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HISTORY AND LEGAL INTERPRETATION: THE EARLY DISTORTION OF THE FOURTEENTH AMENDMENT BY THE GILDED AGE COURT

Edward M. Gaffney, Jr.*

I. LAW, HISTORY, AND LEGAL HISTORY

I can only hope that the result of the book [A History of English Law] will be to demonstrate, firstly, the essential incompleteness of English histories in which no account is taken of the legal point of view, and secondly, the impossibility of gaining a complete grasp of the principles of English law without a study of their history.1

In the preface to his monumental, fifteen-volume A History of English Law, Sir William Holdsworth succinctly states the mutual relationship between law and history. When considered in the American context, Sir Holdsworth's observation remains viable, but emphasis should be placed on his second observation; it seems more common for historians and students of history to be familiar with the holdings of Marbury v. Madison,2 Dred Scott v. Sandford,3 Miranda v. Arizona,4 and Roe v. Wade5 than it is for lawyers and law students to place significant constitutional rulings within their historical context.

Morton Horwitz has recently suggested that lawyers rarely pay attention to the way in which the legal tradition has been shaped by "both the internal demand of professionalization and the external demand for creating an ideological buffer zone between the claims of politics and those of law."6 As a result, the legal tradition—the "prime matter" of American legal history—has been treated as a kind of meta-historical set of eternal values.


2. 5 U.S. (1 Cranch) 137 (1803).
3. 60 U.S. (19 How.) 393 (1856).
rather than as the contingent, changing product of specific historical struggles within which social conflict always takes place. Horwitz noted further that, for decades, American legal history remained isolated within a narrow mold of technicalities imposed by lawyers untrained in the discipline of history or of other human sciences. Shaped by the dominant influence of Dean Roscoe Pound, the basic categories of American legal history were shot through with unexamined, conservative political choices disguised in the neutral garb of "objective" history. For example, Pound thought of "the received legal tradition" as a sort of anti-Marxist medicine which would immunize legal historians against the dread disease of serious economic analysis.

In a similar vein, lack of skill in economic interpretation led Oliver Wendell Holmes to ascribe the 19th century movement towards fault liability to the triumph of a nonhistorical "common sense" rather than to the conscious desire of railroads and other business enterprises to reduce the costs of development and expansion.

Writing in 1941, Daniel Boorstin urged a change in this approach of searching the past only for distant legal principles. He urged instead an awareness "that law itself is a part of history," a viewpoint that would lead lawyers and legal historians to a concern for the relationship between legal institutions and the rest of society, and ultimately "into the materials of economic and social history."

Legal history in the broader sense advocated by Boorstin has fortunately come into its own. Witness the steady flow of perceptive articles on legal history in law reviews and scholarly journals (most notably *The American Journal of Legal History*), the gradual appearance of the *Holmes Devise History of the Supreme Court* under the general editorship of Paul A. Freund, the contribution of several significant studies by a nonlawyer, Leonard W. Levy, and with the recent appearance of Lawrence M. Fried-
man's *A History of American Law*, a book in which the author deals with American law "not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society."  

Before defining the canons of historical method and assessing Supreme Court performance in light of them, it is important to differentiate the various meanings of the term "history" as used in the context of legal opinions. First there is "internal history," or documents which are intrinsic to the legal process, and upon which courts must rely in their every decision. Such internal history would obviously include the text of the fundamental law, or constitutions, of the United States and the several states, statutes enacted by Congress and the state legislatures, and judicial decisions which serve as binding precedents. But there is also an "external history," or history which serves either to illuminate the meaning of the constitutions and statutes in their original context, or to reveal conditions in the nation since ratification or promulgation which have a bearing on subsequent interpretation.

In a sense, then, the Supreme Court is daily engaged in the task of interpreting history, for it must constantly refer to prior texts as a reference point for its decisionmaking. The way in which members of the Court perform the task of interpreting those texts, however, as well as the use they make of external history to bolster their ratio decidendi in specific instances, together constitute grounds for an interdisciplinary dialogue between law and history. In other words, as long as Justices of the Supreme Court write history in their opinions, they should know what historians generally consider essential to an honest and fruitful performance of the historical task.

Historians have roundly criticized the Supreme Court for its use of history. In order to appreciate the point of such criticism, it is necessary first to state four canons of historical method formulated by the Canadian philosopher Bernard J. F. Lonergan: be attentive to all the data; be intelligent in interpretation of the data; be reasonable in verifying the accuracy of one's
interpretation; and be responsible. These canons form a basic touchstone against which one can evaluate the methodological integrity not only of the Court but of its critics as well. Historical knowledge is simply a specific instance of knowledge; knowledge is not attained by neglecting relevant data, by failing to grasp the significance of data, or by refusing to account reasonably for one's judgments.

Under Lonergan's method, the historian is first called on to attend to all data within the scope of his inquiry. Such attention calls for objectivity, but not the 19th century view of objectivity which embraced only that which was to be seen, a notion which demanded of the historian a "pure receptivity that admitted impressions from phenomena but excluded any subjective activity." The attention involved here is to be paid by the historian, acting as a conscious subject who is bound to be influenced by his own world view and philosophy.

Second, there is the duty of the historian to be intelligent in his interpretation of the data. This duty imposes a threefold exegetical task on the historian: to understand the text, to judge the accuracy of his understanding, and to state what he judges to be the correct meaning of the text. In understanding the text, the historian may not assume the worth of what Lonergan calls the "Principle of the Empty Head"—that the less one knows, the better an exegete he will be. On the contrary, "the greater the exegete's resources, the greater the likelihood that he will be able to enumerate all possible interpretations and assign to each its proper measure of probability." In the context of constitutional history, for example, a knowledge of both the Articles of Confederation which preceded the Constitution and of the debates accompanying the adoption of the Constitution can be of some assistance in understanding specific constitutional texts. By the same token, however, if one relies on the Federalist Papers for such understanding without recognizing their political character as the propaganda of an anti-populist party which purported to represent "the education, the talents, the virtues, and the property of the country," one is bound to have difficulty

16. Id. at 234.
17. Id. at 157, 204-23.
18. Id. at 156.
in judging the correctness of one's understanding of the text. Similarly, if one states that he has discovered the intent of the framers on a specific text, he may still be far from a correct statement of that text for purposes of resolving a present dispute, as recent litigation on the establishment clause of the first amendment amply illustrates. In this sense, Justice Brennan was quite right when he acknowledged in 1963 that "an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems." The context of a statement can be crucial to its content; it can be anachronistic, then, to ask an 18th century text to resolve a subsequent issue not even imagined when the text was written.

Third, the historian must be reasonable; he must attempt to verify the accuracy of his interpretation. For Lonergan, the test is

[whether or not] insights are invulnerable, whether or not they hit the bull's eye, whether or not they meet all relevant questions so that there are no further questions that can lead to further insights and so complement, qualify, correct the insights already possessed.

The point here is not simply that the historian searches for the right questions as well as for answers, but that in the process his questions and answers must become interlocked in such a way as to effectuate "the eventual enclosure of the interrelated multiplicity within a higher limited unity," in order that he be able "to recognize the task as completed and to pronounce [his] interpretation as probable, highly probable, in some respects, perhaps, certain."

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21. See Kelly, Clio and the Court: An Illicit Love Affair, 1965 Sup. Ct. Rev. 119, 137-42, and the cases cited therein, for a discussion of the Supreme Court's application of history to the controversy over the proper delineation of the line between church and state. In his conclusion, the author notes:

The church-state matters to which Jefferson, Madison, Fisher, Ames and the others of the First Congress were addressing themselves are not resolvable by any plausible process of historical reasoning into a solution of the problem of aid for parochial schools, lunch programs, bus transportation, [and] released time. The application of precedent, legal continuity, and balanced contemporary socio-political theory is almost certain to produce a more intelligent result than is the attempt to use a few scattered historical documents as though they possessed the qualities of Holy Writ. Most inquiry into the past illustrates dramatically the discontinuity of culture and social process rather than their continuity. A more sophisticated and restrained approach to the use of history by the Court might well take this fact into account.

Id. at 156-57.


23. B. Lonerger, supra note 15, at 162.

24. Id. at 165.
The historian, then, cannot be value-free in the sense of refraining from all value judgments, for he is bound to make some such judgments; he should be value-free, however, at least to the extent of recognizing that his own value judgments neither constitute empirical evidence nor settle matters of fact. Finally, the historian is asked to remain detached from all bias which, for Lonergan, represents a distortion or a block in intellectual development. Indeed, says Lonergan, the historian has a greater need of such detachment from bias than the natural scientist whose work is more adequately objectified and publicly controlled. Such detachment is not to be conceived of in terms of a naive objectivism that ignores the subjectivity of the historian. On the contrary, it is only when the historian consciously makes unremitting efforts to overcome bias and to verify his interpretations and judgments that genuine detachment in the writing of history can ever be achieved.

II. THE SUPREME COURT AND ITS USE OF HISTORY: SOME PRELIMINARY CONSIDERATIONS

Since the scope of the Supreme Court's use of history is too broad for intelligent treatment within the confines of a single article, this effort will concentrate on the Supreme Court of the "Gilded Age," i.e., post-Reconstruction, and the manner in which the Court during this time utilized history in its interpretation of the fourteenth amendment. As background for that analysis, an examination of critical commentary on the Court's approach to history and examples of the Court's use of "internal history" are in order.


27. See B. Lonergan, supra note 15, at 230-32. Lonergan states that "the only adequate positive control is to have another historian go over the same evidence." Id. at 231.

28. The phrase "Gilded Age" was coined by Mark Twain and Charles Dudley Warner to describe America during the 1870's. They used it as the title of a satirical novel, in the preface to which they stated with tongue in cheek:

In a state where there is no fever of speculation, no inflamed desire for sudden wealth, where the poor are simple-minded and contented, and the rich all honest and generous, where society is in a condition of primitive purity and politics the occupation of only the capable and patriotic, there are necessarily no materials for such a history as we have constructed out of an ideal commonwealth.

S. Clemens & C. Warner, The Gilded Age v-vi (1873). When used in the context of this article, the reference is to the Court from around 1865 until the turn of the century.
A. Early Criticism of the Court's Use of History

Students of American legal history have grown accustomed to recent attacks on the Supreme Court's use of history.29 Today's student may be unaware, however, that critics of the Supreme Court have been questioning the Justices about their use of history from the earliest days of the Court. As early as 1816, Spencer Roane of the Virginia Supreme Court criticized the Court's use of history when he rebuked his fellow Virginian John Marshall for the Federalist Chief Justice's nationalistic dicta in Martin v. Hunter's Lessee,30 which Judge Roane deemed to be contrary to the intent of the Founding Fathers on the true locus of sovereignty in the new "confederation."31 Shortly thereafter, James Madison expressed the fear that the Marshall Court was interpreting the Constitution not according to "its true meaning as understood by the nation at the time of its ratification,"32 but according to the needs of commercial interests.

The Taney Court had its historical critics as well. Indeed, two of the

29. See, e.g., Levy, The Right Against Self-Incrimination: History and Judicial History, 85 POL. SCI. Q. 1 (1969). Levy claims that in their interpretations of the fifth amendment,

[the justices] stand censured for abusing historical evidence in a way that reflects adversely on their intellectual rectitude as well as on their historical competence . . . . The Court artfully selects historical facts from one side only, ignoring contrary data, in order to support, rationalize, or give the appearance of respectability to judgments resting on other grounds.

Id.

Others who have criticized the Court's use of history include Alfred Kelly, who charged the Court with writing "very bad history indeed," with using "evidence wrenched from its contemporary historical context," and with "carefully select[ing] those materials designed to prove the thesis at hand, suppressing all data that might impeach the desired historical conclusions," Kelly, supra note 21, at 126; Paul L. Murphy, who expressed chagrin at the Court's reliance on "a shockingly inaccurate use of historical data," Murphy, Time to Reclaim: The Current Challenge of American Constitutional History, 69 AM. Hist. REV. 64, 65 (1963); Alexander M. Bickel, who chastised the Court for its reading of the history of the fourteenth amendment with regard to racial segregation, Bickel, The Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1 (1955); and John Wofford, who took issue with the Court's assertion that the free speech clause of the first amendment was intended to supersede the English common law of seditious libel and who, in support of his claim, gathered considerable historical evidence which the Court either overlooked or suppressed. Wofford, The Blinding Light: The Uses of History in Constitutional Interpretation, 31 U. CHI. L. REV. 502 (1964).


32. 9 WRITINGS OF JAMES MADISON 74 (G. Hunt ed. 1901-1910), cited in Kelly, supra note 21, at 120.
critics sat on the Court.\(^{33}\) Dissenting in *Dred Scott v. Sandford*,\(^{34}\) Justice McLean noted that Taney's reference to the intent of the framers in regard to the citizenship for blacks overlooked a significant debate on the nature of slavery, in which James Madison opposed Pinckney's motion to extend the period of importation to 1808.\(^{35}\) Another dissenter in *Dred Scott*, Justice Curtis, also challenged Taney's historical accuracy in denying the American citizenship of free persons descended from African slaves at the time the Constitution was adopted.\(^{36}\) A third critic of the *Dred Scott* decision was Abraham Lincoln, who disputed the historical accuracy of Chief Justice Taney's claim that blacks were excluded from the meaning of "men" or "persons" in the Declaration of Independence.\(^{37}\)

In sum, criticism of the Supreme Court's craftsmanship, although undertaken with greater zeal recently\(^{38}\) than in the past, has firm antecedents in the 19th century, and, as Justice Frankfurter has acknowledged, that is as it should be:

Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. . . . [J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.\(^{39}\)

\(^{33}\) The two were Justice McLean and Justice Curtis.

\(^{34}\) 60 U.S. (19 How.) 393 (1857).

\(^{35}\) Justice McLean quoted Madison in support of his position:

Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves; so long a term will be more dishonorable to the American character than to say nothing about it in the Constitution. (Madison Papers.)

*Id.* at 536 (McLean, J., dissenting).

\(^{36}\) Justice Curtis framed the issue as follows:

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution.

Of this there can be no doubt.

*Id.* at 572 (Curtis, J., dissenting).


\(^{39}\) *Bridges v. California*, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting).
B. The Relevance of Internal History

As described above, "internal history" refers to legal documents intrinsic to the process of judicial decisionmaking. The first area of internal history subject to historical criticism is the Court's understanding of the Constitution itself. Some Justices conceive of the Constitution in a static fashion as a changeless document with invariant meaning. Rather than acknowledge that significant shifts in cultural and social contexts may result in meanings never imagined in the 18th century, advocates of this "constant meaning" theory allow only for a shift in the application of the old and invariant meaning to new situations.

Although few Justices have addressed themselves explicitly to the philosophical question of historical meaning, some have at least opted for a more dynamic conception of the Constitution than that espoused by the "constant meaning" proponents. Justice Brandeis, for example, expressed a strong conviction that "our Constitution is not a strait-jacket. It is a living organism. As such it is capable of growth—of expansion and adaptation to new conditions. Growth implies changes, political, economic, and social." A classic statement of this viewpoint is found in South Carolina v. United States, 199 U.S. 437 (1905), in which Justice Brewer stated: "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now." Id. at 448.

Justice Sutherland, dissenting in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), characterized this process by stating:

The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls within their meaning. But, their meaning is changeless; it is only their application which is extensible.

Id. at 451 (Sutherland, J., dissenting).

For a brief but perceptive essay on Blaisdell, see C. Miller, supra note 38, at 39-51. Elsewhere in the work, Miller criticized Justice Sutherland's dichotomy between meaning and application, stating:

Many constitutional lawyers have found this distinction between meaning and application perfectly intelligible. Not only do they believe in an immortal Constitution, but they believe also in immortal constitutional essences or ideas, with a priori definitions. In this scheme the Constitution defines meanings which, when applied to various circumstances, become the judicial contribution to the Constitution. Under the influence of pragmatism in philosophy and functionalism in jurisprudence, however, most people now understand that meaning and application are at least interdependent, or that they are identical, or even that meaning depends upon application rather than the other way around.

Id. at 151.

This view of the Constitution as a developmental instrument of social meaning found adherents on the Court in numerous Justices, from Chief Justice John Marshall, who spoke of the necessity of adapting the Constitution to "various crises of human affairs,"43 to Chief Justice Earl Warren, who stated: "For the Constitution to have vitality, this Court must be able to apply its principles to situations that may not have been foreseen at the time those principles were adopted."44

A second issue regarding "internal history" focuses on whether or not the Court should rely on legislative history in the construction of statutes presented to the Court. On the one hand, according to Chief Justice Marshall, "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived."45 Taking a contrary position, Justice Day stated in Standard Fashion Co. v. Magrane-Houston Co.,46 that there is no compulsion to resort to the "extraneous statements and often unsatisfactory aid" of legislative history when "the words of the act are plain and their meaning is apparent."47 It should be noted that attempts to ascertain the intention of the legislature through recourse to travaux préparatoires are characteristic of the civil law tradition, whereas English courts generally refuse to consider such legislative material, preferring to rest their decisions on the "plain meaning" of the words used.48 No such systematic rationale regarding the use of legislative history can be discerned from the practice of the United States Supreme Court, which seems to rely on legislative history whenever it will bolster an opinion, and to ignore it whenever it would complicate an otherwise tidy opinion. The Court has thus opened itself to charges of violation of Lonergan's first canon—be attentive—by its selectivity in the use or nonuse of material normally deemed relevant to statutory construction.

A third instance of the Court's use of internal history is its reliance on judicial precedents as controlling, at least by analogy, the case at bar. The doctrine of stare decisis is, of course, neither a facile nor an automatic determinant of the outcome of a case, since the Court must select, from among the cases offered by opposing counsel, which rules of law most nearly fit the context of the case being litigated. Historians should not fault the Justices for the mere fact that they are selective, for that is intrinsic to the judicial process. But Lonergan's first canon—be attentive—applies whenever the

46. 258 U.S. 346 (1922).
47. Id. at 356. See generally Edwards v. Douglas, 269 U.S. 204, 211 (1925).
48. See D. Lloyd, INTRODUCTION TO JURISPRUDENCE 733-43 (1972).
Justices overlook or ignore without comment precedents which are squarely on point. His second canon—be intelligent—applies whenever the Justices misstate or misunderstand the holding in a prior case. And his third canon—be reasonable—applies whenever one precedent is chosen over an equally applicable but contrary precedent because of the Justices' unexplained preferences. Value judgments, while inevitable, neither settle matters of fact nor constitute empirical evidence.

Several concrete instances suffice to illustrate this difficulty in the Court's use of internal history. First, in the 1973 abortion cases, Justice Blackmun cited *State v. Murphy* for the proposition that the anti-abortion legislation of the 19th century was intended solely to protect the pregnant woman, and that "[t]he few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the state's interest in protecting the woman's health rather than in preserving the embryo and fetus." Justice Blackmun's sweeping historical generalization flew in the face of evidence presented to the Court four months earlier in the appellant's brief in *Byrn v. New York City Health & Hospitals Corp.* In *Byrn*, the Court was advised of 11 state court decisions in the 19th and 20th centuries which had stated explicitly and unambiguously that protection of the life of an unborn child was at least one of the purposes of the respective state's abortion statutes; the Court was also advised of nine decisions in which state courts clearly implied that one of the purposes of the relevant statute was the protection of the unborn children. Most surprisingly, the one 1858 case which

51. 410 U.S. at 151.
54. The nine decisions were: Montgomery v. State, 80 Ind. 338 (1881); State v. Moore, 25 Iowa 128 (1868); Smith v. State, 33 Me. 48 (1851); Worthington v. State, 92 Md. 222, 48 A. 355 (1901); People v. Sessions, 58 Mich. 594, 26 N.W. 291 (1886); Edwards v. State, 79 Neb. 251, 112 N.W. 611 (1907); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Mills v. Commonwealth, 13 Pa. 631 (1850); State v. Crook, 16 Utah 212, 51 P. 1091 (1898).
Justice Blackmun cited in support of his historical assertion had been overruled in 1881 on the very point for which Justice Blackmun cited it; in State v. Gedicke, the New Jersey Supreme Court held that, contrary to Murphy, the New Jersey statute was designed "to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die." Robert M. Byrn has pointed out other historical errors committed by Justice Blackmun in the abortion cases, such as the apparent acceptance of the notion that abortion was not a crime at common law. Whatever one may think of the results reached in Roe and Doe, Justice Blackmun's casual use of precedents is an instance of the Court's failure in its use of internal history.

A second instance of such historical carelessness can be found in Kastigar v. United States, in which the Court held that the grant of "use immunity" sufficed to compel testimony of a witness before a grand jury. In a brief historical essay, Justice Powell, citing a 1562 statute, extolled the virtues of the grand jury in English law, and, citing a 1612 case, stated that "all subjects owed the King their 'knowledge and discovery.'" Nowhere in his short historical excursus did Justice Powell note that neither the statute nor the case refer explicitly to the institution of the grand jury; further, he omits to state a highly relevant fact: that after considerable debate about the dangers which the grand jury posed for individual freedom, the English abolished this prosecutorial tool in 1925.

A third instance of slipshod historical craftsmanship is in Justice Powell's reading of the purpose of the exclusionary rule solely as a deterrent to unlawful police misconduct in violation of the fourth amendment guarantee against

55. 43 N.J.L. 86 (N.J. Sup. Ct. 1881).
56. Id. at 90.
59. "Use immunity" was defined by the Court as a promise to the witness of "immunity from the use of compelled testimony and evidence derived therefrom." Id. at 443. The practical effect of this grant of immunity is that if the witness were subsequently prosecuted, the prosecutor would have the burden of showing that the evidence introduced was not derived from the compelled testimony but from independent sources.
60. "Transactional immunity" is a "grant [of] immunity from prosecution for offenses to which compelled testimony relates." Id. In other words, it is a bar to subsequent prosecution of the witness for offenses to which the compelled testimony relates.
61. 406 U.S. at 443, n.3, citing Statute of Elizabeth, 5 Eliz. 1, ch. 9, § 12 (1562).
62. Id. n.4, citing Countess of Shrewsbury's Case, 2 How. St. Tr. 769 (1612).
unreasonable searches and seizures. In *United States v. Calandra*, the Court ruled that illegally obtained evidence and the fruits of such evidence can be used before a grand jury and held that a witness before a grand jury cannot refuse to answer questions based on evidence obtained from an unlawful search and seizure. Justice Powell asserted that the exclusionary rule was only a judicially created rule of evidence to deter unlawful police misconduct rather than a personal constitutional right of the party aggrieved by the unlawful search and seizure. Once again, there is a problem of selectivity of data. To maintain his position, Justice Powell relied on an inference from Justice Frankfurter's opinion in *Wolf v. Colorado*, in which the Court declined to extend the federal exclusionary rule of *Weeks v. United States* to state proceedings. But Justice Powell overlooked contrary data which emerged after *Wolf*: when the Court overturned *Wolf* in the 1961 case of *Mapp v. Ohio*, it rejected as erroneous Justice Frankfurter's notion that the exclusionary rule was not a constitutional requirement of the fourth amendment. Dissenting in *Calandra*, Justice Brennan pointed out Justice Powell's historical oversight and noted that the exclusionary rule was adopted for at least two other purposes more significant than the deterrence of police misconduct: (1) to provide an enforcement tool giving content and meaning to the fourth amendment guarantees of personal security for one's person, papers, and effects; and (2) to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct.

Finally, in recent years Justice Rehnquist has demonstrated that historical selectivity can lead to incongruous results which might be amusing were it not for the loss of a significant right by parties before the Supreme Court. Justice Rehnquist is apparently of the opinion that the closer in time an observer is to an event, the more probably accurate is his interpretation of the event. Specifically, as he noted in *Ham v. South Carolina*, he relies on Justice Miller's dictum in the *Slaughter-House Cases* that the principal purpose of the equal protection clause of the fourteenth amendment was to prohibit the states from discriminating against blacks. In accordance with

64. 414 U.S. 338 (1974).
65. Id. at 347-48.
69. Id. at 655-57.
70. 414 U.S. at 357 (Brennan, J., dissenting).
72. 83 U.S. (16 Wall.) 36 (1873).
73. Id. at 81. Justice Miller's characterization of the amendment's impact was as follows:

We doubt very much whether any action of a State not directed by way of dis-
this belief, Justice Rehnquist ruled in *Ham* that the fourteenth amendment demands that a trial judge questioning prospective jurors in voir dire must probe the possibility of their racial animus against a black defendant.\(^{74}\) However, even though the defendant wore a beard and was charged with possession of marijuana, Justice Rehnquist held that the trial judge need not put any question to the jurors about their possible prejudice against the long hair or beard of the defendant, or whether they had been prejudiced against the defendant by a public television broadcast against drug offenders by the State's chief witness, a police officer.\(^{75}\)

For Justices Douglas and Marshall, this distinction without a difference was unacceptable judicial hairsplitting. They concurred that the judge was constitutionally required to probe for racial prejudice, but dissented on the ground that the judge had abused his discretion when he precluded an inquiry into the juror's prejudice on hair length.\(^{76}\) For them, the point at stake was the defendant's constitutional right to a trial by a neutral and impartial jury, which right can be infringed not only by racial bias but by subtler forms of prejudice as well. While the dissenting Justices cited cases which the opinion of the Court passed over in silence,\(^{77}\) it should also be noted that Justice Rehnquist overlooked another section of the *Slaughter-House Cases*, in which Justice Miller noted: "We do not say that no one else but the negro can share in this protection."\(^{78}\)

Other examples of misuses of legal history in the United States Reports are numerous, but these four should suffice to demonstrate the point of Robert Schuyler's complaint: "Unfortunately, a knowledge of American [and English] history has not yet been made a prerequisite for admission to the Supreme Court."\(^{79}\)

\(^{74}\) 409 U.S. at 526-27.

\(^{75}\) *Id.* at 527-28.

\(^{76}\) *Id.* at 529-30 (Douglas, J., dissenting in part); *id.* at 532-34 (Marshall, J., dissenting in part).

\(^{77}\) Justice Douglas cited Morford v. United States, 339 U.S. 258 (1950), and Dennis v. United States, 339 U.S. 162 (1949), as instances in which defendants were held to have the right to inquire into possible bias other than racial prejudice. 409 U.S. at 529 (Douglas, J., dissenting in part). Justice Marshall cited several cases and quoted extensively from Irvin v. Dowd, 366 U.S. 717, 722 (1961), which quoted Reynolds v. United States, 98 U.S. 145, 155 (1878): "'The theory of the law is that a juror who has formed an opinion cannot be impartial.'" 409 U.S. at 531 (Marshall, J., dissenting in part).

\(^{78}\) 83 U.S. (16 Wall.) at 72.

\(^{79}\) R. SCHUYLER, THE CONSTITUTION OF THE UNITED STATES 92 (1923). A more
III. THE GILDED AGE COURT AND THE FOURTEENTH AMENDMENT

Justice Rehnquist's opinion in *Ham* serves as an introduction to the theme explored herein: the distortion of the fourteenth amendment in the 19th century. Misuse of history becomes apparent in three areas of fourteenth amendment analysis by the Gilded Age Court: the extension of substantive due process protection to economic interests of corporate "persons," the denial of procedural due process to criminal defendants in state proceedings, and the tragic failure of the Court to safeguard the privileges and immunities of newly emancipated black citizens or to extend to them the equal protection of the laws.

The thirteenth, fourteenth and fifteenth amendments were designed to abolish slavery, to grant federal protection to the civil rights of the newly emancipated black Americans, and to secure the right to vote against racial discrimination, whether by the federal government or by the states. Nevertheless, neither the text of these amendments nor the series of civil rights statutes enacted by Congress in 1866, 80 1870, 81 1871, 82 and 1875 83 proved to be an effective guarantee of civil rights for blacks during the 19th century. Some of the blame for this tragic chapter in American legal history is to be laid at the doorstep of the Supreme Court for the constitutional blessings they gave to the Compromise of 1877, 84 which marked the end of Reconstruction and the abandonment of the cause of federally protected civil rights for black Americans.

Chief Justice Charles Evans Hughes once stated with more candor than discretion that "[w]e are under a Constitution, but the Constitution is what

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84. See note 192 & accompanying text infra.
the judges say it is."\textsuperscript{85} Corporate interests were delighted that this was so in the decades of the Gilded Age when the Court appeared as their savior in a series of decisions that elevated laissez-faire capitalism to the stature of a constitutional imperative. But criminal defendants and black Americans who watched what they thought were solid constitutional rights evaporate into legalistic mist during the same period would have taken greater comfort had the Court followed not the gist of Chief Justice Hughes' remark, but the maxim of the sixth century Emperor Justinian: "To know the laws, one must grasp not only their words, but their force and power as well."\textsuperscript{86} The spirit of interpretation by which the Court reversed the thrust and impact of the fourteenth amendment to favor the rich and powerful is marked by a studied focus on words rather than on their force and power.

A. Substantive Due Process: A Boon for Corporations

It is perhaps an accident of history, though a highly symbolic one, that the first test case to come before the Supreme Court on the meaning of the fourteenth amendment was presented not by poor blacks seeking judicial vindication of political and civil rights, but by white businessmen from the South who complained that a carpetbag monopoly law had deprived them of economic benefits which they deemed to be a "privilege and immunity" secured by the amendment. In the \textit{Slaughter-House Cases},\textsuperscript{87} Justice Miller, writing for a 5-4 majority, ruled against the antimonopolistic plaintiffs largely because he could not accept the sweeping contention of counsel for the appellants, John A. Campbell,\textsuperscript{88} that the Court should strike down any state law which abridged the "liberty" and "property right" of a citizen to live under a laissez-faire system. Justice Stephen Field, a pistol-packing rugged individualist from California,\textsuperscript{89} wrote a strong dissent which cited Adam Smith's \textit{Wealth of Nations}\textsuperscript{90} and which urged that the fourteenth amendment was designed not only to protect blacks but to "protect the citizens of the

\textsuperscript{85} Hughes made the remark in an extemporaneous speech given in 1907 while he was governor of New York. M. Pusey, \textit{Charles Evans Hughes} 204 (1951). During the same period, Judge Andrew Bruce of North Dakota wrote: "We are governed by our judges and not by our legislatures . . . . It is our judges who formulate our public policies and our basic law." A. Bruce, \textit{The American Judge} 6, 8 (1924).

\textsuperscript{86} \textit{Justinian, Digest} 1, 3:17.

\textsuperscript{87} \textit{See} notes 72-78 & accompanying text \textit{supra}.

\textsuperscript{88} Campbell was an Associate Justice of the Supreme Court from 1853 to 1861, when he resigned to return to his native Alabama during the Civil War. \textit{See} H. Connor, \textit{John Archibald Campbell} (1920).

\textsuperscript{89} \textit{For} a description of Justice Field, see C. Swisher, \textit{Stephen J. Field, Craftsman of the Law} (1930).

United States against the deprivation of their common rights by state legislation.\textsuperscript{91} Among such "inalienable rights" was the "right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons,"\textsuperscript{92} a right which Justice Field found to be violated by the Louisiana monopoly. Although Justice Field served long enough on the Court to see his broad interpretation of the due process clause utilized in a substantive sense, implying the power of the Justices to read their own economic beliefs into the Constitution, in 1873 he could not yet gather a majority. Justice Miller, anxious to refute Justice Field's thesis, engaged in judicial overkill, butchering the privileges and immunities clause so badly that it would never again serve as a useful tool for securing civil rights.\textsuperscript{93} Further, Justice Miller intimated that the fourteenth amendment had conferred on Congress no general powers to regulate in the area of civil rights, and that the states retained most of their original powers.\textsuperscript{94} The upshot of the case was that it laid the foundation in Justice Field's dissent for substantive due process; Judge Campbell in effect prevailed, although "not as the butchers' attorney but as a Southerner and a Democrat hostile to broad national powers."\textsuperscript{95}

The Supreme Court during this era, as during all other periods, was composed of men who breathed in the atmosphere of their times. Several of the Justices were conservative in outlook,\textsuperscript{96} having drawn not only their fees but their opinions from corporate wealth. Predisposed to the businessman's point of view, they were convinced that the "manifest destiny" of the nation lay in giving free rein to laissez-faire capitalism. The political and economic context of the times in large measure explains decisions of the Supreme Court during the Gilded Age,\textsuperscript{97} but the legal historian must also focus on the legal methodology used by the Justices to bestow their constitutional blessings on corporate "persons" during a time of phenomenal economic expansion and industrialism.

One device was a new interpretation of the phrase "due process of law,"

\textsuperscript{91} 83 U.S. (16 Wall.) at 89 (Field, J., dissenting).
\textsuperscript{92} Id. at 97.
\textsuperscript{93} 83 U.S. (16 Wall.) at 75-81.
\textsuperscript{94} See id. at 77-78.
\textsuperscript{95} C. MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 117 (1963) [hereinafter cited as MAGRATH].
\textsuperscript{96} As early as 1835, Alexis de Tocqueville noted that lawyers in America, by virtue of their training, tended to end up "eminently conservative and anti-democratic." 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 285 (P. Bradley ed. 1945). For a recent statement of the conservative character of the 20th century bench and bar, see J. AUBERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANCE IN MODERN AMERICA (1976).
\textsuperscript{97} See pp. 236-40 infra.
which appears in the text of the fourteenth amendment as well as in the fifth. At least since 1833, the scope of the fifth amendment had been limited to protection of the individual against attempts by the federal government to deprive him of his right to grand jury indictment, of his right against double jeopardy, of his right against the taking of life, liberty, or property without adequate notice and a fair and full hearing, and of his right to just compensation if private property were taken for a public use.98 Edwin S. Corwin gathered considerable evidence on the meaning of due process before the Civil War, and he doubted whether the phrase was ever meant to give the courts power to restrict or overturn legislative action, even in matters of procedural fairness.99 Whether or not Corwin is correct in his restrictive view of due process, it is clear from his research that no more than a procedural meaning was intended by the Founding Fathers. Consequently, Chief Justice Taney's use of due process in a substantive sense in Dred Scott v. Sandford100 to legitimate the Court's voiding of the Missouri Compromise as an unconstitutional regulation of economic conditions, marked an unfounded departure from the original meaning of due process. And the subsequent reliance on substantive due process by Justice Field and his colleagues proves to be another species of fruit from a poisoned tree.

A second development which was incorporated into the judicial arsenal by the Gilded Age Court was the Taney Court's acceptance of the principle that a corporation was an artificial "person" for certain kinds of cases at common law.101 This fiction, together with the Waite Court's acceptance in Santa Clara County v. Southern Pacific Railway Co.102 of the proposition that corporations were intended by the framers to benefit as "persons" under the fourteenth amendment,103 served as a solid base for the expansion of judicial protection of the rights of corporations.

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98. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), held that the Bill of Rights applied only to the federal government, not to the states.
100. 60 U.S. (19 How.) 393 (1857). For a detailed discussion of the Dred Scott decision, see V. HOPKINS, DRED SCOTT'S CASE (1971); C. SWISHER, supra note 12, at 592-652.
102. 118 U.S. 394 (1886).
103. The Court announced this boon to corporations in two brief sentences:
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.
Justice Field, then, had inherited from the Taney Court the notion of corporate personality and the tool of substantive due process. However, his attempts to combine the two in support of the position that the due process clause of the fourteenth amendment charged the Court with the duty of protecting business enterprises against unfavorable economic regulation were initially blocked by other policies with roots in the Taney Court, most notably by Chief Justice Waite’s “recognition that property rights are not absolute, [his] broad view of the states’ police powers, and a conscious deference to legislative policy judgments.”

Although Justice Field’s view was adopted during the 1890’s (after Chief Justice Waite and Justices Miller and Bradley had been replaced by Melville Fuller, David Brewer and Henry Brown), his efforts during the Waite era were restricted to the frequent dissents in which he “waged a powerful though unsuccessful campaign for his view that the Fourteenth Amendment was the guardian angel of vested property rights.”

While some seeds of Justice Field’s victory were sown in his dissents, others found receptive soil in casual dicta granted as doctrinal concessions by Chief Justice Waite himself and the majority for whom he wrote. One example of this pattern can be seen in the famous *Granger Cases*, in which Chief Justice Waite upheld a series of statutes which were designed to protect Midwestern farmers from the Eastern-dominated railroads by subjecting the rail-

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Id. at 396 (emphasis added).

One of the individuals principally responsible for the Court adopting this position was Roscoe Conkling. Conkling, a shrewd railroad lawyer and a former member of Congress who had served on the Joint Committee of Fifteen on Reconstruction which drafted the fourteenth amendment, had stated in an argument before the Supreme Court: “At the time the Fourteenth Amendment was ratified, individuals and joint stock companies were appealing for congressional and administrative protection against invidious and discriminating state and local taxes.” STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877, at 137 (1966), quoting Roscoe Conkling. The argument that Congress meant to protect corporations through the fourteenth amendment, coming as it did from one who had direct input into the drafting process of the amendment, has prompted some historians, most notably Charles and Mary Beard, in their RISE OF AMERICAN CIVILIZATION (1928), to suggest a “conspiracy theory” of the fourteenth amendment. Under this theory, Conkling, together with John Bingham, another member of the Joint Committee of Fifteen, subtly used their unsuspecting colleagues in Congress to promote the property interests of corporate “persons” while ostensibly protecting the civil rights of blacks. For a detailed review and rejection of the “conspiracy theory,” see Boudin, Truth and Fiction About the Fourteenth Amendment, 16 N.Y.U.L. REV. 19 (1938), and Graham, The “Conspiracy Theory” of the Fourteenth Amendment, 47 YALE L.J. 371 (1938).

104. MAGRATH 185.
105. Id. 202.
106. Included under this title are Munn v. Illinois, 94 U.S. 113 (1877), and seven companion cases. For a discussion of the cases, see Fairman, The So-Called Granger Cases, Lord Hale and Justice Bradley, 5 STAN. L. REV. 587 (1953).
roads to regulation by public authorities.107 Although the Chief Justice's views as expressed in the principal case, *Munn v. Illinois*,108 affirmed the states' power to regulate the railroads and sparked a blistering dissent from Justice Field (who asserted that the majority opinion was "subversive of the rights of private property")109, there were two valuable elements buried in the *Munn* opinion that would later support the business-oriented position of Justice Field. The first was Chief Justice Waite's acknowledgement that "under certain circumstances," unspecified in *Munn*, regulatory legislation might violate due process.110 The second point flowed from the notion that states could regulate property "affected with a public interest";111 it implied that they could not regulate property "unaffected" with a public interest. Half a century after *Munn*, Chief Justice William Howard Taft seized on the inverse reactionary possibilities of the *Munn* doctrine and struck down regulatory statutes adverse to the economic and property interests which he and his colleagues favored.112

By the end of the 19th century, the Court came to occupy a position so close to the conservative views espoused by Justice Field that even he could hardly have desired a more flattering epitaph—the voice of the lone dissenter in *Slaughter-House* and *Munn* became the spokesman of the Court in *Pollock*

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107. As described by Magrath, the contested statutes varied from state to state, but the main features were similar: establishment of maximum rates for railroad freight and passengers and for storing of grain by direct legislative enactment or by regulatory commissions; prohibition of discriminatory rates between places by means of the so-called "shorthaul" clause; and encouragement of competition by forbidding the consolidation of parallel lines. Magrath 175.

108. 94 U.S. 113 (1877).

109. Id. at 136 (Field, J., dissenting).

110. See id. at 125.

111. "[W]hen private property is devoted to a public use, it is subject to public regulation." Id. at 130.

v. Farmer's Loan & Trust Co. and United States v. E.C. Knight Co. In Pollock, the Court struck down a proposed graduated federal income tax on corporate wealth. Justice Field viewed the tax with alarm as only the beginning of an "assault on capital," which if left unchecked by the Court would result in "a war of the poor against the rich . . . constantly growing in intensity and bitterness." The Court's sanction of such a tax, said Justice Field, would "mark the hour when the sure decadence of our government will commence." In Knight, also known as the Sugar Trust Case, the Court gravely weakened the 5-year-old Sherman Antitrust Act by relying on an "artificial and mechanical separation of 'manufacturing' from 'commerce' without regard to their economic continuity or the effects of the former on the latter." And finally, three years after Pollock and Knight, the Court rejected Chief Justice Waite's philosophy of judicial restraint and deference to the legislature on matters concerning the reasonableness of rates, declaring "unreasonable" rates set by the state of Nebraska on a public utility because the rates did not, in the judgment of a majority of Justices, allow a "fair return upon the value of that which it employs for the public convenience."

While it is true that Justice Field could not have won over a Court to whom his economic and social views were antithetical and that he clearly appeared to the Court of the Gilded Age to speak with the voice of a prophet, it is likewise correct to suggest that he and his colleagues were either innocent of the historical data suggesting a procedural rather than a substantive meaning to due process, or that they consciously rejected this data when they em-

114. 156 U.S. 1 (1895).
115. Act of Aug. 27, 1894, ch. 349, §§ 27-37, 28 Stat. 553. It was not until ratification of the sixteenth amendment in 1913 that Justice Field's economics were undone.
116. 157 U.S. at 607.
117. Id.
120. See, e.g., Chicago, B. & Q.R.R. v. Iowa, 94 U.S. 155 (1877), in which Chief Justice Waite stated:
   Our province is only to determine whether [establishment of rates] could be done at all, and under any circumstances. If it could, the legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done.
   Id. at 164.
122. See Corwin, supra note 99. For a discussion challenging Corwin's view of due process, see McGrath 194-97. Relying in part on Graham, Procedure to Substance—Extra-Judicial Rise of Due Process, 1830-1860, 40 CAL. L. REV. 483 (1952), and Graham, The Early Antislavery Backgrounds of the Fourteenth Amendment, 1950 Wis. L. REV. 479, 610, McGrath suggests:
ployed substantive due process as a legal instrument with which they consummated an illegitimate union between the "Gospel of Wealth" and the United States Constitution.

**B. Procedural Due Process: A Bane to Criminal Defendants**

While the Gilded Age saw a flowering of Court-protected capitalism through substantive due process, it also witnessed a diminution of procedural rights which state criminal defendants, rightly or wrongly, believed to be guaranteed to them by the fourteenth amendment. The paradoxical result was that due process of law was held to protect the private property of corporate "persons" more meaningfully than the life and liberty of natural persons accused of a crime in a state court.

Just as Justice Hugo Black argued that the fourteenth amendment was not intended to immunize corporations from state regulation,\(^{123}\) he also maintained in his famous *Adamson v. California*\(^{124}\) dissent that the first section of the fourteenth amendment was intended "to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights."\(^{125}\) Justice Black maintained that the majority in *Adamson*, which included Justice Frankfurter, had erred in holding that the fifth amendment right against self-incrimination was not binding in state prosecutions because they had not taken the trouble "to appraise the relevant historical evidence of the intended scope of the first section of the [Fourteenth] Amendment."\(^{126}\) Accordingly, Justice Black supplemented his historical essay with a 31-page appendix consisting mainly of extracts from debates of the Congress that framed the fourteenth amendment.

Two years after *Adamson*, two Stanford Law School professors, Charles Fairman and Stanley Morrison, published lengthy articles attacking Justice

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\(^{123}\) From the very beginning [of the postwar Court], all of the justices regarded due process as furnishing protection against any purely arbitrary actions by government, irrespective of whether the arbitrary act occurred in a trial or in a regulation of property.

\(^{124}\) See *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938), in which Justice Black asserted:

The history of the [Fourteenth] Amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from control of state governments.

\(^{125}\) Id. at 87 (Black, J., dissenting).

\(^{126}\) Id. at 74.
Black's views. Fairman maintained that contemporary evidence in the congressional debates, newspapers, campaign speeches of 1866, and gubernatorial messages, all of which called for ratification of the amendment and records of state legislatures, "overwhelmingly" refuted Justice Black's incorporation thesis. Morrison corroborated Fairman's findings by conducting an examination of judicial interpretations of the fourteenth amendment, and concluded that Black's dissent amounted "simply to an effort to put into the Constitution what the framers failed to put there."

The chief problem with Fairman's article is the limit of its scope to the immediate background of the framing and ratification of the amendment. As Leonard Levy has shown, the entire period of debate over slavery is relevant to a proper historical understanding of the amendment. Furthermore, Fairman's finding was negative: that there was not much evidence to support Justice Black's conclusion. This technique, however, is exactly what he criticizes Justice Black for doing, that is, relying heavily on negative evidence and drawing conclusions from arguments ex silentio.

The chief difficulty with Morrison's article is in its uncritical assumption that the judges whose decisions he examined were competent historians. As Levy points out, with the exception of the elder Harlan, the Justices relied upon relatively unexamined historical data. Although Levy faults both Fairman and Morrison, he goes beyond them in attacking Black not merely for writing ex parte law office history, but for mangling and manipulating
it by his selectivity. Levy concludes by asserting that the historical record is "not only complex and confusing; it is inconclusive," and by judging Fairman as the "better historian by far." He concedes, however, that "even if history spoke with a loud, clear and conclusive voice, it ought not to control judgment."

On the larger issue of whether the Bill of Rights should be incorporated into the fourteenth amendment, the Warren Court subsequently vindicated Justice Black in all respects save for the fifth amendment provision for indictment by grand jury, the seventh amendment provision for jury trial in suits at common law when the amount in controversy exceeds 20 dollars, and the eighth amendment prohibition against excessive bail, none of which have yet been made binding upon the states. After the landmark decisions of Mapp v. Ohio, Benton v. Maryland, Malloy v. Hogan, Klopfer v. North Carolina, Duncan v. Louisiana, Pointer v. Texas, Washington v. Texas, Gideon v. Wainwright, and Robinson v. California, Justice Black wrote that while he was "not completely happy with the selective incor-

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133. See id., in which Levy faults Justice Black for abusing history by artfully selecting facts from one side only, by generalizing from grossly inadequate "proof," by ignoring confusion and even contradictions in the minds of some of his key historical protagonists, and by assuming that silence on the part of their opponents signified acquiescence.

134. Id. at 68.
135. Id. at 70.
136. Id. at 71.
139. 378 U.S. 1 (1964). In this case, the Court reversed Adamson v. California, 332 U.S. 46 (1947), and Twining v. New Jersey, 211 U.S. 78 (1908), and held that the fifth amendment right against self-incrimination applied to the states.
140. 386 U.S. 213 (1967) (sixth amendment guarantee of a speedy trial applies to state proceedings).
141. 391 U.S. 145 (1968) (sixth amendment right to trial by an impartial jury effective in state proceedings).
142. 380 U.S. 400 (1965) (sixth amendment provision for the confrontation of adverse witnesses extended to the states).
143. 388 U.S. 14 (1967) (state defendant has sixth amendment right to have compulsory process for obtaining favorable witnesses).
144. 372 U.S. 335 (1963) (sixth amendment right to assistance of counsel in non-capital felony cases extended to the states).
145. 370 U.S. 660 (1962). Robinson reversed O'Neil v. Vermont, 144 U.S. 323 (1892), and applied the eighth amendment prohibition against cruel and unusual punishment to the states.
poration theory,” it could be supported since “it has the virtue of having worked to make most of the Bill of Rights’ protections applicable to the States.”146

In light of the evidence adduced by Howard Graham and Jacobus ten-Broek on the antislavery origins of the “code words” used in the fourteenth amendment,147 it seems now that Justice Black’s view is more accurate historically as well as jurisprudentially than either he or Fairman anticipated. In any event, it is against the background of this debate on the meaning of the fourteenth amendment that the Gilded Age Court must be assessed in its handling of procedural due process questions.

In 1884, the Court held in Hurtado v. California148 that the fifth amendment requirement of a grand jury indictment before the trial of a capital case was not binding on a state despite the due process clause of the fourteenth amendment. Then in 1892, the Court ruled in O’Neil v. Vermont149 that the eighth amendment prohibition against cruel and unusual punishment was not binding on a state. The Court reaffirmed its earlier Hurtado ruling in 1900 when it ruled in Maxwell v. Dowd150 that a state may proceed to trial in a criminal case without a grand jury indictment, and added that the sixth amendment constituted no obstacle to the practice of trying defendants before an eight-member petit jury. Finally, in the 1908 case of Twining v. New Jersey,151 the Court held that the due process clause of the fourteenth amendment required that states only follow the “settled usages and modes or proceedings in the common and statute law of England” as modified by judges in light of new circumstances;152 it then added its historically unsound opinion that the fifth amendment right against self-incrimination was not among such “settled usages” and hence not “fundamental” enough to be binding on the states.153 Thus, at regular eight-year intervals, the Court denied to state criminal defendants basic procedural safeguards found in the Bill of Rights, but which according to the Court formed no part of the fourteenth amendment’s command to the states against deprivation of life, liberty or property without due process of law.

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148. 110 U.S. 516 (1884).
149. 144 U.S. 323 (1892).
150. 176 U.S. 581 (1900).
151. 211 U.S. 78 (1908).
152. Id. at 100.
153. See id., at 106-14.
Throughout this period, one voice was consistently raised in protest, that of the "great dissenter," Justice John Marshall Harlan, whose career from 1877 to 1911 spanned almost the entire period of the Gilded Age. In *Hurtado*, Justice Harlan wrote in lone dissent a masterful essay on the history of the protection of fundamental human rights in the Anglo-American legal system. He argued that the similarity of language in the fifth and fourteenth amendments shows an intention to have the safeguards that had been applied to the federal government apply to the states.

The *O'Neill* case raised the issue of whether the state of Vermont had inflicted cruel and unusual punishment when it sentenced the defendant to confinement at hard labor in a house of correction for 19,914 days for the crime of "selling, furnishing, and giving away intoxicating liquor without authority." Even Justice Field found this penalty excessive and dissented. Justice Harlan filed a separate dissent in which he stated that he concurred fully with Justice Field that the fourteenth amendment guaranteed "immunity from cruel and unusual punishment" in state proceedings just as in federal actions.

In *Maxwell*, Justice Harlan wrote another excellent historical essay, underscoring the Court's inverted values and inconsistency as reflected in its willingness to borrow from one section of the fifth amendment in order to expand substantive due process benefits for corporate "persons" while contracting procedural due process for natural persons by refusing to graft on to the fourteenth amendment another section from the fifth amendment.

Finally, in *Twining*, the lone dissenter, now an old man one year from death, wrote the last of his attempts to educate his colleagues on the history of due process in Anglo-American law. In the course of this last great dissent, he stated tartly:

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154. Although Justice Holmes is also known as the "great dissenter," the elder Harlan is at least as worthy of the title. See A. Barth, Prophets with Honor, Great Dissents and Great Dissenters in the Supreme Court 22-53 (1974); Beth, Justice Harlan and the Uses of Dissent, 49 Am. Pol. Sci. Rev. 1085 (1955).

155. 110 U.S. at 541 (Harlan, J., dissenting).

156. 144 U.S. at 325.

157. Id. at 370 (Harlan, J., dissenting).

158. Justice Harlan framed his view by stating: If then the "due process of law" required by the Fourteenth Amendment does not allow a State to take private property without just compensation, but does allow the life or liberty of the citizen to be taken in a mode that is repugnant to the settled usages and the modes of proceeding authorized at the time the Constitution was adopted and which was expressly forbidden in the National Bill of Rights, it would seem that the protection of private property is of more consequence than the protection of the life and liberty of the citizen. 176 U.S. at 614 (Harlan, J., dissenting).
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[A]s I read the opinion of the court, it will follow from the general principles underlying it, or from the reasoning pursued therein, that the Fourteenth Amendment would be no obstacle whatever in the way of a state law or practice under which, for instance, cruel or unusual punishments (such as the thumb screw, or the rack or burning at the stake), might be inflicted. So of a state law which infringed the right of free speech, or authorized unreasonable searches or seizures of persons, their houses, papers or effects, or a state law under which one accused of crime could be put in jeopardy twice or oftener, at the pleasure of the prosecution, for the same offense.\textsuperscript{159}

It is appropriate to conclude this overview of the Court's interpretation of due process in the Gilded Age with the \textit{Twining} case, for \textit{Twining} illustrates not only the Court's failure to attend to the relevant external history of the antislavery origins of the language used in the fourteenth amendment, but also a tragic instance of the Court's reliance on inaccurate data and erroneous law office history. For example, in one sentence Justice Moody asserted in \textit{Twining} that he resorted to "every historical test by which the meaning of the phrase [against self-incrimination in the Fifth Amendment] can be tried."\textsuperscript{160} Earlier in the opinion, however, he had confessed that he was obliged to "pass by the meager records of early colonial times, so far as they have come to our attention, as affording light too uncertain for guidance."\textsuperscript{161} Even earlier in his opinion, Justice Moody had cited the 1637 Massachusetts heresy trial of Anne Hutchinson, who freely and voluntarily incriminated herself. Not finding the light of this case "too uncertain for

\textsuperscript{159} 211 U.S. at 125 (Harlan, J., dissenting).

It is interesting to note that many of the problems Justice Harlan anticipated did indeed go unaddressed for a significant period. For example, it was 1936 before the Court, in \textit{Brown v. Mississippi}, 297 U.S. 278 (1936), spoke clearly to the question of impermissible methods of obtaining a confession. Chief Justice Hughes, writing for a unanimous Court, stated:

The rack and torture chamber may not be substituted for the witness stand.

\ldots It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

\textit{Id.} at 285-86.

Likewise, it was 1931 before the Court clearly protected freedom of the press and of speech from invasion by state action in \textit{Near v. Minnesota}, 283 U.S. 697 (1931); 1961 before the exclusionary rule which applied to the federal government in regard to evidence obtained in unlawful searches was applied to the states in \textit{Mapp v. Ohio}, 367 U.S. 643 (1961); and 1969 before the double jeopardy protection of the fifth amendment was extended to state proceedings in \textit{Benton v. Maryland}, 395 U.S. 784 (1969).

\textsuperscript{160} 211 U.S. at 110.

\textsuperscript{161} \textit{Id.} at 108.
guidance,” he argued that the case proved that colonial judges were “not aware of any privilege against self-incrimination or any duty to respect it.” Conclusions drawn from a negative pregnant are always rather dubious, but Justice Moody’s is simply erroneous.

Only a few months before the Hutchinson trial, Anne Hutchinson’s brother-in-law John Wheelwright had refused to answer questions about the orthodoxy of his views, grounding the refusal in his right against self-incrimination. Acting as a judge in the case, Governor Winthrop hastily explained that his court neither meant to examine the defendant by compulsory means nor sought to “draw matter from himself whereupon to proceed against him.” Justice Moody’s resort to “every historical test” of the meaning of the fifth amendment apparently failed to disclose that the maxim *Nemo tenetur prodere seipsum* (“no one is bound to betray himself”) was widely known and relied upon by the Puritans in Massachusetts.

Justice Moody’s historical excursus took him not only to the colonial period but also into early English legal history. He took comfort in the absence of a specific formula against self-incrimination in the Magna Charta and noted that the practice of self-incriminatory examinations continued for more than four centuries after 1215. This argument, however, is, as Leonard Levy characterizes it, “mischievous over-simplification, a half-truth,” for it fails to understand that the Magna Charta grew in meaning from a feudal document protecting barons from the king to an instrument of quasi-constitutional dimensions protecting the expanding liberties of all English subjects. As early as 1246, Henry III condemned self-incriminating oaths as “repugnant to the ancient Customs of the Realm” and to “his Peoples Liberties.” And by 1590, Robert Beale, the clerk of the Privy Council, could declare that “by the Statute of Magna Carta and the olde lawes of this realme, this othe for a man to accuse himself is utterly inhibited.”

162. Id. at 103-04.
164. See W. BRADFORD, BRADFORD’S HISTORY “OF PLIMOUTH PLANTATION” 465 (1898).
165. 211 U.S. at 102-08.
Justice Moody also misspoke himself when he claimed that the Petition of Right in 1628 contained no reference to self-incrimination.\textsuperscript{169} The Petition did in fact address this issue by censuring as "not warrantable by the laws or statutes of this realm" an oath which had operated since 1626 to coerce confessions from opponents of a tax enacted by Charles I and euphemistically described by him as a "loan."\textsuperscript{170}

Looking at American colonial history, Justice Moody found significance in the absence of a specific enjoinder of compulsory self-incrimination by the Stamp Act Congress and the First Continental Congress, and the absence of such a prohibition in the Northwest Ordinance.\textsuperscript{171} Failure to enumerate the principle, however, does not prove that the colonists did not count it among the fundamental rights guaranteed to them in the declaration by the First Continental Congress that they were "entitled to the common law of England,"\textsuperscript{172} and implied in the provision in the Northwest Ordinance for "judicial proceedings according to the course of the common law."\textsuperscript{173}

Finally, in support of the conclusion that the right against self-incrimination is not "an essential part of due process,"\textsuperscript{174} Justice Moody mentioned that only six states provided such protection in their constitutions.\textsuperscript{175} Yet he undermined the relevance of this statement by his acknowledgment that by 1776 the courts in all the new states protected the right, even if it was not explicitly stated in the constitution of the state.\textsuperscript{176} Further, his tally was incorrect, since he overlooked similar provisions in the constitutions of Delaware\textsuperscript{177} and Vermont.\textsuperscript{178} It should also be noted that the constitutions

\begin{itemize}
\item \textsuperscript{169} 211 U.S. at 107-08.
\item \textsuperscript{170} The incriminating oath procedure is set forth in \textit{The Constitutional Documents of the Puritan Revolution,} 1625-1660, at 55 (S. Gardiner ed. 1906). The Petition of Right is reprinted in \textit{id.} at 69.
\item \textsuperscript{172} Declaration and Resolves of the First Continental Congress, Fifth Resolution, \textit{reprinted in Sources of Our Liberties, supra} note 171, at 288.
\item \textsuperscript{173} Northwest Ordinance art. 2, \textit{reprinted in Sources of Our Liberties, supra} note 171, at 395.
\item \textsuperscript{174} 211 U.S. at 106.
\item \textsuperscript{175} Id. at 91. Justice Moody made reference to the constitutions of Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania and Virginia.
\item \textsuperscript{176} Id. at 92.
\item \textsuperscript{177} \textit{See Del. Declaration of Rights} § 15 (1776), \textit{reprinted in 1 Del. Code Ann.} at 110 (1974).
\item \textsuperscript{178} \textit{See Va. Const.} § 10 (1777), \textit{reprinted in Sources of Our Liberties, supra} note 171, at 366. It should be noted, however, that Vermont was not admitted to the Union.
\end{itemize}
of the other states which failed to include a specific reference to the right did not contain a separate bill of rights: every state having a bill of rights guaranteed the right against compulsory self-incrimination.

In its holding that the fifth amendment right against compulsory self-incrimination was not binding on the states, *Twining* typifies the tendency of the Court during the Gilded Age to place the procedural meaning of the due process clause of the fourteenth amendment in narrow, restrictive confines. In its regrettable reliance on imprecise and inaccurate history, Footnote 179 cooked up in the New Jersey Attorney General's office to win a case rather than to relate the past truthfully, *Twining* represents a tragic instance of the principle that justice delayed is justice denied. Footnote 180

C. Unequal Protection of the Laws: Frustrated Hopes for Blacks

The Court in the Gilded Age managed to butcher the privileges and immunities clause beyond recognition or usefulness in the *Slaughter-House Cases*, and it inverted the due process clause by expanding the property interests of corporate "persons" and contracting the procedural rights of criminal defendants interested in protecting their life and liberty. It remains only to survey the Court's astonishing treatment of the equal protection clause in cases involving racial discrimination to complete the picture of reversal of the historical meaning of the fourteenth amendment.

In no period of the Court's history is it more necessary to situate the Justices in the political and economic context of their time than during the Gilded Age. It is, of course, true that in no period of American history has the Court been entirely apolitical, for the Court has the solemn duty of resolving constitutional questions and national issues which often have clear political overtones or ramifications. Footnote 181 At least in this sense, then, the Supreme Court has always been and probably always will be a political institution.

Footnote 179. Leonard Levy summarized the Court's understanding of history in *Twining* by stating that the opinion was founded on inaccurate and insufficient data. Contrary to the Court's assertion, the right against self-incrimination did evolve as an essential part of due process and as a fundamental principle of liberty and justice. *Judgments: Essays on American Constitutional History* 268 (L. Levy ed. 1972).

Footnote 180. It was not until 1964, in *Malloy v. Hogan*, 378 U.S. 1 (1964), that *Twining* was overruled.

Footnote 181. In 1835, Alexis de Tocqueville observed that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." A. de Tocqueville, *Democracy in America* 137 (J. Mayer & M. Lerner ed. 1966).
Political history is especially relevant to understanding the Court of the Gilded Age because its members participated in the political life of the country more actively than in other eras. Two Chief Justices were potential nominees to the office of the Presidency: Salmon P. Chase avidly seeking the Democratic nomination in 1868 and 1872,\(^\text{182}\) and Morrison R. Waite unsuccessfully sought after by the Republicans in 1875 to run in the following year to succeed President Grant.\(^\text{183}\) In response to efforts to put forward his name in 1884, Justice Harlan, like Chief Justice Waite before him, replied that for him politics and judicial duties were "utterly irreconcilable."\(^\text{184}\) Another Associate Justice, David Davis, joined Chief Justice Chase in maneuvering for the Presidency in 1872. When Chief Justice Waite suspected Justice Davis of doing so again in 1876, the Chief Justice made one of his rare comments about a fellow judge, charging him with making "the Supreme Court the anteroom of the White House."\(^\text{185}\)

Much more significant than such political self-seeking, however, was the direct involvement in 1877 of five members of the Court—Democrats Nathan Clifford and Stephen J. Field, and Republicans Samuel F. Miller, William Strong, and Joseph P. Bradley—in the Electoral Commission established by Congress to resolve the crisis which developed when four states filed contested returns in the closest presidential race in history.\(^\text{186}\) These Justices not only "followed the election returns," as Finley Peter Dunne's Mr. Dooley would have said at a later date, they determined its outcome. In ruling on light of this situation, de Toqueville stated that judges must know "how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away." \textit{Id. See also M. Shapiro, Law and Politics in the Supreme Court} (1964).

\(^{182}\) See \textit{Magrath} 285.

\(^{183}\) Chief Justice Waite refused to consent to having his name forwarded for the Presidency, declaring:

\begin{quote}
I have now no other ambition than to fill worthily the high office to which I have been called. To me it is the most desirable as well as the most honorable position in the government... I would rather die with a name fit to be associated with those of my great predecessors than be 40 times a President.
\end{quote}


\(^{185}\) Letter from Morrison R. Waite to Elihu B. Washburne, Apr. 30, 1876, \textit{quoted in Magrath} 286. Two other justices so tempted were Justice Field, in both 1880 and 1884, and Justice Miller in 1884. It is the opinion of Magrath that, of the two, Justice Field was far more interested in the possibility of a presidential nomination. \textit{See id.} at 285-87.

\(^{186}\) For an extended description of the contested election, see P. Haworth, \textit{The Hayes-Tilden Election of 1876} (1906); C. Woodward, \textit{Reunion and Reaction} 16-19, 150-165 (1951).
each of the 20 disputed electoral college votes, the Justices split along straight party lines, with the result that the office of the presidency, badly marred by the scandal and corruption rampant during the second administration of General Grant, was assigned by the Commission to Rutherford B. Hayes, the Republican Governor of Ohio, rather than to his Democratic opponent, Samuel J. Tilden, the Governor of New York, who had a popular majority of some 250,000 votes and probably a slight majority in the electoral college as well. 187

"This outrageous display of partisanship," states historian John Garraty, "made Hayes President and left the Democrats more convinced than ever that their candidate had been deprived of office by fraud." 188 Although Garraty makes no comment as to the impact of the episode on the Court, C. Peter Magrath, biographer of Chief Justice Waite, argues that the "Court as a whole came through the Disputed Election crisis comparatively unscathed." 189 Magrath is of the opinion that "the Court was not very vulnerable to charges of having debased itself during the crisis of 1876," and suggests the contrary: that "by doing its best with an unusual and nasty chore it assisted in ending one of the Republic's few really serious political crises." 190 Magrath's rationale for absolving the highly partisan performance of the Justices on the Electoral Commission—"virtually everyone else in the country" would have behaved that way 191—is hardly an adequate standard, even pre-Watergate, for evaluating the official acts of members of the highest tribunal in the land. Additionally, his conclusion on the impact or consequences of the episode on the Court is too facile, for in restricting the focus of judgment to only the immediate context of the Commission's work, Magrath overlooks the connection between the outcome of the Hayes-Tilden election and the infamous Compromise of 1877. According to the terms of this political horsetrading, Democrats consented to Hayes' election in

187. Tilden needed only one of the disputed electoral votes in order to prevail and it has been suggested that in an honest election, Tilden might have prevailed over Hayes in Florida, although not in Louisiana or South Carolina. See C. Woodward, supra note 186, at 19. It is impossible, however, to be certain of this outcome since the estimates are based largely on the fact that blacks, who at that time voted Republican as a solid bloc, were in a majority in Louisiana and South Carolina, but not in Florida. One of the few things that is certain concerning the election of 1876 is the unprecedented degree of fraud and corruption which surrounded it. In the three Southern states in question, black Republicans were kept from the polls by force and intimidation, while Republican election officials systematically threw out or invalidated thousands of Democratic ballots. See J. Garraty, The New Commonwealth: 1877-1890, at 259-60 (1960).
188. J. Garraty, supra note 187, at 260.
189. Magrath 294.
190. Id. at 294-95.
191. Id. at 294.
return for a Republican promise to end the era of radical Reconstruction in the South.\textsuperscript{192} It is beside the point to argue that there is no evidence to demonstrate that five Justices who sat on the Electoral Commission also participated formally in negotiating the terms of the Compromise, which was more a tacit agreement among party leaders than a formal document or binding contract. The point is that all of the Justices, not merely those who served on the Commission, were fully aware of the Compromise. Breathing in the political atmosphere of the day, all of them, with the exception of Justice Harlan, deemed it their duty to act as guardians of the Compromise and to pronounce their judicial benediction on its basic terms in the civil rights cases heard from 1877 down to the close of the Gilded Age.

The remarkable shift in the Republican party's strategy toward the South by the Compromise of 1877 can be explained in terms of political opportunism calculated to keep a Republican in the White House. Louis M. Hacker notes that by 1877 the "old" radical Republicans—men like Thaddeus Stevens, Charles Sumner, and George Julian, who were abolitionists committed to political, social and economic equality for blacks—were either dead or politically impotent and had been replaced by the "new" radicals—men like Roscoe Conkling, John Logan, and James Blaine, who were opportunists eager to woo the votes of Southern blacks as long as they were necessary to maintain the thin majority of their party, but who were willing to abandon their struggle for civil rights once an alliance had been forged with Western interests sympathetic to industrial capitalism.\textsuperscript{193}

Economic history also has general relevance to the performance of the Court during the Gilded Age,\textsuperscript{194} and there was a direct link between economic history and the Compromise of 1877, which was not only a barometer of the political climate of the day, but a reflection of the economic mood of the country as well. Northern businessmen interested in the economic expansion of the South preferred a policy of "moderation" to the grant of real political power to Southern blacks, since the latter policy had provoked turmoil and violence, which in turn impeded the flow of capital to the area.\textsuperscript{195}

\textsuperscript{192} The details of the Compromise provided that the Democrats would (1) allow Hayes to become President; (2) allow the Republicans to organize the House of Representatives; (3) protect blacks' rights in the South; and (4) help to revive the Republican party in the South. The Republicans agreed to (1) recognize the election of Democratic states in Louisiana and South Carolina; (2) end the stationing of federal troops to enforce Reconstruction in the South; (3) aid in securing internal improvements for Southern states, including an East-West railroad via a southern route; (4) include some Southern Republicans in Hayes' cabinet; and (5) give more federal jobs to Southerners. See C. Woodward, supra note 186.

\textsuperscript{193} See L. Hacker, The Triumph of Capitalism 339-45 (1940).

\textsuperscript{194} See notes 9, 12, 13 & accompanying text supra.

\textsuperscript{195} Magrath characterizes the situation by noting:
It is against the background of this external political and economic history, then, that the Supreme Court's use of the internal legal history of the fourteenth amendment and the accompanying Civil Rights Acts of 1866, 1870, 1871 and 1875 must be evaluated. As Gunnar Myrdal has reminded us in his classic work on racism in America, "it must not be forgotten that the decisions of the Court had themselves a substantial share in the responsibility for the solidification of the Northern apathy." In 1876, 100 years after American revolutionaries had declared as a self-evident truth that "all men are created equal," the Court handed down two voting rights cases which weakened the notion that black Americans shared in this vision of equality. Taken together, these cases helped set the pattern for subsequent developments in fourteenth amendment analysis.

In United States v. Cruikshank, the other voting rights case of the same found guilty under section 4 of the Enforcement Act of May 31, 1870 for refusing to receive and count the vote of a black man. Chief Justice Waite abandoned his usual philosophy of judicial deference to the legislature and found the penal sections of the 1870 Act not "appropriate legislation" for enforcing the fifteenth amendment. According to the Chief Justice, "[i]t is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment." On this narrow construction of the amendment,

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When it became clear that the price to be paid for Negro equality included continuing military rule and a certain amount of violence—at the cost of business profits—there could be but one outcome. Capitalism was on the march and surely the Republican Party, its political prophet, would not stand in the way.

Magrath 115. See also P. Buck, The Road to Reunion (1937), in which the author writes: "When theories of Negro equality resulted in race conflict, and conflict in higher prices of raw cotton, manufacturers were inclined to accept the view of the Southern planter rather than that of the New England zealot." Id. at 154.


197. United States v. Reese, 92 U.S. 214 (1876); United States v. Cruikshank, 92 U.S. 542 (1876). The cases were brought under the Enforcement Act of May 31, 1870, ch. 114, §§ 1-23, 16 Stat. 140. This Act had been passed pursuant to the powers given Congress under section 2 of the fifteenth amendment and represented a comprehensive attempt to guarantee federal enforcement of the right to vote by blacks in the South. Section 4 of the Act, which was challenged in Reese, penalized the hinderance of any person from qualifying to vote, while section 6, the provision involved in Cruikshank, prohibited banding together or conspiring to deprive a citizen of rights secured by the Act.

198. 92 U.S. 214 (1876).
199. Act of May 31, 1870, ch. 64, 16 Stat. 140.
200. 92 U.S. at 221.
201. Id. at 218.
he voided key sections of the Enforcement Act as a far-reaching invasion of states' rights. He did so by a strange bit of inverted logic, construing the statute to mean more than it actually said, so that he could then conclude that by meaning that much, Congress had gone beyond the scope of the amendment.\footnote{202}

In \textit{United States \textit{v}. Cruikshank},\footnote{208} the other voting rights case of the same year, sophistry reigned supreme when the Court reversed a conviction under section 6 of the 1870 Act. Early in 1873, a group of about 300 blacks had attended a political meeting at the Grant Parish Courthouse in the town of Colfax, Louisiana, the rally ending in a terrible riot.\footnote{204} Believing the incident to be a vicious instance of a racially motivated attack on blacks in order to inhibit the exercise of their civil rights, the Justice Department secured indictments for almost 100 white men. Nine defendants, including Cruikshank, were subsequently arrested and found guilty on charges of conspiring to interfere with the blacks' right to assemble, to bear arms, to vote, and to obtain equal protection of the laws safeguarding persons and property. Presiding over the trial jointly with Circuit Judge William Woods, Justice Bradley voiced a difference of opinion with his colleague over the sufficiency of the indictment.\footnote{205} In his circuit opinion, Justice Bradley stated that the affirmative protection of the fundamental rights of citizenship "does not devolve upon [the federal government] ... but belongs to the state government as a part of its residuary sovereignty."\footnote{206} Under this view, the fourteenth amendment gave to Congress no affirmative power to furnish redress against hostile state laws, for "the only constitutional guaranty of . . . privileges and immunities is, that no state shall pass any law to abridge them . . . ."\footnote{207} While Justice Bradley acknowledged that the fifteenth amendment conceded empowered Congress to forbid "outrage, violence, and combinations on the part of individuals"\footnote{208} interfering with the right to vote, he believed that the indictments in the case were defective for failure to aver improper state action and for failure to allege racial animus as the basis of the mass killing of blacks at the courthouse. Chief Justice Waite expressed an incredible degree of naiveté and legal sophistry when he upheld Justice Bradley on

\footnote{202. See \textit{id.} at 220-21.}
\footnote{203. 92 U.S. 542 (1876).}
\footnote{204. A marker outside the town of Colfax tells the white Southerners' version of the event: "On this site occurred the Colfax Riot in which three white men and 150 Negroes were slain. This event on April 13, 1873 marked the end of carpetbag misrule in the South." \textit{Cited in C. Fairman, supra note 12, at 1377.}}
\footnote{205. United States \textit{v}. Cruikshank, 25 F. Cas. 707 (No. 14,897) (C.C.D. La. 1874).}
\footnote{206. \textit{id.} at 710.}
\footnote{207. \textit{id.} at 714.}
\footnote{208. \textit{id.} at 713.
the insufficiency of the indictments, stating, "We may suspect that race was the cause of the hostility; but it is not so averred." More ominous for future interpretation of the fourteenth amendment was his conclusion that the amendment did not reach the indictments in Cruikshank. The tragic implication of Cruikshank and Reese for black Americans was poignantly highlighted in two letters of the period written by federal attorneys working in the South. In 1875, while the cases were still pending on the Supreme Court docket, a band of whites murdered four blacks after an election in Columbus, Mississippi, and as a result of such violent intimidation the voting strength of blacks in that town dropped from 1,200 to 17. Henry Whitfield, United States Attorney in the area, reported that prosecutions would be "utterly futile":

Notorious violations of the election laws have been absolutely ignored by grand jurors who had direct and personal knowledge of the violation. It is impossible to get the witnesses, who have personal knowledge of the facts, to tell the truth, or what they know, even, in presence of the grand jury, for fear of their lives, or for considerations of policy, protection of personal friends, accomplishment of political and party purposes etc. . . .

The only hope now is through the officers and Court of the United States. If these fail, then a large mass of the people here are without remedy, or protection, by reason of the practical nullification of the Constitution and laws of the Country. Nearly three years after the Court dashed that "only hope" in Reese and Cruikshank, another federal attorney, L. C. Northrop, gave a vivid description of the situation he faced in Charleston, South Carolina:

I have been forced by the unfortunate condition here, to give to Reese et al and Cruikshank et al my severest study. I made

209. 92 U.S. at 556.
210. Id. at 554-56. The Chief Justice reached this result by reasoning that the fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not . . . add any thing to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. . . . [But] that duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

Id. at 554-55.
211. MAGRATH 125.
212. Letter from Henry Whitfield to Edwards Pierrepont, Nov. 6, 1875, quoted in MAGRATH 125.
last spring a careful abstract with notes, of these and all kindred cases and came to the conclusion then, which is much stronger now, that with the single exception of a few sections, relating to the elections of federal officers, the federal election laws are a delusion and farce. . . . If red shirts break up meetings by violence, there is no remedy, unless it can be proved to have been done on account or race, etc., which cant [sic] be proved. . . . It is hard to sit quietly and see such things, with the powerful arm of the Government, bound in conscience to protect its citizens, tied behind its back by these decisions. With colored men crowding my office, it is hard to make them understand my utter helplessness.213

In 1883, in cases involving legislation enforcing the equal protection clause, the Court delivered two more severe blows to the civil rights advocates. In United States v. Harris,214 the Court invalidated section 2 of the Ku Klux Klan Act of 1871,215 which provided penalties in cases involving conspiracies to deprive individuals of the equal protection of the laws. This provision, wrote Justice William B. Woods (another Hayes appointee), exceeded the authority given to Congress in the fourteenth amendment, because the amendment did not reach acts of private persons. Congress was therefore powerless to curb the Klan's lynching and mob violence because such activity was not carried on by state officers or under color of state law. Nor could the federal government lay upon the states an affirmative duty to protect black citizens from Klan terrorism, for the Civil War Amendments reached only “state action,” not state inaction or sins of omission of the grossest sort.

Magrath states that it was the Civil Rights Cases216 “that pleased the South most and best signif[y] the Supreme Court's role as constitutional guardian of the Compromise of 1877.”217 In the Civil Rights Cases, the Court was faced squarely with a choice between Jim Crow218 and the Civil Rights Act

214. 106 U.S. 629 (1883).
216. 109 U.S. 3 (1883).
217. Magrath 142.
218. This was the name given to a series of segregation laws which rigidly and systematically excluded blacks from contact or communication with whites. As Woodward noted, these laws lent the sanction of the law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, they extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries.

The latter was the most significant piece of civil rights legislation enacted by the Congress to enforce the Civil War Amendments. Five cases, involving denial of equal service or accommodations to blacks in a theater in San Francisco, an opera house in New York, and a hotel, restaurant, and train in the South were consolidated for a decision on the constitutionality of the Act. It seems difficult today, more than a decade after the Court upheld the Civil Rights Act of 1964, to imagine that the Court previously found a similar Act of Congress unconstitutional. But the Court of the Gilded Age did just that, striking down the equal accommodations provisions of the 1875 Act by a vote of eight to one. Building on the "state action" foundation laid by Chief Justice Waite in *Cruikshank*, the Court held that the fourteenth amendment only spoke to actions by state officials and did "not authorize Congress to create a code of municipal law for the regulation of private rights . . . ." And, as if blacks needed a reminder that the days of Reconstruction were over and that the welcome mat for blacks on their way to the court had been removed, Justice Bradley added with cruel irony that the effects of slavery wear off over time and that there comes a time when the former slave "takes the rank of a mere citizen, and ceases to be the special favorite of the laws."

It was the elder Justice Harlan, a Kentucky colonel and former slaveholder, previously opposed to the ratification of all three Civil War Amend-

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219. Act of Mar. 1, 1875, ch. 114, §§ 1-5, 18 Stat. 335. The specific section of the Act challenged provided in part:

That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations . . . of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

*Id.* § 1.


221. 109 U.S. at 11.

222. *Id.* at 25.

223. Justice Harlan's nomination to the Supreme Court was opposed by a Union Army General who wrote to the Senate Judiciary Committee that, during the Civil War, Harlan had told him that he had no more conscientious scruples in buying and selling a horse, that the right of property in a Negro was identical with that of the property in a horse, and that the liberation of slaves by our general government was a direct violation of the Constitution of the United States.

*Letter from Speed S. Fry to William Brown, Nov. 2, 1877, quoted in Westin, supra note 184, at 669-70.*
ments, who, to quote Justinian, showed greater understanding of the historical "force and power" of those Amendments, "not merely of their words."\footnote{224} His dissent remains today a masterpiece of judicial wisdom.\footnote{225}

The Court during the Gilded Age also displayed considerable ability at sleight of hand in its use of the commerce clause to defend Jim Crow. In 1878, the Court struck down a Louisiana law prohibiting segregation on steamboats by employing the rule of \textit{Cooley v. Warden}\footnote{226} to hold that regulation of steamboats traveling up and down the Mississippi required uniform national regulation.\footnote{227} But in 1890, in \textit{Louisville, New Orleans & Texas Railway Co. v. Mississippi},\footnote{228} the Court upheld as only intrastate in scope a Jim Crow law requiring segregation on railroad cars traveling within the state of Mississippi, even though Congress had presumably exercised its plenary power and "occupied the field" by the passage of the Interstate Commerce Act\footnote{229} in 1887. Justice Harlan again dissented, pointing out the obvious inconsistency in commerce clause interpretation, and implied that the only consistency in the cases was the interest of the Court in upholding segregation.\footnote{230}

Given a green light by the Supreme Court in the \textit{Civil Rights Cases} and the Mississippi railroad case, some legislatures proceeded to expand the reach

\begin{itemize}
\item \footnote{224} Justinian, Digest 1, 3:17.
\item \footnote{225} The dissent reads in part:
\begin{quote}
I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. . . . Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law.
\end{quote}
\footnote{109 U.S. at 26 (Harlan, J., dissenting).}

What I affirm is that no State, nor the officers of any State, nor any corporation or individual wielding power under State authority for the public benefit or the public convenience, can, consistently either with the freedom established by the fundamental law, or with that equality of civil rights which now belongs to every citizen, discriminate against freemen or citizens, in those rights, because of their race, or because they once labored under the disabilities of slavery imposed upon them as a race.
\footnote{Id. at 59.}
\item \footnote{226} 53 U.S. (12 How.) 299 (1851). In \textit{Cooley}, Justice Curtis ruled that the congressional commerce power, although plenary, was concurrent with that of the states, at least as to those matters affecting commerce which do not of their nature require uniform national resolution.
\item \footnote{227} Hall v. DeCuir, 95 U.S. 485 (1878).
\item \footnote{228} 133 U.S. 587 (1890).
\item \footnote{230} 133 U.S. at 594 (Harlan, J., dissenting).
\end{itemize}
of Jim Crow into every nook and cranny of social life. C. Vann Woodward noted that the purpose of the Jim Crow laws was to sustain the illusion of white superiority and that their effect was to promote the illusion of black inferiority. In 1896, the Court had an opportunity to curb such racial aggressions in the celebrated case of Plessy v. Ferguson. Instead, it upheld a Louisiana statute which was enacted “to promote the comfort of passengers on railway trains” by requiring “equal but separate accommodations” on trains. The plaintiff, Homer Adolph Plessy, had challenged the statute in the court of state judge John Ferguson on fourteenth amendment grounds, contending that state action requiring racial segregation violated the equal protection clause. Justice Henry B. Brown, appointed to the Supreme Court in 1890 by President Harrison, upheld Judge Ferguson’s rejection of this contention, reflecting the apathy to the race problem shared by the eight-man majority on the Court and probably a similar proportion of the country. In framing his customary dissent, Justice Harlan penned some of his most memorable phrases, including his prediction 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.” By way of explanation of the reasons for the stance he assumed in the dissent, he stated:

231. Woodward cites a host of state and local enactments mandating segregation in a variety of settings, including an Alabama law which prohibited white female nurses from attending to black male patients; an Oklahoma law which banned interracial boating or fishing; North Carolina and Virginia statutes which outlawed fraternal organizations that permitted members of different races to address each other as “brother”; New Orleans ordinances providing for separate red-light districts for segregated prostitutes; and a Birmingham ordinance which made it unlawful for blacks and whites to play dominoes or checkers “together or in each other’s company.” C. Woodward, supra note 218, at 99, 118, 100, & 102.

232. As Woodward characterizes it, this purposeful humiliation put the authority of the state or city in the voice of the street-car conductor, the railway brakeman, the bus driver, the theater usher, and also into the voice of the hoodlum of the public parks and playgrounds. They [Jim Crow laws] gave free rein and the majesty of the law to mass aggressions that might otherwise have been curbed, blunted or deflected.

Id. at 107-08.

233. 163 U.S. 537 (1896).


235. Justice Brown wrote with remarkable smugness and insensitivity:

We consider the underlying fallacy of the plaintiff’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.

163 U.S. at 551.

236. Id. at 559 (Harlan, J., dissenting).
The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. 237

Finally, in 1908 in *Berea College v. Kentucky*, 238 the Court sustained a Kentucky statute which, by prohibiting integration in privately incorporated educational institutions, forced the college to close its doors to black students. Seeking to avoid the obvious constitutional issue in the case, the Court based its decision on the right of the states to change the terms of corporate charters granted by the legislature. The elder Justice Harlan saw through this ploy and noted that the Kentucky statute was not really a regulation of corporate business, but was essentially an education statute requiring racial segregation and was therefore void under the equal protection clause as an "invasion of the rights of liberty and property guaranteed by the Fourteenth Amendment against hostile state action . . . ." 239 The aging gadfly left his colleagues with a poignant and penetrating question in his last dissent in a civil rights case:

Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races? 240

IV. CONCLUSION: HISTORY AS A NECESSITY AND A DUTY

Justice Harlan's question in *Berea College* has stinging force when it is remembered that the Supreme Court during the Gilded Age had moved, gradually at first but then with increasing momentum, to a position adverse to state regulation of corporate "persons" when their profits would thereby fall below a judicially determined "reasonable rate." 241 In *Berea College*,

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237. *Id.* at 560 (Harlan, J., dissenting).
238. 211 U.S. 45 (1908).
239. *Id.* at 67 (Harlan, J., dissenting). Speaking to the question of incorporation, Justice Harlan noted:
   There is no magic in the fact of incorporation which will so transform the act of teaching the two races in the same school at the same time that such teaching can be deemed lawful when conducted by private individuals, but unlawful when conducted by the representatives of corporations.
   *Id.* at 65 (Harlan, J., dissenting).
240. *Id.* at 69 (Harlan, J., dissenting).
in which the issue concerned people rather than profits, and equal educational opportunity rather than a “fair return” on corporate investment, the Court found no difficulty in allowing the Commonwealth of Kentucky to intervene in the business of an educational “corporation” and to radically alter its policy under the guise of modifying its corporate charter.

The irony of the Berea College case, then, symbolizes the paradoxical result of the judicial interpretation of the fourteenth amendment in the first four decades after the amendment was adopted. In 1873, the Slaughter-House Court butchered the privileges and immunities clause beyond recognition or usefulness. The Court then transformed the due process clause, giving it substantive content in the area of economic regulation of corporations, an area almost certainly not intended by its framers, while limiting its sweep in the area of procedural fairness to criminal defendants, an area most clearly intended by the framers. And by the close of the Gilded Age, the Court had repeatedly instructed black Americans that Congress was powerless to reverse the blatantly unequal protection of the laws which they experienced after the Compromise of 1877, when a dubiously elected President sacrificed the cause of racial justice in the name of national conciliation and a Chief Justice led the Supreme Court in pronouncing solemn constitutional benediction on the arrangement.

Hopefully it is clear that the law does not have a life all its own and that one cannot, therefore, understand legal history without raising questions of political, economic, and social history as well. Hopefully it has also become clear from the sorts of cases reviewed that the quality of the Court’s use of history should not be of interest to constitutional scholars and lawyers and other professional specialists alone. The Supreme Court in our society has been entrusted not with the business of maintaining political compromises which benefit a few or even a majority, but with the nobler task of safeguarding for all “a constitution . . . intended to endure for ages to come” as a basic statement of constitutive social meaning which “We the People . . . do ordain and establish.” Hence, the Court’s public authority in American life can only be diminished when it fails to be attentive, intelligent, and reasonable in its use of history. Conversely, the Court can only increase its stature when it shows reverence for our past heritage, especially as it is expressed in the documents which we have enshrined as fundamental or constitutive of our national self-understanding, when it displays insight not only as to the original intent of such documents, but also as to their present meaning in a rapidly changing world, and when it recognizes that “the law is not

majestic enough in the American system to endure for good but unexplained or unexplicable reason."244

Justice Holmes once wrote that "it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity."245 In light of the above considerations, however, the Court would do better to heed Justice Frankfurter's revision of Justice Holmes' distinction without a difference, and to acknowledge that judges

are under a special duty not to over-emphasize the episodic aspects of life and not to undervalue its organic processes—its continuities and relationships. For judges at least it is important to remember that continuity with the past is not only a necessity but even a duty.246

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244. C. Miller, supra note 38, at 14.
245. O.W. Holmes, Collected Legal Papers 139 (1920).