for everyone but the Negro race—let all these get forthwith and read *Blackwell on Tax Titles*,⁷⁰ the first edition of which was published in Chicago in 1855, fully thirteen years before Thomas M. Cooley graciously acknowledged his own indebtedness by citing it at the head of his famous chapter on taxation. Read particularly the “Introduction,” and Blackwell’s enthralling first chapter, “Of the Fundamental Principles Which Control the Taxing Power,” in which are gathered and synthesized, and wedded to taxation and equal protection, all the early due process cases. Yes, here is another fountainhead indeed.

To get back to our biography, Dr. Magrath might have clinched his challenge of the facile thesis that the Waite Court bears the chief responsibility for the great shifts we are speaking of by noting three further developments: not until after Waite’s death did Field himself finally manage to make the corporate “person” truly explicit in constitutional decisions; not until this same date, 1889-1890, did Justice Bradley, speaking for a unanimous Court, clearly hold section 1 to be a potential curb on the state taxing power;⁷¹ and in 1890 too came the holding⁷² that heralded the demise of *Munn v. Illinois*.⁷³ The late Waite years must doubtless be counted as transitional, but personnel changes which began at this time spelled the major shifts. Between December 1887 and December 1890, Woods, Waite, Matthews and Miller were succeeded by Lamar, Fuller, Brewer and Brown. By December, 1895, Shiras, Jackson, White, and Peckham, had replaced Bradley, Lamar, Blatchford and Jackson.⁷⁴ Aside from a few limited “concessions,” as Magrath notes, the weakened Fuller Court, not Waite’s, refashioned due process and equal protection on the economic side. Doctrinaire Fieldian liberty of contract and due process and the corporatized “person,” and “property,” caught on

15, 16, 17, 21, 22” along with Taylor v. Porter, “4 Hill, 144” “1 Ohio State R.633”—the Ohio Chief Justice’s discussion of Waite’s 1853 due process argument in *Bank of Toledo v. City of Toledo*, discussed herein at notes 39 and 64; the original “Points for Plaintiff,” at p. 14, citing (along with Pliny’s Natural History, Herodotus, and Tacitus): “Songs of Solomon, 8, v.12, Psalms, 104, v.14 and 15” in support of this statement on due process: “Under these universally reserved rights, we are to be protected against all sumptuary laws and all interference with personal rights.”

70. The full title is BLACKWELL, A PRACTICAL TREATISE ON THE POWER TO SELL LAND FOR THE NON-PAYMENT OF TAXES ASSESSED THEREON (1855).

71. See note 52 *supra*.

72. Chicago M. & St. P. Ry. v. Minnesota, 134 U.S. 418, 461 (1890) (opinion by Blatchford, J., Miller, J., concurring; Bradley, Gray, and Lamar, JJ., dissenting).

73. 94 U.S. 113 (1877). Magrath has supplemented his chapter on the *Granger Cases* with an excellent article on the *Munn* case in 15 AMERICAN HERITAGE 44 (Feb. 1964).

74. MAGRATH, *op. cit. supra* note 1, at 201-02, makes the point; see 3 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 482 (1923), for appointment dates.

first in the state and lower federal courts⁷⁵ and among those justices who served short and generally rather undistinguished terms. The Fuller and the White Courts, far more than Waite's, must bear the burden.

Another point usually overlooked in assessing the Supreme Court's record in this field is that, at the very least, due process and equal protection and the corporatized "person" were and are infinitely preferable to the corporatized "citizen" and comity clause which the corporate bar so obstinately proffered for eighty years.⁷⁶ Here at least was a discretionary formula, flexible and syncretic, a law-fact-embracing tool in the great tradition of common law constitutionalism, two forms which syncretized, as Professor Corwin⁷⁷ long ago demonstrated, the constitutional rules and precedent which had developed primarily in the state courts during the first century of judicial review. Like our present-day transistor, due process at least did jobs more efficiently, supplanted more cumbersome apparatus, operated on lower amperages, muted natural law premises, achieved a tighter, tidier solution. Compare with this that absurd automaton and chestnut offered by the insurance and interstate commerce bars!

Three crucial and final points: First, section 1 blanketed the freedmen in; it couldn't and didn't throw others out. Application of these guarantees in defense of Negro and racial rights, in other words, was climactic, normative, additive, not original, unique, or exclusionary. Negroes were to get what others long had had. That was the whole thought and point. And it was precisely because the framers looked at the matter in that light that they gave so little thought to constitutional mechanics other than to assuring—or so they thought—the added power necessary to make possible a continuing progressive solution. Second, from our vantage point today it can be seen that Justice Miller's "one pervading purpose-Negro race" rule was over-narrow, imprecise. Race discrimination per se, all race discrimination, not simply that directed against the Negro race, really was the target. Miller tripped over a small point, but he tripped, and the lucky Field capitalized on it for all it was worth. Third, race prejudice and race discrimination being what they are, and manifesting themselves as they did and do—in arbitrary, invidious, often cynical and disguised action—

75. See Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909), reprinted in ASS'N OF AM. LAW SCHOOLS, *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 208 (1938); PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* (1960).

76. See Graham, *Corporate Person* n.97. A study of the insurance and interstate commerce bars' efforts, both in Congress and in the Court, to corporatize the comity clause and citizenship, 1810-1910, especially during the years 1865-1871, will document this point overwhelmingly.

77. See CORWIN, *LIBERTY AGAINST GOVERNMENT* 97 (1948), and earlier works there cited.

accordingly to give to the judiciary power to decide what was *due* and *equal* and *protection* and what was not in this area *in itself spelled a large and imponderable increase of judicial discretion*. For if courts were not to be dupes they had, willy-nilly, to begin doing, and to continue doing, what they thoroughly dislike to do, and often deny that they do at all: scrutinize legislative-executive motive, purpose, and good faith. Put a little differently, these were qualitative phrases, standards, and tests resting on natural rights premises; as such, they spelled new problems and burdens—many that were not sensed at all at the time. But these difficulties obviously are inherent in the problem and in the objective, not alone in the constitutional forms or texts.⁷⁸

Why has not more of this been seen clearly before? Why indeed, judges and historians may well ask and commiserate one another. Their troubles stem from that common source—common law constitutionalism. Anachronism is bred right into both fields: as the institutionalized method of the one (re-read Dicey's⁷⁹ brilliant introduction on the ways and uses of precedent); as the bane, the occupational hazard of the other—especially of legal and constitutional historians whose "sources" (precedents read in reverse) soon come to mean and to cover so much more than ever is originally conceived, intended, or said.

So it chanced that the Beards' Conspiracy Theory, or, speaking more accurately, the Progressive-New Deal generations' Conspiracy Theory, really was anachronized—"Pogo"-ized—history. To quote the learned Walt Kelly,⁸⁰ "Incongruity is the nature of the natural You develops a good memory, then you reverses the whole process." *Due* process easiest, certainly first, of all! Forty years of constitutional development were misread, and read back into, that one word, "person." The miracle was that the second fluke—the reversed image of the first—helped expose, caricature, in time perhaps, correct the original. Only the Negro race—only the avowed, intended beneficiaries—had to wait still longer.

Fluke, fiction, imposter—constitutionally, historically, historiographically. Such is the record and the verdict on the corporate "person." So far as sections 1 and 5 as a whole are concerned, it is clear enough now that history and interpretation, not draftsmanship, were what

78. This of course is the answer to all talk about "poor draftsmanship."

79. See DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 15-19 (7th ed. 1908).

80. Quotations of the Okefenokee scholars are from that brilliant series of "Pogo" published Dec. 18, 1963, to Jan. 9, 1964, climaxing: "I predicts that on January first, 1863, A. Lincoln will issue the *Emancipation Proclamation!*" "Man! That's not Future! That's Past!" "Maybe it jus' seem like the *Future sometime*. . . ." (Emphasis as in the original.)

got sophisticated and misread.

The ultimate irony is that both the Waite Court and the Negro race caught it coming and going. Belabored as "anticorporate," even "communistic," in its own day by business and bar leaders, as Magrath shows, the Waite Court got tagged and re-slandered again in ours as the one that "reneged," "caved in," "reversed itself" on the corporate "person," automatically corporatizing due process and equal protection, completing these framers' *intended* revolution (*i.e.*, a revolution by constitutional amendment!), accomplishing all this by a one-word construction, by "mere acquiescence," when as a matter of fact the shifts and the development of course required decades and literally thousands of cases.

This was the imagined, the postulated, the fictitious Due Process or Judicial Revolution. Yet all the while there also was a real one—flagrant, disastrous, generally ignored: the 1883 *Civil Rights* decision that de-racialized, *instanto*, "by a subtle and ingenious verbal criticism," precisely those protections which Justice Bradley himself so clearly had seen and regarded as necessary and appropriate in 1871. The haunting realization thus is that the corporate fluke, the eventual hypertrophy of the fourteenth amendment on the economic side, completely overshadowed and obscured the misreading, the reneging, the stasis and paralysis that developed on the racial side. Inaction ignored, inaction institutionalized, inaction alibied (as even Dr. Magrath is too ready to alibi it—Waite simply was "a man of his era") became inaction indeed. De-racializing equal protection, not corporatizing it—this was our national catastrophe.

Underscoring so much while leaving so much unsaid, this book is a powerful plea for post-1937 trends and constructions—not merely in the Supreme Court, but now in Congress. How does the nation, the Court, the Congress, make good a lost century? Chief Justice Waite's triumph—decidedly more modest in my estimation than in Dr. Magrath's—was that he dared, tried, succeeded—at least by half. The country's failure was that it so long did not—has not yet—even by half.

Twenty years and three constitutional amendments after emancipation too many of our forebears, including all members of this Court except the former Union colonel and converted slaveholder, Mr. Justice Harlan, let themselves be persuaded, as too many others have since, that American governments still lacked the mandate and the power to do, after emancipation and amendment, in behalf of "liberty," what those same governments originally, for three quarters of a century, had been able to do, and had done, against "liberty," in defense of slavery and slave "property." No mandate and no power

to protect the "li(ves), liberty and property" of "persons" at last free, nor of those newly-made "Citizens of the United States" for whose double, triple, above all, *equal* protection, these three overlapping guarantees and clauses again had been employed, both affirmatively and negatively, as they had been employed incessantly for two generations. No mandate and no power to protect as *free* "persons," and as "Citizens of the United States," those whom this antislavery generation at least, believed governments had the *power* and the *duty* to protect even as enslaved "persons."

Two years short of the fourteenth amendment centennial, let us speak no more of the "failures" and of the "miserable draftsmanship" of that Joint Committee of Fifteen. John A. Bingham and his colleagues did very well indeed. The date, remember, was 1866.