THE CONSTITUTIONAL WORD INCARNATE:
THE PROBLEM OF THE FOURTEENTH AMENDMENT

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I. INTRODUCTION

What exactly was the Fourteenth Amendment supposed to do – not in 1868, but in the future of American constitutionalism? In the 1860s, the structure and purpose of the Amendment was *determined* by immediate needs: it was critical that the Constitution empower Congress "to enforce, by appropriate legislation, the provisions of this article," to decisively bring the South back into the Union, and bring Southern Society into line accordingly.

The reaction from white Southerners proved its necessity. One dissenter, a certain "G.T.C," wrote in *The Round Table* in 1868 that "without scruple, straight to its object, and directly athwart the sovereign rights of those peoples, the Radical Congress moved in a solid phalanx to the accomplishment of its purpose, and crushed out beneath the heel of military power the very political and sovereignty which it should have respected as constituting the state." Even more frightening for Southern sensibilities was the policy of "equalizing" the races. Social hierarchy was the most fundamental social fact, and it was the lone fulfillment of the "subordination of one race to the other." Reconstruction had nothing to do with justice; it could only mean the whites' turn to be dominated had come. They were sure that freedmen could not possibly use their new voting rights merely for their own interests, or hold an equal station as citizens. Given their condition of slavery, it was perfectly logical to assume that they would use whatever political power they

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could find to strike back in any number of horrific ways. It allowed African Americans "to wield an undue proportion of political power," and "hold a majority of the whites in a condition of disenfranchisement just so long as they please."[1]

Addressing the tension between freedmen and whites did not require the usual passions for equality or a spirit of postwar vengeance. It required a statement of purpose as strong and concise as the one that defined so many generations of brutal Southern hierarchy, but in the direction of justice, and a principled basis for equality. In practice, Congress knew that Reconstruction legislation needed a firm basis in the Constitution: a carefully crafted amendment that would make the precepts of republicanism clear – a system that guarantees the equal rights for all sides, rather than allowing the proverbial "oppressed to become the oppressors." The problem, though, was that "precepts" or philosophic principles never belonged in the positive law of the U.S. Constitution. It was not a treatise on American political philosophy or a statement of normative duties and "fundamental rights." It was a practical document, designed to avoid those kinds of controversies that were best left in to the people, as an object of deliberation. Law was meant to keep such principles in view, to be sure. But to drag philosophic truths into positive law was to greatly corrupt and confuse the role of the Judiciary in national life.

This essay is an exploration of the effects of that embodiment or "incarnation" of the American proposition in the fundamental law, and what it has come to mean for us today. First, I will examine the relationship between the principles of the Fourteenth Amendment and their inherent harmony with the state police power, prior to the Gilded Age. I will then compare the short-term and long term intention of the Amendment, and why it was meant to introduce principles that would endure well beyond Reconstruction alone. I will consider the troubled development of Fourteenth Amendment interpretation in the following years, and how it set the framework for "fundamental rights" jurisprudence as we know it today. Lastly, I will explore Justice John Marshall Harlan's "corrective" or "remedial" view of the Fourteenth Amendment when it came to abuses of state police power. It was not a statement of "fundamental rights," as we know it today, but the empowerment of the federal government, whether through Congress or the Judiciary, to help states recover their own republican first principles.

II. State Police Power as the Basis of the Fourteenth Amendment

The major challenge for the Fourteenth Amendment was, of course, how it applied to U.S. citizens living under the sovereign authority of state governments, who were free to exercise extensive police powers over the lives of citizens. Police power is usually understood to mean the authority of states to regulate health, safety and morals, or all of the things left to them according to the Constitution's Tenth Amendment.

The strongest explanation of police power prior to the Civil War came from Chief Justice Roger Taney, who gave it a much stronger definition, particularly in his opinion for the Court in the *Charles River Bridge* case (1837). It was "the object and end of all government… to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created." "Happiness" and prosperity clearly had nothing to do with positive rights or freedoms according to Taney. They

[1] G.T.C., *Letters to the Editor: The Issue*, The Round Table: A Saturday Review of Politics, Finance, Society and Art, August 15, 1868, 104.

depended instead on the power of the people, exercised through the instrument of a state government. "While the rights of private property are sacredly guarded," Taney wrote, "we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation." Even if there were natural rights, they could not be used to second-guess the community's general interest. This meant that a state was quite within its legitimate authority to favor one part of society over another (in this case, granting exclusive privileges to the proprietors of the Charles River Bridge in the state of Massachusetts). He concluded that the Court cannot "take away from them any portion of that power over [the states'] own internal police and improvement, which is so necessary to their well-being and prosperity."[2]

If the Thirteenth Amendment was designed to cancel the affect of Justice Taney's other infamous opinion in *Dred Scott v. Sanford* (1857), then the Fourteenth Amendment seemed to address the *Charles River Bridge* definition of police power. As the evidence shows, the Amendment was not meant to incorporate all states in the sense of subordinating them to constant federal supervision. It was instead meant to empower Congress to repair state governments according to the states' own first principles. It granted Congress a "corrective" power, recognizing that the means of state power also needed a clear view of the end. It adhered to classic social contract theory, where each state, through its police power, was meant to protect the rights of individuals. In this, the Fourteenth Amendment embodied a goal that was far greater than resolving the ill treatment of former slaves. The Thirteenth and Fifteenth Amendments did that well enough (with the government's limited ability, at least), emphasizing the racial aspect of factional state laws. But Congress understood that its future ability "to enforce, by appropriate legislation, the provisions of this article," as the Amendment says, depended on a much broader understanding of rights and privileges – one that transcended race, and established a clear view of citizenship. This was a result of the lesson of the Civil Rights Act of 1866.

A. The First Civil Rights Act

The Civil Rights Act, which passed over President Andrew Johnson's veto, embodied the same wording and general structure as the later Amendment: while it nationalized citizenship, it also said in Section 1 that such citizens, "of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States." It was clear, though, that the goal of those protections found their basis in economic rights. Former slaves now had the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens," according to Section 1.

In his veto message, President Andrew Johnson wrote that it would certainly result in an "absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited power, and break down the barriers which preserve the rights of the States." What was worse, according to Johnson, was how the bill "proposes a discrimination against large numbers of intelligent,

[22] Charles River Bridge v. Warren Bridge, 36 U.S. 420, at 548-549; 552 (1837).

worthy and patriotic foreigners, and *in favor of the negro.*" The very awareness of African-Americans in the bill was no doubt "made to operate in favor of the colored against the white race," and by doing that, "the tendency of the bill must be to resuscitate the spirit of rebellion, and to arrest the progress of those influences which are more closely drawing around the States the bonds of union and peace." Johnson's objection was obviously fueled by the usual racism of the time, which saturated much of his other writings and speeches. (The legislation sought "a perfect equality of the white and colored races," he wrote, expressing the dread that filled white Southerners.)[3] But despite his bigotry, he brought attention to an important point: no matter how severe the oppression, no matter how grave the injustice, civil rights legislation is not meant to favor one particular class of citizens over another. Such policies are legitimate when their goal is general; it must be broader and more basic than mere social inequalities.

Congress plainly had these things in mind when it drafted the Fourteenth Amendment. They omitted any specific reference to race, and sought to ensure the most general guarantees, i.e., "life, liberty and property." The only way to solve the problem of racial discrimination was to envelop the injustice of "Black Codes," thus correcting it according to a much broader and more fundamental understanding of rights. Ideally, this meant the eighteenth and nineteenth century theory of *natural* rights, or the sort that all human beings had *as* human beings. This was not President Johnson's objective, but it certainly presented the challenge that any new Amendment had to include if it was to protect former slaves in a way that was just for all, rather than in their own narrow favor. In this case, the Amendment (and ensuing legislation) should be greater than negative feelings that come from slavery and segregation by helping African-Americans, on the one hand, *and* appealing to even the most racist white supporters of Johnson on the other.[4]

This explains the simplicity of the provisions of the Amendment's Section 1: citizenship is nationalized; state laws cannot abridge privileges and immunities; "nor shall any person be deprived of life, liberty, or property without due process of law"; nor shall any state deny persons of "equal protection of the laws." It was a remarkably calm and simple set of provisions, given the extremism tendencies of the Reconstruction Era Congress.[5] But more importantly, it was a calm that gave way to careful thinking about how to best correct state governments: the task was to bring them back to their true

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[3] Andrew Johnson, Veto of the Civil Rights Bill, March 27, 1866, in Lillian Foster, ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES: HIS LIFE IN SPEECHES (New York: Richardson and Company, 1866), pp. 279; 267; 280.

[4] The opinion in Plessy v. Ferguson (1896) was a tremendous misuse of that principle. Justice Henry Brown could perceive no difference between the disapproval of segregation on equal protection grounds and mere emotional distaste for it among African-Americans. Such laws did not give a "badge of inferiority," he wrote, came only from how "the colored race chooses to put that construction upon it," he wrote. The assumption here, according to Justice Brown, echoed President Johnson's point: legislation that seeks to extend civil rights only to African-Americans will no remedy the problem, but simply favor that particular class over everyone else. "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals." 163 U.S. 537, at 551. But Brown was mistaken about the Amendment's true intent, which was to correct the error of the Civil Rights Act: to seek a basis for equality that was more fundamental than race alone.

[5] Consider also the modest punishments placed on the South in Section 3: only those who had "engaged in insurrection or rebellion" were forbidden from entering public office, though Congress could remove such restrictions by a two-thirds vote in each house for the truly repentant.

purpose, i.e., to protect the ends of government through due process guarantees of "life, liberty and property," and then protect the proper means of attaining those ends through equal protection, which would prevent class legislation. It was, again, a principle that was meant to be realized in the states; the national government's involvement, whether thought legislation or litigation, was only meant to set things right according to a universal view of justice.[6]

B. Theory in Practice

The great problem with the Fourteenth Amendment, though, was how the Constitution was not meant to make such universal things explicit. As all the evidence of the Convention and the ratification debates shows, it was meant to deal only with broad questions of national interest, stated in terms of distinctly positive law. The particulars of moral philosophy and political theory, much less natural or God-given rights, were no less important; but they were best kept in the realm of public consciousness, and general understanding among a free people, not in positive law. They were premises, not conclusions: they were "settled usages and modes of proceeding"[7]; they constituted the "basis on which the whole American fabric has been erected, and, "so established are deemed fundamental," and were "designed to be permanent."[8] To make those precepts explicit in the document itself, as the Fourteenth Amendment does, is to invite complexity and confusion in the judicial task. Like many other clauses in the Constitution, they are stated in broad ambiguities. "If the controversy about the meaning of its provisions, which existed from the first case in which it was interpreted, was partly the result of the defects or limitations or preference of its interpreters, it must also, to some extent, be blamed on the defects of the draftsmanship," Christopher Wolfe observes.[9] But those ambiguities were there for a reason: like many clauses in the

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[6] The modern understanding of justice reverted back to the "preferred class" approach in later years with the rise of twentieth century affirmative action policies in state universities. Setting things right was not a matter of looking to universal precepts of justice; it was instead a matter of correcting past wrongs through policies that explicitly favored minority students. The Supreme Court never supported it on that basis, of course; it always maintained Justice Powell's "diversity" standard in the interest of the institution. But according to Justice Thurgood Marshall, there was no ignoring the "legacy of unequal treatment." Such a troubling history required the Court to "permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America." It was only when at legacy was corrected that we could begin to discuss justice meaningfully. "I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible," he wrote. Regents of the University of California v. Bakke, 438 U.S. 265, at 401-402 (1978). Just how long or to what degree public institutions should favor one group over another has never been entirely clear.

[7] Murray's Lessee v. Hoboken Land Improvement Co. 18 Howard 272, at 282 (1865).

[8] Marbury v. Madison, 5 U.S. 137, at 76 (1808). The bedrock principle of those rights was, of course, the right to keep and acquire property. There were "certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power," Justice Samuel Chase wrote. To not review laws that sought to restrict this right would "authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established." Calder v. Bull, 3 U.S. 386, at 388 (1798).

[9] Christopher Wolfe, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (Lanham: Rowman & Littlefield Publishers, Inc., 1994), 141. Thomas Cooley's warning was particularly apt here: even when "persons skilled in the use of words" draft a law there can be confusion; but when "draughtsman are careless," he wrote, "these difficulties are increased; and they multiply rapidly when the instruments are to be applied," especially to the "new circumstances which could

Constitution – that Congress shall do whatever is "necessary and proper"; that the President shall "take care that the laws be faithfully executed"; that the Constitution itself shall be the "supreme law of the land" – the Fourteenth Amendment was meant to offer flexibility.

It is one thing to give Congressional or Presidential power a broad, sweeping grant of authority, especially when the institutions are elected by the people and then pitted against each other in a system of checks and balances. It is quite another thing to place substantive rights explicitly in the domain of positive law. This leaves far fewer chances to declare something a "political question," and it creates far more serious responsibilities for the Supreme Court. Most of the Court's earlier statements about "fundamental laws" and "natural rights" and the "fabric" of our republic appeared in dictum not essential to the outcome of the case. But now, it would become an essential interpretation of the law of the land, and open up vast new precedents. "The historic irony is that the ambiguity of the Fourteenth Amendment," Wolfe writes, "which should have served to minimize judicial review, has become instead the very basis for judicial review."[10]

III. THE FOURTEENTH AMENDMENT IN THE MOMENT: DEALING WITH THE SOUTH

Looking back on the critical days, Congressman James G. Blaine, who had opposed many of the Radical policies for a more moderate approach, still admitted that it was "not uncharitable or illogical to assume that the ultimate reenslavement of the race was the fixed design of those who framed the [Jim Crow] laws, and of those who attempted to enforce them." The only way to prevent this, beyond the Thirteenth Amendment, was to grant a basis for liberty that was far broader than the immediate problem – and to do so quickly, completely, and decisively. Legislative action had to happen before Southern states could escape the Union's intent for the nation; at the same time, though, they had to ensure a just and fair new solution. Plainly, these were not easy things to reconcile. Such haste in the formation of a constitutional amendment would, no doubt, come with a great lack of foresight, especially when Congress proceeded on what Blaine thought to be inevitable circumstances. "To restore the Union on a safe foundation," he wrote, "to reestablish law and promote order, to insure justice and equal rights to all, the Republican party was *forced* to its Reconstruction policy," i.e., forced by conditions in the South. "To have destroyed the rebellion on the battlefield, and then permit it to seize the power of eleven States and cry check on all changes in the organic law necessary to prevent future rebellions, would have been a weak and wicked conclusion to the grandest contest ever waged for human rights and for constitutional liberty."[11]

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not have been anticipated, but which must nevertheless be governed by the general rules which the instruments establish." A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION, VOL. I (Boston: Little, Brown, and Company, 1927), 97.

[10] *Id.* 143.

[11] James G. Blaine, *Ought the Negro to be Disenfranchised? Ought He to have Been Enfranchised?* CXXVIII NORTH AMERICAN REVIEW 268 (March 1, 1879): 225.

But, for all the congressional haste, the Fourteenth Amendment did feature a thoughtful and deliberate structure, at least for a society where the pre-modern assumptions about republicanism still prevailed. Section 1 of the Amendment was, in truth, only half of is intent. Far more important for the Reconstruction Congress was Section 2, which would base representation on "the whole number of persons" (rather than the previous three-fifths of the slaves); this, in turn, would bring greater representation of Republican interests in the House, and enable Congress to more fully realize its goals. The importance of Section 2 was obvious "when South Carolinians by the hundreds were indicted for interfering with the freedom of elections in killing negroes by the score, it was found impossible to convict one them," Blaine wrote. "Against the clearest and most overwhelming evidence, those murderers were allowed to go free, and the prosecutions were abandoned." Such horrors were plainly in defiance of the principles stated in Section 1; but no amount of congressional power could actualize them on its own. It required a method by which Congress could overcome these things. It was the distinctly republican means to liberty – the very sort of active state liberalism that many state governments would later employ to remedy economic injustices. But again, the necessary assumptions about republicanism – that there is a place for active state liberalism in the service of the right end, as my thesis holds – are the only ideas that make sense of the Amendment.

Section 1 did not occupy much time for the Reconstruction Congress, nor did Blaine have anything to say about it. Yet the idea of Section 1 was abundantly present in Blaine's words: "In a fair and generous struggle for partisan power let us not forget those issues and those ends which are above party." Achieving those ends, though, meant that "the Republic must be strong enough, and shall be strong enough, to protect the weakest of its citizens in all of their rights."[12] These claims are plainly full of ideas about "privileges and immunities," "equal protection" and "due process" – all of which are quite "above party"; there was nothing partisan about them, because they were the precepts which made the political life of a republic possible. Blaine simply stated them as the assumptions of the time, or ideas that were inherent in all republican forms of government.

For Congressman Blaine and his fellow Republicans, only Congress could make the guarantees of Section 1 a reality for freedmen, especially now that it was empowered by the electoral support from the Amendment's Section 2, as well as the Fifteenth Amendment. They were aware that even the noblest legal promises, though declared in the law of the land, would not enforce themselves – that right always depends on a tremendous amount of political might. "It admits that a State shall not abridge the privileges or immunities of citizens of the United States, but commits the seeming absurdity of allowing the people of a State to do what it prohibits the State itself from doing," Fredrick Douglas wrote. "What does it matter to a colored citizen that a State may not insult and outrage him, if a citizen of a State may?"[13] Never did it seem to cross their minds that that the judiciary – inherently the weakest, most un-enforcing branch of government – would eventually become the institution devoted to protecting the rights, liberties, and equality of citizens as stated in the Amendment, thus protecting the end of

[12] *Id.* 263.
[13] Fredrick Douglas, SELECTED SPEECHES AND WRITINGS, edited by Philip S. Foner (Chicago: Lawrence Hill Books, 2000), 691.

government regardless of the republican means that were meant to do that well enough on their own.

A. Freedmen, the South, and the Judiciary

The strongest feelings toward the Supreme Court's Fourteenth Amendment jurisprudence came from the ruling in *Strauder v. West Virginia* (1880), and its companion case, *Ex Parte Virginia*. The cases were plainly judicial questions: they upheld major civil rights legislation, which declared that a state cannot forbid freedmen from serving on juries in criminal trials, especially when the defendant was black. Justice William Strong, who wrote the opinion in both cases, appeared to understand the true intent of the Amendment, i.e., that it was designed to empower Congress to compel states to grant the rights of United States citizens, now seen as individuals before the law. True, state governments were well within their rights to determine who was fit to serve on a jury. "But, in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power," Strong wrote. "Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted." At the same time, he was not entirely clear about *why* Congress could do such a thing. It appeared to be a transaction of enumerated powers, that "every addition of power to the general government involves a corresponding diminution of the governmental powers of the States" – that it was in fact "carved out of them."[14] Did the national government exist merely because it had "carved out" a space for itself? If so, how did that justify Congress' ability to enforce such civil rights – much less the Court's authority to rule on them?

This confusion explains Justice Strong's ruling in *Strauder*. Speaking of the Fourteenth Amendment, he asked: "What is this but declaring that the law in the States shall be the same for the black as for the white," or "that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" Justice Strong acknowledged that all juries are more or less slanted, and that the selection of jurors in a criminal case was never perfect; but with random selection, careful screening, and the requirement of a unanimous majority for the more serious crimes, it was the best method of justice a free people could find – and one that was most certainly promised to those who had been enslaved. But Justice Strong and the majority could not allow that the Amendment meant anything more than this: states could still have requirements for who could and could not serve on a jury, and those rules might exclude women, the poor, or the uneducated. "The Fourteenth Amendment makes no attempt to enumerate the rights it designs to protect," Strong wrote. The Amendment did not grant privileges, because "its language is prohibitory."[15]

Hence, the case actually did little in favor of former slaves.[16] Though one would never guess that based on popular reactions to the case. The "Legal Department" section

[14] Ex Parte Virginia, 100 U.S. 303, at 347 (1879).
[15] Strauder v. West Virginia, 100 U.S. 303, at 307; 310 (1880).
[16] The Court slightly broadened Justice Morrison Waite's view on this issue. Consistent with his United States v. Cruikshank ruling (1876), he wrote that a trial by jury is not "a privilege or immunity of national

of the *Christian Advocate* declared the ruling a victory for freedmen. Forbidding them from serving on juries was the worst denial of equal protection, "since the constitution of juries is a very essential part of the protection which the trial by jury is intended to secure." The article expressed how sacred the jury was in the American mind, and how great the responsibility of citizens was in light of life-and-death questions in criminal law. Yet it was for the same fundamental reason that such guarantees had to be extended to former slaves, who were now part of the polity. A jury is "composed of the peers or equals of the person whom rights it is selected or summoned to determine; that is, of persons having the same legal status in society as that which he holds," the article stated. "These decisions of the Supreme Court leave no doubt that the Fourteenth Amendment is broad enough and plain enough to secure to colored citizens the enjoyment of those rights which have been flagrantly denied to them."[17] *The Independent* had much the same praise for the Court: "[t]he exclusion of the colored race, as s race, from the jury-box is at an end in this country." It was here that the article declared *Dred Scott* officially overturned, showing that "the American people have taken a long stride in the direction of equal rights… Chief Justice Taney, if now living, would not repeat the utterance of 1856."[18]

The truth, however, was not so glorious: the ruling was not that broad in its protections, nor was the Fourteenth Amendment very broad at all when it came to later civil rights legislation. And, of course, compliance with the act and the subsequent ruling was minimal. The *Albany Law Journal*, for instance, reported that a certain Judge Christian in Richmond, Virginia, would "summon them whenever he deems it best for the enforcement of the laws. 'When I find that I can best do this by selecting colored juries, I will do so, but not till then,'" he said. All of this is quite true for the proper functioning of a jury in a criminal trial: "'Education, elevation of character, and the legal qualifications are the only things that I know of necessary to render any person 'liable' to such duty in this court.'"[19] Yet, much like literacy tests for voting, it was plain that it left much room for the sort of jury selection that would appease white Southerners, and avoid both the civil rights law and the intent of the Amendment as the Court has interpreted it *Strauder*.

The Court further minimized the effect of the Fourteenth Amendment in the *Civil Rights Cases* (1883), when it struck down Congress' protection of freedmen to use "public conveyances on land or water, theaters, and other places of public amusement." Just before the cases were handed down, the *New York Times* reported that in the last few years, "Congress appears to have gone far beyond its limits in what was assumed to be appropriate legislation for the enforcement of its provisions"; at the same time "judicial interpretation has been gradually undoing some of its work." Such legislation would not stand "until public sentiment is brought into accord with it" – which was plainly something that Congress could never do, at least not through sheer force. "[T]he national

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citizenship, which the States are forbidden by the Fourteenth Amendments to abridge." Nor was there any damage to the Constitution's Due Process requirement, "which is met if the trial is had according to the settled course of judicial proceedings," he wrote. "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State." Walker v. Sauvinet, 92 U.S. 90, at 92-93 (1875).

[17] *Legal Department: Colored Men as Jurors*, CHRISTIAN ADVOCATE 55, 12 (March 18, 1880): 187.

[18] *Colored Jurors*, THE INDEPENDENT 32, 1653 (August 5, 1880): 17.

[19] *Current Topics*, 19 ALBANY LAW JOURNAL: A WEEKLY RECORD FOR LAW AND LAWYERS 24 (June 14, 1879): 465.

Government cannot deal with offenses which are those of persons or corporations and not of States."[20] *The Independent* concurred: "It is just as important that the Federal Government should keep within the sphere assigned to it by the Constitution as it is that the states should keep within the sphere of the powers reserved to them by the same Constitution," the columnist wrote. "In this way and in no other way can our duplicate system of government be harmoniously and successfully worked."[21] The Court largely agreed with this view. The Fourteenth Amendment, according to Justice Joseph P. Bradley, only meant to empower Congress to regulate states – not society. "In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action for the state or its authorities." To do so would be to state a whole range of nation-wide laws of interpersonal conduct. The intent of the Fourteenth Amendment was aimed only at state governments, not the values or chosen lifestyles of individual white Southerners. "An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the states," Justice Bradley wrote. "It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States."[22] This the Supreme Court could not allow, especially when so many civil rights were already granted protection. Such narrowing of the congressional use of the Fourteenth Amendment was, of course, complete when the Court handed down the infamous *Plessy v. Ferguson* decision in 1896; the case held that "separate but equal" Jim Crow laws were in perfect accordance with the Equal Protection Clause, thus undermining once and for all civil rights legislation that might prevent broad social injustices against freedmen.

B. John Marshall Harlan's "Corrective" Solution

When the Court announced its ruling in the *Civil Rights Cases*, the *New York Times* reported that "it seems as though nothing were necessary but a careful reading of the amendment [to see] that it did not authorize such legislation as the Civil Rights act." Perhaps freedmen were entitled to a basic social equality, beyond merely political rights. "But it is doubtful if social privileges can be successfully dealt with by legislation of any kind… If anything can be done for their benefit it must be through state legislation."[23] This was, of course, an indictment of Justice John Marshall Harlan's reading of the Fourteenth Amendment, which he explained in his dissenting opinion. For the *Times*, it seemed Harlan was "laboring to give a forced construction to the amendment and to import into it something which the ordinary mind cannot find there." The Amendment granted certain specific, basic rights; but "[i]t does not say that no person or corporation within a State shall interfere with the rights of citizens or make discriminations in their treatment." To read it as Harlan did would give Congress a power that "could be exercised in every case in which the privileges and immunities of citizens are liable to

[20] *The Question of Equal Rights*, NEW YORK TIMES, Jun. 17, 1883.
[21] *The Civil Rights Decision*, THE INDEPENDENT 35, 1783 (Feb. 1, 1883): 17.
[22] Civil Rights Cases, 109 U.S. 3, at 10; 14 (1883).
[23] *Civil Rights Cases Decided*, NEW YORK TIMES, Oct. 16, 1883.

infringement," calling for endless, confusing, and potentially oppressive legislation.[24] Indeed, for all its authority and noble intentions, Congress could have no legislative power over people's hearts.

But this was a grave misunderstanding of Justice Harlan's legal reasoning. The ruling in the *Civil Rights Cases*, he believed, was a plain denial of the full authority of Congress – not a claim for itself of the things that states could not do, as Justice Strong would have it, but, as my thesis holds, a way of compelling the states into what they were supposed to be.

It was contended, of course, that a broad reading of the Fourteenth Amendment would amount to a congressional takeover of the entire nation. "Not so," Harlan insisted.

> Prior to the adoption of that amendment the constitutions of the several states, without, perhaps, an exception, secured all persons against deprivation of life, liberty, or property, otherwise than by due process of law, and, in some form, recognized the right of all persons to the equal protection of the laws. These rights, therefore, existed before that amendment was proposed or adopted.

It was therefore the purpose of the Amendment to return the states to their own constitutions and republican principles, and the guarantees that existed for all citizens, regardless of race (or class). "If, by reason of that fact, it be assumed that protection in these rights of persons still rests, primarily, with the states, *and that congress may not interfere except to enforce, by means of corrective legislation*," he wrote, "it does not at all follow that privileges which have been granted by the nation may not be protected by primary legislation upon the part of congress."[25]

Hence, the critical difference between "correction" and "domination" of the national government over the states – an important aspect of my thesis. Congress was empowered to correct the states, to recover their lost heritage, and bring them back to their own first principles, through the persistence of slavery before the war and Jim Crow laws after. Such legislation, though, was never meant to overpower them completely, or to practice social engineering as the majority in the *Civil Rights Cases* held. Such corrective measures, aimed at the states, had a clear problem to solve; once that task was finished, the Amendment's purpose would be complete.

Perhaps Justice Harlan did apply the idea of "corrective" legislation too broadly in this case. It might have been an instance of Congress doing too much, or reaching too deeply into social legislation, perhaps seeking reforms in the South that were premature and excessive. But his point was clear, and crucially important: the best Fourteenth Amendment legislation proceeded, not on the arbitrary whim of the Union (or its own "values," as we might call it today) but on the basis of a truth so plain that we might call it self-evident, according to Justice Harlan: if, at one time, "it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom [then at] some future time it may be some other race that will fall under the ban," Harlan wrote. Indeed, any principle that one part of society lays down to deny others their basic natural rights is equally applicable to themselves. "If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such

[24] "Judge Harlan's Reasoning," NEW YORK TIMES, Nov. 21, 1883.
[25] Civil Rights Cases, at 55-56 (Harlan, dissenting.) (Emphasis added.)

privileges as they may choose to grant."[26] In practice, Harlan assured his critics that any law that overstepped the "corrective" intent – one that imposed any of the abuses or acts of class legislation that white Southerners feared – would indeed be declared unconstitutional for precisely that reason. But truly corrective legislation was, or had to be, perfectly legitimate.

But, of course, this view of the Fourteenth Amendment was rejected in the *Civil Rights Cases*, and it continued to decline by the end of the nineteenth century, even as the Court's involvement in such questions increased. "Correction" assumes that there is a proper condition of the thing corrected; if it is corrupt, then correction recovers what it is supposed to be. This is not simple when the thing corrected is as vast and complicated as a state. Nonetheless, that is what the Reconstruction amendments were meant to do, in the most prudent way possible.

Inevitably, Harlan's view of the original intent for the Fourteenth Amendment slowly broke down into two parts: political power on one hand, and "fundamental rights" on the other. It was the latter that gave rise to the idea that there was, in fact, a new American regime, entirely different than the one left us by the Founders.

IV. THE FOURTEENTH AMENDMENT IN THE FUTURE: A NEW REGIME OF RIGHTS

It was no doubt difficult to read the Fourteenth Amendment without a sense of novelty in the text, at least when it came to serious judicial questions about Section 1. There had certainly been such a spirit in Abraham Lincoln's understanding of the Civil War, which inspired the Reconstruction Congress. What else could the President have meant in the Gettysburg Address when he said that "that this nation, under God, shall have a new birth of freedom"? This appeared to be the spirit of Reconstruction: the new order would be based only in part – or perhaps not at all – on the older order. Just as the old regime was framed and ratified, so too was the new one.

Was the Amendment the foundation of a new regime? Was it substantially different from the previous order of the American Founders, thus requiring the Supreme Court to promulgate its substantive grants and restrictions? Or was it in fact an outgrowth of that order, as Justice Harlan saw it, featuring a great deal of both institutional and philosophic continuity – and therefore still demanding the "that veneration which time bestows on every thing," as James Madison described it?[27] Which of the two options prevailed – and which one *ought* to have prevailed?

A. States in the New Regime of Rights

Critics of the Fourteenth Amendment, aware of what it meant in the long run, knew that for all its noble intentions, it still contained a "fatal defect." That defect "consists in an assumption which, if it were true, would revolutionize our whole system of government," one editor wrote in an 1876 issue of *The Independent*. It was correct to

[26] *Id.* 62.

[27] James Madison, Federalist #49. Alexander Hamilton, Federalist #28. In James Madison, Alexander Hamilton, and John Jay, THE FEDERALIST PAPERS, ed. Charles R. Kesler and Clinton Rossiter (New York: Signet Classic, 1999), 311.

say that "the object aimed at by Congress was to extend the protection of the General Government to the colored people of the Southern States"; had it been a question of pure justice, "it would have our hearty sympathy," the editor wrote. But that should have stayed a concern of legislation, not the reason for altering the constitutional basis for federalism. "Here we insist that the General Government shall not keep within the limit of its constitutional power, and not undertake to discharge its police duties, which the Constitution assigns exclusively to the state governments."[28] For all his concern about the dignity of the states, one thing was obviously missing from this editor's point of view, i.e., that state governments had any respective ends to fulfill. Plainly, according to this editor, police power was more a matter of local self-legislation than the realization of republicanism; the national government was best when it stood by a policy of non-interference. "Corrective" Fourteenth Amendment legislation, as Justice Harlan described it, was in fact the display of political power by a new regime, itself a threat to the old one.

The Independent, though a Boston-based magazine, was adamant in this view of states rights in the face of the Fourteenth Amendment's political novelty. Over a decade later, one editorialist wrote that "the Government of the United States is one of *enumerated* powers." The rights of citizens came above all from the states, as an aspect of their collective consciousness. "[I]n respect to these rights the states are supreme, except as limited by the Federal Constitution," he wrote. Yet this editor had a peculiar way of describing popular sentiment, claming that "[t]he states themselves are Republican in their form of government." This meant that "although there may be great abuses in the exercise of their powers, the theory of the Constitution is to take the hazard of such possible abuses, rather than dispossess them of these powers and virtually absorb them in the powers of the General Government." Something had happened, it seemed, to the definition of a "republic" after the Civil War: it was no longer the sort of government that, theoretically, recognized certain basic rights of citizens; nor was it practically a set of institutions arranged by a neutral laws into a self-checking system. In fact, it did not resemble any of the classic definitions.[29] It was instead little more than local self-determination. It was still the rule of the majority in the interest of the whole. It did not conform to any idea of "interests" as pre-existing rights. Instead, it created them. To forget this, though, was to "not understand the political system under which we are living."[30] It was, in short, a confusion of the basic difference between a democracy and a republic. At the state level, there was only democracy, and any tampering, whether to

[28] "Congress and the Supreme Court," THE INDEPENDENT 28, 1428 (Apr. 13, 1876): 14.

[29] This was, of course, a timeless tendency in political life. Marcus Tullius Cicero, for instance, wrote that "there is no state to which I should be quicker to refuse the name of republic than the one which is totally in the power of the masses." The absolute power of the few can certainly use that name for its advantage; but so too can the democratic mob, and make it all the more convincing. In truth, there is no republic unless the people are "held together by legal agreement." The democratic mob, on the other hand, "is just as tyrannical as one man, and all the more repellent in that there is nothing more monstrous than a creature which masquerades as a [republic] and usurps its name." THE REPUBLIC AND THE LAWS, Trans. Neill Rudd (Oxford: Oxford University Press, 1998), III.45. The difference in the United States was, of course, the way that due process could still be in place, and all the outer forms of a republic could persist – i.e., the "masquerade" could be even more convincing than it was in republican Rome.

[30] *Rights of United States Citizens*, THE INDEPENDENT 39, 2022 (Sep. 1, 1887): 18.

make a state more republican or to directly protect the basic rights of its citizens, was nothing less than usurpation of sovereignty.

For all these objections, the revolutionary nature of the Fourteenth Amendment was a quite favorable idea for most Americans at the end of the nineteenth century. The enduring sense after the Civil War was that the original system was indeed broken and irredeemable; the nation was therefore better off as it left the old American proposition behind. The destruction of federalism, the most prominent feature of that old order, was an easy thing to accept for a society that had lost over six-hundred thousand of its own in an effort to realize that ideal. The American founders had left it a puzzle for future generations; yet no one imagined there would be such a high cost of solving it. The war "tore a hole in their lives," according to Louis Menand in his study on the origins of modern America. "To some of them, the war seemed not only just a failure of democracy, but a failure of culture, a failure of ideas," and in this it had "discredited the beliefs and assumptions that preceded it." While the war had effectively destroyed the South, "it swept away almost the whole intellectual culture of the North along with it. It took nearly half a century for the United States to develop a culture to replace it, to find a set of ideas, and a way of thinking, that would help people cope with the conditions of modern life."[31] The Fourteenth Amendment and its place in the judiciary was at least the initial attempt (before the Progressive Era) to do that for the United States, and contrary to the earlier protests, many interpreted it accordingly.

In practice, though, this meant that the days of federalism, in any original sense, were numbered. Far more than the design of political institutions or separation of powers, people like David Dudley Field, the brother of Justice Stephen Field and a prominent Union Democrat who had a change of heart after the Civil War, maintained the idea that "a Federative Union" was itself the single greatest protection of freedom. In 1881 he wrote: "The vital principle of this system is the balancing of the governments national and State, in such manner as to hold them forever in equipoise." But from its earliest days, that dual system of federalism had been gradually declining, and leading to the sort of "consolidation" that the early defenders of state sovereignty had feared all along; the Fourteenth Amendment had only finalized that trend, and now threatened to complete it – and public opinion seemed to give its strongest approval. "There is not a city in any of the States, there is not a village along the rivers, and scarce a hamlet among the hills, that does not look to Congress more than to its own legislature to determine the occupations of its people," Field wrote.[32] This was a tremendous departure from the American way of politics and self-government.[33]

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[31] Louis Menand, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA (New York: Farrar, Straus and Giroux, 2001), x.

[32] David Dudley Field, *Centralization in the Federal Government*, THE NORTH AMERICAN REVIEW CXXXII, CCXCIV (May, 1881): pp. 407-408.

[33] Such a system maintained the all-American precept of freedom, i.e., that "the individual remains his own master in all that concerns only himself," Field wrote. This is a revealing passage: that guarantee is precisely what the Fourteenth Amendment offered "all persons," and which most Reconstruction legislation (as well the Supreme Court's twentieth century civil liberties rulings) sought to protect. But Mr. Field maintained a different view: that individual liberty was only realized through a collective sort of freedom found in local governments. "When [one citizen's] actions interfere with the actions of another, the two act together. Whatever may have been the origin of the social compact or body politic, this is the theory on which joint action is founded, whether of two persons or of many," he wrote. Whatever concerns one alone is for him to do; whatever concerns his neighbor and himself is for the two do to together; and soon through

Others, though, focused on the cases themselves, and gave strong criticism of the Court when it refused to realized its new duty and apply the principles of the new regime. Congressman John S. Wise wrote in *The North American Review* that the Court had "reestablish[ed] the very States Rights doctrines for the suppression of which the country had expensed so much blood and treasure." He was sure that when the scholar of the future "shall come to examine into the changes in our written Constitution resulting from the war, he will doubtless be astonished to see how few changes there are" – despite how many there should have been. The Supreme Court had essentially undermined those efforts, and left state sovereignty just as it always was, thus greatly undermining the new order. Yet, much like Mr. Field, Wise understood that this existing interpretation of the Fourteenth Amendment would not stand for long, and that the Court could not refuse its latent duty. There was something about the Amendment, on the one hand, and the nature of the Court's jurisprudence on the other, that would eventually come together. One need only consider the Court's early history, particularly in the era of Chief Justice John Marshall, to see its essential role in national life: so long as the Constitution was the supreme law of the land, the rulings of the Supreme Court were final, and provided the bedrock on which all other national questions stood. There was no denying that "a tribunal essentially Federal, more independent of the power of the States than any other body or officer in any of the departments of Government, has from the beginning oftener pointed out the boundary where Federal power ends and State power begins than any other in our Government." It was, after all, entrusted with protecting the Constitution, and it was always aware of those forces and ideas that wished "the Constitution shall be blotted out."[34] When the time came, it would prefer that fundamental law over any concept of state sovereignty.

A new regime of liberty, a new emphasis on substantive "fundamental" rights, a "new birth of freedom" – what else could these things mean but a movement away from the political institutions of government, and toward the one that would articulate them, and protect them accordingly? Those political departments, which were elected by the people, would proceed with legislation and enforcement as they always had; but it was the judiciary who would limit and contain their power, drawing the line for the extent of legislation into the lives of individual citizens. Eaton S. Drone, long-time Editor of the *New York Herald* and frequent commentator on the Supreme Court, promoted the view

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all aggregations of individuals until we arrive at that final organization which we call the state." To proceed too far from the interest of the individual, though, is to usurp the collective basis of freedom. This, Field believed, was the result of the Civil War and the Amendments that ensued, all passed at the whim of a Republican Congress seeking to aggrandize its power for a very short-sighted goal. Such a mechanism in the Constitution would certainly "reduce the States to insignificance," and bring all things into the prevue of the Congress, long after its desired Reconstruction legislation was passed. *Id.* 419. Mr. Field knew that the Supreme Court's involvement was a far greater thing than that of Congress. The Court's decisions, "it must not be forgotten, are reasoned out of the doctrine that Congress is the sole judge of the means it may use to carry its express powers into effect." *Id.* 413. Obviously, his worry could not have been about the Court's rulings on the state regulatory laws in Slaughterhouse or Munn, which allowed extensive regulation at the state level, and had nothing to say about the power of Congress over the states. About these rulings, Field could have no complaint. It seems, therefore, that he saw something else changing at the heart of American constitutional law. It was the allure of absolute and untouchable rights, which the Court could only refuse appellants so many times, as it tried to deny the regime that had emerged.

[34] John S. Wise, editorial in THE NORTH AMERICAN REVIEW Vol. CXXXVIII, No. CCCXXVIII (Mar. 1884): pp. 302; 311.

that the judiciary was quite simply the voice of the Constitution itself. The Constitution was at once the "supreme law of the land" and an ambiguous document.[35] But, according to Drone, such open-endedness was meant for the Court itself, and only the Court, as "the authoritative interpreter of the Constitution of the United States." As such, the Court's rulings "are binding on the executive and legislative departments of the general government, and on every State government," he wrote. "When the Supreme Court interprets the Constitution, its opinion practically becomes a part of the fundamental law of the land, a part of the Constitution itself."[36]

Such a view of judicial duty was, of course, amplified greatly by the Fourteenth Amendment. The limits on state governments were "more radical and far-reaching than are imposed by all the rest of the Constitution," Drone wrote. "It brought the States, in their internal affairs, under federal power to an extent unknown before its adoption" – and, most importantly, it "transferred from the State to national control the great body of the people's civil rights."[37] As other critics pointed out, the Supreme Court had so far failed to fulfill this reading of the Amendment; but Drone, like so many others, remained confident that it would eventually live out its true purpose: to be the consistent guardian of fundamental rights against all political forces – once thought to be the main practices of a republican form of government, but now reduced to mere democratic power that had to be contained and restricted in its authority over the fundamental rights of United States citizens. So who exactly was promulgating this view with such persuasive force?

B. The Judiciary as Guardian in the New Regime of Rights: William Dameron Guthrie

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[35] This, of course, was intentional, expressed in such things as Congress' "necessary and proper clause," or the president's requirement that he "take care that the laws be faithfully executed"; these clauses that made the Constitution a political document, meant to be interpreted by all branches.

[36] Eaton S. Drone, *The Power of the Supreme Court*, FORUM (Feb. 1890): 654. True, the Constitution did not specifically proclaim such a role for the Court; it was, like so many other things, an "implied power," according to Drone. Yet it was an implication that became explicit with the Fourteenth Amendment, given the prominence of substantive rights in Section 1. This did not mean they could go against the fundamental law, any more than any other branch of government. "They are sworn to obey it," he wrote. Here, Drone introduced a novel concept – an idea of judicial power that set the tone for modern judicial review for the rest of American political history: for all their absolute power of constitutional questions, the justices "have no right or authority to give the Constitution any other meaning," Drone wrote. "They have no business to import into their own notions of what the Constitution should be, or what they may think the people or any political party would like it to be." *Id.* pp. 656-657. The only thing that could prevent the Court from being captive to a narrow political philosophy was, of course, the conscience of the justices themselves, who looked strictly at the letter of the Constitution; at the same time, Drone did not give any second thought to declaring that the Constitution means whatever the Court says it means – again, that "its opinion practically becomes a part of the fundamental law of the land, a part of the Constitution itself." *Id.* 654. Such a judicial philosophy is, of course, quaint in hindsight; for modern Americans. But in Drone's day, such an idea was still quite novel, and it introduced the progressive reasoning that would bring on the era of modern judicial review.

[37] *Id.* 663. Drone's greatest concern was the voting process on the Court: the most important cases that might have protected the rights of citizens were frequently determined by a 5-4 decision. "Its record in this matter furnishes an extraordinary instance of the power of five men to sacrifice or save one of the chief results gained by the greatest war known in history," he observed, "and suppose to have been securely embodied in their fundamental law by the people of the nation." *Id.* Drone did not offer a prescription to this problem, but it seemed that some restructuring of the Supreme Court to realize its purpose in the new regime was quite necessary.

The place of the judiciary in the new regime was received well by major figures in the legal community, which was developing a whole new sense of itself by the end of the nineteenth century. Few perceived it as a grant of excessive power or "judicial supremacy," in the modern sense; it was precisely what many popular figures thought it was, as they called for professionals to act as guardians of the public interest against the broad range of political forces in the states. This was, after all, the era of specialization, where the measure of a professional was not experience or even character so much as formal schooling, which immersed students into their respective "science," and awarded them the essential degree. This did not eliminate the bar exam as the final entrance into the legal profession, but the education that preceded it was gaining much more importance than it had in the days of common law apprenticeships and self-taught jurists. Law, like other professions, now consisted of "graduates" who relied greatly on those new publications that could perpetuate the critical discussions that informed the craft: law reviews. Here, "doing law" was gradually mixing with "the study of law," and though lawyers and judges no doubt maintained a distinction between the two, it was inevitable that they would blend as new generations of specialists emerged from American law schools. Such a transition in the legal profession could not help but be shaped by the Fourteenth Amendment; the Amendment and the legal profession, it seemed, were made for each other.

William Dameron Guthrie, a professor of law at Yale University who went on to become President of the Bar Association in 1926, exemplified this view. Much of Guthrie's scholarship was meant to justify the "guardian" approach to judicial review exemplified by Justice Stephen Field. His series of lectures in the 1890s described the law as a true profession. Guthrie announced that the Fourteenth Amendment had done precisely what many popular sources believed: it created a new regime – one that placed his own legal discipline at its foundation.

True, most of the provisions left with the judiciary were already in the state constitutions, and had been the aim of those republics from the beginning. But the conditions of the Civil War had proved how inefficient the states actually were in protecting those rights and liberties, meaning that neither the power of Congress nor the interpretive authority of the Court could redeem them. Indeed, there was no "corrective" legislation, as Justice Harlan understood it. This had "convinced the people that fundamental rights could no longer coexist in safety with unrestrained power in the States to alter their constitutions and laws as local prejudice or interest might prompt or passion impel," Guthrie wrote. For this reason, "[t]he rights of the individual to life, liberty and property had to be secured by the Federal Constitution itself, as, indeed, they should have been when it was originally framed." This was the reason for the Amendment's limitations, which compensated for the defects of the original Constitution. But, as the Civil War proved, those defects were so extreme that only a new order could truly compensate for them. Those provisions are "universal in their application," he wrote. "They are directed against any and every mode and form of arbitrary and unjust state action."[38]

[38] William Dameron Guthrie, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (Boston: Little Brown & Company, 1898), pp. 2-3. (Emphasis added.)

Professor's Guthrie's judicial philosophy was based on his concept of American political life: politics was little more than power, which was by definition "arbitrary," even when it was "constitutional" by state standards. The only rational response to such a dangerous force was judicial containment; the Court's role was not a matter of teaching the presuppositions of legislation, but of merely defining its boundaries, and curbing its excesses. It assumed, of course, that the law of the Constitution was itself a fundamentally different thing in kind from American political life, thus breaking a great deal of continuity with the American political tradition. Politics had made the Constitution at the convention in Philadelphia, and politics had given it life and substance for almost two generations since. But now, deliberation, compromise, and even prudence were in conflict with the fundamental law, and it was the duty of the judiciary to make it prevail.

Professor Guthrie did not view this new role of the judiciary with any caution: there was no question in his mind, it seemed, that judicial power was nothing if not absolute in its ability constantly limit politics. "Great cases involving constitutional rights are continually being decided and should be carefully studied by lawyers. The importance which the Fourteenth Amendment has attained in our system of constitutional law will then be realized," he wrote. "We shall also be led to the immense labors which the Supreme Court performs and the inestimable services which it renders to the nation sometimes unperceived and frequently by the people at large." Those entering the legal profession – his own students – no longer faced the expectations of judges and lawyers; more than wisdom or a love for justice, it was competence that truly mattered, and an awareness of the heritage behind their honored profession. Previous generations of lawyers and judges "solved the great problems of the war and of the reconstruction period and in the Fourteenth Amendment they gave us as our heritage a new Magna Charta" – and what Magna Charta had done to contain the arbitrary power of the King, the Fourteenth Amendment would do to the power of American politics.[39] Each generation of jurists, at least in the great English tradition of freedom, faced the same problems, and were called upon to exercise the same heroic duty. This would continue to be the role of the American judge, according to Professor Guthrie.

Such a fear of political power was not entirely unfounded. Given the popular trends of modern times, Guthrie found that judicial power was no ordinary method of heroism. The "levers of legislative power" were designed to be quite responsive to local majorities, but this made them plainly threatening to rights. He reminded his students that there is "a growing tendency to invade the liberty of the individual and to disregard the rights of property, a tendency manifesting itself in many forms and concealing itself under many pretexts."[40] This was not the usual class hostility, which had always existed to some extent in free societies. Socialism, or the American version known as "nationalism," had tremendous allure, and while the way to achieve it was not as violent as it was in Europe, it was nonetheless a great threat to American liberty.

But how exactly could judges "act" in such a way? As always, they had "neither the sword nor the purse." For Guthrie, it depended entirely on the respect for the rule of law, then so engrained into the American mind. "So long as the Constitution of the United States continues to be observed as the political creed as the embodiment of the

[39] *Id.* 28; 30.
[40] *Id.*, 30.

conscience of the nation, we are safe," he said. It was the enduring "veneration" for the Constitution that would allow judges to take the sort of drastic action necessary to contain these dangerous impulses. But far more than guardians on the old order, the judges entrusted with this duty were the ones who could make the Constitution adapt – and do so even better than the elected branches could. "A constitution is designed to be a frame or organic law of government and to settle and determine the fundamental rights of the individual." This "organic" structure, rather than its intended meaning, was what allowed it to "endure for all time," he wrote. "Its provisions should not in any sense be limited to the conditions happening to exist when it is adopted although those conditions and the history of the times may well throw light upon the provisions and reveal their true scope."[41] So while the most modern rights happened to involve property and the economic liberties the Guthrie believed were under such threat, there was no denying that this too could change – that, in time, there could be a new set of fundamental rights, and that the Court would discover and protect them accordingly. The problem for dangerous popular movements was not their disregard for the rule of law understood as an *enduring* thing; it was instead their tendency to seize the sort of adaptations and changes that could usurp the Court's own authority.[42]

C. The Reluctant Guardianship of Thomas Cooley

Professor Guthrie represented the judicial philosophy that continued to embrace the Fourteenth Amendment as formal permission to review practically any piece of legislation. One reviewer of Guthrie's book noted that "[h]is views are the 'views of the day' in an exaggerated degree," in that he "expresses in the most pronounced from the present increasing tendency to shoulder upon the Federal courts responsibility for everything."[43] Other legal scholars presented a much tamer approach. As Dean of the University of Michigan Law School, Thomas M. Cooley became an American jurist in the style of Joseph Story and James Kent, doing for the modern Constitution what William Blackstone had done for the common law. A mind so attuned to the law would certainly reflect the sort of shift that occurred with the Fourteenth Amendment. It was, for Cooley, a constitutional fact; unlike Guthrie, he at times accepted the Amendment with apprehension, but more often a simple acceptance of what the Amendment meant

[41] *Id.* 33.

[42] True, the Constitution enumerated rights and institutions that were meant to be enduring. But the broadness of those provisions appeared primarily for the Court's disposal: it was "a declaration of general principles to be applied and adapted as new conditions presented themselves." *Id.* 33-34. The malleability of the Constitution might have existed in the people themselves granted them in Article V; but by exercising that power in 1868, by ratifying Section 1 of the Fourteenth Amendment, the people essentially passed that power to the true amending institution designed to protect those rights through interpretative enforcement. Justice William Brennan seemed to restate this idea in his famous speech at the Text and Teaching Symposium in 1986. There, he referred again and again to our "amended Constitution," which is the "lodestar for our aspirations" toward social justice. It is difficult to see how such amendments inform the duty of the Court – especially with the most important amendments of the Reconstruction Era were designed to override the Court's decision in Dred Scott v. Sanford (1857). Still, for Justice Brennan, the fact that it had been amended at all indicates great ambiguity, which "calls forth interpretation, the interaction of reader and text" – which he was quick to identify as "my life's work." In AMERICAN POLITICAL RHETORIC: A READER, eds. Peter A. Lawler and Robert M. Schaefer (Lanham: Rowman & Littlefield, 2005), 132.

[43] R.W.W., AMERICAN LAW REGISTER 47, 4 (Apr. 1899): 267.

for the judicial craft. He knew that the days of the *Munn* doctrine were truly numbered, though not by any choice of the Supreme Court.[44]

Such a transition was meant to happen as it did under Article V: the nation had calmly and deliberately altered its Constitution to fit certain dire needs, precisely as the Founders anticipated. "The Constitution provides a simple, easy, and peaceful method of modifying its own provisions, in order that needed reforms may be accepted and violent changes forestalled," Cooley wrote. Such a quiet method had occurred fifteen times. But plainly the newer amendments had done far more than the older ones. The most recent amendments were shaped by the destructive effects of the Civil War, which actually lasted well after the fighting was over; even in peace, "the same divergence in sentiment and a like estrangement in feeling still prevailed, and were now found to centre on the policy to be adopted for restoring and strengthening the shattered fabric of government," Cooley wrote. In such conditions, there was, quite simply, no way to preserve the old Constitutional order, at least not in its entirety; the amendment process, for all its careful steps, could still take on a revolutionary intent – in this case, putting rights and liberties at the forefront, and leaving institutions and procedures in obscurity. Such a transition was plain in the design of the older amendments themselves. "While, therefore, the first amendments were for the purpose of keeping the central power within due limits, at a time when the tendency to centralization was alarming to many persons, the last were adopted to impose new restraints on state sovereignty, at a time when state powers had nearly succeeded in destroying the national sovereignty."[45] The guarantees in the first set of amendments were, for the most part, superfluous: the government checked and limited itself through the interaction of its institutions, and therefore required no preventative measures in law to keep it from abusing its power. The latter amendments, however, called for another method entirely.[46]

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[44] Hadley Arkes describes Cooley well in his judicial biography of George Sutherland, the jurist's most famous student at the University of Michigan. The professor "suffered no epistemological doubts when [he] made the rudimentary point that the purpose of the Constitution was to protect its citizens from the 'arbitrary' uses of political power." Procedures of law did not mean that the law passed was truly fair and just. Such procedures could go quite far to protect the rights of the people, or of equal classes of the people; but, as Arkes points out, they had their limitations. "The Constitution implied, in short, the possibility of distinguishing between the legitimate and illegitimate exertions of political authority," Arkes writes, "and it was assumed that the distinction had to be accessible to any person of wit." Hadley Arkes, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (Princeton: Princeton University Press, 1994), 43. Plainly the "person of wit" was losing sight of such realities – nor for lack of intelligence, but because such ideas were becoming unbelievable in the modern world. If the reality of rights and principles of justice were no longer present in the popular mind, they would have to be promulgated. Hence, the coming role of the Supreme Court in the twentieth century.

[45] Thomas McIntyre Cooley, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA (Boston: Little, Brown & Co., 1890), pp. 218; 220.

[46] This was precisely James Madison's understanding of amendments in Federalist #49. For all the need for long-term stability in the constitutional order, it was still true that "the people are the only legitimate fountain of power"; for this reason, it made sense, "strictly consonant to the republican theory, to recur to the same original authority." Such a return to the people could indeed "enlarge, diminish, or new-model the powers of the government" – i.e., restrict *or* expand its power. More often, though, he believed such restrictions were not a matter of shielding state governments; it was instead "whenever any one of the departments may commit encroachments on the chartered authorities of the others," he wrote, i.e., whenever the president or Congress infringed too much on each other's authority. FEDERALIST PAPERS, pp. 310-311. Hence, there appears to be in Madison's constitutional thinking a place for the sort of "active state liberalism" that would later occur, both in national and state governments.

This was most apparent in the Privileges and Immunities clause – a right that was abundantly obvious even without the Fourteenth Amendment. "It is plain that State laws cannot impair what they cannot reach," he wrote. The national government, by its mere existence, ensured the privileges and immunities of citizens. The postal service, patents, copyrights, or assistance with trouble overseas – these things were never in doubt. "Nevertheless this portion of the Fourteenth Amendment has its importance in the fact that it embodies in express law what before, to some extent, rested in implication merely" – an implication that was far too weak to deserve respect, much less command the consent of the public for the existing government.[47] The new Amendment, however, commanded far greater consent (or, in some cases, provoked repugnance) for the existing regime. This, in turn, indicated that there truly was a new order, a transformed regime that had very little in common with the previous one, and the prominence of its substantive rights called for some kind of direct recognition and enforcement.

Cooley enumerated and explained the significance of "due process of law," "life, liberty, and property," and "equal protection" knowing that they would gradually become, in many issues, the sole concern of judges facing Fourteenth Amendment questions. Cooley allowed that the extent of police powers was still quite broad within the states, and that the Amendment was "held not to have taken from the States the police power reserved to them at the time of the adoption of the Constitution." Still, in the exercise of police power, "regard must be paid to the fundamental principles of civil liberty, and to processes that are adapted to preserve and secure civil rights; persons cannot arbitrarily be deprived of equal protection of the laws, or of life, liberty, or property."[48] Again, the possibility that the police power of the state was meant to protect certain rights – keeping and pursuing property, in particular – was no longer present for Cooley. Legislation was merely power, and rights were rights.

Professor Cooley elaborated on this in his most famous work, *A Treatise on the Constitutional Limitations*. The massive two-volume set, which went through seven editions between 1868 and 1927, was constantly looked to and cited in both popular and professional writings of the Lochner Era; it made him "the high priest of the theory that revolutionized thinking about the power of state legislatures and the role of the courts," according to Paul Kens.[49] For all the sensible legislation a state legislature may produce, Cooley wrote, "general rules may sometimes be as obnoxious as special if they operate to

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[47] *Id.* 227.

[48] *Id.* 251.

[49] Paul Kens, LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL (Lawrence: University of Kansas, 1998), 100. Later reviewers could only write of their awe at the size of Cooley's work, as he applied his legal reasoning to the vast amount of case law, both state and federal. Many pages of the latest edition consist almost entirely of footnotes. One reviewer in 1904 noted that "[a] comparison of this edition with the one preceding shows that some two thousand new cases are cited, making the total number more than twelve thousand, while the volume has swollen in size from 993 to 1159 pages, 215 of which are given up to the tame of cases and the index." 4 COLUMBIA LAW REVIEW 3 (Mar. 1904): 241. Others, though, found the book unworkable in later years. "There is a limit to what an editor can do to make effective for present use a legal classic originally published nearly sixty years ago," another reviewer wrote. Cooley had merely "crystallized and strengthened the legal movements of his day." W.F.D., YALE LAW JOURNAL 37, 1 (Nov. 1927): 136. Thomas Reed Powell of Harvard Law School concurred: "Unless one were to smash the mould of the original, a new edition could do little but add new information." 41 HARVARD LAW REVIEW 2 (Dec. 1927): 273. This certainly gave a "bird's eye view" of the topic, but it did little to assist judges doing modern law.

deprive individual citizens of vested rights." Cooley's concern was very much about the problem of class legislation, or the tendency of state regulations to favor one interest over another. But, "[w]hile every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors," he wrote, "the whole community is also entitled at all times to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation." Even impartial legislation, which did not single out or favor one class over another at all, could still quite easily deprive individual persons of the fundamental rights to which they are entitled. "It is not the partial nature of the rule so much as its arbitrary and unusual character that condemns it as unknown to the law of the land." Should such cases come to the Supreme Court, its duty was clear: assume that the state is not equipped to protect such rights, that all exercises of police power were potential threats to property, and that state constitutions are only the feeblest safeguards. "When the government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land," Cooley wrote, "we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and *not generally by rules that pertain to forms of procedure merely*."[50] Concerns about procedural due process could only go so far; at some point, the rights that such a process was designed to protect emerged on their own, and required the careful attention of the judiciary.[51]

In this, of course, both Guthrie and Cooley (perhaps one more than the other) endorsed the jurisprudence of Justice Stephen Field. Guthrie praised Field as "one of the greatest judges that ever sat in the Supreme Court."[52] They shared the view that there could be no other institution, nor institutions checking each other, nor any other method, that could secure the new substantive rights of the Fourteenth Amendment like the Supreme Court could. Yet Justice Field, for all his generalizations about rights and liberties, did restrict his view of "fundamental rights" considerably, as would anyone who tried to protect rights in such a way: they were absolute on some points, but non-existent in others. Field's dissent in *Ex Parte Virginia* (the companion case to *Strauder*), for instance, could not have sounded more out of character for him. When the question was whether or not a state could bar freedmen from serving on a jury, suddenly the sovereignty of state governments was immensely important. "The government created by the Constitution was not designed for the regulation of matters of purely local concern," he wrote, while "the central government was created chiefly for matters of a general character, which concerned all the States and their people, and not for matters of interior regulation." To say otherwise, as the majority did in this case, was to "destroy the independence and the autonomy of the States," and "reduce them to a humiliating and degraded dependence upon the central government, engender constant irritation, and

[50] Thomas McIntyre Cooley, A TREATISE ON CONSTITUTIONAL LIMITATIONS (Boston: Little, Brown and Company, 1903), pp. 504-506.
[51] As Felix S. Cohen later put it, this made the courts "lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren." Quoted in Bickel, LEAST DANGEROUS BRANCH, 37.
[52] Guthrie, LECTURES, 26.

destroy that domestic tranquility which it was one of the objects of the Constitution to insure."[53] But Field did not contradict himself: for him, if the Amendment was meant to grant solid, undeniable, untouchable protections of business interests, then it had to come at some expense – in this case, the due process guarantees of criminal procedure for blacks. To broaden in one area, such fundamental rights had to be narrowed in another.

This rationing of rights exposes the problem of a "new regime" reading of the Fourteenth Amendment, especially when the sole institution entrusted with that task is the judiciary.[54] While it might have been based on a great many claims about the equality and rights and liberties of citizens, and while the Court would be the institution to secure such things, this reading was, in fact, greatly limited in what it had to offer. This was usually the case with generalizations: when such dogmas about "rights" and "liberties" "are once dragged down into the mud of practical politics, and are cut to the measure of party tactics," William Graham Sumner wrote, "they are the most pernicious falsehoods," in that they always result very favorably for one group, and not at all for another.[55] It was quite predictable that African Americans would be the ones to not receive these protections – even though they were supposed to be the primary recipients when the Amendment was framed. By the time of *Plessy v. Ferguson* in 1896, the judicial process of rights-rationing was complete: by interpreting the Equal Protection Clause to allow for "separate but equal" Jim Crow laws, the rights and freedoms there stated were left to white men only, and it would stay that way for some time. Indeed, in this respect, there is a greater continuity between Justice Field and the *Plessy* decision than there is between the fundamental rights jurisprudence and the Lochner Court.

Still, despite these problems, the advocates of Fourteenth Amendment judicial supremacy proceeded with their teaching, so certain that this was the judicial philosophy of the future. As the new century arrived, "proponents of liberty of contract had argued that the intended role of the Court was to protect individuals from the tyranny of the majority," according to Paul Kens. "For people such as William D. Guthrie [and] Thomas Cooley, substantive due process and liberty of contract represented not only reasonable but necessary interpretations of the Constitution."[56]

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[53] Ex Parte Virginia, at 354-355; 358 (1879). (Field, dissenting.) Any decision from an interracial jury "would hardly be considered just," since it would be "reached by a sort of compromise in which the prejudices of one race were set off against the prejudices of the other," Field wrote. Such juries, of course, would be impossible anyway in most states; hence, most juries would consist entirely of blacks, including the judge, which, Field believed, would always proceed with bias, and could never determine guilt, no matter how obvious. *Id.* 368-369.

[54] Justice Field confirmed this point as well: because the power in question is "judicial in their nature" – far more than anything having to do with local legislation – it could not be tampered with by any legislative act. Judicial authority was meant "to determine who were qualified to serve in that character, and, for that purpose, whether they possessed sound judgment and were free from legal exceptions." *Id.* 359. Far greater than the pursuit of justice in a fair trial was the pure authority of the legal profession, according to Field. Such authority of local judges was, at the national level, the authority of the Supreme Court to apply the Fourteenth Amendment's substantive rights.

[55] William Graham Sumner, *Democracy and Plutocracy*, in ON LIBERTY, SOCIETY, AND POLITICS: THE ESSENTIAL ESSAYS OF WILLIAM GRAHAM SUMNER, ed. Robert C. Bannister (Indianapolis: Liberty Fund, 1992), 142. Sumner pointed out the distinctly democratic problem in the "absolute rights" view of things: those who receive such rights in practice are always only a part of society, which is common sense. But the increased certainty of those rights raises majority tyranny to dangerous new levels.

[56] Kens, LOCHNER V. NEW YORK, 179.

D. The Judiciary meets the Fourteenth Amendment

The Supreme Court justices who saw the apparent meaning of the Fourteenth Amendment wished very much to avoid it. It was, no doubt, a frightening thing from a judge's point of view: the floodgates of litigation always threatened to burst open with a single precedent; by calling certain rights "constitutional," one interest group could find itself permanently lodged under the Court's protection, where it might use judicial leverage against all opponents. For this reason, there was "a disposition on the part of the court to keep away from the danger line of interference with the operation of the local police power."[57] Perhaps there really were certain natural rights that government was meant to protect. But the Court was never meant to defend and protect those rights directly, save for extreme circumstances. It was designed to focus on institutions, separation of powers, federalism, and other things related solely to the letter of the Constitution – which in turn could secure those rights, as they were designed to do. American political institutions were sufficient to ensure neutrality, thereby protecting rights in the way they checked and limited each other. Left to itself, the American political system was quite well designed to fulfill this end; judicial meddling might very well disrupt it beyond repair.

For many, this seemed to have been Justice Morrison Waite's point in *Munn v. Illinois*, i.e., when there is unwise or even unjust legislation, "the people must resort to the polls, not to the courts."[58] This was a popular position, and it was the surest maxim that lower courts could fall back on. Judge Hiram Gray of the New York Supreme Court gave what many believed to be the bottom line: "[t]he police power extends to the protection of persons and of property within the state." This meant that "[t]he natural right to life liberty and the pursuit of happiness is not an absolute right," he wrote.

> It must yield whenever the concession is demanded by the welfare health or prosperity of the state. The Individual must sacrifice his particular interest or desires if the sacrifice is a necessary one in order that organized society as a whole shall be benefited. That is a fundamental condition of the state and which in the end accomplishes by reaction a general good from which the Individual must also benefit.[59]

But others saw a more elaborate explanation (or, perhaps, a post facto rationalization) of Waite's words in *Munn*. According to Judge Charles Andrews of the New York Circuit Court, "life, liberty, and property" did not need judicial protection at all, because it would always find its greatest defense in "a pervading public sentiment which is quick to resent any substantial encroachment upon personal freedom or the rights of property." Thankfully, that public sentiment was always present, and always reliable: "In no country is the force of public opinion so direct and imperative as in this." Obviously, the judiciary had little to do when it came to protecting basic rights; that was the power of the people themselves. True, the people could do very unjust and foolish things left to themselves; but it was worth reflecting on how often those pieces of legislation "have generally been the result of haste or inadvertence, or of transient and unusual conditions in times of public excitement which have been felt and responded to in the halls of legislation." In the end, he wrote,

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[57] Shepherd Barclay, The Danger Line, AMERICAN LAW REVIEW (May/June, 1898): 24.
[58] Munn v. Illinois, 94 U.S. 113, Id., at 134 (1876).
[59] People ex rel. Nechamus v. Warden of City Prison, 144 N.Y. 529, at 535 (1895).

> no serious invasion of constitutional guarantees by the legislature can for a long time withstand the searching influence of public opinion, which sooner or later is sure to come to the side of law and order and justice, however much for a time it may have been swayed by passion or prejudice, or whatever aberration may have marked its course.[60]

All of this may have been true in practice. But Judge Andrews quite overlooked the institutional aspect of American democracy. There was, indeed, a sensible, rational, aggregate public opinion, as he described it; but that phenomenon owed itself entirely to the constitutionalism that shaped and directed the public. The point was not the effectiveness or wisdom of a law, but whether or not it abided by the more fundamental law that made the whole democratic arrangement possible. Andrews seemed to ignore the intent behind some of these state laws: more than whims that might be corrected by the legislative process, they were often rationalized by progressive notions of local experimentation, which were quite hostile toward the Constitution's intentions for national life.

In truth, Fourteenth Amendment constitutionalism, so far as it embodied the idea of constitutionalism itself, was simply incompatible with "general will" democracy, however construed. The Amendment did grant real substantive rights, and stated quite plainly what "no state" shall do; and, in doing so, it presented the nature of republicanism, and the point from which all free government found its origin. In light of those words, the Court could not escape its duty to ensure that no troubling legislation "takes place in the absence of an investigation by judicial machinery"; it was no light or transient thing when a citizen was "deprived of the lawful use of… property, and thus, in substance and effect, of the property itself, without due process of law… in violation of the constitution of the United States."[61]

The Supreme Court, particularly under the leadership of the new Chief Justice, Melville Fuller, had to confront the Fourteenth Amendment squarely and ensure that the states did as well. Whatever their approach, this would mean a limitation on the uses of police power, which had become an essential instrument for the peculiar alliance between reformers and progressives. "The liberty of contract doctrine, which restricted legislative authority, stood in sharp contrast to the tenants of the Progressive movement, which called for a more active governmental role in regulating the economy and addressing social problems," according to James W. Ely, in his study on the Fuller Court. "The Progressives especially urged a more expansive reading of the police power to support legislation designed to correct perceived imbalances of economic power associated with the new industrial order."[62] More troubling still, the rule could not be drawn from any clear precedent. No one had ever needed a definitive explanation of police power, since it was always understood as the proper character of the states. The justices on the Fuller Court would have to discover it and develop it – knowing all the while that their efforts might come to nothing, as indeed they did with the New Deal.

V. In Search of a Fourteenth Amendment Rule

[60] People v. Budd, 22 N.E. 670, at pp. 680-681 (N.Y. 1889).
[61] Chicago, Minneapolis, & St. Paul Railway Company v. Minnesota, 134 U.S. 418, at 457-458 (1890).
[62] James W. Ely, The Fuller Court: Justices, Rulings and Legacy (Santa Barbara: ABC-Clio Supreme Court Handbooks, 2003), 110.

There were, of course, many obvious things that the Amendment would not do, especially in light of the challenges to the "moral" aspect of police powers. For such legislation to appear at the dawn of advanced modernity, where the grounding for moral questions was slipping away, was to invite serious disapproval; here, it became more and more difficult to see prohibition as anything other than the arbitrary will of righteous reformers intent on bullying those into compliance when their only wish was to be left alone. "The likings and dislikings of society," John Stuart Mill observed, "or of some powerful portion of it, are thus the main thing which has practically determined the rules laid down for general observance, under the penalties of law or opinion."[63]

Peter Mugler certainly felt the full brunt of the "dislikings of society" in the state of Kansas. The entrepreneur spent over ten thousand dollars of his own money to build a brewery, in close contact with the necessary grain, only to witness the passage of an amendment to the state constitution that prohibited the sale of alcohol. Mugler complied, and stopped selling alcohol within the state; but the state then passed a law under the amendment prohibiting the manufacture of alcohol as well. "The effect of the act is to close the doors of his business, and leave what had been valuable property, recognized and protected by the law, lifeless… as if consumed by fire," his attorney claimed. "There is no notice, no hearing, no opportunity for redress; nothing is heard but this inexorable decree of annihilation, and the defendant sits in the midst of the ruins of that which years of toil had accumulated, under the vain hope that he had security under the law." This was plainly not a question of rates, much less health and safety standards, since "not a drop of liquor of his manufacture" was sold within the state.[64] It was, above all, an objection to "paternalistic" legislation – a term that would become essential in the coming Lochner Era.[65] Despite all the claims of nineteenth century temperance movements, there was simply no reason to believe that alcohol consumption, much less manufacture, could affect public health to a degree that called for such patently unjust state regulation according to Mugler's attorney. This may have been true, but for Justice John Marshall Harlan, it was no grounds for usurping legislative judgment about the requirements of public morality: "society has the power to protect itself, by legislation, against the injurious consequences of that business." To not allow the state legislature such authority was to allow the few to dominate; these few, "regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please," Harlan wrote. "Under our system that power is lodged with the legislative branch of the government"; it was representation, checks and balances, and the political process that would ensure the best judgments. This constituted "what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the

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[63] John Stuart Mill, ON LIBERTY (Minola: Dover Publications, Inc.), 6.

[64] Council for appellant Peter Mugler, quoted in State of Kansas v. Peter Mugler, 29 Kan. 252, at 1; 5; 3 (1883).

[65] Mill certainly had people like Mugler in mind when he lamented the "limitation in number… of beer and spirit-houses, for the express purpose of rendering them more difficult of access, and diminishing the occasions of temptation." It was nothing less than a modern society's refusal to fully realize itself; it was an arrangement "suited only to a state of society in which the laboring classes are avowedly treated as children or savages, and placed under an education of restraint, to fit them for future admission to the privileges of freedom." Mill, ON LIBERTY, 85-86.

public morals, the public health, or the public safety."[66] To do otherwise, to rule against a legislative determination of public health and safety, would in fact be a violation of separation of powers according to Harlan: it would force the Court to assume the role of a legislature.

There was a natural consequence of such broad legal guarantees, which the justices rightly feared. If they proposed a "right" that appears generally applicable, everyone would suddenly have a claim to protection against the most common-sense legislation – even swindlers and scam artists. The rights umbrella, so to speak, would cover a great many things. Hence, the "oleomargarine butter" case, which involved a product that was made primarily from animal oils rather than pure milk. A certain Mr. Powell, a food distributor in Pennsylvania, found himself in violation of "an act to prevent deception in the sale of butter and cheese." It was not a complete scam on his part: Powell made it known that this was no ordinary butter by stamping "Oleomargarine Butter" "upon the lid and side in a straight line, in Roman letters half an inch long."[67] Still, "if this statute is a legitimate exercise of the police power of the state for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment" according to Justice Harlan, who seemed to be the one entrusted with writing the opinion for such rulings. It is "the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects."[68] Plainly, the Fourteenth Amendment could not require them to do any such thing. Harlan restated Justice Morrison Waite's point in *Munn v. Illinois*: if the law was unfair, the way to correct it was through the state legislature itself, not the courts.[69]

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[66] Mugler v. Kansas, 123 U.S. 623, at 660-661 (1887). The opinion upheld the Kansas Supreme Court's ruling, which maintained Justice Morrison Waite's rule in Munn v. Illinois (1876): only when actual property is taken away without just compensation can there be a complaint. "We suppose that the defendant founds his right to continue to manufacture and sell beer solely and exclusively upon his supposed vested right to operate his brewery in undisturbed tranquility forever" according to Justice Daniel Valentine. Mugler could have no protection of liquor "which had not yet been brought into existence." Justice Valentine admitted that Mugler may have suffered great loss, "but such loss is not the direct and immediate result of such act." Such state legislation was indeed no different from natural disasters and fires in Justice Valentine's view: Mugler's loss was "simply the remote and consequential result of the act, and is wholly speculative and problematical," he concluded. "Such indirect and remote losses cannot render acts of the legislature unconstitutional." State of Kansas v. Peter Mugler, at 11. The Court, it seemed, existed only to shape and channel the various legislative outcomes that may appear.

[67] Powell v. Pennsylvania, 127 U.S. 678, at 681 (1888). It was not only an honest announcement to the consumer, but "a matter for congratulation on the part of the state that in the progress of science," which yielded a cheaper and equally nutritious food for the public, Justice Stephen Field wrote in dissent. "Thanks and rewards would seem to be the natural return for such a discovery, and the increase of the article by the use of the means thereby encouraged. But not so thought the legislature of the commonwealth of Pennsylvania." *Id.*, at 689. (Field, dissenting.) It was a rare instance of Field's recognition that the market can produce such fruits. But even if it did not – even if the butter was full of unhealthy materials and produced at great risk to the public or even to the food producers – it was clear that Field would have still abided by his principles, and his belief that the Court existed to ensure them.

[68] *Id.*, at 685.

[69] According to Thomas Cooley, this was but an extension of a state legislature's power over business – not only a regulation, but an authority that enabled it to squelch the business entirely. "An occupation opposed to public policy, like that of gaming, may be prohibited altogether," he wrote. The manufacture of liquor could be prohibited "because the evils are supposed to exceed any possible benefits," he wrote, "and the prohibition invades no principle of constitutional liberty," thus going against the principle in Munn, i.e.,

The existence of these cases, though, raises an important question: given how adamant the Court was about keeping the Fourteenth Amendment out of state business following the *Munn* doctrine, what inspired these people to continue pursuing a judicial decree on constitutional rights? If a service as essential as a grain elevator could not receive constitutional protection, why would it be granted to alcohol production in a dry state, or the distribution of fake butter? "In spite of this emphatic language," Charles Warren wrote, "council for the defendants, whether by reason of ignorance, [or] incorrigible optimism" continued to insist that there were certain constitutional guarantees that applied directly to them.[70] Whatever the short-term intent of the Fourteenth Amendment might have been, however "declaratory" and "corrective" its purposes, it gave a new constitutional reality that the Supreme Court could not escape; this, the Court slowly, carefully, and reluctantly admitted.

Justice John Marshall Harlan was the first to do this. He wrote in the *Mugler* opinion that there are, "of necessity, limits beyond which legislation cannot rightfully go," and that reaching beyond such boundaries could only destroy the whole point of American constitutionalism. "While every possible presumption is to be indulged in favor of the validity of a statute," he wrote, "the courts must obey the constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed." This placed the Court under a "solemn duty, to look at the *substance of things*, whenever they enter upon the inquiry [of] whether the legislature has transcended the limits of its authority." If the Amendment was going to live on in national life – if it was not a short-term provision after all – its application to the states needed to be all the more clear, even in cases where extensive police regulations were upheld. Hence, the rule, which would endure throughout the Lochner Era:

> [if] a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.[71]

There is an end for republican government, i.e., to preserve the right to keep and pursue property. But there is also a means, or a method by which a government might attain that purpose in the long-term life of a republic. Again, the means might go very far – in fact it might even surpass or violate the end, at least for a time. It might monopolize a slaughterhouse or limit grain elevator rates – or, more importantly, it might set the wages and hours of laborers by what it perceives to be fair and just. It was a question of constitutional judgment, though, to ask whether or not such extreme means were designed to meet the ends they sought to achieve, or if they were used for motives that might favor one class over another, and deprive citizens of basic rights. And that was precisely the sort of judgment that the Supreme Court was forced to make.

This was a fundamentally different rule from the Stephen-Field-style absolutism that preceded it. The Court could have issued the final say about police powers:

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that if the property involved is not completely destroyed, the individual can have no due process complaint. GENERAL PRINCIPLES OF CONSTITUTIONAL LAW, 257.

[70] Charles Warren, "The New 'Liberty' Under the Fourteenth Amendment," 38 HARVARD LAW REVIEW 4 (Feb. 1926): 436.

[71] Mugler, at 661. (Emphasis added.)

Peckham, Harlan, Fuller and later, George Sutherland, among others, might have consistently stood by the judicial philosophy of laissez-faire, and convinced the majority to strike down state regulations again and again; they might have sought to beat back the onslaught of progressivism with their pens, and issued multiple edicts about the duty to preserve liberty and forbid paternalism. But we find no such thing in their jurisprudence. In truth, they were not dogmatizing, but struggling to define the indefinable, or to forge a Fourteenth Amendment rule that met the demands of the document itself.

If the judiciary should become involved in such a way, the justification had to be complete. Justice Harlan admitted that this judicial task was one of "extreme delicacy" – a duty that indeed required them to "determine whether such enactments are within the powers granted to or possessed by the legislature." It was impossible, it seemed, to patch up every last hole in the Fourteenth Amendment's protections, as Justice Waite and the *Munn* majority believed they could do. Whether intentional or not, Amendment had broader purposes for the nation, and it was "the duty of the court" to declare whether or not a "state legislature, under the pretense of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights secured by the supreme law of the land."[72] This did not mean the Court would become a "perpetual censor"; Harlan seemed to know that there would be many cases like *Mugler* and *Powell* where the Court would uphold the law in question. His concern was that the Court would ensure the right trajectory of the legislation, and make the people know that there was indeed a *constitutional* reason for each regulatory law.[73]

How exactly the Court would do this, though, was not yet clear – and the uncertainty would only increase, as the Amendment's "declared" principles and its "corrective" method slowly declined. When was a state regulatory law beyond its proper end? When was it not? Those laws might address a legitimate grievance, and seek a popular solution; but it could do so in ways that had nothing to do with recovering the purpose of government when it had been forgotten or rejected.

VI. CONCLUSION: JUSTICE JOHN MARSHALL HARLAN'S ROAD NOT TAKEN

One of the more remarkable things about the unanimous opinion in *Brown v. Board of Education* in 1954 was the absence of any reference to Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* (1896), which the Court claimed to overturn. In the case so famous for bringing about a much-desired social equality, it did not appear that Chief Justice Earl Warren and his colleagues believed the constitution was

[72] Powell, at pp. 686-687.

[73] This view of Fourteenth Amendment jurisprudence seems to have reached Justice Stephen Field – at least for a time. Amid his usual laissez-faire absolutist objections to the *Powell* ruling, Field wrote that the statute "must have in its provisions some relation to the end to be accomplished. If that which is forbidden is not injurious to the health or morals of the people, if it does not disturb their peace or menace their safety, it derives no validity by calling it a police or health law." *Id*., at 695. (Field, dissenting.) If health was the goal, as the state of Pennsylvania claimed, then it must be demonstrated that the law was designed to achieve that goal, or else it was not a law. This appears to have been an anomaly of sorts in Justice Field's legal thinking, in the twilight of his career: such a concern about the need for republican legislation was never restated in his opinions for the Court. Field is frequently cited as the intellectual vanguard of the Lochner Era. But given the Supreme Court's willingness to apply Justice Harlan's ends-means test, this claim is difficult to maintain.

"colorblind," or that the "law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved."[74] Yet this was not a denial of precedent on their part. It was simply the recognition of how the Fourteenth Amendment had opened the way to a new jurisprudence based on developments in moral philosophy far more than the intent of written law itself.

The year *Brown* was handed down, Historian Howard Jay Graham made one final attempt to recover Justice Harlan's meaning, or at least remind his readers of the value of Harlan's republicanism. He claimed that the Amendment was "declaratory" of the original American proposition, in that it restated basic truths on which the nation had been founded, thus reviving them in positive law. It was therefore a means of assessing state police powers – and a congressional means of correcting them when they were in error, as they were with the variety of segregation laws. The passage of the Fourteenth Amendment "was one of the most subtle and evanescent of all the possible changes in law and government," Graham wrote. He even employed a theological term to make his point, calling the Amendment "a transubstantiation of values from the ethical to the civil and constitutional plane. It was a delicate, uneven and above all a continuing change – a 'constitutionalization' of the old law of nature. It modern terms, under our system of government, it meant that there was under way a large-scale shift from general, abstract, and really hypothetical rights to specific, concrete and enforceable constitutional ones." Such "transubstantiation" – the real presence of such an abstract truth appearing in positive law – made it inevitable that the judiciary would soon be quite involved in Fourteenth Amendment jurisprudence, as it was to a great extent by Graham's time. "Enlarged judicial responsibility was for the most part implicit in the antislavery generation's position," Graham wrote, "just as was the acceptance of evolving standards of public ethics and protection in matters pertaining to race." The framers of the Amendment, Congressman John Bingham in particular, "really were trying to convert ethical into political power, and moral into constitutional rights."[75]

But in this, Graham observed a whole new problem: that the written Constitution "was competing with, and must somehow be articulated with, another 'higher law.'"[76] This put tremendous strain on words and ideas; theoretical concepts simply did not belong in practical politics. The Fourteenth Amendment was the American truth incarnate, or the presence of abstract reality about "personhood," "life," "liberty," "equality," and, of course, "property." Despite the simplicity and clarity of these ideas, when it came to realizing them in political practice, "it was readily conceivable that thinking and communicating might break down entirely" in congressional deliberation as well as public discourse about how to apply those principles in practice – not to mention the truth of the principles themselves, in light of the onslaught of Darwinism and other progressive philosophies of government. Americans "were left without adequate points

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[74] *Plessy v. Ferguson*, 163 U.S. 537, at 559 (1898) (Harlan, dissenting.)

[75] Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STANFORD LAW REVIEW 1 (Dec. 1954): pp. 8-9.

[76] *Id.* 4. Justice Strong said this in his opinion for the Court in Ex Parte Virginia (1879), the companion case to Strauder v. West Virginia: the guarantees of the Fourteenth Amendment are "declaratory of rights, and tough in firm prohibitions, they imply immunities such as may be protected by congressional legislation." 100 U.S. 303, at 345.

of reference," he wrote; "they did not agree about what their old Constitution meant because they never squarely faced the problem of who decided what it meant."[77]

Justice Harlan maintained what thoughtful Americans had long understood: that the institutional design of a republican government, for all its flaws, was still the best possible means of both protecting basic rights and ensuring a neutral government. Legions of lawyers and judges, despite their public respect and good will, simply could not compete with political power; such power therefore had to be restricted in such a way that it could do that protecting on its own. It was by arranging the "several offices in such a manner as that each may be a check on the other," according to James Madison, "that the private interest of every individual may be a sentinel over the public rights"; and, of course, this was "requisite in the distribution of the supreme powers of the State" as well.[78]

Yet limitations alone were not the sole feature of republican government: there was also "energy." Checks and balances – ambition "made to counteract ambition" – would compel each institution toward its highest end, and make them actively fulfill the purpose of republican government. It was not the checks and limitations, but the energetic outcome that would ensure the "protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice," Alexander Hamilton wrote, and provide the "security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy."[79]

This was Justice Harlan's position, among many others, prior to the end of the nineteenth century. It was especially true of earlier justices on the Court who had "always given a broad and liberal construction to the constitution, so as to enable congress, by legislation, to enforce rights secured by that instrument," he wrote. "The legislation congress may enact, in execution of its power to enforce the provisions of this amendment, is that which is *appropriate to protect the right granted*." Reviewing such laws, therefore, meant determining if the means were *in*appropriate to the end, and of ensuring that the end was actually in view. "Under given circumstances, that which the court characterizes as corrective legislation might be sufficient," he wrote.[80] This was the view of his namesake Chief Justice John Marshall, who wrote that "[t]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the *means* by which the powers it confers are to be carried into execution,

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[77] *Id.* 38. This understanding of the Constitution was held by none other than Fredrick Douglass, who wrote in 1864, in the midst of the Civil War, "that the Federal Government was never, in its essence, anything but an anti-slavery government." Even without such thing as the Fourteenth Amendment, it was clear that if the nation "abolished slavery tomorrow… not a sentence of syllable of the Constitution need be altered." The original Constitution's spirit was mean to "give no claim, no sanction to the claim, of property in man," he wrote. "If in its origin slavery had any relation to the government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed," (i.e., speaking of the Constitution's three-fifths and fugitive slave clauses). AMERICAN POLITICAL RHETORIC: A READER, 256. Plainly, though, the view of Justice Marshall and others was that the structure under the scaffolding was not worth redeeming, and that it would have to be perpetually remade through the act of judicial review.

[78] James Madison, Federalist #51. In FEDERALIST PAPERS, 319.

[79] Federalist #71, in FEDERALIST PAPERS, pp. 421-422. Hamilton spoke here of the Chief Executive; but it was plain that the advantages of energy were true of good government as a whole. Energy is, after all, the active condition of the thing – a full realization of its proper function.

[80] Civil Rights Cases, at pp. 50-51. (Harlan, dissenting.) (Emphasis added.)

which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, – let it be within the scope of the constitution, – and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[81]

Obviously, though, such a proper function is a delicate thing, especially at the state level. It can be distorted and corrupted, and made to fall terribly short of the ends for which they were intended. Mass-democratic impulses can use the levers of local government for its advantage – against ethnic, religious, and indeed economic minorities. At the same time, such state police powers can move in a very good direction. Knowing this, it is also obvious what "correction" of that error means: it is a matter of ensuring that the power of government is designed to meet its purpose. Congress framed Fourteenth Amendment to do precisely that: to empower Congress to make states live up to their respective ends in the Reconstruction Era. But just as it fell to the Court to review those acts – to ensure that they did not surpass the means – it also fell to them to review such acts at the state level. Yet it assumed that the essential terms – "persons," "privileges and immunities," "due process," and "equal protection" – would go on meaning what they had always meant, and that the assumptions about the nature of republican government would not change in the future. Indeed, if Justice Harlan's understanding is correct, the Fourteenth Amendment should have fulfilled its role, and then gone the way Article VII on the ratification process, or the Third Amendment on quartering soldiers. But, given the nature of Section 1, as well as the onslaught of modernity, this could not last.

Whatever the Reconstruction Congress intended for the Fourteenth Amendment, Section 1 became in the minds of many an attempt to make might not only obey right, but somehow *become* right – to convert the "ought" into an "is." It was assumed, of course, that Congress would do what it had always done, and that such broad statements about fundamental rights would not disrupt the political process, nor cause the sort of philosophic conflicts that would call for intense judicial power in later years. It was only a matter of time, though, before Americans would begin to accept that the "ought" *really did* come from the "is" – the "is" of judicial ruling, rather than an act of Congress or a state legislature. Later twentieth century civil rights cases, as well as rulings on sexual and reproductive privacy, and the whole range of liberties guaranteed by the "incorporated" Bill of Rights, were, I propose, entirely because of the Fourteenth Amendment. It stated in fact what was supposed to only exist in theory; the purpose of the law became present within the law itself, where it never belonged. In this, it was the gateway to modern judicial review. In our own time, many of those rights would eventually detach themselves from the Constitution altogether, depending entirely on the Court's own will rather than the law. The Supreme Court in the late nineteenth century struggled to avoid such a duty. Its approach in *Munn v. Illinois* (1877), and subsequent cases, was but a crude attempt to sever itself from such a role; but, as the history of the Court shows us, it was a hopeless endeavor on their part, and it was only a matter of time before the Court would find itself forced to be the sole guardian of liberty. They would cease to find the fundamentals at the core of American political consciousness, or at the bedrock of our self-understanding, and find them instead as an expression of written law.

[81] McCulloch v. Maryland, 17 U.S. 316, at 421 (1819).

Like all written laws, it would not have life until it was enforced – and it would fall to the judicial branch to make that happen.[82]

[82] Alexander Bickel had much the same lament: "Our point of departure… has been that judicial review is the principled process of enunciating and applying certain enduring values of our society," he wrote. Again, the variety of values that would emerge from the words of the Fourteenth Amendment – a problem that would compound with the new "incorporation doctrine" – made it inevitable that the final decision would fall to the Supreme Court. "When values conflict – as they often will – the Court must proclaim one as overriding, or find an accommodation among them," he wrote. The root idea, which makes the Court even more essential than our democratic institutions, "is that the process is justified only if it injects into representative government something that is not already there; and that is principle, standards of action that derive their worth from a long view of society's spiritual as well as material needs and that command adherence whether or not the immediate outcome is expedient or agreeable." THE LEAST DANGEROUS BRANCH, 58. Since those "fundamentals" are not longer latent in the American mind, it falls to the Court to provide them. It is not a matter of getting them right, for Americans admit of no standard by which they may judge such rulings. Far more important is that the Court render some ruling – any ruling – and essentially create the fundamentals by which politics might operate.