

Notes on Howard Jay Graham (1968). *Every man's constitution*. Madison, Wisconsin: State Historical Society of Wisconsin.

James Allison

May, 2005

Amendment XIV. (Ratified July 9, 1868.) Section 1. 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. (Sections 2, 3 and 4 deal with the apportionment of Representatives, the denial of office to former rebels, and how neither the U. S. nor any State would pay any debts incurred in the aid of insurrection or rebellion.) Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

*Every Man's Constitution* is a series of law journal papers on the Fourteenth Amendment that Graham, a law librarian, published between 1938 and 1964. Of principal interest to me were papers on the Beards' conspiracy theory of the Fourteenth Amendment, Justice Stephen J. Field's interest in the Fourteenth Amendment and its extension to corporations, the antislavery background of the Fourteenth Amendment, Roscoe Conkling's mendacious testimony about the framing of the Fourteenth Amendment, and the Morrison R. Waite court's corporatization of the Fourteenth Amendment by means of a dictum written by the Court Reporter, J. C. Bancroft Davis.

### Why a Fourteenth Amendment?

This amendment came out of the antislavery movement in the United States, often identified with the Massachusetts abolitionists, William Lloyd Garrison and *The Liberator*. But the most important elements in the earliest stages came from the west, in the form of evangelists and students of theology. They took inspiration from the Great Revival, the evangelical campaign that centered in upstate New York, Pennsylvania and Massachusetts in 1824-1827. In the late thirties it spread through Ohio, the Northeast and Northwest, leaving one community after another converted to abolition, women's rights and temperance.

The movement attracted wealthy supporters, such as Arthur and Lewis Tappan, New York merchant-philanthropists. They financed such schools as Lane Seminary in Cincinnati, and later Oberlin College, whose mission was to train revivalists who would spread

benevolent reform throughout the frontier. Unlike Garrison, who tended to offend the establishment, these evangelists reached out to the pillars of the community, business and professional figures, with a strong, simple message infused with God's moral law, Christian benevolence and the egalitarian theme of the Declaration of Independence: Slavery was a monstrous, criminal, sinful anachronism that deserved immediate abolition.

It would be a mistake to think of the emancipation movement as a continuous growth of conversions. One major setback occurred in 1831, when a literate Virginia slave, Nat Turner, led an uprising that began with the murder of his master's family and ended with the deaths of nearly sixty whites, mostly women and children. Such episodes tended to inspire vigilantism, the legislative tightening of slave codes and the treatment of abolitionist activity as seditious.

A guiding light of the movement was Theodore Dwight Weld, a self-educated orator and organizer. After an 18-day discussion of slavery and Christianity, Weld wrote a parting manifesto when Lane Seminary suppressed the antislavery society for having abolitionized the college. Weld insisted that free discussion was both a right and the duty of every rational being, of every free moral agent. The following year, in the spring of 1835, the entire group moved to Oberlin College, whence Weld-trained evangelists, 70 strong, went forth to spread the word. Another important figure was James G. Birney, Princeton educated, who, after listening to Weld, returned to his native Kentucky, manumitted his slaves, and began to turn out pamphlets that became bibles of the abolitionist movement. Other important recruits were Joshua Giddings, Thaddeus Stevens and Salmon P. Chase.

Some of these men left behind letters that clearly reveal a shift in the basis of the movement. What began as an ethico-moral-religious attack on slavery gradually became a legal-constitutional attack. Graham (1968, p. 169) notes three outstanding features of the crusade. First, it was a quest for protection of the laws that derived from the self-evident truths of the Declaration. Slavery denied the protection that governments were created to provide, and to which all humans were entitled. Second, what began as a quest to protect slaves and free Negroes became broader, a quest to secure civil liberties in general. Its scope included other dissident and unpopular groups, such as Mormons and Indians. Moreover, it was the duty of the federal government to safeguard civil rights from abridgment by the states—a controversial issue at that time. Third, the abolitionists used every helpful clause they could find, from the Preamble to the Bill of Rights. Most favored were the due process, just compensation and comity clauses, merged with the original concepts of protection, freedom and equality. (The comity clause provides that “the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.” [Graham, 1968, p. 176.]) Many of these features eventually made their way into political platforms and courtroom arguments throughout the land.

To read Graham's book is to come away persuaded that the wording of the Fourteenth Amendment, written in 1866 by a Joint Committee of Congress, did not come out of the blue.

Some thirty years before, lawyers and leaders of the anti-slavery movement had already begun to formulate and publish a constitutional basis for the protections that were eventually codified in Sections 1 and 5 of the Fourteenth Amendment.

## The Conspiracy Theory

In 1927 historians Charles and Mary Beard published *The Rise of American Civilization*, in which they proposed that the framers of the Fourteenth Amendment, in 1866, had participated in a corporate conspiracy. According to the Beards, the framers deliberately worded the amendment in such a way as to restore “. . . to the Constitution the protection for property which Jacksonian judges had whittled away and made it more sweeping in its scope by forbidding states, in blanket terms, to deprive any person of life, liberty or property without due process of law. By a few words *skillfully chosen* every act of every state and local government which touched adversely the rights of persons and property was made subject to review and liable to annulment by the Supreme Court at Washington.”

They offered no direct evidence for their claim, but at that particular time in American history many Americans found the claim plausible. It was not without skeptics, such as Walton Hamilton, who wrote in 1932 that the Beards' conspiracy theory “endows . . . captains of a rising industry with a capacity for forward plan . . . they are not usually understood to possess.” The Beards focused their suspicions on Representative John A. Bingham, Ohio, who was chiefly responsible for the wording of Section 1. They characterized Bingham as “a shrewd . . . and successful railroad lawyer, . . . familiar with the possibilities of jurisprudence.” While his colleagues were intent on the rights of Negroes, he wanted to take in the whole national economy. Graham debunks the Beards' suspicions of Bingham, but shows that another member of the framing committee, Roscoe Conkling, many years later played a less innocent role.

Conkling, a Gilded Age politician from New York, was amazingly adept at self-advancement through political intrigue. Once a U.S. Senator, he twice refused offers from two different presidents of a seat on the Supreme Court. He gained his place in American history when, in the employ of the railroads, he testified before the Supreme Court in an effort to persuade the judges that the framers had intended the Fourteenth Amendment to protect corporations as well as freed slaves.

One of Conkling's claims was that the Joint Committee that framed the amendment had been approached with petitions and bills in behalf of joint stock companies in search of protection against invidious and discriminatory state and local taxes. Graham exploded this claim with research that showed that none of these overtures had been directed toward members of the Joint Committee.

The most famous part of Conkling's representation before the Supreme Court came on Dec. 22, 1882, when he produced a manuscript claimed to be the journal of the Joint Committee's deliberations (*San Mateo County v. Southern Pacific R.R.*, 116 U.S. 138). This

purported to show that the committee had vacillated between the terms “citizen” when referring to the non-economic Privileges or Immunities clause, and “person” in reference to Due Process and Equal Protection. The impression he tried to create was that the framers had finally settled on “persons” in an effort to cover corporate “persons.” What Graham discovered was that the word “citizen” had never been used in any of the due process-equal protection drafts, and that “person” had been used throughout. Graham concludes: “This part of Conkling’s argument was a deliberate, brazen forgery” (p. 417).

But what was the effect of Conkling’s testimony at the time? In this regard it is worth quoting a long extract from p. 414 of Graham’s book: “Aside from Conkling’s dramatic use—and misuse—of the manuscript Journal to convey an impression that he and his colleagues on the Joint Committee had drafted Section One with an eye to the status of corporations, arguments before the Supreme Court in December, 1882, added comparatively little to what had been said and resaid in California. This, however, is not the measure of the arguments’ importance. As already noted, no formal opinion ever recorded the grounds or reasoning on which the Supreme Court accepted corporate personality. Three years after the *San Mateo* arguments, i.e., in January, 1886, Chief Justice Waite orally announced that the Court then unanimously conceded corporations to be persons within the meaning of the Equal Protection Clause. Because of this passive acquiescence—which was commented on in the 90’s as most extraordinary procedure for the decision on so vital an issue—the arguments in December, 1882, constitute the last affirmative word on the corporate constitutional ‘person.’”

For one of the most unflattering views of Supreme Court behavior on record, the reader need only turn to p. 566: “Nowhere in the United States Reports are there to be found words more momentous or more baffling than these:

Mr. Chief Justice Waite said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does. [*Santa Clara County v. So. Pac. R.R.*, 118 U.S. 394, 396 (1886).]

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

“For those who wonder what light the Waite Papers have shed in this area, there are two dazzling, stroboscopic flashes. Yet all that these tantalizing glimpses really make clear and

certain is that even the recording of this statement was a fluke—the Court Reporter’s after-thought!”

“Preparing text for Volume 118 of the U.S. Reports, J. C. Bancroft Davis, the Supreme Court Reporter, cautiously addressed this note to Waite (Davis to Waite, May 26, 1886 [exactly four months after Waite’s announcement], Waite Papers, on file in Library of Congress.):

I have a memorandum in the California Cases

Santa Clara County

v.

Southern Pacific &c &c

as follows:

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

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

Waite replied:

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

‘In other words,’ Magrath concludes, ‘to the Reporter fell the decision which enshrined the declaration in the United States Reports. Had Davis left it out, *Santa Clara County v. Southern Pac. R. Co.* would have been lost to history among thousands of uninteresting tax cases.’ (C. Peter Magrath [1963]. *Morrison R. Waite.*)”

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

Comment by James Allison

In May, 1886, when news of the Santa Clara decision was published, no newspaper accounts suggested that the decision had settled any constitutional issues. Instead, it was reported that the court had decided in favor of the railroad because of a minor technical error by the California Board of Equalization. Specifically, because the board had mistakenly included some fences in its assessment of the value of the roadbed, the court invalidated the entire case against the railroad. Justice Harlan, who wrote the majority opinion, explicitly denied the need to rule on any constitutional issue. In his dissenting opinion, Justice Field expressed his disappointment with the court's failure to address constitutional issues. Their reason is plain: It was not the decision, but the headnote to the decision, written later by Court Reporter Davis, that gave corporations the personhood protections they had sought in vain for so long.

Jump three years ahead to January 7, 1889, when Justice Field delivered the Supreme Court decision on *Minneapolis & St. Louis Railroad Co. v. Beckwith* (129 U.S. 26). His decision there seems careless or disingenuous, because it flatly contradicts his earlier view that Santa Clara had failed to touch on corporate personhood. In 1889 Field wrote: "It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of the clause in question. It was so held in *Santa Clara Co. v. Railroad Co.*, 118 U.S. 394, 396, 6 S. Sup. Ct. Rep. 1132, and the doctrine was reasserted in *Mining Co. v. Pennsylvania*, 125 U.S. 181, 189, 8 S. Sup. Ct. Rep. 737."

To students of *Santa Clara*, Field's Minneapolis decision rings false. They know that the Santa Clara decision itself, delivered by Justice Harlan, was made on the basis of fences, and not on the railroad's claim to the equal protections guaranteed to persons under the Fourteenth Amendment. In Harlan's own words: "If these positions [concerning the fences] are tenable, there will be no occasion to consider the grave questions of constitutional law upon which the case was determined below; for, in that event, the judgment can be affirmed upon the ground that the assessment cannot properly be the basis of a judgment against the defendant." And so it was. In the final paragraph of the Santa Clara decision, Harlan wrote: "As the judgment can be sustained upon this ground, it is not necessary to consider any other questions raised by the pleadings and the facts found by the court."

In fairness to Field, we should consider the possibility that he truly believed that a headnote, written by the court reporter, carried the same weight as a decision written by the Supreme Court. After all, it was not until 1906 that the court declared that headnotes had no legal standing, and even that decision was not unanimous. Justice Harlan dissented. We can only wonder how Field would have voted had the question arisen 17 years before, in 1889.

#### Associate Justice Stephen J. Field and Amendment XIV

Corporations owe a major debt to Justice Field. Graham compares him with Justice Holmes, who often advocated self restraint in the use of the judicial veto. In contrast, Field,

on his retirement at age 81, celebrated the judicial veto: “This negative power, the power of resistance, is the only safety of a popular government . . .” (Graham, 1968, p. 111; 168 U.S. 713-17, 1897). Holmes protested attempts to use the Fourteenth Amendment as a bar against social and economic legislation, and as an unrestricted license to contract. In contrast, liberty to contract and substantive due process can be traced directly to Fields’ dicta in majority opinions of the eighties, in key dissenting opinions and in circuit court opinions that asserted corporate personhood under the due process and equal protection clauses. (The custom of the day allowed Field to serve simultaneously as a judge in the Ninth Circuit Court and the U.S. Supreme Court. As a result, he was sometimes able to render a majority opinion in the Circuit Court that became only a minority opinion on appeal to the Supreme Court.)

In his old age Field was an anxious man, fearful of the self-destructive forces of democracy. In a tax case in 1895 he railed against the constitutionality of the 4% Federal Income Tax as an “assault upon capital” destined to “become a war of the poor against the rich.” (Graham, 1968, p. 113; *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429, 607 [1895].)

To some degree, he was railing against forces he himself had helped to unleash. At the 1890 centenary of the U.S. Supreme Court he said: “As population and wealth increase—as *the inequalities in the conditions of men become more and more marked and disturbing*—as the enormous aggregation of wealth possessed by some corporations excites uneasiness lest their power should become dominating in the legislation of the country, and thus encroach upon the rights or crush out the business of individuals of small means—as population in some quarters presses upon the means of subsistence, *and angry menaces against order find vent in loud denunciations*—it becomes more and more the imperative duty of the court to enforce with a firm hand every guarantee to the constitution. *Every decision weakening their restraining power is a blow to the peace of society* and to its progress and improvement . . .” (Graham, 1968, p. 114. [1890] 24 Am L. Rev. 351, 366-67 [italics added].)

Still he clung to policies whose effects he had begun to doubt. But the Field of 1890 was a very different man from the Field of 30 years before. On the California bench from 1857 to 1863, his views were liberal. He celebrated frequent elections by the people as the only real protection against the abuse of legislative power. He celebrated the law when it stepped in to restrain the power of capital and to protect labor. He did not see due process as something to limit the state’s taxing power as an instrument of social policy. In short, his philosophy was essentially that of Justice Holmes. However, it underwent a complete reversal in the seventies and eighties.

Field biographer Carl Swisher thought the judge’s fear of communism and socialism would account for his espousal of individualism and laissez faire. It would also explain his concern for the rights of property and corporations and his broadening of judicial review as a way to frustrate governmental paternalism (Graham, 1968, p. 116).

Several events might have triggered the judge’s fear. Thanks to the new transatlantic cable, American newspapers could report on horrific developments in Europe with an utterly novel sense of immediacy. One such occurred on March 18, 1871, when exasperated citizens of Paris staged a spontaneous uprising that had been brewing for months. The Paris

Commune, as it came to be known, “shocked the entire world, discredited collectivist and radical programs, and produced a hysteria in conservative circles in the United States which caused such current indigenous forms of radicalism as the Granger and labor movements to be attacked as conspiracies against the institution of property.” (Graham, 1968, pp. 124-125.) American newspapers tended to exaggerate the role played by Marxists and the Internationale, and the horrors were compounded by the bloody suppression of the Communards in May, 1871.

Correspondence from Field leaves no doubt that his attention had been absorbed by the events in Europe. Many years before he had seen the same kind of unrest during a European tour in the eventful period 1848-49. Similar events awaited him when he arrived in San Francisco in July 1871 in the midst of a miners’ strike in the Amador mines. The strikers had stopped the pumps and damaged \$100,000 worth of property in a failed effort to get a three-dollar wage and the abandonment of the twelve-hour day (Graham, 1968, p. 125). Troops had been sent in to quell the strike, and the battle went back and forth. No one can say exactly how these experiences affected Field’s jurisprudence, but to know them may make the turn in his philosophy seem less bizarre than otherwise.

In the seventies and early eighties Field became increasingly frustrated with the judicial reserve toward his pro-corporate opinions. It was during that time that he hatched the same kind of plan that would later prove so embarrassing to President Franklin D. Roosevelt. The major difference was in their aims: Field wanted to install a constitutional basis for laissez faire, and Roosevelt wanted to eradicate it. Specifically, Field thought he could reverse the course of judicial decision by raising the number of Supreme Court judges to 21. Later he embraced a more effective tactic, that of “making his dissenting opinions on the scope of the Fourteenth Amendment the constitutional law of the Ninth Circuit” (Graham, 1968, p. 137). These opinions were eventually attacked as “Ninth Circuit law.”

Graham suggests that similar ambitions pushed Field into Democratic Presidential politics, where he found some favor among business leaders and southerners. There was a modest Field-for-President boom at the 1880 Democratic Convention, but in 1884 his Presidential hopes met a decisive end. Circuit decisions that stymied a fair assessment of railroad properties had aroused some important opponents, California agrarians and laborers. These angry activists saw to it that the Democratic state platform of 1884 included a plank “expressly repudiating the Presidential aspirations of Stephen J. Field” (Graham, 1968, p. 140). But Field continued to peddle his Ninth Circuit law, which the U. S. Supreme Court finally bought in 1886—although Field himself was unaware of the sale until Court Reporter Davis rang it up in his *Santa Clara* headnote.

John Norton Pomeroy

It would be a mistake to think of Field as the only powerful advocate for the protection

of corporations under the Fourteenth Amendment. Another key player was John Norton Pomeroy, Professor of Municipal Law at Hastings Law College in San Francisco. A well-known legal scholar, he was a close friend and political supporter of Justice Field, who urged his railroad friends to retain Pomeroy's legal services.

In the brief Pomeroy prepared for the railroads in 1881 he argued that the framers of the Fourteenth Amendment had meant to protect more than the blacks. Its object, he claimed, was to "protect life, limb and property of all natural persons, and the *property* of all persons, whether natural or legal" (Graham, 1968, p. 401). Originally, he admitted, the Supreme Court majority had taken a narrower view, but he argued that the narrower view had been abandoned in a series of subsequent cases. Some of those had, reasonably enough, extended the protections to other racial minorities--most notably the Chinese, whom the railroads had hired in great numbers to build their tracks. But Pomeroy got to the real point by insinuating that once the narrow interpretation had been left behind, the sky was the limit.

As for personhood, there was no effort to justify corporate personhood on its merits. The way to handle that was simply to assume that corporations were persons or property, and always had been. In Graham's words: "Without corporate personality, property was defenseless, expropriation and chaos were certain. With it, the way would be safe and clear" (Graham, p. 403). In Pomeroy's words, "The Fourteenth Amendment may prove to be the only bulwark and safeguard by which to protect the great railroad systems of the country against the spirit of communism which is everywhere threatening their destruction or confiscation" (Graham, p. 403). And Justice Field's circuit opinions on corporate personhood came largely from Pomeroy's briefs.