

# JUSTICE FIELD AND THE FOURTEENTH AMENDMENT\*

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“It is a misfortune if a judge reads his conscious or unconscious sympathy for one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong. . . . When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law. Judges are apt to be naïf, simple-minded men, and they need something of Mephistopheles. We too need education in the obvious—to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law.”<sup>1</sup>

SIXTEEN years before Justice Holmes thus stated the case for tolerance and self-restraint in the exercise of the judicial veto, another jurist gifted with the power of luminous statement and self-revelation seized an opportunity to epitomize his judicial philosophy. The jurist was Associate Justice Stephen J. Field;<sup>2</sup> the opportunity was the occasion presented by his retirement from the Supreme Court of the United States after a record-breaking term of thirty-four and a half years.

In a touching valedictory, Field recalled that he had received his appointment from President Lincoln in 1863, that previously he had served five and a half years as justice and chief justice of the Supreme Court of California, that he had thus rounded out more than forty years on the state and federal bench. Now, past eighty-one, feeble to the point of senility, yet his appearance and mien reminding one more than ever of

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\* “Any attempt to interpret trends in American constitutional history outside the frame of professed doctrine calls for the utmost wariness. Its chief impulse must be the hope of stimulating confirmation or contradiction, and especially that pertinacious inquiry into the cultural and psychological roots of legal doctrine on which very little spadework has yet been undertaken. At best we are likely to know much less of the forces that shaped the great judge and the development of his mind after he came to the Bench, than we know about distinguished statesmen. Often the intellectual history of a great judge before his appointment is largely irrecoverable.” FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE* (1937).

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1. See HOLMES, *Law and the Court* in *COLLECTED LEGAL PAPERS* (1920) 295.

2. See SWISHER, *STEPHEN J. FIELD, CRAFTSMAN OF THE LAW* (1930); *SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD* (Black and Smith ed. 1881).

Michelangelo's aged figure of Moses, he concluded his valedictory with these words:

"As I look back over the more than a third of a century that I have sat on this bench, I am more and more impressed with the immeasurable importance of this court. . . . It has indeed no power to legislate. It cannot appropriate a dollar of money. . . . But it possesses the power of declaring the law, and in that is found the safeguard that keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government. . . ." <sup>3</sup>

The gulf between two opposing conceptions of judicial duty, and between the social and political philosophies underlying them, has probably never been made clearer than in these contrasting statements of Justice Holmes and Justice Field. Here, in essence, are philosophies grounded on faith and on fear, on the premise men can govern themselves and on the premise they must be governed, on the conviction that democracy must ultimately be the preserver of the judiciary and on the conviction that the judiciary must ultimately be the preserver of democracy. In both cases the philosophies were integrations of experience and found their clearest expression in prophetic interpretations of the Fourteenth Amendment. Their very antithesis thus illumines and correlates nearly half of our constitutional history.

To Justice Holmes, a skeptic with "no belief in panaceas, and almost none in sudden ruin," an intellectual aristocrat with an Olympian faith in "a universe not measured by our fears, a universe that has thought and more than thought inside of it," the "provisions of the Constitution were not mathematical formulas." Indeed, "a constitution was made for peoples of fundamentally differing views" and "not intended to embody a particular economic theory." And because Holmes was convinced that the successful functioning of popular government presumes "the right of a majority to embody their opinions in law," <sup>4</sup> he often felt it his duty to uphold legislation he believed unwise. He especially mistrusted attempts to make the Fourteenth Amendment a bar to social and economic legislation. In classic dissents he repeatedly indicated his disapproval of the

3. 168 U. S. 713-17 (1897).

4. See FRANKFURTER, MR. JUSTICE HOLMES (1931); LIEF, THE DISSENTING OPINIONS OF MR. JUSTICE HOLMES (1929), for concise (and perhaps overdrawn) statements of Holmes's philosophy. The writer is not here concerned how consistently Justice Holmes adhered to a philosophy of self-restraint, (note that in only one-fourth of all cases involving invalidation of state laws under the Fourteenth Amendment during his term did Holmes disagree with his colleagues) nor how frequently and tenaciously Justice Field espoused doctrines inconsistent with his principles. See FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890 (1939) 317, n. 5. The contrast of approaches and major premises is sufficiently clear to warrant inquiry into Field's motivation.

accordion-like process by which an "unpretentious assertion of the liberty to follow the ordinary callings . . . was expanded into the dogma, Liberty to Contract."<sup>5</sup> More than anything else, therefore, it was to this amazing judicial hybridization of due process of law with the economic tenets of *laissez-faire* that Justice Holmes objected.

He obviously believed that the proliferation of substantive due process which began in the nineties and reached one of its peaks about 1910<sup>6</sup> was attributable in part to conservatives' mounting fear of socialism and to their conscious and unconscious desire to read into vague constitutional clauses personal predilections for individualism as opposed to paternalism in government. It is clear that he mistrusted this tendency, not because he personally believed in socialism, for he did not, but because he was convinced that in the long run judicial enforcement of *laissez-faire* would prove mischievous and self-defeating. Modern urban industrial society presumed the progressive extension of social controls; democracy presumed their extension in accordance with popular desires. Judges, too, therefore, needed "education in the obvious"—to learn to transcend their convictions and leave room for much they held dear "to be done away with short of revolution by the orderly change of law." Resistance to change might well lead courts to immolate themselves. Hypertrophy of due process might prostrate judicial as well as legislative power. The "rule of reason," applied as a purely reactionary formula, might lead to the rule of force and unreason.<sup>7</sup>

The contrast between Justice Holmes, the restrained judge solicitous of the right of the majority to embody its opinions in law, and Justice Field, the advocate of "resistance" and judicial trusteeship to save the "fabric of government . . . from rushing to destruction" is manifested both doctrinally and psychologically in Field's work. It is manifested doctrinally by the fact that he laid the foundations for the doctrines whose misuse and extension "to dryly logical extremes" Holmes later deplored. To a greater or lesser degree, liberty to contract and substantive due process are rooted in dicta in Field's majority opinions of the eighties; and the whole modern interpretation of the Fourteenth Amendment rests upon his dissenting opinions in the *Slaughter-House*<sup>8</sup> and *Granger*<sup>9</sup> cases and upon opinions at circuit holding that corporations are "persons" within the meaning of the equal protection and the due process clauses.<sup>10</sup>

5. *Adkins v. Children's Hospital*, 261 U. S. 525, 568 (1923).

6. See FRANKFURTER, *op. cit. supra* note 4, App. I.

7. See ADAMS, *THE THEORY OF SOCIAL REVOLUTIONS* (1913), for a statement of this thesis which may have impressed Holmes more than he was aware. Cf. 1 HOLMES-POLLOCK LETTERS (Howe ed. 1941) 123-24.

8. 16 Wall. 36, 83 (U. S. 1873).

9. 94 U. S. 113, 136 (1877).

10. See *San Mateo County v. Southern Pacific R. R.*, 13 Fed. 722 (C. C. Cal. 1882); *Santa Clara County v. Southern Pacific R. R.*, 18 Fed. 385 (D. Cal. 1883).

The contrast is manifested psychologically by a pervading tone of anxiety, by an almost total lack of that sense of relativity which so distinguished Holmes's opinions. Forebodings and premonitions,<sup>11</sup> ungrounded fears for the security of corporate property,<sup>12</sup> "parades of horrors," and threats of ruin<sup>13</sup> were familiar features of Field's opinions; and they reached an anguished crescendo in the oft-quoted passage attacking the constitutionality of the four per cent Federal Income Tax of 1895 as an "assault upon capital . . . the stepping stone to others, larger and more sweeping, till our political contests . . . become a war of the poor against the rich; a war constantly growing in intensity and bitterness."<sup>14</sup>

Coupled with this dark outlook was a sense of confused frustration that at times seemed to heighten anxiety and reveal a partial awareness that even the staunchest resistance to paternalistic trends might prove fruitless and self-defeating. Observation of the developing frontier made Justice Field as conscious as Henry George<sup>15</sup> of the parallel growth of wealth and want, progress and poverty. That he brooded over this paradox, yet was powerless to resolve it, and that failure added to his troubled state of mind is clear from an address he delivered in New York at the centenary of the Supreme Court of the United States in 1890. Appealing for an increasingly broad enforcement of all guarantees of private rights, he distilled his anxiety and dissatisfaction into one remarkable sentence:

"As population and wealth increase—as the inequalities in the conditions of men become more and more marked and disturbing—as the enormous aggregation of wealth possessed by some corporations excites uneasiness lest their power should become dominating in the legislation of the country, and thus encroach upon the rights or crush out the business of individuals of small means—as population in some quarters presses upon the means of subsistence, and angry menaces against order find vent in loud denunciations—it becomes more and more the imperative duty of the court to enforce with a firm hand every guarantee to the constitution. *Every decision weakening their restraining power is a blow to the peace of society and to its progress and improvement.* . . ." <sup>16</sup>

11. See *Juillard v. Greenman*, 110 U. S. 421, 470 (1884): "From the decision of the court I see only evil likely to follow."

12. See *Sinking Fund Cases*, 99 U. S. 700, 750 (1879): "The decision will . . . tend to create insecurity in the title to corporate property. . . ."

13. See *Bartemeyer v. Iowa*, 18 Wall. 129, 139 (U. S. 1874): "If the state can say the owner shall give the horns and hoofs, it may say he shall give the hide and the tallow. . . . It may say that the butcher shall retain the four quarters and return to the owner only the head and the feet."

14. See *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 607 (1895).

15. It is interesting to note that it was during the period 1870-71, while Henry George was editor of the *San Francisco Daily Evening Post* that his single tax theories began to crystallize.

16. (1890) 24 AM. L. REV. 351, 366-67 (italics added).

That during his final quarter-century on the Court Field was thus obviously an anxious and troubled man, committed to policies whose ineffectiveness he sensed, yet to which he clung all the more tightly, is no more remarkable than that his early opinions reveal a very different motivation.<sup>17</sup> On the bench of California from 1857 to 1863, Field distinguished himself by his liberality with the legislature, his readiness to sustain state interference, his refusal to expand discretionary judicial review. "Frequent elections by the people," he declared in an opinion upholding the validity of a Sunday law, "furnish the only protection under the Constitution against the abuse of acknowledged legislative power."<sup>18</sup> The fact that such legislation interfered with economic liberty and freedom of contract impressed him hardly at all: "The law steps in to restrain the power of capital . . . not to protect those who can rest at their pleasure, but to afford rest to those who need it, and who, from the condition of society, could not otherwise obtain it." Authority for the enactment lay in "the great object of all government, which is protection. . . . To protect labor is the highest office of our laws."<sup>19</sup> Moreover, it is striking to note that in 1859 Field emphatically did not regard a limited due process clause of the state constitution as a limitation on the taxing power.<sup>20</sup>

For some years after his elevation to the Supreme Court, Field held to his tolerant views. In interpreting the contract<sup>21</sup> and commerce<sup>22</sup> clauses

17. See SWISHER, *op. cit. supra* note 2, at 77-81.

18. See *Ex parte Newman*, 9 Cal. 502, 527 (1858). In 1861 a similar Sunday law was upheld, Field concurring. See *Ex parte Andrews*, 18 Cal. 679 (1861). For further evidence of Field's liberality toward the legislature, see *McCauley v. Brooks*, 16 Cal. 11, 56 (1860); *Lin Sing v. Washburn*, 20 Cal. 534, 586 (1862); and *McMurray, Field's Work as a Lawyer and Judge in California* (1917) 5 CALIF. L. REV. 87, 104.

19. See *Ex parte Newman*, 9 Cal. 502, 520, 521 (1858).

20. See *People v. Burr*, 13 Cal. 343 (1859). After hearing arguments that a funding measure took property without due process of law, Field declared that "the only limitation" on the taxing power was in the state uniformity clause. *Id.* at 350. It is true that the due process clause of the California Constitution of 1849, Art. I, § 8, was clearly limited to the protection of the accused "in any criminal case"; but it is also true that such limitations were often ignored by judges who felt need for protecting private rights. See Graham, "Conspiracy Theory" of the Fourteenth Amendment: 2 (1938) 48 YALE L. J. 171, n. 47.

21. Note his concurrence with the strict constructionist minority, in *Home of the Friendless v. Rouse*, 8 Wall. 430 (U. S. 1869); *Washington University v. Rouse*, 8 Wall. 439 (U. S. 1869); *Chenango Bridge Co. v. Binghampton Bridge Co.*, 3 Wall. 51 (U. S. 1866). Field, of course, subsequently maintained opposition to bartering away the taxing power. The point here is not that he turned doctrinal somersaults on points of law after 1871, but that his *relative* position on the Court shifted markedly to the right with the years; before the seventies he was less inclined than his colleagues to void regulatory legislation, after the seventies, more inclined.

22. See *Gilman v. Philadelphia*, 3 Wall. 713 (U. S. 1866), Justice Field concurring, Justices Clifford, Wayne and Davis dissenting. See also *Steamship Co. v. Joliffe*, 2 Wall. 450 (U. S. 1864), majority opinion by Justice Field, Justices Miller, Wayne and Clifford dissenting.

of the Constitution, he was less disposed than his associates to overturn state legislation. As late as 1869, in the *National Bank* cases,<sup>23</sup> he voted to sustain a sweeping exercise of the Federal taxing power, not as a source of revenue, but as an instrument of social policy. In *Paul v. Virginia*<sup>24</sup> he shifted attention from the possible abuses of legislative authority to the need for regulating large aggregations of capital.

In short, until about 1870, in matters affecting property rights, Field was a liberal, restrained judge, tolerant of legislative innovation, who could see clearly that democratic government assumes wide margins of error and a continual clash of opinions and interests. His philosophy was not materially different from that of Justice Holmes in that he not only resisted attempts to broaden the discretionary powers of the courts, but he recognized the impropriety of making his personal views on the soundness of social legislation the criterion of constitutionality.

The obvious conclusion, therefore, is that during the Reconstruction period,<sup>25</sup> and through the seventies and eighties, Field reversed himself, not only on judicial first principles, but on fundamental concepts of his social and political philosophy. The mild paternalist of the fifties became the arch-individualist of the seventies and eighties. The staunch defender of legislative power became the leader in expanding judicial review. The judge who in 1859 had given no inkling that he regarded due process as a limitation on the taxing power, in 1882 made it a limitation, not only as regards natural persons, but corporations as well.<sup>26</sup>

Impressed with paradoxes of this sort, and seeking a plausible rationale, Carl B. Swisher concluded in an interpretive chapter of his biography, that Field found "the menace of communism . . . no idle threat."<sup>27</sup> Field's vehement individualism, his allegiance to *laissez faire*, his preoccupation with the rights of property and corporations, his successful efforts to broaden judicial review and make it the means of frustrating

23. See *Veazie Bank v. Fenno*, 8 Wall. 533 (U. S. 1869). Justices Nelson and Davis dissented.

24. 8 Wall. 168 (U. S. 1869).

25. See *Ex parte Garland*, 4 Wall. 333 (U. S. 1867); *Cummings v. Missouri*, 4 Wall. 277 (U. S. 1867). Justice Field wrote the majority opinion invalidating the test oaths in both cases, and his predilections against such measures probably originated as a result of his early experience in California. See SWISHER, *op. cit. supra* note 2, c. 2. See also *Hepburn v. Griswold*, 8 Wall. 603 (U. S. 1870).

26. See *San Mateo County v. Southern Pacific R. R.*, 13 Fed. 722 (S. D. Cal. 1882); *Santa Clara County v. Southern Pacific R. R.*, 18 Fed. 385 (S. D. Cal. 1883). Legalists will point out that, strictly speaking, Field did not declare corporations persons, but rather adopted the fiction of "looking through" to the stockholders. To historians concerned with practical consequences the difference is small, and the craftsmanship is noteworthy in itself.

27. SWISHER, *op. cit. supra* note 2, at 383, 429.

paternalistic ventures in government—all these were expressions of deep-seated anxiety for the stability and safety of social institutions. Courageous as he was in his relations with people, Field was “thoroughly fearful of attacks upon what were to him fundamental principles in the organization of society.”<sup>28</sup>

Thus, without stressing the fact, Swisher advanced essentially the same hypothesis as a rationale for the paradoxes of Field’s career that Justice Holmes had offered years before as an explanation and criticism of the general trend of judicial decision. In both instances, fear of communism and socialism was regarded as a decisive factor in the self-expansion of judicial power. This article will present evidence corroborative of these views.

It now appears not only that fear of communism and radicalism was an underlying cause of much of Justice Field’s distressed anxiety at the course of democratic government, but that this same fear was an important factor in bringing about the near-reversal in his views on judicial first principles in the years following 1870. The two historic events which served to crystallize Field’s fears and affect his reorientation were the Franco-Prussian War and the Paris Commune. Like many Americans living in the chaos of the Reconstruction period, fearful that their new industrial order might be jeopardized almost at the moment of its birth, Justice Field was appalled at the recrudescence of revolution in Europe. Under the cumulative impact of successive shocks, and because his personal experiences abroad and in California rendered him particularly sensitive to these influences, he became an apostle of reaction, determined, in his own later phrase, “to strengthen, if I could, all conservative men.”<sup>29</sup> The evidence is clearly such as to mark the Paris Commune as an important pivot in American constitutional history, a chronological and doctrinal key both to Justice Field’s career and to the historical evolution of the Fourteenth Amendment.

### I.

Circumstantially, there are several major reasons for accepting this hypothesis relating to communism and socialism and for suspecting that it affords a clue to the expansion of the judicial power in the eighties and nineties.

One reason is the relation between the use and growth of substantive due process and that will to “resistance” born of overpowering anxiety and insecurity which came eventually to characterize Justice Field’s whole

28. *Id.* at 429.

29. Field to Matthew P. Deady, May 17, 1886, shortly after the Haymarket Riot: “On many accounts I should be glad to go to the Pacific Coast this summer. I should like to add my voice to strengthen, if I could, all conservative men.” See note 70 *infra*.

outlook.<sup>30</sup> It is significant in this regard that until 1870 the cases in which substantive due process was invoked almost without exception concerned either novel reform legislation or momentous social and partisan issues. The determination of these questions not only stirred endless controversy but invited a forensic use of any formula which disguised individual opinions and gave them the sanction and prestige of a supreme fundamental law. Due process met these requirements perfectly and was increasingly used as a weapon of last resort, as an ingenious question-beggar, as an Archimedian lever whose adjective "due" served as the fulcrum to shift ultimate responsibility for decisions upon social policy from the legislature to the courts. Its advantages lay in its extraordinary simplicity, in the universal scope of its subordinate terms, in its historic connotations as a right derived directly from Magna Charta, and above all, in its users' unconscious capitalization of the fact that in democratic limited governments due process *as an ideal* implies more than due procedure and thus inevitably raises substantive questions.

The dangers inherent in its use were derived from its advantages, and they were foreshadowed as early as 1818, long before the advent of the due process clause of the Fourteenth Amendment. In that year Chancellor Kent stressed confidentially to the President of Dartmouth College that his "objections," made fourteen years before as a member of the Council of Revision, to certain changes in the New York municipal charter had been "made as a politician, not as a judge" and that he was "not clear that the doctrine laid down [and grounded on the state due process clause] was correct as applied to corporations for the purposes of government."<sup>31</sup> Possibly these scruples of Chancellor Kent against the extension of "law of the land" beyond historical and textual limitations contributed to Webster's and Marshall's shift in the *Dartmouth College* case to the contract clause as the major bulwark for corporate rights.

Yet during the Jacksonian period, as the number and importance of corporations increased—even in the face of growing popular hostility—conscientious judges continued to ignore phraseological limits and on several occasions indicated that their willingness to stretch the meanings of key words was prompted by general mistrust of legislative trends and policies.<sup>32</sup> Illustrating this tendency, and in a sense broadening and culminating it, was the epidemic of substantive use of federal and state constitutional terms that broke out in the mid-fifties. In swift succession the

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30. See Graham, *The "Conspiracy Theory" of the Fourteenth Amendment* (1938) 47 YALE L. J. 371, (1939) 48 YALE L. J. 171, especially notes 11 and 36 of second part.

31. SHIRLEY, *THE DARTMOUTH COLLEGE CAUSES* (1895) 270, letter of Francis Brown to Daniel Webster, September 15, 1818. See Howe, *A Footnote to the "Conspiracy Theory"* (1939) 48 YALE L. J. 1007.

32. See Graham, *supra* note 20, notes 37, 47.



New York Court of Appeals invalidated on the ground of that state's due process clause a married woman's property act<sup>33</sup> and a drastic anti-liquor law,<sup>34</sup> and counsel for insurance companies and railroads attempted unsuccessfully to void state regulation and charter repeals. Republicans in Congress and on the stump brandished the due process clause of the Fifth Amendment as a weapon against slavery; and in 1857 the elderly Taney, seeking to bolster what others would destroy, vainly turned the tables on his opponents and denied Congress power over slavery in the Territories.<sup>35</sup> It is plain that substantive due process is a weapon born of political stress, that its use flourishes in periods of crisis and under the pressure of intense conviction. It should occasion little surprise, therefore, if counsel and judges frightened by socialism and communism fell back upon this guarantee in the troubled Reconstruction period.

Another circumstance supporting the hypothesis is implicit in Chancellor Kent's statement: "I have likewise imbibed from the stupendous events of the French Revolution an aversion to innovation except by cautious steps."<sup>36</sup> In view of the fact that conservatism and radicalism are reciprocal and self-neutralizing forces,<sup>37</sup> that the Terror of 1791-93 contributed to the establishment and early growth of judicial review in the United States,<sup>38</sup> that successive French revolutions each produced widespread psychological repercussions in this country,<sup>39</sup> and that the great European revolutions of 1848, occurring simultaneously with the birth of Marxism and promulgation of the Communist Manifesto, tended to combine in American minds a horror of the traditions of violence with a mistrust of such ill-fated collectivist experiments as Louis Blanc's National Workshops<sup>40</sup>—in view of these facts, it would scarcely be surprising to learn that fear of communism and radicalism played its part

33. See *Westervelt v. Gregg*, 12 N. Y. 202 (1854).

34. See *Wynehamer v. People*, 13 N. Y. 378 (1856).

35. See *Dred Scott v. Sanford*, 19 How. 393, 450 (U. S. 1856).

36. HORTON, JAMES KENT (1939) 271, quoting an undated letter to Edward Livingston, published in (1837) 16 AM. JURIST 361, in which Kent explained his reasons for preferring the common law to codes.

37. See WOLFE, CONSERVATISM, RADICALISM AND THE SCIENTIFIC METHOD (1923).

38. Beveridge brilliantly sketched the influence of the French Revolution in America concluding that there was "scarcely an incident" in Marshall's private experience "but was shaped and colored by this vast series of human events." 2 BEVERIDGE, JOHN MARSHALL (1929) c. 1, 44.

For further insight, see the speeches of Federalist members of Congress in the debates on the repeal of the Judiciary Act of 1801, especially speeches of Senator Ogden, 11 ANNALS OF CONG. 171 (1851); Representative James C. Bayard, 11 ANNALS OF CONG. 627 (1851); and Representative John Rutledge, 11 ANNALS OF CONG. 746 (1851).

39. See GAZLEY, AMERICAN OPINION OF GERMAN UNIFICATION, 1848-1871 (1926) 247; Curtis, *American Opinion of French Nineteenth Century Revolution* (1914) 19 AM. HIST. REV. 249.

40. *Ibid.*

either in conditioning Field's outlook or in coloring his views on social and economic policy.

This is especially true in view of the further fact that at the time when Justice Field's opinions were veering more and more in the direction of conservatism, he had reason to be troubled by the trend of domestic affairs and by his colleagues' decisions.<sup>41</sup> These were the months of the Tweed Ring exposures, the aftermath of the Erie Wars and Gold Corner, and the impeachment of President Johnson—months of widespread demoralization in all departments of government, state and national—and months characterized more than anything else by growing public antipathy and contempt for the policies and personnel of state and national legislatures.<sup>42</sup> For a War Democrat who had hoped for magnanimity toward the South, who had welcomed the Fourteenth Amendment<sup>43</sup> only to see it turned into an instrument for radical aggrandizement, who publicly deplored the majority of the Court's refusal to invalidate the Congressional reconstruction program, they were the agonizing months of democracy's Gethsemane. Far from bringing improvement and relief from these conditions, the spring of 1871 intensified them. During this time the reconstituted Supreme Court reversed the *Legal Tender*<sup>44</sup> decisions, in which Field had concurred, and upheld, over his dissent, legislation authorizing confiscation of Confederates' property.<sup>45</sup> Legislatures in the Granger states debated and passed the first statutes that established maximum rates

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41. One can hardly fail to note here how suddenly, during Reconstruction, the tides of fortune shifted for Field. A Union Democrat, bullionist, friend and brother of rising capitalist-promoters, he shared to the full the elation over Union victory and the phenomenal material successes of his time, only to see the whole suddenly threatened, after 1866, by a motley crew of Radicals, Greenbackers, and Grangers. Increasingly circumscribed in personal contacts, unfamiliar (rather than unsympathetic) with the lot of small farmers and laborers, inclined to judge eastern and midwestern legislation of the seventies and eighties by California conditions and standards of the fifties, he thus suffered equally from the handicaps of his position and experience and from the general demoralization of the times.

42. See editorials, *San Francisco Alta*, Nov. 13, 1870 ("A legislature so tied . . . that it cannot move at all is . . . the greatest of blessings."). *Disregard of Constitutions*, *Sacramento Union*, Nov. 8, 1870, citing flagrant evasions of prohibitions against subsidies and lotteries.

43. See especially, Field to Chief Justice Chase, June 30, 1866, quoted in SWISHER, *op. cit. supra* note 2, 144-45.

44. See *Knox v. Lee*, 12 Wall. 457 (U. S. 1871), *rev'g* *Hepburn v. Griswold*, 8 Wall. 603 (U. S. 1870), decided May 1, 1871, by a 5 to 4 vote. Intra-court bitterness remained intense throughout 1870-71. See FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT* (1939) c. 7; SWISHER, *op. cit. supra* note 2, c. 7.

45. See *Miller v. United States*, 11 Wall. 268 (U. S. 1871). In his dissent Field declared that "the same reason which would sustain the authority of the government to confiscate the property of a traitor would justify the confiscation of his property when guilty of any other offense." *Id.* at 323.

and regulated the businesses of grain elevators and railroads.<sup>46</sup> Radicals in Congress pushed through the drastic Ku Klux Klan act.<sup>47</sup> Finally, as if to personalize the confusion and heartbreak of the entire period, Field's elder brother and patron, David Dudley, for months under ceaseless attack for his activities as counsel for Fisk and Gould in the Erie Wars, was now engaged in a battle for his professional and moral reputation.<sup>48</sup> In these circumstances can be perceived a basis for acute psychological and judicial maladjustment. The precise focus is admittedly difficult to establish with precision; yet the biographical significance is readily apparent.

The view that Justice Field's retreat from his early liberalism stemmed in part from events of 1870-71 is further supported by the circumstance that it was during this period that the equal protection, due process, and privileges or immunities clauses first clearly emerged as bulwarks of a new capitalist order. One need not assume that Field intuitively, or at the cost of great intellectual effort, discovered these potentialities for himself. For, prompted by two influential and provocative syntheses of the case law<sup>49</sup> and encouraged to seek the sort of substantive protection which Chief Justice Chase had invoked in the case of *Hepburn v. Griswold*,<sup>50</sup> lawyers throughout the nation, from California to Maine, began barraging courts with appeals against advancing state regulation<sup>51</sup> and Reconstruction mis-

46. See letter to Chief Justice Chase, June 30, 1866, quoted in SWISHER, *op. cit. supra* note 2, at 145-46.

47. 17 STAT. 13-15 (1871). President Grant's message of March 23, calling for suppression of the outrages in the South preceded enactment and touched off a month-long debate on the scope and purpose of the Fourteenth Amendment. See notes 86, 88 *infra*, and John Norton Pomeroy's unsigned article, *The Force Bill (1871)* 12 NATION 268.

48. See Stickney, *The Lawyer and His Clients*, and Adams, *An Erie Raid* in HICKS, HIGH FINANCE IN THE SIXTIES (1929), which assembles materials bearing on both sides of the controversy.

49. COOLEY, CONSTITUTIONAL LIMITATIONS (1868) (with its chapter XI "On the Protection of Property by 'the Law of the Land'"), and POMEROY, CONSTITUTIONAL LAW (1868) were both published almost simultaneously with ratification of the Fourteenth Amendment. See especially COOLEY, *supra* at 356-57, POMEROY, *supra* at 156-60.

50. 8 Wall. 603, 624 (U. S. 1870). Clarkson N. Potter, one of the leading counsels, had raised the point.

51. See *Ex parte* Smith and Keating, 38 Cal. 702 (1869), where counsel unsuccessfully attacked a Sacramento ordinance prohibiting music and the presence of women in saloons after midnight. See also the line of Maine due process, Fourteenth Amendment cases antedating the *Slaughter-House* decision. Opinion of the Justices, 58 Me. 590 (1871) (state due process); *Allen v. Jay*, 60 Me. 124 (1872) (state due process); *Maine v. Doherty*, 60 Me. 504 (1872) (Fourteenth Amendment); *Dunn v. Burleigh*, 62 Me. 24 (1873) (Fourteenth Amendment). See also Chief Justice Lawrence's opinion in *Chicago-Alton R. R. v. People*, 67 Ill. 11 (1873), substantially holding corporations persons "so far as necessary to protect their property and franchises against the operation of a law that . . . condemns without a trial." *Id.* at 24. Due process, both federal and state, came rapidly to the fore in the *Granger Cases* in the state courts, 1872-73. Arguments printed in 2-4 ANNUAL REPORTS OF THE ILLINOIS RAILROADS AND WARE-

rule.<sup>52</sup> Along with the trends of usage thus established, strategists for the insurance companies which had asked Congress for relief while the Fourteenth Amendment was being drafted,<sup>53</sup> sought to profit by its broad phraseology. Early in the first session after ratification, John A. Bingham, drafter of section one and the chairman of the House Judiciary Committee, sponsored a bill<sup>54</sup> skillfully designed to extend to corporations the

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HOUSE COMMISSION (1872-1874) indicate that Corydon Beckwith, Chief Counsel for the Chicago and Alton Railroad and the Northwestern Fertilizing Co. pioneered the usage, though he apparently was much handicapped by Judge Woods's decision in *Continental Insurance Co. v. New Orleans*. See note 56 *infra*. Judge Drummond's decision in *Northwestern Fertilizing Co. v. Hyde Park*, 18 Fed. Cas. 394 (C. C. Ill. 1873), holding corporations persons within the Civil Rights Act of 1871, promised partial relief, but was immediately overshadowed by the Supreme Court's decision in the *Slaughter-House Cases*.

It was not until after the *Bartemeyer* decision that counsel again took heart. One then finds James C. Storrs, Chief Counsel for the Central Pacific Railroad, advising California subordinates to make use of the due process clause of the Fourteenth Amendment in various tax cases then pending. Storrs to S. W. Sanderson, May 17, 1874, 6 HUNTINGTON CORRESPONDENCE (1874) 175, Stanford University Library.

52. See the ingenious argument of A. W. Shaffer in *Worthy v. Commissioners*, 9 Wall. 611 (U. S. 1870) (unsuccessfully employing section one of the Fourteenth Amendment as a weapon to defeat the provisions of section three), and the masterpiece of research and opportunism prepared by former Justice John A. Campbell as counsel for the butchers in the various *Slaughter House* cases [*State v. Fagan*, 22 La. 545 (1870) and 16 Wall. 36 (U. S. 1873)]. It is interesting to note that Campbell in his arguments before the Supreme Court in 1872 and 1873 stressed the potentialities of section one as a bulwark against Communism and Socialism. See CONNOR, JOHN A. CAMPBELL (1920) 214.

53. See Graham, *supra* note 30, n. 86.

54. See House Bill 349, 41st Cong., 1st Sess. (1869). The text of this measure is not found in the Congressional Globe. It was repeatedly referred to, however, as a sweeping bill which extended to corporations "the privileges and immunities guaranteed by the Constitution of the United States," *i.e.*, under both the comity clause and the Fourteenth Amendment.

Apparently no serious move was made to secure passage until after the Supreme Court in *Ducat v. Chicago*, 10 Wall. 410 (U. S. 1871), and *Liverpool Ins. Co. v. Mass.*, 10 Wall. 566 (U. S. 1871), had cleverly put an end to hopes of judicial relief. On Feb. 15, 1871, after the Senate had acted unfavorably on a much less sweeping substitute measure, Bingham sought House action on the same substitute. See CONG. GLOBE, 41st Cong., 3d Sess. (1871) 538, 715, 1288-90. This revised bill provided, he explained, "first, that no corporation created by any State of this Union shall be subjected to forfeiture or penalty for bringing a suit authorized by the laws of the United States. . . . Second, that being ruled to be citizens of the United States within the meaning of the Constitution to the extent that they shall be entitled as such to sue and be sued in the courts of the United States, by virtue of their citizenship under the Constitution, against the citizens of any other State, they are therefore, of necessity, within the ruling of the Court, under the protection of that provision of the Constitution of the United States which gives them in whatever State they may be found no greater disability in reference to trade and commerce than the citizens of the state in which they live."

"That, Sir," Bingham added (with reference to the first half of the statement, and in apparent hopes listeners might conclude he was speaking of the whole) "is the ruling

privileges or immunities of citizens of the United States. After Congress had rejected this measure, and after Justice Bradley's and Judge Woods's decisions in the *Slaughter-House Cases* at circuit<sup>55</sup> had seemed to take for granted that corporations — or at least shareholders — were protected by the phraseology of section one, the insurance company lawyers turned again to the courts and sought Judge Woods's express ruling on corporate personality and citizenship. In a remarkable *volte face* that dismayed the entire insurance bar, Judge Woods ruled in *Continental Insurance Company v. New Orleans*,<sup>56</sup> in 1871, that corporations were neither "citizens" nor "persons" within the meaning of the Fourteenth Amendment.

Whatever may be one's views on the bearing of these facts on the problem of the framers' intentions,<sup>57</sup> it is obvious that there early de-

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made and adhered to by the Supreme Court of the United States for more than fifty years."

Like other skeptics, the writer has often asked, "Why, if framers of the Fourteenth Amendment intended to aid or include corporations in 1866, no evidence has been found that identifies them with such usage in the years immediately following ratification"? With reference to corporate benefits under the citizenship clause, it now appears that such evidence is at hand. Neither the circumstances of the utterance, nor Bingham's standing and abilities as a constitutional lawyer seem to the writer to be consistent with Professor McLaughlin's view that the argument just quoted indicates Bingham's ignorance of what the Court recently had held in the *Paul, Ducat*, and *Liverpool* cases. See note 57 *infra*.

55. See *Livestock Dealers & Butchers Association v. Crescent City Livestock Landing & Slaughter House Co.*, 4 Fed. Cas. 891 (C. C. La. 1870).

56. 13 Fed. Cas. 67 (C. C. La. 1870). Judge Woods reasoned much as did Mr. Justice Black in his dissent in *Connecticut General Life Ins. Co. v. Johnson*, 308 U. S. 77 (1938), *i.e.*, that since only natural persons can be "born or naturalized" a double standard of interpretation of the word "person" in section one is required to make the due process and equal protection clauses cover corporations. So far as the framers' intentions are concerned, this argument of course ignores the fact that the introductory sentence defining citizenship was added in the Senate, and did not appear in the Joint Committee's drafts. See note 82 *infra*.

57. Possibly unaware that Bingham had first introduced the broader House Bill 349, 41st Cong., 1st Sess. (1869), Professor McLaughlin minimizes the importance of immediate post-ratification use of section one by insurance companies. See McLaughlin, *The Court, the Corporation, and Conkling* (1940) 46 AMER. HIST. REV. 45, 50-51. He further questions whether corporate activity in Congress caused framers to consider applicability of the section to corporations.

Pending Harris L. Rubin's completion of a projected biography of Bingham, the writer is unprepared to carry skepticism so far. Evidence not only corroborates Conkling's statements with regard to the corporation petitions but reveals several possible links between members of the Joint Committee on the one hand, and between prior users of due process and current (*i.e.*, 1866) seekers after federal protection on the other. See Graham, *loc. cit. supra* note 20. Consequently, the writer feels that the so-called "secondary intention hypothesis" best accords with the facts as they stand: Bingham and his colleagues drafted section one to safeguard the rights of Negroes, mulattoes and Southern loyalists. Yet they probably soon became aware, by reason of the insurance company and

veloped—and while Field was in a mood to have appreciated its timeliness—a pattern of constitutional usage strikingly like the one that he eventually championed. Not only in Congress but in the courts, well-organized campaigns were under way to make the Fourteenth Amendment a shield against what many businessmen and conservatives regarded as dangerous and excessive regulation. It is no great act of faith to believe that these maneuvers came to the attention of a Justice of the Supreme Court of the United States and that he probably formulated conclusions as to their merits.

Finally, climaxing the circumstantial case, is the fact that a great social cataclysm—the first to be reported by cable and exploited by modern journalistic devices<sup>58</sup>—may well have been one of the decisive factors in

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railroad petitions, and as draftsmen obliged to consider all meanings of their texts, that “persons” as a generic term embraced corporations.

Speculation ought not to proceed much beyond this point, but Bingham’s acceptance of Credit Mobilier stock in 1866 suggests that the anti-slavery zealot of the fifties was now on intimate terms with business leaders, and inclined to favor their programs. His original positively-worded draft—“Congress shall have power . . .”—harmonized nicely with the needs and aims of petitioning business interests. Together with such colleagues as Reverdy Johnson and Roscoe Conkling he probably saw no reason to oppose phraseology which offered prospects of incidental Congressional or judicial aid to beleaguered railroads and insurance companies. This conclusion is strengthened by the fact that Radicals in 1866 not only assumed Congress to have plenary powers under the Amendment but were currently solidifying their alliances with business. See BEALE, *THE CRITICAL YEAR* (1930). In the last analysis, therefore, belief in a secondary intent to aid business presumes little more than a decent respect for the framers’ intelligence and a willingness to believe that intelligent and informed men did not rigidly compartmentalize conceptions of “persons” and “due process” but adopted prevalent conceptions which harmonized with their general views of statecraft.

Perhaps for these reasons it is difficult for the writer to accept Professor McLaughlin’s view that Bingham’s failure to cite decisions in which the Supreme Court had recently blasted counsel’s hopes of judicial protection under the comity and commerce clauses signified ignorance of these decisions and presumably ignorance of any company plans for Congressional protection under the comity clause and the Fourteenth Amendment. Silence here might also be construed as discretion, though as the writer has pointed out elsewhere, silence in such cases is admissible neither as proof of intent, nor the lack of it.

In those railroad charter cases in which Reverdy Johnson had successfully figured as counsel just prior to his membership on the Joint Committee, and in which due process arguments had been used, it may be added that the cases were decided favorably to the railroads a few months before the Fourteenth Amendment was declared officially ratified. See Graham, *supra* note 22, at 186-90; *Commonwealth v. Pittsburgh & Connellsville R. R.*, 58 Pa. 26 (1868). Continued citation of such cases as *Brown v. Hummell*, 6 Pa. 86 (1847), and *Erie R. R. v. Casey*, 1 Grant’s Cases 274 (Pa. 1856), indicates that Reverdy Johnson continued to rely on due process, although the decision turned on other points.

58. Tremendous sums were spent by the American press for cable tolls and correspondence during the Franco-Prussian War and the Paris Commune. See LEE, *HISTORY OF AMERICAN JOURNALISM* (1923) 328-29. Contemporary readers probably gained a sense of the immediacy of events which is difficult for jaded moderns to appreciate. Field’s cor-

reorienting Field's outlook. Simultaneously with the most depressing personal and national crises in the spring of 1871, the Paris Commune<sup>59</sup> shocked the entire world, discredited collectivist and radical programs, and produced a hysteria in conservative circles in the United States which caused such current indigenous forms of radicalism as the Granger and labor movements to be attacked as conspiracies against the institution of property.

These effects are most strikingly revealed in E. L. Godkin's editorials in *The Nation*<sup>60</sup> and by the repercussions of the Commune in California. Familiarity with French revolutionary backgrounds and with the Marxian thesis and program currently propagandized by the Internationale led Godkin to anticipate outbreaks which, after their first occurrence in October, 1870, during the Siege, and especially after the carnage and incendiarism that finally marked the Communards' overthrow in May, 1871, prompted repeated editorial probing of domestic affairs. Mounting labor unrest, sectional, class and partisan antagonisms, legislative and executive demoralization, the greed and lawlessness of capital—all ominous in themselves—were now viewed against still darker backgrounds. Appalled at these "unforeseen tendencies of democracy," Godkin not only flinched at the thought of increased state interference and argued that nothing could be accomplished by legislation toward reconciling capital and labor, but rebuked such humanitarians and reformers as John Stuart Mill and Wendell Phillips for their espousal of labor and land reforms which, he declared, would only encourage irresponsible fanatics to make greater demands.

This same impairment of reason and social sympathy by acts of violence is even more forcibly illustrated by the aftermath of a miners' strike in Amador County, California.<sup>61</sup> Bitter against "Amador Communists" who

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respondence often glowed with fraternal pride and wonder at the miracle of the cable and telegraph; potentialities of the instruments fascinated him, and apparently he pondered deeply their significance and reports.

59. For the modern view of this complex upheaval, which uniformly emphasizes its spontaneous, heterogeneous, often chauvinistic and proletarian, but essentially non-Marxian and unsocialistic character, see Bourgin, *The Paris Commune* in 4 *Encyc. Soc. SCIENCES* (1931) 63-66; MASON, *THE PARIS COMMUNE* (1930). Mason concluded: "The revolution of March 18th was the product of a spontaneous uprising of an exasperated populace." *Id.* at 133. Compare contemporary accounts in the *New York Herald*, *San Francisco Alta*, and FETRIDGE, *THE RISE AND FALL OF THE PARIS COMMUNE (1871)*, all of which tended to exaggerate the role of the Internationale and Marxists in fomenting revolt.

60. See particularly: *The French Republic*, Oct. 27, 1870; *The 'Red' Uprising in Paris*, March 23, 1871; *La Commune*, April 13, 1871; *'The Commune' and the Labor Question*, May 18, 1871; *The Objectives of the Commune*, May 25, 1871; *Communistic Morality*, June 15, 1871; *The Future of Capital*, June 22, 1871. The titles themselves, and their sequence, convey something of the impact on Godkin's thinking.

61. See CROSS, *HISTORY OF THE LABOR MOVEMENT IN CALIFORNIA* (1935) 68; and the *San Francisco Bulletin*, *San Francisco Chronicle* and *San Francisco Alta*, June 23

had stopped the pumps, damaging property to the value of \$100,000, after failing to gain demands for a three-dollar wage and abandonment of the twelve-hour day, San Francisco's leading daily, the *San Francisco Alta*,<sup>62</sup> sensationalized a drunken brawl which occurred shortly after the withdrawal of state troops from the scene of the strike and represented it as a desperate assault upon organized government and property. A remarkable editorial entitled "The Federal Authority and the Amador Conspiracy"<sup>63</sup> climaxed appeals for judicial as well as renewed military protection. In the editor's judgment both the Fourteenth Amendment and the Ku Klux Act gave the federal courts ample powers to deal with such violence, so that if the value of mining property were again endangered, it was their duty to exercise these powers.

These circumstances afford impressive documentation of the view that fear of socialism and radicalism may have profoundly affected Justice Field and the course of judicial history. Recurrence of revolution abroad, in conjunction with Reconstruction and the rise of the regulatory movement at home, obviously stimulated an opportunist "natural rights" use of all the clauses of section one. Bingham's triple-reinforced but highly ambiguous phraseology<sup>64</sup> literally collapsed under the threat of

to August 1, 1871. Violence was first reported June 23 while papers were still filled with news of suppression of the Communards. Troops were withdrawn July 15th. The Orange-men riots in New York City on July 12, 1871, in which more than 100 persons were killed and 300 wounded, likewise alarmed law-abiding citizens and excited fears of increasing social instability. (See *San Francisco Alta*, July 26, 1871; *San Francisco Chronicle*, July 15, 1871, reprinting editorials of the *Chicago Tribune* and *New York Tribune*).

62. The *San Francisco Alta's* accounts, later acknowledged to have been sensationalized (see issues of July 29 and 30) were so virulent in attacks on the miners, as to lend weight to the charge that McCrellich, publisher of the *San Francisco Alta*, held a large financial interest in the mines.

63. July 26, 1871. Most alarming feature of the affair in the *San Francisco Alta's* eyes was the fact that public opinion, especially in the Amador district, supported the miners and acknowledged their grievances. Unreconciled to the discovery that it had lost its strictly "private" character, property appealed for military sanctions, and invoked aid of the recently-passed Ku Klux Klan Act and Fourteenth Amendment.

And it is here that one encounters the most puzzling—or impressive—of all circumstances: John A. Bingham, drafter of section one, returned temporarily to San Francisco from Oregon (where he had continued his stumping for the Republican ticket) on July 24th—the day of the renewed violence at Sutter Creek, the day before the newspapers' reports thereof, and two days before publication of the *San Francisco Alta's* leader, *The Federal Authority and the Amador Conspiracy!* No substantial evidence has been found linking Bingham with this suggested use of the Fourteenth Amendment. Furthermore, it is obvious that editorial opportunism affords a perfectly adequate explanation of such usage. Numerous brief reports of Bingham's remarks do show, however, that section one—and especially the equal protection clause—constituted the core and refrain of nearly every speech. Possibly the Bingham papers hold the clue to this baffling circumstance. But a preliminary search, undertaken by Dr. Austin Hutcheson of the University of Nevada, disclosed nothing in the correspondence of the framers bearing on these matters.

64. See Graham, *The Conspiracy Theory of the Fourteenth Amendment: 1* (1938) 47 *YALE L. J.* 371, 397-400.



universal usage. Obligated to deal at once with the one problem which had all but escaped the framers' attention—namely, which department of government was charged with delimiting the states' powers—the federal courts were thrust into a deadly cross-fire between Confederates and Radicals and corporations and Grangers. Statesmanship in such a situation called for curtailment of jurisdiction, and this in turn required retreat from the advanced position originally taken by Justice Bradley and Judge Woods.<sup>65</sup> Yet manifestly there were definite limits to judicial caution and self-restraint. Resolve to uphold historic state powers and prestige of the courts during a prolonged national crisis could in the long run only intensify appeals for judicial protection. Ebbing respect for legislatures and mounting fears of revolt, on the other hand, progressively undermined the confidence and security which were the bulwarks of judicial self-restraint. Above all, the courts most emphatically had *not* totally rejected the doctrines of corporate personality and liberty of contract.<sup>66</sup> They had rejected merely the uses to which those doctrines had been put.

Our problem now is to determine the relevancy and application of these general circumstances. Did Justice Field react to the Commune in substantially the same manner as Godkin and the editor of the *Alta*? Is it likely that he learned of the Amador riot and shared the reactions of his California friends?<sup>67</sup> Is there anything in his correspondence that sheds light on this episode and points to its biographical importance?

Additional circumstantial, as well as direct contemporaneous, evidence suggests affirmative answers to these questions. It appears that Justice

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65. That is, in the *Slaughter-House Case* at circuit, 4 Fed. Cas. 891 (C. C. La. 1870). The concluding paragraphs of Justice Bradley's dissenting opinion in the same case before the Supreme Court, 16 Wall. 36 (U. S. 1873), aimed at what he called the "argument from inconvenience," emphasize how heavily political and practical considerations weighted the majority opinion.

66. See Justice Miller's opinion in *Bartemeyer v. Iowa*, 18 Wall. 129, 133 (1873); and Chief Justice Waite's dictum in the *Sinking Fund Cases*, 99 U. S. 700, 718 (1879), assuming corporations to be persons within the meaning of the due process clauses of the Constitution. Consider too, that the Court in the *State Railroad Tax Cases*, 92 U. S. 575 (1875); in the *Granger Cases*, 94 U. S. 155 *et seq.* (involving corporations); and in *Railroad Co. v. Richmond*, 96 U. S. 521 (1877), while obviously dismayed at the increasing economic and substantive usage of due process, nevertheless tacitly permitted corporations to continue raising the point. Indeed, the latter case was argued the day Justice Miller delivered his oft-quoted rebuke of due process misusers in *Davidson v. New Orleans*, 96 U. S. 97, 102-03 (1877). Yet the fact that the Supreme Court four years later (in 1882) permitted lengthy arguments on the point of corporate personality cautions against the view that there were no doubts or reservations in the Justices' minds in 1878-79 at the time of Waite's dictum. Probably few questions have raised more momentous and confusing problems in seemingly simple form than the questions whether corporations should be permitted to challenge state legislation under the due process clauses.

67. It is not to be overlooked, for example, that D. D. Colton, later the business associate of Stanford and Huntington, and, intimate friend of Field, was president of the Amador Mine. See SWISHER, *op. cit. supra* note 2, at 247.

Field arrived in San Francisco on July 10, 1871,<sup>68</sup> five days before withdrawal of troops from the Amador mines, and was holding circuit court there when the *Alta* bore the news: MORE TROUBLE IN AMADOR. REIGN OF TERROR IN SUTTER CREEK. MASKED MINERS HUNTING FOR MINE OFFICERS. AMADOR MINE STILL IN POSSESSION OF OWNERS. BADGER SHAFT OF THE AMADOR MINE ON FIRE. THE WAR SAID TO BE JUST COMMENCED. Under these circumstances it would have been remarkable if the *Alta's* suggested applications of the Fourteenth Amendment and the Ku Klux Act failed to receive his earnest consideration.

The real importance of the Amador episode is indicated, however, not by these circumstances, but by a reference in a letter written six months earlier. On December 12, 1870, during the siege of Paris and shortly after the first outbreaks<sup>69</sup> that eventually culminated in the Commune, Field excused his neglect of a correspondent stating, "For months the stirring events occurring in Europe have absorbed my thoughts to the exclusion of almost everything else, except the duties which I have been obliged to discharge from day to day."<sup>70</sup>

It is not difficult in the light of his known experiences before 1870 to account for this preoccupation. Unlike most Americans, Field knew the meaning of revolution; he had witnessed it at first hand, and his life and environment had been among the best proofs of its folly.

An impressionable New England-bred law clerk of thirty-two, off for a *wanderjahr*<sup>71</sup> with his elder brothers and sisters, he had arrived in Paris

68. See San Francisco *Alta*, July 10, 1871, p. 1, col. 2.

69. American papers devoted considerable attention to an abortive assault on the Hotel de Ville led by Gustave Florens, October 31. See the telegraphic dispatches, San Francisco *Alta*, Nov. 5-10, 1870; editorial comment in the Sacramento Union, Nov. 5, 1870, N. Y. Herald, Nov. 4, 5, 9, 1870; and delayed accounts in the San Francisco *Alta*, Dec. 1-10, 1870.

70. To Matthew P. Deady, United States District Judge, 1859-1893, and one of Oregon's most distinguished citizens. The Field-Deady correspondence consisting of 156 letters extending over the period 1865-1893 is preserved with other Deady papers in the archives of the Oregon Historical Society, Portland.

71. See SWISHER, *op. cit. supra* note 2, at 22-23. As nearly as can be reconstructed from his *Reminiscences* and from family sources, Field sailed from New York in June, 1848, with his father; they were met in London by his brother Henry; the party proceeded through Belgium to Paris and spent several days there while the city still bore the scars of the "Bloody Days of June." After touring the provinces, and perhaps Germany, the family wintered in Paris. At Galignani's news room in December, Field read President Polk's message confirming the discovery of gold in California, but resolved to complete his travels as planned. In the spring, joined by Cyrus and family, the party journeyed through Italy, arriving in Rome just after lifting of the siege and occupation by French troops. Severe fighting was under way in Hungary when the party reached Vienna.

There is no evidence that the tour during the year of the revolutions was more than mildly exciting; but it would have been remarkable if Field, having been in Paris during Louis Napoleon's election as President and shortly after promulgation of the Communist

in July, 1848, just after General Cavaignac's suppression of the barricades, the discredit and collapse of the Provisional Government, and its unsuccessful experiments with Louis Blanc's National Workshops. Continuing their grand tour, the Fields witnessed outbreaks in Rome and Vienna, the beginnings of German unification and Marxian socialism, the seethings and travail of a whole continent in ferment. After more than a year abroad, Field returned to New York, and sailed almost immediately for gold-rush California.<sup>72</sup>

During the next two decades, borne on by the exhilarations and opportunities of a rapidly growing nation, Field advanced swiftly from law clerk to Alcade, to legislator, to justice, to chief justice of the state supreme court, and finally to Associate Justice of the highest Court in the land. In 1870-71, reviewing the miracle of the frontier against embittered talk of class war and the bloody struggles of Communards and anti-Communards, the man who barely twenty years before had, penniless, walked the streets of San Francisco exclaiming, "Isn't it glorious! Isn't it glorious!"<sup>73</sup> turned his thoughts to the problem of ordering society to escape the horrors of revolution<sup>74</sup> and to safeguard institutions<sup>75</sup> he held dear.

More and more, beginning in the seventies, Justice Field tended to condemn, where earlier he had approved, legislation regulating the use and acquisition of property.<sup>76</sup> Historically considered, it was Field's tragic

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Manifesto, had evinced no more than casual interest, twenty-two years later, in the collapse of Napoleon's Second Empire, and in a sudden resurgence of Marxism.

72. He landed in New York, October 1, 1849; and six weeks later sailed for California via the Isthmus, arriving in San Francisco, December 28, 1849.

73. See FIELD, REMINISCENCES (1893) 6-7.

74. Apparently the David Dudley Fields were in Paris during the Commune. DEADY'S JOURNAL, entry May 9, 1871. It is possible that their accounts or experiences intensified Field's reactions.

75. Though too much easily could be made of the fact, there is fragmentary evidence which suggests that Field felt his childlessness keenly, that a sense of frustration, which would have increased in the seventies with the certainty that he was to remain without issue, may have been an unfathomable influence in his life. See the letter of Oct. 19, 1866, congratulating Deady on "the happy event which is to be," and adding "would that like good fortune was to happen to me." See also the request made of his brother-in-law, G. E. Whitney, dated Dec. 16, 1869, that a new-born niece be christened Stephanie. See DEADY COLLECTION, FIELD PORTFOLIO.

One feels at least that the almost religious regard for the family and home which pervades Field's correspondence (which made Marxism doubly loathsome), owed its poignancy and compulsion in part to this circumstance.

76. See his dissenting opinion in the Sinking Fund Cases, 99 U. S. 700, 750 (1879); and compare the views expressed in *Ex parte Newman*, 9 Cal. 502 (1858); and other cases cited note 18 *supra*. See also his concurrence with Justice Bradley's dissenting opinion in *Railroad Co. v. Peniston*, 18 Wall. 5, 38 (U. S. 1873) (wherein the minority favored exemption from state taxation of the property of federal-chartered and subsidized Pacific railroads. Note that Field earlier had concurred with the unanimous deci-

confusion that made the aftermath of Civil War and the conduct and program of desperate Parisians denied security, self-government, and justice, the test of democracy's validity and strength. Yet in the light of what Field had seen and experienced his confusion was not unnatural. Probably most individuals, reared in his environment, witnessing the same contrasts and suffering the same shocks and disappointments, would have reacted in much the same manner.

The historian's problem, therefore, is not merely one of explaining Justice Field's reorientation, but of undertaking to gauge its consequences. This task involves exploring the relation between Field's personal anxiety and his role as the leading apostle of *laissez-faire* and broadened judicial review. What remains obscure, yet is plainly essential to the understanding of recent constitutional history, is the connection in Field's thought between the psychological aftermath of the Commune and the hybridization of section one of the Fourteenth Amendment with the economic tenets of *laissez-faire*. In what ways did Field's economic motivation manifest itself? What objectives did he pursue? Is there evidence that he fostered or accelerated development of the doctrines of liberty to contract and corporate personality? Were his contributions to these doctrines indispensable? What is their ultimate bearing on Field's place in judicial history?

## II.

It is obvious that before these questions can be considered the constitutional history of the post Civil War period must be briefly reviewed, and Field's part therein critically examined. Historians have long puzzled over the paradox that the biography of the Fourteenth Amendment begins with an apparent death sentence and ends in near apotheosis. Phraseology which today has come to be literally a bill of rights in itself, a constitution within the Constitution, and a phenomenally efficient source of judicial power originally received the narrowest possible reading and was restricted in its practical application to "persons of the Negro Race."<sup>77</sup>

Widespread cynical opportunism in the use of the concepts was without doubt an important factor in the sudden eclipse of due process and corporate personality in the period 1871-73. Yet it is equally clear that Judge Woods's substantial about-face in *Continental Insurance Company v. New Orleans*<sup>78</sup> and Justice Miller's majority opinion in the *Slaughter-House Cases* would both have been unlikely but for two textual flaws which had

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sion in *Thomson v. Pacific R. R.*, 9 Wall. 576 (U. S. 1870) (holding the state-chartered, federal-subsidized Pacific Railroad to be taxable by the states).

77. See *Slaughter-House Cases*, 16 Wall. 36, 83 (U. S. 1873) (opinion by Justice Miller, speaking primarily with reference to the equal protection clause). Paradoxically, this clause was the first to be universally applied.

78. See note 51 *supra*.

crept unnoticed into the framers' drafts in 1866. Radical Republicans had warmed easily to the logic of Bingham's rudimentary equal protection—due process—privileges or immunities clauses; they feared only that even these three complementary guarantees might prove worthless if Democrats regained control of Congress.<sup>79</sup> Conservatives, on the other hand, bitterly opposed any sweeping enlargement of Congressional power. To achieve a *constitutional* rather than mere *Congressional* protection, therefore, and to placate opponents of unitary, centralized government, Bingham shifted from his original positively-worded draft, "Congress shall have power to make or enforce all laws necessary and proper," to the present negative form, "no state shall make or enforce any law," and in the fifth section gave Congress power "to enforce the provisions of this article by appropriate legislation." Whether, in making this shift, Bingham uncritically regarded it as a clever compromise which gave Congress substantially the same powers as the original form, or whether he perceived that in evading a showdown with critics, he had merely authorized Congress to enforce a prohibition on the states, is not today apparent. Textually, the effect was a drastic reduction in the scope of Congressional power and an attendant failure of the framers to consider further what department of government should enforce the new guarantees.<sup>80</sup>

The same excessive zeal for multiple protection responsible for this flaw had also made for another. Was it not a curious oversight, critics argued, that the Amendment designed to clarify rights of citizenship nevertheless failed to include any definition of the crucial word "citizen"?<sup>81</sup> Deeming the point well taken, the Senate without extended debate<sup>82</sup> added to the Joint Committee's draft the present introductory sentence: "All persons born or naturalized in the United States . . . are citizens of the United States and the state wherein they reside." No one observed, apparently, that while citizenship was thus made dual in the first sentence, only the privileges or immunities of "Citizens of the United States" were specifically protected in the second sentence against abridgement by the states! This oversight is, of course, easily explained. For years Bingham, and, indeed, all Republican opponents of slavery and of the *Dred Scott* decision, had assumed every important constitutional right to be a privilege or immunity of citizens of the United States.<sup>83</sup> Such had been the basic premise

79. See Graham, *loc. cit. supra* note 64; FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908) *passim*.

80. Flack concluded that Bingham and other leading Radicals regarded the change as having little effect on Congress' power—a conclusion difficult to accept until one perceives how far natural rights ideology dominated the framers' thinking. *Ibid.*

81. *Id.* at 88. Senator Ben Wade of Ohio, an ultra-Radical, was chiefly responsible for the change.

82. See CONG. GLOBE, 39 Cong., 1st Sess. (1866) 2869.

83. See Graham, *supra* note 64, at 400, n. 98.

and the theory of the entire Amendment. They therefore could not conceive—what nevertheless plainly was the case—that a sentence added to clarify rights of citizenship, might, by its juxtaposition and inclusiveness, have the contrary effect of obscuring and jeopardizing those rights. Likewise it escaped notice that an Amendment originally regarded as necessary, and originally designed to broaden Congress's powers, ultimately passed in a form which not only fell short of clear-cut enlargement, but actually fell back on the very form which, in the case of the Thirteenth Amendment, had been regarded as ambiguous and inadequate.<sup>84</sup>

These defects came to light early in the Reconstruction era. They figured in Democratic attacks<sup>85</sup> on the Radical program in Congress and the courts. Yet it was not until early in 1871, in debates<sup>86</sup> over the Ku Klux Klan Act, that their potentialities were fully perceived. Ironically, responsibility for emphasizing them rests with two of the ablest and staunchest defenders of Negro rights, Senators Trumbull of Illinois and Carpenter of Wisconsin. President Grant's message advocating a Second Force Bill to cope with extra-legal suppression of Negro rights in the South had raised a host of troublesome questions. Had Congress the power to deal with these matters, to hold, in short, that the Amendment forbade denials of equal protection and abridgement of privileges by acts either of omission or of commission?<sup>87</sup>

Torrents of rhetoric and political casuistry sought to answer these questions, but an extempore exchange in the Senate between Trumbull and Carpenter epitomized the debate and reveals the sources of both previous and subsequent confusion. An idealist and ardent believer in Federalism, who was as distressed at this time by the latitudinarianism of the vindictives as he had earlier been at the cynical opportunism of the Confederates, Trumbull denied that the Fourteenth Amendment authorized Congress to protect citizens in their rights of person and property in the states. Such an interpretation, he declared, would mean "annihilation of the States." "The Fourteenth Amendment has not changed an iota of

84. Whether section two of the Thirteenth Amendment had granted Congress power to pass the Civil Rights Act of 1866 was one of the chief issues agitating Congress at the time of the drafting of the Fourteenth Amendment. Bingham himself contended that further and unequivocal enlargement of Congressional power was essential. See CONG. GLOBE, 39 Cong., 1st Sess. (1866) 429, 1034, 1064-65, 1089-95, 1292.

85. See FLACK, *op. cit. supra* note 79, c. 5, particularly at 221-22.

86. See CONG. GLOBE, 42d Cong., 1st Sess. (1871) 376-592 *passim*. As originally submitted the Ku Klux Klan Act of 1871, in the words of Trumbull, went to the extent of punishing offenses against the states and undertook "to furnish redress for wrongs done by one person upon another in the . . . states . . . in violation of their laws." But as passed by the House it went no further "than to protect persons in the rights . . . guaranteed to them by the Constitution and laws of the United States."

87. This question had arisen a year earlier. See CONG. GLOBE, 41st Cong., 2d Sess. (1870) 3611 (remarks of Senator Pool).

the Constitution. . . . The difference between the Senator and myself is as to what are the privileges and immunities of citizens of the United States. . . . National citizenship is one thing, and state citizenship is another. . . . Before this amendment was adopted the same obligation . . . rested upon the Government of the United States to protect citizens of the United States, as now."<sup>88</sup> In short, the Fourteenth Amendment was not remedial; it was simply declaratory—declaratory of what *always* had been the *real* meaning of the Constitution. Thus it "added nothing," created no rights, merely recognized and restated the inalienable, universal, indestructible rights of man.

When he was later retained to argue the validity of the New Orleans Slaughter-House monopoly before the United States Supreme Court, Senator Carpenter made telling use of these views, the expression of which he had previously prompted and criticized. It is no disparagement, indeed, to say that Justice Miller's opinion in the *Slaughter House Cases* is largely a re-synthesis of the arguments Senator Carpenter<sup>89</sup> derived from Trumbull. The heart and strength of both the arguments and opinion inhered in a skillful emphasis on the dual character of the Union, the expediency of maintaining the integrity of the police power and of declining to establish judicial censorship of state legislatures, and an uncanny capitalization of the view that the Fourteenth Amendment had "added nothing" to the Constitution. Basically it was the third point—the joint product of natural rights thinking and of inability to see (while judicial review was still incompletely established) that the *content* of citizenship is actually whatever courts will enforce—that determined the entire result. Justice Miller's *Slaughter-House* opinion—a never-ending source of amazement to his admirers—moved majestically, almost irresistibly, from the Trumbull-Carpenter premises to the practical absurdity that the Fourteenth Amendment effected no fundamental change either in the content of national citizenship or in the scope of Congressional power. It did so, of course, because Miller and four colleagues were convinced that statesmanship would be best served during Reconstruction by interpretations which upheld the legislature's capacity to govern and which at the same time restricted the discretionary powers of the courts.<sup>90</sup> Accordingly, these Jus-

88. CONG. GLOBE, 42d Cong., 1st Sess. (1871) 577. FLACK, *op. cit. supra* note 79, at 225 *et seq.* summarizes the debates. The Carpenter-Trumbull exchange occurred on April 11, 1871.

89. See *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394, 399-402 (U. S. 1873).

90. Interesting in light of the relations of Representative Bingham and Justice Miller to the Fourteenth Amendment is the fact that these two statesmen toured the Pacific Coast together in the same party in the summer of 1871, (DEADY'S JOURNAL, entry July 21, 1871, and Portland Oregonian, July 19, 1871) while Bingham was almost daily expounding his views of the Amendment's scope and purpose. See note 57 *supra*. It hardly seems possible, therefore, that Justice Miller was unfamiliar with the framers' views; yet his reading of the Amendment in the *Slaughter-House Cases* was certainly not that assumed by Bingham in 1866.

tices freely exploited the flaws in one of the loftiest expressions of American idealism and foreshadowed the virtual emasculation of the amendment as a bulwark of Negro rights.

The fact that Field, a states' rights Democrat who feared centralization, led the attack on the self-denying majority decision written by the Republican and nationalist Miller is further evidence of the intellectual and political confusion of the post Civil War years. To Stephen Field, his brethren's *Slaughter-House* opinion was an offense against both reason and justice. It was not only bad law, but poor statesmanship: bad law, because it reduced the Fourteenth Amendment to an absurdity, "a vain and idle enactment which accomplished nothing," and the passage of which "most unnecessarily excited Congress and the people"<sup>91</sup>; and bad statesmanship, because the Court construed its own powers so narrowly as to threaten leaving the South at the mercy of Negroes and carpet-baggers, and business, to the discretion of Grange-dominated legislatures. To Field these consequences were equally fearful. Throughout the seventies he stated and restated his convictions with a fervor that at times, as in his opinion in *Bartemeyer v. Iowa*,<sup>92</sup> in 1874, came close to exasperation and querulousness. He had no objection to—indeed concurred in—later decisions<sup>93</sup> restricting Congress' powers under the amendment and exploiting further the two flaws with reference to Negro rights, but he thoroughly deplored the Court majority's failure to expand the due process and equal protection guarantees in order to make the Amendment—and the Court—"a perpetual shield" against "hostile and discriminating legislation."<sup>94</sup> In his dissenting opinions in the *Granger* and *Sinking Fund* cases he argued for the broadest possible substantive protection and criticized both decisions as blows to the security of corporate rights.<sup>95</sup>

What historians and biographers have overlooked is that by the mid-seventies Justice Field was neither psychologically able nor judicially willing merely to state these views in dissenting opinions. Even as early

91. 16 Wall. 36, 96 (U. S. 1873).

92. 18 Wall. 129, 137 (U. S. 1874).

93. See *United States v. Cruikshank*, 92 U. S. 542 (1876); *United States v. Harris*, 106 U. S. 629 (1883); *Civil Rights Cases*, 109 U. S. 3 (1883). Field even dissented from the decisions in *Ex parte Virginia* and *Coles*, 100 U. S. 339, 349 (1880); *Virginia v. Rives*, 100 U. S. 313 (1880), and other of the 1880 *Civil Rights Cases*, assuming positions which would have completely destroyed the Amendment as a source of protection for the Negro Race.

94. *Sinking Fund Cases*, 16 Wall. 36 (U. S. 1873). These phrases, and their counterparts, recurred in Field's opinions and at times were the articulate major premise.

95. Field's basic premise as stated in *Ex parte Wall*, 107 U. S. 265, 302 (1883) was that ". . . all the guarantees of the Constitution designed to secure private rights, whether of person or property, should be broadly and liberally interpreted so as to meet and protect against every form of oppression at which they were aimed, however disguised and in whatever shape presented."



as the *Bartemeyer* decision, the tenor of a reference to his new chief, Morrison R. Waite, suggested mounting dissatisfaction and maladjustment.<sup>96</sup> Prolonged economic depression, unfortunate personal investments, the failure of the Bank of California,<sup>97</sup> and the continual scandals of the Grant administration, all added to his restlessness and anxiety. "God help the country when the public service and public offices are thus demoralized—whither are we drifting?" he wrote in 1876.<sup>98</sup> In swift succession there followed the strain of his service on the Electoral Commission<sup>99</sup> and the galling spectacle of President Hayes's inauguration.<sup>100</sup>

96. Field to Deady, March 16, 1874: "That matter—the Chief Justiceship is at last settled. We have a Chief Justice. He is a new man that would never have been thought of for the position by any person except President Grant. He is a short thick set person, with very plain—indeed rough features. He is gentlemanly in his manners and possesses some considerable culture. But how much of a lawyer he is remains to be seen. He may turn out to be a Marshall or a Taney, though such a result is hardly to be expected. My objection to the appointment is that it is an experiment whether a man of fair but not great abilities may make a fit Chief Justice of the United States—an experiment which no President has a right to make with our Court."

Interesting in this light is Circuit Judge Sawyer's report of a conversation he had had with Field the previous summer: "Upon my suggestion that if [Attorney General] Williams should not be appointed and it should not be deemed expedient to elevate one of the associate Justices to the position, the appointment ought to be made from those who had already distinguished themselves on the bench of some other Court rather than from the bar at large, or the mere politicians. He remarked that the Chief Justice ought to be a Statesman as well as a lawyer and few of them were sufficiently distinguished in that line. I do not fully appreciate the force of the suggestion. He said the Chief Justice would not be taken from the Justices of the Supreme Court." Sawyer to Deady, May 23, 1873.

97. "I have been very much down in mind and purse since my return from Oregon. The failure of the Bank of California affected in some degree almost every one. Even so humble a person as myself has found great inconvenience following from it. My stocks have so shrunk in consequence that an immediate sale would cause me great loss." Field to Deady, September 26, 1875.

Judging by evidence in the Deady papers, Field suffered a high degree of loss in many of his investments; mining stocks particularly proved disappointing. Field to Deady, September 14, 1872, October 29, 1875. Late in life his straightened financial position and meager estate caused him much anxiety and embarrassment. Field to Deady, November 10, 1885, April 24, 1890, December 6, 1890.

98. Field to Deady, April 2, 1876. The passage begins: "There is nothing new here. The very air is heavy with scandals unearthed, and rumors of greater scandals yet to be exposed."

99. See SWISHER, *op. cit. supra* note 2, c. 10; DOYLE, *The Electoral Commission of 1877* in *SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD* (1881) 411. "The decision of the Commission, not to enquire into the correctness of the action of the Canvassing Boards of Louisiana and Florida was a great shock to the Country. It is the first time, I believe, that it has ever been held by any respectable body of jurists, that a fraud was protected from exposure by a certificate of its authors. I shall have much to say to you during the summer of the proceedings before that Tribunal and of its action." Field to Deady, April 2, 1877.

100. Following the passage quoted in note 99 *supra*, Field continued: "The President, who owes his seat to the success of a gigantic conspiracy and fraud, is not finding his

And while overwrought and embittered at these events Field had to face the long-delayed decisions in the *Granger Cases* and the great Railroad Strike of 1877.<sup>101</sup> Inevitably, his relations with colleagues and subordinates suffered. Great patience and firmness were required of Chief Justice Waite in resisting Field's efforts to gain assignment of the opinion in a Pacific Railroad case<sup>102</sup> that involved the obligations of his friends, Stanford and Huntington. Throughout the Hayes administration Field confided details which left friends with an unfavorable opinion of Justice Bradley's decisive role as a member of the Electoral Commission.<sup>103</sup> How irascible and domineering he eventually became in relations with the subordinate judges of his circuit is evident in his remark: "It is not pleasant to find the moment one leaves the State that all the spirit and courage ooze out from the Federal judges in San Francisco."<sup>104</sup>

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place a bed of roses. It is right that it should be so. He is evidently a very weak man, and hardly knows what to do. He perceives very clearly, for that has been dinned into his ears, that he and Packard [Governor of Louisiana] are twins of the same birth, and that he cannot well proclaim Packard a bastard, without impeaching his own legitimacy. And yet the people will not stand much longer bayonet rule in Louisiana. The vile wretches, who have fattened on the life-blood of that state, must be driven from their places, and its people be allowed to govern themselves, like the people of other States. What a commentary it is upon the utter demoralization of the public mind, that it can be supposed for a moment that a Governor of a State requires, for the legitimacy of his authority, the recognition of the President! He has no more to do with the matter than he has with the conduct of my family." *Ibid.*

101. The *Granger Cases* were finally decided March 1, 1877; the great Railroad Strike occurred in July, 1877.

102. *United States v. Union Pacific R. R.*, 91 U. S. 72 (1875) (opinion by Justice Davis). Apparently Field had been refused the assignment because of his well-known friendship with the California railroad promoters, and because his dissatisfaction with the Government's argument might "unconsciously . . . find expression in your opinion. Once in, it would be difficult to get it out." Waite to Field, November 10, 1875, quoted in TRIMBLE, CHIEF JUSTICE WAITE: DEFENDER OF THE PUBLIC INTEREST (1938) 262.

103. Several entries in *Deady's Journal* mention "long talks with Field" regarding the Electoral Commission and other matters, and on August 31, 1878, Deady observed that Field's "account of what passed between him [Field] and Bradley, when he chose the latter for the Fifth Judge on the electoral commission . . . does not redound to Bradley's credit, but the contrary." No details were given, but it was currently charged that Bradley had yielded to partisan influence. DEADY'S JOURNAL, entry August 31, 1878.

See NEVINS, ABRAM S. HEWITT, WITH SOME ACCOUNT OF PETER COOPER (1935) 305-400, for apparent confirmation, though judgment on this point may be suspended until publication of Charles Fairman's life of Bradley, based on the Justice's personal papers.

104. Field to Deady, April 3, 1890, with reference to his subordinates' indifference to his requests in matters growing out of the Sharon-Hill divorce and will cases. Parenthetically, it may be said that strain and excitement of this prolonged litigation burdened Justice Field's later years. His confidential correspondence must necessarily be read with regard for the personalities and conduct of the Terrys. See SWISHER, *op. cit. supra* note 2, c. 13; 15 AMERICAN STATE TRIALS (Lawson ed. 1926) 465. Yet his prejudices were apparent from the beginning, Field to Deady, Aug. 25, 1885, Sept. 5, 1885, and the an-

Judicial reserve, therefore, was in time overbalanced by restlessness, ambition and anxiety. During the seventies and eighties Field maneuvered to reverse the trend of judicial decision, unsuccessfully at first by sponsoring a proposal whereby membership of the Supreme Court would be increased to twenty-one; later, by the more fruitful expedient of making his dissenting opinions on the scope of the Fourteenth Amendment the constitutional law of the Ninth Circuit.

By one of the strangest paradoxes in American history, the means which President Roosevelt later would have used to eradicate *laissez-faire* from the Constitution was originally conceived and sponsored by Justice Field as a device to assure its development. Burdened with more arduous circuit duties than his colleagues and convinced that some means had to be found to expedite the vastly increased business of the federal judiciary,<sup>105</sup> Field in the late sixties or early seventies became the advocate of a functionalized Supreme Court.<sup>106</sup> Enlarged to twenty-one members, the

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tagonisms aroused and rekindled by the cases soon transformed him into a heated partisan of the Sharons. See Field to Deady, Feb. 2, 1888, Sept. 13, 1888, May 25, 1889, July 23, 1889, Nov. 5, 1889, April 24, 1890. Field's ablest colleagues at circuit, Deady and Sawyer, were themselves men of strong will and character, who, while sharing many of Field's social views, occasionally resented dictation and interference. "If as Field wrote and telegraphed us we are bound to follow him till reversed by the Supreme Court although every other Judge in the Circuit disagrees with him, then that Court ought to decide the question between us, when it gets the question regularly before it and thus relieve us for our exceedingly embarrassing and disagreeable position." Sawyer to Deady, Nov. 9, 1884.

105. Field's proposals for reform of the judiciary must be viewed in the light of the burdens under which he and his colleagues labored until Congress at last passed the Act of March 3, 1891, creating the United States Circuit Courts of Appeals. 26 STAT. 826 (1891). For an excellent survey of the expansion of the Court's docket and the numerous proposals and attempts made to secure relief, see FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1927) c. 2 *passim*. Many members of the bar and judiciary advocated similar or competing plans. *Id.* at 69-102. See also *Reports of the Committees on Relief of the United States Courts* (1883) 5 A. B. A. REP. 343-86.

Field seems to have been the only member of the Court who actively favored its enlargement; Justice Miller favored relief by curtailment of appellate jurisdiction; former Justice Davis worked zealously for creation of circuit courts of appeals. Functionalization (but not enlargement) of the Court was advocated in (1875) 9 A.M. L. REV. 668. Circuit Judge Sawyer sponsored a hybrid plan which called for enlargement of the Supreme Court to eighteen, with the same Justices sitting from time to time as a National Court of Appeals. See (1883) 5 A. B. A. REP. 348.

106. Field outlined his views on judicial reorganization in several letters to Deady. On March 16, 1874, immediately following the passage quoted in note 96 *supra*, relating his unfavorable impression of Chief Justice Waite, he wrote:

"Our Court has disposed of an unusually large number of cases this year and before we adjourn shall probably dispose of one hundred and fifty more. But there must be some radical change in our Court before the business, which is increasing every year can be disposed of each term. I believe I explained to you my ideas on the subject some years ago. I would have twenty-one judges, divided into three Sections of seven each and

new Court would have sat in three sections after the manner of the continental Courts of Cassation. The stressed advantage of this reform was that under it closely contested and constitutional cases could be decided by the full Court while all others could be expedited through an appropriate section. How far original sponsorship of the plan was determined by political considerations is not clear.<sup>107</sup> Yet it is evident that hopes of reversing majority holdings eventually colored the entire scheme. Beginning in the late seventies, they combined to push Field deeper and deeper

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assign to one Section the admiralty, patent and revenue cases, to another Section the Equity cases, and to the third Section all other cases. If a constitutional question had to be decided before the case could be disposed of, and there was any difference of opinion among the Judges of the Section considering the case, I would have it referred to the full number for decision. By this system we could have the equivalent of three Courts of last resort, between which there would be no clashing decisions, as a different class of cases would be assigned to each Section." Field to Deady, March 16, 1874.

On October 23, 1877, he stated: "The Court has got fairly at work, but with a calendar so great as to take away all hope of disposing of it for years. I don't think that the country will long stand the present organization of the Federal Courts. Some more efficient system must be devised for the disposition of their business particularly in the Supreme Court. The system I outlined to you when in Oregon, of providing different Sections for the disposition of different classes of business is growing more and more into favor every day. But I don't think anything will be done this present session—meaning by that the extra and regular session together. I am inclined to think that the coming winter will be devoted by Congress principally to financial measures, and measures for preventing frauds in Presidential Elections. The country is pretty well disgusted with the tricks of the politicians, and is determined to have no more of such scandalous transactions as disgraced the last election. Such scenes could not take place again without a civil war." Field to Deady, October 23, 1877.

107. Possibly Field's interest in the functionalized Court dated from his European tour or was stimulated by his brother David Dudley's knowledge of continental legal systems. An enlarged court of eighteen modeled on the French Court of Cassation, had been advocated by Senator Thurman in Senatorial debate in 1869. See *CONG. GLOBE*, 41st Cong., 1st Sess. (1870) 210.

It will be observed that in the first recorded reference to the proposal in 1874 Field recalled having outlined his ideas on the subject "some years ago." Subsequent references likewise indicate persistent and zealous advocacy. Sponsorship apparently tapered off and finally ceased after the Court began to adopt the Fieldian interpretations of the Fourteenth Amendment. In 1885, the Washington correspondent of the *St. Louis Post Dispatch*, reporting Field's contemplated retirement in 1888 on completion of twenty-five years' service, declared that Field "hopes to secure, before he retires, an increase in the number of Justices. . . . He believes in raising the number . . . to fourteen, with a quorum of six. . . . He has already talked with the President upon the subject, and has asked him to recommend such legislation to Congress." See *San Francisco Morning Call*, May 10, 1885, reprinting the dispatch dated April 29, 1885.

So far as the writer is aware this was the only occasion in which Field's name was publicly linked with the proposal; and no later sponsorship, either public or private, has been found. On January 26, 1880, a bill incorporating the chief features of the plan was introduced in the House by Representative Manning of Mississippi. It was indorsed in principle by a minority of the American Bar Association Committee in 1882. See (1883) 5 A. B. A. REP. 363.

into Presidential politics.<sup>108</sup> Ill-concealed dislike for President Hayes, mounting agrarian and labor unrest, particularly in California, praise for his dissenting opinions by business leaders who also saw merit in the Court plan, natural enthusiasm for his candidacy in the South—these factors made it inevitable that he sanction use of his name for the Democratic nomination. After hurried efforts of friends and brothers failed at Cincinnati in 1880, systematic preparations were laid for the campaign four years later.<sup>109</sup>

But the forces which had propelled Field's candidacy ultimately sabotaged it. Aroused and embittered at circuit decisions which had blocked attempts to secure an economically fair assessment of the property of the Southern and Central Pacific Railroads owned by Stanford and Huntington,<sup>110</sup> California agrarians and workingmen inserted a plank in the democratic state platform of 1884 "expressly repudiating the Presidential

108. "You say that my name is being mentioned in connection with the presidency. I suppose you smiled at that, as I have; and would probably smile more if I should be generally taken up as a candidate. But there is little probability of that—not one chance in a thousand. Therefore, I do not give any thoughts to the subject, nor allow it to distract my sleep or trouble my digestion. Seriously, I would not give up the independence of thought and action I enjoy for the presidency for life." Field to Deady, May 31, 1879 (shortly after his dissenting opinion in the *Sinking Fund Cases* first inspired serious talk of his candidacy).

"Justice Field is largely occupied (*entre nous*) in putting the wires in order for the next Democratic National Convention to nominate a candidate for President. He is *not without hopes* and is doing his level best in that direction." Sawyer to Deady, September 18, 1879.

"Judge Field's 'Boom' seems to be booming quite finely just now. He is beginning to write letters on the Chinese. See Letter to General Miller in today's Call." Sawyer to Deady, March 22, 1880, alluding to an open letter wherein Field had clarified his views of Chinese immigration.

109. Field was philosophical at defeat in 1880: "You see, by the result of the Cincinnati Convention, that I am to be left in peace this summer—not badgered nor fretted, not abused nor villified, not shown to have been guilty of all the crimes on earth for which I have been or ought to have been punished—in other words, I am to be permitted to maintain during the year some little of a civilized and christian character.

My candidacy for the Presidency has been but an episode in my quiet life and will soon be forgotten. I shall remain as a good soldier at my post." Field to Deady, July 10, 1880.

Yet friends were amused that he should still circulate his unpublished recollections. "They will be ready for the campaign of '84." Sawyer to Deady, Aug. 2, 1880. "Field showed me a sketch of his life and an analysis of his leading opinions by Pomeroy . . . and wanted me to look it over and tell him what I think of the propriety of publishing it. . . . Talked at some length and with some feeling of the mean way the railway people of Cal. had used him about the Democratic nomination in 1880. . . ." DEADY'S JOURNAL, entry Dec. 28, 1881. See also Field to Pomeroy, June 21, 1881, published in Graham, *Four Letters of Mr. Justice Field* (1938) 47 YALE L. J. 1100.

"Field still dreams of the Presidency and may yet attain it." DEADY'S JOURNAL, entry Sept. 22, 1883.

110. See SWISHER, *op. cit. supra* note 2, c. 12.

aspirations of Stephen J. Field."<sup>111</sup> This blow, falling, as it did, on the eve of the national convention, made a jest of Field's candidacy and inflicted wounds which never healed. Its full impact, however, was not felt until some months later when diatribes against "communist" and "agrarian"<sup>112</sup> enemies further betrayed the subconscious sources of Field's anxiety. Yet distress mingled with bewilderment and resentment was manifest in a letter which disclosed to John Norton Pomeroy the hopes which had motivated the entire venture:

I shall have much to say to you when we meet; particularly of the very strange action of California. Had I received the cordial support, instead of the opposition of that State, my candidacy . . . would have stood great chances of success. . . .

I had, of course, some ambition to carry out certain measures which I believed would be of great advantage to the country. Particularly did I desire a reorganization of the Federal Judiciary. As now constituted it fails of the purpose of its creation. The Supreme Court is three years behind in its regular business, and its docket is increasing so rapidly that it will soon be four years, and more, before a case can be reached after it is docketed. Could I have been instrumental in reorganizing the Federal Judiciary I would have placed on the Bench able and conservative men and thus have brought back the decisions of the Court to that line from which they should not have departed and thus, as I believe, have contributed something towards strengthening and perpetuating our institutions.<sup>113</sup>

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111. Apparently Field's initial reaction was a greater consciousness of his social sympathies. "The wealthy and comfortable wonder . . . at the grumblings of the needy and are measuring the eye of the needle which the camels of old had some difficulty in squeezing through, to see what chance there is for their passage. They are not so confident of the 'good time' hereafter as they are of the condition of their bank account now. I am on the other side and would give the underfellow a show in this life. It is a shame to put him off to the next world." Field to Deady, Oct. 29, 1884. But later, after the magnitude of the humiliation at Stockton became clearer, and California supporters sought aid in the bitter fight to control local patronage, his tone changed. "I have not hesitated to explain the true situation of things in California to the President and Heads of Departments who have inquired of me respecting it. I have let them understand that the question was not whether A or B should have a particular place but whether the men of order and law, men who believed in the great institutions of society should have the ascendancy in the State, or whether the outcome of the sandlot, and the agrarian and nihilistic element should control. Having stated that the real contest was between civilization on the one hand and anarchy on the other I have left the matter to those who may feel disposed to aid either the one side or the other." Field to Deady, April 8, 1885.

112. See the letters quoted in SWISHER, *op. cit. supra* note 2, 314-16; and Field to Deady, May 17, 1886.

113. Field to Pomeroy, July 28, 1884, published in Graham, *supra* note 109, at 1107-08. Field's political naïveté and his handicaps of temperament and position were also strikingly revealed in the letter written to Deady, July 16, 1884:

"My name was not presented by my friends, who thought it would be unwise, so long as the strength of Cleveland remained unbroken. Had that ever been broken, my

Coincident with Justice Field's campaigns for the Presidency—and for an enlarged reconstituted Court—was another campaign, still less publicized and understood, which ultimately proved of greater significance. This was the development, in a series of major circuit opinions, of what subsequently came to be attacked as "the Ninth Circuit law."<sup>114</sup>

name would have been brought before the Convention, and according to the statement of my friends, with a reasonable prospect of success.

"The action of the Stockton convention, in California did me much harm with politicians; for it seems to be an established rule with them, that a candidate must have the support of his own state before he can expect the support of a National Convention. The rule is a very unwise one; for the acts and measures which may render him popular outside of his own state, may render him unpopular there. But aside from politicians, with the thinking men throughout the country, the action of the Stockton convention did me no harm, but rather called forth tributes of regard and appreciation greater than I had ever received before.

"I am well contented with the result. Indeed, had my wishes been consulted, my name would never have been used. In my present sphere I may do some good, and after all position is only desirable as a means of doing good." Field to Deady, July 16, 1884.

See also the statement printed in San Francisco Alta, June 18, 1884, and quoted in SWISHER, *op. cit. supra* note 2, at 308-09.

114. "Certain mischievous tendencies are observable in the Federal courts, which the scheme of reporting circuit court decisions according to circuits is calculated to promote. We allude to what is called the 'law of the circuit.' Certain judges, for instance . . . have certain ideas upon certain questions. It may be the circuit justice; it may be the circuit judge. More likely it is both together. They impress these ideas . . . upon their subordinates . . . and these ideas become, until reversed, what is termed 'the law of the circuit.' These ideas very often relate to questions which, from their nature, can not get to the Supreme Court,—such as questions arising in criminal prosecutions and under the writ of habeas corpus. . . . [The judges] in the Ninth Circuit . . . have certain ideas [which] . . . are alluded to as 'the law of the Ninth Circuit.' The leading characteristic of this new law is an unwarrantable enlargement of Federal jurisdiction, the erection of a general and irresponsible superintendency over the police regulations of the States, over their process of interstate extradition, and over the administration of their criminal laws. It is quite time that this matter were checked." Thompson, Book Review (1884) 18 AM. L. REV. 535-36. See Thompson, *Abuses of the Writ of Habeas Corpus* (1884) 18 AM. L. REV. 1-23, *Practice in Cases of Extradition* (1883) 17 AM. L. REV. 315-49, (1883) 17 AM. L. REV. 997-1000, (1884) 18 AM. L. REV. 136-38, 145-47, 284-85, 321-29, 327-28, 690-92, 891-94, 1030-31, 1062-64.

Thompson argued that the objection was not so much to what the judges had decided in these cases as to the fact that they had exercised jurisdiction at all. By passing on the validity of state laws and provisions of state constitutions, the federal and district judges had assumed, he maintained, a final appellate jurisdiction over the courts of the state, without reference to their rank or authority. See Thompson, *supra*, 18 AM. L. REV. 1-23.

Thompson's campaign was thus waged chiefly with reference to the jurisdictional rather than constitutional phases of the decisions, yet he stressed the great importance of the constitutional questions in *Parrott's Chinese* case. See note 128 *infra*.

Largely in response to his agitation in the *American Law Review*, and before the American Bar Association Conventions of 1883 and 1884, Congress finally passed the Act of March 3, 1885, restoring appellate jurisdiction of the Supreme Court in habeas cor-

Long before Field's time, determined justices, dissatisfied with colleagues' decisions, had sought by well-phrased dicta to gain recognition and eventual acceptance for their minority views. How far the dissenter would go in these directions was of course determined by his self-restraint and his respect for the majority's holdings. In actual practice, by taking advantage of cases in which decisions of the circuit courts were final,<sup>115</sup> it was quite possible for a strong-willed dissenter to ignore and occasionally undermine majority decisions by establishing his minority

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pus cases. Sawyer's and Deady's opinions, especially those cited hereafter, appear to have contributed heavily to the result. See *Report of the House Judiciary Committee*, 48th Cong., 1st Sess. (1885); H. R. REP. No. 730, 48th Cong., 1st Sess. (1885).

Insofar as criticism directed against the circuit law was based on abuse of the writ of habeas corpus, it appears to the writer that Judge Thompson ignored—perhaps for tactical reasons—the degree to which such factors as the statutory extension of habeas corpus during Reconstruction, the broad wording of section one of the Fourteenth Amendment, and the implication of the supremacy clause of the Federal Constitution combined to work revolutionary changes in the use and effect of any ancient common law writ—combined to make it, potentially—and at times in practice—the writ of error it had never been intended to be. Yet this does not preclude criticism of the manner in which Sawyer and Deady, with Field's encouragement, chose to exercise an exceedingly delicate jurisdiction. In such cases as *In re Ah Lee*, 5 Fed. Cas. 899 (D. Ore. 1880); and *In re Lee Tong*, 18 Fed. 253 (D. Ore. 1883), Deady (in Thompson's phrase) proceeded almost as if section 753 of the Revised Statutes were "a ram in the judicial fleet by which a single judge might cut the processes of the State courts in two amidships." And it would appear that the extraordinary dicta of the former opinion, as well as the severely criticized holdings of the latter, originated from a desire to embroider the Fourteenth Amendment.

When at length in *Robb v. Connolly*, 111 U. S. 624 (1884), the Supreme Court [unanimously overruling Sawyer in *In re Robb*, 19 Fed. 26 (D. Cal. 1884)] held the habeas corpus jurisdiction of the federal courts to be concurrent rather than exclusive, thus partially clipping the circuit judges' wings, Judge Sawyer declared himself "mortified and astonished," especially that Justices Field and Matthews had concurred in the decision. To the sympathetic Deady he confided that both Justices had expressed their approval (in advance) of a draft of his circuit opinion—Field declaring emphatically that "in any conflict [the state] court must go to the wall." "So it is now settled," Sawyer added philosophically, "that we judges on this coast have been 'elevating our horns' a little too high of late, and we must take them down." Sawyer to Deady, May 21, 1884.

It is only fair to say that federal-state issues in the *Robb* case were presented in such scrambled form that first-rate minds might easily have been confused. Yet one wonders, in retrospect, if the harvest was not partially of the Ninth Circuit judges' own sowing.

For a merciless probing of the difficulty of confining the writ of habeas corpus to purely jurisdictional matters, and the virtual necessity of permitting its use in certain instances as the equivalent of a writ of error, see *In re Bell*, 19 Cal. 488 (Cal. 1942).

115. Notably habeas corpus cases, see note 118 *infra*; criminal prosecutions, see REV. STAT. § 697 (1815); FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) 79, n. 107; and suits in circuit courts involving less than \$5000, see REV. STAT. § 691-92 (1875); FRANKFURTER AND LANDIS, *supra* at 87-88. Prior to the Act of Feb. 16, 1875, 18 STAT. 316 (1875), decrees of the circuit courts had been final only in cases involving less than \$2000.



views as the law of his own circuit.<sup>116</sup> Such occasional applications, however, appear to have had little or no constitutional significance until after 1868. In that year, to forestall an adverse decision on the constitutionality of the Reconstruction Acts,<sup>117</sup> a Radical-dominated Congress summarily withdrew the Supreme Court's appellate jurisdiction in all habeas corpus cases.<sup>118</sup> The practical and unforeseen result, of course, was to increase tremendously the freedom and discretion of the circuit Justices and their subordinates in dealing with the momentous political and economic issues of Reconstruction whenever these issues were raised in habeas corpus proceedings.<sup>119</sup>

In this manner it developed that in the summer of 1874, shortly after his slighting reference to Chief Justice Waite<sup>120</sup> and after his vehement, almost querulous, opinion in *Bartemeyer v. Iowa*, Justice Field journeyed to San Francisco and there heard the habeas corpus case of *The Twenty-One Chinese Prostitutes*.<sup>121</sup>

Concluding a remarkable opinion, which already had invalidated as an infringement of treaty rights and exclusive Congressional power a California statute the purpose of which had obviously been to choke off Chinese immigration by authorizing an inspector to bar "all lunatic, idiotic . . . , crippled . . . , lewd and debauched" persons, Field declared that inasmuch as the equal protection clause applied to all "persons" rather than "citizens," the statute violated the Fourteenth Amendment as well. Since the point was judicially redundant,<sup>122</sup> it may be inferred that the postscriptum was added principally to make Field's *Slaughter-House* and *Bartemeyer* dissenting opinions on the scope of section one the constitutional law of the ninth circuit.<sup>123</sup>

116. This is reputed to have been the result in Justice Nelson's circuit in the sixties with regard to foreign extradition proceedings. Compare *Ex parte Kaine*, 14 How. 103 (U. S. 1852) with *Ex parte Kaine*, 14 Fed. Cas. 78 (S. D. N. Y. 1853). See *In re* *Henrich*, 11 Fed. Cas. 1143 (S. D. N. Y. 1867); *In re* *Farez*, 8 Fed. Cas. 1007 (S. D. N. Y. 1870). See also Thompson, *Practice in Cases of Foreign Extradition* (1883) 17 AM. L. REV. 315-49, 322.

117. See *Ex parte* *McCardle*, 6 Wall. 318 (U. S. 1868), 7 Wall. 506 (U. S. 1868). See also SWISHER, *op. cit. supra* note 2, at 158-63; 2 BROWNING, *DIARY* (1925) 191-92.

118. Act of March 27, 1868, 15 STAT. 44, §2 (1868), repealing relevant parts of Act of Feb. 5, 1867, 14 STAT. 385 (1867).

119. See note 114 *supra*.

120. See note 96 *supra*.

121. See *In re* *Ah Fong*, 1 Fed. Cas. 213 (D. Cal. 1874). See also SWISHER, *op. cit. supra* note 2, c. 8, 211-16.

122. It is difficult to see by what line of reasoning the equal protection clause can be applied to aliens seeking admission to the United States; for the clause reads: "Nor shall any State . . . deny to any person *within its jurisdiction* the equal protection of the laws." (italics added). Logically, the Court's decision was necessary to place the Chinese women "within the jurisdiction" of California.

123. This conclusion is strengthened by the fact that Field wrote no concurring opinion expressing his view that the statute violated the Fourteenth Amendment when the Su-

However this may have been, the Ninth Circuit law flourished in proportion to the reverses its doctrines suffered in the Supreme Court of the United States. In the summer of 1879, after the majority's disappointing decisions in the *Granger* and *Sinking Fund*<sup>124</sup> cases, and while California conservatives were aghast at the regulatory agencies created by their new state constitution, Field reaffirmed and elaborated his earlier dictum. The equal protection clause, he declared in the famous *Queue* case,<sup>125</sup> applied to "all persons . . . native or foreign, high or low"; it even shielded Chinese petty offenders from a San Francisco ordinance designed to collect cash fines under pain of clipping off queues; its implied equality of

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preme Court of the United States, on writ of error to the Supreme Court of California, unanimously invalidated the statute in *Chy Lung v. Freeman*, 92 U. S. 275 (1876). To have done so would have emphasized the minority character of his views and might have evoked unfavorable comment on use of the equal protection clause in cases where the question before the Court was the power of the state to exclude.

124. *Union Pacific R. R. v. United States*, 99 U. S. 700 (1878) (Justices Strong, Bradley, and Field dissenting). Field's dissent, *id.* at 750, is of special interest viewed in relation to his Presidential aspirations and his friendship with the Central Pacific promoters. Bitterly denouncing interference with a state-chartered corporation, he argued for extension of judicial review to the point of making the "spirit of the contract clause" a limitation on Congress' powers (which in this instance had been exercised to compel a recalcitrant and mismanaged enterprise to safeguard the Government's equity).

125. *Ho Ah Kow v. Nunan*, 12 Fed. Cas. 252 (D. Cal. 1879). See SWISHER, *op. cit. supra* note 2, at 216-20, SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD (1881) 394-98, for the background of this interesting case. Here again, the important point is not that Field invalidated a discreditable statute or ordinance, but rather the manner in which he rephrased dicta with an eye to emerging issues. In the *Prostitute* case he had said merely that "equality of protection implies . . . equal accessibility to the Courts for the prevention or redress of wrongs and the enforcement of *rights*." Now, pressing for judicial recognition of the concept of freedom of contract, see note 124 *supra*, he substituted "for the prevention or redress of wrongs, and the enforcement of *contracts*" and laid stress on the point that "all the instrumentalities and agencies" of state government were thus inhibited. (*italics added*).

It is also interesting to note that this appears to have been one of the few instances in which Field exercised his privilege of writing the opinion in a case handled at circuit largely by his subordinates. "Justice Field prefaced his remarks with the statement that the papers in the case were transmitted to him some time ago by Judge Sawyer [who had handled the routine matters] but he did not have time to examine the matter until the recess of the Supreme Court." *San Francisco Evening Bulletin*, July 7, 1879. *San Francisco papers* had apparently expected Judge Sawyer to hand down the decision. See *San Francisco Chronicle*, July 8, 1879. The fact that judicial relief almost of necessity at this date usually tended in opposite directions testifies to Field's extraordinary interest. It should be added that while not jurisdictionally grounded on habeas corpus Field's decision in the *Queue* case proved to be final—whether from statutory reasons or merely from failure of Nunan to appeal, the incomplete record fails to show. It is hard to believe that the Supreme Court would not have upheld Field, though one wonders, on the basis of Justice Miller's complaint in *Davidson v. New Orleans*, 96 U. S. 97 (1877), whether the majority would have relished the advertising, either of the Fourteenth Amendment, or the minority views on the scope of the equal protection clause.

protection, moreover, embraced protection for the enforcement of contracts; its inhibitions extended to "all the instrumentalities and agencies" of state government.

As a persecuted racial minority whose treaty rights of residence and employment were repeatedly violated in western states, Chinese aliens thus succeeded in advancing, in a purely humanitarian context, the very interpretations of the key words "person," "liberty," "property," "due process," and "equal protection" which corporation lawyers had sought in vain.<sup>126</sup> Moreover, subordinate judges who originally had been amazed at Field's audacity and had declined to concur in his views in the *Prostitute* case,<sup>127</sup> now zealously followed his lead. In habeas corpus proceedings early in 1880,<sup>128</sup> Circuit Judge Sawyer and District Judge Hoffman invalidated the newly-enforced provision of the California Constitution of 1879 which prohibited corporations from employing Chinese.<sup>129</sup> Such a

126. Compare, for example, the arguments in the various *Granger* cases, in state as well as Federal courts.

127. "Judge Hoffman said he entirely concurred in the opinion of Judge Sawyer that neither the treaty with China, the 14th Amendment, nor any law of Congress passed in pursuance of it, had any bearing on the question before the Court." *San Francisco Alta*, Sept. 22, 1874. See also *San Francisco Evening Bulletin*, Sept. 22, 1874; BROOKS, BRIEF TOUCHING THE CHINESE QUESTION (1877) 50-51.

On Oct. 16, 1874, Sawyer wrote to Deady: "Mr. Justice Field in my judgment overruled *United States v. Miln & the Passenger Cases* in his recent decision in *Lewd Women* case. It is true the exact point was not absolutely necessary in judgment in these cases, but the grounds upon which the first was put and the solemnly expressed opinions of the judges in the other cases cannot with any sort of propriety be called mere dicta. And I see no reason for distinguishing 'moral' from 'physical pestilence.'" Sawyer to Deady, Oct. 16, 1874.

If, as his reference to "the other cases" seems to indicate, Judge Sawyer referred to the *Passenger Cases*, 7 How. 283 (U. S. 1849), he apparently was confused by the multiplicity of opinions, for a bare majority of the Court therein invalidated the statutes, although nine separate opinions were written, and Taney, Daniel, Nelson, and Woodbury dissented.

128. See *In re Tribucio Parrott*, 1 Fed. 481 (D. Cal. 1880). See also *In re Ah Chong*, 2 Fed. 733 (D. Cal. 1880), wherein Sawyer in habeas corpus proceedings held void as a violation of the Fourteenth Amendment and treaty rights a California statute prohibiting all aliens incapable of becoming electors of the state from fishing in California waters.

129. A statute passed February 13, 1880 (Cal. Acts Amend. of the Codes, 1880, Penal § 178) in enforcement of Art. XIX, § 2 of California Constitution of 1879 made an officer of any corporation employing Chinese guilty of a misdemeanor punishable by fine and imprisonment, and provided that for a second offense the corporation should lose its charter. Parrott, president of a mine that employed 200 Chinese aliens, was arrested and convicted in a San Francisco police court February 21. His attorneys thereupon petitioned the United States circuit court for a writ of habeas corpus and elaborate arguments were made.

Sawyer had confided in a marginal note to Deady, February 15, 1880, "Yesterday both houses rushed through the anti-Chinese bill prohibiting corporations to employ them. Read three times in house on same day and the Governor hastened to sign it on same day before the ink's dry. I shall have it before long when Baker will come into play."

provision, the judges held, invaded the economic rights of both employers and employed. Due process and equal protection embraced the right to pursue lawful callings. Although the Court was apparently unwilling in the face of the decision in *Continental Insurance Company v. New Orleans* to hold with counsel<sup>130</sup> that corporations were "persons" within the meaning of section one, Judge Sawyer virtually made the *Slaughter-House* dissents the law of the Ninth Circuit,<sup>131</sup> and his confidential remarks<sup>132</sup> suggest that he was aware of the effect of his opinion.

The psychological and doctrinal significance of these Chinese cases is at once apparent. The very establishment and extension of the "Ninth Circuit law" are corroborative evidence of Field's determination to bolster the constitutional position of property. Moreover, the doctrines thus developed were the doctrines which had suffered implicit—though not explicit—rejection by the majority of the Supreme Court in the *Slaughter-House* and *Granger* cases. Assertion—either by dictum or otherwise—of a constitutional right to pursue lawful callings, to make and enforce contracts, and to conduct one's business free from extraordinary legislative demands had been prudently avoided by the majority before 1880. The later results were, therefore, anomalies which lawyers could exploit

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"Baker" was of course *Baker v. Portland*, 2 Fed. Cas. 472 (D. Ore. 1879), wherein Deady, in a decision later affirmed by Field, had voided (as an infringement of the implied treaty right to labor in self support) an Oregon statute of 1872 prohibiting the employment of alien Chinese on public works. See also Deady's earlier opinion in *Chapman v. Toy Long*, 5 Fed. Cas. 496 (C. C. Ore. 1876).

130. The leading argument on corporate personality was made by Delos Lake, an intimate friend of Field and Sawyer, who was also counsel for the Central Pacific Railroad. See summaries in *San Francisco Morning Call*, March 7, 1880; *Sacramento Record Union*, March 8, 1880.

Obviously by 1879-80, the question of whether corporations were to gain benefits under the Fourteenth Amendment was one which could no longer be ignored on the Pacific Coast.

131. Note that Sawyer quotes Judge Swayne's dissenting opinion, *Slaughter-House Cases*, 16 Wall. 36, 127 (1872) to the effect that "property" signifies everything which has "exchangeable value." Cf. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924) c. 2.

132. An entry in *Deady's Journal*, dated April 10, 1880, reads:

"Got the opinions this morning of Sawyer and Hoffman in Parrott's case and read them. Hoffman does not notice my opinions in *Chapman v. Toy Long* and *Baker v. Portland* which surprises me. It was certainly not magnanimous or kind. Sawyer does—but mincingly—I won't say grudgingly—*Baker v. Portland*. I had a letter from him with the opinions in which he speaks of having used my 'wedge' with his little mallet as well as he could."

The letter mentioned by Deady is missing in the files, but apparently the "wedge" was Deady's doctrine of the implied treaty right to labor in self-support, while the "mallet," which Sawyer now willingly claimed as his own, notwithstanding his original views in the *Prostitute* case, was the doctrine that the Fourteenth Amendment guaranteed to both Chinese and mine owners the right to acquire and enjoy property free from extraordinary legislative demands.

to the utmost. Chinese aliens on the Pacific coast had rights superior to American citizens in Louisiana. The Chinese were secure in their constitutional right to work in a quicksilver mine; yet New Orleans butchers were not similarly free to pursue their hallowed calling. A California mining corporation might hire and fire as it pleased, despite legislation to the contrary; yet a midwestern railroad or a New York insurance company was required to submit to ceaseless legislative exactions. Ever ready to capitalize on such anomalies, and to reason by processes of logical extension, lawyers at last had powerful leverage in their fight to overturn *Continental Insurance Company v. New Orleans* and to remove the worst handicaps from the *Slaughter-House* decision.

Opinions differ as to the ethical and legal points raised by Justice Field's court plan and the "Ninth Circuit law." The gains and losses resulting from abandonment of the positions assumed by the majority in the *Slaughter-House Cases* are today so mixed that it would be difficult to criticize Field's maneuvers at circuit even if it could be demonstrated that they alone had caused the revolutionary shifts. The range of the rights embraced by due process and equal protection and the tendency of the courts continually to redefine and extend the rights demands recognition of the dual character of Field's contribution.

Similarly, if it is granted that the merits of a case and whether a court properly may substitute its judgment for the legislature's are generally the crucial questions in most constitutional debates, it is academic to criticize Field for stretching phraseological limits and for enlarging constitutional jurisdiction. Biased he obviously was, and at times, especially after 1877, lacking in judicial temperament and open-mindedness. Yet he was a slave to duty—steadfast, conscientious, almost puritanical in his resolute determination. The Reconstruction cases made him one of the leading advocates of natural rights doctrines which were possessed of great intrinsic appeal and limitless possibilities for expansion. His psychological state impelled him to explore and refine the attributes of these doctrines. In the Chinese cases at circuit he won assent to interpretations of the equal protection clause which, if they had continued to be debated in economic and political terms, might have aroused momentous controversy. Whether in these cases Field exercised more than a circuit Justice's customary freedom of expression depends upon whether the majority ever seriously believed it to be either possible or desirable *permanently* to restrict the scope of section one to persons of the Negro race, whether Field himself understood such to be the majority's intention and was thus honor-bound by it, and whether the broad phraseology employed by the drafters would have supported any attempt so to limit the section.

Fortunately, an estimate of Field's contribution, and of the importance of his circuit opinions, does not depend upon answering these questions. Whatever his motives, it is obvious that he pioneered the prevailing

interpretation of the equal protection clause; he capitalized the rhetorical advantages of the Chinese cases; he probably helped as much as Cooley or John A. Campbell to fashion the forensic weapons that counsel needed. This is his great, if not an altogether lasting, achievement. It is the basis upon which his career should be judged. If, as seems likely, the threat of Court-packing has now become part of our unwritten constitution, assuring less divergence between popular desires and constitutional decisions, there is a profound, almost involute, irony in the fact that Field himself stood ready to launch this innovation.

### III.

Although many of the problems of Justice Field's career and the paradoxes of his motivation may require further specialized study, one at least is now clearer and more sharply defined. This is his central role in expanding judicial power and in reading an economic content into the clauses of section one. Surveying matters broadly, and fitting facts in historical perspective, we may briefly summarize our findings.

Justice Field's important contributions to the development of the *laissez-faire* doctrine of freedom of contract, and to the establishment of revolutionary substantive due process, were essentially products of a conviction that the salvation of democracy lay in a judicial trusteeship. Judges must construe governmental powers strictly, and private rights broadly, toward the end that state interference be held to a minimum and anything savoring of the collectivist doctrines which Field associated with the violence and bloodshed of the Commune be rendered forever impossible and unconstitutional. Fortuitously, the Fourteenth Amendment was advanced as an economic and political weapon at exactly the time Field was preoccupied with this crucial problem of statecraft. Perceiving the Amendment's uses as an instrument of judicial restraint, he seized it avidly, and sought in the *Slaughter-House* and *Granger* cases to develop its capacities, but failed to convince the majority of his brethren of the expediency of such restraint. Frustrated, he sought to accomplish his purposes by singularly direct means. Failing in politics, he nevertheless succeeded, through a brilliant understanding of how the law grew and how it might be made to grow, in fostering development, through humanitarian cases unencumbered by political niceties, of those very doctrines for which skilled constitutional lawyers had before argued in vain and which they later exploited to the fullest degree.

By conditioning a state of mind which stigmatized as "Communistic" the efforts of agrarian and labor groups to control the abuses of unregulated and publicly subsidized businesses, the Paris Commune tragically confused American social thinking, came close to subverting the basic tenets of democracy, and set in motion forces which caused constitutional

theory often to run counter to social needs. Because of this fateful anachronism, and by extraordinary conjunction of circumstances, purely "individualistic" enterprise was thus enshrined in the Constitution just as it ceased to be an economic fact; exercise of social and economic control, on the other hand, was discredited, and the motives of those sponsoring it made suspect, just as it became economically necessary and inevitable. In the light of this breach between theory and practice, it is not too much to say that the Paris Commune helped lay the foundations for a constitutional crisis which took two generations to mature and which ended only recently in repudiation of the Fieldian viewpoints.