

CIVIL LIBERTY IN THE AGE OF ENTERPRISE*

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IN THE half-century which separated 1870 from 1920—which has been styled the “Age of Enterprise”—American society was put through the wringer of the Industrial Revolution. American constitutional law, like all other institutions, was transformed to meet the exigencies of the new society, though some of the transformations were delayed until virtually the eve of World War II. Elsewhere I have examined the impact of the Age of Enterprise on the interpretation of the police power and the commerce power.¹ Here we turn to the examination of the place of civil liberties in the constitutional firmament of the Age of Enterprise.

There are continuities that can be traced, and discontinuities that can be identified, in the interpretation of the police power and the commerce power. The constitutional lawyer who in 1963 dilates on these topics is speaking essentially the same language as his predecessors in 1880 or 1920. But in the area of civil liberties there has been a qualitative jump between the views of our legal ancestors and those of our contemporaries. We can no more inquire how the Court in 1880 felt about civil liberties than we can ask how the physicists of that era responded to the theory of relativity. As I have argued at length in my recent study of civil liberties in modern America,² the whole notion of individual rights *enforceable against the community*, while traceable to Abolitionist political theory, is a twentieth century legal innovation.

This is not to say that American political thought in the eighteenth and nineteenth centuries did not endorse “civil rights.” It did, but these rights were defined in a very special, essentially majoritarian fashion as safeguards against oppressive *governmental* action, *i.e.*, legislative or executive “usurpations.” Americans had, of course, fought the British for their “civil rights” on precisely this ground: They demanded the right to define their own rights. But nowhere except among the persecuted

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¹ See Roche, *Entrepreneurial Liberty and the Fourteenth Amendment*, 4 *LABOR HISTORY* 3 (1963); Roche, *Entrepreneurial Liberty and the Commerce Power*, 30 *U. CHI. L. REV.* 680 (1963).

² ROCHE, *THE QUEST FOR THE DREAM: THE DEVELOPMENT OF CIVIL LIBERTIES IN MODERN AMERICA* (1963).

Abolitionists have I discovered any theoretical justification for minority rights per se, and, as far as I can discover, state bills of rights extended no protection to the individual nonconformist confronted by the wrath and retribution of his neighbors. Although there must be some decisions of this sort somewhere in the state reports, I have yet to find an early case in which a state appellate court reversed a conviction below on the basis of a state bill of rights. Typical, I suspect, was the 1838 decision of the Massachusetts Supreme Judicial Court in the appeal of Abner Kneeland,³ who asserted that his conviction for blasphemy violated the religious freedom guaranteed by article II of the Massachusetts Bill of Rights. Kneeland, who had denied the doctrine of the Virgin Birth, was told by Chief Justice Lemuel Shaw for the court that the blasphemy statute was no limitation on his religious liberty—it merely punished acts which had “a tendency to disturb the public peace.” Article II, in Shaw’s view, gave full protection to “honest” religious dissenters but none to those with “bad” motivation.⁴

Liberty, in short, was a condition conferred by the community at its discretion, usually only to “good” people who had earned their prerogatives. John Stuart Mill gave this philosophy its classic nineteenth century formulation in his essay *On Liberty* when, after extolling the individual’s absolute sovereignty over “his own body and mind,” he hastened to add:

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. . . . For the same reason we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage. The early difficulties in the way of spontaneous progress are so great that there is seldom any choice of means for overcoming them; and a ruler full of the spirit of improvement is warranted in the use of any expedients that will attain an end perhaps otherwise unattainable. *Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement and the means justified by actually effecting that end. Liberty, as a principle, has no application to any state of things exterior to the time when mankind have become capable of being improved by free and equal discussion.* Until then, there is nothing for them but implicit obedience⁵

3 *Commonwealth v. Kneeland*, 37 Mass. 206 (1838). See also LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 43-58 (1957).

4 37 Mass. at 220.

5 MILL, *ON LIBERTY* 13-14 (Library of Liberal Arts ed. 1956). (Emphasis added.)

Implicit in this statement—which those who praise Mill as the tribune of the “open society” have curiously ignored—is a jurisdictional grant: It is obviously the right of those who exercise liberty to determine when others shall graduate from despotism to this blissful state. To put it in the American context, it was the right of the community to decide when the Irish, the Jews, the Negroes, the industrial workers, the Mormons, or whatever deviant group, should be admitted to membership. To return for a moment to the blasphemous Abner Kneeland, Chief Justice Shaw did point out that the blasphemy statute had no relevance to a “simple and sincere avowal of a disbelief in the existence and attributes of God”⁶—it constrained only the activities of *insincere* dissenters, *i.e.*, Bad Men. When the American Legion argues today that Communists should be excluded from the coverage of the Bill of Rights because the party does not believe in civil rights, it is simply formulating in a contemporary context the standard eighteenth and nineteenth century maxim: Bad Men Have No Rights. It was Jefferson, anticipating Joseph R. McCarthy, who announced in connection with the illegal arrest of the “Burr Conspirators” that, whatever the constitutional niceties, Burr had it coming, and that the public wanted no mercy shown to “traitors.”⁷

This is the background which must be appreciated if one is to understand the Supreme Court's attitude towards civil liberties in the period under analysis. Perhaps a few words are also in order on the character of the Court and the general ideological position which it supported, particularly in view of the fact that my views differ rather sharply from many standard formulations.

A number of commentators on American constitutional law have, in their explorations of this period, discovered a “conservative” bias in the Supreme Court.⁸ If this elusive designation is used in a rough and ready, essentially pejorative fashion to describe judicial favoritism towards the business elite and dedication to the theology of entrepreneurial liberty, there is no point in stirring up a terminological dispute. But if, on the other hand, the word “conservative” is employed in any meaningful ideological sense to suggest that the judiciary was inspired by a Burkean conception of history or a deep attachment to the principles of community, the usage is absurd. A perverse logician using the same set of

⁶ 37 Mass. at 220.

⁷ I am indebted to Leonard Levy for showing me his superb detailed study of Jefferson's handling of the Burr Conspiracy which became a chapter in his recent book, *JEFFERSON AND CIVIL LIBERTIES* (1963). See also ABERNATHY, *THE BURR CONSPIRACY* (1954).

⁸ See JACOBS, *LAW WRITERS AND THE COURTS* (1954); McCLOSKEY, *AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE* (1951); PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* (1960); TWISS, *LAWYERS AND THE CONSTITUTION* (1942).

facts could easily argue that the Court, and those who shared the judicial viewpoint, were engaged in a destructive and fundamentally "radical" assault on the underlying principles of American political theory. In the name of what Karl Marx called the "pig philosophy," they blasted away such antique notions as the obligation of the individual to the community (the Christian concept of "stewardship"), the subservience of entrepreneurial ambition to the police power, and the passion for equality. From this angle of vision, the defenders of the police power are converted into the "conservatives"—Burke's "little platoons"—in their unsuccessful attempt to hold back the disruptive forces of entrepreneurial aggrandizement.

On the abstract level, both positions can be defended indefinitely; this, indeed, is what gives abstract argument its charm. But in concrete terms, neither is viable, that is, supported by a coherent body of empirical data. The problem has arisen from the employment of such terms as "conservative," "radical," "liberal," or "progressive" in a sense fundamentally European: Categories which may have meaning in the analysis of European phenomena simply have not survived transplantation to the American scene. In fact, every attempt to utilize them in the American context has led to an ideological shambles in which analysts, hopelessly committed to their deductive categories, have saved the day for Theory by improvising such emergency rubrics as "conservative-liberal" or "moderate progressive." Nowhere has the empty character of these categories been more effectively demonstrated than in the investigation of judicial behavior.

Take Mr. Justice Harlan, for example: While Harlan was "progressive," if not "radical," in his dour view of monopolies and "trusts," his dissent in *Stone v. Farmers Loan & Trust Co.*⁹ and his opinion of the Court in *Smythe v. Ames*¹⁰ put him high on the list of "reactionary" enemies of the police power. But when two more variables are thrown in, identification in any ideological sense becomes impossible: How does one reconcile Harlan's solitary and magnificent defense of the deserted Negro with his bitter prejudice against trade unions and their members? There are, of course, explanations, but they have to be sought in Harlan's biography and in the personal scale of social, economic and political value priorities that he developed.¹¹ Mr. Justice Stephen Field was probably about as close to being an ideologue as any Justice has ever been, at least before Frank Murphy, but even Field knew when to rise

⁹ 116 U.S. 307, 337 (1886).

¹⁰ 169 U.S. 466 (1898).

¹¹ See Westin, *John Marshall Harlan and the Constitutional Rights of Negroes*, 66 YALE L.J. 637 (1957). Harlan's attitude towards trade unions suffuses his opinion in *Adair v. United States*, 208 U.S. 161 (1908).

above principle. The Justice, who insisted that the fourteenth amendment had been designed to nationalize liberty, and who could work himself into a frenzy over the plight of butchers deprived of their employment, was totally unmoved by efforts to enforce the equal protection clause on behalf of the Negroes¹² or the due process clause in aid of the convicted Haymarket anarchists.¹³ In short, to employ such designations as "conservative" or "liberal" is completely misleading (unless one simply means by them "good" and "bad," in whichever order) in its pretension that there are coherent philosophical patterns. These terms have been outlawed from this analysis.

The modern reader may be startled by some of the material included in this essay—the *Income Tax* decisions, for example—and note the absence of much that he normally includes under the contemporary heading of civil liberty. Perhaps the point should be reemphasized that each epoch establishes its own definitions and the proper concern of the historian is to examine the constitutional status of civil liberties as the latter were defined in the legal and political lexicons of that time. As was noted earlier, what we today think of as civil liberties largely date from definitions adopted in the 1930s; the very absence of a civil rights tradition was a distinctive characteristic of the period before World War I. True, there were groups which fought for their own rights—radicals, suffragettes, trade unionists, Jews, Negroes, etc., but they did so on an *ad hoc* basis. The old Abolitionist dream of basic natural rights guaranteed by national power collapsed among the debris of Reconstruction, and among civil libertarians, as elsewhere, the guiding maxim was *sauve qui peut*. Finally, for reasons which I have examined at length elsewhere,¹⁴ I consider World War I to be the watershed between the "old America" and the "new" with respect to the development of a civil liberties jurisprudence; I have therefore excluded from this study the civil liberties problems that proliferated with American involvement in the First World War.

Let us begin with the evisceration of the fourteenth amendment and the Civil Rights Acts. We cannot take the time here to explore the logic of the *Civil Rights Cases*¹⁵ in which the Supreme Court delivered the *coup de grace* to the effort to protect the Negro from race discrimination. By giving an extremely narrow interpretation to the fourteenth amend-

¹² See Mr. Justice Field's opinions in *Ex parte Virginia*, 100 U.S. 339, 349 (1879); *Virginia v. Rives*, 100 U.S. 313, 324 (1879); *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879).

¹³ *Spies v. Illinois*, 123 U.S. 131 (1887); DAVID, *THE HISTORY OF THE HAYMARKET AFFAIR* 375-88 (2d ed. 1958).

¹⁴ ROCHE, *op. cit. supra* note 2.

¹⁵ 109 U.S. 3 (1883).

ment, Justice Bradley (with the former slaveholder Justice Harlan alone dissenting¹⁶) ruled that only formal state action of a discriminatory character fell within the amendment's interdict. Consequently, "private" racial discrimination by railroads, theatres, hotels, and the like was held to be a matter within the sole jurisdiction of the states. Bradley suggested that to rule otherwise would make the Negroes favorites of the national government and would discriminate against white men, who presumably were in need of equal treatment.

The Bradley opinion has to be understood as a period-piece. It was grossly unhistorical: The framers of the fourteenth amendment were attempting to provide constitutional certainty for the Civil Rights Act of 1866 which penalized racial discrimination by "custom" as well as by "law."¹⁷ In an ironic sense, Bradley's opinion echoed President Johnson's veto of the Civil Rights Act, which was promptly overridden by two-thirds of both houses of Congress.¹⁸ And it was Johnson's veto, and the fear that the good work might be undone by future presidents and legislatures where two-thirds could not be mustered, that led to the passage of the fourteenth amendment.¹⁹ Fundamentally, Justice Bradley declared the fourteenth amendment, as originally conceived, to be unconstitutional.

It is worth noting that Bradley's decision here marked a sharp break with his earlier construction of the purpose of the fourteenth amendment and the reach of the civil rights statutes. In December, 1870, Bradley's Circuit Judge (later Justice) William Woods wrote him at length on the constitutional problems involved in a suit by the United States under the Enforcement Act of May 31, 1870. An Alabama mob led by Hall, it was charged, "did unlawfully and feloniously band and conspire together, with intent to injure, oppress, threaten and intimidate" a group of Negroes "with intent to prevent and hinder their free exercise and enjoyment of the right of freedom of speech" and "freedom of assembly," rights which were "granted and secured to them by the constitution of the United States." Hall filed a demurrer on constitutional grounds, claiming that "the matters charged in said counts are not in violation of any right of privilege granted or secured" by the Constitution since neither the fourteenth amendment nor the Civil Rights Acts could legitimately penalize private action.

Woods described the situation to Bradley in detail in a letter dated December 24, 1870²⁰: A peaceful Republican gathering of Negroes en-

¹⁶ *Id.* at 26.

¹⁷ 14 Stat. 27 (1866).

¹⁸ See Johnson's veto message of March 27, 1866, in 6 RICHARDSON, MESSAGES AND PAPERS 405 (1897).

¹⁹ MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 326-36 (1960).

²⁰ The following correspondence is among the Bradley Papers in the New Jersey

gaged in "political discussion" was broken up by a gang of armed whites who had killed two and wounded over fifty. The authority of the state of Alabama, however, had nowhere been involved, and Woods queried Bradley, in essence, whether jurisdiction existed over private action as distinct from state action. On January 3, 1871, Bradley replied that "viewed simply as a riot, it was an offense against the municipal law only; but viewed as a riot to intimidate persons and prevent them from exercising the right of suffrage, guaranteed to them by the fifteenth amendment to the Constitution, it was a violation [of national law]." ²¹ Woods was not satisfied and again raised the subject with Bradley inquiring whether the riot was a federal offense "when committed simply for that purpose [to break up the Negro gathering], without any definite intent to prevent the exercise of the right of suffrage." ²²

Replying, Bradley came down vigorously in support of national jurisdiction. Writing on March 12, 1871, the Justice informed Woods that under the fourteenth amendment Congress could protect fundamental rights such as speech and assembly "against unfriendly or insufficient state legislation." ²³ Treating these basic rights as privileges and immunities of national citizenship, Bradley continued:

Therefore, to guard against this invasion of the citizen's fundamental rights, and to ensure their adequate protection, *as well against state legislation as state inaction or incompetency*, the amendment [fourteenth] gives Congress power to enforce the amendment by appropriate legislation. And as it would be unseemly for Congress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses and protect the rights which the amendment secures. The extent to which Congress shall exercise this power must depend on its discretion in view of the circumstances of each case. If the exercise of it in any case should seem to interfere with the domestic affairs of a state, it must be remembered that it is for the purpose of protecting federal rights: and these *must be protected whether it interferes with domestic laws or domestic administration of laws.* ²⁴

In May, 1871, Judge Woods issued his opinion in *United States v.*

Historical Society. I am indebted to C. Peter Magrath of Brown University for calling this material to my attention. See also MAGRATH, MORRISON R. WAITE 119-23 (1963).

²¹ Letter from Bradley to Woods (draft), Washington, D.C., January 3, 1871.

²² Letter from Woods to Bradley, March, 1871.

²³ Letter from Bradley to Woods (draft), Washington, D.C., March 12, 1871.

²⁴ *Ibid.* (Emphasis added.)

Hall,²⁵ overruling the demurrer and sustaining the jurisdiction of the federal government under the fourteenth amendment and the Enforcement Act of 1870. His views were practically identical with the formulations in Bradley's letter. Freedom of speech and assembly were privileges and immunities of national citizenship and consequently:

[C]ongress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation, for the fourteenth amendment not only prohibits the making or enforcement of laws which shall abridge the privileges of the citizen, but prohibits the states from denying . . . the equal protection of the laws. Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as the enactment of such laws. Therefore, to guard against the invasion of the citizen's fundamental rights, and to insure their adequate protection, as well against state legislation as state inaction, or incompetency, the amendment gives congress the power to enforce its provisions by appropriate legislation. And as it would be unseemly for congress . . . [the remainder of Bradley's formulation quoted above follows].²⁶

Although Bradley, in a different context, endorsed this nationalizing interpretation of the privileges and immunities clause by joining the Field dissent, and elaborated on the due process theme in his own dissent in the *Slaughter-House Cases*,²⁷ in the decade that followed he came about full circle. As he put it to a friend, he was "*seeking the truth*" rather than "dogmatically laying down opinions,"²⁸ and beginning with his circuit opinion in the *Cruikshank* case,²⁹ he moved perceptibly towards the position, incorporated in his decision in the *Civil Rights Cases*,³⁰ that congressional power limited only formal state action. In a later comment on one of the letters cited here he noted retrospectively that his views "were much modified by subsequent reflection, so far as relates to the power of Congress to pass laws for enforcing social equality between the races."³¹

²⁵ 26 Fed. Cas. 79 (No. 15,282) (C.C.S.D. Ala. 1871).

²⁶ *Id.* at 81-82.

²⁷ 83 U.S. (16 Wall.) 36, 111 (1872).

²⁸ Letter from Bradley to Frederick Frelinghuysen (draft), Stowe, Vt., July 19, 1874.

²⁹ *United States v. Cruikshank*, 25 Fed. Cas. 707 (No. 14,897) (C.C.D. La. 1874).

³⁰ 109 U.S. 3 (1883).

³¹ Noted in letter to Frelinghuysen, *supra* note 28.

"Social equality" was hardly a real issue in the 1870s; the fact of the matter was that by 1883, the Negro had been left to his fate by Congress, the President, and the American (white) people.³² All Justice Bradley did was incorporate the realities of the day into the fourteenth amendment. Moreover, echoes of "Black Reconstruction" can be heard in his opinion; indeed, right down to our own time the reputation of the Southern Reconstruction legislatures, in which the Negroes were often manipulated by rascally "carpetbaggers," has been one featuring egregious corruption. Though an objective historical observer might have difficulty deciding whether these governments were more corrupt than their "lily-white" successors, or than those in the northern states at the same time,³³ Bradley shared the common view that the white man had been discriminated against by the civil rights laws with unfortunate results. He demanded fair play for the white population.

"Private acts" (though in fact they were enforced by the police power of the state) were thus eliminated from national jurisdiction. Even the action of a railroad, which Bradley in the *Granger* cases³⁴ had agreed was "affected with a public interest," being in effect a quasi-public corporation, was a "private" decision so far as racial discrimination was concerned. Thus a railroad became a schizophrenic entity: Some of its decisions were public (rates and schedules, for example) and some private (racial segregation). By these same paradoxical rules, a state law banning racial segregation on interstate carriers was unconstitutional as a burden on interstate commerce,³⁵ while a similar law requiring segregation was upheld as a legitimate police regulation.³⁶

As it survived the *Civil Rights Cases*, the fourteenth amendment limited only state action depriving individuals of due process or equal protection of the laws. Occasionally the Court did find some state action, for example, a law barring Negroes from juries,³⁷ to be unconstitutional, but the characteristic pattern of racial discrimination was left undisturbed by the development of two subsidiary propositions. First, "state action" was generally defined in a very narrow legalistic fashion as action taken in pursuance of state law: The fact that no Negro had ever been called to jury duty was, for example, no proof as far as the Court was concerned that Negroes were being discriminated against providing no law

³² See WOODWARD, *REUNION AND REACTION* (1951).

³³ See JOSEPHSON, *ROBBER BARONS* (1934); JOSEPHSON, *THE POLITICOS* (1938).

³⁴ *Munn v. Illinois*, 94 U.S. 113 (1876).

³⁵ *Hall v. DeCuir*, 95 U.S. 485 (1877).

³⁶ *Chiles v. C. & O. Ry.*, 218 U.S. 71 (1910).

³⁷ *Neal v. Delaware*, 103 U.S. 370 (1880). This was a fifteenth amendment case: Delaware required that jurors be voters and limited the vote to whites; *Strauder v. West Virginia*, 100 U.S. 303 (1880).

forbade their serving on juries.³⁸ Moreover, if an official act of discrimination was technically in violation of a state constitution or statute, it was not considered "state action" on the ground that a state cannot be held responsible for the illegal actions of its agents.³⁹

In the second case, the Court began in 1882 the process of redefining "equal protection" which culminated, with *Plessy v. Ferguson*,⁴⁰ in constitutional sanction for "Jim Crow" laws in 1896. Although seldom emphasized by commentators, the decision in *Pace v. Alabama*⁴¹ was in *loco parentis* to the "separate but equal rule" of *Plessy*. At issue were two Alabama laws: The first punishing fornication or adultery between persons of the same race as a misdemeanor (100 dollar fine or six months in jail); the second essentially making it a felony for persons of different races to intermarry or live in adultery or fornication with each other (two to seven years in jail). A Negro man and a white woman, who had been sentenced to two years in prison, appealed their sentences on the ground that the differential treatment prescribed by statute for interracial sexual relations was state action denying them equal protection of the laws. Note that the law penalized intermarriage on the same basis as illicit relations.

Justice Field, for a unanimous Court, found no difficulty in sustaining the Alabama Code. A man may have had a natural right to follow his calling, in Field's view, but he had no equivalent right to choose his wife free from state control. The laws under attack did not discriminate against Negroes, observed Field, any more than they did against whites: "The two sections of the Code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the other prescribes a punishment for an offense which can only be committed when the two sexes are of different races. There is in neither section any discrimination against either race."⁴² After all, Field concluded, both the Negro and the white woman received the same punishment. For some reason he did not seem to feel that the penalization of intermarriage violated "freedom of contract."

While Field's opinion was brief, its import for the future was enormous. In less than three pages, the Justice, his eight brethren concurring, ef-

³⁸ *Virginia v. Rives*, 100 U.S. 313 (1880). But discrimination by a state judge, even in the absence of a statute, was held to be state action, *Ex parte Virginia*, 100 U.S. 339 (1880).

³⁹ See the discussion of this proposition by Frankfurter, J. dissenting in *Monroe v. Pape*, 365 U.S. 167, 202 (1961).

⁴⁰ 163 U.S. 537 (1896).

⁴¹ 106 U.S. 583 (1883).

⁴² *Id.* at 585.

fectively torpedoed the equal protection clause. Even Harlan could not dissent in this instance; miscegenation probably hit him at his weakest point: his fundamentally southern social and religious convictions about the distinctiveness of the "races."⁴³ What *Pace v. Alabama* did was re-establish the legal category "Negro"—it now became legitimate for the states to differentiate formally between Negroes and whites as they did between men and women, or aliens and citizens. While the purpose of the equal protection clause had been to eliminate from American law the category "Negro"—its authors were infuriated by the "Black Codes"—the Court now told the states that "race" was a valid basis for differentiation among its citizens. Of course, there were potential limits. Under the equal protection clause every category had to be justified in terms of its purpose: A state would have no difficulty forbidding sale of intoxicants to minors, but would run into difficulties if sales were forbidden to blue-eyed citizens. There had to be, in other words, a reasonable connection between the end and the means, and the category had to be discrete.

But in the case of the category "Negro" few limitations were discovered. Recall that in *Pace v. Alabama* the Court implicitly held that the state could, in the effort to maintain public morality, treat marriage between a white and a Negro as if it were adultery or fornication. In short, the "race" of one partner could convert a lawful relationship into a felony. Moreover, in defiance of the history of race relations in the South, "Negro" was treated as a homogeneous category; white supremacists apparently saw nothing illogical in defining as a Negro anyone with one Negro grandparent, or great-grandparent in some states, though when the odds get up to seven to one, some question arises as to which is the "master race." Even when, as in Alabama, one Negro grandparent was decisive, the category was a bit eccentric; it was rather as if a state legislature had defined a basket of apples as a basket containing at least twenty-five per cent apples. This problem, however, never troubled either southern politicians or the courts.

The southern Negro, poor and landless, "knew very well that immediate, daily necessities came first—land, mules, plows, food, and clothes, all of which had to be got from a white man who oftener than not had too little himself."⁴⁴ Thus, in terms of the social system, the Negro, even at the zenith of "Radical Reconstruction," never achieved equality. From the viewpoint of the southern white community, the Civil Rights Acts were a marginal harassment; Union troops were a problem, but the last blue contingent went North in 1877. With the

⁴³ As pointed out in Westin, *op. cit. supra* note 11, at 673.

⁴⁴ WOODWARD, *THE ORIGINS OF THE NEW SOUTH* 209 (1951).

outlawing of "Black Codes," informal measures of social control, which were no less effective because informal, were utilized to the same end. Then, in the late '80s and early '90s, began the flood of "Jim Crow" legislation, laws based on the principle enunciated in *Pace v. Alabama* that Negroes were different from whites and that this distinction justified differential treatment. Curiously, as Professor C. Vann Woodward has noted, "the barriers of racial discrimination mounted in direct ratio with the tide of political democracy among whites. In fact, an increase of Jim Crow laws upon the statute books of a state is almost an accurate index of the decline of the reactionary regimes of the Redeemers and triumph of white democratic movements."⁴⁵ The Redeemers had used the Negroes as pawns in their maintenance of political power; now the Negroes were to be punished for their cardinal sin—helplessness.

The classic "Jim Crow" law was an enactment requiring racial segregation in railroad and tram cars. In order to understand the importance of the Supreme Court's decision in *Plessy v. Ferguson*,⁴⁶ which provided the constitutional foundation for racial discrimination until 1954, let us review the principle involved. When a state required that railroads provide facilities for whites and Negroes on a separate basis, it was establishing a classification on the basis of "race." For this classification to be sustained in the face of the equal protection clause, it had to be demonstrated that separation based on "race" was a reasonable method of attaining a legitimate legislative goal: the maintenance of public health, morals and welfare. Assuming for purposes of argument that some special "scientific" rationale could be introduced to justify laws against intermarriage, there would be no necessary carryover to transportation. One can require, for example, that men and women use different dressing rooms at the beach without insisting that they swim at different places. In short, the emotionally charged problem of sexual relations present in *Pace v. Alabama* was absent in *Plessy v. Ferguson*. If the Court sustained the statute, it would be hard to conceive of any social, economic or political relationship in which segregation could not be legally required.

In 1890, Louisiana passed a "Jim Crow" transportation law. One Homer Adolph Plessy was arrested for attempting to enter the coach reserved for whites and refusing to leave when ordered to do so. There is an air of unreality about the whole episode: Plessy was one-eighth Negro and insisted that he was "white." Like his French contemporary Captain Dreyfus, who was something of an anti-Semite, Plessy was hardly a fighter for the rights of man. The Louisiana courts declared him a Negro and he challenged the constitutionality of the statute.

⁴⁵ *Id.* at 211.

⁴⁶ 163 U.S. 537 (1896).

Dividing seven to one, the Supreme Court upheld the Louisiana enactment.

Justice Henry B. Brown wrote the opinion of the Court. Early in his statement, he put the holding in a nutshell: "A statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races . . ." ⁴⁷ After examining precedents and noting that the state legislatures must be permitted a large area of reasonable discretion in their police power enactments—a latitude, it might be recalled, the Court was reluctant to grant in the economic sphere—Brown came to the heart of his opinion. The whole difficulty, he averred, arose from Negro hypersensitivity:

We consider the underlying fallacy of [Plessy's] argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. ⁴⁸

As the clincher to this argument, Brown observed that if the Negroes controlled state legislatures and passed "precisely similar" enactments, white men would not feel they had been assigned an inferior position.

This brings us to Brown's sociology which needs to be set out at some length in his own words:

The argument [against the segregation statute] also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality, it must be the result of mutual affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals *Legislation is powerless to eradicate racial instincts* or to abolish distinctions based upon physical differences. . . . If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane. ⁴⁹

Although it might have come as a shock to Justice Brown, this opinion is an interesting theoretical statement; on a practical and somewhat

⁴⁷ *Id.* at 543.

⁴⁸ *Id.* at 551.

⁴⁹ *Id.* at 551-52. (Emphasis added.) Concretely, Brown thus held the statute to be a not unreasonable technique of foreclosing social conflict and maintaining the public peace.

foggy level, it was a combination of the leading scientific views of the time with Aristotle's conception of proportional equality.

It was in precisely this period that racial theories reached their apogee in the United States; among biologists, sociologists and social anthropologists as well as journalists and political commentators, the assumptions of Baron Gobineau and Houston Chamberlain—that races were discrete entities and that the white or “Caucasian” race was superior to the others—were taken for granted. The southern politician, of course, needed no lofty theoretical justification for white supremacy—he knew what he wanted and really did not care how the scientists, journalists or Supreme Court Justices rationalized his attainment of racial segregation. But the better elements in the community needed a respectable intellectual base to justify discrimination, and the “social science” of the time supplied the requisite foundation.⁵⁰

Negroes, then, were biologically different from whites, essentially members of a different species, set apart by their “racial instincts.” Thus, in the same fashion that an intelligent zoo keeper separates the lions and the elephants in different compounds, the Supreme Court endorsed the proposition that biologically distinct Negroes and whites need not be given identical treatment. What was good for Negroes was not necessarily good for whites, any more than a lion would necessarily thrive on an elephant's diet. Fundamental to this view, though not explicit in Brown's opinion, was the further corollary that the whites were more advanced, more “civilized,” than the Negroes, that they were several stages higher in the evolutionary scale. Incidentally, this “science” also supplied a good genetic rationale for anti-miscegenation laws. As late as 1955 the Virginia Supreme Court justified an anti-miscegenation statute as an effort to “preserve the racial integrity” of the state's inhabitants and to “regulate the marriage relation so that it will not have a mongrel breed of citizens.”⁵¹

Once the proposition that Negroes were in essence a distinct biological category had been established (by *ipse dixit*), the principle of proportional equality could come into play. Equality, according to Aristotle and a steady stream of theorists since, is treatment according to merits or desserts. For Aristotle, however, a man's merits were a function of his potentialities, not of the color of his skin or the color of one great-grandparent's skin. Now merit became a function of membership in a racial category, and the “Negro Race” had no claim to treatment in the laws of the United States identical with that accorded members of the

⁵⁰ See SPITZ, PATTERNS OF ANTI-DEMOCRATIC THOUGHT 137-62 (1948).

⁵¹ *Naim v. Naim*, 197 Va. 80, 90, 87 S.E.2d 749, 756, *vacated and remanded*, 350 U.S. 891 (1955), *reaffirmed*, 197 Va. 734, 90 S.E.2d 849, *appeal denied*, 350 U.S. 985 (1956).

"Caucasian Race." While the analogy is perhaps banal, recall that the zoo keeper does not "discriminate" against the elephant when he feeds him hay instead of the red meat beloved by lions. On this basis, Justice Brown could blandly and quite sincerely state that segregated treatment for Negroes was only a consequence of their distinctiveness and was in no way a "badge of inferiority." Only a psychotic elephant would complain because he got no steak.

Justice Harlan wrote what many consider his finest dissent in *Plessy v. Ferguson*. It is an interesting opinion because Harlan subscribed completely to the "Negro Race" theory, but refused to admit the relevance of this "social science" to American constitutional law. "The white race," said Harlan, "deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not that it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty."⁵² The Constitution, Harlan thundered, "is color-blind"; the former colonel of Kentucky volunteers in Lincoln's army effectively charged the Court with overruling the verdict of Appomattox. He asserted bluntly that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*."⁵³ The nub of his position was that the Court had confused social with constitutional equality—the first was not at issue in the case, he said, since

[S]ocial equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same race sit by each other in a street car

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. . . . But by the statute in question a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union . . . are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.⁵⁴

"Every true man has pride of race," observed the Justice, "but I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved."⁵⁵

Equal protection of the laws was in this fashion glossed by the Supreme

⁵² 163 U.S. at 559.

⁵³ *Ibid.*

⁵⁴ *Id.* at 561.

⁵⁵ *Id.* at 554.

Court to eliminate juridical equality of Negroes; essentially a state fulfilled the requirements of the fourteenth amendment if it treated all whites equally, all Negroes equally and granted "substantial equality" to Negroes vis-à-vis whites. The Court's holding unloosed a flood of "Jim Crow" lawmaking in all the southern, and even some of the northern, states, a flood which ended by submerging every aspect of day to day life under the protocol of segregation. As C. Vann Woodward has shown, some ingenious legislator in one state would devise a new law, providing segregation coverage for some area theretofore overlooked, and it would rapidly spread from state to state in a wave of mimicry.⁵⁶ It seems to have become a species of nasty game—and one totally lacking a logical rationale. The same Negro woman who prepared a white family's meals and all but raised its children would be compelled to use the "Colored" drinking fountain, the "Colored" wash rooms and sit in the back of the trolley to keep the white population uncontaminated. But few attempted to defend the system logically, and it did seem to keep the "Red Necks," or the "Crackers"—the poor rural whites—happy and secure in a status at least one notch above the bottom.

The Negroes were in neither position nor mood to fight back. Their greatest leader, Booker T. Washington, the Negro prototype of Horatio Alger, was a conciliator who urged his fellows to accept the limitations established by the white community and work within them. Washington has been accused by later Negro leaders of being an "Uncle Tom," a cringing suppliant at the white man's table, but the more one studies those terrible years, the more he wonders what alternative Washington had if he wanted to stay in the South. There is a curious parallel here between Washington and Samuel Gompers of the American Federation of Labor, who was likewise condemned by impatient radicals as a "class collaborationist": When the odds against success reach a certain point, there is often a need for the courage to refuse to be drawn into a fight. So Washington accepted apartheid and set to work at Tuskegee Institute to develop a Negro elite, men who hopefully in the next generation could provide the anomic Negro community with leadership of a different sort than that supplied by preachers, who tended to be the foci of existing social organization. As Washington appraised the situation, the alternative to appeasement was the lynch mob and the race riot, and the events of those years should lead anyone to pause before pronouncing a malediction on the man and his message.

Indeed, a case can be made that from the viewpoint of the Negro, the picture got worse rather than better as the United States moved into the twentieth century. For one thing, perhaps under the impact of the racial

⁵⁶ WOODWARD, *THE STRANGE CAREER OF JIM CROW* (rev. ed. 1957).

dogmas which were so popular, the number of white men who were concerned about the cause of Negro rights went into decline after the Civil War. As the old radicals—Charles Sumner, Wendell Phillips, George W. Julian, William Lloyd Garrison—died, there were no replacements. The *reductio ad absurdum* probably came in 1903 when the program of the Louisiana Socialist Party came out for “separation of the black and white races into separate communities, each race to have charge of its own affairs.”⁵⁷ Eugene Victor Debs, the tribune of American socialism, rejected this leftwing version of apartheid in favor of full equality, but the Socialists put little emphasis on race problems; the latter were merely manifestations of a fundamental social malaise and could be eliminated only at the source, by transforming the United States from a capitalist oligarchy into a socialist cooperative commonwealth.⁵⁸

A second cause of Negro discouragement was the spread of southern white racial mores into the North and West, a phenomenon which accelerated with World War I and the concomitant exodus of Negroes from southern farms to northern factories, or to service jobs in factory towns. The early years of the new century were racked by a series of savage race riots; significantly they took place in cities on both sides of the Mason-Dixon Line, the two worst being in Atlanta (1906) and Springfield, Illinois (1908). According to John Hope Franklin, more than a hundred Negroes were lynched in the first year of the century and “before the outbreak of World War I the number . . . had soared to more than 1100.”⁵⁹ Symptomatic of the rising pressure was the Kentucky legislature’s assault in 1904 on Berea College and other unsegregated private schools in the state. The legislative instinct was probably sound. Berea, with its abolitionist heritage, was precisely the sort of school where able young Negroes could get the wrong ideas; and in an untheoretical way, the legislature moved to suppress a source of ideological infection in the Negro community. Let the colored youngsters go to agricultural schools on a segregated basis, but keep them out of a mixed intellectual atmosphere dedicated to Christian principles. The legislators may have reflected that Christianity had been subversive on occasions.

Berea College was fined 1000 dollars for violating the 1904 statute, and in 1908 the case came before the United States Supreme Court for final determination. The right of the states to segregate public educational facilities had been covertly sustained by Harlan for the Court in 1899 in *Cumming v. Board of Education*.⁶⁰ In meticulous legal terms, Harlan

⁵⁷ Cited in KIPNIS, *THE AMERICAN SOCIALIST MOVEMENT, 1897-1912*, 131 (1952).

⁵⁸ *Id.* at 131-36.

⁵⁹ FRANKLIN, *FROM SLAVERY TO FREEDOM* 432 (1947).

⁶⁰ 175 U.S. 528 (1899).

ducked the substantive issue: The validity of "separate but equal" educational institutions, he observed lamely, was not raised in the pleadings and was therefore not before the Court.⁶¹ In fact, it does not appear that Harlan considered integrated schools as part of the civil rights package. If he had, one can predict that he would have gotten to the merits over any number of technical, procedural hurdles.⁶² The practical consequence of the *Cumming* case was a *de facto* validation of public school segregation. But in *Berea College v. Kentucky*,⁶³ the situation was different in Harlan's eyes, though not in the view of his judicial brethren, who disposed of the litigation on a narrow basis.

Berea College was a decision with interesting dimensions. In the first place, Berea argued that the Kentucky statute deprived it of the corporate right to do business on its own terms, that is, Berea invoked the blessing of the spirit of entrepreneurial liberty. Indeed, counsel for Berea relied heavily on both *In re Jacobs*⁶⁴ and *Lochner v. New York*⁶⁵ to support their contention that the Kentucky enactment was not *really* a police power action, but was an encroachment on contractual freedom disguised as a police measure. But while the lawyers did a noble job of trying to fit the case within the vested rights tradition—they even cited *Dartmouth College*⁶⁶—Justice David Brewer suddenly developed a deep affection for the police power. He flatly refused to examine the constitutional issue of equal protection, ruling merely that Kentucky was within its rights in altering corporate charters.⁶⁷ Justice Holmes and Moody concurred in the judgment, Justice Day dissented without opinion, and Justice Harlan loosed his thunderbolts in a vivid, caustic dissent. This time Harlan brushed away the procedural difficulties as so much irrelevant fluff and struck at the heart of the matter.

The Kentucky law, said Harlan, deeply distressed and angered by this action in his beloved Commonwealth, was an unconstitutional infringement of the right of private association and of the equal protection clause. Moreover, Harlan, a deeply religious man (he objected to the Chicago World's Fair being open on Sunday),⁶⁸ felt that the decision of the Court would justify a state in laying "unholy hands on the religious

⁶¹ *Id.* at 541.

⁶² See Westin, *John Marshall Harlan and the Constitutional Rights of Negroes*, 66 YALE L.J. 637, 689 (1957).

⁶³ 211 U.S. 45 (1908).

⁶⁴ 98 N.Y. 98 (1885).

⁶⁵ 198 U.S. 45 (1905).

⁶⁶ *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

⁶⁷ 211 U.S. at 57.

⁶⁸ Westin, *supra* note 62, at 639.

faith of the people.”⁶⁹ If a state could tamper in this fashion with the inner life of a religiously sponsored corporation, “white and colored children may even be forbidden to sit together in a house of worship or at a communion table in the same Christian church.” “Have we become so inoculated with prejudice of race,” he asked, “that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make [racial] distinctions in the matter of their voluntary meeting for innocent purposes”?⁷⁰ The answer given by his associates, and by the American people was clearly “Yes.”

These decisions offer a good insight into the operation of the American constitutional process. Two Supreme Court holdings—*Pace v. Alabama* and *Plessy v. Ferguson*—dealt squarely with the merits of state segregation laws. Yet the Court’s rulings in these cases, particularly in the *Plessy* case, were by extrapolation used to validate the whole structure of “Jim Crow.” The fundamental question—whether state enforced segregation violates the equal protection clause—was not (with one area of exception) reexamined by the Supreme Court until the 1940s and 1950s. Thus, while lawyers are technically within their guild prerogatives when they assert that a Supreme Court decision is only a determination of the case at bar, the Justices in one “limited” holding (enforced segregation in transportation does not violate the equal protection of the laws), *Plessy v. Ferguson*, in social and institutional terms gave their *imprimatur* to the whole structure of white supremacy. In other words, the *Plessy* opinion was a monumental piece of judicial legislation. In fact, the Supreme Court effectively amended the Constitution of the United States by re-writing the fourteenth amendment.

The problem of Negro suffrage arising under the fifteenth amendment was disposed of in parallel fashion; the Court in this period allowed the amendment, designed to guarantee the voting rights of the freedmen, to become virtually a dead letter. The states achieved Negro disfranchisement by a number of devices—literacy tests, payment of poll taxes, property qualifications, *inter alia*—but most effective of all was the “white primary.” Political parties barred Negroes from membership and participation in primary elections, and the Court sustained this technique by holding parties to be “private” organizations beyond the reach of federal power.⁷¹ Only in 1911⁷² was a beginning made towards employing

⁶⁹ 211 U.S. at 68.

⁷⁰ *Ibid.*

⁷¹ *Grove v. Townsend*, 295 U.S. 45 (1935).

⁷² *Bailey v. Alabama*, 219 U.S. 219 (1911). The anti-peonage statute had earlier been sustained against charges of unconstitutionality, *Clyatt v. United States*, 197 U.S. 207 (1905).

the thirteenth amendment to end the labor contract peonage system which held many rural Negroes in virtual slavery. As far as the Negro was concerned, the Civil War had altered his juridical status, but not his basic relationship to the power structure.

In only one area was the authority of the states circumscribed: when racial legislation flagrantly conflicted with the dogmas of entrepreneurial liberty. Justice Field set the precedent here when he and his associates on the Ninth Judicial Circuit in the 1880s declared war on the anti-Asian enactments of the West Coast states. The classic instance was the *Parrott* case⁷³ in which the federal circuit court in San Francisco declared unconstitutional a provision of the California Constitution of 1879 which forbade corporations to employ Chinese. While in this and similar instances, the net effect was to bestow protection on the helpless Chinese, the gravamen of the decision was clearly that the proviso in question violated entrepreneurial liberty, the employer's right to hire at his discretion. In 1886, in a decision anticipating *Lochner v. New York*,⁷⁴ Justice Matthews held that a San Francisco ordinance, allegedly a fire prevention measure, which eliminated wooden laundries was in fact designed to drive Chinese laundrymen out of business and thus violated the equal protection clause.⁷⁵ Justice Field, an intimate of the great corporate figures in California who had imported the Chinese to undercut the local (unionized) labor market, took these aliens under his personal protection. He and his loyal circuit and district judges struck down on one ground or another any police power enactment which seemed to be part of the "Chinese Must GO!" campaign sponsored by the Union Labor Party and its "sand lot" allies.⁷⁶

In the *Berea College* case, it will be recalled, counsel for the college attempted to call up the spirit of entrepreneurial liberty from the murky deep. Their incantation, which included the magic words *Jacobs* and *Lochner*, was, however, a dismal failure. But in 1917, this formula did demonstrate its potency, and under its aegis certain property rights were excised from the sway of "separate but equal." In 1914 the city of Louisville, Kentucky, in order to "prevent conflict and ill-feeling between the white and colored races" zoned certain districts for Negro inhabitation and others for whites. By employing some quite complicated legal techniques which need not detain us here, a test case was brought to the Supreme Court which unanimously ruled that the municipal ordinance

⁷³ *In re Tribucio Parrott*, 1 Fed. 481 (C.C.D. Cal. 1880).

⁷⁴ 198 U.S. 45 (1905).

⁷⁵ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁷⁶ See Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851, 881-88 (1943), for an account of Field's special dispensations for the Chinese.

violated the due process clause of the fourteenth amendment.⁷⁷ Justice Day distinguished *Plessy v. Ferguson* and stated that the issue here was not the right of a state to classify legitimately its citizens by race. In his words:

The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person.

. . .

We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law . . . preventing state interference with property rights except by due process of law.⁷⁸

In practical terms, this did not, of course, open up housing to Negroes in white districts; whites took recourse to restrictive covenants, private stipulations not to sell to Negroes or other "undesirable" ethnic groups which ran with property and were, until 1948, enforceable at law. What the decision did demonstrate was that in the event of clear conflict between ideologies, entrepreneurial liberty was even more sacrosanct than racism.

Let us turn now from the civil rights of racial minorities to the problems of the spokesmen for the economic and political underdogs, the Socialists and the trade unionists. It should perhaps be emphasized that relatively few of the issues here ever reached the stratospheric level of Supreme Court adjudication. What we can attempt to convey is the atmosphere of the era and examine the few cases that did reach the top of the judicial pyramid. The first thing that has to be visualized is the tradition of direct action which played so striking a role in industrial relations. With effective legal techniques of unionization crippled by judicial roadblocks (particularly the inevitable injunction), it was not surprising that determined, militant unionists, usually of Socialist persuasion, turned to violence to defend what they considered their rights. The employers, with their private armies, played rough, and in members of an organization like the Industrial Workers of the World (IWW) they found men who were ready to meet them on their own ground.

From roughly 1890 to the end of World War I an industrial civil war raged intermittently in the mining states of the West. On one side

⁷⁷ *Buchanan v. Warley*, 245 U.S. 60 (1917).

⁷⁸ *Id.* at 81-82.

was the Western Federation of Miners, later to become a sponsor of the IWW, and on the other, the gradually consolidating mine owners, determined to break the power which the union had established in the early days.⁷⁹ The owners, mostly absentee, were exposed to problems in the West which they had seldom encountered in the eastern mines. First, in mining areas the population was almost totally committed to the union cause and characteristically elected pro-union men to local office—the sheriff and the town marshal were rarely “reliable” and elected judges too could create unforeseen problems. Second, there were few available strikebreakers in the isolated western communities. Third, virtually everyone possessed arms and experts with high explosives were a dime a dozen; industrial conflict was punctuated with dynamite blasts: In 1899, at the famous “Battle of Bunker Hill & Sullivan” in the Coeur d’Alenes, ninety cases of dynamite (4,500 pounds) were used by the WFM to obliterate one of the largest ore concentrators in the country. (“It went up like an umbrella,” one of the union leaders remarked.)⁸⁰

Any campaign to break the union had to be prepared on military lines: Strikebreakers had to be imported, militia from nonmining sections of the states mobilized, and local judges and officials neutralized. And the WFM had its covert allies: At least one large shipment of “scabs” bound for southern Idaho was deposited in Oregon by railroad unionists. The injunction, that old standby in the East, was a complete flop. The western equivalent was martial law. This is hardly the place to chronicle the thirty years’ war which ended with the defeat and suppression of the WFM in its old strongholds; this story has been told with meticulous care by Vernon Jensen⁸¹ and the dimensions of violence have been vividly etched by Stewart Holbrook.⁸²

What is important here is the total absence of any tradition of civil rights, the willingness on both sides to utilize illegal techniques. The derailling of a trainload of “scabs,” or the murder of a company “fink” by the WFM goonsquad, brought almost as much joy to the heart of a hard-rock miner as the deportation of five hundred union stalwarts into the reaches of the desert did to a mine owner. Two quotations will reinforce this point. In 1904 the Cripple Creek district of Colorado exploded when the mine owners, who had advertised for labor as far away as Duluth, moved in strikebreakers and locked out the WFM. After various sanguinary events, Governor Peabody declared Teller County to be in rebellion and proclaimed martial law.

⁷⁹ See JENSEN, *HERITAGE OF CONFLICT* (1950).

⁸⁰ See HOLBROOK, *THE ROCKY MOUNTAIN REVOLUTION* 34-41 (1956).

⁸¹ JENSEN, *op. cit. supra* note 79.

⁸² HOLBROOK, *op. cit. supra* note 80.

The local police were deposed. National Guardsmen were set to patrolling all the towns. Citizens were ordered to bring in their arms. . . . The Western Federation hurriedly got out a handbill and distributed it throughout the district. It was a message from Federation President Moyer: "I strongly advise every member to provide himself with the latest improved rifle . . . so that in two years we can hear the inspiring music of the martial tread of 25,000 armed men in the ranks of labor."⁸³

. . .

All union leaders were hastily arrested by military authority and as promptly demanded their constitutional right to habeas corpus. "Habeas corpus be damned!" replied General Bell of the National Guard. "We'll give 'em post-mortems!"⁸⁴

In the long run, the mine owners, with the federal army at their disposal in real crises, in other words, when the state militia were unreliable, could not lose. They were wards of the state, and if the state did not fulfill its obligations to entrepreneurial liberty, or wavered, they took direct action to guarantee their prerogatives. In 1904, when the liberal Democrat Alva Adams defeated Peabody in the gubernatorial election in Colorado, the mine owners immediately moved to block him from office and in 1905 convinced the legislature to install his defeated opponent!⁸⁵

The WFM was a well organized union and its men thought of themselves as "aristocrats of labor" and prided themselves on their courage and skill. By comparison the migratory agricultural workers of the West were a disorganized horde of peons, but it was this depressed constituency which the "Wobblies" (IWW) set out to organize. IWW organizers, or "job delegates" as they called themselves, were very bad insurance risks; if the private police of the "ranchers" did not catch up with them, the sheriff generally did. They lived their lives in the shadow of the noose, either private or public. As might be surmised, they were seldom models of gentlemanly decorum. A classic "Wobbly" handbill gives the atmosphere: "Don't put copper tacks in fruit trees! It kills them!" This was passed out in fruit country along with bags of copper tacks.⁸⁶

The "Wheatland Riot" of 1913 is a good example of the impact of

⁸³ *Id.* at 104.

⁸⁴ *Id.* at 106. See the judicial fallout from this episode in *Moyer v. Peabody*, 212 U.S. 78 (1909), in which Holmes sustained the Governor's action.

⁸⁵ JENSEN, *op. cit.* *supra* note 79, at 155-59.

⁸⁶ I am grateful to my colleague Professor Ray Ginger of Brandeis University for calling this item to my attention.

civil rights doctrines at the grassroots. Let us quote from Stuart Jamieson's authoritative study:

Following a practice not unusual among large-scale growers, E. B. Durst, hop rancher, had advertised in newspapers throughout California and Nevada for some 2,700 workers. He subsequently admitted that he could provide employment for only about 1,500, and that living arrangements were inadequate even for that number. . . . A great number had no bedding and slept on piles of straw thrown on floors, in tents rented from Durst at 75 cents a week; many slept in the fields. There were no facilities for sanitation or garbage disposal and only 9 outdoor toilets for 2,800 people; dysentery became prevalent. . . . The water wells were insufficient . . . workers were forced to buy what supplies they could afford from a concession store on the ranch . . . [and Durst paid lower wages] because of the surplus labor he had recruited . . . [which] were further reduced by the requirement of extra "clean" picking.⁸⁷

Into this appalling environment came a "Wobbly" organizer, Blackie Ford, who led a spontaneous demonstration against Durst demanding decent sanitary conditions and a fair wage. Durst, who attended the meeting, agreed to discuss issues with a grievance committee and promised to install adequate toilet facilities and supply water to the workers in the fields (whose only thirst quencher to that date had been lemonade at five cents a glass, sold by Durst's cousin). When Durst failed to fulfill his commitments, another meeting was called in a hired hall in Wheatland which was "invaded by a band of armed deputies who came to arrest Ford."⁸⁸ The meeting, which had been peaceable to that point, turned into a riot when one of the deputies fired an intimidating shot "to quiet the mob." Four were killed and many injured in the melee, and then, in Jamieson's words:

Hysteria apparently gripped the authorities. . . . Mass arrests of "wobblies" or sympathizers were carried out. Many of the arrested men were severely beaten or tortured, and many others were held incommunicado for weeks. Ford and Suhr, the two leading I.W.W. organizers in the camp, were convicted of murder and sentenced to life imprisonment."⁸⁹

While this sort of open warfare was going on in the West, things were also going badly for the "conservative" wing of the labor movement, those in the organization dismissed by the IWW as the "American

⁸⁷ JAMIESON, *LABOR UNIONISM IN AMERICAN AGRICULTURE* 61-62 (1945).

⁸⁸ *Id.* at 62.

⁸⁹ *Ibid.*

Fakeration of Labor." I have already examined in previous articles the devastating impact of the injunction on organizing campaigns and the problems of the Danbury Hatters.⁹⁰ Recall that in the *Hitchman* case⁹¹ the district judge had forbidden union organizers even to *discuss* the case for the United Mine Workers with the employees of Hitchman Coal & Coke Co. This stringent limitation on freedom of speech was upheld by Justice Pitney with no apparent qualms. In *Gompers v. Bucks Stove & Range Co.*⁹² and *Gompers v. United States*,⁹³ Samuel Gompers and the top leaders of the American Federation of Labor were found guilty of contempt of court essentially for acting like trade union leaders.

There must have been times when Gompers felt like wiring the Western Federation of Miners for some dynamite. In the *Bucks Stove* case, the AFL had responded to a plea for assistance from the Iron Molder's local in St. Louis by putting the company on its "We Don't Patronize" list, published in the monthly magazine, *The American Federationist*. The Bucks Stove Co., supported by the American Anti-Boycott Association which had financed Loewe and Fuchs' legal assault on the Danbury Hatters, asked a federal judge for an injunction against virtually the whole trade union movement and the nine members of the AFL Executive Council to terminate the boycott. The judge promptly responded by enjoining the AFL from combining to injure the company's business and in particular from publishing any printed matter which listed Bucks Stove on an "Unfair" or "We Don't Patronize" list. The AFL appealed immediately.

The technical aspects of the case got very complex at this point. The injunction was not to go into effect for five days, and during that period the AFL leadership hastily rushed another issue of the *American Federationist*, featuring the Bucks Stove Co., into print. This brought a new lawsuit, this time for contempt of court; Bucks Stove charged that the rushed printing of the magazine and several public speeches by Gompers and others were in violation of the injunction. On December 23, 1908, Judge Wright agreed and sentenced Gompers to a year in jail, John Mitchell, President of the UMW, to six months and Frank Morrison, editor of the *American Federationist*, to nine months. This too was appealed, and thus there were two lawsuits moving up the appellate ladder.

⁹⁰ Roche, *Entrepreneurial Liberty and the Fourteenth Amendment*, 4 LABOR HISTORY 3 (1963); Roche, *Entrepreneurial Liberty and the Commerce Power*, 30 U. CHI. L. REV. 680 (1963).

⁹¹ *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917).

⁹² 221 U.S. 418 (1911).

⁹³ 233 U.S. 604 (1914).

It would be a labyrinthine task to trace the litigation fully. From a political viewpoint, it would appear that the Supreme Court was not overjoyed by Judge Wright's militance. It may be doubted whether the Justices wanted to see the top leadership of the AFL consigned to federal prison. Justice Lamar devised a splendid face saver by upholding the substance of Judge Wright's action and voiding the procedures employed. Wright, who was thus given another chance, promptly—this time with appropriate legal rites—reimposed the sentences. Once again an appeal went up the line; the body was soon back on the Supreme Court's doorstep. This time Oliver Wendell Holmes, Jr., took charge of its disposal, and, by ingeniously inventing a statute of limitations applicable to contempt proceedings, sustained Judge Wright but freed the defendants.

Gompers did not go to jail, but the Court did sustain the injunction. To the argument that the injunction was an unconstitutional limitation on freedom of speech and a prior restraint of the press, the Justices were unresponsive. In concrete terms, this made possible injunctions which would prevent a trade unionist from saying or publishing anything of a derogatory character (which might hinder business) about a nonunion firm. Entrepreneurial liberty clearly ranked above the first amendment on the Court's scale of constitutional priorities.

This somewhat mordant narrative may provoke the question: Were there any civil rights protected by the Constitution? Once the fourteenth amendment had been destroyed as an instrument for nationalizing basic "natural rights," the answer was that an individual's civil rights were those respected by a jury of his neighbors. There were some who argued that the due process clause of the fourteenth amendment was intended to enforce on the states the same procedural requirements—*e.g.*, grand jury indictment, twelve man petty jury with requirement of unanimity for conviction, privilege against self-incrimination, etc.—that the Bill of Rights imposed on the national government. It is historically doubtful whether the Committee of Fourteen which drafted the amendment had precisely this in mind, though one can assert with confidence that they intended to impose certain principles of "natural justice" on the states.

However, the intention of the Committee of Fourteen, whatever it may have been, became completely irrelevant when in a series of decisions the Supreme Court effectively eliminated the due process clause of the fourteenth amendment as a meaningful limitation on state procedures in criminal prosecutions. (The Justices were a bit more finicky about civil actions, in which valuable property was often involved.⁹⁴) In

⁹⁴ See, *e.g.*, *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897), where the Court held that the due process clause of the fourteenth amendment incorporated the fifth amendment's requirement of "just compensation."

Hurtado v. California,⁹⁵ the issue was California's right in a capital case to substitute indictment by information, a streamlined technique in which the state's attorney filed criminal indictments directly with a judge, for the traditional grand jury process. Hurtado claimed that California could not deny him a grand jury without violating the federal guarantee of due process. In reply, Justice Matthews lauded the dynamic flexibility of American law and its adaptability to new needs and announced that the fourteenth amendment could not be construed to put the states in a procedural straitjacket. He issued the customary malediction of unlimited state power:

[I]t is not to be supposed that these legislative powers [to alter traditional legal procedures] are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint.⁹⁶

And he concluded by upholding the California procedure as a valid experiment well within the spirit of due process.

Subsequently the Court took the same position in a number of cases, holding for example, that Utah could cut the petty jury down to eight⁹⁷ and that New Jersey could impair the right against self-incrimination.⁹⁸ Justice Harlan invariably dissented in cases of this sort, asserting indomitably that the fourteenth amendment *had* been intended to impose precise procedural checks on state action.⁹⁹ It is interesting to note that whatever abstract potentialities Justice Matthews may have seen in the due process clause as a "practical restraint," no state criminal procedure was held to violate the fourteenth amendment in the period covered in this study.

In fairness to the Justices, one should make the effort to see the world through their eyes. From this vantage point, it is probable that the decisions endorsing "liberty of contract" were seen as major contributions

⁹⁵ 110 U.S. 516 (1884).

⁹⁶ *Id.* at 535.

⁹⁷ *Maxwell v. Dow*, 176 U.S. 581 (1900).

⁹⁸ *Twining v. New Jersey*, 211 U.S. 78 (1908).

⁹⁹ See Harlan's dissents in *Hurtado v. California*, 110 U.S. 516, 538 (1884); *Maxwell v. Dow*, 176 U.S. 581, 605 (1900); *Twining v. New Jersey*, 211 U.S. 78, 114 (1908). There were two levels of argument which should be distinguished. One was that the due process clause of the fourteenth amendment imposed traditional common-law procedures on the states; the other that the due process and privileges and immunities clauses "incorporated" the Bill of Rights *in toto* as a check on the states. Justice Harlan began with the first position in *Hurtado* and switched to the far broader second view in *Maxwell v. Dow*. See Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140, 146-57 (1949).

to "civil rights." It also seems probable that the *Income Tax*¹⁰⁰ decision was considered by its authors to be a lasting blow in the eternal struggle to preserve liberty from tyrants. Briefly the background was this: In 1894 when the Democratic administration and Congress set out to lower tariffs, they agreed that the decrease anticipated in customs revenue should be compensated for by what amounted to a two per cent tax on incomes over 4,000 dollars. While the tariff was not significantly dropped, the tax was enacted over bitter protests that it was a confiscatory, socialist piece of class legislation. Judge John F. Dillon, one of the outstanding leaders of the American bar, considered the tax:

a forced contribution from the rich for the benefit of the poor . . . a means of distributing the rich man's property among the rest of the community . . . class legislation of the most pronounced and vicious type . . . violative of the constitutional rights of the property owner, subversive of the existing social polity, and essentially revolutionary.¹⁰¹

This subversive measure was, it should be recalled, a flat (not progressive) tax of two per cent on most income, with all those who annually received less than 4,000 dollars (roughly equivalent to 25,000 dollars today) exempt; one can wonder what Judge Dillon would think of the annual communication that the American citizen today receives from the Internal Revenue Service. A minute proportion of the American people were affected by it; in 1891 a report of the United States Commissioner of Labor, based on 1890 census figures, indicated that the average annual money income of city wage and clerical workers in nine basic industries was 573 dollars; average monthly farm wages in 1894 were \$12.50 with board, \$18.50 without board, or sixty-five to eighty-five cents a day if that was the basis of computation.¹⁰²

As Arnold M. Paul has chronicled,¹⁰³ the entrepreneurial community and its great legal sepoys became convinced that if the income tax were sustained by the courts, American liberty would be in dire peril and an almost unbelievably complex course of litigation was launched. The tax, in the view of its enemies, was clearly unconstitutional, but the constitutional basis for this certainty was rather misty. Skilled lawyers set to work to demonstrate to the Supreme Court that when the answer is so obvious, there must be some good constitutional formulations which will evoke it. In a classic and much quoted summation before the Court,

100 *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, *affirmance upheld on rehearing*, 158 U.S. 601 (1895).

101 Cited in PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* 164 (1960).

102 *HISTORICAL STATISTICS OF THE UNITED STATES* 181, 281 (1960).

103 PAUL, *op. cit. supra* note 101, at 159-84.

Joseph H. Choate called the tax by its rightful name: "Communistic." Like Horatio and his stalwart Romans, the Justices had to hold the bridge against this "communistic march" and vindicate the rights of private property. To help the Court find a constitutional foothold, Choate and his associates elaborated some distinctions in the federal taxing power that would have turned a medieval scholastic green with envy. The essence of their argument was that the income tax was a "direct tax" in the constitutional meaning and therefore had to be apportioned among the states by population.

The Supreme Court took two formal hearings of the case in 1895 before it could reach a conclusive determination of all the issues involved. After the second, it decided by a five-to-four majority that the whole tax (which involved different provisions for various forms of income) was unconstitutional.¹⁰⁴ Although in historical terms the best definition of a "direct tax" was one either on polls (a capitation) or on land, and all others were "indirect" or excises, Chief Justice Fuller accepted Choate's line of reasoning: The tax *on the income* from real and personal property was ruled a tax *on the property itself*, hence "direct." Justice Harlan vented a furious dissent which led to his being accused of endorsing the "Marx gospel." Waving his finger under the Chief Justice's nose, Harlan accused the majority of participating in a "judicial revolution which may sow the seeds of hate and distrust among the people."¹⁰⁵ But the "communists" were short one Justice; the Constitution had to be amended before the income tax could again be instituted.

At any rate, the civil right not to pay an income tax was given a ringing endorsement; entrepreneurial liberty was preserved from the spoliation of the majority. As Justice Field, still ferocious though seventy-nine years old and close to retirement, remarked in his concurring opinion, the Constitution had to be protected from the masses. If this "usurpation" were upheld, Field said, the income tax would be the camel's nose under the tent:

The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness.¹⁰⁶

The Income Tax case, decided in the same year as *In re Debs*¹⁰⁷ and the

¹⁰⁴ Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895), *affirmance upheld on rehearing*, 158 U.S. 601 (1895).

¹⁰⁵ 158 U.S. at 665.

¹⁰⁶ 158 U.S. at 601.

¹⁰⁷ 158 U.S. 564 (1895).

Sugar Trust case,¹⁰⁸ contributed to precisely the eventuality that Field dreaded: In the presidential campaign of 1896, William Jennings Bryan, one of the congressional sponsors of the income tax, launched a bitter attack on the Court as a fortress of oligarchy, and demanded that judicial authority be curbed.¹⁰⁹

Two other problems, which would be discussed today under the heading of "civil liberties," also came before the Court and deserve mention here. The first is important as showing how far Congress, the President and the courts were prepared to go in suppressing local practices which offended national morality. For this reason the rigorous employment of the mailed fist against the hapless Mormons provides an interesting contrast with the *laissez faire* attitude towards southern state governments. It is true that the Mormons involved were living in territories, not states, and might thus be considered more directly subject to national power than the white supremacists, but it is submitted that in the appropriate context of the fourteenth amendment this distinction is fictitious. State actions in the South enforcing racial discrimination were constitutional because they were quite "moral"; territorial actions in Utah condoning "plural marriage" were just plain bad. The reasons that Mormon polygamy aroused such fierce antagonism must be left to the social psychiatrist; the fact is that no effort was spared to wipe out polygamous Mormonism. Indeed, in our own time, the polygamous underground of primitive Mormons has been harassed under the Mann Act,¹¹⁰ though no intelligent observer of this unorthodox remnant would accuse them of encouraging "vice."

The federal assault on the Mormons, as distinct from the lynch mobs under quasi-governmental auspices which drove them from Missouri and Illinois in the 1840s, began in the 1870s with indictments for bigamy.¹¹¹ The Mormons raised the issue of freedom of religion, claiming that their practices were protected from governmental infringement by the first amendment. This argument got short shrift from the Supreme Court.¹¹² Chief Justice Waite agreed that Congress could not "pass a law for the government of Territories which shall prohibit the free exercise of religion," but promptly held for a unanimous Court that Mormonism was not a "religion."¹¹³ But the federal government had its

¹⁰⁸ *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

¹⁰⁹ See Westin, *The Supreme Court, the Populist Movement and the Election of 1896*, 15 J. POLITICS 3 (1953).

¹¹⁰ See *Cleveland v. United States*, 329 U.S. 14 (1946).

¹¹¹ See WEST, *KINGDOM OF THE SAINTS* ch. 15 (1957).

¹¹² *Reynolds v. United States*, 98 U.S. 145 (1879).

¹¹³ *Id.* at 162.

problems in Utah, particularly in finding juries which would indict and convict under this heading and in dealing with local officials elected by those of polygamous persuasion. As we have seen, when confronted with this sort of local resistance in the South, the national government had effectively said "boys will be boys" and dropped the matter. But with the "immoral" Mormons, a different line was taken: In 1882, Congress passed a statute which barred "bigamists," "polygamists," and "any person cohabiting with more than one woman" from voting or serving on juries. Again the Mormons took the matter to court; again the Supreme Court distinguished between bona fide and spurious religions and upheld the act.¹¹⁴

In 1890, the Court finally disposed of the issue in two cases. The territorial legislature of Idaho passed a drastic statute requiring a test oath from all voters: Before voting each had to swear that he was not a member of "any order, organization, or association which teaches, advises, counsels, or encourages" bigamy, polygamy or plural marriage. Note that this enactment was aimed at opinion—it did not merely penalize overt polygamous acts. Justice Field for a unanimous Court sustained this broad interdiction, denouncing Mormonism in unrestrained fashion and asserting that "crime is not the less odious because sanctioned by what any particular sect may designate as religion."¹¹⁵ Field dismissed the Mormon claim that the Idaho law infringed their rights under the first amendment (territorial legislatures, it should be recalled, were congressional instruments) by stating in effect that bad people have no rights.

Later in the year, Field had reason to modify this extreme view. In 1887, in a Draconic enactment, Congress repealed the federal charter to the Mormon Church, and confiscated all the nonecclesiastical property of the religious corporation! As one might imagine, Justice Field took a dim view of this. While Justice Bradley for the Court upheld the statute, on the grounds that Congress was "*parens patriae*" to all federal corporations with the sovereign's right of escheat, and found no religious issues whatsoever in the litigation,¹¹⁶ Chief Justice Fuller with Field and Lamar dissented. The core of the dissent was that Congress could do anything it liked with Mormon opinion, but it could not "confiscate" Mormon property.¹¹⁷

The suppression of polygamous Mormonism has been examined at

¹¹⁴ *Murphy v. Ramsey*, 114 U.S. 15 (1885).

¹¹⁵ *Davis v. Beason*, 133 U.S. 333, 345 (1890).

¹¹⁶ *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

¹¹⁷ *Id.* at 66.

some length for two reasons: First, it is generally overlooked in studies of civil liberty; and second, it is a classic example of the exercise of vigorous congressional authority against people adjudged "bad." No one seemed seriously distressed, except of course the Mormons, by this imposition of "stateways" on "folkways." Even those who seemed most convinced, with special reference to the South, that group custom was not an appropriate subject for social engineering, rushed to bludgeon the Mormons into conformity.

The last point to be examined in this essay is one which arose from the imperialist thrust of 1898, and the concomitant acquisition of possessions outside the continental United States. Up to that point, American expansion had been largely into a vacuum and the settlers took their law and their institutions with them. A few islands of French and Spanish culture existed in the Anglo-Saxon sea, but they were of little consequence in the overall fulfillment of "Manifest Destiny." However, with the acquisition of Puerto Rico, the Philippines and other miscellaneous pieces of foreign real estate after the Spanish-American War, a new problem emerged. Were the populations of these new territories, most of whom were non-English speaking, entitled to the full panoply of constitutional rights? In the current phrase, "Did the Constitution follow the Flag?"

To make a long story short, the Court in a series of *ad hoc* determinations over a period of twenty years held that parts of the Constitution followed the flag, while other parts did not. To supply a theoretical foundation for this improvisation, Chief Justice White invented two categories of territory: "incorporated" and "unincorporated"—the whole Constitution was applicable to a territory which Congress had incorporated *into* the United States, but only fundamental constitutional principles were resident in those territories not incorporated. This meant that in the Philippines, for example, which were held to be an "unincorporated" territory, the procedural requirements of the Bill of Rights (grand jury, right to counsel, etc.) were not enforced. In essence, the Court applied to the unincorporated territories roughly the same set of rules that it utilized vis-à-vis the states in procedural questions arising under the fourteenth amendment and refused, as it had in *Hurtado v. California*¹¹⁸ or *Twining v. New Jersey*¹¹⁹ to define the precise content of the "fundamental" constitutional provisions which *always* followed the flag. The so-called *Insular* cases¹²⁰ are above all interesting as re-

¹¹⁸ 110 U.S. 516 (1884).

¹¹⁹ 211 U.S. 78 (1908).

¹²⁰ *Rassmussen v. United States*, 197 U.S. 516 (1905); *Hawaii v. Mankichi*, 190 U.S.

markable examples of judicial legislation: Court holdings in this area were exercises in pure creativity.

To conclude, it is fair to say that the Constitution had no effective civil liberties content—in the contemporary sense of that category—throughout the period under analysis. The fourteenth amendment, I am convinced, was intended to nationalize fundamental individual rights—both personal and property—and put them under the umbrella of federal protection.¹²¹ But within a decade after the Civil War the idealistic thrust of Abolitionist political and legal theory had vanished, leaving only a few lonely voices to maintain the tradition. Outstanding among them was that turbulent jurist, John Marshall Harlan who asserted in season and out, for a quarter of a century, that the framers of the fourteenth amendment had not been weighted down by concern about states rights, but had designed a strong instrument of national sovereignty over state and local instrumentalities. It is somehow most appropriate that today, as the Supreme Court restores the fourteenth amendment to its pristine power, Court decisions on Negro rights and criminal due process echo the embattled dissents of that grand old Kentucky Unionist.

197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901).

¹²¹ In saying this, I am not challenging Charles Fairman's massively documented case against full "incorporation" of the Bill of Rights, which has sometimes been interpreted as proving that the sponsors of the fourteenth amendment were simply killing time between important pieces of legislation. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949). I accept Howard Jay Graham's equally substantial arguments in favor of "selective incorporation," Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954), see particularly note 80 at 19-20. Graham's position escapes from the polemical overtones of Fairman's massacre of Justice Black and sets forth a view which Fairman indeed hints at in relaxed moments, e.g., *id.* at 81, 139.