EXERCISE OF POWER:

The Fourteenth Amendment and Corporations in the Late Nineteenth Century

by

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> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> United States Constitution,
> Article XIV, Section 1

The Fourteenth Amendment, generated out of the Civil War in 1868, to grant citizenship to the former slaves, within twenty years, was serving as the buttress for the corporate domination of American business and industry. Through various twistings and turnings, it had come to possess powers in excess and outside the intentions of the framers.

This paper will attempt to explain, document, and hopefully clarify the situation surrounding the Fourteenth Amendment's due process clause, particularily its application toward corporations in the late nineteenth century. It will first discuss due process and attempt a definition of that simple yet most illusive phrase. Secondly, specific court cases will be studied in which the evolution of the Supreme Court's position on the matter of corporate personality can be shown. Finally, an evaluation of "why" the corporate personality developed and what its application meant in the late nineteenth century, as well as its implications for today, will be undertaken. Recognizing the presence of a large contingent of lawyers, pseudo-lawyers and simple first-year drop-outs in the audience, I present this analysis as historian-not attorney - for whatever that means.

Why could such an ancient and worn phrase, due process of law, provoke in the late nineteenth century such prolonged legal battles and in the twentieth century such lengthy scholarly discourse? Indeed, due process stems from the very seedbed of our constitutional antecedents, the Magna Carta. Since its formalization in 1354 as "due process of law," the phrase has remained virtually unchanged.[1] In America, the phrase was widely used. Many state charters and the 1789 "Bill of Rights" contained the phrase (5th Amend.) Since such wording had long existed, it would be logical to assume that a definition of the term would also be both ancient and, by the nineteenth century, quite solid. Upon this lengthy tradition of use, the framers of the Fourteenth Amendment, seeking to protect the rights of individuals, especially Negroes, in 1868 simply included this time-honored phrase as a part of the new amendment.

Webster's defines due process of law as "a course of legal proceedings carried out regularly and in accordance with established rules and principles." This brief statement covers the traditional understanding of the term--a guarantee of proper procedure in legal proceedings. Procedural due process is concerned with how the law operates. However, due process also guarantees a substantive control within the law, concerned with what the law is and what law can do.[2] While much scholarship has probed at length the emergence of substantive due process in addition to strictly a procedural guarantee, the argument is actually somewhat strained.[3] The two types are contained within the single phrase, due process, always possessing a dual nature.

In practice, the two elements of due process have tended to merge, because proper procedure is itself a substantive guarantee within the law. The modern forms of due process concern the total scope of our legal system:

1. Prompt and speedy trial
2. Legal assistance
3. Prohibition of undue coersion or influence
4. Freedom to conduct one's own defense
5. Right to public trial and written procedure
6. Presumption of innocence
7. Burden of proof on prosecution to prove guilt beyond resonable doubt
8. Security against cruel and unusual punishment[4]

These basic criminal procedural rights and guarantees, compiled by Justice William Brennan, do have a definite substantive effect on the outcome of any legal proceeding. While Brennan has set down a comprehensive list, it is necessary to remember Henry Steele Commager's admonition and observation that is is useless to attempt a concrete definition of due process since the phrase is only one of many constitutional words that are subject to interpretation. "Commerce" and "Executive Power" are two obvious examples.[5]

Interpretation is, indeed, the vital concern regarding due process and equal protection, both included in the Fourteenth Amendment. The fact of the phrase's existence is meaningless apart from judicial interpretation. Only within the courts does the guarantee have usefulness. Interpretation, especially by the Supreme Court, in the late nineteenth century regarding due process and equal protection helped reshape the traditional outlook toward due process, as well as reshape the scope and coverage of the entire Fourteenth Amendment.

Since procedural and substantive due process have traditionally been regarded as distinct, it is necessary to trace the development of substantive due process. Through a series of cases, the Supreme Court, by 1898, had firmly established the legitimacy of a distinct application of substantive due process. Acceptance of substantive process involved a new approach to the law and marked a departure from the long-standing idea that the Court was to simply apply existing law. Since substantive due process is "essentially constitutionalized natural law," its origins are also far back in our constitutional heritage.[6]

In the first half of the nineteenth century, there were various imputs into the due process area. The first thrust came from outside the courts, where the most persistent demand for "substance" came from abolitionists and anti-abolitionists who used due process as the prop for their arguments. Both sides used the moral connotation of due process as "just" process. Abolitionists won early victories in several states. Massachusetts had outlawed slavery as early as 1783, citing the contradiction between theory (all men free and equal) and practice.[7] The pro-slavery people saw the protection of property as supreme. Slaves were property and therefore not to be taken without due process. Abolitionists saw the inherent denial of basic human "process" in slavery. Thus, through the extra-legal actions of often emotional and vocal groups regarding slavery, the widespread knowledge of substantive due process provided the climate for its legal acceptance.

The widespread knowledge and usage of broad Lockean phrases also contributed to the popular conception of substantive due process. State constitutions were filled with broad sweeping guarantees of due process and equal protection. Publications such as the Western Law Journal and the American Law Magazine devoted pages to articles and letters on the sancity of property.[8] Although due process involved both procedure and substance, the distinction between the two, so evident today, was not obvious in the nineteenth century. Howard Jay Graham observed, "Hindsight has projected backward the current, yet highly artificial, distinction between procedure and substance. And it has missed almost entirely the significance of the then universal belief in natural and inalienable rights."[9] We must constantly remember that simply "because due process today is a highly technical field," that the practices in the early years, even into the nineteenth century, were not as refined. Technical complexity and its resultant obscurity in the public mind are decidedly modern phenomena in the area of due process.[10]

It is here necessary to examine several specific Court cases in which the changing attitude of the Court toward substantive due process, applied to corporations, may be seen. The key change, beginning in the 1870's, is not that corporations were suddenly regarded as "persons," but that under the Fourteenth Amendment, these corporate persons came to possess substantive rights and immunities in addition to or outside of the specific grants set down in the corporate charters. Corporations, heretofore, limited by their charters, came to possess "personality," and therefore the

full grants under the Constitution afforded to any person.

The earlier concept of limited corporate personality was firmly established by Chief Justice John Marshall. In the celebrated Dartmouth College case of 1819, the principle was clearly stated:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidential to its very existence.[11]

Marshall later elaborated on the same concept:

> The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist.[12]

Although Daniel Webster sought to expand corporate personality in 1838 to make it identical with the rights of natural persons, he was unsuccessful. Chief Justice Roger Taney simply quoted the Marshall Dartmouth ruling and concluded,"It cannot be necessary to add to these authorities."[13]

After the post-Civil War addition of the Fourteenth Amendment, with its new statement of due process, there quickly occurred an attempt to redefine corporate personality. In 1873, former Justice John A. Campbell, an ex-confederate leader from Alabama, argued the Slaughter House Cases before the Supreme Court.[14] Campbell appeared on behalf of independent butchers in New Orleans who were allegedly being denied the right to conduct their chosen profession due to a 1869 law granting a corporation an exclusive

twenty-five year right to run slaughter houses in that city. The Louisiana legislature had enacted the statute under the police power to regulate health and safety. In addition to granting the monopoly, the law set certain operating standards. The Court upheld the Louisiana law. However, three Justices, Chief Justice Salmon Chase, Noah Swayne, and Joseph Bradley concurred in Stephen J. Field's vigorous dissent. While he granted to the state the power to regulate health and safety, Field opposed the monopoly granted in New Orleans:

> ...under the pretense of prescribing a police regulation the state cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgement.
>
> If exclusive privileges can be granted to a corporation, they can also be granted to a single person, and if for twenty-five years, for ever.
>
> Indeed, upon the theory on which the exclusive privileges granted by the act in question are sustained, there is no monopoly, in the most odious form which may not be upheld.[15]

The dissenters were interested in the consequences of the law, the substantive result. They saw a danger in upholding state action which they felt violated fundamental rights of individuals. Primarily concerned with the right, in Justice Bradley's terms, "to follow whatever lawful employment he chooses to adopt," the dissenters opted for the extreme position, and concluded, in principle, that if butchers could be regulated, then anyone or any profession could be regulated and proscribed.[16] Justice Swayne had joined Bradley in emphasizing a broader application of due process. However, both regarded "persons" as

human beings, not artificial entities. While they dissented in the verdict, they were not willing to argue in the same vein as had Justice Field.

With this vigorous defense of private enterprise, Justice Field had begun a long series of weighty dissents that would over the next years establish him as one of the strongest supporters of laissez-faire. It is noteworthy that in this initial post-Fourteenth Amendment due process case, four Justices were virtually ready to uphold his substantive interpretation of due process.

Three years later, the Court again refused to apply a substantive due process in Munn v. Illinois.[17] The case grew out of an attempt by the Illinois legislature to fix grain warehouse rates in cities of over 100,000 population. Practially, the law was directed toward Chicago, the only Illinois city that large. The Chicago warehousemen had, in effect, created a monopoly by price-fixing. Both the Criminal Court of Cook County and the Illinois Supreme Court had upheld the statute. Chief Justice Morrison Waite, who had replaced Chase in 1874, wrote the majority opinion sustaining the lower court's position:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good...."[18]

Waite acknowledged that an owner was entitled to a reasonalbe return on his property. However, he rejected the argument that determining "reasonableness" was a judicial function. He left the regulation of rates to the legislatures, the body that had traditionally regulated businesses affecting the public interest. "We know this is a power which may be abused," the Chief Justice wrote, "but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."[19]

Mr. Justice Field lashed out at the decision as "subversive to private property" and argued forcefully that:

> All that is beneficial in property arises from its use, and fruits of that use.
>
> There is, indeed, no protection of any value under the constitutional provision, which does not extend to the use and income of the property, as well as to its title and possession.

Carrying his argument to the extreme, Field maintained, "the decision of the court in this case gives unrestrained license to legislative will."[20] Field saw the worst possible results from the decision and predicted a wave of regulation directed at various corporations. However, the prophecy remained unfulfilled in the late nineteenth century.

The next few years saw the transformation of an essentially pro-regulation Court into a body supportative of laissez-faire. Between November 1877 and November 1882, one month before the next great "due process" case, five members of the Court were replaced. Of the five, four had sided with the majority in both the Slaughter House and Munn cases. Specifically, Justices David Davis, William Strong, Noah Swayne, Nathan Clifford, and Ward Hunt were replaced

by John Marshall Harlan, William Woods, Horace Gray, Stanley Matthews and Samuel Blatchford.[21]

The membership had scarcely stabilized when, late in December, San Mateo County v. Southern Railroad Company appeared on the Court's docket.[22] The railroad had been sued by San Mateo County, California, for uncollected taxes. Declaring the tax illegal and discriminatory, the railroad won its point on appeal in Federal Court. The county then appealed to the Supreme Court, where the county faced formidable opposition from railroad lawyers Roscoe Conkling and United States Senator George Edmunds. Conkling, a great and noted orator, carried the bulk of the case.[23] He argued forcefully for a judgement limiting state control over corporations. In his famous brief, Conkling produced a manuscript copy of the journal of the Committee of Fifteen, never before made public. (The Committee of Fifteen had been the body which had written the Fourteenth Amendment. Conkling was one of the few living ex-members of that committee.) By skillfully combining exerpts, he intimated that the committee intended corporations to be protected by the due process clause. Conkling concluded his oral presentation with some of his "best" oratory:

> I have sought to convince your honors that the men who framed, the Congress which proposed, and the people who through their Legislatures ratified the Fourteenth Amendment, must have known the meaning and force of the term 'person'....
>
> Who would be so rude as to suggest that committee, Congress, or people, when engrafting the Fourteenth Amendment upon the Constitution, omitted, only because

> they forgot it, to say that citizens might be stripped of their possessions without due process of law; provided only the spoliation should be under pretense of taxation and the victims robbed in a corporate name?
>
> Those who devised the Fourteenth Amendment wrought in grave sincerity. They may have builded better than they knew....
>
> They vitalized and energized a principle, as old and as everlasting as human rights. To some of them, the sunset of life may have given mystical lore.
>
> They builded, not for a day, but for all times; not for a few, or for a race; but for man. They planted in the Constitution a monumental truth, to stand four-square whatever wind might blow. That truth is the golden rule, so entrenched as to curb the many who would do to the few as they would not have the few do to them.[24]

One can virtually see the tears streaming down Conkling's face, given the emotional appeal of this,as well as additional sections of his presentation before the Court.

Apparently unmoved by Conkling, the Justices remained silent for three years regarding the San Mateo case, by that time combined with a similar case for judgement.[25] In the official record, Chief Justice Waite simply acknowledged Conkling's point:

> The Court does not wish to hear argument on the question whether the provisions in the Fourteenth Amendment to the Constitution, which forbids a State to deny any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.[26]

Thus, the Court by waiving additional legal argument recognized corporations as legal persons. This apparent legal bombshell was almost casually made by Waite. In fact, the above quoted sentence, was almost left out of the record, and is most certainly not Waite's actual words. The circumstances surrounding its inclusion in the record bear a brief discussion.

Four months after Waite's statement, the Supreme Court Reporter, J.C. Bancroft Davis, wrote the Chief Justice regarding the San Mateo—Santa Clara case asking if his memory and record regarding Waite's dictum was correct. Part of Waite's reply is worth noting:

> I leave it to you to determine whether anything need to be said about it in the report inasmuch as we avoided meeting the constitutional question in the decision.[27]

Had Waite thought he was prolumgating a new all-encompassing ruling, the exchange would, no doubt, have been very specific, and Waite would have written his opinion for the record. Instead, the Chief Justice left totally up to Davis the determination of what was to be included in the official record. What was to become the touchstone for virtually all future corporate due process cases was made, not as a Court ruling, but simply as an oral dictum of the Chief Justice. He simply supposed that he spoke for the entire court. The Santa Clara and San Mateo cases were formally decided in the railroads' favor on a technicality,' simply another relatively insignificant decision.[28] However, corporate lawyers were quick to see that Waite's dictum could be put to good use to help their clients.

Justice Field was also contributing to the good fortunes of the corporations. Two years after the San Mateo decision, he discovered Justice Marshall's old evaluation of corporate personality, and selectively used portions to prove that, "there is no doubt that a private corporation is included as a person under the Fourteenth Amendment."[29]

> Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall, "The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men."
> (Providence Bank v. Billings, 4 Pet. 514, 192.)[30]

Field, however, conviently left out the last two sentences of Marshall's opinion, apparently since they limited corporate personality.[31] While Marshall had clearly seen corporate rights limited and firmly controlled, Field pronounced an unlimited "person" status on corporations, equating them with natural individuals.

The next years saw a number of cases in which the Court simply declared the existence of corporate personality by citing the Santa Clara and Pembina cases as evidence of the truth of their declaration. Therefore, an oral dictum, casually made, and an out-of-context quotation from John Marshall formed the foundation of the establishment of complete corporate personality.

In 1887, the case of Missouri Pacific Railway Company v. Mackey saw the first use of the Santa Clara and Pembina precedents. Justice Field wrote, "it is conceded that corporations are persons....[32] The following year saw Minneapolis and St. Louis Railway Company v. Beckwith and another citation of the Santa Clara and Pembina justification of corporate personality.[33] An 1891 case, Charlotte, Columbia and Augusta Railroad v. Gibbes, used as evidence of corporate personality the Santa Clara, Pembina, and Minneapolis cases.[34] In 1896, Justice David Brewer, Justice

Field's nephew, maintained, "A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens." He then cited Santa Clara, Pembina, and the Missouri Pacific case of 1887.[35]

Meanwhile, the Court had added rooms to the corporate house "with the shaky foundation" by, in effect, overturning Munn v. Illinois and ruling that determination of "reasonableness" was indeed a judicial matter:

> If the company is deprived of the power of charging reasonable rates for the use of its property...in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States.[36]

While the case was decided on a procedural item, the clear intent of the majority had been stated. In 1898, the opportunity arose to use the new power and a Nebraska statute fixing intrastate freight rates was overturned as unreasonably low and in effect amounting to a "deprivation of property without due process of law."[37]

Ultimately, between 1877 and 1913, in forty-nine separate cases, the Supreme Court used the Fourteenth Amendment to invalidate state action.[38] Of immediate concern, then, is why this occurred. There are several reasons why the attitude of the Court changed in the late nineteenth century. Laissez-faire did not merely arise by itself--it had help. Help came primarily from two sources, the judicial revolution and the large corporations, mainly the railroads.

The court system was undergoing its own revolution. Professional lawyers, under long-lasting retainers from big business, came in droves to the courts to argue for laissez-faire. Professionalism among lawyers was fostered by the rise of state and local bar associations, culminating in 1878 with the formation of the American Bar Association.[39] A close working relationship soon developed between lawyers and big business. Business could afford to retain the best lawyers and consequently lawyers and lawyers' organizations came to support and defend laissez-faire, precisely what big business wanted. As bar associations were organized, they often invited jurists to address their meetings. An extremely close relationship between jurists, who were often bar association members, and lawyers naturally developed. A triangle of business, judiciary, and professional lawyers helped promote good relations among the three groups.[40] The corporate lawyers seized on the Fourteenth Amendment.

The Fourteenth Amendment was seen as an efficient and very expedient means of securing relief from state regulation of big business. While earlier efforts had centered on the Privileges and Immunities (Comity) clauses of the Constitution (Article 4), the complexity and combersome nature of such a rationale would not work in a period of rapid industrial expansion.[41]

The courts were being swamped with corporate cases. Crowded dockets is one of the primary features of the era. The Supreme Court's docket doubled each decade from the 1860's through the 1880's. Cases became more complex, briefs lengthier, and appeals

more frequent. As a direct result of the overcrowded courts and limited staff and research facilities, the Justices were tremendously overworked. They even lacked law clerks. This resulted in often haphazard decisions. As was traditional, wherever possible the Justices disposed of a case without making a constitutional judgement. Remember Chief Justice Waite's reply to Davis regarding the Santa Clara case, "We avoided the constitutional question."[43] The court apparently muddled its way through its burdensome workload, constantly trying to do as much as possible, but overburdened by the caseload. "Questions just came to thick and fast, were too snarled, ramifying, and inseverable" to enable the Court to "match practice and result on the one hand with the formal opinions, arguments, and rhetoric on the other."[44]

A primary reason for both the crowded courts and the corporate success stemmed from the tremendous resources of the primary corporate litigant, the railroads. Behind the corporate power were lawyers, politicians, and huge sums of money. One rail system can serve as an example of the awesome power of these huge corporations. In 1882, the Central Pacific Railroad employed 12,978 persons in California. The system's (Central and Southern Pacific) annual gross income from 1878-1882 was approximately $21 million. This was over five times the income of the entire state government! Other corporate figures are equally telling. While San Mateo was in the courts, seventeen lawyers were on retainers by the Central Pacific Railroad. The chief council for the line was salaried at $24,000 per year. At the same time,

the California Attorney General's office worked under a $10,000 budget, including the Attorney General's salary of $3,000. While California spent, in 1882, $200,000 for its entire legal system, the Central Pacific's "Legal Expense Account" was $216,000.[45]

Without any further explanation, it is obvious the litigants seeking regulation were out-manned, out-financed, and probably out-thought since the best and highest paid lawyers were retained by the railroads. With such talent and resources, cases were often tied up in courts for years, contributing to the clogged dockets, and the wearing down of judges who might decide a case, only to have the same problem, slightly altered, reappear almost immediately. San Mateo and Santa Clara[46] are very similar, while Missouri Pacific Railroad Co. v. Mackey and Minneapolis and St. Louis Railway Co. v. Herrick are virtually identical.[47] The Supreme Court record for these years contains numerous other examples.

What did all this activity mean? There were several results. Not the least of which was increasing pressure on the national government to act as a regulating agency. In addition to limiting state government's power, the Supreme Court decisions forced those seeking business regulation to look toward the Federal government for action.[48] Secondly, the focus of the Fourteenth Amendment was successfully turned toward protecting corporate rights, at the expense of those individual rights the framers had sought to guarantee in 1868. The sustained business drive twisted the scope of

the Fourteenth Amendment. It almost appears, that the Fourteenth Amendment was unable to protect individual and corporate rights at the same time. The huge corporations dominated the attention of the courts, to the detriment of the intended beneficiaries to such an extent that Howard Jay Graham concluded, after years of study, that the real revolution in due process was not the corporate due process, but the "de-racialization" of the Fourteenth Amendment.[49] Graham sees the corruption of the Fourteenth Amendment as the tragedy of the late nineteenth century.

Finally, the ultimate interpretation of the Fourteenth Amendment given in the late nineteenth century reveals something of value about our basic legal structure. The law, in a very real sense, responded to popular pressure. This pressure, from our vantage point, may seem illegitimate, but it was pressure, and the law did respond. One, however, cannot help wondering about the strange justifications of corporate personality. If other fundamental changes in the law are built on similar foundations, then the entire structure may be open to question. Nevertheless, in a period of rapid industrialization and consolidation, the new corporations succeeded in using the courts to protect their interests. As a result, they created the basis of our present-day system of business and industry, and that system's relationship to the government.

NOTES

[1]Alfred Kelly and Winfred Harbison, The American Constitution: Its Origin and Development, 4th ed. (W.W. Norton and Co., 1970), p. 504. The concept of due process was embodied in the Magna Charta, but not formally stated as "due process of law" until 1354.

[2]Howard Jay Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspriacy Theory, and American Constitutionalism (Madison: The State Historical Society of Wisconsin, 1968), p. 3.

[3]For the usual argument, see Benjamin Wright, The Growth of American Constitutional Law (Chicago: The University of Chicago Press, 1942; reprinted by Phoenix Books, 1967), pp. 102-105.

[4]William J. Brennan, Jr., "Landmarks of Legal Liberty," in The Fourteenth Amendment, Bernard Schwartz, ed. (New York: New York University Press, 1970), p. 4.

[5]Henry Steele Commager, "Historical Background of the Fourteenth Amendment," Ibid., p. 24.

[6]Graham, "Procedure to Substance: Extra-Judicial Rise of Due Process, 1830-1860," in Everyman's Constitution, p. 249. The Graham essays and articles compiled in Everyman's Constitution originally appeared in scattered state law journals, not readily available. They will here be cited from the collected volume.

[7]Ibid., "The Early Antislavery Backgrounds of the Fourteenth Amendment," p. 191-193.

[8]Ibid., "Procedure to Substance," p. 258-260.

[9]Ibid., p. 256

[10]Ibid.

[11]Dartmouth College v. Woodward 4 Wheaton 636; rebound as 4 Curtis 489.

[12]Providence Bank v. Billings 4 Peters 514, 516; rebound as 9 Curtis 171, 174.

[13]13 Peters 581; rebound as 13 Curtis 281. A brief account of Webster's activities before the Taney court may be found in Richard Current, Daniel Webster and the Rise of National Conservatism (Boston: Little Brown and Co., 1965).

[14]16 Wallace 36.

[15]Ibid., pp. 87-89.

[16]Ibid., p. 113.

[17]4 Otto 113.

[18]Ibid., p. 133.

[19]Ibid., p. 134.

[20]Ibid., pp. 136-148.

[21]Graham, "An Innocent Abroad: The Constitutional Corporate Person," p. 397.

[22]116 U.S. 138.

[23]David M. Jordan, Roscoe Conkling of New York (Ithaca: Cornell University Press, 1971), p. 417.

[24]116 U.S. 138. Conkling's argument is in part reprinted in Graham, pp. 595-610.

[25]Santa Clara County v. Southern Pacific Railroad Company 118 U.S. 394.

[26]116 U.S. 394, 396.

[27]Graham, "The Waite Court and the Fourteenth Amendment," p. 567. Post-1960 research of Graham and C. Peter Magrath, working independently, discovered the Waite-Davis exchange.

[28]Ibid., p. 569.

[29]Pembina Mining Company v. Pennsylvania 125 U.S. 181, 189.

[30]Ibid.

[31]See above, preceeding note 11.

[32]127 U.S. 205, 209.

[33]129 U.S. 26.

[34]142 U.S. 386.

[35]Gulf, Colorado and Santa Fe Railroad v. Ellis 165 U.S. 150,154.

[36]Chicago, Milwaukee and St. Paul Railway Company v. Minnesota 134 U.S. 418, 458 (1890).

[37]Kelly and Harbison, p. 522. Symth v. Ames 169 U.S. 466.

[38]Felix Frankfurter, Mr. Justice Holmes and the Supreme Court (Cambridge: Harvard University Press, 1938), Appendix.

[39]Benjamin R. Twiss, Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court (Princeton: Princeton University Press, 1942; reissued 1962), p. 145.

[40]For an in depth study of the bar associations' ties with the Judiciary, see Ibid., Chap. 7.

[41]Graham, "An Innocent Abroad," fn. 97, p. 395; "The Waite Court," p. 581.

[42]Ibid., p. 435.

[43]Ibid., p. 567.

[44]Ibid., p. 437.

[45]Ibid., p. 432, fns. 226, 227.

[46]San Mateo 116 U.S. 138; Santa Clara 118 U.S. 394.

[47]Missouri 127 U.S. 205; Minneapolis 127 U.S. 210.

[48]Loren P. Beth, The Development of the American Constituion, 1877-1917 (New York: Harper and Row, 1971), p. 67.

[49]Graham, "The Waite Court," p. 583.

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