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MORAL PHILOSOPHY AND THE INTELLECTUAL WORLD OF THE JUSTICES: THE UNITED STATES SUPREME COURT, 1860-1910

by

MARK WARREN BAILEY

DEPARTMENT OF HISTORY

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DISSERTATION ABSTRACT

The United States Supreme Court during the period between 1860 and 1910 has been portrayed as the source of a laissez-faire style of constitutional interpretation under which the nation and the Court largely abdicated their obligation to protect society's common interests from the ideologically conservative influences of new and powerful economic interests.

Recent trends in legal/intellectual history have moderated this critical view and have begun to rehabilitate the Supreme Court's image by placing it in a more accurately drawn intellectual context. This approach reasserts the role of ideas in shaping the law and reduces that of economic determinism. This thesis extends that trend by examining the powerful influence of antebellum Moral Philosophy, particularly as it was presented in the antebellum Protestant colleges, upon legal theory and practice during the last third of the nineteenth century.

The thesis examines the philosophical public statements and legal opinions of a select group of justices appointed after 1862, who shared exposure to an antebellum college education, to the doctrines of American Protestant theology, and to varying levels of legal education. This examination avoids, as far as practically possible, adopting a legal typology of the subject and adopts instead the typology of nineteenth-century moral science, with a view to illustrating the relationship between American Protestant theology, academic Moral Philosophy, and legal theory. This approach provides a better understanding of late nineteenth-century judicial conservatism in its own terms of reference. It demonstrates that the acceptance by conservative jurists of a voluntaristic, moral view of the individual, society, and the economy led them to conclusions concerning individual liberty and responsibility, race and the question of equality, and the role and function of government profoundly different from those of late nineteenth-century reformers. It demonstrates that judicial conservatism had less to do with belief in a gospel of wealth than an attempt to preserve a vision of man and society founded upon moral values.

To Alexandra

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In a project as large as this, it is impossible to thank everyone who has offered guidance and encouragement. There are, however, several individuals who deserve special mention. I am especially grateful to my wife, Alexandra, and my family for their unflagging support of a seemingly endless undertaking. I also wish to thank my advisors in the Department of History: David H. Flaherty for his early guidance and Jean V. Matthews and Roger L. Emerson for their continuing advice and encouragement. Finally, I must acknowledge my appreciation of the efforts of the library staff, in particular Ann Morrison and David Murphy, in the Reference Department of the D.B. Weldon Library at the University of Western Ontario.

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FOREWORD

The writing of American legal history has been affected by the same ideas which have influenced mainstream historiography. One important and enduring influence has been the Progressive tradition in American history writing. In the Progressive view, the history of the United States represents the culmination of Western European social, political, and economic development since classical times. In this historiographical context, movements or individuals looking to the past for informing values but who subsequently proved to be on the losing side of historical controversy have earned harsh treatment from historians associating them with unwarranted checks upon historical progress and the generally upward direction of American history.

The reluctance of historians to explore the philosophical underpinnings of late nineteenth-century conservatism is attributable in part to the popularity of social history and its heavy reliance upon a quantitative methodology which discourages attempts to explore the influence of things as ephemeral as ideas. Intellectual historians have been left exposed to the charge that, lacking quantitative, factual data and without a certain knowledge of their subjects' motives, they cannot definitively prove anything about a historical state of mind. Granting that the historian of ideas cannot hope to demonstrate conclusively a past state of mind and leaving aside the vexatious question of the validity of historical proofs based on statistical evidence, there is value in promoting an increased understanding of the past through the study of ideas.

Legal historians have generally preferred to begin and end their inquiries into early influences on the judicial mind with a short overview of legal education. They have preferred to leave aside the possible influence of religion, college studies, and, indeed, of the content of legal education itself on the formation of the judicial mind. Certainly a case can be made for the influence of legal education on the jurist; however, this work takes the position that the peculiar power of axiomatic principles over the nineteenth-century legal mind drew itself from informing values lying outside

the purely legal sphere; namely, from the conjunction of academic Moral Philosophy and evangelical moralism.

Henry F. May and others have made a persuasive case for the entrenchment in the American college curriculum between 1800 and 1860 of the moderate English Enlightenment of the first half of the eighteenth century, notably that branch of the Enlightenment centred in the Scottish universities. In the antebellum colleges, virtually all graduating students were exposed during the required senior course in Moral Philosophy to the doctrines of a Christian Enlightenment.

The position of Moral Philosophy at the apex of the classical American college curriculum is important to an understanding of the emphasis and faith placed on absolute moral principles in American thought in the nineteenth century. American moral philosophers concluded from the argument by design perfected by eighteenth-century Christian apologists such as Joseph Butler and William Paley that natural theology justified the natural, social, and economic order. At the same time, the Scottish moral and common sense philosophers argued that close study of the natural and social order revealed rational and eternal principles of morality that, if followed, would fulfil the divine plan by promoting greater human happiness. This predilection towards seeing a providential hand at work in the natural order and the belief that an innate moral sense was capable of discerning the dictates of natural and absolute justice predisposed educated Americans toward accepting a system of thought that appeared to explicate and systematize those principles.

If academic Moral Philosophy exerted a powerful influence on the thought of educated Americans throughout the nineteenth century, one must also take into account the continuing profound influence of Protestant theology on Victorian America's view of society and the individual. The role of religion has been consistently played down by mainstream historiography in the twentieth century. Historians from a more secular age have preferred to search for the past in the cold and cheerless world of economic theory rather than in outmoded religious values. They have erred in dismissing the importance of religion in American thought after the late 1850s. Although many Americans knew of Darwin's theory of evolution and

were familiar with popularized versions of his ideas such as those espoused by Herbert Spencer, few were prepared to dismantle the structure of Christian belief in order to accommodate the new science. Instead, Darwinian science, like Newtonian science before it, was integrated into the popular understanding of Christian belief.

The adoption by American evangelicals of Moral Philosophy's emphasis on morality as the rational basis of religion and the tie which bound society was the functional tie between Enlightenment rationalism and Christian pietism. Nineteenth-century evangelical moralism served to disseminate the Enlightenment's belief in the ameliorative moral influence of secular material progress. Both material and moral progress were founded upon the maintenance and improvement of the intuitive moral sense upon which ethical behaviour was grounded and which formed the basis of individual self-improvement and the development of character.

In recent years, historians have begun to broaden their exploration of the intellectual underpinnings of late nineteenth-century legal thought and to rehabilitate to some degree the reputation of the United States Supreme Court during the Gilded Age. Harry N. Scheiber, William McCurdy, and R. Kent Newmeyer have examined legal antecedents in the antebellum period, while William LaPiana has studied the influence on jurists of the changes wrought in legal education during the 1870s by Christopher Columbus Langdell at the Harvard Law School. David Gold has examined the influence of moral values such as responsible individualism on the thought of one individual, Judge John Appleton of Maine. Herbert Hovenkamp has probed the influence upon late nineteenth-century concepts of substantive due process and laissez-faire constitutionalism of classical political economy, while Michael Les Benedict has suggested the need to explore the ethical, libertarian foundation of nineteenth-century economic theory. The works of these authors suggest that legal historiography is moving toward a greater appreciation of the influence of moral science on legal ideas in the late nineteeth century. This thesis is part of this new direction in legal and intellectual history and seeks to add to this greater appreciation of the role of ideas by exploring the profound influence of academic Moral

Philosophy on the legal thought of a select group of justices of the Supreme Court between 1860 and 1910.

American jurists in the eighteenth and nineteenth centuries made much of the fact that the law was a science. In this regard, they saw the law as an important branch of the moral sciences the purposes of which were to give practical effect to the unified and immutable natural laws governing creation and human nature. As a moral science, the law's embodiment of natural and divine law was expected to yield an intellectual and material improvement in the human condition and further the advance toward the millennium. Functioning with the same ultimate end as Moral Philosophy, the collection and classification of decisions and the operation of stare decisis over a period of centuries represented the continual refinement, through the use of the moral sense and reason, of man's knowledge and understanding of the fundamental principles of truth and justice. The principles of law possessed, therefore, something of the same absolute character as those derived from Moral Philosophy, for correctly formulated legal principles expressed the unchanging purpose of Providence as laid down in God's laws and the natural order.

By studying the philosophical public statements as well as the legal decisions of a select group of late nineteenth-century Supreme Court justices, all of whom shared exposure to an antebellum college education, to the doctrines of American Protestant theology, and to varying degrees of legal education, with a view to the relationship between American Protestant theology, academic Moral Philosophy, and legal theory, this study provides a better understanding of late nineteenth-century judicial conservatism in its own terms of reference. It demonstrates that the acceptance by judicial conservatism of an essentially voluntaristic, moral view of society and the individual led the justices to conclusions concerning individual freedom, race and the question of equality, and the role and function of government profoundly different from those of late nineteenth-century reformers.

CHAPTER I

AMERICAN LEGAL HISTORY: THE PROBLEM OF IDEOLOGY, EPISTEMOLOGY, AND TYPOLOGY

§ I COMPREHENDING THE HISTORICAL MIND

Historical studies of the United States during the period from the end of the Civil War to the presidency of Woodrow Wilson have generally been critical of society and politics in the Gilded Age. Legal historians have likewise been critical of the United States Supreme Court during this period and have characterized the Court as unreservedly reactionary in its social and political views during an important period in the emergence of modern America. Historians have, in essence, labelled the court's conservatism as undesirable, if not consciously immoral, because judicial conservatism appeared to be in conflict with the political ideals of Progressives and with the direction taken by American policy-makers since the acceptance of Franklin D. Roosevelt's New Deal in the 1930s.

It would be difficult, if not impossible, to refute the charge that the Supreme Court was a conservative body during the period from 1870 to 1938. Indeed, this work generally accepts that evaluation. The problem of understanding the roots of the judicial conservatism must, nevertheless, be addressed, for ex post facto demonstrations of the way in which the Court's conservative tenor retarded the Progressive political agenda before 1938 frequently portray a shallow understanding of the temperament of late nineteenth-century conservatism. They also beg the question of what the justices themselves believed they were accomplishing, since one might reasonably presume that they felt their decisions were both morally and legally correct.

Americans in the late nineteenth century possessed a view of society, drawn originally from the Moderate Enlightenment, that rested upon faith in a unified and regular natural and social order of providential design, in the relationship between the improvement of knowledge and the moral and material progress of society, and in the benefits of an orderly republican political system. That faith reflected a synthetic vision of society that would shortly succumb to new conceptions of the nature and purpose of philosophy, of creation, of human nature and society but which remained an integral part of American jurisprudential thought until the early years of the twentieth century.

In order to obtain a better understanding of the judicial mind during the Gilded Age, it is insufficient to confine one's examination to the economic context of social and legal change. Nor is it sufficient to study only the law's internal doctrinal development or the technicalities of legal education, although those certainly had a role to play in the formation of that mind. An appraisal of judicial conservatism must include wider intellectual traditions that nevertheless formed integral parts of juridical thinking.

A logical although largely neglected beginning for a study of the intellectual world of the late nineteenth-century Supreme Court lies in the educational background of the justices who occupied the bench between the group of appointments made by Abraham Lincoln in 1862 to 1863 and the appointment by William McKinley of Joseph McKenna in 1898. As James McLachan has shown in his study of the Mugwumps, the late-nineteenth-century reformers, an examination of a particular social group reveals "subtle elements of culture--a style of thought, a mode of discourse, the emerging outlines of a particular social and intellectual world view."[1] If, as Paul Hamlin has also suggested, "law is a function of the ideas held by those who practice it and their ideas are very largely governed by the quality of their

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[1]James McLachan, "American Colleges and the Transmission of Culture: The Case of the Mugwumps," in S. Elkins and E. McKitrick, eds., The Hofstadter Aegis: A Memorial (New York: Alfred A. Knopf, 1974), 185.

education,"[2] an examination of the form and purpose of nineteenth-century education is essential to an understanding of the intellectual world of American lawyers. Among leading legal professionals that background included by the end of the nineteenth century a college education combined with law school and/or a law-office apprenticeship.

An exploration of the influence of a specific aspect of the broader intellectual milieu such as the role of the antebellum college in maintaining an intellectual tradition in American culture goes some way toward placing the Court of the Gilded Age in its own intellectual context. It illuminates the relationship of Protestant theology, academic Moral Philosophy and legal science to the judicial and political conservatism of many educated Americans in the late nineteenth century. Specifically, it demonstrates the effects of extra-legal ideas on the legal doctrines which the Supreme Court applied to the growing range of social and political questions which came before the court during this period of rapid change.

§ II AMERICAN HISTORY WRITING AND PROGRESSIVISM

The history of the United States Supreme Court during the late nineteenth century has been written within a particular ideological and methodological tradition that has tended to impose sharp conceptual limits upon the discipline. Those limits have derived partly from epistemological and methodological assumptions concerning the nature of historical knowledge and partly from a deterministic view of history which implicitly accepts it as an ascending process and which encourages normative judgements of history itself.

Henry F. May has associated those assumptions with what he has called the politicization of American history.[3] American histories and historians have displayed a tendency to equate the history of America with the political triumph during the

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[2]Paul M. Hamlin, Legal Education in Colonial New York (1939; reprint, New York: Da Capo Press, 1970), xvii.

[3]Henry F. May, The Enlightenment in America (Oxford: Oxford University Press, 1976), xiii.

American Revolution of the European Enlightenment and with it the spread of modernity, secularism, and democracy. The liberal determinism implicit in this view of American history was reinforced in the United States with the development during the last decade of the nineteenth century and the early years of the twentieth century of a political ideology which can loosely be termed reformist. To give it its popular name, Progressivism reached its political peak during the presidency of Woodrow Wilson. As Sidney Fine has described it, this evolving ideology, the end of which was the elimination of "the artificial restrictions that blocked human progress," had developed by the end of the nineteenth century into "a positive effort to better man's estate by constructive action."[4] This "positive effort" demanded social, economic, and political reforms. Progressivism gave new expression to educated Americans' long-standing faith in reason and science as the twin engines of moral and economic progress and accepted the view that their free play in American society and history had resulted in the unparalleled prosperity and democratic civilization of the United States. In Fine's view and in that of historians generally, Progressivism's assertion of a need for social, economic, and political reforms represented an expression of the true spirit of an evolving liberal ideology.[5]

Progressives nevertheless called for sweeping social and political reforms based upon a searching critique of the course of American development. That critique adopted the epistemological assumptions and methodologies of the new social sciences which had lately emerged from under the umbrella of the old Moral Philosophy course taught to generations of American students in the nation's colleges and universities.

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[4]Sydney Fine, Laissez-Faire and the General Welfare State: A Study of Conflict in American Thought, 1865-1901 (Ann Arbor: University of Michigan Press, 1964), 30.

[5]Fine, Laissez-Faire and the General Welfare State, 30.

The new social sciences, although they covered much the same content of the old Moral Philosophy course, became increasingly specialized, abandoning the belief in the unity of knowledge which had characterized older course's earlier intellectual investigations.[6] The new sciences, largely divorced from the religious and ethical context of Moral Philosophy, aimed their increasingly positivistic and descriptive analysis of society at the guiding beliefs of the nineteenth century.[7] This Progressive faith in the social sciences as tools of analysis and their critical approach to the intellectual and ideological verities of the Gilded Age have exercised a powerful influence on both the imagination of professional historians and on American politics throughout the twentieth century.[8]

Progressivism's critical review of history travelled within two powerful ideological currents. In part, its appraisal of American society expressed elements of the thought found in the theories of John Dewey and the American Pragmatists.[9] Like the Pragmatists, Progressives envisioned ideas as derived from experience and therefore contingent expressions of knowledge rather than immutable principles of truth. Moreover, the most important ideas were practical ones and aimed at guiding

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[6]Norman S. Fiering, "President Samuel Johnson and the Circle of Knowledge," William and Mary Quarterly, 3rd ser., 28 (1971): 199. See also Gladys Bryson, "The Comparable Interests of the Old Moral Philosophy and the Modern Social Sciences," Social Forces 11 (Oct. 1932): 19 and Gladys Bryson, "Sociology Considered as Moral Philosophy," Sociological Review 24 (Jan. 1932): 26-36.

[7]Fiering, "Samuel Johnson and the Circle of Knowledge," 231.

[8]The term "Progressive" is used here to denote both a particular historical period between 1900 and 1919 and an informing ideology. Other historians have used terms such as "liberal" and "reformist" to describe this complex of ideas. See David S. Sugarman, "Law, Economy, and the State in England, 1750-1914: Some Major Issues," in David S. Sugarman, ed., Legality, Ideology, and the State (Toronto: Academic Press, 1983), 213-66 and G. Edward White, Tort Law in America: An Intellectual History (New York: Oxford University Press, 1980), 65.

[9]John Dewey (1859-1952) is often associated with a number of somewhat earlier thinkers sharing similar ideas: Chauncey Wright, Charles Sanders Peirce, and William James.

actions. Even the truth and meaning of ideas were found in their utility and relation to practical affairs rather than in metaphysical speculations about ultimate causes, substances, or realities which could not change.

James Harvey Robinson, an early proponent of this new school of thought in history, argued in The Mind in the Making (1921) that ideas about religion, property, business, and politics were unconsciously absorbed from the environment. Thus, an understanding of the historical social environment which produced particular ideas and their social and economic consequences was the proper concern of the historian.[10] In Robinson's works, modern industrial society represented the "zenith in human achievement."[11] History, itself, was an ascending or progressive process, and Robinson's equation of change with improvement led him to characterize conservatism as a "hopeless and wicked anachronism."[12] Used as a "pragmatic weapon" of critical analysis,[13] historical studies exposed the errors of the past and led "conscious reformers," the "final product of a progressive order of things," onto the path to the future and "happy and rational lives."[14] Like the other social sciences, history retained from the old Moral Philosophy course a normative element which suggested what social policy ought or should do; however, this normative prescription looked less to the informing values of the past and immutable principles of truth drawn from

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[10]James Harvey Robinson, The Mind in the Making: The Relation of Intelligence to Social Reform (New York: Harper & Brothers, 1921), 42-3. See also Robert Allan Skotheim, American Intellectual Histories and Historians (Princeton: Princeton University Press, 1966), 78-9.

[11]Skotheim, American Intellectual Histories and Historians, 80.

[12]James Harvey Robinson, "The Spirit of Conservatism," in James Henry Robinson, The New History: Essays Illustrating the Modern Historical Outlook (New York: Macmillan, 1912; reprint, New York: The Free Press, 1965), 265.

[13]Morton G. White, Social Thought in America: The Revolt against Formalism (1947; reprint, Boston: Beacon Press, 1961), 8.

[14]Robinson, "The Spirit of Conservatism," 263, 264.

metaphysics than to a contingent analysis of the present facts and the perceived needs of society.

The Progressive critique also expressed elements of the historicism and economic determinism found in the ideas of both the positivists and Marx. Historians writing in the Progressive tradition have taken for granted the relationship between the nature of the economy and the character of social institutions.[15] Progressive historiography has viewed the development of ideas, values, and social institutions in terms of an evolutionary functionalism or instrumentalism in which material factors, notably the economy, were the determinant factors.[16] This functionalism constructed or assumed a typology of stages of development following an objective, determined, progressive path of social evolution.[17] In this view, the legal system and other social institutions were auxiliary to social life and their contingent nature changed to meet the needs of society.

The Progressive paradigm encouraged the writing of histories critical of prevailing nineteenth-century attitudes towards the social, economic, and legal orders. These were considered not merely outmoded but socially and economically dysfunctional and were as a result regarded as antithetical to both the liberal values of American politics and to progress generally. The complex of ideas and values which formed the conservative position in late nineteenth-century America stood, as Roscoe

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[15]Sugarman, "Law, Economy and the State in England," 224. David S. Sugarman, "Theory and Practice in Law and History: A Prologue to the Study of the Relationship between Law and Economy from a Socio-Historical Perspective," in B. Fryer et al, eds., Law, State, and Society (London: Croom Helm, 1981), 81.

[16]Robert W. Gordon, "Critical Legal Histories," Stanford Law Review 36 (1983-84): 59. See also for a discussion of functionalism and instrumentalism Morton J. Horwitz, "The Emergence of an Instrumental Conception of American Law, 1780-1820," Perspectives in American History 5 (1971): 287-328 and Harry N. Scheiber, "Back to 'The Legal Mind'? Doctrinal Analysis and the History of Law," review of The Transformation of American Law, 1780-1860, by Morton J. Horwitz, Reviews in American History 5 (Dec. 1977): 458-66.

[17]Gordon, "Critical Legal Histories," 62-4 passim.

Pound observed in the case of the judiciary, "between the public and what the public needed" in order to achieve happy and rational lives.[18]

The works of Charles Beard, an early and influential member of the Progressive school, explicitly adopted the Progressive epistemology and methodology. They focused on the social and political consequences of changes in the economy such as the enormous expansion of capital, the emergence of the trusts, and the consequent creation of a conflict between the interests of labour and capital. For Beard, the proper concerns of the historian were technological change and industrial development and their effects upon social and political relations.[19]

Beard applied this paradigm to a study of the constitution, the fountain from which flowed America's political values. Beard's Economic Interpretation of the Constitution argued that economic self-interest had motivated the framers of the Constitution and that the purportedly neutral principles of constitutional law favoured the formation of powerful economic and political interests antithetical to a liberal interpretation of constitutional principles.[20]

Beard's critical approach to constitutional history was later echoed in Edwin S. Corwin's influential studies of the constitution. These, too, reflected the Progressive appraisal that American history and its embodiment in constitutional law had in many respects failed to measure up to its original ideals. As Corwin stated the case in "The Constitution as Instrument and Symbol," American constitutionalism had operated to favour the minority interests of capital, of both the slave-owning and big business

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[18]Roscoe Pound, "Common Law and Legislation," Harvard Law Review 21 (Apr. 1908) at 403 cited in Fine, Laissez-Faire and the General Welfare State, 164.

[19]Charles A. Beard, Contemporary American History, 1877-1913 (New York: Macmillan, 1913), 32.

[20]Charles A. Beard, An Economic Interpretation of the Constitution of the United States (New York: Macmillan, 1913). See also Kermit L. Hall, "The Magic Mirror: American Constitutional and Legal History," International Journal of Social Education 1 (1987): 24-5.

varieties, over those of the majority so that "the symbol of the many" had become "the instrument of the few."[21]

Subsequent historians adopting the Progressive paradigm have taken a largely negative view of the period between 1870 and 1912. Although acknowledged as the period during which the recognizably modern features of American society developed, the Gilded Age has been portrayed as one in which the people fought a losing battle against big business, market integration, and technological innovation.[22] The view that America in this period was dominated by the economic and political interests of a new and growing capitalist elite has been repeated at length in the social and intellectual histories of the era.[23] Charles Beard's early characterization of politics and society during the Gilded Age as the triumph of private interests over public rights, of "men of affairs" over the majority, in the political and judicial councils of the nation provided a strongly-worded but hardly unique example of this line of historical argument.

> They [men of affairs] believed in the widest possible extension of the principle of private property, and the narrowest possible restriction of state interference, except to aid private property to increase its gains. They held that all of the natural resources of the country should be transferred to private hands as speedily as possible, at a nominal charge, or no charge at all, and developed with dashing rapidity. They

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[21]Edward S. Corwin, "The Constitution as Instrument and Symbol," American Political Science Review 30 (Dec. 1936): 1080.

[22]James Livingston, "The Social Analysis of Economic History and Theory: Conjectures on Late Nineteenth-Century American Development," American Historical Review 92 (1987): 69. See also Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940," Research in Law and Sociology 3 (1980): 4.

[23]Robert G. McCloskey, American Conservatism in the Age of Enterprise, 1865-1910: A Study of William Graham Sumner, Stephen J. Field, and Andrew Carnegie (1951; reprint, New York: Harper & Row, Publishers, 1964); Clinton Rossiter, Conservatism in America (London: William Heinemann Ltd., 1955); Samuel P. Hayes, The Response to Industrialism, 1885-1914 (Chicago: Chicago University Press, 1957); Robert H. Wiebe, The Search for Order, 1877-1920 (New York: Hill & Wang, 1967).

> also believed that the great intangible social property created by community life, such as franchises for street railways, gas, and electricity, should be transformed into private property. They supplemented their philosophy of property by a philosophy of law and politics, which looked upon state interference, except to preserve order, and aid railways and manufacturers in their enterprises, as an intrinsic evil to be resisted at every point.[24]

The effects of the Progressive paradigm on history writing are also reflected in the attitudes of historians towards late nineteenth-century conservatism. One might, for example, consider the sophisticated accounts of conservative thought in the late nineteenth century by Sidney Fine, Clinton Rossiter, and Robert G. McCloskey.[25] These works share common features, the most important of which is a tendency to treat the word conservatism as a pejorative term. They are not, to be sure, polemical rants against conservatism in nineteenth-century America. Clinton Rossiter, for example, has provided a sophisticated definition of conservatism in which he has identified a spectrum of conservative thought running from a largely "nonrational," "temperamental conservatism" produced by habit, inertia, fear, and emulation through to "possessive" and "practical" styles of conservatism, and finally to a conscious "philosophical conservatism".[26] In all cases, Rossiter has characterized American conservatism in the Gilded Age as "led by the rich and well-placed, sceptical of popular government... and politically, socially, culturally, and... economically antiradical." More importantly, Rossiter has identified conservatism with opposition to "the demand of the new Liberalism for government intervention" and its justification of the status quo with a profoundly materialistic gloss of liberal and democratic language.[27]

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[24]Charles A. Beard, Contemporary American History, 53.

[25]Fine, Laissez-Faire and the General Welfare State; Rossiter, Conservatism in America; McCloskey, American Conservatism in the Age of Enterprise.

[26]Rossiter, Conservatism in America, 7-9 passim.

[27]Rossiter, Conservatism in America, 7-9 passim, 133.

Rossiter's depiction of conservatism in the Gilded Age echoes the earlier works of Sidney Fine and Robert McCloskey. Fine's Laissez-Faire and the General Welfare State argued that by establishing "economic freedom as an end in itself rather than as a means to an end" conservatives had fallen "out of harmony with the spirit of liberalism" and were working counter to the "general welfare" of society.[28] McCloskey's American Conservatism in the Age of Enterprise took up the theme that the conservative defence of vested economic interests was attributable to a general debasement of the spiritual and humane values of the American democratic tradition, a "general deterioration of standards and ideals," due largely to the ideological dominance of a conservative materialism in late nineteenth-century America.[29] In terms of the Progressive paradigm, conservative thought in the late nineteenth century was merely an expression of the material interests of the nation's industrial and financial elite dressed up in the garb of metaphysical speculation. In these works, ideas had become, in effect, less important than the environmental conditions that created them.

§ III THE MINIMIZATION OF RELIGION

The acceptance in history writing of a pragmatic and "hardheaded empiricism" has accorded higher status to material factors as both causal mechanisms and normative ends in the historical process. This explanatory role for material factors has been accompanied by a correspondingly reduced role for ideas and intellectually motivated behaviour in human affairs.[30] In line with this trend, historians have demonstrated a consistent tendency to minimize the importance of religion and spiritual values in America after c.1860. With a few notable exceptions, mainstream historiography has most often adopted the view that the intellectual influence of American Protestantism was in serious decline after the Civil War. This decline was

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[28]Fine, Laissez-Faire and the General Welfare State, 31, 25.

[29]McCloskey, American Conservatism in the Age of Enterprise, 2, 13.

[30]Skotheim, American Intellectual Histories and Historians, 67.

attributed to religion's losing battle with modern science, notably the impact of Darwinian theories of evolution on the certainty of scriptural accounts of history and the fixity of belief.[31] As James R. Moore has suggested, however, the metaphor of warfare used by historians to describe the relation between science and religion was ill-chosen. Rather, several studies have suggested that the response of most Americans after 1860 to the new science was one of accommodation, with relatively few individuals prepared to renounce Christian beliefs and to place their faith in science.[32]

Although many of the studies examining the role of religious belief in American society and politics have concentrated on its early history, historians have nevertheless contributed to a literature that illustrates the powerful influence of religion, particularly evangelical religion, in nineteenth-century America's intellectual and social life.[33] Historians of religion in America have taken the position that, as

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[31]James R. Moore, The Post-Darwinian Controversies: A Study of the Protestant Struggle to Come to Terms with Darwin in Great Britain and America, 1870-1900 (Cambridge: Cambridge University Press, 1979), 15.

[32]Moore, The Post-Darwinian Controversies, 78-9. See also Robert C. Bannister, Social Darwinism: Science and Myth in Anglo-American Social Thought (Philadelphia: Temple University Press, 1979); T.J. Jackson Lears, No Place of Grace: Antimodernism and the Transformation of American Culture, 1880-1920 (New York: Pantheon Books, 1981); James Turner, Without God, Without Creed: The Origins of Unbelief in America (Baltimore: Johns Hopkins University Press, 1985).

[33]See Ralph Gabriel, The Course of American Democratic Thought: An Intellectual History since 1815 (New York: The Ronald Press, 1940); Henry F. May, Ideas, Faiths, and Feelings: Essays on American Intellectual and Religious History, 1952-1982 (Oxford: Oxford University Press, 1983); Mark A. Noll, Princeton and the Republic: The Search for a Christian Enlightenment in the Era of Samuel Stanhope Smith (Princeton: Princeton University Press, 1989); Mark A. Noll, A History of Christianity in the United States and Canada (Grand Rapids, Mich: William B. Eerdmans Publishing Co., 1992); Mark A. Noll, "The Image of the United States as a Biblical Nation, 1776-1865," in Nathan O. Hatch and Mark A. Noll, eds., The Bible in America: Essays in Cultural History (Oxford: Oxford University Press, 1982), 39-58. See also in that volume George M. Marsden, "Everyone One's Own Interpreter? The Bible, Science, and Authority in Mid-Nineteenth Century America," 79-100. Timothy L. Smith, Revivalism & Social Reform: American Protestantism on the Eve

Robert Skotheim has suggested in his American Intellectual Histories and Historians, religious ideas have their own intellectual worth and causal effect.[34] They have recognized and attempted to counterbalance Progressive interpretations of American history which have seldom taken religion seriously. As Perry Miller admitted, in disregarding economic and social factors in his works,

> I lay myself open to the charge of being so very naive as to believe that the way men think has some influence upon their actions, of not remembering that these ways of thinking have been officially decided by modern psychologists to be generally just so many rationalizations constructed by the subconscious to disguise the pursuit of more tangible ends.[35]

Miller's observation is as accurate concerning the role of religion and ideas generally during the Gilded Age as it was concerning Puritan orthodoxy in the seventeenth century. The manner in which people think represents more than simply the effects of their environment and more than a set of elaborate rationalizations for the obtaining of selfish ends. The world of ideas gives purpose and pattern to their actions. This is what the historian seeks to understand and explain.

§ IV THE PROGRESSIVE PARADIGM IN AMERICAN LEGAL HISTORY

Legal historiography has not been unaffected by ideological and methodological currents in the mainstream of history writing. Legal historians have tended to adopt the Progressive paradigm, with its concern for a sociological appr to historical causation and its identification of the Supreme Court with a brand of conservatism hostile to the interests of the majority. At the same time, legal historians in the United States have paradoxically tended to treat the law as an autonomous intellectual system and have engaged in an ongoing debate concerning the degree to which external influences may alter the character of the legal system. This

of the Civil War (Baltimore: Johns Hopkins Press, 1957).

[34]Skotheim, American Intellectual Histories and Historians, 248.

[35]Perry Miller, Orthodoxy in Massachusetts, 1630-1650 (Cambridge, MA: Harvard University Press, 1933), xi.

debate has tended to focus attention upon internally generated doctrinal and institutional changes at the expense of attention to external sources of normative values.

In his classic work, The Common Law, Oliver Wendell Holmes rejected the rule of axiomatic principles and syllogistic reasoning in the law and stated:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[36]

In the sense that Holmes suggested an important role for sociological influences and pragmatic considerations in any evaluation of juridical thought and thus signalled the beginning of a slow shift in American jurisprudence, his observation has served to focus scholarly attention on the ideological and methodological distinctions between the formalist[37] and realist[38] views of law that clashed in the American legal system during the early decades of this century. The attention paid by American legal historians to the debate concerning the dichotomy between formalist and realist notions of law and the emphasis placed by legal historians on a pragmatically oriented sociological methodology and epistemology in evaluating the historical influence of both styles of juridical thought demonstrate the extent to which legal historians have

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[36]Oliver Wendell Holmes, Jr., The Common Law (Boston: Little, Brown & Co., 1881; reprint, New York: Dover Publications, Inc., 1991), 1. Holmes served as an Associate Justice on the United States Supreme Court from 1902 to 1932.

[37]Formalism is used here in the sense of a philosophical system emphasizing abstraction or the nature or principles of things rather than their effects, parts, subject matter, or contents.

[38]Realism is used here to suggest the rejection of idealization and speculation in favour of an objective assessment of things as they are said to be at any given time.

knowingly or unconsciously adopted the Progressive and realist historical perspective.[39]

Prompted by what G. Edward White has described as "a sense of a wholesale loss of consensual American values" and the "perception of the costs of industrial progress,"[40] American jurists at the turn of the century such as Oliver Wendell Holmes, Jr.[41] and Louis D. Brandeis[42] accepted the pragmatic, or realist, view of the law and moved toward a system of "sociological jurisprudence" and historical methodology.[43]

Robert Gordon's discussion of academic legal realists such as Roscoe Pound and Karl Llewellyn has suggested that by the early 1930s legal realism had adopted much of the functionalism of the Progressives. Rejecting the axiomatic reasoning of the legal formalists, the realists envisaged the legal system as part of a larger political, social, and economic fabric in which decision-making was self-consciously directed toward satisfying social needs. The autonomy of legal principles existed only to the extent that decision-makers were isolated from short-term economic and political pressures. In the realist view, law functioned as a policy instrument

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[39]This discussion owes a good deal to the definitions of legal formalism and realism contained in Gordon, "Critical Legal Histories," 57-125. See also Lynda Sharpe Paine, "Instrumentalism v. Formalism: Dissolving the Dichotomy," Wisconsin Law Review (1978): 997-9 passim.

[40]G. Edward White, "Holmes, Brandeis and the Origins of Judicial Liberalism," in G. Edward White, ed., The American Judicial Tradition: Profiles of Leading American Judges (New York: Oxford University Press, 1988), 150-52.

[41]See above 14n. 36.

[42]Louis D. Brandeis (1856-1941), American jurist. Brandeis made a reputation as counsel representing consumers, labour unions, and investors. He served as an Associate Justice on the United States Supreme Court from 1916 to 1939.

[43]See, for example, Muller v. Oregon, 208 U.S. 412 (1908) and the famous "Brandeis brief." Named after the pioneer in its use, Louis D. Brandeis, these legal briefs included economic and sociological surveys along with the traditional legal principles and citations.

reflecting a larger social reality rather than as a repository of immutable truths and values.[44]

Despite the adoption of a critical and reformist perspective that has focused on a functional or instrumental view of law, legal historiography has generally adhered to what Roscoe Pound referred to as the imperatives of the "taught legal tradition" in its treatment of external influences and its choice of subject matter. Legal historians have shown a reluctance to venture beyond what Robert W. Gordon has described as the "box" of legal history.[45] Thus, they have imported the political ideology of Progressivism and its functionalism into legal history without altering either legal history's largely internal focus or the legal taxonomy of the subject matter.

The most successful effort to broaden the scope of legal history has been the work of James Willard Hurst.[46] Hurst's functionalist approach to a social history of law has suggested that the historian's goal is to explore the nature and role of law in its social setting, in the way that the law "embodies the wishes, desires, and ambitions of the populace."[47] Hurst's works have assumed that the law operated as both a functional derivative of social needs and as a normative model for an essentially instrumentalist vision of legal history.[48]

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[44]Gordon, "Critical Legal Histories," 66-7 passim.

[45]Roscoe Pound, The Formative Era of American Law (1938) at 83-4 quoted in Robert W. Gordon, "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography," Law & Society Review 10 (1975): 39. See also Gordon, "Critical Legal Histories," 60.

[46]Hurst is the author of numerous works exploring the relationship between law and society, particularly the nexus of law and the economy in nineteenth-century America.

[47]David H. Flaherty, "An Approach to American History: Willard Hurst as Legal Historian," American Journal of Legal History 14 (1970): 226.

[48]Harry N. Scheiber, "American Constitutional History and the New Legal History: Complementary Themes in Two Modes," Journal of American History 68 (Sept. 1981): 337.

> Basic... is the way that people generally have used law in a narrowly practical way. Typically they were concerned with law more as an instrument for desired immediate results than as a statement of carefully legitimated, long-range values.... The values that people wrote into law and more or less implemented through law did not add up to a neatly balanced, conceptually complete pattern of human interest.[49]

Hurst's legal functionalism has led him to identify economic development and its release of creative human energy as the primary determinant in shaping the law in the nineteenth-century United States.[50] Further, Hurst's broad definition of law as a form of "applied social intelligence" has encouraged him to focus on legislative activity as the arena in which the historian finds the clearest examples of a "directive intelligence" at work.[51] Hurst's retention of Progressivism's functional realism and its sociological methodology has led him to eschew the realm of ideas to concentrate almost exclusively on economic and institutional matters. Roscoe Pound's taught legal tradition exists in Hurst's work as an instrumentality rather than as a system of distilled ideas and legal principles existing within a distinct intellectual tradition. Hurst's argument is persuasive and his work has encouraged others to examine the institutional connections between government and economy within a more or less explicitly functional perspective.[52] For example, Lawrence Friedman and Jack Ladinsk / defined legal change in their discussion of developments in the law

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[49]James Willard Hurst, Law and Social Order in the United States (1977) at 23-5 quoted in Stanley N. Katz, "The Problem of a Colonial Legal History," in Jack P. Greene and J.R. Pole, eds., Colonial British America: Essays in the New History of the Early Modern Era (Baltimore: Johns Hopkins Press, 1984), 465.

[50]Flaherty, "Willard Hurst as Legal Historian," 227.

[51]Gordon, "J. Willard Hurst," 48.

[52]To identify only a few, see Robert S. Hunt, Law and Locomotives: The Impact of the Railroad on Wisconsin Law in the Nineteenth Century (1958); Harry N. Scheiber, Ohio Canal Era: A Case Study of Government and the Economy, 1820-1861 (1960); Lawrence M. Friedman and Jack Ladinsky, "Social Change and the Law of Industrial Accidents," Columbia Law Review 67 (1967): 50; Lawrence M. Friedman, A History of American Law, 2nd edition (New York: Simon & Schuster, 1985).

governing industrial accidents as "more or less orderly" change resulting from "the conscious and unconscious attempts of people to solve social problems through collective action" and as a "purposive and rational" effort to define and solve a problem through "the rational use of effective means."[53]

The instrumentalist approach has widened the scope of legal history by promoting a shift away from studying constitutional law and the appellate courts towards examining the social and economic role of legislative bodies at the state and local levels. It is equally true, however, that the economic determinism of the instrumentalist approach and its somewhat severe pragmatism continue effectively to circumscribe the acceptance by legal historians of the causative power of ideas originating outside the legal system.

Historians of ideas in legal history can be criticized on similar grounds. The acceptance of Progressivism's sociological methodology and its functional emphasis and the retention of a legal typology of the subject produces intellectual history with a narrow view of the historical life of the legal mind. Ignoring or playing down the significance of moral and religious ideas in nineteenth-century juridical thought results in an oversimplified economic and political determinism that glosses over not only the subtleties of nineteenth-century thought but also many profound convictions.

An example of this difficulty can be found in the legal/intellectual histories of G. Edward White. White's characterization of late nineteenth-century intellectuals, among whom he included the legal formalists, makes a series of debatable assumptions. He argues that late nineteenth-century policy makers appeared indifferent to social and economic realities because of their unswerving belief that axiomatic moral and legal principles governed the operation of society. In particular, they refused to abandon their conviction that "the economy was fated to rise and fall

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[53]Friedman and Ladinsky, "Social Change and the Law of Industrial Accidents," 50-1.

at regular intervals; that the laws of the marketplace were invariably sound; and that man had a discernible and predictable nature."[54]

White fails to identify adequately the extra-legal sources of these assumptions. White suggests that after c.1850 the function of organized religion as an expository device rapidly declined within intellectual circles. Post-Civil-War scholars seeking to describe the nature and dynamic of their society rejected efforts to derive order and unity from "mythologic religious principles" and substituted in the place of religious dogma and an eighteenth-century view of man and society new secular theories, particularly the understanding of man and society expressed in Darwinian theories of evolution after 1860.[55] In White's view, scientism, the belief that science was the only source of certain knowledge, posed an increasing challenge to established faiths and traditional social values after 1860.[56] He appears unconcerned with the continued intense interest of American intellectuals during the period following the Civil War "with ineluctable rules, principles, and axioms" which he describes as a "curious combination of spiritualism and Darwinism."[57] White describes this "impulse toward 'conceptualization'"[58] as characteristic of American culture during the Victorian era. Conceptualization, meaning by this term the attempt to order and

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[54]G. Edward White, "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America," Virginia Law Review 59 (1972); reprint, in G. Edward White, ed., Patterns of American Legal Thought, (Indianapolis: Bobbs-Merrill Co., 1978), 101.

[55]G. Edward White, "The Intellectual Origins of Torts in America," Yale Law Journal 86 (1977); reprint, in G. Edward White ed., Patterns of American Legal Thought (Indianapolis: Boobs-Merrill Co., 1978), 164, 168, 169.

[56]White, "The Intellectual Origins of Torts in America," 199. Donald H. Meyer makes somewhat the same point in "American Intellectuals and the Victorian Crisis of Faith," American Quarterly 27 (Dec. 1975): 585-603, where he argues that the scientific or critical method increasingly left traditional ideas and beliefs open to doubt.

[57]White, "From Sociological Jurisprudence to Realism, 101.

[58]White, "The Intellectual Origins of Torts," 164.

simplify information and ideas by placing them into general categories or under general abstractions,[59] represented a response to the realization that earlier conceptions of knowledge and of human nature as essentially static were inadequate guides to action in the face of the massive social changes arising from rapid industrialization.[60] American juridical thought and behaviour in the late nineteenth century represented, in White's view, a belated and inevitably unsuccessful effort to apply the axiomatic moral and legal principles of an earlier era to entirely new social, economic, and political questions. In short, the ineluctable rules to which the legal system appeared wedded no longer fit the specific cases to which they were applied.

Another example of the extent to which legal historians have adopted the Progressive paradigm can be found in the works of Harry N. Scheiber. In the Hurstian mould, Scheiber's work adopts a broader approach to legal history. He has attempted to escape the "box" of legal history by abandoning the idea that "law, governmental institutions, and policy processes" were external to economic analysis and by exploring the influence of "rules and institutions" in shaping the market.[61] To the extent that Scheiber has treated the law in a broader social context he has been successful; however, he and legal historians with similar interests such as Morton Horwitz and Lynda Sharpe Paine have conducted this examination within a purely materialistic and economically deterministic intellectual framework.[62] They

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[59]See Kennedy, "Toward an Historical Understanding of Legal Consciousness," 8.

[60]White, "The Intellectual Origins of Torts," 168. See also Daniel Walker Howe, "American Victorianism as a Culture," American Quarterly 27 (Dec. 1975): 508, 516; David D. Hall, "The Victorian Connection," American Quarterly 27 (Dec. 1975): 561-74 and Stow Parsons, The Decline of American Gentility (New York: Columbia University Press, 1973).

[61]Harry N. Scheiber, "Regulation, Property Rights, and the Definition of 'The Market': Law and the American Economy," Journal of Economic History 41 (Mar. 1981): 104.

[62]See also Morton J. Horwitz, "The Emergence of an Instrumental Conception of American Law, 1780-1820," 287-329; Morton J. Horwitz, The Transformation of American Law, 1780-1860 (Cambridge, MA: Harvard University Press, 1977);

explicitly accept the economy, though it reacts to some extent to "rules and institutions," as the determining factor in their analyses. Thus, for example, in his article, "The Road to Munn," Scheiber's largely internal legal analysis is conducted purely in terms of the economic implications of the American legal system's efforts in the second half of the nineteenth century to clarify the doctrine of public and private enterprise. In Scheiber's view, that process culminated in the Supreme Court's decision in Munn v. Illinois (1877), in which the majority attempted to define and justify the extent to which quasi-public businesses such as grain elevators in Illinois should be subject to public authority.[63] Moreover, although his analysis adopts an external approach to the extent that his interest centres on the nexus of law and economy and devotes considerable effort to explaining the intellectual sources of Chief Justice Waite's decision, Scheiber's analysis uses entirely internal sources, concentrating on doctrinal developments in the cases appearing before the Court in the 1860s and 1870s and on the influence upon American juridical thought of legal sources such as Lord Chief Justice Matthew Hale's De Portibus Maris, written c.1670 and published in 1767.

A decidedly broader approach to legal/intellectual history has recently been attempted by Herbert Hovenkamp. Reinstating extra-legal ideas as important factors in the development of the law, Hovenkamp argues that legal rights such as substantive due process are intellectual creations reflecting the world view of "the people who make and defend them" and that "pre-Modernist economic policy," by which he means pre-1860 classical economic thought, had a profound effect upon formalist legal thought in the late nineteenth century.[64] Although Hovenkamp's primary

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Lynda Sharpe Paine, "Instrumentalism v. Formalism: Dissolving the Dichotomy," 997-1027.

[63]Munn v. Illinois, 94 U.S. 113 (1877). Harry N. Scheiber, "The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts," Perspectives in American History 5 (1971): 329-404.

[64]Herbert Hovenkamp, "The Political Economy of Substantive Due Process," Stanford Law Review 40 (Jan. 1988): 380.

emphasis remains on the influence of economic thought as it was expressed in popular textbooks and in periodicals such as the North American Review, he acknowledges the importance in late nineteenth-century conservative thought of a "moral theory of laissez-faire" which he associated with the Scottish common sense philosophers.[65]

The theme that late nineteenth-century judicial conservatism rested upon an "ethical libertarian foundation" is also present in the works of Michael Les Benedict and David M. Gold. Both of these authors suggest that "law is not only a reflection of the interests of those who shape it" but that it also reflects "their ideas of right and wrong as well as their ideas of expediency and self-interest."[66] In their view, the values expressed by American judges in supporting what Benedict calls laissez-faire constitutionalism had less to do with judicially-approved "protection of entrenched economic privilege" or an axiomatic belief that "all government economic activity violated 'immutable' economic laws" than with the "broader moral dimensions" of individualism and personal responsibility.[67]

All three authors fail to make clear, however, the extent to which classical Political Economy was a subdiscipline of Moral Philosophy in the antebellum college curriculum or, indeed, to identify explicitly any specific source for a moral economy. If, as Hovenkamp suggests, American jurists were receptive to the economic ideas of American intellectuals and in particular of classical political economists, that acceptance resulted from their early exposure to a moral economy which operated within the intellectual framework of antebellum Moral Philosophy, with its emphasis

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[65]Hovenkamp, "The Political Economy of Substantive Due Process," 419. See also Herbert Hovenkamp, Enterprise and American Law, 1836-1937 (Cambridge, MA: Harvard University Press, 1991), 68, 97.

[66]Michael Les Benedict, "Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," Law and History Review 3 (1985): 297-8 and David M. Gold, The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism (New York: Greenwood Press, 1990), x.

[67]Benedict, "Laissez-Faire and Liberty," 296, 298 and Gold, The Shaping of Nineteenth-Century Law, 69, 73.

on the voluntaristic individualism of Protestantism, on the regular course and determined nature of creation and the human character, and on the inevitability of moral and material progress in a society devoted to truth and justice. These works are, nevertheless, a contrast to those of legal historians who have generally identified the Supreme Court as a source of "bad" conservatism that worked against the general welfare of the nation and emphasized the role of material and functional concerns over ideas in shaping the internal development of the law.

§ V JUDICIAL BIOGRAPHY AND THE LEGAL MIND

Traditional judicial biographies such as those found in William Draper Lewis' Great American Lawyers, Friedman and Israel's Justices of the United States Supreme Court, the many articles found in the periodical literature, and older doctoral dissertations provide a wealth of purely factual information concerning the lives of the justices and their most important decisions on the bench.[68] They do not, however, provide much insight into the formation of legal minds.

Some noteworthy efforts have been directed toward replacing the development of juridical thought in the nineteenth century within a broader intellectual context. John Philip Reid's study of Chief Justice Charles Doe of New Hampshire and Kent Newmeyer's biography of Justice Joseph Story represent successful attempts to explore the social and intellectual contexts of judicial thought.[69] Newmeyer illustrates particularly well the influence upon Joseph Story's thought of his

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[68]William Draper Lewis, ed., Great American Lawyers, 7 vols. (Philadelphia: John C. Winston Co., 1909; reprint, South Hackensack, NJ: Rothman Reprints, Inc., 1971) and Leon Friedman, and F.L. Israel, eds., The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions, 4 vols. (New York: R.R. Bowker, 1969).

[69]John Phillip Reid, Chief Justice: The Judicial World of Charles Doe (Cambridge, MA: Harvard University Press, 1967)and Kent Newmeyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic (Chapel Hill: University of North Carolina Press, 1985). For another example of this trend see Jean V. Matthews, Rufus Choate: The Law and Civic Virtue (Philadelphia: Temple University Press, 1980).

prodigious education and the broader influence upon American legal culture of Story's lectures at the Harvard Law School and impressive literary output between 1829 and 1845. Newmeyer is interested, then, in more than a forensic examination of Story's decisions on the bench; rather, he attempts to cut Story's judicial thought from the whole cloth of the man by examining in addition Story's off-the-bench philosophical and legal commentaries.

§ VI EDUCATION AND THE LANDSCAPE OF IDEAS

Lawrence Friedman's brief treatment in his History of American Law of changes in legal education during the nineteenth century is a reminder that a growing number of lawyers availed themselves of both an undergraduate and law degree during this period and that the justices appointed to the Supreme Court between 1862 and 1898 illustrate this general trend.[70] The form and content of their educational experiences provide an insight into the sources of late nineteenth-century conservatism attuned to contemporary definitions of human nature, the nature of the economy, and the functions of science and religion in describing the world and prescribing a course of collective and individual conduct.

Friedman's cursory treatment of legal education illustrates the limitations of the literature in this area. Referring to nineteenth-century legal treatises as "barren enough reading when they first appeared" and their doubtful utility to the modern scholar, he actively discourages an investigation of the sources of legal thought.[71] Not only does Friedman effectively dismiss the content of legal education as a potential source of intellectual influence, he completely ignores the possible role of the antebellum colleges in the process of intellectual development. Instead, he concentrates his attention on pedagogical and institutional developments such as

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[70]The number of law schools in the United States grew rapidly between 1850 and 1900 from 15 to 102 and were broadly dispersed in 33 states. Alfred Z. Reed, Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States (New York: Scribner's Sons, 1921; reprint, Buffalo: William S. Hein, 1986), 444, 446.

[71]Friedman, History of American Law, 624.

Christopher Columbus Langdell's introduction of the case method of instruction at Harvard Law School in the early 1870s. Friedman's work provides only the barest outline of a changing curriculum and no analysis of its content.[72] Other legal historians have also concentrated on individual law schools, their faculty, and their alumni, emphasizing institutional development and/or the heroic treatment of influential educators.[73] They have also displayed a tendency to treat historical developments largely in terms of their relation to contemporary policy questions within the legal profession.[74] This approach has very little to say about curriculum beyond how it was affected by changes in teaching methodology. It minimizes the extent to which the intellectual content of curriculum might affect ideas and makes little attempt to explain how variations in both content and methodology influenced jurisprudential thought. More importantly, legal historians have not explored the relationship between the doctrines of legal science and moral science in the college curriculum before 1860.

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[72]Some work has been done on legal education in the nineteenth century. See Albert J. Harno, Legal Education in the United States (San Francisco: Bancroft-Whitney Co., 1953); William C. Chase, The American Law School and the Rise of Administrative Government (Madison: University of Wisconsin Press, 1982); Robert Stevens, Law School: Legal Education in the United States from the 1850s to the 1980s (Chapel Hill: University of North Carolina Press, 1983).

[73]Julius Goebel, Jr., A History of the School of Law, Columbia University (N.p.: Foundation for Research in Legal History, 1953); Arthur E. Sutherland, The Law at Harvard: A History of Men and Ideas, 1817-1967 (Cambridge, MA: Belknap, 1967); Elizabeth G. Brown, Legal Education at Michigan, 1859-1959 (Ann Arbor: University of Michigan Law School, 1959); Frank L. Ellsworth, Law on the Midway: The Founding of the University of Chicago Law School (Chicago: University of Chicago Press, 1977).

[74]Josef Redlich, The Common Law and the Case Method in American University Law Schools (N.p.: Carnegie Foundation for the Advancement of Teaching, 1914); Reed, Training for the Public Profession of the Law.

General histories of education have also tended to focus on institutional issues,[75] although significant work has been produced examining the influence of the college curriculum on educated Americans. The most important of these have dealt with the role in the formation of American theories of human nature and society of the moderate European Enlightenment as it was transmitted through the Moral Philosophy courses in the antebellum colleges .

Henry May's discussion of the content of American higher learning in the first quarter of the nineteenth century suggests that the "nineteenth-century compromise" between "a belief in moral certainties and a belief in the desirability of change and progress" among American intellectuals was a product of a synthesis of sixteenth and seventeenth-century Calvinist Protestantism and the eighteenth-century Enlightenment. The nineteenth century in America was, therefore, an age characterized by the fusion of religious faith and a belief in the advance of human understanding based on the use of the natural faculties.[76]

May argues that the Presbyterian, Congregational, and Unitarian clergy who dominated the American college movement undertook a conscious programme of intellectual selection in which they favoured those precepts of the Moderate Enlightenment, as it was developed by the Scottish common-sense philosophers,[77] which best suited the political ideals of the new nation. The intellectual system which they developed and which found expression in the senior course of Moral Philosophy taught by the president of virtually every antebellum college represented, together

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[75]Frederick Rudolph, The American College and University: A History (New York: Vintage, 1965); Rudolph, Curriculum: A History of the American Undergraduate Course of Study Since 1636 (San Francisco: Jossey-Bass Publishers, 1977); Lawrence R. Veysey, The Emergence of the American University (Chicago: University of Chicago Press, 1965); Louis Franklin Snow, The College Curriculum in the United States (New York: Teachers College, Columbia University, 1907; reprint New York: AMS Press, 1972).

[76]May, The Enlightenment in America, xi, xiv.

[77]May, The Enlightenment in America, 337.

with the doctrines of American Protestantism, the foundation of American ethical and juridical thought in the nineteenth century.[78]

Legal historians judging American jurisprudence during the Gilded Age by the twentieth century's social scientific and instrumentalist standards have frequently failed to understand that legal formalism existed in an intellectual culture in which modern conceptions of science and technological utopianism exercised increasing influence but which nevertheless displayed a continued commitment to the "essential reality and dependability of moral codes and the certainty of progress."[79]

May's emphasis of the Enlightenment's importance to an understanding of the intellectual foundations of nineteenth-century American thought has been paralleled by authors interested in the effect on cultured Americans of education as it was presented in the antebellum colleges. These studies accept less readily the Progressive paradigm's metaphorical war between science and religion and the abrupt abandonment by Americans of older religious ideas and social theories after 1860. Rather, they emphasize the striking continuity of American thought from the late eighteenth century through to the end of the nineteenth century. Indeed, Donald Meyer argues that the "intellectual synthesis that joined science and faith... lasted,

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[78]There is a large literature on the Scottish Enlightenment in its own context which is not dealt with here. The influence of the Scottish Enlightenment in the American colleges is examined in George P. Schmidt, The Old-Time College President (New York: Columbia University Press, 1930; reprint, New York: AMS Press, 1970); Wilson Smith, Professors and Public Ethics: Studies of Northern Moral Philosophers before the Civil War (Ithaca: Cornell University Press, 1956); Terence Martin, The Instructed Vision: Scottish Common Sense Philosophy and the Origins of American Fiction (Bloomington: Indiana University Press, 1961); Daniel Walker Howe, The Unitarian Conscience: Harvard Moral Philosophy, 1805-1861 (Cambridge, MA: Harvard University Press, 1970; Douglas Sloan, The Scottish Enlightenment and the American College Ideal (New York: Teachers College Press, 1971); Donald H. Meyer, The Instructed Conscience: The Shaping of the American National Ethic (Philadelphia: University of Pennsylvania Press, 1972); Merle Curti, Human Nature in American Thought: A History (Madison: University of Wisconsin Press, 1980); and Noll, Princeton and the Republic (1989).

[79]May, The Enlightenment in America, 358.

despite severe stress, until the First World War."[80] The foundation of this continuity lay in the one area common to most educated Americans in the nineteenth century: the senior course of Moral Philosophy.

> It was virtually impossible for a person born in the first sixty years of the nineteenth century and educated in the American colleges to escape the influence of the course in moral philosophy.[81]

Academic Moral Philosophy's powerful synthesis of eighteenth-century thought and Protestant belief is the missing link needed to reconnect the justices of the Supreme Court to their social and intellectual context. Legal historians concerned with explaining a "legal consciousness"[82] have failed to grasp the extent to which jurisprudential thought travelled along the extra-legal lines laid down by academic Moral Philosophy. Moral Philosophy provided an explanation of human nature and society that accommodated not only the new science but older religious and moral ideas in an orderly and, more importantly, a unified fashion.

§ VII A NEW APPROACH

This brief review suggests that a fresh approach to the intellectual history of the Supreme Court requires certain characteristics if it is to successfully escape both the Progressive paradigm in history writing and the "box" of legal history. Such an account must necessarily play down the role of economic determinism and an excessive stress upon the functional aspect of law. It presupposes the inherent value of ideas and their influence upon individual and social behaviour. It regards the law as something more than an autonomous body of rules and principles subject to their own internal laws of development. Moreover, it suggests that, while forensic examinations of legal doctrines are useful, those doctrines must also be studied within a broader intellectual context outside of a purely legal taxonomy of the subject.

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[80]Meyer, "The Uniqueness of the American Enlightenment," American Quarterly 28 (Summer 1976): 172.

[81]Meyer, The Instructed Conscience, vii.

[82]Kennedy, "Toward an Historical Understanding of Legal Consciousness," 23-4.

In order to claim a broader intellectual context, it is obviously necessary to look beyond the Supreme Court reports which form the traditional sources for legal histories. The reports constitute, of course, a formidable body of writing and an undeniably rich repository of intellectual, social, economic, and institutional developments; however, an overreliance on decided cases tends to lead toward the sort of internal approach that this study avoids.

Another obvious source for the intellectual historian and biographer are the personal papers of the justices. These, however, present something of a problem. There are a surprising number of justices for whom no personal papers exist. Of the twenty-three potential candidates for this study, seven did not leave personal papers. Another seven left small and fragmentary collections. Even where more substantial papers exist, they are widely scattered in dispersed geographic locations. Fortunately, a number of the justices published articles and addresses on a wide variety of topics. These enable one to reconstruct much of the general philosophy and mentalité that the justices brought to the bench. This study makes extensive use of these sources in conjunction with their decisions in key cases.

The work is structured so as to provide the reader with a necessarily brief survey of the structure and content of the Moral Philosophy course in the antebellum American colleges. The account follows as closely as possible the taxonomy of the course as it would have been presented to students in the nineteenth century, including a brief overview of the relation between moral and legal science. In that portion of the work which specifically examines the thought of Justices Miller, Field, Strong, Bradley, Harlan, Gray, Brewer, and Brown, the work departs completely from any attempt to follow a legal taxonomy and instead places the speeches, writings, and decisions of the justices within the intellectual context of the Moral Philosophy course. In this way, it is hoped that the reader will better be able to see the relationship of moral science with judicial and conservative thought during the Gilded Age.

CHAPTER II

THE SUPREME COURT BENCH: JUDICIAL CAREERS IN THE LATE 19TH CENTURY

§ I GENERAL OBSERVATIONS ABOUT THE COURT

The Progressive paradigm in history writing has tended to characterize the United States Supreme Court during the Gilded Age as the instrument of a new and increasingly powerful corporate and financial elite in American society. The biographies of the members of the Supreme Court during the Gilded Age raise doubts concerning the accuracy of that contention. Although the justices clearly stood at the pinnacle of the legal profession, their family backgrounds, educations, and lifestyles suggest that these men were and saw themselves as something other than members of the new financial and business elite. The Court was sympathetic during this period to the interests of property only to the extent that those interests harmonized with the values and ideals of the occupational and intellectual traditions in which the justices grew to manhood.

Various dates have been assigned to what has been termed the formalist period of the Court's history. Although most historians agree that it began in 1871 when the Court handed down its decision in the second Legal Tender Cases, less agreement exists on a terminal date.[1] In some instances, the period has been extended to the

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[1]Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871). The Legal Tender Cases determined the legality of the "greenbacks" issued by the Union government during the Civil War. Historians generally agree that President Grant's appointment of Justices Joseph P. Bradley and William Strong immediately before the Court reversed itself on the constitutionality of paper currency gave to it the intellectual character that it would retain throughout the Gilded Age.

late 1930s, when the so-called "Four Horsemen," Willis Van Devanter, James C. McReynolds, George Sutherland, and Pierce Butler, departed the bench shortly after Franklin D. Roosevelt's implied threat to pack the Court in order to insure that his New Deal would survive the conservative constitutional challenge.[2] If this periodization is adopted, there would be in total forty-one justices to consider; however, since many of these men matured after the decline of academic Moral Philosophy in American colleges began and were appointed well after the turn of the century, the link between their ideas and the nineteenth-century judicial ethic is correspondingly less plausible. Judicial conservatives were certainly appointed after 1900; however, it is equally true that the appointment of Oliver Wendell Holmes, Jr. in 1902 presaged a new sensibility on the Court less concerned with moral absolutism and more with the law as a social artifact.[3] Excluding appointments made after the turn of the century leaves twenty-three justices as potential candidates for closer study. They are listed in Appendix One.

These twenty-three men were appointed by eight presidents over a thirty-six year period at an average age of fifty-five years and a median age of fifty-six years. Only one of those presidents, Grover Cleveland, was a Democrat.[4] The political predominance of the Republican party was also reflected in the membership of the bench. Seventeen of the twenty-three appointments in this period were Republicans, while only six were Democrats. Interestingly, three of those six were also appointed by Republican presidents.

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[2]Willis Van Devanter, A.J. (1910-1937), James C. McReynolds, A.J. (1914-1941), George Sutherland, A.J. (1922-1938), Pierce Butler, A.J. (1922-1939).

[3]Oliver Wendell Holmes, Jr., Associate Justice (1902-1932), was the author of several works of legal philosophy, the best known of which was The Common Law (Boston, 1881). The views expressed there lead him to be identified as a precursor of the Legal Realist movement of the late 1920s and 1930s.

[4]Stephen Grover Cleveland (1837-1908), Democrat, served two terms as President of the United States between 1884-1888 and 1892-1896.

The changing nature of an expanding Union after 1864 and the relative disenfranchisement of the South was evident in the geographic dispersal of the appointments. Although legal historians have for the most part concentrated their studies on the New England and mid-Atlantic states, those states accounted for only seven appointments. The Southern states accounted for another five. The remaining eleven appointees were drawn from California and the rapidly growing states in the Midwest.[5] At a more personal level, the country's westward expansion can be seen in the fact that seventeen of the justices were born in the East but eleven of them were residing in the West when appointed to the Supreme Court.

The justices' religious affiliations demonstrate both the predominance of Protestantism in the nineteenth-century United States and Protestantism's sectarian character. Only two of the twenty-three appointees were Roman Catholics. The remainder were split among the various Protestant sects, with the Presbyterian and Congregational churches accounting for nine of the appointees and the Protestant Episcopal church another four.[6] The predominance in the legal profession of these three sects in relation to Methodists and Baptists may be partially accounted for by the higher educational level of these groups.[7]

This group also supports the conclusion that the leaders of the American bar increasingly availed themselves of both a college and law school education. Twenty of the twenty-three justices appointed during this period graduated from college before 1860. Fewer attended a law school; however, ten did so and four of them graduated. This represented a higher level of vocational education than in the profession generally.

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[5]Since what was considered the frontier constantly moved westward throughout the nineteenth century, it is difficult to define what constituted the Midwest. For the sake of simplicity here, it includes the Old Northwestern states of Ohio, Michigan, Illinois as well as Iowa and Kansas.

[6]See Appendix II.

[7]Timothy Smith, Revivalism & Social Reform: American Protestantism on the Eve of the Civil War (Baltimore: Johns Hopkins Press, 1957), 22.

James McLachan's statistical studies of antebellum college enrolments and the family backgrounds of college students shows that the benefits of higher education were not confined during the nineteenth century wholly to the wealthy. For example, surveys of New England college students demonstrate that during the latter half of the eighteenth century and during the nineteenth century New England colleges enroled large numbers of the sons of poor to middling farmers in addition to those of the traditional landowning, merchant and professional elites. McLachan points out that as early as the period 1748 to 1768 approximately fifty percent of Princeton graduates came from poor to middling agricultural backgrounds--a pattern that he found continued in the nineteenth century.[8] McLachan found that at least until the end of the nineteenth century American colleges continued to draw the majority of their students from the traditional occupations and professions rather than from the new manufacturing and commercial class.[9] This pattern was reflected in the group of justices appointed to the Court during the period between 1862 and 1898. Of twenty-three men, fully eighteen were drawn from families pursuing traditional occupations and professions. Of the five men whose families could properly be described as part of the business class, three were small to middling merchants or manufacturers. Only Justices Gray and Brown came from families possessing considerable wealth generated by business activities and, indeed, this characterization applied to Horace Gray only until 1847 when the family's fortunes were ruined.

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[8]James McLachan, "The American College in the Nineteenth Century: Toward a Reappraisal," Teachers College Record 80 (1978): 294-6.

[9]James McLachan, "American Colleges and the Transmission of Culture: The Case of the Mugwumps," in S. Elkins and E. McKitrick, eds., The Hofstadter Aegis: A Memorial (New York: Alfred A. Knopf, 1974), 191.

§ II DEFINING A SAMPLE

In order to study their ideas in depth, it was necessary to reduce the twenty-three to a more manageable sample. Several criteria were used to determine whether an individual ought to be included in the smaller group which was to be more carefully examined. The Chief Justices have already received ample attention from historians and are not further considered here.[10] In addition, justices who did not serve ten years or more on the bench were excluded, since, compared to an average of slightly over sixteen years of service and a median service of approximately fourteen years for the group, they were not and are not considered to have been particularly significant members of the Court.[11] For example, William B. Woods, who served between 1881 and 1887, has been described as "one of the least known of all the Justices" and as "a mere political appointee" whose "personal qualifications did not enter significantly into his appointment," while Howell E. Jackson has been described as secreted beneath "a shroud of anonymity."[12] Educational attainments were also taken into consideration. Since this study is concerned with the influence of the Moral Philosophy taught in the antebellum Protestant colleges, those justices who did not attend such a college are not considered.[13] This left a sample of twelve justices,[14] from which four additional justices were removed. Ward Hunt technically served ten years on the Court but, in fact, suffered a debilitating stroke in 1878, only

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[10]Salmon P. Chase, Morrison R. Waite, Melville Weston Fuller, Edward D. White.

[11]William B. Woods, Stanley Matthews, Lucius Q.C. Lamar, Howell E. Jackson.

[12]Louis Filler, "William B. Woods;" and Irving Schiffman, "Howell E. Jackson," in Leon Friedman and F.L. Israel, eds., The Justices of the United States Supreme Court, 1789-1969: Their Lives and Major Opinions, 4 vols. (New York: R.R. Bowker, 1969), 1327, 1603.

[13]Noah H. Swayne, Rufus W. Peckham, Joseph McKenna.

[14]Samuel F. Miller, David Davis, Stephen J. Field, William Strong, Joseph P. Bradley, Ward Hunt, John Marshall Harlan, Horace Gray, Samuel Blatchford, David J. Brewer, Henry B. Brown, George Shiras, Jr.

six years after his appointment, that left him unable to perform his duties.[15] David Davis, a prominent political figure before his appointment to the Court and after his resignation in 1877, has generally been considered unremarkable as a justice and, moreover, left few published works.[16] Finally, since this study is as interested in the justices' off-the-bench writings as it is in their opinions, George Shiras, Jr. and Samuel Blatchford are not considered, because neither man left any publications beyond their opinions.[17]

This process of elimination resulted in a sample of eight justices: Samuel F. Miller (1862-1890), Stephen J. Field (1863-1897), William Strong (1870-1880), Joseph P. Bradley (1870-1892), John Marshall Harlan (1877-1911), Horace Gray (1881-1902), David J. Brewer (1889-1910), and Henry B. Brown (1890-1906). These are the individuals around whom this study of the intellectual background of the Supreme Court during the period between 1862 and 1911 is constructed. They provide an identifiable and representative group whose ideology can be presented within an intellectual tradition and whose application of the same to contemporary questions can be isolated and studied with a reasonable degree of confidence. In this instance, all eight justices attended colleges in the period prior to 1860 and prior to the slow decline thereafter of the Moral Philosophy course. They also represent an interesting perspective on the character of the Supreme Court during this period. Justices Miller, Field, Bradley, and Harlan are generally considered to have been among the most important members of the Court during their tenures "partly because

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[15]Stanley I. Kutler, "Ward Hunt," in Friedman and Israel, eds., The Justices of the United States Supreme Court, 1789-1969, 1228.

[16]Stanley I. Kutler, "David Davis," Friedman and Israel, eds., The Justices of the United States Supreme Court, 1789-1969, 1045.

[17]Samuel Blatchford published one off-the-bench piece, A Century of Patent Law (Washington: Pearson, 1891), which was essentially a reprint of an earlier address.

they stood out prominently as the 'strong' members of the court."[18] It is worth noting, moreover, that, with the exception of William Strong who served on the Court for only ten years, this group served terms on the bench much longer than average, 23.3 as opposed to 16.3 years. They collectively spent 186 man-years on the Court, wrote 4,133 opinions of the Court, and filed 455 dissents. In the instance of Justice Harlan, for example, this meant that he participated in 14,226 cases, delivered 745 opinions, and dissented on 380 occasions.[19] This is an impressive body of work which illustrates the durable influence of these men on the Court's character and doctrines.

§ III FAMILY BACKGROUND AND RELIGIOUS INFLUENCES

The family backgrounds of the eight justices in this study show that they were hardly the sons of privilege. Only two of the eight, Horace Gray and Henry Billings Brown, were born into families with business backgrounds and significant wealth. Two more of the remaining six, Samuel Freeman Miller and Joseph P. Bradley, were born into farming families in poor and backward areas of the country. Of the remaining four, John Marshall Harlan was the son of a prominent lawyer and politician, while Stephen J. Field, William Strong, and David J. Brewer were the sons of ministers.

Joseph P. Bradley and Samuel Freeman Miller represented to some degree nineteenth-century America's belief in the Horatio Alger myth of success. A contemporary memorialist of Justice Miller expressed his admiration for "the stalwart, sturdy statesman, brawny in physique, original in thought, pure in morals, gifted with commonsense rather than erudition, fighting his way to a life of influence through

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[18]Horace Stern, "An Examination of Justice Field's Work in Constitutional Law," in William Draper Lewis, ed., Great American Lawyers, 7 vols. (Philadelphia: John C. Winston Co., 1909; reprint, South Hackensack, NJ: Rothman Reprints, Inc., 1971), 7: 52.

[19]Alan F. Westin, "Mr. Justice Harlan," in Allison Dunham and Philip B. Kurland, eds., Mr. Justice, revised ed. (Chicago: University of Chicago Press, 1964), 117.

hardships of poverty," a description of Miller's life and character which might have been equally well applied to others such as Joseph P. Bradley. The "self-reliant character and iron determination" developed by making one's successful way in life characterized a "type of American" who "was more common in the days before the Civil War and immediately thereafter than it is now." He found that struggle to attain a station in life recorded by Emerson.

> "A sturdy lad from New Hampshire or Vermont," says Emerson, "who in turn tries all the professions, who teams it, farms it, peddles, keeps a school, preaches, edits a newspaper, goes to Congress, tries a township and so forth, in successive years, and always, like a cat, falls on his feet, is worth a hundred of these city dolls."[20]

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[20]Horace Stern, "Samuel Freeman Miller," in Lewis, ed., Great American Lawyers, 6: 541.

Table I[21]
Occupations of the Justices' Fathers

Name	Agriculture	Medicine	Law	Theology	Business	Education
Noah Swayne	a					
Samuel F. Miller	a					
David Davis		a				
Stephen J. Field				a		
Selmon P. Chase				a		b
William Strong				a		
Joseph P. Bradley	a					
Ward Hunt					a	
Morrison R. Waite	a		b			
John Harlan Marshall			a			
William B. Woods	a				b	
Stanley Matthews						a
Horace Gray					a	
Samuel Blatchford			a			
Lucius Q.C. Lamar	a		b			
Melville W. Fuller			a			
David J. Brewer				a		
Henry B. Brown					a	
George Shiras	a				b	
Howell E. Jackson						
Edward D. White	a	a				
Rufus W. Peckham			a			
Joseph McKenna					a	
TOTAL	8	2	6	4	6	2

[21]"a" and "b" denote primary and secondary occupations. Chief Justics are in italics. Justices in this study are underlined.

Justice Bradley's "Autobiographical Sketch" related his humble social and educational background in up-state New York. Born in 1813 and raised on the family farm at Berne, Bradley worked in the fields for both his father and great-grandfather. The oldest of twelve children, he supplemented the family's meagre income by burning timber cut from newly cleared fields into charcoal and selling it in Albany. In later years, he taught during winter in the country school and put his mathematical skills to work as a land surveyor for a dollar a day.[22] Bradley's early education was, perforce, most rudimentary. His lifelong friend Cortland Parker later observed: "His education was of the simplest sort. It was not even a common school education. It was a winter-school."[23]

Bradley was early aware that his chances for higher education and social advancement were limited by his family's chronically straightened financial circumstances. His recollection of the events in the autumn of 1831 leading up to his departure for college show that Bradley understood early the harsh demands of everyday life and the possibilities it offered for improving one's self.

> Whilst my father and I were thrashing out the buckwheat crop one day in the month of October or November of that year, the desire for an education became so vehement that I . oke out in a way I had never done before to my poor father. I told him that my life was being wasted. That what I was doing amounted to nothing. That I felt I must have an education. He said, "I cannot afford to give you an education." I said, "I did not expect him to do it; but if he would let me go (I was then over 18 [sic]) I would somehow obtain an education

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[22]Joseph P. Bradley, "Autobiographical Sketch," Bradley Papers ms. quoted in Charles Fairman, "What Makes a Great Justice? Mr. Justice Bradley and the Supreme Court, 1870-1892," Boston University Law Review 30 (1950): 52n. 4. See also Charles Fairman, "The Education of a Justice: Justice Bradley and Some of His Colleagues," Stanford Law Review 1 (Jan. 1949): 222-6 and Leon Friedman, "Joseph P. Bradley," in Friedman and Israel, eds., Justices of the United States Supreme Court, 1789-1969, 1181-2.

[23]Cortland Parker, "Mr Justice Bradley of the U.S. Supreme Court. Address presented to the New Jersey Historical Society" (Newark, NJ, 1893) at 4 quoted in Anthony Champagne and Dennis Pope, "Joseph P. Bradley: An Aspect of Judicial Personality," Political Psychology 6 (1985): 482.

> myself; and I would fully make up to him the loss of my unexpired time before coming of age.... He finally consented to my proposition, only stipulating that I should help him get in the balance of the Fall crop. He further gave me a small amount of money (about twenty dollars) to start with.[24]

Having missed the last boat of the navigation season from Albany to New York and after spending a few days at Albany reading in the State Library,[25] Bradley returned to Berne where he studied Greek and Latin in preparation for his entrance examination at Rutgers College under the supervision of Abraham H. Meyers, a former teacher in the country school which Bradley had attended and then the dominie of the recently erected Dutch Reformed Church.[26]

Bradley's early professional aspirations were also noteworthy and the difficulties that he overcame in his efforts at advancement were formidable. Like many of his contemporaries, Bradley initially saw his future in the church. "I went [to college] under the... auspices [of the Dutch Reformed Church] intending, at first, to study theology; but subsequently abandoned it for the law."[27] Initially, however, Bradley was also faced with the practical difficulties of supporting himself while away at college and in this endeavour he employed various means. In one instance, he obtained employment as a correspondent for the Newark Daily Advertiser through his

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[24]Fairman, "The Education of a Justice," 224-5. See also Charles Fairman, "Mr. Justice Bradley," in Dunham and Kurland, eds., Mr. Justice, 69 and Parker, "Mr. Justice Bradley of the U.S. Supreme Court," 481-93.

[25]Bradley recorded that he read Geoffrey Chaucer (c.1343-1400), the essays of Sir William Temple (1628-99), author of Observations upon... the Netherlands (1672), an essay upon The Advancement of Trade in Ireland (1673), and three volumes of Miscellanea (1680, 1692, 1701) and Junius, pseudonymous author of a series of letters that appeared in the Public Advertiser, Jan 1769-Jan. 1772. Fairman, "The Education of a Justice," 225.

[26]Fairman, "The Education of a Justice," 222 and Fairman, "Mr. Justice Bradley," 69.

[27]Joseph P. Bradley, "Fragment of an Autobiography," quoted in Fairman, "The Education of a Justice," 227.

connection with the college's Philoclean Literary Society and during his Senior year in March, 1836, arranged a teaching position at an academy for boys at Millstone: "the faculty having promised, in consideration of my proficiency, to recommend me for a degree at the ensuing commencement with the rest of my class."[28]

Bradley's decision to begin the study of law was undoubtedly influenceed by his college intimates, Frederick T. Frelinghuysen, the future Senator from New Jersey and Secretary of State, and Cortland Parker, a future president of the American Bar Association, both of whom read law in Newark with Frelinhuysen's uncle, Theodore Frelinghuysen,[29] and who strongly encouraged Bradley to abandon his teaching position in favour of a legal apprenticeship in Newark. "Come! Come! Tell the millstones they can revolve without you. It is a grand situation for you.... Mr. Gifford is a nice man and you would do well by him."[30] Their encouragement may have reinforced Bradley's own dissatisfaction with his situation and his prospects. Upon graduation in 1836 he wrote:

> I turn to the future--"gloomy & dark is my pathway, lonely & low is my grave"--I see my companions, classmates, my competitors so long,--I see them far before me, distinguished in their professions, beloved for their virtues, respected for their talents, and honored with the confidence of their fellow citizens--I see myself far behind, toiling with both hands to keep a station and a name, but sinking under the task and dying young and forgotten in the middle of my course.[31]

This fear of failure prompted Bradley to follow his friends' advice and in 1836 he embarked upon his legal studies with Archer Gifford, the collector of the port of Newark. He was admitted to the New Jersey bar in 1839.

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[28]Fairman, "The Education of a Justice," 227, 228, 229-30.

[29]Theodore Frelinghuysen (1787-1862), attorney general of New Jersey (1817-29), United States Senator (1829-35), Chancellor of the University of the City of New York, President of Rutgers College.

[30]Fairman, "The Education of a Justice," 230.

[31]Joseph P. Bradley, "Thoughts on Commencement," quoted in Fairman, "The Education of a Justice," 229.

During his youth Bradley was rarely exposed to organized religion and later recalled that during his first eleven years: "A church I never saw--there was none in our neighborhood. Occasionally religious meetings were held in school houses or barns, by itinerant preachers of the Baptist, Methodist and Christian persuasions." Not until Bradley was fifteen years of age was a Dutch Reformed Church built in the area.[32] The lack of formal religion did not, in Bradley's case, translate into an indifferent or irreligious nature later in life. Bradley maintained a strong interest in the history and doctrines of Christianity and his Miscellaneous Writings are peppered with entries dealing with religious subjects such as, among other topics, the "living and inextinguishable truth of Christianity" "as preserved in the Holy Scriptures," the Lord's Prayer as "an Epitome of Christianity," and the Bible and the history of its translations.[33]

The early lives of Justice Bradley and Justice Miller show remarkable similarities. Born in 1816, Miller, like Bradley, was the eldest child of a large family farming near Richmond, Kentucky. Miller's advancement into the front rank of the legal professional was, like Bradley's, a combination of fortuitous circumstances and dogged persistence. Receiving only intermittent schooling at the local academy while working on his father's farm Miller had less formal education than Bradley but like him aspired to a professional career. Having left school to become a clerk in a drugstore, Miller was fortunate to attract the attention of a local physician by winning a contest in which he accurately recited over five hundred Bible verses. As a result, Miller was sponsored to study in the Medical Department at Transylvania University

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[32]Fairman, "What Makes a Great Justice?," 52, 53.

[33]Joseph P. Bradley, "Christianity, Its Immortality," (1838); "The Lord's Prayer" (n.d.); "The Bible" (1875); "English Translation of the Bible" (Dec. 1867); "English Translation of the Bible II" (n.d.); "Judge Bradley on the Old English Bible," The Evangelist (3 May 1883), all in Charles Bradley, ed. and comp., Miscellaneous Writings of the late Honorable Joseph P. Bradley, Associate Justice of the Supreme Court of the United States (Newark: L.J. Hardham, 1902), 359, 368-9, 370-1, 373, 376-8, 378-82.

in Lexington, Kentucky. There he attended two courses of lectures, graduated in 1838, and immediately took up medical practice in Barbourville, Kentucky, the seat of Knox county, which then possessed a population of less than two hundred people. Miller conducted his practice there for ten years (1837-1847) but, like Bradley, completely changed the direction of his life while in Barbourville by gradually abandoning after 1845 the practise of medicine and taking up instead the study of law. Miller was admitted to the bar in 1847.[34]

If the early lives of Justices Bradley and Miller are examples of men rising from humble agricultural beginnings, the backgrounds of Justices Field, Strong, and Brewer suggest that a legal career was less the preserve of the wealthy than it was a perceived path to success for young men possessing a classical education. If Bradley and Miller saw potential careers and an escape from the grinding poverty of agricultural life in the ministry and in medicine, their contemporaries from New England ecclesiastical families, whose sons traditionally received fine educations, saw in the legal profession a more rewarding vocation than the poverty of a parish clergyman.

Stephen J. Field, whose biographers have for the most part minimized the influence on his thought of his strict religious upbringing and his education,[35] was born in 1816 at Haddam, Connecticut, one of ten children of the prominent New

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[34]Mac Swinford, "Mr. Justice Samuel Freeman Miller (1816-1873)," Filson Club Historical Quarterly 34 (1960): 37. See also William Gillette, "Samuel Miller," in Friedman and Israel, eds., Justices of the United States Supreme Court, 1789-1969, 1011-2; Charles Fairman, "Justice Samuel F. Miller: A Study of a Judicial Statesman," Political Science Quarterly 50 (1935): 16; Charles Fairman, "Justice Miller and the Mortgaged Generation," Iowa Law Review 23 (Mar. 1938): 352.

[35]Carl Brent Swisher, Stephen J. Field: Craftsman of the Law (Hamden, CT: Archon Books,, 1930, 1963), 8-9. Swisher describes Field's thoroughly orthodox religious upbringing but suggests that Field "was later to reject many of the dogmas that were taught him."

England pastor, the Reverend David Dudley Field,[36] and raised according to the strictest Congregationalist standards. His brother, Henry M. Field, later recorded his recollections of their home life.[37]

> Our whole domestic life received its tone from the unaffected piety of our parents, who taught their children to lie down and rise up in that fear of the Lord, which is the beginning of wisdom. The sweetest and tenderest moments of the day were at morning and evening prayers. We read the Bible "in course," beginning at Genesis and going straight through to Revelation. All sat around the fireplace in a circle. Father began, reading the verses, and we followed, from the oldest to the youngest.[38]

The religious principles inculcated in this fashion were not necessarily full of tender sentiment. Taking his cue from his own theological instructor, Timothy Dwight,[39] and his predecessor at Stockbridge, Jonathan Edwards,[40] the family patriarch tended towards a traditional Puritan view of man's fallen state and his duties toward God. Henry Field's sketch provides an insight into the character and beliefs of the elder Field.

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[36]Rev. David Dudley Field (1781-1867) was a Congregational clergyman at Haddam, Connecticut, and Stockbridge, Massachusetts. Field graduated from Yale College in 1802 and thereafter studied divinity with Dr. Charles Backus of Somers, Connecticut. He was also a local historian of some note and published a series of historical works that included History of the Towns of Haddam and East Haddam, Connecticut (1814) and History of the County of Berkshire, Massachusetts (1829).

[37]Henry M. Field (1822-1907) was a clergyman and writer. He graduated from Williams College in 1838 and studied divinity at the Theological Seminary at East Windsor, Connecticut.

[38]Henry M. Field, Record of the Family of the late Reverend David Dudley Field, D.D., of Stockton, Massachusetts. Compiled by his youngest son... (New York, 1880) at 40 quoted in Swisher, Stephen J. Field, 7-8.

[39]Timothy Dwight (1752-1817) was a noted Congregational clergman and author. He was president of Yale College from 1795 to 1817.

[40]Jonathan Edwards (1703-1758) was a noted Congregational clergyman and theologian. He graduate from Yale College in 1720.

> He held the doctrines of his fathers with an acceptance which did not abate one jot or tittle from their sternness and severity, and the effect upon him was to give a stamp to the whole man. If the creed of the Puritans was an iron creed, it formed an iron character, a firmness and intrepidity which have produced the greatest effects in both Old and New England. His faith was one in which there was no enfeebling doubt.... To him the Bible was the word of God--the one absolute and infallible source of truth, from which there was no appeal. Like his great predecessor, Edwards, he believed that the "Scheme of Redemption" was the key which unlocked all the mysteries of Providence and of history, from the beginning of the ages to the end of the world.[41]

Field's early life was not, however, wholly given over to orthodox observances. In 1833, at the age of thirteen, he accompanied his sister Emilia and her husband, the Reverend Josiah Brewer, on their mission to Asia Minor for two and a half years. Upon his return to America, Field entered Williams College, where he soon demonstrated the independent, perhaps one might say fractious, spirit for which he and his famous siblings were well known.[42] The college's faculty minutes recorded that in each of his four years there, Field was found guilty of various misdemeanours against the college's laws. In his sophomore year he was fined one dollar and put on probation for "smoking out" a fellow student. In his junior year he was fined five dollars and damages for disorderly conduct and injuring college buildings and the following year he was disciplined for "repeatedly disturbing the quiet and order of the College by blowing a horn in the halls, and having manifested... a spirit of insubordination to the Laws of the College and the authority of the Faculty."[43]

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[41]Henry M. Field, Record of the Family at 35-6 quoted in Swisher, Stephen J. Field, 11.

[42]David Dudley Field, Jr. was the author of New York's Field Code. Cyrus Field laid the Atlantic Cable. Henry M. Field was a noted preacher and editor of a religious journal. Fairman, "The Education of a Justice," 240.

[43]Faculty minutes of Williams College, 9 Feb. 1837, quoted in Fairman, "The Education of a Justice," 241.

Following his graduation from Williams College in 1837, Field read law in the office of his elder brother, David Dudley Field, in New York and later in that of John Van Buren, attorney general of New York, in Albany. He entered the bar after three years of preparation in 1841.[44]

Justice Brewer, like his uncle Stephen J. Field, was also the son of a New England Congregationalist pastor, the Reverend Josiah Brewer, with whom Stephen J. Field had travelled to Asia Minor and during the course of whose mission there David Josiah Brewer was born at Smyrna in 1837. Following their return from overseas, Brewer's father held a variety of posts, none of which were notable for their munificence. Although there is no record of whether Brewer possessed the musical inclinations of his uncle, he also benefitted from a first-class education. While his father taught at Middletown, Connecticut, between 1850 and 1857, Brewer prepared for and then attended Wesleyan College. In September, 1854 he transferred to Yale College, the alma mater of his father and grandfather, from which he graduated in 1856 in company with Henry B. Brown.[45] Following his graduation, Brewer followed in the footsteps of his uncle, Stephen J. Field, and studied law for a year in the offices of his uncle, David Dudley Field. He also spent a year at the Albany Law School and graduated from that institution in 1858. Later the same year Brewer was admitted to the New York bar.

Unlike his uncle, about whose religious observances and involvements, as distinguished from patterns of thought, little is known, David J. Brewer maintained an active involvement in missionary efforts. These efforts primarily took two forms. On the domestic side he was a prominent member of the American Missionary Society and served for many years as its vice-president. He also served between 1905

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[44]Fairman, "The Education of a Justice," 242.

[45]Fairman, "The Education of a Justice," 243. See also Dictionary of American Biography [hereinafter DAB], s.v. "David Josiah Brewer," by Robert E. Cushman; Arnold M. Paul, "David J. Brewer," in Friedman and Israel, eds., Justices of the United States Supreme Court, 1789-1969, 1515-6.

and 1910 as president of the Associated Charities of Washington.[46] On the international side Brewer maintained a lifelong commitment to international law and peace. Between 1895 and 1897 he served as president of the congressional committee investigating the Venezuela-British Guiana boundary dispute and with Chief Justice Fuller on the arbitration committee that settled the dispute. He also served as the founding president of the American Society of International Law, presided at the Mohonk Conference on International Arbitration in 1904, and wrote numerous articles and speeches on the duty of the United States to promote the ideals of universal peace.[47]

Justice William Strong's early life and education displayed much the same pattern as that of Field and Brewer. The eldest of eleven children, Strong was born at Sommers, Connecticut, in 1808, the son of a prominent Presbyterian pastor in Connecticut, the Reverend William L. Strong. He early imbibed the strict tenets of his faith--beliefs that may have been reinforced by his experience as a student at Yale

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[46]DAB, s.v. "David J. Brewer." See also "Justice Brewer and Organized Charity," The Survey 24 (1910): 119; David J. Brewer, "Social Services in Associated Charities of Washington, D.C." Charities and the Commons 15 (Mar. 1906): 813-5.

[47]DAB, s.v. "David J. Brewer;" Paul, "David J. Brewer," 1522. See also David J. Brewer, The Spanish War: A Prophecy or an Exception. Address before the Liberal Club, Buffalo (New York, 16 Feb. 1889); David J. Brewer and Charles Henry Butler. "International Law; a Treatise," in Cyclopedia of Law and Procedure 40 vols (New York: American Law Book Co., 1901-12), 22: 1697-1759 and also David J. Brewer and Charles Henry Butler, International Law: a Treatise. Reproduced from the Cyclopedia of Law and Procedure (New York: American Law Book Co., 1906); Brewer, "Keeping to the Highest Ideals." Address at the Tenth Conference, June 3rd, 1904 in Edward E. Hale and David J. Brewer, Mohonk Addresses (Boston: Ginn & Co., 1910) and "America's Duty in the Peace Movement." Address at the Fourteenth Conference, May 22, 1908, in Edward E. Hale and David J. Brewer, Mohonk Addresses (Boston: Ginn & Co., 1910), 98-103, 125-28; Brewer, The Mission of the United States in the Cause of Peace. Address of the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States, before the New Jersey Bar Association, 12 June 1909 (Boston: International School of Peace, 1910).

College. During the period of Strong's attendance there between 1824 and 1828, Yale was described by a contemporary as "simmering with religious fervour."[48] Between 1820 and 1824, the college had experienced five "awakenings" or religious revivals. Moreover, in 1825, Strong's freshman year, the college endured what one observer described as "another and more extensive outpouring of the Holy Spirit,"[49] followed by yet another revival in 1827. Strong completed his education by reading law between 1829 and 1832 under the supervision of a series of attorneys and spending six months at the Yale Law School in 1832.[50]

Strong's commitment to a Christian society was an enduring one, predating his elevation to the judiciary and continuing long after his retirement from the Supreme Court in 1880. The extent of his involvement in religious societies leaves one to wonder how he found time for his judicial duties. One of the most prominent laymen in the Presbyterian church, Strong served as President of the American Tract Society for twenty-two years, President of the American Sunday-School Union for twelve years, and at one point was a Vice-President of the American Bible Society.[51] He

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[48]Jon C. Teaford, "Toward a Christian Nation: Religion, Law and Justice Strong," Journal of Presbyterian History 54 (Winter 1976): 424.

[49]Chauncy Goodrich, "Revivals of Religion in Yale College," Quarterly Register (Feb. 1838) at 305 quoted in Teaford, "Toward a Christian Nation," 424.

[50]DAB, s.v. "William Strong;" National Cyclopedia of American Biography [hereinafter NCAB], s.v. "William Strong." See also Brooks Mather Kelley, Yale: A History (New Haven: Yale University Press, 1974), 201.

[51]Teaford, "Toward a Christian Nation," 433. See also Fairman, "What Makes a Great Justice?" 64; DAB, s.v. "William Strong;" NCAB, s.v. "William Strong"; "Political Portraits with Pen and Pencil: Honorable William Strong of Pennsylvania," United States Democratic Review 27 (Sept. 1859): 269. Evangelical benevolent societies were powerfully influential throughout the century. Founded in the first quarter of the century (American Bible Society, 1816; American Sunday School Union, 1824; American Tract Society, 1825) along with a host of others, these societies represented the evangelical effort to spread the Christian message. In this undertaking they were notably successful. Shortly after its foundation, the A.B.S. was publishing some 70,000 volumes of the Scriptures per annum and by 1830 that number had risen to 300,000. (See Mark Noll, A History of Christianity in the

was also a founding member and President of the National Association for the Amendment of the Constitution, otherwise known as the National Reform Association, an organization which long sought a specific acknowledgement of God and Jesus Christ in the preamble to the Constitution.[52]

Born in Boyle county, Kentucky, in 1833, John Marshall Harlan also came from a professional rather than commercial background. His father, James Harlan (1800-1863), was a prominent member of the Whig party in Kentucky, an ardent follower of Henry Clay and a leading member of the Kentucky bar. During his career the elder Harlan served in numerous political posts including two terms in Congress, as Kentucky's Secretary of State and attorney general, and near the end of his career as federal district attorney in that state.[53]

In addition to an unparalleled introduction to Kentucky politics immediately before and during the Civil War, the young John Marshall Harlan received a thoroughly religious college education at Centre College, from which institution he graduated in 1850, and during his legal studies at Transylvania University, both of

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United States and Canada (Grand Rapid, Michigan: William B. Eerdmans Publishing Co., 1992), 403.) During the same period, the A.S.S.U., whose goals was to establish "a Sunday school in every destitute place where it is practicable, throughout the valley of the Mississippi," (See A.S.S.U., Sixth Annual Report (1830) at 3 cited in Robert T. Handy, A History of the Churches in the United States and Canada (New York: Oxford University Press, 1977), 180) sent a steady flow of missionaries to unevangelized areas and provided reading materials for the schools established there--some 70,000 in the nineteenth century. See Noll, A History of Christianity, 230.

[52]The National Reform Association was founded in 1864. Strong was elected as its President in 1867. See Teaford, "Toward a Christian Nation," 428-9.

[53]DAB, s.v. "James Harlan."

which institutions were bastions of orthodox Presbyterianism.[54] Harlan's legal studies were concluded by reading law in the office of his father in Frankfort, Kentucky.[55]

Harlan took from his college days ideas and values that would influence him throughout his long life. Writing in 1889 to decline regretfully an invitation to attend the inauguration of William C. Young, the son of president John C. Young of Harlan's student days, as the new president of the Centre College, Harlan stated that the college during the tenure of the elder Young had been "a power for good" and expressed his pleasure that the college continued "still under such control as entitles it to claim the confidence of parents seeking to have their sons thoroughly trained in all that is essential to make sound scholars and worthy citizens."[56] These ideals were reflected in his own continued involvement in religious education and observance. He early became involved in the Temperance movement, taught a Sunday school class until his death in 1911, and acted as a delegate on several occasions at meetings of the Presbyterian Union.[57] Harlan's piety was well known to his peers. Justice Brewer allegedly observed that "He retires at eight with one hand on the Constitution and the other on the Bible, safe and happy in a perfect faith in justice and righteousness."[58] Indeed, as late as 1905, an article written by Harlan touched on what he believed were the close relations between American Protestantism, notably

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[54]James H. Hewlett, "Centre College of Kentucky, 1819-1830, Filson Club Historical Quarterly 18 (1944): 177-8.

[55]DAB, s.v. "John Marshall Harlan;" NCAB, s.v. "John Marshall Harlan."

[56]Letter from John Marshall Harlan to William C. Young, 1889, in General Catalogue of the Centre College of Kentucky, with fifty-five pages devoted to Inaugural Ceremonies, 9 Oct. 1889 (Danville, 1890) at 49 quoted in Hewlett, "Centre College of Kentucky, 1819-1830," 189.

[57]Louis Hartz, "John Marshall Harlan in Kentucky, 1855-1877: The Story of his Pre-Court Political Career," Filson Club Historical Quarterly 14 (1940): 18.

[58]DAB, s.v. "John Marshall Harlan."

similarities between the constitution of the United States and that of the Presbyterian church. He noted as well the early support given to the new nation by Presbyterian divines such as John Witherspoon.[59]

> Liberty regulated by law and Presbyterianism are... so linked together historically.... Presbyterianism in its vital principles is Calvinism. And Froude[60] well said that Calvinism was the creed of republics. Holland, England, and America, Motley[61] said, owe their liberties to Calvinists.[62]

Justices Horace Gray and Henry Billings Brown were the only members of this group born into families directly connected to the business class. Their early lives exhibited clear parallels in a fashion similar to the justices discussed above. Horace Gray was born into one of Boston's leading commercial families in 1828. During the period before and after the War of 1812 his grandfather, William Gray, had been one of the largest shipowners in the country and a leading merchant in New England. His father, Horace Gray, Sr., invested his considerable inheritance in a variety of commercial and manufacturing enterprises, becoming an early and prosperous

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[59]John Marshall Harlan, "The Courts in the American System of Government," Remarks of Mr. Justice Harlan at the banquet of the Presbyterian Social Union of Philadelphia, 27 March 1905, Chicago Legal News 37 (8 Apr. 1905): 271-2 passim.

[60]James Anthony Froude (1818-94), historian, was known chiefly for his well-regarded History of England from the Death of Cardinal Wolsey to the defeat of the Spanish Armada, 12 vols. (1856-70) and his less popular biography of Carlyle, Reminiscences (1881). Froude made a short lecture tour in the U.S. in 1872.

[61]John Lothrop Motley (1814-77), historian and diplomat, was the author of The Rise of the Dutch Republic (1855) and History of the United Netherlands (1860-67).

[62]Harlan, "The Courts," 271. The references to Froude and Motley suggest that Harlan continued to read histories long after his college days.

manufacturer of iron before financial reverses ruined his fortune in 1847.[63] The father's financial reversal fundamentally altered the life of the son.

Educated first at private schools in Boston and then at Harvard College, from which he graduated in 1845, Gray's interests in college had been directed almost entirely toward Natural History. George F. Hoar, his lifelong friend from his days at Harvard, considered him "an excellent botanist" and "a learned ornithologist." Only after he received word during one of his several visits to Europe of his father's financial downfall did he "exchange his rare library of books on natural history for law books."[64] After graduating from Harvard Law School in 1849 and reading law with the firm of Sohier & Welch, Gray was admitted to the bar in 1851.

Henry Billings Brown was born at South Lee, Massachusetts, in 1836 into a wealthy merchant and manufacturing family. His father early determined that his son should enjoy the benefits of an excellent education and pursue a legal career. As Brown later recalled,

> I was naturally obedient, and when my father said to me one day, "My boy, I want you to become a lawyer," I felt that my fate was settled, and had no more idea of questioning it than I should have had in impeaching a decree of Divine Providence. It was certainly not a bad idea in my case, as it settled the doubts which boys usually have regarding their future. It also had an important effect in directing my studies.[65]

Brown's father may have done him a service, for in his subsequent academic career Brown displayed the same diffidence toward his studies as he had demonstrated

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[63]See Moorefield Story, "Horace Gray," in Mark A. DeWolfe Howe, ed., The Later Years of the Saturday Club, 1870-1920 (Freeport, NY: Books for Libraries Press, 1968), 49 and George F. Hoar, "Memoir of Horace Gray," Massachusetts Historical Society Proceedings, 2nd ser., 18 (1905): 157, 161.

[64]Hoar, "Memoir of Horace Gray," 161.

[65]Henry Billings Brown, "Autobiographical Sketch," in Charles A. Kent, Memoir of Henry Billings Brown: Late Justice of the Supreme Court of the United States: Consisting of an Autobiographical Sketch with Additions to his Life (New York: Duffield & Co., 1915), 5.

in his choice of career. After receiving an excellent private education at Monson Academy in Massachusetts, Brown entered Yale College in September 1852, where he quickly sank to the bottom of his class.[66] "Unfortunately there were four graduates of Monson in our class and all rooming in the same house and all equally lazy. My desire at first was merely to keep in college and in truth I hardly did that the first term." The remainder of Brown's college days were a constant effort to maintain his standing without overexerting himself. In 1855 he observed:

> Don't know what the term will eventually prove but am quite certain that it has commenced as hard as any I have yet experienced. Are then all my hopes of a quiet lazy time to be dashed to the ground? God forbid.... Nothing occurs beyond the daily routine of college life which, Heaven knows, is tiresome enough.[67]

His somewhat lacklustre academic performance notwithstanding, Brown graduated from Yale in 1856, a member of the same class as David J. Brewer, his future colleague on the bench. His father rewarded him with a year in Europe following which he began reading law at Ellington, Connecticut, and attended for a time both Yale and Harvard Law Schools. After moving west from Connecticut to Detroit in 1859, he soon completed his legal studies and was admitted to the Wayne county bar.

Unlike his contemporaries, with the possible exception of Stephen J. Field, Brown was without any strong feelings concerning organized religion. Although he described his mother as a woman of "pronounced religious convictions," who was "strict in the performance of her religious duties, insistent upon her son's attendance upon Church" and "a typical Puritan mother," his father "disliked the orthodoxy of his time" in the Congregational church. The attitudes of the father may have coloured those of the son, for Brown himself remained ambivalent about religion and his memoir contained extracts from his diaries concerning his disillusionment with

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[66]Brown, "Autobiographical Sketch," in Kent, Memoir of Henry Billings Brown, 4.

[67]Fairman, "The Education of a Justice," 249-50.

religion generally and church-going in particular.[68] Brown left, for example, a revealing account of his attitude toward revivalism during his legal apprenticeship at Ellington.

> I shall not enter into the details of my life there. I studied faithfully and mingled somewhat in the simple social life of the village. But as at that time there was a general revival in progress, in which I took no active part, I fear my conduct did not elicit the approval of the ecclesiastical authorities, and that I was looked upon rather as a warning than as an example. But my conscience was "void of offense," and I still see nothing to regret or apologize for.[69]

In his biography of Brown, Charles Kent stated: "he does not seem to have had any pronounced views as to the nature of the Great First Cause or of a future life. He took no great interest in such questions."[70]

§ IV PROFESSIONAL, POLITICAL AND JUDICIAL LIVES

It may, perhaps, go without saying that the professional lives of the justices shared the common feature of success; however, that is not the same as stating that their individual interests and careers were necessarily of a piece. Their pre-court lives instead demonstrated considerable variation in the paths they followed to the Supreme Court bench. In the case of these men, those paths converged from three branches.

Justices Strong, Gray, Brewer and Brown served lengthy terms in the lower courts before being elevated to the United States Supreme Court. Not appointed to the U.S. Supreme Court until he was aged sixty-two, Justice William Strong enjoyed an active professional and political life before his appointment to the Pennsylvania bench in 1857. Strong's practice in Reading, Pennsylvania, was a large and successful one, and he quickly rose to prominence in the Pennsylvania bar holding

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[68]Brown, "Autobiographical Sketch," in Kent, Memoir of Henry Billings Brown, 2 and Kent, Memoir of Henry Billings Brown, 86

[69]Brown, "Autobiographical Sketch," in Kent, Memoir of Henry Billings Brown, 17-8.

[70]Kent, Memoir of Henry Billings Brown, 86.

positions such as Director of the Farmers' Bank of Reading and of the Lebanon Valley Railroad and as legal counsel of the Philadelphia and Reading Railroad. He also took an active part in politics by serving first as a member of city council and on the board of education. In 1846, he was elected to Congress, where he served two terms as a Democrat in the House of Representatives before returning to his legal practice. In 1857, he was elected for a fifteen-year term on the Pennsylvania Supreme Court and served in that position until 1868, when he resigned. His appointment to the United States Supreme Court came two years later in 1870.[71]

Justice Gray, in particular, embarked early on his judicial career. As his memorialist, George F. Hoar, suggested, Gray "was called to the bench too early in his career to have won much fame in any other field."[72] Almost immediately after his admission to the bar, he took up the duties of Reporter for the Supreme Court of Massachusetts on behalf of the ailing incumbent, Luther S. Cushing. Upon Cushing's death in 1854, Gray was appointed Reporter, which position he held until 1861. During this period he also practised law in Boston, singly and with a succession of partners, among whom was Ebenezer Rockwood Hoar, the brother of Gray's college friend, George, and a future justice of the Massachusetts Supreme Court and Attorney General of the United States. It was also during his tenure as Reporter that he wrote for Quincy's Massachusetts Reports his well-known "notes" to the Writs of Assistance Case argued by James Otis before the Massachusetts Superior Court in 1761, in which Otis had denounced the writs as against the fundamental principles of law. In an appendix to the same volume, Gray explored the legal history of slavery in Massachusetts and the New England states. He also wrote "notes" to the case of Commonwealth v. Roxbury, which definitively settled the legal history of the state's

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[71]NCAB, s.v. "William Strong," 1154; Teaford, "Toward a Christian Nation," 422.

[72]Hoar, "Memoir of Horace Gray," 156.

title to tidal flats.[73] In 1864, Gray was appointed an Associate Justice of the Supreme Judicial Court of Massachusetts and, in 1873, he was made chief justice of that body.[74] Thus, by the time of his appointment by President Arthur to the United States Supreme Court in 1881, Gray had already served some seventeen years on the bench.

The professional lives of Justices Brewer and Brown were remarkably similar. After graduating from the same class at Yale (1856), studying law at both law school and in offices, and gaining admittance to the bar, each determined to head west, where they enjoyed long, though varied, judicial careers. After his admission to the bar in 1858, Brewer set up practice in Leavenworth, Kansas, where he quickly embarked on his political and judicial career. He was appointed in 1861 to the administrative position of commissioner of the federal circuit court for the district of Kansas. In 1862, he was elected judge of the probate and criminal courts of Leavenworth county. This position soon led to his advancement, when, in 1865, he

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[73]Horace Gray, Jr., "Note to Paxton's case of the Writs of Assistance," and Gray, "Notes on Slavery in Massachusetts and England," both in Quincy's Massachusetts Reports of Cases, 1761-1772 (1865); Gray, "Notes on the Early Government and Legislation of the Massachusetts Colony and the Title in the Sea Shore of Massachusetts," or "Note to Roxbury Flats Case," Commonwealth v. Roxbury, 75 Mass. (9 Gray's Massachusetts Reports) 451 (1857): 503-28. Gray maintained a life-long interest in legal history. He joined the Massachusetts Historical Society in 1858 and the American Antiquarian Society in 1860. He published several studies on subjects of interest. See Horace J. Gray, "A Legal Review of the Dred Scott Case, as Decided by the Supreme Court of the United States," Monthly Law Reporter (Jun. 1857); reprint, (Boston: Crosby, Nichols, 1857; reprint, Plainview, NY: Books for libraries Press, 1973); Horace J. Gray, The Power of the Legislature to Create and Abolish Courts of Justice (Boston: G.C. Rand & Avery, 1858); Horace J. Gray, "Argument from the Plaintiffs in the Case of the Golden Rocket before the Supreme Court of Maine," (Boston: John Wilson and Son, 1862); Horace J. Gray, The Abolition of Slavery in Massachusetts: A Communication to the Massachusetts Historical Society, 16 April 1874 (Boston: John Wilson & Son, 1874); Horace J. Gray, "Note to the Case of Nathaniel Jennison," Massachusetts Historical Society Proceedings 13 (Apr. 1874): 293-9.

[74]Hoar, "Memoir of Horace Gray," 156, 158, 162; Louis Filler, "Horace Gray," in Friedman and Israel, eds., The Justices of the United States Supreme Court, 1380-1.

became judge of the First Judicial District of Kansas. Brewer left this position in 1869 to become county attorney of Leavenworth but returned to the judiciary less than a year later, when he was elected to the Supreme Court of Kansas in 1870. Brewer was re-elected to that body in 1876 and 1882. In 1884, he made the transition to the federal judiciary with his appointment by President Arthur to the Eighth Federal Circuit Court. He served in this capacity until 1889, when President Harrison appointed him to the Supreme Court after having served in various judicial positions for a total of twenty-six years.[75]

Henry Billings Brown followed a similar pattern of advancement. In 1859, he moved west from Connecticut to Detroit, where he soon completed his legal studies and was admitted to the bar. In 1860, he was appointed as Deputy United States Marshal and, in 1863, as Assistant United States Attorney for Detroit, the duties of which positions he was able to fulfill while expanding his legal practice. In practice, Brown capitalized upon his location in the busy port of Detroit and specialized in commercial and maritime matters. In 1868, he began his judicial career with a brief appointment as a circuit court judge. In 1875, he was appointed as United States District Judge for Eastern Michigan, in which post he served for fourteen years. Brown's experience as a practitioner of admiralty law was bolstered by the heavy flow of admiralty cases before his court. By the time of his appointment by President Harrison to the Supreme Court in 1890, he was considered a leading authority on Admiralty law.[76]

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[75]DAB, s.v. "David Josiah Brewer;" NCAB, s.v. "David Josiah Brewer;" Arnold M. Paul, "David J. Brewer," in Friedman and Israel, eds., The Justices in the United States Supreme Court, 1516; "David Josiah Brewer," Case and Comment 3 (June 1896): 1; Warren Watson, "David Josiah Brewer," in Henry W. Scott, ed., Distinguished American Lawyers (New York: C.L. Webster & Co., 1891; reprint, Littleton, Colorado: Frederick B. Rothman & Co., 1989), 75-88.

[76]DAB, s.v. "Henry Billings Brown;" NCAB, s.v. "Henry Billings Brown;" Joel Goldfarb, "Henry Billings Brown," in Friedman and Israel, eds., The Justices of the United States Supreme Court, 1554-5; "Henry Billings Brown," Case and Comment 2 (March 1896): 1.

Although he initially entered a partnership with his elder brother in New York, the greatest part of Stephen J. Field's professional life was spent in California. Arriving in San Francisco in December, 1849, Field quickly removed to the newly created town of Marysville, where he established himself as a land speculator, as the fledgling town's alcalde, or civil magistrate, and as an attorney. In 1850, he was elected as a Democrat to the state legislature for one term during which he sponsored and secured the passage of bills reorganizing the judiciary and modelling procedure in civil and criminal cases upon that of the New York Codes developed and introduced by his brother, David Dudley Field. Although it was short (Field failed to win re-election the following term) his "legislative career was," as he described it, "not without good results."[77] In 1857, he succeeded in winning election to the Supreme Court of California and became chief justice of that court in September, 1859, in which position he remained until appointed by President Lincoln to the United States Supreme Court in 1863.[78] Field represented, therefore, a somewhat different pattern than Justices Strong, Gray, Brewer, and Brown in that he possessed less judicial experience before being elevated to the Supreme Court bench.

Justices Bradley, Miller, and Harlan presented an entirely different picture than the other five justices in that none of them possessed previous judicial experience at the time of their appointments to the Supreme Court. After his admission to the New Jersey bar in 1839, Joseph P. Bradley entered legal practice in partnership with John P. Jackson, then the superintendent of the New Jersey railroad. When Jackson retired in 1845, Bradley inherited many of his clients, and this was the foundation of

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[77]Stephen J. Field, Personal Reminiscences of Early Days in California. To Which is Added the Story of his Attempted Assassination by a Former Associate on the Supreme Bench of the State, by George C. Gorham (1893; reprint, New York: Da Capo Press, 1968), 72.

[78]DAB, s.v. "Stephen J. Field;" NCAB, s.v. "Stephen J. Field;" Robert G. McCloskey, "Stephen J. Field," in Friedman and Israel, eds., The Justices ofthe United States Supreme Court, 1070-3; John Norton Pomeroy, Jr., "Stephen Johnson Field," in Lewis, ed., Great American Lawyers, 7: 3-51.

Bradley's success as a practitioner for thirty years. Like William Strong, Bradley's success at the bar translated into influential positions in the commercial community, where he served as a director and the principal counsel of the Joint Companies of New Jersey (the New Jersey, Trenton and Philadelphia Railroad, the Camden and Amboy Railroad and the Delaware & Raritan Canal Company) as well as several financial institutions. His expertise in mathematics led him to serve as the actuary of the Mutual Benefit Insurance Company of Newark between 1857 and 1861 and between 1865 and 1869 he was the president of the New Jersey Mutual Life Insurance Company.[79] Charles Fairman has suggested that "perhaps no other member down to Mr. Justice Brandeis brought to the Court so intimate a working acquaintance with the entire range of the nation's business."[80]

Samuel Freeman Miller and John Marshall Harlan differed from Joseph P. Bradley, because their prominence as practising lawyers was less a factor in their appointments than their political activities. Justice Miller relocated to Keokuk, Iowa, in 1850 in order to remove himself from the increasing influence of slavery in Kentucky. He almost immediately became one of Iowa's leading members of the bar.[81] This rapid rise was made possible by Miller's fortuitous social connections. The influence of a former schoolmate obtained for Miller

> an advantageous partnership with Lewis R. Reeves, who was perhaps the ablest lawyer of the Keokuk bar then in active practice and who having a large real estate interest in the half-breed tract, desired a law partner who would attend to the general business of the firm, and aid him in the litigation which then involved all half breed lands. The connection proved in every way a fortunate one for Mr. Miller, who at

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[79]DAB, s.v. "Joseph P. Bradley;" NCAB, s.v. "Joseph P. Bradley;" Appleton's American Biography, 1887 ed., s.v. "Joseph P. Bradley," 1: 352-3.

[80]Fairman, "The Education of a Justice," 219.

[81]Fairman, "Justice Miller and the Mortgaged Generation," 353; Gillette, "Samuel Miller," 1012.

> once found himself engaged in a large and remunerative pratice and took a front rank among the lawyers of the state.[82]

Following the death of Reeves, Miller married his widow and formed in 1854 a new partnership with another leading attorney, John Rankin, and his legal practice continued to prosper.[83]

Miller also became increasingly involved in politics on behalf of the fledgling Republican party. In June, 1856, he became chairman of the Republican organization in Keokuk and that same year ran an unsuccessful race as a Republican candidate for the Iowa Senate. During the presidential campaign of 1860, Miller was as a member of the party's State Central Committee and a strong supporter of Lincoln's candidacy. In 1861, Miller was a prominent member of the State Convention and contested with the incumbent, Samuel Kirkwood, the gubernatorial nomination. In 1862, the reorganization of the federal judicial circuits and three vacancies on the United States Supreme Court resulted in Abraham Lincoln's appointment of Miller, strongly supported by the Iowa bar, as the first justice from west of the Mississippi to become a member of the nation's highest court.[84]

If Justice Miller's career suggested the importance of political affiliations in the appointment of a justice, the pre-court career of John Marshall Harlan irrefutably proved the point. As the son of a prominent Whig and supporter of Henry Clay, Harlan entered Kentucky politics early in life. In 1855, at the age of twenty-two he campaigned actively for the victorious Whig-American (Know-Nothing) ticket. In 1859, he was recognized as a leading member of the new Whig organization and was nominated at its state convention as a Congressional candidate for the Ashland district. The defeat of the Whigs and the onset of the Civil War left Harlan with no

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[82]Fairman, Justice Miller, 18-9; Gillette, "Samuel Miller," 1012.

[83]Fairman, "Justice Miller and the Mortgaged Generation," 353; Gillette, "Samuel Miller," 1012.

[84]Fairman, "Samuel Miller and the Mortgaged Generation," 354-5; Gillette, "Samuel Miller," 1013-4.

party and difficult personal and political choices. In the state elections during the summer of 1861, Harlan campaigned for the Union ticket and played a prominent role keeping Kentucky in the Union. In the autumn of 1861, he raised a regiment for the federal forces and was appointed colonel of the Tenth Kentucky Infantry. Harlan saw considerable action at the head of his regiment before he was obliged by the death of his father and the need to attend to family affairs to retire from active service in 1863.[85]

His return from the war soon prompted a resumption of his political activities. In 1863, he was unanimously nominated as the Union party's candidate for state attorney general and won that post in the subsequent elections on a pro-Union but anti-Lincoln platform. In the 1866 election, he sought no office but campaigned again on the behalf of the Conservative Unionists.[86] By 1868, Harlan had shifted his political allegiance to the Republican party and the presidential campaign of Ulysses S. Grant. In 1871 and 1875, Harlan was the Republican candidate for governor but suffered defeat in both campaigns. In 1876, he led the Kentucky delegation at the Republican national convention, where his timely shift of support to Rutherford B. Hayes obtained for Hayes the presidential nomination. This led to an offer by Hayes of the ambassadorship to England, which Harlan declined. He did, however, accept in early 1877 an appointment to the Louisiana electoral commission and in the autumn of that year the nomination to the U.S. Supreme Court.[87]

These brief sketches of the justices' lives produce a picture of a late nineteenth-century court composed of men who were not, themselves, members of a corporate elite and whose traditional views of society and the individual were not necessarily dominated by the interests of financiers and corporations. Rather, the

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[85]Filler, "John Marshall Harlan," 1282; Hartz, "John Marshall Harlan in Kentucky," 18-28 passim.

[86]Hartz, "John Marshall Harlan in Kentucky," 28, 31.

[87]Filler, "John Marshall Harlan," 1283; Hartz, "John Marshall Harlan in Kentucky," 39-40.

justices in this study came largely from families in traditional occupations and professions and frequently from less financially advantaged backgrounds. If they demonstrated sympathy for the claims of propertied interests that sympathy was not necessarily the result of self-interest, since, with the possible exception of Henry Billings Brown, they were not men of great personal wealth. Indeed the available evidence suggests that those justices solely dependent for their livings upon their judicial salaries were anything but members of the financial elite. For example, after his paralysing stroke in 1878, Justice Hunt refused to resign his seat, because he had failed to serve the ten years necessary to be eligible for a pension. In the end, Congress passed a special retirement bill to provide for him.[88] Justices Miller, Harlan and Brewer, all of whom were "poor men," taught law in university night schools in order to supplement their salaries,[89] and Charles Fairman has suggested that Justice Brewer's readiness to speak on any public occasion may have been attributable as much to his financial situation as to missionary zeal. Fairman also noted that, upon his death in 1890, Justice Miller's cash assets amounted only to the balance due upon his salary and the funds realized from the sale of his library of law books.[90] These examples suggest that, while the justices could be considered members of the educated, professional middle class, they were not members of the monied elite. Thus, Justices Bradley and Strong, both of whom were long associated with the railroad interests in New Jersey and Pennsylvania, made comfortable livings from providing the companies with legal counsel, but they were not owners of the roads. This emerging pattern of strong ties among the justices to the social and

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[88]Stanley I. Kutler, "Ward Hunt," in Friedman and Israel, eds., The Justices of the United States Supreme Court, 1228.

[89]Charles Fairman, "What Makes a Great Justice?" 66; F.B. Clark, "The Constitutional Doctrines of Justice Harlan," ser. 32, 4 of Johns Hopkins University Studies in History and Political Science (Baltimore: Johns Hopkins Press, 1915; reprint, New York: Da Capo Press, 1969), 10.

[90]Fairman, "The Education of a Justice," 248; Fairman, "Justice Samuel F. Miller," 44.

intellectual heritage of traditional occupations and professions is further born out by an examination of nineteenth-century education.

CHAPTER III

THE PATTERN OF ANTEBELLUM COLLEGE AND LEGAL EDUCATION

§ I ANTEBELLUM EDUCATION

An important influence upon judicial thought in the period between the end of the Civil War and the election of Woodrow Wilson in 1912 was antebellum Moral Philosophy. Although the intellectual content and philosophical underpinnings of nineteenth-century Moral Philosophy will be dealt with in detail in Chapters Four and Five, it is necessary to have an understanding of the overall shape of education and in particular of the college curriculum in the antebellum period in order to appreciate fully the role of Moral Philosophy as the culmination of the undergraduate college program. The most striking characteristic of this curriculum was the uniformity of both its structure and content until at least the Civil War. The classical college curriculum was taught at the colleges attended by the justices during the period prior to 1856, when David J. Brewer and Henry B. Brown, the last members of this group to attend college, graduated from Yale. This commonality in the antebellum curriculum gave to these men the same philosophical assumptions and subject matter, and it had done so from at least the beginning of the nineteenth century. Moreover, the curriculum of the nineteenth-century grammar school was also much the same across the land. The members of the Supreme Court received, in effect, a systematic presentation of the Christian Enlightenment, the content and style of which provided them with a mental apparatus with which to address questions brought before the court. This is not to say that the justices reached the same conclusions in identical fact situations, and, indeed, the court's record of dissents and split decisions during the period between 1870 and 1911 makes that point abundantly clear. It does,

however, suggest that the justices came to the bench with an intellectual perspective and style of reasoning that predisposed them toward the intellectual traditions of the Christian Enlightenment. The judicial expression of those traditions can be associated with the formalist style of judicial reasoning.

The uniformity which tended to characterize ethical thought in nineteenth-century America permeated the educational system from bottom to top. Studies by Ruth Miller Elson and George Littlefield of common and grammar school textbooks during the eighteenth and nineteenth centuries show that there were remarkably few changes in the curricula of these institutions until the end of the nineteenth century. Like the antebellum colleges, these institutions saw their purpose as that of instilling into children's minds correct ideas of religion and morals as well as the first rudiments of language and mathematics.[1] Schools operated upon the principle enunciated by Noah Webster in 1805, when he stated, "How little of our peace and security depends on REASON and how much on religion and government."[2] That is to say on revelation, testimony, tradition, and authority. Ruth Miller Elson's work has confirmed that an important concern of educators at all levels "was the formation of character and sound principles"--a work not only based on reason but on the inculcation of values, feelings, and respect for tradition.[3]

Elson's study has revealed that the elementary school curriculum of reading, writing, and arithmetic was presented within a strongly religious context that did not weaken appreciably during the course of the nineteenth century. To this foundation English grammar, geography, and the history of the United States were gradually added in the 1820s and 1830s. The literary component which comprised the core of

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[1]Ruth Miller Elson, Guardians of Tradition: American Schoolbooks of the Nineteenth Century (Lincoln: University of Nebraska Press, 1964), 1 and George Emery Littlefield, Early Schools and School-Books of New England (1904; reprint, New York: Russell & Russell, 1965).

[2]Noah Webster, An American Selection of Lessons in Reading and Speaking (Salem, 1805) at 147 quoted in Elson, Guardians of Tradition, 225.

[3]Elson, Guardians of Tradition, 225.

this program was presented largely in the form of readers, compilations of pieces from a variety of sources, which might typically include fragments from authors of established literary excellence from Cicero or Shakespeare to contemporary poets, statesmen, and divines. Most of the selections embodied moral, political, or religious lessons.[4]

Elson contends that taken as a whole nineteenth-century schoolbooks presented a series of lessons to students based upon the fundamental principle that the universe displayed a moral character.[5] "The Earth was formed by the Creator to be the abode of man during a short life, and the school in which he is to prepare for a life that will never end."[6] Order in the universe proved the existence of God and the study of nature revealed his glory and faultless planning.[7] Nature was providentially designed for the good of man and progress toward material and moral perfection, a movement which the history of the United States exemplified, was its first and invariable law.[8] God was "a firm and inexorable judge" who rewarded virtue and punished sin during this life and in the hereafter.[9] Economic virtues such as industry and frugality and the material rewards which resulted from them were blessed by God, while idleness and sloth merited divine punishment in the form of poverty and misery. Unearned wealth such as an inheritance which removed the necessity for personal industry or the profits of speculation and excessive luxury were dangers to the character, but the self-made man was an example of virtue worthy of emulation and a valuable

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[4]Elson, Guardians of Tradition, 5, 4.

[5]Elson, Guardians of Tradition, 338.

[6]William C. Woodbridge, Modern School Geography, 2nd ed. (Hartford, 1845) at 45 quoted in Elson, Guardians of Tradition, 17.

[7]Elson, Guardians of Tradition, 18.

[8]Elson, Guardians of Tradition, 59-61, 337.

[9]Elson, Guardians of Tradition, 42.

contributor to the well-being of society.[10] The values presented to children in this "world of fantasy"[11] represented the system of republican virtue which formed the foundation upon which the grammar schools and colleges sought to build a sound moral and social order formed from a virtuous and useful citizenry. That this system also resembled a much diluted version of academic Moral Philosophy suggests that even those students who did not progress beyond the common or district school shared to some extent the moral values and philosophical assumptions of the educated elite. These shared values and a common outlook made it easier for the elite to lead people predisposed to accept the premises of its social, political, and legal arguments.

§ II COLLEGE ENTRANCE REQUIREMENTS

The curriculum of the nineteenth-century grammar school also displayed a high degree of stability. As George Littlefield has suggested the continued emphasis in the grammar schools upon the ancient languages was due largely to the fact that the antebellum colleges continued to "recognize the ancient tongues as the only sound basis of a liberal education."[12] The largely literary curriculum of the grammar school, the purpose of which was to prepare students for college, consisted almost entirely of the classics taught with some history and geography and mathematics. In the 1790s, the Boston Latin School was still using a curriculum essentially the same as that published in John Clarke's An Essay Upon the Education of Youth in Grammar Schools of 1740.[13] Students laboured through Latin and Greek grammars, received some knowledge of ancient and modern geography and history, read a selection of Latin and Greek authors in the original, and acquired a basic knowledge of geometry through spherical trigonometry and of arithmetic through cube roots and

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[10]Elson, Guardians of Tradition, 251-2, 254-5, 256.

[11]Elson, Guardians of Tradition, 338.

[12]Littlefield, Early Schools and School-Books o. New England, 232.

[13]Littlefield, Early Schools and School-Books, 97. John Clarke, An Essay upon the Education of Youth in Grammar-Schools (London: Charles Hitch, 1740).

logarithms.[14] Although the specific texts varied over time from school to school and individual to individual, a course of study similar to this was considered a sufficient preparation for the college entrance examinations throughout the antebellum period.

Even students such as Joseph P. Bradley, who lacked the advantages of grammar-school preparation, were required to face the college entrance examination, and for that reason Bradley spent that portion of 1832 between his return from Albany to his removal to Rutgers College improving his Latin and Greek with the local pastor. Bradley was not, however, unduly handicapped by his country-school education nor completely ill-prepared for college, for he was an avid reader despite his isolation and the difficulty of obtaining books. The lack of a church in the vicinity during the early days of his youth freed him to spend the Sabbath happily pursuing his passion for reading.

> I was an incessant devourer of every mental aliment that could possibly be obtained.... Histories and travels I obtained from the Town library

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[14]Clarke, An Essay upon the Education of Youth, 97. In addition to the grammars, Clarke recommended Christoph Cellarius' (1638-1707) geography of the ancient world (London, 1745); Richard Blome, ed., A Geographical Description of the Four Parts of the World: Taken from the Notes and Works of the Famous M. [Nicholas] Sanson (London, 1670), Basil Kennett's (1674-1715) Romae Antiquae Notitia: or, The Antiquities of Rome (London, 1696; 1st American ed., 1822), and Laurence Echard's Roman History, 5 vols. (1702). Among Latin authors he recommended Caesar's Commentaries on the conquest of Gaul; at least twelve books of the Roman historian Justin (c. 2nd or 3rd century B.C.); the history of Eutropius' Historiae Romanae Breviarium which was also available in English translation as A Compendius History of Rome, trans. by John Clarke, 1st American ed. (Boston, 1793); Florus' Epitome of all the Wars during Seven Hundred Years which was also available in an English translation under the title A Compendius History of Rome, trans. by John Clarke, 3rd ed. (1739; the comedies of Terence; the histories of Sallust; the biographies of Suetonius; seven or eight books of the poet Ovid's Metamorphoses; the Eclogues and Aeneid of Virgil; the poetry of Horace and Juvenal. Among Greek authors he suggested "the Gospels and Acts in the Greek Testament, twelve books in Homer's Iliad, the poetry of Theocritus, and the histories of Herodian and Zosinus. Clarke does not explicitly mention any textbooks on arithmetic; however, there were a plethora of books on arithmetic and mathematics available to students and which can be found in Littlefield, Early Schools and School-Books, 159-83, 198-210.

> of which our uncle [Job]... was the keeper. Many and many a Saturday night, when I could get away, I would tramp down to this mecca and during the entire Sunday revel in the intellectual treats which it offered.[15]

The few examples recorded in his memoir suggest that his taste in literature was as broad as his pocket book was limited. More importantly, however, Bradley's account of his early studies suggests that, leaving aside his lack of Latin and Greek, he had read much the same types of works as a student educated in district and grammar schools. Among his early conquests were the works of ancient history by Charles Rollin, Josephus, and Edward Gibbon, the histories of England by David Hume and Tobias Smollett,[16] the travel accounts of William Mavor, Mungo Park and Charles Bertram,[17] "and a great many other books of the same sort, together with solid works of Divinity, which formed the country reading of those days."[18] These works were hardly deficient when compared to the readers, geographies, and histories available to students with more formal education. Moreover, Bradley's skill

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[15]Joseph P. Bradley, Family Notes Respecting the Bradley Family of Fairfield, and Our Descent Therefrom... For the Use of My Children (Newark, NJ: A. Pierson & Co., 1894), 54. Bradley described his maternal uncle as "a great thinker and reasoner on religious and metaphysical subjects, and [who] started inquiries in my mind which took many years to solve, if they are all solved yet."

[16]Flavius Josephus (AD 37-c.98), History of the Jewish War and Jewish Antiquities. Edward Gibbon (1737-94), The History of the Decline and Fall of the Roman Empire (1776). Charles Rollin's The Ancient History (Edinburgh, 1789-90). David Hume (1711-76), History of Great Britain (1754-62). Tobias George Smollett (1721-71), Complete History of England (1757-8).

[17]William Fordyce Mavor's Historical Account of the most Celebrated Voyages, Travels, and Discoveries (London, 1796-97); Mungo Park's (1771-1806), Travels in the Interior District of Africa... in the Years 1795, 1796 and 1797 (1799). Charles Bertram's The Description of Britain, Translated from Richard of Cirencester: With the Original Treatise, De Situ Britanniae; and a Commentary (1757).

[18]Charles Fairman, "The Education of a Justice: Justice Bradley and Some of his Colleagues," Stanford Law Review 1 (Jan. 1949): 223. See also Bradley, Family Notes, 54.

as a mathematician pre-dated his studies at Rutgers College.[19] He later recalled learning the art of practical surveying from "an old copy of Moore on Surveying, and Wilson's old book in navigation."[20] Wilson's book was old indeed. It was listed in a bookseller's catalogue in 1726.[21] The occasional decrepitude of the texts notwithstanding, for boys planning to attend college, this sort of general background in history and geography plus a sampling of the classics and of mathematics served as preparation for the college entrance examination.

§ III THE ANTEBELLUM COLLEGE CURRICULUM

When William Strong entered the college in 1822-23, the entrance examination at Yale required a knowledge of Cicero's orations, John Clarke's Introduction to the Making of Latin, Virgil, Sallust, the Greek Testament, Dalzell's Graeca Minora, Alexander Adam's The Rudiments of Latin and English Grammar, Goodrich's Greek Grammar, Latin prosody, English grammar, geography and arithmetic.[22] When

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[19]Cortland Parker, "Mr. Justice Bradley of the U.S. Supreme Court." Address presented to the New Jersey Historical Society, 24 Jan. 1893 (Newark, 1893) at 4 cited in Anthony Champagne and Dennis Pope, "Joseph P. Bradley: An Aspect of a Judicial Personality," Political Psychology 6 (1985): 482.

[20]Joseph P. Bradley, "Autobiographical Sketch" quoted in Fairman, "The Education of a Justice," 223. Bradley was probably referring to Sir Jonas Moore (1617-1679), Surveyor General of His Majesty's Ordinance and Armories, who published an Arithmetick in 1660 and The History of the Great Level of the Fennes in 1685. The reference to Wilson is unknown.

[21]"Mathematical Books, Sold by Samuel Fuller, at the Globe in Meath-Stree. 1726" in Littlefield, Early Schools and School-Books, 207.

[22]John Clarke, An Introduction to the Making of Latin (London, 1733). This book, which went through its twenty-second edition in 1775, was still in use in the Boston Latin School in 1800 and went into its 30th edition in 1836. See Littlefield, Early Schools and Schoolbooks, 259. Andrew Dalzell, Collectanea Graeca Minora (Edinburgh, 1787; 1st American edition, Cambridge, 1791). Alexander Adam's The Rudiments of Latin and English Grammar (London, 1772). Chauncey Allen Goodrich, Elements of Greek Grammar... Used in Yale College (Hartford, 1814). See also "A Statement of the Course of Instruction, Expenses, etc., in Yale College" (1822-23) in Catalogue of the Officers and Students in Yale College, 1822-1823 (n.p.) cited in Brooks Mather Kelley, Yale: A History (New Haven: Yale University Press,

Stephen J. Field arrived at Williams College in 1833, academic requirements were similar to those which Bradley had to meet at Rutgers College.[23] Entrants at both institutions were expected to be proficient in arithmetic, including, at Rutgers, John Mair's Book-Keeping Methodized: or A Methodical Treatise of Merchant-Accompts (1764), Latin and Greek grammar, Dalzell's Graeca Minora or another Greek reader, Caesar's Commentaries, the Greek Testament, and selections from the writings of Cicero and Virgil's Aeneid. Rutgers required in addition Sallust, while Williams required a knowledge of geography. Thus, Justices Field, Strong, and Bradley mastered essentially the same course of study in order to gain admission to Williams, Yale, and Rutgers in the early 1830s. These requirements were, moreover, virtually identical to those at Harvard College and Transylvania University in the late 1820s.[24] Since the curriculum at Yale remained largely unchanged until the end of President Theodore Dwight Woolsey's tenure in 1871,[25] one may surmise that Justices Brewer and Brown passed much the same sort of entrance examination in 1852.

The curriculum at Williams College during Stephen J. Field's student days in the early 1830s was generally representative of the antebellum colleges.[26] The

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1974), 499n. 57 and The Quarterly Register and Journal of the American Education Society [title varies] 1 (Apr. 1828): 228.

[23]See Fairman, "The Education of a Justice, 242.

[24]The Quarterly Register and Journal of the American Education Society, 228.

[25]Kelley, Yale: A History, 174-75.

[26]Little is known of the curriculum in the Medical Department at Transylvania University. Peter Robert, himself a faculty member at the university, recorded in his history that the department enjoyed a degree of success during its existence. Between 1817-18, the year in which it was "fully organized as a department of the University, and a full course of lectures was delivered," and 1856-57 some 6,456 students were enroled in the program and 1,881 of those graduated. In 1837-38 there were 227 pupils and 84 graduates. Peter and Johanna Robert, Transylvania University: Its Origins, Rise, Decline, and Fall (Louisville: John P. Morton & Co., 1896), 99-100. Peter Robert, The History of the Medical Department of Transylvania University (Louisville: John P. Morton & Co., 1905), Appendix, Schedule B, 167. An

eighty to one hundred and twenty undergraduates were taught by a staff comprised of President Griffin, a Professor of Languages, who was also the Librarian, professors of Natural History, of Moral Philosophy (Mark Hopkins),[27] Mathematics and Natural Philosophy, and of Chemistry, and two tutors.[28] There were three years of the ancient tongues and mathematics. Science was taught in the junior (third) year along with the evidences of religion, while the senior year was largely taken up with Moral Philosophy, the principles of expression, and subjects such as the philosophy of rhetoric, ethics, and metaphysics, political philosophy and economy, and the law of nations.[29] Seniors read George Campbell's Philosophy of Rhetoric, Francis Wayland's Elements of Moral Science, Dugald Stewart's Philosophy of the Human Mind, Richard Whately's Elements of Logic, Lord Kames' Elements of Criticism, Joseph Butler's Analogy of Religion, Charles Leslie's Short and Easy Method with the Deists, William Paley's Natural Theology, and Joseph Story's Commentaries on the Constitution.[30]

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examination of faculty titles suggests that the curriculum included surgery, theoretical and practical Anatomy, the theory and practice of medicine, Physiology, Obstetrics, Materia Medica and Botany, and Chemistry and Pharmacy. Robert, History of the Medical Department, Appendix, Schedule A, 166.

[27]Mark Hopkins succeeded Griffin in the presidency in 1836 but continued to teach the Moral Philosophy course.

[28]Carl Brent Swisher, Stephen J. Field: Craftsman of the Law (1930; Hamden, CT: Archon Books, 1963), 17. See also Tables II-V.

[29]Fairman, "The Education of a Justice," 242. See also Swisher, Stephen J. Field, 18.

[30]George Campbell, Philosophy of Rhetoric, 2 vols. (London, 1776); Francis Wayland, Elements of Moral Science (Boston, 1834); Dugald Stewart, Elements of the Philosophy of the Human Mind (1792-1827); Richard Whately, Elements of Logic (London, 1826); Lord Kames, Elements of Criticism, 3 vols. (Edinburgh, 1762); Joseph Butler, The Analogy of Religion Natural and Revealed to the Constitution of Nature, 3rd ed. (London, 1887; reprint, Charlottesville, VA: Ibis Publishing, n.d.); Charles Leslie, Short and Easy Method with the Deists, Wherein the Certainty of the Christian Religion is Demonstrated (London, 1698); William Paley, Natural

This generally but fairly describes the curriculum of any of the six colleges during the antebellum period. Walter Groves wrote in describing the curriculum at Centre College that the general character of the work did not change in the period between 1838 and 1857. "The emphasis, from first to last, was on the classics of Greek and Roman literature studied in the original."[31] Similarly at Yale in the 1820s

> The scheme of instruction the new student faced was almost entirely fixed.... For the first three years he studied mainly Greek, Latin, and mathematics (algebra, geometry, and spherical trigonometry). In addition, he got a smattering of geography, history, science, astronomy, and English grammar and rhetoric. Senior year was devoted to metaphysics and ethics (very broadly interpreted) and a small amount of composition and belles-lettres.[32]

In the mid-1850s, the scheme of instruction at Yale was little changed. Indeed, Brooks Mather Kelley has observed that in the core areas of the senior curriculum, "in rhetoric, logic, and mental and moral philosophy, the graduate of 1845 would have felt right at home in 1870-71," with only minor alterations to some of the books read.[33] The fixity of the college curriculum and the heavy emphasis on ancient languages and moral lessons was not necessarily condemned by the former inmates of these institutions. Justices Bradley and Brown, for example, each had words of praise for the lessons imparted by their alma maters. Justice Bradley

Theology, 4 vols., edited by Henry, Lord Brougham and C. Bell (London: C. Cox, 1851) and Joseph Story, Commentaries on the Constitution of the United States, 3 vols. (Cambridge, 1833). See D.A. Wells and S.H. Davis, Sketches of Williams College (Williamstown, MA, 1847) cited in Swisher, Stephen J. Field, 18.

[31]Walter A. Groves, "Centre College--The Second Phase, 1830-1857," Filson Club Historical Quarterly 24, No. 4 (Oct. 1950): 324.

[32]Julian M Sturtevant, ed., Julian M. Sturtevant: An Autobiography quoted in Kelley, Yale: A History, 157. See also Richard Hofstadter and Wilson Smith, eds., American Higher Education: A Documentary History (Chicago: University of Chicago Press, 1961), 1: 274.

[33]Kelley, Yale: A History, 174-5.

commenting on his studies at Rutgers college went to the heart of the classical curriculum.

> If the range of our studies at that period, was not so great as more celebrated institutions could boast, we must, nevertheless, acknowledge our deep obligations for the correct and earnest habits of thought which we acquired, and for the impress of generous and liberal culture, and gentlemanly feeling which we received.[34]

In reminiscing of his student days at Yale College, Henry Billings Brown recalled his tuition "under the former régime of prescribed studies, with little opportunity for choice" and what he described as the "medieval" atmosphere of the place but expressed his doubts about the superiority of the elective system over the classical curriculum, since it "almost presupposed that a boy had already chosen his profession when he entered college and selected his course of studies with reference to that."[35]

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[34]Joseph P. Bradley, "Historical Discourses," in The Centennial Celebration of Rutgers College, June 21, 1870. With an Historical Discourse, Delivered by Honorable Joseph P. Bradley, Associate Justice of the Supreme Court (Albany, NY: Joel Munsell, 1870), 62.

[35]Henry B. Brown, "Autobiographical Sketch," in Charles A. Kent, Memoir of Henry Billings Brown: Late Justice of the Supreme Court of the United States: Consisting of an Autobiographical Sketch with Additions to his Life (New York: Duffield Co., 1915), 13.

Table II

The Classical College Curriculum: First Year			
College	Term I	Term II	Term III
WILLIAMS	Livy; Andrew Dalzell, Collectanea Graeca Maiora; William Neilson, Exercises on the Syntax of the Greek Language; Alexander Adam, Roman Antiquities	Livy; English Grammar; Webber; Graeca Maiora; Day; Geography	Horace; Algebra; Geography; Graeca Maiora
YALE	Livy; Adam, Roman Antiquities; Samuel Webber, Mathematics; Jeremiah Day, An Introduction to Algebra; Graeca Maiora; French	Livy; Graeca Maiora; Day	Graeca Maiora; Jedidiah Morse's Geography Made Easy; Murray's Grammar
RUTGERS	Horace; Prosopography; Roman Antiquities; Graeca Maiora; Neilson; Arithmetic; Geography; Grammar; Composition	Horace; Roman Antiquities; Graeca Maiora; Greek Antiquities; Neilson; Algebra	Cicero; Graeca Maiora; Neilson; Algebra; Geography
HARVARD	Graeca Maiora; Livy; Grotius, de Veritate Religionis Christianae; Adrien Legendre, Elements of Geometry; Roman Antiquities	Graeca Maiora; Livy; Grotius; Legendre; Horace (Cambridge ed.); Silvestre Lacroix, Elements of Algebra	Graeca Maiora; Roman Antiquities; Horace; Lacroix; Griesbach's Greek Testament; Well's ed. Excerpta Latina; Robert Lowth's A Short Introduction to English Grammar
CENTRE	Virgil's Aeneid, Latin Translation; Xenophon's Cyropedia; Roman Antiquities; Charles Davis' ed. of Louis Bourdon, Elements of Algebra In 1838 there were two terms of study of five months each.	Livy; Latin Translation; Graeca Maiora; Greek Antiquities	N/A

Table III

The Classical College Curriculum: Second Year			
College	Term I	Term II	Term III
WILLIAMS	Rhetoric; Grammar; Horace; Geometry; Geography	Logic; Geometry; Day; Rhetoric; the Greek Testament	History; Graeca Maiora; Cicero's Orations
YALE	Horace's Odes and Satires; Graeca Maiora; John Playfair's ed. of Euclid's Elements of Geometry	Horace; Euclid; Graeca Maiora; Day	Graeca Maiora; Cicero's Orations and de Officius; Day; Dutton's Conic Sections and Spherical Geometry; Jamieson's Rhetoric
RUTGERS	Virgil's Georgics and Bucolics; Graeca Maiora; Geometry	Virgil's Georgics; Graeca Maiora; Ancient Geography; Geometry; Rhetoric	Horace; Graeca Maiora; Day; Rhetoric
HARVARD	Graeca Maiora; Greek Testament; Excerpta Latina; Legendre; Patrick Tytler's History of Scotland (1828-43) or England under the Reign of Edward VI and Mary (1839)	Graeca Maiora; Tytler; Cicero de Oratore; Analytic Geometry (Cambridge course of Mathematics); Blair's Lectures on Rhetoric	Graeca Maiora; Tytler; Cicero; Topography (Cambridge Course of Mathematics)
CENTRE	Virgil's Georgics and Bucolics; Cicero's Orations; Homer's Iliad; Legendre	Horace; Graeca Maiora; Young's Trigonometry (Plane and Spherical); Surveying (Heights and Distances); Spherical Projections; Navigation; Nautical Astronomy	N/A

Table IV

The Classical College Curriculum: Third Year			
College	Term I	Term II	Term III
WILLIAMS	Graeca Maiora; Day; Chemistry; Natural Philosophy	Excerpta Latina; Paley's Evidences of Christianity (1794); Analytic Geometry and Conic Sections; Natural Philosophy; Chemistry	Excerpta Latina; Graeca Maiora; Natural Philosophy; Paley; Fluxions
YALE	Cicero's de Oratore; Robinson's ed. of Homer's Iliad; Dutton's Spherical Trigonometry; Webber's ed. of William Enfield's Institutes of Natural Philosophy	Tacitus, The History, De Moribus Germanorum and Agricola; Graeca Maiora, vol.2; Enfield	Enfield's Astronomy; Tytler's History; Samuel Vince, A Treatise on Plane and Spherical Geometry; Graeca Maiora or Hebrew, Spanish, French (optional)
RUTGERS	Livy; Graeca Maiora; Day; Calculus; rhetoric	Horace; Graeca Maiora; Calculus; Rhetoric; Moral and Intellectual Philosophy	Cicero's Orations; Graeca Maiora; Natural Philosophy; Moral and Intellectual Philosophy; Rhetoric
HARVARD	Hebrew; Chemistry; Levi Hedge, Elements of Logic; Paley's Moral and Political Philosophy	Tacitus or an equivalent in Latin; Robinson's ed. of Homer's Iliad; Differential Calculus; Mechanics; Modern Language	Mechanics completed; Electricity and Magnetism (Cambridge course of Natural Philosophy)
CENTRE	Cicero de Oratore; Graeca Maiora; Richard Whately's Rhetoric and Elements of Logic; Young's Analytical Geometry (Conic sections and fluxions)	Tacitus; Graeca Maiora; Mental Philosophy; Chemistry; Young; Olmsted's Natural Philosophy	N/A

Table V

The Classical College Curriculum: Fourth Year			
College	Term I	Term II	Term III
WILLIAMS	Philosophy of Rhetoric; Dugald Stewart, Philosophy of the Human Mind	Anatomy; which may refer to either of Paley's Natural Theology or Evidences of Christianity; Charles Leslie on Deism; Moral Philosophy	Political Philosophy; Vattel, The Law of Nations; or Princip. s of the Law of Nature
YALE	Hugh Blair, Lectures on Rhetoric; Levi Hedge, Elements of Logic; John Locke, Essay Concerning Human Understanding; Greek or Latin	Paley's Natural Theology; Stewart, Philosophy of the Human Mind; Brown, Lectures on Philosophy of Mind	Political Economy; Paley, Moral and Political Philosophy and Evidences; Greek and Latin; 1844/45 Kent's Commentaries; Wayland's Political Economy
RUTGERS	Cicero's Orations; Horace's Arts poetica; Longinus, "On the Sublime"; Natural Philosophy; Moral Philosophy; Intellectual Philosophy; Logic	Tacitus, the Greek Testament; Natural Philosophy; Evidences of Revelation; History and Chronology; Intellectual Philosophy	Tacitus; the Greek Testament; Political Economy; Evidences; History and Chronology
HARVARD	Intellectual Philosophy; Dugald Stewart Philosophy of the Human Mind; Thomas Brown, Lectures on Philosophy of Mind; Opticks (Cambridge course of Natural Philosphy); John Gummere, An Elementary Treatise on Astronomy	Gummere; Opticks; Paley, Evidences; Joseph Butler, Analogy of Religion; J.B. Say, A Treatise on Political Economy; Chemistry; Minerology & Geology; William Smellie, Philosophy of Natural History	Say; Smellie; Composition and Speaking
CENTRE	Juvenal; Graeca Majora; Moral Philosophy; Geology; Constitution of the United States and National Law; Olmsted's Natural Philosphy; Astronomy	N/A	N/A

As Tables II to V clearly show, the antebellum college student received an education in which the form and content of the curriculum varied little between colleges. Francis Wayland, the president of Brown University, observed in 1842 that "the studies 'in all Northern Colleges are so nearly similar that students, in good standing in one institution, find little difficulty in being admitted to any other.'"[36] A revealing example of this similarity was the widespread instructional use of William Paley's works during the entire period. At Yale College, Paley's Moral Philosophy was used between 1791 and 1845, his Natural Theology between 1824 and 1867, and his Evidences of Christianity between 1824 and 1830 and again between 1860 and 1867. At Williams College, his Natural Theology and Evidences were used from 1822 until after 1845. At Harvard College, his Moral Philosophy was used between 1800 and 1847 and his Evidences between 1844 and 1860.[37] One may conclude from this that at least five of the eight justices in the sample, Field, Strong, Gray, Brewer, and Brown, studied Paley's works at college. Another example of the similarity of the Moral Philosophy courses was the popularity of Francis Wayland's textbooks.[38] Wayland's Elements of Moral Science, in particular, was phenomenally

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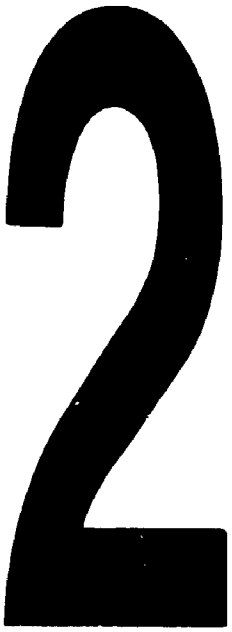
[36]Francis Wayland (1796-1865), On the Present College System (Boston, 1842) at 35 quoted in Louis Franklin Snow, The College Curriculum in the United States (New York: Teachers College, Columbia University, 1907; reprint, New York: AMS Press, 1972), 141. Wayland was a prominent Baptist clergyman and educator. He was educated at Union College during the tenure of its long-time president, Eliphalet Nott, and graduated in 1813. After abandoning the study of medicine, he took up divinity studies at Andover Theological Seminary (1816-17) under Moses Stuart. He returned to Union as a tutor for four years and in 1821 assumed the duties of pastor at the First Baptist Church in Boston. In 1827, he was called to the presidency of Brown University and filled that post until 1855.

[37]Wilson Smith, "William Paley's Theological Utilitarianism in America," William and Mary Quarterly, 3rd ser., 11 (1954): 420.

[38]Francis Wayland, The Elements of Moral Science (1835; reprint, Cambridge, MA: Harvard University Press, 1963) and Wayland, The Elements of Political Economy (1837; new ed., New York: Sheldon & Co., 1886).



successful and, by 1867, had sold some ninety-five thousand copies.[39] Wayland's Elements of Moral Science was used at Williams in the 1830s and his Elements of Political Economy was used by President Woolsey at Yale in the late 1840s.[40] In addition, Dugald Stewart's Philosophy of the Human Mind was used in the late 1820s at Williams, Yale, and Harvard and Thomas Brown's, Stewart's successor at the University of Edinburgh, Lectures on the Philosophy of Mind at Yale and Harvard. Moreover, the dominance in the curricula generally of Dalzell's Greek reader meant that the justices read largely the same selections from the Greek classical authors.

Not only did the justices study similar if not identical materials, they studied them in an identical manner. Course material, whether from a text or from dictated lectures, as was frequently the case in the Moral Philosophy course,[41] was covered by a system of lectures and recitations. "On one day the instructor imparted information and on the next the pupils handed it back to him."[42] A former student of Yale College later described the recitations.

> The tutors were... generally excellent drillmasters. They could hardly be said to teach at all, their duties being to subject every pupil three times a day to so searching a scrutiny before the whole division as to make it apparent to himself and all his fellows either that he did or did

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[39]Francis and H.L. Wayland, A Memoir of... Francis Wayland (New York, 1867) at 1: 385 cited in Wilson Smith, Professors and Public Ethics: Studies of Northern Moral Philosophers before the Civil War (Ithaca, NY: Cornell University Press, 1956), 38n. 29. See also McLachan, "American Colleges and the Transmission of Culture: The Case of the Mugwumps," in S. Elkins and E. McKitrick, The Hofstadter Aegis: A Memorial (New York: Alfred A. Knopf, 1974), 198, where McLachan corroborates this figure.

[40]Kelley, Yale: A History, 175.

[41]President John C. Young of Centre College (1830-1857), for example, rarely used a text for his lectures. Walter Groves observed that "all biographies comment on President Young's gifts as a speaker, though since he usually spoke from skeleton outline notes, few of his addresses have been preserved." Groves, "Centre College," 315.

[42]George P. Schmidt, The Old Time College President (1930; reprint. New York: AMS, 1970), 94; Kelley, Yale: A History, 157.

> not understand his lessons. In the course of the recitation the tutor would furnish needed explanations and put those who were trying to improve in a way to do better next time. It was considered no part of his duty to assist his pupils in preparing for recitation. In that task the pupil was expected to be entirely self-reliant.[43]

This drill was admittedly a boring exercise for both student and teacher, and modern historians of education have missed few opportunities to criticize the antebellum curriculum for its fixity and its encouragement of rote learning.[44] This may be beside the point, for this system of instruction, which lasted without major modifications until after the Civil War and which also formed the basis of the teaching methods used in the new college law schools founded during this period, was designed upon different principles than those of a modern university. The purpose of a college education lay not in specialized studies nor in training for a profession but in a "thorough education" in the broad principles of science which were "the common foundation of all high intellectual attainments." Moreover, the content of the curriculum, with its emphasis on classical language and literature and on digested presentations of authoritative works in theology and moral philosophy, and the system of lectures and recitations through which it was delivered were designed, not to direct the attention of students to "the more abstruse and disputable points" or to "the latest discoveries" in science, but to "the principles which have been in a course of investigation through successive ages, and have now become simplified and settled."[45] The curriculum was designed, therefore, to convey to the student a European classical and Christian heritage deemed to be true, correct, and useful

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[43]Sturtevant, ed., Julian M. Sturtevant: An Autobiography quoted in Kelley, Yale: A History, 159.

[44]James McLachan, "The 'Choice of Hercules:' American Student Societies in the Early Nineteenth Century," in Lawrence Stone, ed., The University in Society, 2 vols. (Princeton: Princeton University Press, 1974), 2: 466. See also Douglas Sloan's critical evaluation of the historiography in "Harmony, Chaos, and Consensus: The American College Curriculum," Teachers College Record 73 (1971): 223-7.

[45]"Summary of Report of Yale Faculty, 1827," in Snow, The College Curriculum, 143n. 1.

through a series of repeated exercises.[46] It was not, nor was it intended to be, a free inquiry into the foundations of religion and philosophy but, rather, an introduction to proper modes of reasoning and correct standards of appreciation and behaviour.

§ IV ANTEBELLUM LEGAL EDUCATION

In the antebellum college curriculum the intellectual tradition which embodied the Christian Enlightenment was most fully articulated in the senior course in Moral Philosophy and was expressed in similar terms in the works of prominent academic moral philosophers; however, that tradition was also embodied to a significant degree in the structure and content of antebellum legal education. A pattern of educational ideals similar to those found in the antebellum colleges is identifiable in American legal education before the Civil War. The late eighteenth and early nineteenth century pattern and content of legal education continued to influence American legal thought during the course of the century through the institution of legal apprenticeship, which coexisted with the emerging law schools but which remained the dominant method of legal education in the United States until the end of the nineteenth century. The justices examined in this study illustrated this slow transition in legal education toward a pattern in which the best-educated lawyers combined a college education, study at a college law school, and a law-office apprenticeship.

With the exception of Justice Miller, who attended the medical school at Transylvania University, the justices examined here received a classical education in antebellum colleges. The same degree of uniformity did not apply to their legal training. Justices Miller, Field, and Bradley never attended a law school but received all their legal training by reading in law offices. Of the five men who did attend law school, only Justices Gray and Brewer graduated, from Harvard and Albany Law Schools respectively. Irrespectively of attending law school all eight justices read law in the office of a practising lawyer for varying periods of time before being admitted to the bar.

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[46]"Report of the Committee of the Trustees, Columbia, February 28, 1810," cited in Snow, The College Curriculum in the United States, 102n. 1.

Justice Miller's legal education was perhaps more typical of a nineteenth-century attorney than that of his colleagues. While conducting his medical practice in Barbourville, Kentucky, Miller decided around 1845 to change his profession and thereafter began the study of law. In 1847, he was admitted to the bar of Knox county. Accounts of this period of Miller's life provide scant details of his studies, and Miller, himself, shed little light on the matter. Miller's initial interest may have been aroused as a result of sharing a log-cabin office with Silas Woodson, a practising lawyer, who allowed Miller access to his law books.[47] Charles Fairman's account of Miller's education further suggests that his reading may also have been guided by Judge Franklin Ballinger, a relative of Miller's wife, Lucy, and his father-in-law, the clerk of the Kentucky circuit court. In either case, Miller was largely a self-taught lawyer, and his education was probably typical of that received by a frontier lawyer during this period.[48]

This is not to say that Miller was necessarily ill-educated. Studies of Wayne County, Michigan, and southern Indiana, both frontier areas in the early nineteenth century, by Elizabeth G. Brown and Michael H. Harris suggest that while the libraries of country attorneys might not have been large they were adequate. Practising attorneys were familiar with and made frequent use of their contents and, while the nature of the cases before the courts might reflect a frontier society, the courts, themselves, followed "the orthodox procedures of the time" in a careful and

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[47]Mac Swinford, "Mr. Justice Samuel Freeman Miller (1816-1873)," Filson Club Historical Quarterly 34 (Jan. 1960): 37. See also William Gillette, "Samuel Miller," in Leon Friedman and F.L. Israel, eds., The Justices of the United States Supreme Court, 1789-1969: Their Lives and Major Opinions, 4 vols. (New York: R.R. Bowker, 1969), 1012; Fairman, "The Education of a Justice," 237.

[48]Fairman, "The Education of a Justice," 236; Fairman, "Justice Samuel F. Miller: A Study of a Judicial Statesman," Political Science Quarterly 50 (1935): 16; Charles Fairman, "Justice Miller and the Mortgaged Generation," Iowa Law Review 23 (Mar. 1938): 353.

orderly manner.[49] Brown's study of Wayne county, in which she established the physical presence of specific law books, illustrated that, while the basic textbook for most law students remained Blackstone's Commentaries on the Laws of England,[50] a typical law library held a variety of both British and American reports of cases, statutory materials of both state and federal governments, and a varied selection of digests, abridgements, and treatises.[51]

Justices Field and Bradley also received law-office educations. As we have already seen, following his graduation from Williams College in 1837, Stephen J. Field read law in the offices of his elder brother and of John Van Buren. Field, however, left no particulars of his preparation for the bar, which he entered after three years of study in 1841.[52] In his Reminiscences of his early years in California, Field concentrated his attention less on his educational attainments than on his successes as a land speculator and legislator and his seemingly effortless ability to make the bitterest enemies.[53]

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[49]Elizabeth G. Brown, "Frontier Justice: Wayne County, 1796-1836," American Journal of Legal History 16 (1972): 135, 152; Michael H. Harris, "The Frontier Lawyer's Library: Southern Indiana, 1800-1850, as a Test Case." American Journal of Legal History 16 (1972): 251.

[50]Sir William Blackstone, Commentaries on the Laws of England (London, 1765-69). See Harris, "The Frontier Lawyer's Library," 249.

[51]Brown, "Frontier Justice," 139-51 passim. The following totals are abstracted from Brown's extensive notes in which are listed the titles of the law books found present. Reports: British (106) and American (77). Law Dictionaries (2). Digests and Abridgements: British (7 titles totalling 40 volumes) and American (10 titles totalling 21 volumes). Treatises (125 titles). Numerous volumes of state and federal statutes.

[52]Fairman, "The Education of a Justice," 242.

[53]Stephen J. Field, Personal Reminiscences of Early Days in California. To Which Is Added the Story of his Attempted Assassination by a Former Associate on the Supreme Bench of the State, by George C. Gorham (1893; reprint, New York: Da Capo Press, 1968).

Joseph P. Bradley, on the other hand, left a more informative account of the apprenticeship upon which he embarked in 1836, with the encouragement of his college classmates, Theodore Frelinghuysen and Joel Parker. He read in the office of Archer Gifford. Predictably, he began his studies with Blackstone, which he read in conjunction with Cruise's digest of English real property law and Coke on Littleton. These were followed with Kent's Commentaries and Bacon's Abridgement. He read the New Jersey statutes and reports in conjunction with Sellon's Practice of the Courts of King's Bench and Common Pleas "so as to know how the English practice and pleadings were modified by New Jersey legislation and usages."[54] He read works on common-law and equity pleading.[55] He thought Gilbert's Law of Evidence so valuable that he "made a careful analysis and index of the work."[56] This course of study was considered sufficient preparation for the bar examination in New Jersey in 1839, and Bradley later recorded that "I had no difficulty in answering all questions propounded on that occasion, so momentous to every student of law."[57]

The remaining five justices combined time in law offices with a law-school classroom before admission to the bar. William Strong financed his legal studies

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[54]Blackstone, Commentaries on the Laws of England; William Cruise, Digest of the Laws of England, respecting real property, 6 vols. (1804-07); Sir Edward Coke, Coke on Littleton, Co. Litt., 1 Inst. [title varies], Vol. 1 of Institutes of the Laws of England, 4 vols. (1628); James Kent, Commentaries on American Law, 4 vols (1826-30); Matthew Bacon, A New Abridgement of the Law, 7 vols. (5th ed., 1798); Sellon, Practice of the Courts of King's Bench and Common Pleas, 2 vols. (1798).

[55]Henry John Stephen, A Treatise on the Principles of Pleading in Civil Law Actions: Comprising a Summary View of the Whole Proceedings in a Suit at Law (London, 1824). Elizabeth Brown notes that this book was still in use at the University of Michigan in 1926. Elizabeth Brown, Legal Education at Michigan, 1859-1959, (Ann Arbor: University of Michigan Law School, 1959), 582. John Mitford, Lord Redesdale, Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill (London, 1780); Chitty, Practical Treatise on Pleading, 2 vols. (New York, 1809).

[56]Geoffrey Gilbert, Law of Evidence by a Late Learned Judge (London, 1717).

[57]Fairman, "The Education of a Justice," 230.

between 1829 and 1832 by teaching school first in East Windsor and later in Tolland, Connecticut, and Burlington, New Jersey. During this period, he read law under the supervision of a series of attorneys and spent six months at the Yale Law School in 1832, where he was instructed by David Daggett, the future Kent Professor of Law, and Samuel Hitchcock.[58]

John Marshall Harlan attended the law school at Transylvania University, where he was instructed by George Robertson and Thomas A. Marshall, both of whom served as Chief Justices on the Supreme Court of Kentucky, and later read law in the office of his father, James Harlan, in Frankfort, Kentucky, before entering the bar in 1853.[59]

Horace Gray undoubtedly received the most professionally oriented education of any member of this group. Following an extended trip to Europe, Gray enroled in Harvard Law School, from which he graduated in 1849, and where he struck a lasting friendship with George F. Hoar, the future senator from Massachusetts. He studied

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[58]DAB, s.v. "William Strong;" NCAB, s.v. "William Strong." See also Kelley, Yale: A History, 201.

[59]DAB, s.v. "John Marshall Harlan;" NCAB, s.v. "John Marshall Harlan." Little is known of the Law School at Transylvania University. In 1799, one year after the University was organized, George Nicholas was appointed "Professor of Law and Politics," a position which remained in existence until 1879. In 1837 its faculty consisted of George Robertson, Professor of Constitutional Law, Equity, and Law of Comity; Thomas A. Marshall, Professor of Law of Pleading, Evidence, and Contract; and Aaron K. Woolley, Professor of Elementary Principles of Common, National, and Commercial Law. The titles suggest that the curriculum varied little from other institutions. Robertson and Marshall were still teaching during Harlan's attendance in the early 1850s. Peter Robert's history of the University records that the annual enrolment in the 1840s was approximately sixty students, although in 1850 that number had fallen to thirty-five. See Alfred Z Reed, Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States (New York: Scribner's Sons, 1921; reprint, Buffalo: William S. Hein, 1986), 118, 118n. 1 and Robert, Transylvania University, 171.

law with the firm of Sohier & Welch and in the office of John Lowell and was admitted to the bar in 1851.[60]

Following his graduation from Yale in 1856, David J. Brewer followed in the footsteps of his uncle, Stephen J. Field, and studied law for a year in the offices of his uncle, David Dudley Field. He also spent a year at the Albany Law School and graduated from that institution in 1858. Later that year, he was admitted to the New York bar.[61]

Henry Billings Brown, a member of Brewer's class at Yale, spent 1857 travelling in Europe before returning to Ellington, Connecticut, in November of that year and taking up his legal studies in the office of Judge John H. Brockway. Brown's autobiographical sketch provided few details of his studies in Ellington. He observed that like the majority of aspiring lawyers he immediately "plunged into that most fascinating of law books--'Blackstone's Commentaries.'"[62] His diary recorded that "Squire" Brockway assigned works other than law books, and Brown read David Hume's and George Macaulay's histories of England, William H. Prescott's Ferdinand and Isabella, and Charles Dickens' Pickwick Papers in addition to James Kent's "tough and dry" work on federal jurisprudence.[63] Brown also recorded the tenor of his days in Ellington. His biographer, Charles Fairman, wrote:

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[60]DAB, s.v. "Horace Gray;" NCAB, s.v. "Horace Gray;" George F. Hoar, "Memoir of Horace Gray," Massachusetts Historical Society Proceedings, 2nd ser., 18 (1905): 158, 161.

[61]DAB, s.v. "David Josiah Brewer;" NCAB, s.v. "David Josiah Brewer;" Arnold M. Paul, "David J. Brewer," in Friedman and Israel, eds., The Justices of the United States Supreme Court 1789-1969, 1516.

[62]Brown, "Autobiographical Sketch," in Kent, Memoir of Henry Billings Brown, 13, 17-8. Blackstone, Commentaries.

[63]David Hume, History of Great Britain, 4 vols. (1754-62); Thomas Macaulay, History of England, 4 vols. (1849, 1855); William H. Prescott, The History of Ferdinand and Isabella (1838); Charles Dickens, The Posthumous Papers of the Pickwick Club (1837); James Kent, Commentaries on American Law, 4 vols. (1826-30). Fairman, "The Education of a Justice," 252.

> Squire Brockway would hear Brown and the other students recite, usually in his office in the evening--apparently about twice a week. After that they would adjourn to the "parlor" for general conversation or a game of whist or cribbage. In the day the students worked in the office; sometimes it became too crowded with clients that he could make no progress, whereupon Brown would go for a walk. He had a daily quota of reading. Often he accompanied his preceptor to court to observe the conduct of a case.[64]

Brown's sketch glossed over his departure from Ellington in less than a year, although one biographer has suggested that his stay there "ended disastrously because his refusal to participate in a general revival did not 'elicit the approval of the ecclesiastical authorities.'"[65] In any case, Brown entered the Yale Law School in the autumn of 1858, where he remained until the following spring. Thereafter he removed to Cambridge and the Harvard Law School, where he spent a further six months in studying the law. This, he later recalled, "was really the pleasantest and most profitable experience of my student days." He nevertheless failed to graduate from either of these institutions. "Though much inclined to do so, I did not finish the course, or take a degree, but in the autumn pitched upon Detroit as my future home." Once there he continued his studies in the office of Walker & Russell, where he familiarized himself with the local practice. He was admitted to the Wayne County bar in July, 1860.[66]

This brief overview of the justices' preparation for the bar examination suggests that legal apprenticeship remained a fundamentally important part of the educational process throughout the antebellum period. Aspiring attorneys turned to practitioners in order to obtain the practical knowledge of the law that was a prerequisite for successful practice.

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[64]Fairman, "The Education of a Justice," 251.

[65]Joel Goldfarb, "Henry Billings Brown," in Friedman and Israel, eds., The Justices of the United States Supreme Court, 1553. Brown alluded to this passage in his sketch but made no mention of poor relations with his mentor.

[66]Goldfarb, "Henry Billings Brown," in Friedman and Israel, eds., The Justices of the Supreme Court, 18.

In an age prior to the general availability of printed forms, the legal system's dependence upon written records required endless copying of legal instruments. This was, in fact, a powerful incentive for attorneys to take in apprentices, who spent their days with pen in hand over the stream of writs, pleadings, and precedents flowing through the office. Copying also served a practical purpose for the apprentice. Roger B. Taney, a future Chief Justice of the United States Supreme Court,[67] obtained his legal education in the office of Jeremiah Thurley Chase, a Judge of the General Court in Annapolis, Maryland, and later outlined the advantages of working in the office of a practising lawyer over his own experience.

> My reading in the office of a judge, instead of a practising lawyer, had some advantages; but upon the whole was I think a disadvantage to me. It is true, it gave me more time for uninterrupted study, but it gave me no instruction in the ordinary routine of practice, nor any information as to the forms and manner of pleading. In that day, strict and nice technical pleading was the pride of the bar.... And every disputed suit was a trial of skill in pleading between the counsel.[68]

Copying was a tedious business, but it served a valuable function in familiarizing the student with the practical elements of the law: the filing of writs, the preparation of pleas, and the notations in dockets and account books that were the basis of everyday practice. More importantly, the apprenticeship system's emphasis on form contributed to the fundamentally conservative attitudes toward legal change of American lawyers. Lawyers remained wedded to the form and ideology of the common law. Young attorneys in mastering the forms of the common law imbibed its underlying principles through their frequent consultations not only with general treatises such as the Commentaries of Blackstone and Kent but with form books such

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[67]Roger Brooke Taney (1777-1864) served as attorney general (1831-33) and secretary of the treasury (1833-35) during the administration of Andrew Jackson. He was appointed Chief Justice of the U.S. Supreme Court in 1836 and served in that capacity until his death in 1864.

[68]Roger B. Taney, Memoir of Roger Brooke Taney (1872: reprint, New York: Da Capo Press, 1970) quoted in Charles Warren, A History of the American Bar, (Boston, 1911; reprint, Buffalo: William S. Hein & Co., 1980), 183-4.

as Coke's Book of Entries or Rastell's Collection of Entries and legal dictionaries.[69] This devotion to form and the perception of the law as an autonomous intellectual system and body of knowledge help to explain the remarkable continuity displayed by the content of legal education in the late eighteenth and nineteenth centuries. It was from this curriculum that the apprentice drew a view of the common law as an intellectual system possessing the attributes of an empirical science and as a body of substantive rules embodying moral and constitutional principles. The educational system in many ways defined both the character of the legal system and its practitioners, for as Julius Goebel has argued, "in the law substance follows invariably on the heels of form."[70]

The continuity of form and content of legal education in America was derived at least partially from the fact that each student's curriculum was set by his master. Lawyers charged with the instruction of their clerks tended, when setting a program of study, to favour expediency over most other considerations. Expediency dictated that they turn for guidance to the works with which they were most familiar and, just as importantly, which were readily available. To use an example from the early national period, Daniel Webster's master, Thomas W. Thompson, assigned him the readings with which he, himself, had started his studies in the office of Theophilus Parsons years earlier: William Robertson's The History of the Reign of Emperor Charles V (1769), Emmerich de Vatel's The Law of Nation's; or Principles of the Law of Nature (1759), and Blackstone's Commentaries.[71]

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[69]Sir Edward Coke, A Book of Entries (London, 1614, 2nd ed. 1671) and William Rastell, A Collection of Entries of declarations, barres, replications, rejoynders, issues, verdicts, judgements, executions, process, continuances, essoynes, and divers other matters (London, 1566 and many subsequent editions).

[70]Julius Goebel Jr., The Law Practice of Alexander Hamilton: Documents and Commentary, 5 vols. (New York: Columbia University Press, 1964), 1: 10.

[71]Alfred S. Konefsky and Andrew J. King, eds., The Papers of Daniel Webster: Legal Papers, 4 vols. (Hanover, NH: University Press of New England, 1982), 1: 6.

Gerald Gawalt has suggested that in the eighteenth century and Elizabeth Brown has confirmed that in the nineteenth century most lawyers owned and mastered a basic collection of legal sources.[72] These common items appeared perennially in student notes and private law libraries.[73] Gawalt's findings are supported by the fragmentary evidence of John Adams' early studies of which he recorded:

> Wood. Coke 2 Vols. Lillies Ab[ridgemen]t. 2 Vols. Salk[eld's] Rep[orts]. Swinburne. Hawkins Pleas of the Crown. Fortescue. Fitzgibbons. Ten Volumes in folio I read at Worcester, quite thro-- besides Octavos and Lesser Volumes, and many others of all sizes that I consulted occasionally, without Reading in Course as Dictionaries, Reporters, Entries, and Abridgements, &c.[74]

Adams' summation of his studies was brief to the point of obscurity but indicated that he read extensively from treatises, abridgements, reports and statutes, form books, and pleadings. A clearer indication of the legal curriculum can be obtained from his professional contemporary, William Smith of New York. Smith recorded an ambitious programme of study in the mid-1750s. Smith's curriculum

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[72]Gerald W. Gawalt, The Promise of Power: The Legal Profession in Massachusetts, 1760-1840 (Westport, CT: Greenwood Press, 1979), 133 and Brown, "Frontier Justice."

[73]Gawalt found they included: Sir Edward Coke, First Part of the Institutes of the Lawes of England: or, Commentaries upon Littleton, 2nd ed. (London, 1644); Timothy Cunningham, New and Complete Law Dictionary: or General Abridgement of the Law, 2 vols (London, 1764-65); Matthew Bacon, New Abridgement of the Law, 5 vols (London; 1736-66); William Hawkins, A Treatise of the Pleas of the Crown, 2 vols. (1716-21); John Lilly, The Practical Register: or, A General Abridgement of the Law (London, 1710); an assortment of "precedent" books containing pleadings and forms; and, in the later part of the century, William Blackstone, Commentaries on the Laws of England (London, 1765-69).

[74]John Adams, Diary and Autobiography at 1: 173 quoted in L. Kinvin Wroth and Hiller B. Zoebel, eds., The Legal Papers of John Adams, 3 vols. (Cambridge, MA: Harvard University Press, 1965), 1: liv. See Thomas Wood, An Institute of the Laws of England: or, the Laws of England according to Common Use, 2 vols, (London, 1720); John Fortescue, De Laudibus Legum Angliae, (1616); Henry Swinburne, Treatise of Testaments and Last Wills (London, 1590); Hawkins, Pleas of the Crown; Salkeld's Reports, 3 vols. (1689-1712); Lily, The Practical Register.

included general studies in English, Latin, and French; writing; mathematics, including geometry and accounting; history and geography; logic and rhetoric; divinity; and the law of nature and nations. In addition to reports of cases in common law and equity, precedents, and entries, Smith assigned to his students general treatises such as Hale's Pleas of the Crown, Fortescue's De Laudibus Legum Angliae, Christopher St. Germain's Doctor and Student, Bacon's Abridgement, and Wood's Institutes as well as treatises on natural and civil law such as Domat's Civil Law in its Natural Order, Wood's Institutes of the Civil Law, Barbeyrac's editions of Pufendorf's Law of Nature and Nations and Grotius' Rights of War and Peace.[75] This curriculum offered a progressive course of study comprised of a broad sampling of the arts and sciences, a requirement otherwise fulfilled by a Bachelor of Arts degree, an introduction to a general knowledge of law, and finally in-depth study of both the theory and practice of law. Smith's course contained a greater fund of legal knowledge than most lawyers would have aspired to possess near the end of the eighteenth century; nevertheless, his list, with minor variations to account for individual taste and the availability of texts, represented an ideal course of study. What is noteworthy is the extent to which the course of studies pursued in the second half of the eighteenth century resembled that still followed in the first half of the nineteenth century. In 1822, William Wirt wrote to then law-student Hampton L. Carson and recommended Blackstone as "the best introductory author" to give him "a

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[75]Sir Matthew Hale, Pleas of the Crown: or, a Brief, but full Account of Whatsoever can be Found Relating to that Subject (London, 1678); Fortescue, De Laudibus Legum Angliae; Christopher St. Germain, Doctor and Student: or, Dialogues between a Doctor of Divinity and a Student in the Laws of England (London, 1543); Bacon, New Abridgement of the Law; Wood, An Institute of the Common Law; Jean Domat, The Civil Law in its Natural Order: together with the publick law (1689; trans. London, 1722), 1st Book; Thomas Wood, "Treatise of Law," in New Institutes of the Civil Law, 3rd ed. (London, 1721); Barbeyrac's ed. of Samuel von Pufendorf, The Law of Nature and Nations (Amsterdam, 1702); Barbeyrac's ed. of Hugo Grotius, The Rights of War and Peace, in three books (Amsterdam, 1720). Paul M. Hamlin, Legal Education in Colonial New York (1939; reprint, New York: Da Capo Press, 1970), Appendix VIII, 197-200.

clear and comprehensive view of its [the law's] present state."[76] Wirt recommended to Carson that he study the law of nature and nations,[77] civil and common law,[78] the statutes and decisions of his state, the rules of pleading,[79] and finally that he undertake a course of reading in history, belles-lettres, rhetoric, and the classics.[80] Joseph Bradley still read Blackstone, Coke on Littleton, and Bacon's Abridgement in Archer Gifford's office as late as 1836 and thought Pufendorf and Grotius worth reading during his early days practising law.[81] Henry Billings Brown began his studies in 1857 with Blackstone and a selection of polite literature and history.[82] Indeed, as late as 1884, Justice Bradley told law students

> it is of the utmost importance to a student of the laws to acquire besides a knowledge of the law itself, the power of expressing it in

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[76]Howell J. Heaney, ed., "Advice to a Law Student: A Letter of William Wirt in The Hampton L. Carson Collection of the Free Library of Philadelphia," American Journal of Legal History 2 (1958): 257.

[77]Thomas Rutherforth's Institutes of Natural Law: The Substance of a Course of Lectures on Grotius' 'De Jure Belli et Pacis,' in Saint John's College, Cambridge," 2 vols. (Cambridge, 1754-56).

[78]Arthur Browne, A Compendious View of the Civil Law, 2 vols. (Dublin: 1797-99) and portions of Corpus Juris Civilis. Matthew Bacon, A New Abridgement of the Law... with Considerable Additions, by Henry Gwillim, 1st American ed. from 6th English ed., with the addition of the later English and American Decisions (Philadelphia, 1813).

[79]Chitty's Practical Treatise on Pleading, 2 vols. (New York, 1809) and Espinasse's Reports of Cases Argued and Rules at Nisi Prius, 6 vols. (1793-1807) or Digest of the Law of Actions at Nisi Prius, 2 vols. (1789).

[80]Cicero's de Oratore and Brutus; the Institutes of Quintillian; Tacitus; the orations of Demosthenes, Cicero, Lord Erskine and Lord Chatham; Hugh Blair's Lectures on Rhetoric and Belles Lettres (1783).

[81]Fairman, "The Education of a Justice," 231.

[82]Brown, "Autobiographical Sketch," in Kent, Memoir of Henry Billings Brown, 13, 17-8.

> correct and appropriate language, such as is found in books of authority.[83]

This facility was, he believed, best acquired by "mastering the best works," among which he singled out as the pre-eminent example Blackstone's Commentaries.[84] Thomas M. Cooley, jurist, legal educator, and commentator on the constitution, thought it worthwhile to issue his own edition of this evergreen work in 1871 and it remained in use in the University of Michigan Law School until after 1911.[85] This continuity of subject matter and texts meant that late eighteenth and early nineteenth century law-office education exercised a continuing influence on American legal thought during the course of the nineteenth century through its emphasis on the technical form and content of the law. Equally importantly, these examples suggest that a law-office apprenticeship frequently went beyond merely utilitarian considerations and that the leading members of the American bar aspired to educational ideals similar to those of the antebellum colleges and, in particular, the inculcation of correct habits of thought and expression in an individual of virtue, culture, and social worth. Indeed, these were precisely the goals and class of individuals towards which Blackstone's Commentaries had been aimed.[86]

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[83]Joseph P. Bradley, "Law: Its Nature and Office as the Bond and Basis of Civil Society," Introductory Lecture to the Law Department of the University of Pennsylvania, October 1st, 1884, Legal Intelligencer 41 (1884): 396; reprint, in Charles Bradley, ed. and comp., Miscellaneous Writings of the late Honorable Joseph P. Bradley (Newark: L.J. Hardham, 1902), 256-7.

[84]Bradley, "Law: Its Nature and Office," Miscellaneous Writings, 256-7.

[85]Thomas M. Cooley, Commentaries on the Laws of England: in Four Books. By Sir William Blackstone... Together with a Copious Analysis of the Contents, and Notes with Reference to English and American Decisions and Statutes which Illustrate or Change the Law of the Text... (Chicago, 1871; 4th ed. by James DeWitt Andrews, 1899). Brown, Law at Michigan, 565.

[86]R. Kent Newmeyer, "Legal Culture, and the Antebellum Origins of American Jurisprudence," Journal of American History 74 (1987): 826; William P. LaPiana, Logic and Experience: The Origin of Modern Legal Education (New York: Oxford University Press, 1994), 46. See also Gawalt, The Promise of Power, 191 and Paul

The law school during this period was not a substitute for clerking in an office but rather complemented the traditional method of instruction. As George F. Hoar, Horace Gray's classmate at Harvard Law School, observed,

> the chief law school was the court-house, and the best place to study was the office of a great practising lawyer. The art of conducting a trial, of convincing courts or juries, of putting in a case, the difficult art of cross-examination, the difficult art of refraining from cross-examination were learned by great examples.[87]

This complementary function was particularly evident in those schools that provided a course of narrow professional training modelled upon the curricula of the early proprietary law schools such as the one at Litchfield, Connecticut. This was the path followed at Yale College in the 1820s. In 1824, the college absorbed a private law school operated by the New Haven law firm of Seth P. Staples (Yale, 1797) and Samuel J. Hitchcock (Yale, 1809). In 1824, Staples turned his interest in the school over to David Daggett (Yale, 1783), who was shortly afterwards appointed to Yale's vacant professorship of law, while Hitchcock was retained as an instructor. The Yale Law School was formally acknowledged as a part of the college in 1826, although it remained for many years "an independent institution only loosely affiliated with the university."[88]

The narrow vocational curriculum was the model for a growing number of law schools in the 1850s.[89] Frank Ellsworth, historian of the University of Chicago Law

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Lucas, "Blackstone and the Reform of the Legal Profession," English Historical Review 77 (July 1962): 485.

[87]Hoar, "Memoir of Horace Gray," 160.

[88]Reed, Training for the Public Profession of the Law, 46, 140-1. Reed cited as his source the Yale Catalogue of 1826. See also George Wilson Pierson, Yale College: An Educational History, 1871-1921 (New Haven: Yale University Press, 1952), Table B, 701.

[89]Alfred Z. Reed showed that in the decades between 1779 and 1840 law schools opened at an average rate of two per decade. In 1840, seven of those schools remained in operation. In the decade 1840-50 ten schools opened their doors, followed by another eight openings between 1850 and 1860. Of these, twelve

School founded in 1859, described the curriculum there as "conventional." "At no time in the history of the department was the program more than an elementary college-level 'bread and butter' curriculum." This "skimpy" course of study largely followed the pattern laid down by Litchfield and Yale. Students received instruction in the law of real property;* equity;* personal property, personal rights and contracts;* commercial and maritime law;* evidence;* pleadings* and practice; criminal law;* and constitutional law and the law of nations.[90] Students read from a core of established sources, which included Blackstone's Commentaries, Bouvier's Institutes, Kent's Commentaries, Stephen's Commentaries and Wooddeson's Lectures.[91]

A broader approach was favoured at Harvard Law School which reflected Joseph Story's view of the lawyer as both a practitioner and a member of America's cultured elite. In 1829, at the start of Story's tenure as Dane Professor of Law, students began their studies with the Commentaries of Blackstone and Kent. These were followed by instruction in personal property; commercial and maritime law; real property; equity; criminal law; civil law; the law of nations; and constitutional law.[92] On the surface, then, the two-year course of study at Harvard was similar to that of the proprietary schools and Yale; however, an examination of the Harvard

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remained in operation in 1860. In the following decades, the rate of openings and of schools remaining in operation at the end of ten years continued to increase. See Reed, Training for the Public Profession of Law, Appendix, Table 6, 444.

[90]Those subjects marked with an asterisk match those offered by Litchfield in 1813 and later by Yale. Frank L. Ellsworth, Law on the Midway: The Founding of the University of Chicago Law School (Chicago: University of Chicago Press, 1977), 12. Reed, Training for the Public Profession of the Law, Appendix, 453.

[91]Ellsworth, Law on the Midway, 12. Blackstone's Commentaries (1760-65); John Bouvier, Institutes of American Law, 4 vols. (Philadelphia, 1851); Kent's Commentaries; Henry John Stephen, New Commentaries on the Laws of England (Partially Founded on Blackstone) (1st American ed., New York, 1841; 15th ed., 1908); Richard Wooddeson, Elements of Jurisprudence Treated in the Preliminary Part of a Course of Lectures on the Laws of England (Dublin, 1792).

[92]Arthur E. Sutherland, The Law at Harvard: A History of Ideas and Men, 1817-1967 (Cambridge, MA: Belknap, 1967), 104.

course reveals that it was, in fact, more ambitious. The President's 8th Annual Report outlined the content of the course in 1832-33. The course was designed to be completed in two years; however, the outline also included in the regular course, for "the studies of gentlemen who remain longer in the school," additional works to be pursued "as far as the leisure and progress of the student may permit." There was, moreover, a "parallel" course, the number of books in which exceeded those in the regular course, "prescribed chiefly for private reading." The regular course listed nineteen basic works in personal property, commercial and maritime law, real property, and equity. Additional reading for the regular course added the subjects of criminal law, civil law, constitutional law and the law of nations, which also "were doubtless covered in the introductory course on Blackstone and Kent,"[93] and a further twenty-six works. The course of private reading added to these another fifty-seven works.[94] This syllabus remained remarkably stable until after the Civil War. Story's bibliography of recommended texts was printed in the Harvard catalogues until 1869.[95] Only two books appear to have been dropped from the course before 1840. Ten were added to the regular course in the period before 1840-41.[96] Thus, both William Strong, who spent six months at Harvard in 1832, and Horace Gray, who graduated from the two-year program in 1849, studied essentially the same legal typology and works.

Nineteenth-century legal educators partook heavily of the claim, commonly made by legal text-writers and jurists alike, that the law was a "science." At both proprietary schools such as Litchfield and at Harvard, legal educators sought to

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[93]Reed, Training for the Public Profession of the Law, 454.

[94]Charles Warren, History of the Harvard Law School, and of Early American Legal Conditions, 2 vols. (New York, 1908; reprint, New York: Da Capo Press, 1970), 1: 436-7.

[95]Reed, Training for the Public Profession of the Law, 455.

[96]Warren, History of the Harvard Law School, 1: 436-7.

impart to their students the law as a "system of connected, rational principles."[97] As William LaPiana has observed, antebellum legal science "shared the general American view of science as a process of inducing from facts general principles which in the end are reflections of the mind of the Creator."[98]

Francis Bacon's Novum Organum (1620) suggested and Newtonian physics demonstrated that certain knowledge, or truth, could be best obtained, not by deductive reasoning and the logic of the syllogism, but by inductive reasoning based upon careful observation and recording of facts. Human reason, operating independently of revelation, could proceed from the observation of facts to the expression of fixed laws of nature. The intellectual history of the European Enlightenment represented an effort to apply the scientific method to an ever-broadening range of questions in order to arrive at the general laws governing human behaviour and the operation of society.

Legal writers and thinkers saw the law as an integral part of this scientific inquiry. In their view, legal science represented an archetypical example of the full range of scientific inquiry. Bacon's inductive method had emphasized the collection through observation and experiment of knowledge and its systematization into general categories. Such efforts led in two directions: one toward Natural History and the other toward Natural Philosophy. Pursued as an end in itself, Baconian science tended toward Natural History, a systematic account of natural phenomena. Pursued as a means to an end, the inductive method led to the formation of general laws and in this sense tended to promote Natural Philosophy, a knowledge of the general causes and principles of natural phenomena.

Legal science appeared to possess both of these elements. The legal record represented a body of historical observation and fact already classified into the various

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[97]James Gould, "The Law School at Litchfield," United States Law Journal 1 (1823) quoted in Perry Miller, The Life of the Mind in America: From the Revolution to the Civil War (New York: Harcourt, Brace & World, 1965), 156.

[98]LaPiana, Logic and Experience, 4.

branches of the law. This gave lawyers some claim as practitioners of a legitimate science, for the legal record represented the sum of human experience in society--a vast catalogue of observations on the human condition.[99] For this reason, Simon Greenleaf told his students at the Harvard Law School in 1838 that

> adjudged cases are to the philosophical student of law what facts are to the student of natural science. They are the elements from which, by the process of induction, his mind ascends to the higher regions of the science, scans its boldest outlines and familiarizes itself with its great and leading principles.[100]

At the same time, however, the study of the law and its historical record, pursued in conjunction with Natural and Moral Philosophy, confirmed both the existence of natural and moral laws and suggested the general principles by which social conduct and municipal laws ought to be governed. When nineteenth-century jurists spoke of legal science, they were referring to this broader intellectual tradition in which the role of science and philosophy generally was the search not only for contingent factual information but for natural laws, those immutable rules by which the universe and everything in it were providentially governed.

This pre-Darwinian science was characterized by a profound faith in the immutability of natural laws. Those laws operated in an integrated system of thought in much the same fashion as the universe was believed to be the product of one omnipotent mind. The powerful influence of the belief in unity should not be underestimated by twentieth-century minds accustomed to the increasing fragmentation and specialization of knowledge.[101] In the nineteenth century, this process was still

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[99]Newmeyer, "Legal Culture, and the Antebellum Origins of American Jurisprudence," 829.

[100]Simon Greenleaf, "Notes of Professor Greenleaf's Introductory Lecture, at the Present Term," Law Reporter 1 (1838): 218.

[101]See Gladys Bryson, "The Comparable Interests of the Old Moral Philosophy and the Modern Social Science," Social Forces 11 (Oct. 1932): 23; Gladys Bryson, "Sociology Considered as Moral Philosophy," Sociological Review 24 (Jan. 1932): 26-36.

in its infancy. Equally as important as the belief in the immutability and unity of creation and natural law was its utility as a predictive and prescriptive device, for laws were not only descriptive but allowed one to comprehend rationally the future consequences of one's actions. Legal science functioned, therefore, in a fashion closely analogous to that of Moral Philosophy, as a vast storehouse of knowledge about man and society, as body of rules and axioms governing the conduct of individuals and societies, and as a practical guide to the attainment of happiness and a virtuous life. Legal education sought ideally to impart a technical knowledge of the law and, in the same way that theology and Moral Philosophy sought to provide a philosophical and ethical context for the individual and society, attempted to place the law in a broader ethical context, as a recognition and an expression, however inadequate, of the eternal laws that underlay both individual and social action.

Whether they attended a law school which followed the vocational pattern of Yale or the Harvard-inspired attempt to produce a classically learned gentleman of the law, students were taught using essentially the same instructional methods found in the undergraduate college program. Rutherford B. Hayes described in his autobiography the somewhat different pedagogical styles of Professors Story and Greenleaf.[102]

> We have no formal lectures. Professors Story and Greenleaf illustrate and explain as they proceed. Mr. Greenleaf is very searching and logical in examination. It is impossible for one who has not studied the text to escape exposing his ignorance; he keeps the subject constantly in view, never stepping out of the way for the purpose of introducing his own experience. Judge Story, on the other hand, is very general in his questions, so that persons well skilled in nods affirmative and negative shakings of the head, need never more than glance at the text to be able to answer his interrogatories.[103]

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[102]Simon Greenleaf (1783-1853) was appointed to replace John Hooker Ashmun as Royall Professor of Law at Harvard Law School in 1833.

[103]Rutherford B. Hayes, Life of Rutherford B. Hayes, edited by William D. Howells (1876) quoted in Warren, History of the Harvard Law School 2: 49.

Story's tendency toward loquacity may have been somewhat easier on his audience, but his teaching method was the same as Greenleaf's. Story, himself, described what he felt were the benefits of "oral" versus "written" lectures, the latter of which he termed "a very inadequate mode." The oral or discursive lectures were

> connected with the daily studies of the students in the various works which they study, and in the lecture-room where they are all assembled in classes, and where they undergo a daily examination; and every lecture grows out of the very pages of the volume in which they are then reading. In this way difficulties are cleared away, additional illustrations suggested, new questions propounded, and doubts raised, and occasionally authorities criticized, so that the instructor and the pupil move along pari passu, and the pupil is invited to state his doubts, and learns how to master his studies.[104]

In 1855-56, by which time the long reign of Story and Greenleaf had given way to that of Joel Parker, Emory Washburn, and Theophilus Parsons, the course was still delivered by lecture supplemented by text assignments.[105] Much the same pattern of discursive lecturing was followed by Theodore Dwight at Columbia after his appointment as dean of the law school there in 1858 and by Thomas M. Cooley at the University of Michigan Law School after 1859.[106] In each instance, students

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[104]Letter from Joseph Story to "an English correspondent," 15 May 1844, quoted in Warren, History of the Law at Harvard, 2: 84.

[105]Warren, History of the Law at Harvard at 2: 218 cited in Albert J. Harno, Legal Education in the United States (San Francisco: Bancroft-Whitney Co., 1953), 51. Joel Parker (1795-1875) was appointed to replace Simon Greenleaf as Royall Professor of Law at Harvard Law School in November 1847 and held that post until 1867. Emory Washburn (1800-1877) was appointed lecturer in 1855 and Bussey Professor of Law in 1856. He held that post until 1877. Theophilus Parsons (1797-1882) was appointed to replace Joseph Story as Dane Professor of Law in July 1848. Sutherland, The Law at Harvard, 152.

[106]Theodore W. Dwight (1822-1892) was appointed dean of the Columbia Law School in 1858. Stevens, Law School, 23. Thomas M. Cooley (1824-1898) was appointed as one of three professors at the University of Michigan Law School in 1859. He succeeded the school's first dean, James V. Campbell, in 1871. Brown, Law at Michigan, 15. Cooley was also an influential judge and legal writer during this period.

were subjected to an oral question and answer session based upon pre-assigned daily readings. As Dwight himself described the process, "to make the assignment effective, he [the student] is questioned on the topic, mainly to make certain that he has studied the subject and has in a measure comprehended it, and is thus in a position to listen with advantage to expositions."[107] Cooley described the course of instruction at the University of Michigan in the early 1860s as comprised of two lectures of an hour each for five days in each week. The professor who delivered the lectures afterwards questioned the class upon their contents in an examination calculated to draw from the student what he had learned and which was accompanied continuously by explanations, by remarks additional to what had been said before, by the citation of illustrative cases, and by responses to such questions as the students felt inclined to ask.[108] In most cases, reading assignments and lectures were supplemented by Moot Courts, debates in law clubs, and written dissertations that paralleled the disputations and compositions undertaken in the undergraduate program.[109] These exercises allowed students a valuable opportunity to polish their oratorical skills and to master the technical aspects of pleading.

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[107]Theodore Dwight, "Columbia College Law School, New York" Green Bag 1 (1889) at 141, 146 quoted in Robert Stevens, Law School: Legal Education in the United States from the 1850s to the 1980s (Chapel Hill: University of North Carolina Press, 1983), 29-30n. 22.

[108]Thomas M. Cooley, "To Wit: Department of Law, University of Michigan, Class of '94" quoted in Brown, Legal Education at Michigan, 182-3. Among the texts used at Michigan, it is worth noting Blackstone's Commentaries. Other texts included Kent, Commentaries; Theophilus Parsons, The Law of Contracts (1853); John Adams, A Treatise on the Law of Equity: Being a Commentary on the Law as Administered by the Court of Chancery (1850); Vol. 1 of Simon Greenleaf, A Treatise on the Law of Evidence, 2nd ed. (1848); Vol. 1 of Joel P. Bishop, Commentaries on the Law of Criminal Procedure: or, Pleading, Evidence and Practice in Criminal Cases (1856, 1866) in "Regent's Proceedings, 1837-1864" at 879 quoted in Brown, Legal Education of Michigan, 188.

[109]Warren, A History of the American Bar, 362-63. See also Hoar, "Memoir of Horace Gray," 160.

The more than coincidental similarities in the style and content of the justices's college and legal educations presents to the historian of ideas a body of thought the influence of which can be traced within a defined social group. The principles of thought and the moral values they expressed dominated judicial thought in the late nineteenth century.

CHAPTER IV
MORAL PHILOSOPHY: A THEORETICAL SCIENCE

§ I SUMMARY BACKGROUND OF JUDICIAL EDUCATION

If educated Americans in the nineteenth century possessed an ideology or guiding cultural ethic,[1] an important element of it was formulated and presented in the senior Moral Philosophy courses of the antebellum colleges. Donald Meyer and other cultural and intellectual historians of nineteenth-century America have argued that no American educated in the colleges before 1860 escaped the pervasive intellectual and normative influence of the course in Moral Philosophy.[2] For example, James McLachlan has argued that "the basic world view of generation after generation of Americans was moulded by what they learned in college" and that "without a full understanding of the history of the college curriculum and its intellectual underpinnings, much of the history of American thought, culture, and social action is incomprehensible."[3] It is the argument of this thesis that the Christian Enlightenment presented in the antebellum colleges defined the values and attitudes which the

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[1]Mark A. Noll, Princeton and the Republic: The Search for a Christian Enlightenment in the Era of Samuel Stanhope Smith (Princeton: Princeton University Press, 1989), 142.

[2]Donald H. Meyer, The Instructed Conscience: The Shaping of the American National Ethic (Philadelphia: University of Pennsylvania Press, 1972), vii. See also Frederick Rudolph, Curriculum: A History of the American Undergraduate Course of Study since 1636 (San Francisco: Jossey-Bass Publishers, 1977), 90; George Cotkin, Reluctant Modernism: American Thought and Culture, 1880-1900 (New York: Twayne Publishers, 1992), 1-2; Mark A. Noll, "Common Sense Traditions and American Evangelical Thought," American Quarterly 37 (Summer 1985): 218.

[3]James McLachlan, "The American College in the Nineteenth Century: Toward a Reappraisal." Teachers College Record 80 (1978): 300.

members of the United States Supreme Court examined in this study applied to the issues facing the Court following the Civil War.[4]

The eight justices examined in this study all attended Protestant colleges between 1824 and 1856 and were educated during the period in which the classical college curriculum maintained its intellectual influence and the Moral Philosophy course remained the keystone of the classical liberal curriculum. Their common experience is evident from an examination of the outline courses of study from their alma maters, which show that Moral Philosophy comprised an important element of the curriculum in the junior and senior years' studies.[5] This educational and intellectual context suggests that the justices comprised a representative sample of contemporary educated Americans among whom the tenets of religious belief and moral science retained a potent intellectual influence. Each justice received to some degree a systematic presentation of the Christian Enlightenment as it had been transmitted to American educators by the works of the Anglo-Scottish literati and by prominent Scottish-educated pedagogues such as John Witherspoon at Princeton. Within this context, the justices represented less an economic and social elite than an intellectual caste for whom, as President John C. Young of Centre College observed, "religion was not a thing apart from life,"[6] but a system of beliefs colouring every aspect of individual behaviour. Young might have added that, if theology provided

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[4]Noll, Princeton and the Republic, 142.

[5]The Quarterly Register of the American Education Society [title varies] 1 (Apr. 1829): 228-32. This article contains the curricula of twenty colleges in c.1828. See also Louis Franklin Snow, The College Curriculum in the United States (New York: Teachers College, Columbia University, 1907; reprint, New York: AMS Press, 1972); G. Stanley Hall, "On the History of American College Textbooks and Teaching in Ethics, Logic, Psychology, and Allied Subjects," Proceedings of the American Antiquarian Society, new ser., 9 (Apr. 1894): 137-74.

[6]John C. Young, "Address of John C. Young, delivered at his inauguration as President of Centre College, Danville, November 18, 1830 at 6 in a bound volume of pamphlets, Centre College Library, quoted in Walter A. Groves, "Centre College -- the Second Phase, 1830-1857," Filson Club Historical Quarterly 24, No. 4 (Oct. 1950): 320.

the foundation of morality, Moral Philosophy provided the practical framework within which to put Christian faith into effect.

§ II THE MORAL PHILOSOPHY CURRICULUM

The antebellum Moral Philosophy courses, indeed the college curricula generally, displayed a high degree of commonality in their philosophical assumptions, subject matter, and conclusions. The stability in the philosophy and content of the courses and of the longevity of the texts used become apparent in any survey of Moral Philosophy texts read in American colleges during the early national and antebellum periods. One reason for this was the remarkably long tenures of the antebellum college presidents.

At Yale College, President Jeremiah Day (1773-1867) held his office for twenty-nine years between 1817 and 1846, while his successor, Theodore Dwight Woolsey (1801-1889) remained in office until 1871.[7] Similarly, John C. Young (1803-1857) was President of Centre College from 1830 to 1857,[8] Mark Hopkins (1802-1887) presided over Williams College for fifty-seven years between 1830 and 1887,[9] while Eliphalet Nott (1773-1866) oversaw Union College for an astounding sixty-two years between 1804 and 1866.[10]

Examples of American texts from as early as the 1740s such as Samuel Johnson's System of Morality (1752) and as late as the 1860s such as Mark Hopkins'

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[7]George Wilson Pierson, Yale College: An Educational History, 1871-1921 (New Haven: Yale University Press, 1952), Table A, "Presidents," 695.

[8]Groves, "Centre College -- The Second Phase," 315.

[9]Wilson Smith, Professors and Public Ethics: Studies of Northern Moral Philosophers before the Civil War (Ithaca, NY: Cornell University Press, 1956), 5. Mark Hopkins was born at Stockbridge, Massachusetts, and educated at Williams College (1824). Although he acquired a medical degree from the Berkshire Medical College, Hopkins was appointed professor of Moral Philosophy at Williams College in 1830. He assumed the presidency of the college in 1836 and held that post until 1872.

[10]DAB, s.v. "Nott, Eliphalet."

Lectures on Moral Science (1863) suggest that the general outlines of moral science and its supposedly immutable principles were accepted as such by academic moral philosophers, who clearly pursued a course of philosophical refinement rather than one of revisionism.[11] The intellectual do:..inance of Moral Philosophy did not decline rapidly after Charles Darwin's Origin of Species was published in 1859. Academic moral philosophers, natural philosophers, and educated Americans generally sought to reconcile the somewhat contradictory strains of Protestant theology and the new sciences. As George Cotkin has argued, Americans during the Gilded Age were "reluctant modernists," who sought an accommodation between the new sciences, for which Darwin's work served as a powerful metaphor, and traditional beliefs.[12] They were "axiological conservatives" in the sense that they connected the moral and material progress of civilization, personal improvement and happiness, and social stability with the preservation of traditional and, to them, immutable moral values and

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[11]Samuel Johnson, A System of Morality (Boston, 1746) in Elementa Philosophica: Containing Chiefly, Noetica, or Things relating to the Mind or Understanding; and Ethica, or Things relating to the Moral Behaviour (Philadelphia: Benjamin Franklin & D. Hall, 1752; reprint, New York: Kraus Reprint Co., 1969) and Mark Hopkins, Lectures on Moral Science. Delivered before the Lowell Institute, Boston (New York: Sheldon & Co., 1863). G. Stanley Hall's article, "American College Textbooks," contains an extensive list of texts by Scottish philosophers used in Ethics and Moral Philosophy courses during the nineteenth century in American colleges. James Beattie, Elements of Moral Science, 2 vols. (Edinburgh, 1790-93); Hugh Blair, Lectures on Rhetoric (Dublin: Colles, Moncrief et al, 1789); Thomas Brown, Lectures on the Philosophy of the Human Mind, 4 vols. (Edinburgh: James Ballantyne, 1820); Thomas Brown, Observations on the Nature and Tendency of the Doctrine of Mr. Hume, Concerning the Relation of Cause and Effect (Edinburgh, 1804); George Campbell, The Philosophy of Rhetoric (London: Strahan, 1776); Thomas Reid, Essays on the Intellectual Powers of Man (Edinburgh, 1785; 10th ed., Philadelphia, J.H. Butler, 1878); Dugald Stewart, Elements of the Philosophy of the Human Mind, 3 vols. (1792-1827); Stewart, Philosophy of the Active and Moral Powers of Man (1828). Other texts referred to throughout this work were written and published during the period spanned by these two works. See also above Chapter III, 22 and Snow, The College Curriculum, 20.

[12]Cotkin, Reluctant Modernism, 2.

ideas.[13] Victorian Americans remained confident that the natural world and human society evinced order, harmony, and unmistakable signs of providential design and that both were progressing steadily toward the millennium. Creation reflected, in their view, "premeditation, power, wisdom, greatness, prescience, omnipotence, providence."[14] Scientists both moral and physical were hardly alone in this belief. At Oberlin College, Charles Grandison Finney (1792-1875), one of the nineteenth century's most prominent evangelists, advised his students:

> Examine works on anatomy, physiology, natural, mental and moral philosophy and such books as will make you acquainted with the structures and laws of the universe; for all these things declare the wonderful works of God.[15]

Americans in the post-war era adhered to their belief in the revelatory power of science and continued a tradition of intellectual accommodation between science and religion.[16]

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[13]See Donald H. Meyer, The Instructed Conscience: the Shaping of the American National Ethic (Philadelphia: University of Pennsylvania Press, 1972), 29.

[14]Oliver Wendell Holmes, Sr., "Agassiz's Natural History," Atlantic 1 (1858): 326. Oliver Wendell Holmes, Sr. (1809-94) was a noted American poet, essayist, and physician. He was also the father of Oliver Wendell Holmes, Jr. (1841-1935), Associate Justice of the United States Supreme Court. Webster's Encyclopedic Dictionary, s.v. "Holmes, Oliver Wendell."

[15]Charles Grandison Finney quoted in William G. McLoughlin, Modern Revivalism (New York: Ronald Press, 1959) and in Douglas Sloan, "Harmony, Chaos, and Consensus: The American College Curriculum." Teachers College Record 73 (1971): 236.

[16]Robert C. Bannister, Social Darwinism: Science and Myth in Anglo-American Social Thought (Philadelphia: Temple University Press, 1979), 9; T.J. Jackson Lears, No Place of Grace: Antimodernism and the Transformation of American Culture, 1880-1920 (New York: Pantheon Books, 1981), xv; James R. Moore, The Post-Darwinian Controversies: A Study of the Protestant Struggle to Come to Terms with Darwin in Great Britain and America, 1870-1900 (Cambridge: Cambridge University Press, 1979), 15, 78-9; James Turner, Without God, Without Creed: The Origins of Unbelief in America (Baltimore: Johns Hopkins Press, 1985), 29, 56, 95.

Given their view of the natural order as a divine construct, it would have been uncharacteristic for nineteenth-century Americans to abandon the synthesis of knowledge and belief characteristic of the Christian Enlightenment in favour of the moral chaos of Darwinian natural selection. Indeed it was precisely Moral Philosophy's ability to integrate new scientific developments into the existing structure of knowledge that helped to account for its intellectual longevity.

The Moral Philosophy course represented both the apex of the undergraduate curriculum and the one essential piece required to tie the curriculum's disparate subjects into a unified structure of principles, knowledge, and action. It presented a coherent picture of the origin, structure, and purpose of the universe and of man that drew heavily upon Protestant theology and, just as importantly, on the prevailing scientific ethos of the seventeenth-century Scientific Revolution and on the eighteenth-century Enlightenment. The doctrine that the universe operated according to unified and harmonious laws directed toward a higher purpose, which laws could be discovered and understood by human reason aided by revelation, observation, and experiment, suggested that humanity was an integral part of this system and that human nature was amenable to the same methods of investigation. The course was designed therefore to integrate the content of the classical curriculum into a coherent intellectual whole and to demonstrate the relation of theology and moral science to individual and social behaviour and condition.[17]

Moral Philosophy performed, therefore, an important pedagogical function. The lectures, usually delivered by the college president, were not designed to stimulate original thought on the part of the student but, rather, to place the students' general education and knowledge in a religious and ethical context and to provide thereby guidance and inspiration in choosing to live a virtuous life. Moral Philosophy placed a stamp or water-mark, as Henry Adams later put it, upon its graduates and sent "young men into the world with all they needed to make respectable citizens, and

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[17]Meyer, Instructed Conscience, vii, 4.

something of what they wanted to make useful ones."[18] To this end, the course related each subject, whether theology, natural history, natural science, or mathematics, "to higher general laws of nature" and, within that epistemological and ideological framework, functioned as "an integrating principle for the entire curriculum."[19] This attempt "to search out all the truths that relate both to ourselves, to God, and our fellow-creatures, and thence to deduce the several duties that do necessarily result from them" represented the common theme in the Moral Philosophy courses offered in American colleges from the late eighteenth century until well after 1860.[20]

The key issue for moral science lay in determining man's moral duty, the path that must be chosen in order to avoid sin and its evil consequences, and in this regard it was essential to consider the intimate connection between the advancement of happiness, rightly understood, and improvement of the "moral taste and character," or the moral sense and rectitude.[21] As an ethical system, the maxims and laws of moral science were intended to provide a guide to individual and social conduct founded upon the science of nature and of man. "The principles of duty and obligation must be drawn from the nature of man. That is to say, if we can discover how his Maker formed him, or for what he is intended, that certainly is what it [duty] ought to be."[22]

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[18]Henry Adams, The Education of Henry Adams (1918; reprint, Boston: Houghton-Mifflin Co., 1974), 54-5.

[19]Sloan, "Harmony, Chaos, and Consensus," 246-7.

[20]Johnson, A System of Morality (Boston, 1746) in Johnson, Elementa Philosophica and Ethica, 10.

[21]Henry Ware, An Inquiry into the Foundation, Evidences, and Truths of Religion. By Henry Ware, D.D., Late Hollis Professor of Divinity in Harvard College, 2 vols. (Cambridge, MA: John Owen. Boston: John Munroe & Co., 1842), 1: 18-9. Ware (1764-1845) was educated at Harvard College (1785) and was its Hollis Professor of Divinity from 1805 to 1840.

[22]John Witherspoon, An Annotated Edition of Lectures on Moral Philosophy, edited by Jack Scott (Newark: University of Delaware Press, 1982), 66. See also

As late as the mid-1860s, Mark Hopkins, the long-serving president of Williams College under whose tutelage Stephen J. Field had studied in the 1830s, stated that Moral Philosophy explained the theoretical grounds of obligation and duty and taught the practical rules of what men ought to do.[23]

§ III COURSE STRUCTURE AND CONTENT

The lessons of ethical guidance provided by Moral Philosophy were presented to students in a manner that altered little during the antebellum period. For example, the course at Harvard in 1817 continued to follow the pattern laid out in John Alford's bequest in 1789 for a Chair of Natural Religion, Mental Philosophy and Civil Polity. The president's lectures were expected to explicate a series of moral and scientific doctrines and to demonstrate their essential unity.

> To demonstrate the existence of a Deity or first cause, to prove and illustrate his essential attributes, both natural and moral; to evince and explain his providence and government, together with the doctrine of a future state of rewards and punishments; also to deduce and enforce the obligations which man is under to his Maker,... together with the most important duties of social life, resulting from the several relations which men mutually bear to each other;... interspersing the whole with remarks, shewing the coincidence between the doctrines of revelation and the dictates of reason in these important points; and lastly,

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Samuel Stanhope Smith, The Lectures, Corrected and Improved Which Have Been Delivered for a Series of Years in the College of New Jersey on the Subjects of Moral and Political Philosophy, 2 vols. (Trenton: Wilson for Fenton, 1812; reprint, Worcester, MA: American Antiquarian Society, Early American Imprints, 2nd ser., No. 26761), 1: 14. John Witherspoon (1723-1794) was educated at the University of Edinburgh (M.A. 1739, M.Div. 1743). He immigrated to America in 1768, where he took up the presidency of the College of New Jersey. He held that post until 1794, when he was succeeded by Samuel Stanhope Smith. Smith (1750-1819) was a graduate of the college (1769), who was appointed professor of the classics and belles lettres in 1770. He became professor of Moral Philosophy in 1779 and held that post until he assumed the presidency in 1794. Smith remained head of the college until his retirement in 1812.

[23]Mark Hopkins, The Law of Love and Love as Law, or Christian Ethics, with an Appendix Containing Strictures by Dr. McCosh, 6th ed. (New York: Scribner, Armstrong, & Co., 1873), 29.

> notwithstanding this coincidence, to state the absolute necessity and vast utility of a divine revelation.
>
> He shall also read a distinct course of lectures upon that branch of Moral Philosophy, which respects the application of the law of nature to nations, and their relative rights and duties; and also on the absolute necessity of civil government in some form, and the reciprocal rights and duties of magistrates and the people resulting from the social compact; and also on the various forms of government, which have existed..., pointing out their respective advantages and disadvantages.[24]

These elements, so reminiscent of eighteenth-century Scottish Moral Philosophy, remained common features of the antebellum Moral Philosophy courses. The much later reminiscence of Frederick W. Seward on his studies at Union College between 1845 and 1849 recalled the general features of the course. Seward noted that the principle text was Lord Kames' Elements of Criticism (1762);[25] however, he observed that: "Lord Kames himself would have rubbed his eyes in astonishment," at finding his compend of aesthetics so amplified and expanded that "it had become a comprehensive study of human nature, ranging over the whole field of physical, moral, and intellectual philosophy, and applied to practical use in business, politics, and religion."[26]

> We were taught the analysis of human emotions and passions--how to control our own, how to deal with the manifestation of them by others, how to choose the modes of expression and rules for conduct of life that would enable each to use his natural powers to the best advantage. Quotations from authors and illustrations from history and from the Doctor's[27] own experience lent the whole a fascinating interest.[28]

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[24]Hall, "On the History of American College Textbooks," 146. See also Daniel Walker Howe, The Unitarian Conscience: Harvard Moral Philosophy, 1805-1861 (Cambridge, MA: Harvard University Press, 1970), 2-3.

[25]Henry Home, Lord Kames (1696-1792), Scottish jurist, landowner, and philosopher. The reference is to his Elements of Criticism (1762).

[26]Frederick W. Seward, Reminiscence of a War-Time Statesman and Diplomat (New York, 1916) at 65 quoted in George P. Schmidt, The Old Time College President (1930; reprint, New York: AMS, 1970), 137.

[27]Eliphelat Nott, President of Union College.

Francis Wayland's Elements of Moral Science, perhaps the most popular of the moral philosophy texts,[29] was organized in a similar fashion. Dividing his subject into theoretical and practical ethics, Wayland systematically presented the moral quality of actions, the role of the moral sense, the relation between virtue and happiness, and man's various duties to God and man.[30]

Moral science represented the culmination of the classical curriculum's effort to train its students "in all virtuous Habits, and all such useful Knowledge as may render them creditable to their Families and Friends, Ornaments to their Country, and useful to the Public Weal in their Generations."[31] In the pursuit of this goal, moral philosophers cast their nets wide, for if education was that which chiefly made a man, whether it be for good or ill, then not only "direct and positive instruction, but every impression which is received directly, or indirectly, by precept, example, or intercourse with mankind contributed to the formation of character".[32] Echoing earlier American educators such as Samuel Johnson at King's College and John Witherspoon and Samuel Stanhope Smith at Princeton, Francis Wayland stated in 1835 that the purpose of Moral Philosophy was to complete the process of taking in hand a child who "enters the world utterly ignorant and possessed of nothing else than a collection of impulses and capabilities" and through the discipline, cultivation, and

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[28]Seward, Reminiscence at 65 quoted in Schmidt, The Old Time College President, 137.

[29]Merle E. Curti, Human Nature in American Thought: A History (Madison: University of Wisconsin Press, 1980), 137. Curti estimated that two hundred thousand copies of Francis Wayland, Elements of Moral Science (1835) were printed before 1900.

[30]Wayland, Elements of Moral Science, 9-16 passim.

[31]Samuel Johnson, "Advertisement of King's College," quoted in Schmidt, The Old Time College President, 41.

[32]Smith, The Lectures on Moral and Political Philosophy, 1: 99, 2: 69.

knowledge furnished by education to strengthen that individual's character and to enlarge his potential happiness and social usefulness.[33]

In this view, intellectual and moral education was important not only to the individual but to the continued well-being and prosperity of the nation. The inculcation of habits of republican virtue and the determination to preserve personal and civic virtue remained an important component of Moral Philosophy and its sub-discipline, Political Economy, throughout the antebellum period.

> As it is the distinguishing happiness of free governments, that the civil order should be the result of choice, and not necessity, and the common wishes of the people become the laws of the land, their public prosperity, and even existence, very much depends on suitably forming the minds and morals of their citizens. Where the minds of the people in general are viciously disposed and unprincipled, and their conduct disorderly, a free government will be attended with greater confusions, and with evils more horrid than the wild uncultivated state of nature. It can only be happy where the public principles and opinions are properly directed, and their manners regulated. This is an influence beyond the sketch of laws and punishments, and can be claimed only by religion and education.[34]

Francis Wayland, although primarily a moral philosopher, recognized in his writings on Political Economy that education promoted the wise and efficacious application of industry, while raising the tone of moral sentiment and favouring with success diligence, honesty, and fidelity in business life.[35] Without those qualities, success and happiness in business or in life were impossible. For this reason, his texts were designed for the purposes of instruction and Wayland's aim was to be simple, clear, and purely didactic. They were not at all intended to serve as an

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[33]Wayland, The Elements of Moral Science, 291.

[34]"Charter of the University of Georgia, 1785," in Robert and George Watkins, eds., A Digest of the Laws of the State of Georgia... to 1798 (Philadelphia, 1800) at 299-302 reprinted in Richard Hofstadter and Wilson Smith, eds., American Higher Education: A Documentary History, 2 vols. (Chicago: University of Chicago Press, 1961), 1: 150-1.

[35]Wayland, The Elements of Political Economy, 29.

introduction to speculative philosophy. As he, himself, stated: "I have rarely gone into extended discussion, but have contented myself with the attempt to state the moral law, and the reason of it, in as few and as comprehensive terms as possible."[36]

As late as 1894, G. Stanley Hall's study of the antebellum curriculum, while acknowledging the great changes taking place in fin-de-siècle America, with the "unparalleled danger" that "new and diverse models of thought and life, and everything unsettled" might lead to arrested intellectual development among youth, retained many of the assumptions that had underlain the Moral Philosophy course throughout the antebellum period. Recognizing the increasingly cosmopolitan nature of American society and the stresses it imposed on settled ways and ideas as well as the scepticism encouraged by new scientific knowledge and theories, Hall nevertheless reaffirmed the importance to a strong character of the early development in the individual of settled moral principles. "The more unsettled the body of ethnic or national customs, traditions, and beliefs, the more critical does the whole adolescent period become." The challenge facing academic moral philosophers in the Gilded Age had not, in his mind, changed. The development, control, and utilization of the individual's powers was still "the life problem in which all higher pedagogic wisdom culminates."[37]

Academic moral philosophers also demonstrated a high degree of agreement in the philosophical assumptions which underlay the structure and content of the course. These similarities can be partially accounted for by the wide-ranging influence of Yale and Princeton graduates on antebellum educational institutions. In his study of antebellum college presidents, George P. Schmidt found that in seventy-five colleges in operation before 1840 some thirty-six had presidents who had graduated from Yale and another twenty-two the presidents of which had graduated from Princeton. Thus,

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[36]Wayland, The Elements of Moral Science, 3.

[37]Hall, "On the History of American College Text-Books," 154-5.

graduates of these two colleges provided roughly seventy-seven percent of antebellum college presidents.[38]

The pedagogical influence of Yale College was reinforced by the high regard in which its Report of 1828 was held by antebellum educators. The report, written by President Jeremiah Day and Professor James L. Kingsley, provided an explicit statement of the philosophical foundation of antebellum pedagogy and the classical curriculum.[39] Accepting the view that the chief task of education was to strengthen and exercise the mind, its authors wrote that "the two great points to be gained in intellectual culture were discipline and the furniture of the mind; expanding its powers, and storing it with knowledge."[40] The method adopted in this pursuit was to call into daily and vigorous use the intellectual faculties of the student at a time in life when the mind was flexible and susceptible to lasting impressions. President Jeremiah Day affirmed the identity between intellectual improvement, the development of a firm character, and following the path of virtue and duty. "Let me tell you that you cannot expect to raise a permanent and elegant edifice unless you lay a firm foundation, unless you build upon a rock that will not yield to the injuries of time."[41]

The emphasis of educators on a broad and solid familiarity with all branches of knowledge had partially to do with the developmental dictates of faculty

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[38]Schmidt, The Old Time College President, 96.

[39]Reports on the Course of Instruction in Yale College (New Haven, 1828); reprinted as "The Yale Report of 1828," in Hofstadter and Smith, eds., American Higher Education, 1: 275-91. See also "Original Papers in Relation to a Course of Liberal Education," American Journal of Science and Arts 15 (1829): 297-358.

[40]Yale Report of 1828 at 6-7 quoted in Snow, The College Curriculum, 143 and Rudolph, Curriculum: A History, 67-8.

[41]Yale Report of 1828 at 6-7 quoted in Snow, The College Curriculum in the United States, 143 and Frederick Rudolph, Curriculum: A History of the American Undergraduate Course of Study Since 1636 (San Francisco: Jossey-Bass Publishers, 1977), 67-8.

psychology. In order to achieve a balance among the reasoning faculties, it was necessary for the student to pursue a variety of intellectual pursuits so as to exercise not only his reasoning powers but also his imagination, taste, and powers of eloquence. The student must develop both his powers of memory and of speculative reasoning. President Day maintained that Yale's course of instruction maintained a proportion between the different branches of literature and science so as to form in the student a proper balance of character.[42]

The exercise and cultivation of the intellectual powers provided by reading the Greek and Latin classics was considered fundamental to the building of an intellectual edifice of pleasing proportion and strength. Their study served to improve the memory, strengthen the judgement, refine the taste, give discrimination and point to the discerning faculty and to confer habits of attention, reasoning, and analysis.[43]

The retention in the curriculum of the classics and the history which was taught with them performed an important educational function within this conceptual framework. This did not mean, however, that the content of the Moral Philosophy course and the curriculum remained static. Rather, the curriculum aimed to be all-inclusive. "A well-proportioned and superior education" included elements of every branch of knowledge: mathematics, history and antiquities, rhetoric and oratory, the sciences, and natural and moral philosophy.[44] Indeed, as Douglas Sloan has pointed out, the so-called classical curriculum based upon specialized professorships was, itself, a relatively recent educational innovation that represented the efforts of educators in the eighteenth century to integrate the "new [scientific] learning" into the curriculum, with a "modernized" curriculum which largely supplanted the old scholastic knowledge and metaphysics and presented new subjects: natural history,

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[42]Yale Report of 1828 at 6-7 quoted in Rudolph, Curriculum: A History, 68.

[43]Solomon Stoddard, "Inaugaural Address," at Middlebury College, c.1839 quoted in Rudolph, Curriculum: A History, 73.

[44]Yale Report of 1828 at 313 quoted in Snow, The College Curriculum, 143-4.

geography, civil history, mathematics, natural philosophy, rhetoric and belles lettres, moral philosophy.[45]

§ IV METHODOLOGICAL PARALLELS BETWEEN MORAL AND NATURAL SCIENCE

The inclusiveness of the antebellum curriculum reflected an epistemological assumption about the fundamental unity of knowledge and truth. In this regard, Moral Philosophy texts uniformly remarked the parallels between Moral and Natural Philosophy, and academicians viewed these sciences as productive of truths of the same axiomatic nature. Moreover, since both sciences ultimately led the investigator to God as the primal cause, they indeed converged and coalesced into a single system. Philosophy was, then, an empirical investigation of the moral and physical laws of nature guided by human reason independently of the light of scriptural revelation.[46]

The study of the natural and moral worlds systematically proceeded by "a minute and patient observation of the phenomena of nature" and "of the conduct of men, individually, and in their various social relations."[47] Francis Wayland described Ethics, or Moral Philosophy, as "the Science of Moral Law," which expressed "either a mode of existence or an order of sequence."[48] In other words, moral science considered the principles and laws of man's moral duty and prescribed therefrom the manner of virtuous living, and, just as importantly, it depicted the effects of causes in the moral sphere.

Analogous examples of such general laws were found in Natural Philosophy in Newton's laws of motion and the axioms of mathematics and chemistry. In Intellectual Philosophy, an example of the same effect following cause was the act of

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[45]Douglas Sloan, The Scottish Universities and the American College Ideal (New York: Teachers College Press, 1971), 23, 24.

[46]Smith, Lectures, 1: 9, 10. See also Johnson, Elementa, 2: 1.

[47]Smith, Lectures, 1: 10.

[48]Wayland, Elements of Moral Science, 17.

perception created by an impression communicated to the brain by the senses. In philosophical terms, therefore, the meaning of law when referring to the relation of cause and effect in the sphere of moral action was substantially the same as when applied to natural and intellectual phenomena. Laws expressed an established order of sequence, or causal connection, between a specified action and a particular result. In moral terms, this meant voluntary action was inevitably followed by reward or punishment.[49]

John Locke's Essay on Human Understanding (1689) had initiated an effort by eighteenth-century philosophers to apply Bacon's inductive method and Locke's empiricism to the study of man and society and to produce thereby general laws modelled after Newton's laws of gravitation. Moral philosophers, particularly those of the Scottish common-sense school, established the methods and assumptions used to obtain the "new knowledge" as the model of rational explanation in philosophical discourse.[50] All rational inquiry in Natural and Moral Philosophy was conducted in an identical manner according to the scientific method and aimed first at discovering efficient causes and secondly at systematizing knowledge of those causes into general laws. In the opinion of academic moral philosophers such as Francis Bowen, those goals tended towards unity "inasmuch as the higher we proceed in the discovery of causes, we necessarily approximate more and more unity."[51]

At Princeton, Samuel Stanhope Smith declared in his lectures that in any philosophical inquiry, one might proceed, with any reasonable prospect of arriving at

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[49]Wayland, Elements of Moral Science, 17-8.

[50]Meyer, Instructed Conscience, 23.

[51]Francis Bowen, The Metaphysics of Sir William Hamilton: Collected, Arranged, and Abridged for the Use of Colleges and Private Students (Boston: John Allyn, Publisher, 1873), 60. Francis Bowen (1811-1890) was educated at Harvard College (1833). He was a tutor at the college between 1835 and 1839 in the fields of Intellectual Philosophy and Political Economy. In 1843, he became editor of the influential North American Review and held that post for a decade, when he was appointed the Alvord Professor of Natural Religion, Moral Philosophy, and Civil Polity at Harvard College. He held that position until his retirement in 1889.

the truth, only by a careful and extensive induction of facts from which one might hope to attain some acquaintance with the principles and causes of things.[52]

Smith's conviction was echoed later in the century by several important moral philosophers. In 1861 in his compilation of Sir William Hamilton's metaphysics, based largely upon the "Lectures on Metaphysics" written by Hamilton in 1836 for his classes at the University of Edinburgh, Francis Bowen recorded that the proper method of Moral Philosophy was the analysis of cause and effect and the formation through induction, of reasoning from the specific to the general, of "synthetic" general laws.[53] James McCosh, who became president of Princeton in 1868, emphasized the importance of proper methodology in reaching correct conclusions.

> The inquirer proceeds, or should proceed, exactly as he does in every other branch of human investigation. He sets out in search of facts; he arranges and classifies them; and rising from the phenomena which present themselves to their cause, he discovers a cause of all subordinate causes.... Natural theology may be made a science, the truths of which are discovered by induction like the truths of physical science.[54]

Noah Porter wrote at Yale in the late 1880s that these moral laws were "the results of careful observations, subtile and exhaustive analyses, clear and complete definitions, verified inductions, logical deductions" and formed "a consistent, articulated, and finished system."[55]

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[52]Smith, Lectures, I: 9-10.

[53]Bowen, Metaphysics of Sir William Hamilton, 60-6 passim.

[54]James McCosh, The Method of the Divine Government Physical and Moral (New York: Robert Carter & Brothers, 1855), 34-5.

[55]Noah Porter, The Elements of Moral Science: Theoretical and Practical (New York: Charles Scribner;s Sons, 1889), 2. Noah Porter (1811-1892), a prominent Congregational clergyman and educator, was educated at Yale College (1831). In 1846, he was appointed Clark Professor of Moral Philosophy and Metaphysics at the college. In 1871, he succeeded Theodore Dwight Woolsey to the presidency of that institution and held the post until his retirement in 1886.

Academic moral philosophers adopted Locke's empirical epistemology and rejected what they saw as the flawed speculative methodology of René Descartes and the idealistic excesses of George Berkeley and David Hume. Samuel Smith, for instance, followed the example of both the Scottish common-sense school[56] and his American predecessors,[57] and explicitly rejected the rationalistic a priori assumptions of medieval scholasticism and of Cartesian science. He maintained that "the wisdom of modern science has justly excluded from philosophy all hypotheses, by which the operations of nature are attempted to be conjecturally explained." Smith's rules of methodologically correct philosophy stated: "that no law should be admitted on hypothesis but should rest solely on an induction of facts."[58] As Francis Bowen later attributed to Sir William Hamilton, synthesis, or induction, without a previous analysis of facts was baseless. "If the elements furnished by analysis are assumed, and not really discovered,--in other words, if they be hypothetical, the synthesis of these hypothetical elements will constitute only a conjectural theory."[59] In Smith's view, only by following the empirical method could one avoid baseless speculation and conjecture and relieve the mind "from the philosophic delirium of hypothesis."[60]

The idealism of later British empiricists such as David Hume was equally suspect in the opinion of the academic moral philosophers. John Witherspoon's lectures at Princeton in the late eighteenth century attacked idealism and appealed to the "common-sense" philosophy. Witherspoon described "the immaterial system" as "a wild and ridiculous attempt to unsettle the principles of common sense by metaphysical reasoning."[61] His successor, Samuel Stanhope Smith, was equally clear

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[56]Sloan, Scottish Enlightenment and the American College Ideal, 159.

[57]Witherspoon, Lectures, 2: 73. See also Johnson, Elementa, xiv.

[58]Smith, Lectures, 1: 10, 19.

[59]Bowen, Metaphysics of Sir William Hamilton, 62.

[60]Smith, Lectures, 1: 20.

[61]Witherspoon, Lectures, 2: 74.

on the need to avoid unsettling metaphysical principles and drew heavily on common-sense epistemology. The testimony of the senses and of simple perceptions were the only sure foundation for truth and no ulterior evidence was required of the reality, or the nature of the facts, which the senses confirmed.[62]

§ V PROOF OF THE DIVINITY

Despite their emphasis on empirical evidence and inductive reasoning, academic moral philosophers did not abandon all fundamental axioms. Specifically, they retained as an indispensable element of their thought the belief that there was a God, whose existence could be proven by logical demonstration and whose attributes could be known to human reason.[63] All agreed that man was capable of knowing moral truth--either from scriptural revelation or, more importantly, from perception and rational thought. Indeed, many Protestant moral philosophers saw no epistemological difference between these two indisputable sources of truth, because

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[62]Smith, Lectures, 1: 23.

[63]This problem has been approached in a variety of ways, although the teleological proof was often favoured as that most amenable to scientific reasoning. See Peter A. Angeles, Dictionary of Philosophy (Barnes & Noble, 1981), s.v. "cosmological argument," "ontological argument," and "teleological argument." The ontological argument for the existence of God proceeds from an acceptance of the definition of God to His existence. "In the idea of God are combined all the attributes of a perfect being; but necessary existence is one of those attributes; therefore he necessarily exists." The cosmological argument proceeds from observed facts about the universe, such as motion, cause, contingency, and order to the conclusion that God exists as the origin and ground for these facts. Thus, it proceeds from an analysis of the existence of things to the existence of God and from there to one or more of his characteristics. See Samuel Clarke's (1675-1729) Boyle lectures of 1704 and 1705 on the attributes and character of God, published in 1705-6 as A Demonstration of the Being and Attributes of God and A Discourse concerning the Unchangeable Obligations of Natural Religion.). The teleological argument or argument from design proceeds from the assertion that order, purpose, design, and pattern exist in the universe. Order cannot exist without an orderer. Therefore, God exists as the source of that order. The argument from design uses a posteriori induction from empirical and/or moral evidence, i.e., the "scientific" method employed by Joseph Butler (1692-1752) and William Paley (1743-1805). See Howe, The Unitarian Conscience, 79.

revelation, itself, can be accepted only on the evidence of our senses or the testimony given by others of their experiences.

> Reason is natural revelation, whereby the eternal Father of light, the Foundation of all knowledge, communicates to mankind that portion of truth which he has laid within the reach of their natural faculties. Revelation is natural reason enlarged by a new set of discoveries communicated by God immediately, which reason vouches the truth of, by the testimony and proofs it gives that they come from God.[64]

The identification of knowledge attained from revelation and reason was particularly evident in the moral philosophers' discussion of natural religion. Francis Wayland asserted that sense experience and reason alone demonstrated the fundamentals of natural religion. In short, human faculties could establish sufficient grounds of religious belief independently of scriptural accounts. Observation and reflection on the nature of the universe informed philosophers that there was an intelligent and universal First Cause who had a purpose and design in constituting things as they were and that a part of that design was to intimate His will to His creatures. Man was capable of observing the relations in which he was placed and of understanding the effects of his actions upon himself and others. He was capable of learning the broad outlines of the providential design, particularly that part of it which conveyed to him the will of the Creator.[65]

The truths of revealed religion harmonized perfectly with those of natural religion, for revelation taught plainly to all what natural religion taught by inference to the learned.[66] There were no perceived conflicts between these two sources of knowledge concerning the nature of man. Indeed, Moral Philosophy was viewed as an important philosophical support for Christian belief and practice, because the laws

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[64]Locke, An Essay Concerning Human Understanding, 698. Locke also took up this theme in his Reasonableness of Christianity (1695).

[65]Wayland, Elements of Moral Science, 107.

[66]Wayland, Elements of Moral Science, 123.

of moral science describing the moral nature and necessities of man were "decisive evidence" of the truth and authority of revelation.[67]

Following an introductory claim for the moral and social benefits of moral science, academic moral philosophers habitually began their texts with an extended demonstration of the existence of God and a discussion of the divinity's character as it expressed itself in both nature and in Scripture. Taking as their starting point the premise that every effect must have a necessary and adequate cause,[68] the academic moral philosophers adopted the teleological arguments fully developed by Butler and Paley in the eighteenth century.[69] More commonly known as the "argument from design", the teleological position posited that, since every effect must have a cause, and since the universe was characterized by order, unmistakable signs of purpose, design and pattern, there must be an orderer.[70] Moreover, the order and harmony of the universe suggested the existence of one designer, or one mind, at work, since its operation displayed the character of a unified system directed toward some purpose.[71]

The unitary nature of the system lead theologians and moral philosophers to certain conclusions concerning the quality of its operation. They presumed that the

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[67]Porter, Elements of Moral Science, 16.

[68]Ware, Inquiry, 1: 92.

[69]See Joseph Butler, Analogy of Religion Natural and Revealed to the Constitution and Course of Nature, 3rd ed. (London: George Routledge and Sons, 1887; reprint, Charlottesville, VA: Ibis Publishing, n.d.) and William Paley, A View of the Evidences of Christianity, 5th ed., 2 vols. (1st ed., 1794; London, 1796; reprint, Gregg International Publishers, 1970); William Paley, Natural Theology, with an Introduction by Lord Brougham and C. Bell, 4 vols. (1st ed., 1802; London: C. Cox, 1851); William Paley, Moral and Political Philosophy, Vol. 2 of The Complete Works of William Paley, D.D., with extracts from his correspondence, 4 vols. (1st ed., 1785; London, 1825).

[70]Angeles, Dictionary of Philosophy, 290.

[71]Ware, Inquiry, 1: 108-9.

Creator would maintain an interest in the preservation of His work through a continuing moral and physical governance.

> The Creator of all things is also their preserver and governor. He exercises a constant care over the whole creation, extending to everything, the most minute as well as the greatest. This care is evidently exercised upon a plan. Everything is provided for, is part of a scheme or system, in which ends are to be accomplished, for which means are provided. Nothing is fortuitous, nothing is left to chance, nothing stands lone and disconnected from the rest. But everything is related to other things about it, forms a part of the whole, and enters into the general system.[72]

The content of the Moral Philosophy course was therefore based upon both teleological and eschatological assumptions. The former assumed the existence of an omnipotent first cause or deity whose attributes and character assured the unity of truth. The latter assumed that the universe and human life possessed an ordered purpose, that all events, large and small, proceeded according to a preordained plan conceived by the divine mind.

William Paley's analogy of God and a watchmaker was the classic example of the argument from design, read by generations of college students in both his Evidences and his Natural Theology.[73] The passer-by observing a watch upon the

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[72]Ware, Inquiry, 1: 139.

[73]William Paley, Natural Theology, 2: 7. For the enduring influence of Paley's works in the antebellum college curriculum, see Wilson Smith, "William Paley's Theological Utilitarianism in America," William and Mary Quarterly, 3rd ser., 11 (1954): 420. Smith shows that at three of the colleges shown in Tables II-V on pp. 75-78. Paley's works enjoyed long tenure.

	Moral Philosophy	Natural Theology	Evidences
Harvard	1800-47	1853-60	1820-27
Williams	1822-35, 1842-58	1822-45	1822-68
Yale	1791-1845	1824-67	1824-30, 1860-67

ground and, after study, understanding its function must inevitably infer that the watch had a maker; "that there must have existed, at some time, and at some place or other, an artificer or artificers who formed it for the purpose which we find it actually to answer; who comprehends its construction, and designed its use."[74] This analogy could be carried further, for, if there could be no effect without a cause, so, too, there could be no design without a designer.

> There cannot be design without a designer; contrivance, without a contriver; order, without choice; arrangement, without anything capable of arranging; subserviency and relation to a purpose, without that which could intend a purpose; means suitable to an end, without the end ever having been contemplated, or the means accommodated to it. Arrangement, disposition of parts, subserviency of means to an end, relation of instruments to a use, imply the presence of intelligence and mind.[75]

If the character of the universe as it was understood by human beings was such as to suggest a creator and governor operating according to a preconceived plan, it also suggested that such a plan must reflect the nature or character of the governor. Theologians and moral philosophers were in general agreement concerning the character of the divinity. Chief among those characteristics was God's benevolence towards his creations. It was inconceivable that a divine being would exercise wanton cruelty towards his creatures, for the infliction of unnecessary pain was an evil incompatible with the moral attributes of divinity. Paley had observed that "the world abounds with contrivances; and all the contrivances which we are acquainted with, are directed to beneficial purposes."[76] Similar sentiments concerning the beneficence of providence appeared in the works of American moral philosophers. William Smith, Provost of Philadelphia College, taught his students that divine goodness spoke creation into birth with no other view but to communicate to finite natures the greatest possible sum of happiness. To this end, divine power governed the universe

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[74]Paley, Natural Theology, 2: 7.

[75]Paley, Natural Theology, 2: 13.

[76]Paley, Natural Theology, 2: 151.

according to its design, and divine wisdom conducted the eternal scheme so that it would at last unfold itself in a perfectly consistent whole, the object of which was the greatest good of all created beings.[77]

Observation taught that the tendency of God's works was toward the production of happiness and provided further proof of both his essential goodness and his wise adaptation of means to ends.

> In all these varieties of animal existence, what do we find? not only life given and preserved, but an evident care to make that life a blessing. We discover a studied attention to adapt the organization of each to the element it is intended to occupy, and the manner of life to which it is destined; to suit its nature to the objects with which it is surrounded; to accommodate the things about it to its necessities; to furnish a supply of its wants; and... to give it the capacity of receiving pleasure from the constant and ordinary functions of life, and from the most common objects.[78]

Francis Wayland and Francis Bowen expressed similar views of the operation of providence in their mid-century works. In Wayland's view, the world was "the work of a Being of infinite wisdom and infinite benevolence," whose revelation indicated to all the way to prosper in the providential order and to attain earthly and eternal happiness. In his compilation of Hamilton's metaphysics, Bowen wrote that the notion of a God necessitated the attributes of intelligence and "holiness of will" in addition to those of "original and omnipotent power." God was not merely a "blind force" operating upon creation but governed the universe according to both physical and, more importantly, moral laws, "for God is only God inasmuch as he is the Moral Governor of a Moral World."[79] Bowen carried this notion into his own works,

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[77]William Smith, "A Philosophical Meditation and Religious Address to the Supreme Being," in William Smith, The Works of William Smith, D.D., Late Provost of the College and Academy of Philadelphia, 2 vols. (Philadelphia: Maxwell & Fry, 1803; reprint, Worcester, MA: American Antiquarian Society, Early American Imprints, 2nd ser., No. 5074), 1: 153.

[78]Ware, Inquiry, 1: 174, 177.

[79]Bowen, Metaphysics of Sir William Hamilton, 14-5, 19.

including his American Political Economy, where he argued that the "same marks of benevolent design which we are accustomed to admire in the anatomical structure of the human body" were observable in the operation of the economy.[80] Bowen accepted therefore that the economy operated according to fixed natural laws the benevolent and just ends of which were guaranteed by their origin in the author of nature. Moreover, economic laws governed voluntary action and therefore described the relation between economic activities and their particular moral consequences.

The tendency to happiness, the happy adaptation of means to ends, was not confined only to nature but extended to man and his works. In this system, nothing occurred according to chance or mere accident. All was governed by providential natural and moral laws, and every event was the effect of a cause, however remote or unknowable, the origin of which was an act of divine or individual will.

> What is chance? Only a name to cover our ignorance of the cause of any event. Nothing can happen by accident in the government of an infinitely wise being. All events depend upon a certain concatenation of causes. The cast of a die is as certainly governed by the laws of matter and motion as the greatest movements of the planets. What is disorder in the works of nature? A name which our weakness and imperfection presumptuously imputes to the wisest designs of Heaven.[81]

This left the theologian and moral philosopher with the problem of explaining the existence of evil in the sense of something injurious, painful, hurtful, or calamitous or, more generally that which interfered with happiness or general well-being.[82] The difficulty lay in squaring the undeniable existence of evil with the essential moral qualities of God, for, if God intended to inflict needless suffering on his creatures, then he was not beneficent nor, if he was unable to eradicate evil from the universe, was he omnipotent. The doctrine of a divinely ordained system

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[80]Francis Bowen, American Political Economy, Including Strictures on the Management of the Currency and the Finances since 1861 (New York: Charles Scribner & Co., 1870), 17.

[81]Smith, Lectures, 2: 22.

[82]See Angeles, Dictionary of Philosophy, 86-7.

operating according to determinate general laws directed toward providential ends provided an avenue of escape from this moral paradox.

Henry Ware's explanation and solution of the problem revealed a great deal about nineteenth-century moral philosophy. First, Ware differentiated between what he called "natural evil", or suffering, and "moral evil", or sin. In the latter, unhappiness was the result of an individual act of will contrary to the laws of God and nature. In the former, suffering was the transient and "incidental" effect of the operation of general laws upon which the whole order of the universe depended. Thus, a man might be crushed under a falling building or perish in a fall from a precipice because of the operation of the law of gravity. This did not make the law of gravity inherently evil, for the general effect of that law upheld the order of nature. Rather, in Ware's view, it was impossible to avoid the natural suffering attached to the particular consequences of a system operating according to general laws.[83]

In the case of moral evil, or sin, the dictates of justice demanded that the transgressor, whether an individual or a society, suffer the consequences. Violating "the inwrought laws of reward for conformity to relations and fixed laws, but also laws of retribution" brought punishment in proportion to the offense.[84]

§ VI PROGRESS AND THE HEAVENLY CITY

The belief in the progressive improvement of mankind's lot on earth has been noted by historians and, indeed, despite the trials of two world wars and the general repudiation of belief in a providential natural order, faith in historical progress remains an important element in contemporary thought. The belief of nineteenth-century Americans in a providential order and in the material and moral progress of society has often been attributed to an increasingly materialistic society somewhat bedazzled by clearly discernible technological and economic advances. This is

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[83]Ware, Inquiry, 1: 186-91 passim, 201.

[84]Hopkins, Lectures on Moral Science, 232.

understandable given the identification in the twentieth-century of progress and economic growth and the utilitarian view of happiness which emphasizes the maximization of pleasure and the minimization of pain, particularly with reference to materialistic concerns. Hence, John Locke's triumvirate of individual rights, life, liberty, and property[85] and, more misleadingly, Thomas Jefferson's life, liberty, and the pursuit of happiness have been interpreted in a materialistic sense, with the primary emphasis on the conjunction of the possession of property and individual happiness. In the nineteenth century, a theological and moral view of happiness was predominant. In Moral Philosophy, happiness was understood to possess both physical and spiritual elements.

It was true that happiness could mean those pleasurable sensations associated with the satisfaction of one's appetites and desires, with the satisfaction of the needs of one's physical being. This was not, however, man's ultimate end when considered in connection with the prevailing view of divine ends and means. True happiness consisted of striving for and achieving one's highest good through the full exercise of one's faculties. Not only did this produce both individual and public good but acting in conformity with God's will and one's religious duty promoted happiness in the hereafter. To live a life of virtue was to live a life conducive to earthly and spiritual fulfilment. As Henry Ware suggested, if "the general tendency of right conduct was to happiness," then the preservation of life and the pursuit of happiness was best accomplished by "the choice and use of those means, opportunity for the practice of virtue, and scope for the exercise of those faculties by which virtue is tried and improved."[86]

Belief in the benevolent purpose of the deity, as an essential quality of a moral governor, was also related to the post-reformation Christian view of history as proceeding from the Fall in a human progress represented as a gradual ascent towards

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[85]See John Locke, Second Treatise of Government, edited with an introduction by C.B. Macpherson (Indianapolis: Hackett Publishing Co. Inc., 1980), § 137, 17, 123.

[86]Ware, Inquiry, 1: 201, 299.

man's original state in Paradise.[87] In his works, Samuel Stanhope Smith explicitly stated:

> When man was perfect he inhabited the garden of Eden. When man was fallen he was cast out into a savage forest. And the reciprocal influence of civilization and of piety will probably tend to bring on that final and happy order of ages which religion hath predicted.[88]

James McCosh wrote in his Divine Government that the world displayed "indications of intended renovation," during which the disorder and sin which marred and defaced the beautiful, the beneficent, and the good in the world would gradually be effaced "as preparatory to a final judgement and consummation."[89]

In this respect, the progress of the arts and sciences and the cultivation of a virtuous character, particularly the latter, served as the means to two ends. In its practical aspect, progress reflected the eighteenth-century philosophes' belief in the power of science to reorganize knowledge and to alleviate the effects of the biblical Fall through education and social reform. Progress in the arts and sciences represented the advancement toward the millennium, "when the earth shall be full of the knowledge of the Lord, as the waters cover the sea,"[90] the attainment of an earthly paradise, a New Jerusalem or Heavenly City, that was to precede the final judgement and which represented the fulfilment of biblical prophecy and the recovery of that state of man's knowledge and power that had prevailed in Eden. Knowledge was, therefore, not directed towards merely providing for human needs but to religious ends. "The end then of learning is to repair the ruins of our first parents by regaining

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[87]See Charles Webster, The Great Instauration: Science, Medicine, and Reform, 1626-1660 (London: Duckworth, 1975).

[88]Samuel Stanhope Smith to Benjamin Rush, May 10th, 1786. Princeton University Library, MS Collection AM 14429 quoted in Sloan, Scottish Enlightenment and the American College Ideal, 174. See also Adam Ferguson's An Essay on the History of Civil Society (1770; Duncan Forbes (ed.), Edinburgh University Press, 1966) at 242 noted in Sloan, Scottish Englightenment, 174n. 77.

[89]McCosh, The Method of the Divine Government, 79, 83.

[90]Isaiah 11: 9.

to know God aright, and out of the knowledge to love him, to imitate him, to be like him, as we may the nearest by possessing our souls of true virtue, which being united to the heavenly grace of faith makes up the highest perfection."[91] Improvement in knowledge and in moral character fulfilled a theological and moral purpose in preparing the individual for the afterlife and final judgement. It was this combination of millenialism and faith in the social and moral benefits which accompanied the improvement of knowledge that led eighteenth and nineteenth thinkers to emphasize the moral qualities inherent in the improvements conferred by civilization.

The theoretical portion of antebellum Moral Philosophy presented to educated Americans a series of fundamental axioms. The world and every creature in it was a creation of a divine power which continued to exercise its governance over its work through the operation of natural laws. This beneficent design was evident, as Henry Ware pointed out, in the admirable adjustment of the nature of man to the world in which he was placed and the objects by which he was surrounded. The design was, moreover, progressive, and history revealed that mankind "had been gradually ascending in the scale of intellectual and moral perfection."[92] The moral and physical laws that governed this process were discoverable through the use of reason and the scientific method as well as from revelation, so that attaining happiness and living virtuously consisted of conforming the behaviour of individuals and of society to the dictates of those prescriptions. The second component of Moral Philosophy therefore consisted of the practical application of these rules to moral actions.

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[91]John Milton, Of Education (1644) at 1 quoted in Webster, The Great Instauration, 100.

[92]Ware, Inquiry, 1: 243.

CHAPTER V

MORAL PHILOSOPHY: A PRACTICAL SCIENCE

§ I DUTY AND VIRTUE

The concern of moral philosophers for the practical application of moral laws represented a form of "moral realism"[1] in which their empirical methodology lead them to reject the impractical and purely visionary. While they accepted the doctrine that universal truths and values existed outside the mind in an independent and unitary reality, their belief that Moral Philosophy must account for the outcome of moral action lead them to conceive of moral science as both theoretical and practical. If the end of man was perfection and happiness, it was the duty of theologians, moral philosophers, and, as the wielders of society's physical sanctions against immoral behaviour, of jurists to communicate the best means of achieving that happiness.

Moral philosophers applied a comprehensive metaphysical and philosophical system to the scientific study of human nature in an effort not only to establish man's place as a created being in the providential design of nature but also to provide a scientific or systematic body of laws describing the individual's relations with himself, with other individuals, with society at large, and, most importantly, with God. Moral science, when carried out by empirical observation, critical analysis, and inductive generalization "showed that cause and effect, balance and harmony, and verifiable laws governed human nature no less than the rest of the Newtonian universe."[2] From

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[1]Donald H. Meyer, The Instructed Conscience: The Shaping of the American National Ethic (Philadelphia: University of Pennsylvania Press, 1972), 47.

[2]Merle E. Curti, Human Nature in American Thought: A History (Madison: University of Wisconsin Press, 1980), 71.

these rules one might therefore form a rational judgement of man's intended end and deduce his moral duty,[3] while adherence to the rules thus set out was the surest way for the individual and society to attain the happiness for which the Creator clearly intended them.

Moral laws fulfilled more than a normative purpose in man's corporeal life; they possessed an important spiritual element. The first point of moral science was to establish man's relation to God and his duty and obligation to his creator. As a creation of the deity, man possessed a duty toward his creator and, indeed, inquiries into the truth of religion such as Henry Ware's were concerned with establishing the Scriptural and reasonable grounds for "that obligation under which an intelligent and moral being lies to the author of its existence."[4] Ware's readers were enjoined, as Moses had likewise enjoined the Israelites, to heed the words of Scripture and to set their hearts unto its words.[5] Duty obliged man to act in conformity with God's moral government of the world as its laws were communicated by revelation and the light of reason. Duty reflected the ideal of what man ought to be and to do in order to make himself in the perfect image of his creator.[6]

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[3]John Witherspoon, An Annotated Edition of Lectures on Moral Philosophy, edited by Jack Scott (Newark: University of Delaware Press, 1982), 66. Samuel Stanhope Smith, The Lectures Corrected and Improved Which Have Been Delivered for a Series of Years in the College of New Jersey on the Subjects of Moral and Political Philosophy, 2 vols. (Trenton: Wilson for Fenton, 1812; reprint, Worcester, MA: American Antiquarian Society, Early American Imprints, 2nd series, No. 26761), 1: 13-8 passim.

[4]Henry Ware, An Inquiry into the Foundation, Evidences, and Truths of Religion by Henry Ware, D.D., Late Hollis Professor of Divinity in Harvard College, 2 vols. (Cambridge, MA: John Owen. Boston: John Munroe & Co., 1842), 1: 1.

[5]Deuteronomy 32: 46-7. This passage is paraphrased in Ware, Inquiry, 1: 3.

[6]Witherspoon, Lectures, 66; Noah Porter, The Elements of Moral Science: Theoretical and Practical (New York: Charles Scribner's Sons, 1889), 3; Mark Hopkins, Lectures on Moral Science. Delivered before the Lowell Institute, Boston (New York: Sheldon & Co., 1863), 66.

Man had been created a moral agent and "placed in a state of trial suited to the infant state of his being and faculties." In this state of trial, virtue was "not to be an original condition but an attainment; not a gift, but an acquisition." Virtue was the "consequence of the right use of the faculties, which had been implanted in his nature," and it was therefore his duty to use those powers and faculties in accord with their design.[7] However, as Ware indicated and warned, man's moral agency allowed to him the unfettered exercise of free will and the free choice, conscious or unconscious, between virtue and evil. This unrestricted exercise of free will and the use of his powers was part of the providential design.

> He has passions, appetites and affections, which fit him for the condition in which he is placed; all of them suited to the objects about him, to his various relations, and to the sphere of action for which he is intended; all of them necessary to his perfection and happiness...;--at the same time each of them is equally capable of taking a right or wrong direction, and of conducting him to virtue and happiness, or to vice and misery. This is true of every passion, every appetite, every affection. Each of them, rightly directed, and kept under due restraint, has a tendency to intellectual and moral perfection, and each, by excess or wrong direction, leads to corruption and degradation.

In practical terms, the exercise of free will meant that each individual must be allowed the opportunity to choose good or evil in order to achieve his full potential as a morally accountable being. Thus, free will and the exercise of choice lay at the heart of moral theory. The acceptance by moral philosophers of the doctrines of man's state of trial and moral accountability was accompanied by a recognition of the natural effects and the penal consequences of sin.[8] To choose rightly was essential in a system where the penal effects of sin took place in the natural course of things. The general tendency of moral evil was to produce natural evil, or suffering, and in that to find its remedy. Conversely, the general tendency of right conduct was the production of happiness. "These tendencies of virtue and vice.... are the appointment

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[7]Ware, Inquiry, 2: 177-9.

[8]Ware, Inquiry, 2: 196, 195.

of heaven, and discover to us... that the Author of nature and the Moral Governor of the world is the friend of virtue and the punisher of wickedness.[9]

Living virtuously according to the moral laws delineated by the light of nature and in Scripture was to live according to one's nature and in conformity with the divine purpose expressed in the character of that design.[10] This was a durable theme in the works of the academic moral philosophers. During the 1750s, Samuel Johnson, wrote that "ETHICS was the Art of living happily, by the right Knowledge of ourselves, and the Practice of Virtue: Our Happiness being the End, and Knowledge and Virtue, the Means to that End."[11] Moral philosophers in the nineteenth century retained this theme. In his Elements of Moral Science, Noah Porter stated that man's highest end, as a "free and reflecting being who knows the end of his living self by a direct and conscious insight," was "the voluntary choice of the highest natural good possible to man, as known to himself, and by himself, and interpreted as the end of his existence." In Porter's view, the authority of such a law was irresistible, for not only was it discerned by reason as arising from man's nature but was reinforced

> with widening and heightened authority, as man's relations to his fellows, to the physical universe, and to God, are discovered, and the ends for which he exists are seen to include other beings in the rational harmony and order, and the consequent well-being, of the universe.[12]

§ II FACULTY PSYCHOLOGY

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[9]Ware, Inquiry, 1: 200-1.

[10]Smith, Lectures, 2: 69.

[11]Samuel Johnson, Elementa Philosophica: Containing Chiefly, Noetica, or Things Relating to the Mind or Understanding; and Ethica, or Things Relating to the Moral Behavior (Philadelphia: Ben Franklin & D. Hall, 1752; reprint, New York: Kraus Reprint Co., 1969), xiii-xiv.

[12]Noah Porter, The Elements of Moral Science, 144. See also Mark Hopkins, The Law of Love and Love as a Law, or Christian Ethics, with an Appendix Containing Strictures by Dr. McCosh, 6th ed. (New York: Scribner, Armstrong & Co., 1873), vii-viii.

The discussion of human nature in the antebellum Moral Philosophy courses took place within the intellectual and pedagogical context of the "faculty psychology," developed during the course of the eighteenth century by British moral philosophers. The doctrine originating in John Locke's Essay Concerning Human Understanding (1690) that the mind was composed of a series of faculties or powers remained a constant feature of Moral Philosophy lectures whatever the varying emphases professors chose to place upon the respective roles of the appetites, sensibilities, and intellect in determining behaviour and the moral obligations of duty and virtue.

Moral philosophers agreed that human nature was unique in creation and that this uniqueness placed man at the head of a great chain of being which gradually ascended from inert matter through "the several forms of vegetable, animal, and intellectual life" to that "high intelligence and power of moral perception which we find in ourselves."[13] Intelligence, free will, and, as a result of the first two, moral agency were the features that distinguished man from all other animal life.

Within this context, man was viewed as a being composed of both body and spirit.[14] Both religious doctrine and faculty psychology accepted the fundamental division between the mind and the body. The immaterial soul or the mind existed independently of the body. This point was an axiom of Christian belief and formed the foundation for Christian morality. Moreover, in response to the perception that Natural Philosophy and the Enlightenment had promoted skepticism and doubt regarding the Christian doctrines of an immanent deity and the immortality of the soul, Christian apologists in the eighteenth century had reinforced the distinction between the soul and the body.

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[13]Ware, Inquiry, 1: 64, 4-5. See also Hopkins, Lectures on Moral Science, 66.

[14]Witherspoon, Lectures, 70; Smith, Lectures, 1: 126-34 passim. See also Joseph Butler, The Analogy of Religion Natural and Revealed to the Constitution of Nature, 3rd ed. (London: George Routledge and Sons, 1887; reprint, Charlottesville, VA: Ibis Publishing, n.d.), whose argument on the immortality of the soul was followed closely by both Witherspoon and Smith.

American moral philosophers drew heavily in the nineteenth century on the most pre-eminent of those writers, Joseph Butler and William Paley. In his discussion of the existence and immortality of the soul, Butler wrote:

> The simplicity and absolute oneness of a living agent.... lead us to conclude certainly that our gross organized bodies, with which we perceive the objects of sense and with which we act, are no part of ourselves; and therefore show us that we have no reason to believe their destruction to be ours.[15]

Butler argued that consciousness did not depend wholly upon sensation but also upon the power of reflection, which was capable of operating independently of the senses and of material reality.[16] As Lord Brougham later wrote in an introduction to the works of William Paley, another author favoured in American Moral Philosophy courses:

> We know the existence of the mind by our consciousness of or reflection on what passes within us, and our own existence as a sentient and thinking being implies the existence of the mind which has sense and thought. To know, therefore, that we are, and that we think, implies a knowledge of the soul's existence.[17]

Based upon the character of the divinity demonstrated by both scriptural and rational proofs, the academic moral philosophers asserted that God had designed the happiness of humanity and had disposed the order of the world in a manner most consistent with the nature of man and the character of human faculties toward the attainment of that end. The system of instincts, propensities, and affections composing human nature "connected them at once with our own happiness, and the best interests of society, and mankind."[18]

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[15]Butler, Analogy of Religion, 15.

[16]Butler, Analogy of Religion, 21-2. See also Smith, Lectures, 1: 128.

[17]Henry, Lord Brougham, Introduction to Natural Theology, by William Paley, 4 vols., (London: C. Cox, 1851), 1: 83.

[18]Smith, Lectures, 1: 269-70. See also Francis Wayland, The Elements of Moral Science (1835; reprint, Cambridge, MA: Harvard University Press, 1963), 57.

Christian theology stated that man's highest end and greatest happiness lay in the spiritual realm; however, academic moral philosophers readily acknowledged that man was not strictly a spiritual being. Indeed, the division into intellect and body represented the first mechanism for classifying the constituent parts of the human frame. No system of expository and normative laws could be successful that ignored the dependence of the intellect upon the physical being. The two were inseparably intertwined, so that the body and soul had a powerful reciprocal influence upon one another.[19] Insofar as the body was "actuated by sensual propensities and animal wants," man was "subjected to the laws of the external universe" and a "slave of necessity."[20] Man's "animal and sensitive life" was "conditional for his rational life," and, in this regard, moral philosophers regarded man as a being of active powers. At the same time, however, man was not simply an organism motivated only by appetites and instincts the end of which was necessitated "by an instinctive force working from without, or from behind."[21] Man possessed intelligence. He was conscious of himself as an intelligence served by faculties "not comprised in the chain of physical necessity." Moreover, his intelligence revealed "prescriptive principles of action, absolute and universal" in the moral laws and "a liberty capable of carrying that law into effect." Intellect freed man to determine his own end "in opposition to the solicitations, the impulsions, of his material nature."[22] For man, as Mark Hopkins observed, "the pillar of cloud and fire puts itself in front, and he follows it or not, as he chooses.[23]

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[19]Witherspoon, Lectures, 70.

[20]Francis Bowen, The Metaphysics of Sir William Hamilton: Collected, Arranged, and Abridged for the Use of Colleges and Private Students (Boston: John Allyn, Publisher, 1873), 16-7.

[21]Hopkins, Lectures on Moral Science, 66.

[22]Bowen, The Metaphysics of Sir William Hamilton, 16-7.

[23]Hopkins, Lectures on Moral Science, 66. See Exodus 13: 21.

Moral Philosophy was properly concerned with understanding the operation of this compound system and the proper regulation of the actions arising from it. Its complex interconnections might best be illustrated by specific examples. The power or faculty of sensation included the five physical senses through which the individual experienced the external world and which as a matter of course provided the individual with the bulk of his perceptions. However, just as there existed a division between body and intellect, so too was sensation broadened by moralists to include higher perceptions of a purely intellectual and spiritual nature. Thus, sensation also came to be associated during the course of the eighteenth century with the aesthetic and moral senses propounded by the Anglo-Scottish moralists.

Sensation produced either pleasure or pain as the circumstances determined, and the desire for pleasure and the aversion to pain represented a fundamental rule of human behaviour which applied to both physical and intellectual perceptions. The stimulation of the external senses led man "to desire what is pleasing and to avoid what is unpleasant or disgusting." Moreover, the "pleasures of the imagination," such as the sense of beauty or the sense of harmony, were as much principles of human action as the external senses, although by reason of their relation to pure intellect were "evidently more excellent" and "more noble" than purely physical pleasures. Passing one's hand through a flame produced pain and an immediate reaction but doing what was dictated by the moral sense, that "sense and perception of moral excellence, and our obligation to conform ourselves to it in our conduct," provided a noble, pure, and durable pleasure.[24]

At the most basic level, man was therefore a creature of sensation; however, sensation derived its power over the human frame, not only through immediate instinctive reactions to external stimuli but also from the "active principles" engendered by the prolonged effect of sensation upon the intellect. Faculty psychology therefore also took into account the presence in man of an intelligence

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[24]Witherspoon, Lectures, 77-9 passim. See also Smith, Lectures, 1: 144, 187, 190.

designed to discover natural and moral laws and to apply those rules to particular cases.[25]

Attributing to man intelligence and power of reason did not fully describe the human character, for perception and reflection alone were products of sensation and essentially passive elements of the human frame. The intellect was, however, also composed of active elements. The desires, affections, and habits required translation into action. This was the function of the will and volition.[26] Samuel Stanhope Smith distilled the nineteenth-century view of the individual will when he identified it as "that power of the soul, and volition the exercise of that power which is the immediate cause of action in man" and described it as perfectly free in its operation.[27] The individual's appetites, propensities, affections, and the other active principles of human nature might stimulate the mind to act; however, every man was consciously free to act in all instances, when he was not under the impulse of some violent passion or the commanding influence of some inveterate habit.[28]

Moral philosophers constructed the moral edifice of nineteenth-century America by accepting as given from both scriptural evidence and from the analogy of nature that, as Joseph Butler had argued, "in the present state, all which we enjoy, and a great part of what we suffer, is put in our own power." Every individual was accountable for his actions, for they were deemed the products of conscious choice. Each individuals' pleasure and pain was the product of voluntaristic moral actions, and it was therefore within the power of the individual in exercising his will to determine whether he would enjoy pleasure or suffer pain as a result of his of actions. As parts of the providential order, pleasure and pain were viewed as the necessary consequences of man's probationary status and the free exertion of his will. Since

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[25]Smith, Lectures, 1: 273-4.

[26]Hopkins, Lectures on Moral Science, 93, 148.

[27]Smith, Lectures, 1: 275, 292.

[28]Smith, Lectures, 1: 277.

man had been endowed by the author of nature with the capacity to foresee the consequences of his actions,[29] moral philosophers assumed that they were designed to induce man to conform his will to that of his creator. Within this context of moral voluntarism and individual accountability, individual happiness was the product of a self-governing individual exerting all of his powers and acting responsibly in all matters in accord with the promptings of the moral faculty and reason.[30]

Man's obligation or duty to behave in a moral fashion, or conformably to the law of his nature, stemmed from his status as a free, created being, with divinely ordained purposes. His actions possessed a moral character, because they contained the element of choice. Reason and volition gave him the freedom to act rightly or wrongly and this was the crucial element in his moral agency. "No moral action is conceivable but where room is left for choice, and where in some degree or other, it depends upon our spontaneity." In other words, moral action required the freedom to act according to the prompting of the will. There could be no moral action where there was an element of compulsion. Moreover, in man's state of trial "all actions are cognizable," and there was no action not subject to reward or punishment.[31] "There is no situation in which a rational being is placed... which affords not room for moral agency,--for the acquisition and display of voluntary qualities, good and bad."[32] Wherever could be found "choice, preference, or resolution" there was an act

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[29]Butler, Analogy of Religion, 29.

[30]Wayland, Elements of Moral Science, 182.

[31]John Daniel Gros, Natural Principles of Rectitude, for the Conduct of Man in All States and Situations of Life: Demonstrated and Explained in a Systematic Treatise on Moral Philosophy (New York: T. and J. Swards, 1795; reprint, Worcester, MA: American Antiquarian Society, Early American Imprints, No. 28775), 157, 68.

[32]William Paley, Natural Theology with an Introduction by Lord Brougham and C. Bell. 4 vols. (London: C. Cox, 1851), 3: 190-1.

of will.[33] Within this scheme, depriving the individual of the opportunity to exercise his will in the pursuit of happiness would subvert the expressed will of the divinity and the attainment of man's ultimate end. Where moral freedom did not exist, there was no room for the exercise of virtue. "You may have order form and regularity, as you may from the tides or the trade-winds, but you put an end to his moral character, to virtue, to merit, to accountableness, to the use indeed of reason."[34]

The system of faculty psychology presented by antebellum Moral Philosophy complemented the metaphysical and religious components of man's moral obligations and duties, of the theological implications of free will and its connection to character and behaviour, and to the influence of these on the well-being of the individual and of society. Given their fundamental assumptions concerning the nature of creation and the character of God and of man, moral philosophers stressed the necessity of the correct regulation of the faculties as the foundation of moral rectitude and a life of virtue. They emphasized above all the refinement of the moral sensibility, the internal perception of right and wrong, which could be exercised and improved only to the extent that duty was accepted and performed.[35] Morally right action and good character required the two essential elements of a firm will and righteousness, the willingness to carry thought into conscious deed.[36]

§ III PRUDENTIAL SELF-REGARD AND CHARACTER

Happiness depended upon careful self-government conducted according to a prudential self-regard or self-interest and close and unfailing attention to the hierarchy of ends and means prescribed by natural and moral laws. In rendering his state as perfect as possible, which meant principally the promotion of his own happiness with

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[33]James McCosh, The Method of the Divine Government, Physical and Moral (New York: Robert Carter & Brothers, 1855), 317. See also Paley, Natural Theology, 3: 190-1.

[34]Paley, Natural Theology, 3: 179.

[35]Hopkins, Lectures on Moral Science, 31-2.

[36]McCosh, Method of the Divine Government, 314.

the means provided by providence, the individual pursued a course of virtue.[37] The pursuit of happiness, that "due concern for one's own interest or happiness, and a reasonable endeavour to secure and promote it," which Butler associated with the meaning of the word prudence, was considered a virtue, while the contrary, imprudence, was thought faulty and blameable.[38]

In a mental universe where every action was the product of individual volition, subject to general natural and moral laws, and ultimately judged in a personal accounting, "the care of each man, and of those immediately dependent upon him, is committed to his own vigilance, industry, and prudence."[39] Prudence demanded that "it is a prime part of our duty to ourselves, to guard against any thing that may be hurtful to our moral character, or religious hopes." It required that the individual employ "all proper methods to preserve and acquire the goods of both mind and body" and "to acquire knowledge, to preserve health, reputation, possessions."[40] As Samuel Stanhope Smith observed, prudence meant "controlling our general conduct within a certain sphere" and "resisting our inclinations, of correcting any habits of thinking and acting which may be in opposition to our duty, interest, or pleasure; and in a word, of changing our moral dispositions."[41] To that end, providence provided for a variety of instincts, propensities, and affections and connected them with both individual happiness and the best interests of society. Indulged in proper measure and proportion, man's faculties and powers were both lawful and virtuous principles of action. Their free exertion became sinful and vicious only when they defeated through excess nature's design and endangered the safety and happiness of the individual or interfered thereby with the exercise of reasonable self-love by other free

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[37]Gros, Natural Principles of Rectitude, 126. See also Smith, Lectures, 1: 269.

[38]Butler, Analogy of Religion, 298.

[39]Smith, Lectures, 1: 269.

[40]Witherspoon, Lectures, 115. See also Smith, Lectures, 1: 269-70.

[41]Smith, Lectures, 1: 293-4.

and prudent individuals.[42] Immorality, or vice, was uniformly associated with either a lack of will, an inability to attain self-command, or, worse, a perversion of the will, the deliberate choice of vice over virtue to the detriment of oneself and others.

In the positive sense, prudential self-interest and the pursuit of happiness contributed to personal industry and the habitual exercise of the faculties of the body and the mind. Nature and the activity it dictated required economic activities, which were an integral part of the providential order. The material world was designed, according to Francis Wayland's textbook on Political Economy, "with qualities and powers" suited to the gratification of human needs and desires. In the context of providential design, self-interest and the accumulation of the comforts of life were subjected to determinate natural and moral laws, and "every man is morally bound to use all the industry and foresight which he can employ for the supply of immediate and pressing wants."[43]

The simplest desires or wants might be satisfied by only minimal exertion; however, the satisfaction of desires stemming from the affections and propensities of the individual and the creation of a worldly estate required both the labour of the body and the mind. It required the use of foresight and skill founded upon hard-won experience. Hence, one's personal duties included the development and use of sagacity and skill in addition to labour.[44] Only by combining the "contriving mind" with "muscular force" was nature made to yield the comforts and conveniences which were the fruit of industry and the symbols of civilization.[45]

Thus, although self-interest and the desires were acknowledged as the primary motives for human action, effectively exercising personal industry and successfully

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[42]Smith, Lectures, 1: 270. See also Ware, Inquiry, 1: 200-1.

[43]Francis Wayland, Elements of Political Economy (1837; New York: Sheldon & Co., 1886), 4-5; Porter, The Elements of Moral Science, 363.

[44]Porter, The Elements of Moral Science, 363-4.

[45]Wayland, Elements of Political Economy, 5.

acquiring worldly comforts required more than brute strength or even native intelligence. It demanded the development and exercise of personal character--the prudent control by the moral sense and the will of the demand by the appetites and desires for immediate gratification--in the pursuit of a greater but deferred individual or social benefit. In this sense, character represented not only "the present intellectual, social, and moral condition of an individual" but also "his powers for attaining to a better state in the future."[46]

In the sense that it "comprehends his actual acquisitions, his capacities, his habits, his tendencies, his moral feelings, and everything which enters into a man's state,"[47] character and the virtues which gave it substance possessed both voluntary and involuntary elements. The involuntary elements were passive and included natural endowments, social environment, and sensibilities. More important were the voluntary elements such as the affections and habits. These were "always active and constantly formative and controlling," and, because they were dependent upon the will and volition, they "give the moral complexion and moral importance to all the special activities of thought and feeling and deed." These propensities of thought, feeling, and action reflected individual character and were judged morally right or wrong insofar as they expressed permanent states or repeated acts of the will.[48] Thus, Francis Wayland's observation that character was the embodiment of individual self-command reflected the views of his contemporaries that it was "the one thing needful" to transform the individual's moral status and prospects for happiness.

> The character is right or wrong, inasmuch as it is its [the will's] supreme voluntary activity, its controlling principle or motive, which

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[46]Wayland, Elements of Moral Science, 238.

[47]Wayland, Elements of Moral Science, 238.

[48]Porter, The Elements of Moral Science, 104-5, 108.

> distinguishes the man, and manifests itself in every one of his special activities, whether of volition or feeling, of thought or bodily act.[49]

Character, the qualities of judgement, discretion, and prudence, was intimately connected with morals, and "necessary to the successful issue of every important design." True virtue always aimed to cultivate it, for a man deficient in character seldom acted to any great or useful purpose. Good character and virtue were therefore identified with the rule of reason over man's physical nature. Thus, "by cultivating a vigorous command of will," man gained power over his "lower propensities" and passions.[50] In this view, immoral acts reflected a loss of self-control and a weakening of "the practical supremacy of conscience."[51]

§ IV POLITICAL ECONOMY

In this vein, moral philosophers viewed worldly success as an indication of personal virtue and of an individual whose native abilities and intelligence had been directed by a fully developed character most in conformity to the laws of nature, morality, and society. The nineteenth-century's understanding of the sources of human motivation, of the operation of faculty psychology, and of the role of the will and of character in determining both individual behaviour and fortune attached to these doctrines broader consequences for society at large. Moral philosophers regarded it as axiomatic that man was a being whose social, political, and economic relations were expressions of his fundamental nature and indicative of society's collective moral status. Moreover, their belief in benevolent providence and the moral government of God lead them to accept as fundamental social principles the harmony of interests and the unbreakable connection between moral standards and well-being of both the individual and of society.[52]

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[49]See Luke 10: 42. Wayland, Elements of Moral Science, 238. See also Hopkins, The Law of Love and Love as Law, 213.

[50]Smith, Lectures, 2: 98, 1: 175.

[51]Wayland, Elements of Moral Science, 66.

[52]Meyer, The Instructed Conscience, 103.

That man had been created as a social being, there was no doubt. His design, as exhibited particularly in his social affections and moral sense, was uniquely adapted to social life. Experience taught that few individuals renounced the benefits of membership in a well-ordered society, for men were "constituted mutually dependent and cooperative" and, by necessity, lived in society.[53] Man's mutual dependence upon others and the need for cooperative endeavours suggested to the rational observer that "civil society is an institution of God" and that "it is the will of God that man should live in society."[54]

As a scientific study of the human condition, Moral Philosophy took into account the role of the individual as a member of a larger group, whether that group might be a family or a nation, for "the larger part of the happiness of the individual depends upon society." Moral philosophers recognized that the relation of man and society meant that "whatever would destroy society... would destroy the happiness of man as an individual." Thus, although every conscious act was a moral act for which each individual was personally accountable, the constitution of nature and society was such that "no benefit or injury can be, in its nature, individual."[55]

Citing Christ's "law of love,"[56] from the Biblical passage, "Thou shalt love thy neighbour as thyself,"[57] Noah Porter argued that happiness was more than a matter of pursuing personal self-interest, with no regard for the well-being of others. "As a social being, he [man] can attain the highest good possible for himself, only as he

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[53]Wayland, Elements of Political Economy, 3.

[54]Wayland, Elements of Moral Science, 311. See also Witherspoon, Lectures, 122.

[55]Wayland, Elements of Moral Science, 57. See also Porter, The Elements of Moral Science, 375.

[56]There are numerous references to this law in the Moral Philosophy texts. The title of Mark Hopkins' The Law of Love and Love as a Law was a direct reference to the passages in Scripture.

[57]Leviticus 19: 18; Matthew 19: 19.

benevolently desires and acts for the highest good of others." In Porter's view, each individual existed for the same ends and taken together they "constitute a social whole in the adaptations of their nature to a moral organism, under the economy of reason and of God." In an "orderly or rationally constituted system or society," this harmony of interests meant that "the best good of each is conducive to and compatible with the best good of all together."[58]

Moral philosophers retained the social affections and the moral sense in their economic and political analysis of society. In the nineteenth century, homo economicus did not represent the complete individual but an abstraction designed for the purpose of hypothesizing and experimentation. As the syllabi of the Moral Philosophy courses indicate, Political Economy remained in the nineteenth century an integral part of a larger moral formulation. Even to those moral philosophers most interested in economic questions,[59] individual and collective economic behaviour depicted a particular application of Moral Philosophy's formulation of theology and faculty psychology. Political Economy was, therefore, "properly considered as one of the Moral Sciences," for the deduction of the general laws governing the acquisition of wealth depended, like those of ethics, on the character of human nature.[60] In this view of Political Economy, what was important to academic moral philosophers was not the glorification of capitalist society but the expression in moral terms of the

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[58]Porter, Elements of Moral Science, 375, 148.

[59]See, for example, Adam Smith, Francis Bowen, Francis Wayland, Richard Whately. Other examples are Samuel Newman (1797-1842), who was educated at Harvard College (1816) and Andover Theological Seminary (1817). Newman was appointed professor of classical languages at Bowdoin College in 1818. In 1824, he became professor of Rhetoric and Oratory and a lecturer on Civil Polity and Political Economy. Newman produced a textbook for Political Economy as early as 1835 (Elements of Political Economy (Andover, 1835)) but was better known for his Practical System of Rhetoric or the Principals and Rules of Style (1827), which went through some sixty editions in the U.S.

[60]Francis Bowen, The Principles of Political Economy (Boston: Little, Brown & Co., 1856), 2-3.

economic realities of commercial society and the demonstration that the laissez-faire economic order represented both a key to understanding the moral universe and proof that the rewards of virtue were an integral part of that moral order.

Economic behaviour was therefore viewed as a product of moral factors rather than the converse, and nineteenth-century Americans understood themselves as living in a moral economy, the study of which remained integrated with "a general science of Human Nature, of which the special sciences of Ethics, Psychology, Politics, and Political Economy are so many distinct and co-ordinate departments."[61] Francis Wayland explained that Political Economy was a science that

> contains elements of both physical and metaphysical philosophy. It differs from the purely physical sciences in that the phenomena of human volition are continually involved in the system. It differs from the branches of intellectual and moral science in that it contemplates all soul-phenomena with reference to certain physical results.[62]

Moral philosophers accepted that the self-interest, the "universal motive of human action,"[63] expressed in economic activities was regulated by determinate natural and moral laws. Citing J.S. Mill, Francis Bowen opined that "the laws and conditions of the production of wealth partake of the elements of physical truths. There is nothing optional or arbitrary in them."[64] Francis Wayland, for instance, accepted as a truism that, "every one, for instance, knows that no one can grow rich, without industry and frugality."[65] Moreover, since those laws were the products of a benevolent deity, their operation and the accumulation of life's blessings worked to the benefit of every individual and of society generally through a providentially

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[61]Bowen, The Principles of Political Economy, iii-iv.

[62]Wayland, Elements of Political Economy, 6.

[63]Bowen, The Principles of Political Economy, 2-3.

[64]J.S. Mill cited in Francis Bowen, American Political Economy Including Strictures on the Management ofthe Currency and the Finances Since 1861 (New York: Charles Scribner & Co., 1870), 108.

[65]Wayland, Elements of Political Economy, 4

designed harmony of interests. Thus, all classes of society were inseparably bound together by a community of interest and the prosperity of each individual depended on the welfare of all.[66]

It was undeniable that men were often motivated by selfish motives in their pursuit of wealth, "but it is a wise and benevolent arrangement of Providence, that even those who are thinking only of their own credit and advantage are unconsciously but surely, to benefit others."[67] This sentiment was best expressed in Adam Smith's Wealth of Nations (1776) and his use of the image of an "invisible hand" controlling the levers of a vast economic machine;[68] however, Smith was far from the only economist to make use of the concept. Francis Bowen's lecture discussion of economic laws, for example, quoted at length from Richard Whately's Lectures on Political Economy.[69]

> Wisdom there surely is, in this adaptation of the means to the result.... There are the same marks of benevolent design which we are accustomed to admire in the anatomized structure of the human body. I know not whether it does not even still more excite our admiration of the beneficent wisdom of Providence, to contemplate, not corporeal particles, but rational free agents, coöperating in systems not less manifestly indicating design, but no design of theirs; and though acted on, not by gravitation and impulse, like inert matter, but by motives addressed to the will, yet accomplishing as regularly and as effectually

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[66]Bowen, The Principles of Political Economy, 18-9; Wayland, Elements of Political Economy, 149, 181.

[67]Bowen, The Principles of Political Economy, 19.

[68]Adam Smith (1723-90), Scottish academician, philosopher, and man of letters. Smith lectured in Rhetoric and Belles-Lettres in Edinburgh and was appointed Professor of Logic at Glasgow in 1751 and of Moral Philosophy in 1752. He is known principally for his An Inquiry into the Nature and Causes of the Wealth of Nations (1776), although he developed many of the premises found there in his much earlier Theory of Moral Sentiments (1759).

[69]Richard Whately (1787-1863), professor of Political Economy at Oriel College, Oxford (1829-31), archbishop of Dublin and author of many works on philosophy and religion. His best known works were his Elements of Logic (1826) and Elements of Rhetoric (1828).

> an object they never contemplated, as if they were merely the passive wheels of a machine.[70]

Whately and Bowen acknowledged that individual self-interest often ignored the interests of both the public and of futurity; nonetheless, both argued that self-interest was part of the providential order and did not necessarily exclude a harmony of interests.

> Society is a complex and delicate machine, the real author and Governor of which is divine. Men are often his agents, who do his work, and know it not. He turneth their selfishness to good; and ends which could not be accomplished by the greatest sagacity, the most enlightened and disinterested public spirit, and the most strenuous exertions of human legislators and governors, are affected directly and incessantly, even through the ignorance, the wilfulness, and the avarice of men.[71]

The moral philosophers' conception of Political Economy as derivative of the moral sphere was, in effect, opposite to the views adopted by Marx and many modern social scientists that society was a product of the economic order. Rather, the economic order was understood in the nineteenth century to stand upon the ethical rules of Scripture and moral science so that, as Francis Wayland asserted, the principles of Political Economy "point to the Golden Rule of Christ as the formula by which the problem [of regulating self-interest] must be finally solved."[72] Political Economy's prescriptive rules perforce emphasized "virtuous" conduct as the bedrock of individual and social success. "The principal causes of the rapid growth of national opulence are moral rather than physical,"[73] according to Bowen. With this

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[70]Richard Whately, Introductory Lectures on Political Economy (London, 1831) at 103-10 cited in Bowen, The Principles of Political Economy, 22. See also the same passage cited in Bowen, American Political Economy, 17.

[71]Whately, Introductory Lectures in Political Economy cited in Bowen, The Principles of Political Economy, 22-3 and Bowen, American Political Economy, 18.

[72]Wayland, Elements of Political Economy, 6-7. See Matthew 7: 12 and Luke 6: 31.

[73]Bowen, The Principles of Political Economy, 75.

relation in view, the Reverend John McVickar, author of a popular Political Economy text, drew out the connections between the moral and economic as well as the personal and social spheres. Political Economy, he asserted

> is to states what religion is to individuals, the "preacher of righteousness"--what religion reproves as wrong, Political Economy condemns as inexpedient--what religion condemns as contrary to duty and virtue, Political Economy proves to be equally opposed to peace, good order, and the permanent prosperity of the community.[74]

§ V PRIVATE PROPERTY

Moral Philosophy's view of natural laws as symbolic of the benevolent government of the Almighty and of the values and institutions of civilized society as the conjunction of those laws with human nature produced a conservative view of social institutions as the embodiment of moral truths. As a result, moral theory possessed practical implications for legislators and judges alike, for municipal laws both reflected the nation's moral development and served to shape its values.

Among the most important of social institutions was that of private property. The moral philosophers' acceptance of the institution of private property ultimately rested upon the proposition that providence intended and self-preservation demanded that every individual and mankind in general exercise industry in order to secure the benevolent ends of both moral and physical happiness. As a creature possessing physical needs and selfish desires, man was obliged to apply his faculties and labour to the bounty of nature in order to obtain the necessities of life and the comforts of civilization. It was undeniable that "a man's faculties and powers are his own and that whatever he produces by the exertion of his powers belongs to him."[75] The

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[74]John McVickar, "Concluding Remarks," in John Ramsey McCulloch, Outlines of Political Economy: Being a Republication of the Article upon that Subject Contained in the Edinburgh Supplement to the Encyclopedia Britannica. Together with Notes Explanatory and Critical... by Rev. John McVickar (New York, 1825) at 136-7 quoted in Meyer, The Instructed Conscience, 105.

[75]Wayland, Elements of Political Economy, 141-2; Samuel Stanhope Smith, Lectures, 2: 188. See also Locke, Second Treatise of Civil Government, Chapter V: "Of Property," § 44, 15, where he wrote: "every man has a property in his own

necessity of labour was, accordingly, the ground of the institution of property and the source of its moral justification. The exertion of labour established a right of property in its fruits and as a necessary consequence engendered in the labourer the idea of exclusive possession.[76] Citing Adam Smith, Francis Bowen wrote that, "the property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the strength and dexterity of his hands."[77] By the end of the nineteenth century, this patrimony of skill and industry was still viewed as the property of the labourer despite economic theory's assignment of ownership of the articles produced in the nation's growing number of factories, where the labourer owned few or no means of production, to the owner of the capital which provided the means of production. Thus, the "law of natural justice" which "assigns the ownership of a useful article to him by whose skill and industry that article was created" was satisfied.[78] The labourer received the reward of his skill and industry in the form of wages, and the businessman who had provided the means of production received his in the form of profit from the use of his capital.[79]

The institution of property provided more than the necessities of life and the satisfaction of the appetites through the direct effects of labour. It provided a mechanism for the play of the desires and, thereby, the development of the intellectual faculties, while taking account of man's social nature. This was

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person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his."

[76]Wayland, Elements of Political Economy, 5.

[77]Adam Smith, The Wealth of Nations, 2 vols. (London: J. M. Dent & Sons, 1933) at 110 cited in Bowen, American Political Economy, 199. See also Wayland, Elements of Political Economy, 175-6.

[78]John Stuart Mill cited in Bowen, American Political Economy, 108. See also Locke, Second Treatise of Civil Government, Chapter V, §§ 26, 30, pp. 16-7.

[79]Smith, Wealth of Nations, 1: 58.

accomplished through the mechanism of exchange. Since one might do as one willed with one's own property, the transfer between individuals of property obtained by labour "constitutes a title to possession as well grounded as that which rests immediately on labor performed." It was the mechanism of exchange, rather than by the existence of property alone, that made possible man's social life and the rise of civilization.[80]

The theory upon which academic moral philosophers rested the institution of property necessarily implied an unequal division of the property created by labour if each individual was to receive a portion proportionate to his efforts. Men clearly differed in the extent of their powers and faculties and in the development of their characters. They therefore differed in the ability to obtain through their labours the bounties of nature. "As men are differently endowed by nature with faculties of mind and body, with indolence or energy, with improvidence or thrift, so their situations in life must differ."[81] These differences inevitably tended toward an unequal distribution of wealth in society. The unequal distribution of property was not, however, a source of injustice, for that division, "or the appropriation to each of his particular portion of that which God has given to us all," lay at the foundation of all accumulation of wealth and of all progress in civilization.[82]

> The general and obvious principle [of the providential design of the world and its laws] involves the right of distributing it in separate property... as being infinitely better adapted for those ends than its original condition of community. For it may be received as a certain maxim, that the worst state in which the earth can exist, and the farthest removed from the apparent design of the Author of Nature, is that of a common. It prevents the improvement of the soil, the multiplication of mankind, and the introduction and growth of almost all the arts which contribute to the accommodation of the life of man,

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[80]Wayland, Elements of Political Economy, 5.

[81]Bowen, American Political Economy, 109.

[82]Wayland, Elements of Political Economy, 98.

> and of the principles of science which expand the sphere of his knowledge.[83]

Wealth and capital were the products of labour; however, they also possessed a moral element insofar as they represented the surplus of labour over what was needed to satisfy the individual's immediate appetites and desires. Francis Bowen called them "consolidated or invested labour" and declared that, as such, they exhibited a moral quality. Wealth and capital were the economic embodiment of character and virtue, of self-command, of the dominance of the moral sense and the will over the appetites and desires. Bowen suggested that "man has no natural instinct for saving, no original propensity to labour;--none, at least, that is not constantly overridden by other and stronger propensities."[84] In that case, wealth, if accumulated by individual prudence, was an index both of individual virtue and more generally of society's moral advancement and of its degree of civilization.

> To accumulate wealth, labor must go beyond what is essential to meet immediate necessities; and the check of foretnought and abstinence must be laid on the immediate consumption of the products of labour. Hence industry and frugality are indispensable conditions to the increase of wealth.[85]

The accumulation of wealth and capital therefore required more than simple labour directed toward immediate necessity. It required both the exertion of one's powers and the exercise of a degree of asceticism associated with good character. In moral theory, these qualities distinguished virtue from sin and the civilized man from the savage and made accumulated wealth and capital a sign of personal character and higher civilization.[86] The savage's enslavement to his appetites and desires made of

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[83]Smith, Lectures, 2: 190-1.

[84]Bowen, The Principles of Political Economy, 64, 66.

[85]Wayland, Elements of Political Economy, 11.

[86]Wayland, Elements of Political Economy, 11.

him a moral foil to the civilized individual's indomitable self-command. The savage was

> indolent, thriftless and self-indulgent. He will work only when the necessity of the hour compels him to do so. He consumes the fruit of his labor at once, on present gratification, reckless of future needs. His first step toward civilization is to learn forethought and self-denial--a hard lesson always.[87]

Forethought and self-denial were, moreover, lessons not always learned by every member of a civil society, for, if the unequal distribution of property in a state of nature was partially the result of differing endowments among individuals, inequalities of wealth and capital in society and the benefits or penalties attending the social station in which the possession or lack thereof resulted were the consequence of varying degrees of character.

> By prudence and care we may, for the most part, pass our days in tolerable ease and quiet; or, on the contrary, we may, by rashness, ungoverned passion, wilfulness, or even by negligence, make ourselves as miserable as ever we please. And many do please to make themselves extremely miserable. They follow those ways, the fruit of which they know, by instruction, example, experience, will be disgrace and poverty and sickness and untimely death.[88]

As the products of both labour and character, wealth and capital deserved the same degree of protection as that accorded to the simple property created directly by labour and, indeed, savings, or accumulated capital, deserved "as high a rate of profit, and as large a measure of physical comfort, social consideration, and political influence as possible."[89] In this fashion, moral theory secured to each individual the benefits of his industry, character, and sagacity. Thus, in moral theory to speak of a "relation of equality" among individuals was not to suggest equality of condition but

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[87]Wayland, Elements of Political Economy, 75. See also Bowen, The Principles of Political Economy, 65.

[88]Butler, Analogy of Religion, 29.

[89]Bowen, The Principles of Political Economy, 76.

"equality of right" and a "duty of reciprocity" based upon the application of the Golden Rule.[90]

Moral science tied the protection of property and the existence of wealth to the economic and the moral advancement of society.

> National wealth is a condition of progress,--a prerequisite of civilization. It is not itself ennobling; but it is that which vivifies and maintains all the other elements and influences which dignify humanity and render life desirable.[91]

The relationship between the protection of property and the advancement of society was held to be particularly close where the frame of government insured the freedom and civil liberties of the individual. In proportion to the degree that the principles of civil liberty were incorporated into the political system and municipal law, "the exertions of industry, both agricultural and commercial, find their greatest encouragement, by the security which each man enjoys in the possession of the fruits of his own labor, or ingenuity."[92] This protection encouraged, with its direct appeal to the individual's self-interest, the moral rectitude, the firmness of will, so necessary to the development of character, the accumulation of wealth, and the progress of society.

> The greatest of all encouragements to frugality is the sure prospect that our savings will contribute largely to our comfort, will elevate our position in society, and add to the estimation in which we are held in the community and to the power which we actually wield.[93]

Where the government or persons acting in its name placed unreasonable and arbitrary restrictions on the liberty of the people, the resulting insecurity to the institution of property was "altogether paralysing to the active energies of producers," for in that case there was little hope of defending private interests against the

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[90]Wayland, Elements of Moral Science, 174.

[91]Bowen, The Principles of Political Economy, 19.

[92]Smith, Lectures, 1: 70.

[93]Bowen, American Political Economy, 91.

depredation of public authority.[94] As a result, whether in consequence of the defective organization of the government or the uncertainty of the laws,[95] the agent most destructive to personal responsibility and individual development was "public oppression."

> It drinks up the spirit of a people, by inflicting wrong through means of an agency which was created for the sole purpose of preventing wrong; and which was intended to be the ultimate and faithful refuge of the friendless.[96]

Wherever individual freedom was subject to the caprices of public power, whether that power was exercised by a monarch, a hereditary aristocracy, or a democratic majority, the moral climate and ultimately the economic status of all must suffer.

The chief function of government in this system was therefore of a moral nature. The highest end of the individual was the fullest development of his powers and faculties and this development served also to benefit others and society generally. Anything which hindered this development was immoral or sinful because it operated contrary to human nature as it was interpreted in the light of Scripture and moral science and inhibited the fullest development of the individual. As the collective embodiment of its citizens and the source of public power and authority, the proper purpose of government was to insure to every individual the greatest possible freedom consistent with the equal rights of others and thereby to promote individual and social virtue through the exercise of moral agency.

§ VI JUSTICE AND RIGHTEOUS GOVERNMENT

In Moral Philosophy, justice was regarded as "that virtue by which we give every one his due."[97] This definition of justice applied equally to conceptions of divine justice and to its secular derivative. Conceptions of divine justice were drawn

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[94]John Stuart Mill cited in Bowen, American Political Economy, 70.

[95]Smith, Lectures, 1: 70.

[96]Wayland, Elements of Political Economy, 101.

[97]Gros, Natural Principles of Rectitude, 100; Smith, Lectures, 2: 40.

in part from prevailing opinion in Natural Philosophy which allowed that, although natural laws governed the operation of the universe, only from time to time requiring the active intervention and correction of their author, such operation occasionally produced the appearance of injustice to the limited perceptions of mortal creatures. Francis Wayland asserted in his lectures that God manifested himself under the character of a "Righteous Governor," whose kindness or benevolence was administered according to the laws of nature. God might be "simply and absolutely benevolent;" however, justice demanded that such benevolence be compatible with his moral government of the world.[98]

This conception of divine governorship suggested that the requirements of man's moral agency and the constitution of the world, expressed as it was in the operation of natural and moral laws, demanded both reward and punishment for individual choices. Justice, the giving of everyone his due, must necessarily contain elements of sternness and rigour if it was to accomplish its purpose, and its appearance of severity was not antithetical to the benevolent ends of the providential design of nature or correctly written and administered municipal laws.[99]

Nineteenth-century American attitudes concerning the attributes of ideal justice were strongly influenced by philosophy's formulation of general laws operating regularly upon a harmonious system. These laws contained no allowance for special circumstances. If their operation occasionally produced suffering, that suffering had to be judged by the preponderance of good over evil that such operation produced and keeping in mind the wisdom and benevolence of the deity.

> It has been frequently and justly remarked that the universe is governed by general and constant laws which never change their operation according to the desires of men, or the convenience of particular parts of the system, which sometimes appear to be productive of accidental and partial ill. A tempest here, a drought there, a contagion, an earthquake, may involve individuals in distress--but the fixed and

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[98]Wayland, Elements of Moral Science, 348.

[99]Gros, Natural Principles of Rectitude, 100-1.

> unvarying laws of the physical world are among the greatest blessings to mankind.[100]

Justice required that municipal laws in order to accomplish their ends must, like natural laws, operate according to general rules and principles. An example of this adherence on the part of moral philosophers to axiomatic principles can be found in their attitudes toward individual and state-sponsored charity.

Scripture made it clear that, as Christians, men had a duty to behave benevolently towards their fellows. While benevolence was not the whole of virtue, it was the highest and most important branch of one's duty to others.[101] Indeed, moral sense philosophers such as Princeton's James McCosh argued that men derived a sensible mental pleasure from the exercise of benevolent affections such as compassion, good-will, and benevolence.[102] Scriptural authority and the pleasure of exercising the benevolent affections aside, there remained important moral considerations to be taken into account in the practical application of benevolence and charity.

> To love our neighbour, which is commanded, is to love him as a moral being, who is supposed to acknowledge the obligations and limits of duty with respect to himself. Every blessing which I am commanded to wish or to will or to effect for him is therefore necessarily limited by his real welfare as controlled by the law of duty which he is presumed to accept.[103]

Thus, just as divine benevolence was exercised with regard to the operation of natural laws and the considerations of justice, so too should the exercise of the benevolent affections be qualified by considerations overruling simple compassion. It had always to be remembered that one's condition in life was contingent upon one's

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[100]Smith, Lectures, 2: 32, 24.

[101]Porter, The Elements of Moral Science, 3[illegible] also Witherspoon, Lectures, 109.

[102]McCosh, Method of the Divine Government, 245. See also Smith, Lectures, 1: 271-2.

[103]Porter, The Elements of Moral Science, 387.

moral rectitude, where "fault" or "culpable" actions and hence "punishment" might arise from either a defective understanding or a defective will resulting in "inattention, improvidency, precipitancy, or carelessness," or any actions proceeding from the neglect of what was necessary for obtaining a salutary end.[104] Benevolence, properly exercised, was always tempered by the knowledge that nothing in nature was accidental or without cause and that all personal action was a product of the will and, thus, subject to man's moral duty and personal accountability. Moral philosophers were unwilling, then, to attribute to the arrangements of divine providence the disastrous consequences of the neglect, precipitancy, or mismanagement of imprudent men.[105]

> What a great abuse is made of the terms misfortune and accidents? How often must they unmerited stand for the natural effects of want of rectitude? The natural consequences of folly, inattention, improvidency, precipitancy, carelessness, and wickedness make up the greatest part of accidents and misfortunes! Comparatively few houses are destroyed by lightning; and is it not the case with respect to other things, as poverty, captivity, &c.[106]

Where prudence was missing, the natural consequences of a defective will must be allowed to follow. To engage in "a weak indulgence in compassion to the errors of human folly" was to misconceive the corrective nature of divine justice by attributing to "the universal government of the Supreme Being" the view that it was "a vacillating and mutable disposition of events, liable to be disarranged according to the exigencies and desires of men."[107]

The divine plan demanded the full moral accountibility of every individual and required, in the economic sphere, that the individual exert his faculties and powers in

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[104]Gros, Natural Principles of Rectitude, 89-90.

[105]Smith, Lectures, 2: 40.

[106]Gros, Natural Principles of Rectitude, 92.

[107]Smith, Lectures, 2: 40.

accordance with the natural laws of economics in order to maintain himself.[108] If, in contravention of divine will, the individual acted imprudently, irresponsibly, and immorally, then divine justice required "that kindness be not dispensed indiscriminately to offenders as well as to faithful observers of law." Indeed, justice required that the disorderly and the wicked experience the full rigour of law. In this vein, the misfortune and misery which frequently afflicted individuals resulted from the withdrawal of the benevolent dispensations of divine Providence. They were the particular tokens of divine displeasure and the just consequences of disobedience and vice.[109] Thus, the evils incident upon vice were intended as corrective for immoral behaviour and acted to "recall the mind from pursuits injurious to its virtue and its true interests." In this sense, justice expressed divine benevolence by deterring individuals from seeking enjoyment in the violation of the general laws of order and happiness and the sacrifice of a greater good.[110]

In nineteenth-century moral and economic theory, poverty coexisting with the opportunity to labour and to earn a living wage and to accumulate and enjoy the benefits of wealth rendered the shiftless individual unsuitable as an object of charity. Francis Wayland asserted that it "is the language no less of reason than of revelation" that "if a man will not work, neither shall he eat."[111] "If a man be indolent the best discipline to which he can be subjected is to suffer the evils of penury." All that charity required in such a case was "to provide such a person with labor and to pay him accordingly." This, Wayland asserted, "is the greatest kindness both to him and to society."[112] At the same time, however, Wayland and other moral philosophers did

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[108]Smith, Lectures, 1: 269.

[109]Gros, Natural Principles of Rectitude, 101-2.

[110]Smith, Lectures, 2: 36, 40.

[111]2 Thessalonians 3: 10.

[112]Wayland, Elements of Moral Science, 345. Hopkins, The Law of Love and Love as Law, 207-8.

not intend this as a blank check to employers for the mistreatment of their employees, for such behaviour was contrary to Scripture, the Golden Rule of Christ, and the harmony of interests upon which the moral economy rested.[113] Wayland contended that employers were "bound to allow to the servant a fair remuneration" based upon mutual agreement and "justly estimated" upon "considerations of labor, skill, and fidelity" as well as upon "the rise and fall of the price of such labor in the market."[114]

The stricture that the chance to work precluded dispensations of charity applied with particular force in a land of abundance and opportunity such as the United States. In his economic analysis Francis Bowen wrote that "neither theoretically or practically, in this country, is there any obstacle to any individual's becoming rich, if he will," other than those "natural and inevitable ones" which arose from the dispensations of providence and which society could do nothing to remove.[115]

This was not to suggest that all charity was immoral and ought to be eliminated. Francis Wayland observed that "the poor we have always with us"[116] and that accordingly there was a necessity for public charity in cases "which fell outside the range of private beneficence." Most poor relief should, however, consist of private efforts, "because Christian beneficence brings a blessing to the giver as well as the receiver."[117] Charity administered by the state undermined the virtuous character of both giver and receiver and of society generally, because it left the distribution of bounty to the hand of an official agent and thereby produced no moral intercourse between the object of charity and the giver. There was, therefore, no

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[113]Wayland, Elements of Political Economy, 181. See Deuteronomy 24: 15; Colossians 4: 1; Leviticus 19: 13; Jeremiah 22: 13; Malachi 3: 5; and James 5:4 concerning the duties of masters towards their servants.

[114]Wayland, Elements of Moral Science, 229. See also Bowen, American Political Economy, 67 and Smith, Wealth of Nations, 1: 59-60, 70.

[115]Bowen, American Political Economy, 105.

[116]Matthew 26: 11.

[117]Wayland, Elements of Political Economy, 130.

stimulation of the social affections on the part of either party.[118] The moral benefits of charity could only come from a manifestation of individual and personal interest. Moreover, in order "to bring to the poor and the suffering and the degraded the hope of restoration of his own self-respect,"[119] "the dictates of both economy and benevolence" demanded that the poor required facilities "to do something towards their own support."[120]

Moral theory and the operation of faculty psychology suggested that well-considered legislation seeking to relieve social misery must eschew simple handouts, which did nothing to foster habits of industry and moral rectitude and which actively fostered pauperism. Instead, legislation must adopt policies which encouraged the individual to accept his moral duties and personal accountibility. "Those modes of charity are to be preferred which most successfully teach the object to relieve himself, and which tend most directly to the moral benefit of both parties."[121] Poor laws, as they were generally called,[122] were defective in that they undermined the benevolent intent of divine and natural laws by removing the individual's stimulus to labour and encouraging the vice of indolence. They failed to impart those qualities of character

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[118]Wayland, Elements of Moral Science, 348.

[119]Hopkins, The Law of Love and Love as Law, 209.

[120]Wayland, Elements of Political Economy, 130.

[121]Wayland, Elements of Moral Science, 348.

[122]Wayland, Elements of Moral Science, 348. Poor laws in one form or another had a long history in the Anglo-American law. The colonies developed their own Poor Laws based on the general features of the Elizabethan statutes (43 Eliz. I, c. 2 (1601)) which still governed English practice in the seventeenth century. These laws established the relief of the poor as a local matter supported by levies on local property owners. Their haphazard measures were accordingly both punitive and harsh. In the first half of the nineteenth century, the poor laws had been little changed from their earlier models and change came only slowly after the Civil War. See Lawrence M. Friedman, A History of American Law (New York: Simon & Schuster, 1973).

that would allow the subject of charity to help himself and to attain his own end.[123] At the same time, by delegating relief of the poor to an official agency of the government and giving to it an element of compulsion, the giver of charity lost not only the opportunity to exercise beneficence, prompted by the natural impulse to sympathy, but that element of free will which characterized moral actions.[124] Thus, both the giver and receiver of indiscriminate charity were damaged. The former was injured by the loss of moral agency and the opportunity to act upon pure and unselfish emotions, thereby cultivating virtuous habits of mind and greater strength and nobility of character.[125] The latter was irreparably harmed by neglect of the most effectual means of reclaiming the abandoned and the outcast by encouraging in them a renewed recognition of the power of those supports which providence afforded to the continuance in virtue.[126]

> Legislation can do much, but when its provisions are best administered it is impersonal; like the Laws of Nature, it must go by general rules, and so cannot touch the heart. It has in it the power of relief, but not of reform. It may reach want, but not character, and till that is reached nothing effectual or permanent is done. The present life is not retributive, but disciplinary, and when the laws of well-being have been so far transgressed as to bring want and suffering that call for charity, these should lead to reformation. But this they seldom do.[127]

Moral theory therefore delineated stringent guidelines for both individual and collective action. In both instances, an appraisal of the goodness or badness of a particular course of action rested upon its ultimate moral influence rather than its immediate results. The individual, as a moral being, was presumed to acknowledge the obligations and limits of duty with respect to himself and his final accountibility

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[123]Hopkins, The Law of Love and Love as Law, 102.

[124]Porter, The Elements of Moral Science, 428.

[125]Porter, The Elements of Moral Science, 354.

[126]McCosh, Method of the Divine Government, 251.

[127]Hopkins, The Law of Love and Love as Law, 209.

for his choices.[128] The same was true of the state, which, though it had a duty to promote the happiness and well-being of its citizens, was obliged to pursue those objectives with a view to the moral outcome of its legislation rather than political expediency and the immediate desires of the people. While utility was a useful measure of the means to an end, it was not, in itself, an ultimate end.[129]

> In estimating more particularly the degree of approbation, or of censure due to particular actions, it is not sufficient to take into view their immediate and momentary effects, but their permanent consequences;--and the good or ill that results from them, but their diffusive influence;--not the benefit or injury of a single act in a particular case, but the consequences which would arise to the social order and happiness from a general prevalence or allowance of similar acts.[130]

Moral Philosophy's stress on character as the foundation of individual and social moral excellence and prosperity conditioned not only attitudes toward philanthropic activities such as the giving of charity and ameliorative legislation but also governed its response toward more distinctly economic concerns such as the nature and purpose of trade unions, combinations, monopolies and the effects of these creations of industrial capitalism upon the moral fabric of society.

For example, Francis Wayland's discussion of trade unionism and of the impact of labour strikes was couched in moral terms. In his view, the articulate major premise of trade unionism was immoral, because it violated the fundamental condition which providence had ordained as essential to human existence and prosperity. "God in giving to man wants, has made the right to labour the property of all men, and this property is the first, the most sacred and the most imprescriptible of all."[131] Labour unions violated that right by usurping control of the opportunity to work in one's chosen calling.

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[128]Porter, The Elements of Moral Science, 387.

[129]Hopkins, Lectures, 236.

[130]Smith, Lectures, 1: 305.

[131]Wayland, Elements of Political Economy, 175-6.

> When,... the striking party uses force to compel others to join the combination or to prevent their working except on the terms which they dictate, there is a monstrous violation of a most sacred right,--a right which should be ever dearest of all, to the laborer,--the right to do what he will with himself, his time, his strength, his skill.[132]

In this way, labour unions undermined the moral foundations of industry, personal security, and the machinery of social and moral progress. "The moral causes which most effectually stimulate labor and frugality, and thereby make capital accumulate most rapidly, are those which secure to the laborer with the greatest certainty the fruit of his industry."[133]

Labour unions presented, moreover, ethical difficulties at several levels. Their efforts to restrict the supply of labour and to raise wages by limiting the number of apprentices in specific trades, by excluding non-members from employment, and by enforcing uniform hours of work and wages on union members during an age when piecework was the norm were seen as an attempt by labour organizations to establish a monopoly and as a contravention of "the normal action of free competition." The moral philosophers' beliefs concerning wage theory and their view of unions as devices to artificially raise wages lead them to view labour organizations as an unjust and "a forced exaction on the whole community for the benefit of a few." Labour organizations penalized the industry and talent of the "superior artisan" by discouraging personal initiative and undermining habits of industry. They hindered the accumulation of wealth by restricting the free flow of labour and capital and by forcing employers to retain less productive workers at higher cost.[134] Their interference with the terms of agreement between labourers and employers concerning the price of labour in a free market worked to raise wages to the point at which the

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[132]Wayland, Elements of Political Economy, 175.

[133]Bowen, The Principles of Political Economy, 76.

[134]Wayland, Elements of Political Economy, 177. This position was hardly unique to Wayland. See Bowen, The Principles of Political Economy, 229, where he echoed Wayland almost point for point.

cost of labour might begin to consume the accumulated capital and wealth of the country. The cost of labour in that case would have exceeded the funds available to pay it, with a consequent decline of living standard for all as capital was withdrawn from productive uses.[135] Labour organizations or, indeed, any form of combination which placed such artificial restrictions upon the movement of property and wealth were deemed by Francis Bowen as counter to the laws of nature.[136]

One might conclude that the economic ideology of nineteenth-century Moral Philosophy was implacably hostile to the labouring poor and an unquestioning supporter of the financial establishment. Certainly nineteenth-century Americans' effusions about the benefits of progress stemming from technological advances and industrialization did little to dispell that opinion. The concerns of the moral philosophers were, however, less with justifying the social status quo and a new economic order than they were with preserving the fundamentals of a Christian ethical order and world view. Thus, the general hostility of moral philosophers to trade unionism sprang not from an intention to justify the admittedly shabby treatment allotted to wage labourers in the new economic order but from their belief that unions irredeemably damaged personal and social ethics. Nor were their criticisms wholly confined to the machinations of organized labour. Rather, they applied the same ethical standards to the moral and economic effects of new forms of business organization and financial activities.

It was revealing that moral philosophers invariably placed gambling and financial speculation in the same ethical dustbin as trade unionists. In his discussion of labour, Wayland differentiated between constructive as opposed to destructive labour. The latter was performed by "persons whose energies are put forth to hinder all productive industry and destroy its fruits. Here must be included those who

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[135]Michael Les Benedict, "Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," Law and History Review 3 (1985): 299.

[136]Bowen, American Political Economy, 107.

pander to the vices that unfit men for effective labour." Wayland included among those who he believed hampered productive industry not only thieves, counterfeiters and swindlers but also

> the whole race of gamblers and speculators, whether their operations be carried on at the faro-table, or the pool-room, or the board of trade, or the stock-exchange. This whole class not only add nothing to the sum of wealth produced, but positively reduce it by unfitting men for useful service and by unsettling the basis of industry.[137]

Theft, counterfeiting, and fraud were vices because they undermined the security of property and because the habits which such activities encouraged destroyed the strength of character which was the basis of individual and social improvement. Moral philosophers had much the same complaint with gamblers. Noah Porter soundly denounced the moral effects of gambling.

> The habit of gaming degrades a man into the abject slave of his passionate and romantic fancies, and condemns him to live in the unreal of excited visions, which he continually persuades himself to be solid facts.

The danger of gambling lay in its appeal to the base instincts, passions, and desires at the cost of the higher sensibilities and reason. Gambling possessed the capacity "to occupy and interest the imagination, and to excite the passions" "by mimic contests of the fancy." "By the striking contrasts between its exciting experiences and the sober facts and occupations of pains-taking labour and self-relying industry,"[138] it diverted the individual from that prudential self-command and rational regard of reality that were the foundation of virtue.

Moral philosophers saw the same dangers in financial speculation. Speculation involved the same elements of imaginative excitement and irresponsibility which made gambling so dangerous to character when it became a preoccupation and a passion.[139]

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[137]Wayland, Elements of Political Economy, 25-6.

[138]Porter, The Elements of Moral Science, 355-6.

[139]Porter, The Elements of Moral Science, 357.

Applying his moral analysis of gambling to speculation in business, Noah Porter wrote:

> The reckless and unprincipled risks assumed in what is called legitimate business partake more or less of the nature of gambling, and are acknowledged to be fraught with evil to the individual and the community. It is not so often noticed that they are also morally injurious and degrading to the man who yields to them.[140]

Francis Bowen allowed that, while all commerce contained an element of speculation to the extent that success in business, as it did in life, required foresight, it might be differentiated from gambling and speculation by the degree to which the risks and contingencies of business were actually known. Bowen argued that what made a financial activity such as stock-jobbing[141] speculative in nature was either the contingent, or changing, nature of the risk or risks of gain or loss so nearly equal that it might well have been determined by the toss of a coin.[142] Noah Porter echoed this view in discussing the moral effects of speculating in "futures."

> What is called speculation, whether in stocks, or grain, or provisions, or any other article of investment, use, or trade, involves the evils of gambling, when no delivery is proposed of the articles which are said to be bought or sold, and the bidding or guessing respects only the market-price at some future date.

In Porter's opinion "to promise to buy or sell, without the sobering and steadying process of paying on the spot," diminished the responsibility of the dealer "in just the proportion in which the cost of an actual purchase and delivery differs from the amount which is pledged 'to cover one's differences.'"[143]

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[140]Porter, The Elements of Moral Science, 356.

[141]Concise Oxford Dictionary , 7th ed., s.v. "Stock." Stock-jobbing, n., dealing in stocks so as to profit by fluctuations in price. The description of "stock-jobber" is a pejorative term used to describe an unscrupulous stockbroker.

[142]Bowen, The Principles of Political Economy, 428-30 passim.

[143]Porter, The Elements of Moral Science, 356-7.

The motives of the legitimate investor and the speculator were therefore perceived to differ. The stolid merchant's motives were based upon rational self-interest and a careful calculation of the risks assumed in each transaction. A rational calculation of his interests meant that his efforts were always aimed at a successful conclusion to his endeavours. These were not the motives of the speculator.

> The gambler, acting from the love of excitement almost as much from the thirst for gain, makes bets, or forms contracts which amount to bets, with reference to the doctrine of chances only, having no regard to the effect which his transaction will have upon markets.[144]

Thus, the speculator's enslavement to the passions undermined individual character and led the individual to all the miseries attendant upon a life of vice. At the same time, his abandonment of a rational calculation of his true self-interest and end and his willingness to act solely upon the promptings of his passions and desires disrupted the harmony of interests which characterized the operation of natural economic laws. In ethical terms, then, what was wrong with speculation was not the desire for gain, which was a logical manifestation of self-interest, but the method by which gain was pursued.

Moral Philosophy in the nineteenth century presented to educated Americans a unified view of their world. In a universe created by a beneficent deity whose providence insured that all moved in harmony and regularity according to fixed laws of being toward a predetermined end or purpose, academic Moral Philosophy combined Protestant theology and the secular influences of the Scientific Revolution and the European Enlightenment to produce a moral science whose laws comprehended every aspect of human activity. Nineteenth-century Americans understood the laws of political economy and all municipal law to operate within the context of and to be expressive of an overarching moral order which was intelligible to reason and which represented both the object of duty and an ethical standard to which the individual and society were ultimately held accountable. As a practical science, Moral Philosophy had counsels, then, for political economists, legislators,

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[144]Bowen, The Principles of Political Economy, 431.

and jurists. The nation ought to possess laws which expressed the principles of divine will and natural law, and justice demanded that municipal laws be administered with the same degree of regularity and with the same commitment to higher principles as their philosophical counterparts. The history of the United States Supreme Court between 1862 and 1911 can only be fully understood if one comprehends the justices as attempting to apply systematically the theories of moral science, a moral philosophy learned during their youth and in a much different and simpler world, to the increasingly complex issues which came before the court during the period in which the United States emerged as a modern industrial society.

CHAPTER VI

LAW AND SOCIETY IN THE CONTEXT OF PROVIDENTIAL DESIGN

§ I RELIGIOUS VIEWS OF THE JUSTICES

The justices of the United States Supreme Court examined in this study wrote and spoke extensively on matters of public interest, philosophy, and religion. Their off-the-bench commentaries, when studied in conjunction with their opinions for the Court, suggest that they saw themselves as practitioners of a moral science and possessors of a public role in guiding the nation in accordance with the fundamental principles of truth and justice enshrined in the Constitution. The family backgrounds, educational experiences, and, most importantly, the tenor of the justices' published remarks, with their frequent allusions to Scripture and the language of Moral Philosophy texts, suggest that in this task religious faith and moral science remained a vital part of their intellectual and judicial life until at least the end of the nineteenth century. The Protestant theological doctrines imbedded in antebellum Moral Philosophy institutionalized the teleological argument for the existence of God while providing both proof of the existence of the deity and a description of the divine character. Those doctrinal assumptions underlay the importance of the "moral sciences," Moral Philosophy and its subdisciplines of Political Economy and Legal Science, for these attempted to express the "truths" of divine and natural law and to provide a practical guide to life based upon a systematic presentation of those precepts. This understanding of the character of the deity and the moral nature of creation reflected the justices' moral perception of the world, of society, and of the individual and their belief that municipal law was ideally a reflection of moral laws

and was successful in promoting the general welfare of society only insofar as it conformed to the dictates and expressed the values of moral science.

That the justices in this study possessed an abiding faith in the existence of God and in the tenets of Christianity was unsurprising given their upbringings and religious inclinations. Justice Field and his nephew, Justice Brewer, both received a strict Congregationalist upbringing. John Marshall Harlan received a thoroughly religious college education at Centre College and during his legal studies at Transylvania University, and he retained a lifelong faith in the relation between the individualistic moral principles of American Protestantism and America's political and legal values.[1]

Justice William Strong also maintained an enduring commitment to a Christian society. Given his long involvement with various missionary societies and the National Association for the Amendment of the Constitution, Strong's opinion that the Constitution should explicitly recognize the pre-eminence of the deity and of Christianity in a nation whose founders had rejected an established church supported by the state was no contradiction. In his view, it was not coincidental that whether civil or municipal laws might be respected as "the accumulated common sense of the wisest men of many generations applied to the affairs of social life, and adapted to that life's innumerable relations,"[2] or grudgingly acknowledged as "the history of how our ancestors have managed propriety in all ages,"[3] there were many similarities between the proscriptions of civil law and of Scripture.

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[1]John Marshall Harlan, "The Courts in the American System of Government," Remarks of Mr. Justice Harlan at the banquet of the Presbyterian Social Union of Philadelphia, 27 March 1905, Chicago Legal News 37 (8 Apr. 1905): 271.

[2]William Strong, Two Lectures upon the Relations of Civil Law to Church Polity, Discipline and Property. Lectures before the Faculty and Students of Union Theological Seminary (New York, 1874-5; New York: Dodd & Mead, Publishers, 1875), 6.

[3]William Strong, American Legislation. An Oration delivered before the Phi Beta Kappa Society, Yale College, August 27, 1859 by Honorable William Strong (New Haven: Thomas J. Stafford 1860), 8.

> Civil law punishes many offenses which are condemned by Divine Law, and which the church also condemns and punishes. Many offenses against civil society are acts prohibited by the Decalogue,[4] and by all churches. False swearing, theft, adultery, and murder are violations of municipal law... because they are infractions of the rules which civil society has found it necessary to establish for its own protection.[5]

An important component of theology and Moral Philosophy was the assertion of the divine origin and providential design of the world. This belief was reflected particularly in the writings of Joseph P. Bradley and David J. Brewer. Justice Bradley accepted it as axiomatic that "such principles as justice, truth, equality" existed independently of human consciousness and that these principles were the products of an eternal and intelligent being. This conclusion flowed from his belief that the human mind could not conceive "such a thing as a principle without a subject." Every effect must have a sufficient cause, "for it is no more possible to conceive of an infinite than a finite progression of effects without a cause." The fact of creation and the evidences it demonstrated of design showed that

> there must have been something from eternity because there is something now, the Eternal Being must be intelligent because there is intelligence now (for no man will venture to assert that nonentity can produce entity, or nonintelligence, intelligence).[6]

"This felt necessity of a primary cause" meant, in his view, that "a recognition of some Superior Being who controls human affairs and whose favor is desirable is indigenous in the human breast." Bradley's belief was little shaken by the discoveries

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[4]Exodus 20 and Deuteronomy 5.

[5]Strong, Two Lectures, 30-1. Strong's list of infractions also included the orderly observance of the Sabbath and abstinence from unnecessary labor, profaneness, and blasphemy, all of which he considered contributed to public order, morals, and decency.

[6]Joseph P. Bradley, "On the Existence of God," in Charles Bradley, ed. and comp., Miscellaneous Writings of the late Honorable Joseph P. Bradley (Newark: L.J. Hardham, 1902), 422-3.

of modern science which had rendered some orthodox beliefs untenable and in 1876 he wrote:

> I, therefore, once for all, protest that whatever modifications my views of the theoretical and speculative part of religion may have undergone, I do not abate one jot or tittle from the claims of religion as a principle of action, the sanctity of moral law, or the necessity of aids and appliances for cultivating the moral nature and promoting moral purity.[7]

In Bradley's view, "there is in fact and truth a strong analogy between the progress of material and spiritual philosophy." The new scientific theories of geological and biological succession, "which are inscribed on every page of Nature's great Book, from the fossils of the earth to the flaming orbs and fading nebulæ of heaven," when rightly interpreted reinforced faith in an omnipotent and immanent deity.[8]

> All that is revealed to us in the universe betokens constant change and constant progression. It is this law of change and progression on which is based the absolute demonstration that the visible universe had a beginning, and that the only occupant of eternity and immensity was and is and must be its Creator and Governor.[9]

In this respect, Bradley's views concerning the intellectual and moral implications of the new sciences for religious belief resembled the contemporary statements of James McCosh at Princeton. Natural laws such as evolution were not causes but effects "which must resemble in their constitutive substance the causes from which they emerge." Evolution could not have been the original cause of the higher mental faculties of man emerging out of the precognitive faculties of lower animals. The cause was insufficient for the effect. "Either a spiritual quality derived

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[7]Joseph P. Bradley, "Esoteric Thoughts on Religion and Religionism," (1876) in Bradley, Miscellaneous Writings, 425, 423.

[8]Joseph P. Bradley, "Esoteric Thoughts on Religion and Religionism," (1876) in Bradley, Miscellaneous Writings, 428, 429.

[9]Joseph P. Bradley, "The World is not Eternal," (1883) in Bradley, Miscellaneous Writings, 383.

from a superior being must lie latent in the original substance of life, or an intervention must take place along the evolutionary process."[10]

Bradley's belief in an omnipotent diety bore a remarkable similarity to Justice Brewer's profession of faith in the existence of an immanent deity. In his optimistic appraisal of the prospects for progress in the twentieth century, Brewer placed his hopes in the spreading principles of Christianity and the accelerating accumulation of knowledge both of which he attributed to the historical unfolding of the divine plan.

> The practical world will grasp two truths. One is, that back of the visible and material world is an infinite being... no man can fathom. The mysteries of that being and the manner of His life are beyond human conception or the power of language to express, yet He... does exist and His infinite power is working... for the final accomplishment of truth, purity, and justice.[11]

Brewer repeatedly took up in his writings the theme of a providential purpose. In connection with his faith in the coming of universal peace and the brotherhood of man, which he regarded as the "purpose running through the life of the world,"[12] Brewer referred to the line from Lord Tennyson, "through the ages one increasing purpose runs,"[13] and took issue with a secular materialism which associated thought and will entirely with the immediate effects or the necessary consequences of impressions upon the senses and which rejected the role of providence in the operation of nature and the advancement of history.

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[10]James McCosh, The Method of the Divine Government, Physical and Moral (New York: Robert Carter & Brothers, 1855) at 279-80, 291 quoted in J. David Hoeveler, Jr., James McCosh and the Scottish Intellectual Tradition: From Glasgow to Princeton (Princeton: Princeton University Press, 1981), 319.

[11]David J. Brewer, The Twentieth Century from Another Viewpoint (New York: Fleming H. Revell Co., 1899), 31, 38-9.

[12]David J. Brewer, "The Promise and Possibilities of the Future," in David J. Brewer, The United States a Christian Nation (Philadelphia: John C. Winston Co., 1905), 82.

[13]Alfred, Lord Tennyson, "Locksley Hall," (1842).

> Some think, or say they think, that there is no such thing as an overruling Providence, that we are mere atoms of matter tossed to and fro on the face of the earth, and that here is the beginning and the end. They do not take into thought the great life of the ages, or measure its movements from its first feeble steps; and yet they sometimes feel compelled to admit that it seems as though there were something more than mere blind chance.[14]

Brewer returned to the theme of universal peace in an address before the New Jersey bar association in 1909. There, Brewer expressed his dismay with the "present shouting for a larger navy" and the growth of the nation's military establishment and argued that the mission of the United States in the cause of peace lay in its duty to decide on the side of right and to accomplish the divine purpose by rejecting militarism and an international system in which "everything was determined by the mere matter of might."[15] However, although he believed that the United States was "the fitting leader in the great cause of peace," Brewer did not tie the purposes of providence and the fulfilment of Christ's "promise and prophecy," "Peace I leave with you, my peace I give to you," to the actions of one nation. "If we fail, the cause of peace will not fail. We shall simply stand in history as the nation which lost the great opportunity."[16]

Like Bradley, Justice Brewer concluded that history was not "a mere accidental succession of unrelated circumstances" but an expression of eternal purpose in which an overruling Providence fashioned and shaped the destiny of nations as well as of individuals.

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[14]Brewer, "The Promise and Possibilities of the Future," 79. See also David J. Brewer, The Mission of the United States in the Cause of Peace, Address of the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States before the New Jersey Bar State Association, 12 June, 1909 (Boston: International School of Peace, 1910), 5 and "America's Duty in the Peace Movement," Address at the Fourteenth Conference, 22 May, 1908, in Edward E. Hale and David J. Brewer, Mohonk Addresses (Boston: Ginn & Co., 1910), 126.

[15]Brewer, The Mission of the United States, 2, 6.

[16]See John 14: 27. Brewer, The Mission of the United States, 2, 9.

> We may not be absolutely certain of the purposes of Providence, yet we can gain some knowledge of them from noticing events as they come and go, sure that in all the great movements of the nations and of humanity some supreme purpose is being accomplished.[17]

Bradley and Brewer's belief in the existence of the deity and in the operation of nature and progress of human history as expressions of his purpose was significant, for it suggested that educated Americans in the late nineteenth century were aware of the n w theories in geology and biology and of their implications for religious orthodoxy but were nonetheless unwilling to abandon the traditional grounds of Christian belief.[18]

§ II BELIEF IN MORAL AND MATERIAL PROGRESS

The nineteenth century was undoubtedly an age of rapid technological progress, and this was no better exemplified than in the transportation revolution which followed the development and application of steam power to transportation and industry. To nineteenth-century Americans, the railroads represented the epitome of the industrial revolution as their tracks spread rapidly across the nation after 1870, accompanied by the rapid growth of industry, the rise of corporate economic power, and the social changes which inevitably followed on the heels of fundamental changes in the nation's economy.

These rapid technological advances and the process of industrialization were viewed by the justices within the context of their religious training and beliefs. Those doctrines informed them that providence would certainly carry mankind forward toward the millenium. In their view of progress, the development of "civilized" society was important not only for its ability to supply the necessities and comforts of life, though the justices did not denigrate those pleasurable benefits, but for its uplifting influence on the moral character of society.

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[17]Brewer, The Mission of the United States, 5.

[18]George Cotkin, Reluctant Modernism: American Thought and Culture, 1880-1900 (New York: Twayne Publishers, 1992), 2.

Certainly the justices were no less impressed than their fellow citizens by the rapid changes taking place in American society as a result of technological advancements and the spread of industrialism. They, too, equated material progress with the rise of industrialism and associated that progress with the moral improvement of society. In his Reminiscences, Stephen J. Field recalled his early days in California and the noteworthy changes he had witnessed during his residence in Marysville. From "a collection of tents with a few hundred occupants" serving as a landing for steamers, Marysville had grown into a substantial town and an important business centre, and Field noted, with a touch of proprietary pride, the many signs of progress that its streets displayed.

> Its merchants were generally prosperous; some of them were wealthy. Its bankers were men of credit throughout the State. Steamers plied daily between it and Sacramento, and stages ran to all parts of the country and arrived every hour. Two daily newspapers were published in it. Schools were opened and fully attended. Churches of different denominations were erected and filled with worshippers. Institutions of benevolence were founded and supported. A provident city government and a vigorous police preserved order and peace. Gambling was suppressed or carried on only in secret. A theatre was built and sustained. A lecture-room was opened and always crowded when the topics presented were of public interest. Substantial stores of brick were put up in the business part of the city; and convenient frame dwellings were constructed for residences in the outskirts; surrounded with plats filled with trees and flowers. On all sides were seen the evidence of an industrious, prosperous, moral, and happy people, possessing and enjoying the comforts, pleasure, and luxuries of life.[19]

Clearly, Justice Field placed importance on the growth and success of the business community; however, he placed equal weight on non-economic and intangible matters. He considered noteworthy the signs of culture implicit in the presence of local schools, lecture halls, theatres, and newspapers as well as other

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[19]Stephen J. Field, Personal Reminiscences of Early Days in California. To Which is Added the Story of his Attempted Assasination by a Former Associate on the Supreme Bench of the State, by George C. Gorham (1893; reprint, New York: Da Capo Press, 1968), 100-1.

important indicators of social progress and of a favourable moral climate such as the presence of well-attended churches and the operation of benevolent societies.

Justice Samuel Miller's experience in Iowa paralleled that of his contemporary, Justice Field. Writing of his residence in Iowa, Miller was more explicitly materialistic than Field in gauging the community's success. In measuring the presence of "all elements of high civilization and prosperity" in that state, Miller's indices of progress were the unparalleled growth of population and wealth, the absolute increase of which he considered "wonderful." Miller, moreover, echoed his contemporaries by identifying the growth of the railways as the symbol of Iowa's material progress and increased wealth.[20]

There was general agreement that there was a relationship between the accumulation of knowledge, material comfort, and the advance of civilization. Progress was not, therefore, considered only in material terms. The justices' view of progress was hedged around with qualifications concerning the pace and character of improvement. The scholarly Justice Bradley's comprehensive survey of history before the Philoclean and Peithessophian literary societies at Rutgers College in 1849 led him to conclude positively that "PROGRESS is a great, indisputable, and uncompromising fact."[21] Bradley's analysis of the undeniable fact of progress laid out more explicitly than had Justices Field and Miller the intimate connections between moral and material improvement. In his view, "the darkness of ignorance, and the mists of superstition, have been gradually dispelled by the rising Sun of Truth, and the philosophies and mythologies of the old world have given place to the faith and the charities of Christianity." As a result of this spiritual illumination, "the world has

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[20]Samuel Freeman Miller, "The State of Iowa," Harper's Monthly Magazine 79 (Jul. 1889): 169, 174.

[21]Joseph P. Bradley, Progress--Its Grounds and Possibilities. An Address before the Philoclean and Peithessophian Societies of Rutgers College, New Brunswick, New Jersey (N.p: The Philoclean Society, 1849), 6.

gone and is yet going forward in all that pertains to the proper dignity and happiness of mankind."[22]

Social progress, Bradley believed, had occurred and would continue in three areas: in knowledge and the arts, in the opinions and character of the people, and in their laws and institutions. In his opinion, the invention of printing and the spread of civilization "around the borders of the globe" guaranteed the permanence and continued improvement of modern civilization by preserving advances in knowledge and the arts. It could be taken for granted that

> the progress of science, and of its applications to the arts of life,--in other words, the progress of man's insight into and power over nature,--is not to meet with the retardations and obstructions, which were formally so fatal thereto.[23]

The application of the "experimental philosophy," with its "superior methods of investigation" and "more rigorous logic," to the sciences of chemistry, astronomy, engineering, and moral philosophy and to the arts of agriculture, commerce, and manufactures had "revolutionized the face of the civilized world" and uplifted the whole fabric of society "upon its majestic bosom."[24]

These "material ameliorations" were "the pillars of civilization, supporting that fair canopy beneath which all other benign principles flourish and expand." Bradley believed, therefore, that the results of advances in the sciences and arts were also seen "in the production of noble sentiments and a higher tone of feeling among men." Indeed, Bradley argued that

> improvement in institutions, and in the general character of the people, is itself but an effect, and mere result, of something behind and beneath it; that that something is the promotion of knowledge; and that the

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[22]Bradley, Progress, 5, 6.

[23]Bradley, Progress, 7, 10.

[24]Bradley, Progress, 11, 12, 15.

> ultimate development at which mankind can possibly arrive, must depend on this primal cause.[25]

"Enlightened public sentiment" and the amelioration of human character and institutions therefore depended on the general dissemination of knowledge and information and not, in Bradley's estimation, on changes in human nature itself. Man's state of moral trial meant that "each individual must begin the world anew for himself, and fight the battle on his own account." Men's habits might be trained, their morals improved, and their opinions and sentiments corrected but these improvements in the human condition rested less upon the perfectibility of the human character than upon the gradual squaring of opinion "with the dictates of truth and justice." Here, Bradley contended, real progress had been made in refining opinions concerning barbarous customs and punishments, the institution of slavery and racial prejudice, the dignity of labour, and the importance of an educated populace. A "true reckoning" of such questions, based on "the records and experiences of the past" and "tested by the well ascertained maxims of human character, right, duty, and interest" would over time produce further advancement in human affairs.[26]

Regarding the progress of human institutions and laws Bradley was of mixed mind. He rejected as a Utopian vision the notion that the progress of society would eliminate the need for civil government and instead emphasized the conviction that "man is bound to preserve society. God and his nature exact it at his hands." The perverse character of human nature required that society possess rules and the authority to enforce them. In short, society required civil government.[27] While Bradley believed in the necessity of civil government, he confessed, "I do not see in what way any material advancement can be made, upon the general form and complexion of the government which we have adopted" and which already represented to a remarkable extent, as Bradley believed it should, "the various interests of the

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[25]Bradley, Progress, 15, 18.

[26]Bradley, Progress, 22-4 passim.

[27]Bradley, Progress, 26, 29, 30.

community." In his consideration of "the interior organization of society," by which he meant its "domestic institutions, relations, and laws," Bradley conceded that "in matters of detail, much progress may and probably will be affected" and acknowledged that the nation's general system of laws, the common law, was still imperfect in some of its particulars.[28] All the same, he maintained that refinements were best expected to derive from the degree to which municipal law gave greater practical effect to universally recognized natural rights rather than the efforts of "misguided visionaries" to impose on society "notions" founded upon "a quick fancy" and a "one-sided and partial view of things" and which sought to force upon it "the teachings of a cold and inanimate philosophy" by which property and civil society would be abolished.[29] In his view, only those persons ignorant of the vast dimensions of the common law and "its ever painful anxiety to base itself upon the eternal principles of equity and justice" could deny that it was best adapted "to the wants of an advanced and enlightened society."

> The responses of many thousand wise and venerable men, declaring and explaining what is right and just... have been compared and sifted; and then moulded and shaped into a SYSTEM as symmetrical as the Parthenon--and that is what we call the common law.[30]

This view of the republican form of constitutional government and of the common law as the highest developments of civil society meshed with Bradley's belief that civilization progressed through well-defined stages characterized by specific developments. A survey of history identified these evidences of providence at work. Bradley observed that the progress of human affairs revealed great and important changes in the character of society at different periods in history. What impressions, Bradley asked, might crowd their minds, if Egypt's wisest priest, if Socrates, if Cicero, could rise, travel along the path of civilization, and witness "the universal

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[28]Bradley, Progress, 32, 33, 34.

[29]Bradley, Progress, 30, 36, 38.

[30]Bradley, Progress, 33, 35.

diffusion of knowledge, comfort, and happiness." If they might see "the vast and multiform machinery which science, enterprise and wealth have erected" and its contribution to "the general economy of society" and "to the individual as well as general happiness and development;" if they might observe "a whole people acknowledging and respecting not only the great moral truths which they were at so great pains to eliminate [sic] and teach, but recognizing and acting upon the principles of a moral code far in advance of theirs;" if they could witness all this, "would they not," he asked, "fancy themselves transported to the fabled islands of the blest?"[31]

The historical figures distinguished by Bradley were not random choices but symbolised important milestones in the development of civilization. Surveying history, Bradley observed that the Asiatic and Egyptian civilizations had "reclaimed men from nomadic habits, organized them into communities governed by laws, and established the division of labor." The ancient Greeks had originated philosophy and art. The Romans had created the jurisprudence of the Civil Law. Medieval Europe's chivalrous society had "introduced a loftier standard of personal honor, courtesy, and regard for the female sex," while modern Europe had "unfolded the book of Science, and created the colossal interests of Commerce and Manufactures." The Anglo-Saxon race had played a role in the development of civil liberty and the rights of man. All of these had, in his opinion, contributed to "the general development of social good."[32]

Justice Bradley was hardly unique in viewing history as the progressive unfolding of a higher civilization. Certainly Justice Brewer saw history in similar terms. Reviewing the lessons of history in an address originally given in 1893 and reprinted in 1900 Brewer observed that through the centuries the human race had been steadily advancing. Notwithstanding the moral and social dangers which he associated with labour organizations and the recent conflict between labour and business at the

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[31]Bradley, Progress, 1-2.

[32]Bradley, Progress, 5.

Carnegie Steel Company's plant in Homestead, Pennsylvania, Brewer agreed with Justice Bradley that civilized man might look backward through history and know that the thoughts and wisdom of all the ages were his and that "he stands possessor of all the beautiful, the true and the good that the ages have wrought or accumulated."[33]

> The potency of civilization is that it accumulates all that the earth produces, and pours it round and into the homes of its children. In the magnificence and luxuriousness which surrounds our lives, Solomon's glory,[34] is an unnoticed and forgotten splendor..., the dim foreshadowings of the American home and life.[35]

This transformation of man's material condition was made possible by the varied efforts of science to "take from mother earth all that it can give for the support and wellbeing of our citizens." Science, Brewer believed, might "fill the land with visible splendor and accumulated wealth" by developing commerce, mining, and manufactures and by redeeming "the arid lands and making the wilderness bud and blossom as the rose."[36]

Justice Brewer was, moreover, a self-confessed believer in the design of providence as it was revealed in Scripture and history, so that, in his view, the progessive unfolding of civilization represented another aspect of providence.

> I believe in the promises of Scripture, that His word shall not return unto Him void,[37] but shall accomplish that which He pleases and shall prosper in the thing whereto He hath sent it; that the time will come

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[33]David J. Brewer, "The Movement of Coercion," Address to the New York State Bar Association, January 1893, American Architect and Building News 70 (Nov. 1900): 85.

[34]1 Kings 4-10.

[35]Brewer, "The Movement of Coercion," 85.

[36]Isaiah 35: 1. David J. Brewer, "Legal Ethics," Address Delivered at Commencement of Albany Law School, June 1st, 1904, in Albany Law School Catalogue, Addresses and Papers, Legal Ethics Lectures (Albany: n.p., 1904), 18.

[37]Isaiah 55: 11.

> when the swords shall be beaten into plowshares and the spears into pruning hooks, and when men shall learn war no more forever.[38]
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> With the eye of faith I see unrolled on the canvas of the future a glorious picture, in which shall be seen every laborer dwelling beneath his own vine and fig tree,[39] receiving ever a living wage for his toil,[40] every merchant and manufacturer pursuing his business and industry without thought of interruption by the ravages of war, and men of science and wealth combining in the achievement of more and more gigantic results, adding not merely to the necessities of life, but taking possession of land and water and air, and all the forces to be found in them, and making them minister to human life.[41]

Justice Brewer was more explicit than Justice Bradley had been concerning the chronology of events that marked the unfolding of the divine plan and the development of civilization. In Brewer's view, the root of civilization lay in Christianity. "Twenty centuries ago there came a change. The heavens above the plains of Bethlehem were filled with a white-robed choir, and the only song of the heavens ever heard by the children of men broke the stillness of the night."[42] Since that time, the purpose of divine providence was discernible in the course of history and developments undoubtedly showed a slow but steady upward progress. Indeed, Justice Brewer offered an extensive list of historical events and persons which demonstrated that God's infinite power was working "for the accomplishment of truth, purity, and justice." He included among these numerous biblical references: Creation, the biblical Flood, the life of Abraham, the Israelites's flight out of Egypt,[43] the life and resurrection of Jesus Christ, and the life of St. John.[44] The

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[38]Isaiah 2: 4; Micah 4: 3.

[39]1 Kings 4: 25.

[40]Deuteronomy 24: 15; Colossians 4: 1; Leviticus 19: 13; Jeremiah 22: 13; Malachi 3: 5; and James 5:4.

[41]Brewer, The Mission of the United States, 23.

[42]Luke 2: 8-14. Brewer, The Mission of the United States, 1.

[43]Genesis, 1-2, 6-8, 12-25; Exodus.

list retained the religious context into historical times and gradually progressed to the secular developments of the modern period. Brewer included here the life of Peter the hermit,[45] the life and teachings of Martin Luther, the Mayflower Compact, the Declaration of Independence (1776), and the "martyred" Abraham Lincoln.[46]

Indeed, in a series of addresses Brewer suggested that the existence and the position among nations of the United States demonstrated the truth of the proposition that history depicted the ongoing fulfilment of the providential purpose.

> There was in the keeping of this continent unknown to civilized nations for long ages and bringing it to their knowledge only within the last four centuries a purpose or purposes. Many have been suggested. One is that as at that time printing was invented this nation was to be the seat of the widest, most universal education and intelligence. It has become so. Again the Bible was unchained, and man was put in settlement of all the great questions of life and eternity face to face with his Maker; and it has been said that this nation was intended to be the one in which religion should be the most free and universal, most personal. And it has been.[47]

Brewer mingled a series of ideas in these addresses. Implicit in his discussion of intellectual improvement was the idea that whatever would elevate the individual would ultimately benefit society. This was true of both moral and economic benefits. Anything conducive to personal purity, morality, and integrity increased the same characteristics in the community. Here, of course, Brewer attached great importance to the ameliorative influence of Christianity. "In so far, therefore, as the principles and precepts of Christianity develop righteousness in the individual, to the same

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[44]St. John (d. c.100 a.d.), an early disciple of Christ, one of the twelve apostles, and author of the fourth Gospel (John), the three Epistles of John (1,2, and 3 John), and Revelation.

[45]Peter the Hermit (c.1050-1115), French preacher of the First Crusade (1096-9) to the Holy Land.

[46]Brewer, The Twentieth Century, 39-43 passim.

[47]Brewer, "America's Duty in the Peace Movement," 126. See also Brewer, The Mission of the United States, 6-7 and Brewer, "The Promise and Possibilities of the Future," 80.

extent will a similar result be found in the life of the nation." Moreover, the close connection in moral theory between virtue and economic success meant that individual righteousness would be translated into national prosperity and happiness. "It has often been said," Brewer stated emphatically, "that Christian nations are the civilized nations."[48] This was not a coincidence, for "there is between the two the relation of cause and effect." The principles of Christianity contributed directly to the nation's advance in civilization.[49]

§ III MATERIALISM AND THE DANGER OF MORAL COLLAPSE

The justices' conception of the connection between material and moral progress was not, however, altogether positive. Justice Miller, for example had been less sanguine concerning the progress of civilization. While he was prepared to admit that "the world is now vastly better, wiser, and happier," he was quick to point out that these great gains had often been interrupted "by long intervals of moral darkness and stagnation."[50] In Miller's opinion, the tenuous gains made by civilization made the preservation and extension of the moral principles contained in the American Constitution all the more important to maintaining the happiness of the nation and, indeed, of the world.[51]

This qualification was a common theme among the justices, for their conception of the divinity and a divinely created and governed universe encouraged them to view American civilization in providential, even in deterministic and

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[48]Brewer, "The Promise and the Possibilities of the Future," 75.

[49]David J. Brewer, "Our Duty as Citizens," in Brewer, The United States a Christian Nation (Philadelphia: John C. Winston Co., 1905), 65.

[50]Samuel Freeman Miller, "The Conflict in this Country between Socialism and Organized Society," Address at the Commencement of Iowa State University, 19 June, 1888, in Charles N. Gregory (ed.), Samuel Freeman Miller (Iowa City: Iowa State Historical Society, 1907), 147 passim.

[51]Samuel Freeman Miller, The Constitution of the United States: Three Lectures Delivered before the University Law School of Washington, D.C., 6, 12, and 19 February, 1880 (Washington, D.C: W.H. and O. Morrison, 1880), 4.

them to view American civilization in providential, even in deterministic and progressive terms; however, they did not, as Justice Miller's view illustrated, always do so in an unqualifiedly optimistic manner. Although progress was an undeniable historical fact, which, as practitioners of the art and science of law, they felt uniquely qualified to assert, it was clearly a discontinuous journey fraught with pitfalls and dead ends. Justice Miller, while warning the graduating class at Iowa State University of the danger to civilization of socialism, had observed:

> It is a very great mistake... to adopt the idea that the progress of the human race in the science of government, in the arts of civilization and refinement, and in the establishment of morality and religion, has been constantly and steadily towards improvement and perfection.[52]

This qualified view of civilization's progress was repeated by his fellows, who at times appeared ambivalent about the benefits of progress.[53] Justice Brewer, for instance, took a generally positive view of the prospects for progress but one nonetheless tinged with regret at the undeniably slow advance of civilization.

> For sad and weary centuries the grand march of humanity upwards has been through strife and blood. But a growing echo of the heavenly music is filling the hearts of men, and the time will come, the blessed time will come.[54]

In his talk before the student societies at Rutgers College in 1849, Justice Bradley had acknowledged the exciting prospects that the future laid before the imagination.

> Imagination, once excited, has busied herself in painting on the canvas of futurity, visions of paradisaical beauty and bliss. Old things, under her pencil, pass away. All things become new. Nature itself wears a different aspect. Passion no longer agitates the human breast. Men become angels. The beasts of the field lose their savage nature.

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[52]Miller, "The Conflict in This Country between Socialism and Organized Society," 147.

[53]For a somewhat tongue in cheek view of the dubious benefits of mechanization, see Henry Billings Brown's paean to the horse and his excoriation of the automobile in "The Status of the Automobile," Yale Law Journal 17 (Feb. 1908): 223-31.

[54]Brewer, The Mission of the United States, 2.

> The lamb dwells with the lion, the lion lies down with the kid. Serpents lose their venom, and sickness and death are banished from the sublunary scene.[55]

Notwithstanding the "most wonderful progress towards betterment, in all that relates to the well-being of the race" and the pleasant prospect of still-greater advances in the future, Bradley had also insisted that progress moved at a "snail-like" pace and, remarking on the faded glories of Egyptian civilization, had been subject to frequent discontinuities and setbacks.[56] Mankind's "progress in virtue and true appreciation of their highest good, is always limited by the essential waywardness of their nature," a nature subject to "a principle within, warring against the law of the mind, and leading to a state of captivity to sin and death," a nature subject always "to the sway of his appetites and his passions." Thus, in Bradley's view, it was in man's very nature to place obstacles such as the vices produced by luxury and idleness or by an inordinate pursuit of gain in the path to happiness.[57]

Justice Brewer rejected as a moral backwater, with no ultimate ends or eternal rewards, the tendency to make materialism an end in itself.

> It may be to-day that in many of our crowded cities where wealth abounds, there are some fashioning a golden calf and calling upon all the people to come forward and worship it, but... the Almighty is chiselling in the heart of the American people the mandate, Thou shalt not steal; Thou shalt not bear false witness; Thou shalt not covet, and with that mandate graven into the heart of the American people, they will, when the time calls for it, take that golden calf and grind it into powder, and all the people will renew their allegiance to that Infinite Being, who is himself Truth, Justice, and Righteousness.[58]

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[55]Isaiah 11: 6-8, 25: 8, 1 Corinthians 15: 54, Revelation 21: 4. Bradley, Progress, 3.

[56]Bradley, Progress, 2, 3, 8-9.

[57]Bradley, Progress, 20, 21. Bradley discussed the enervating effects of luxury and corruption and the cyclical nature of civilization at 4-5.

[58]Exodus 32 and also 1 Kings 12: 28; Exodus 20: 15-7. David J. Brewer, Address of Justice David J. Brewer to the Association of the Northwestern Life Insurance Company, 18 July 1906 (Washington: n.p., 1906), 6.

The worship of material things was not only contrary to divine command but such idolatry actively worked against the improvements in knowledge and character which underlay the continued prosperity and happiness of both the individual and the nation.

> If we bow to the material and lose ourselves in the struggle for acres, for cattle and dollars, we shall see the historic splendors of our past vanishing away, and all that is fresh and grand in man and life weighed in balance of trade and found wanting.[59]

Justices Miller, Bradley, and Brewer were emphasizing the same fundamental point; namely, that material progress was a comforting means to a moral end. Progress was a material aid in uplifting the human spirit, "that spirit which is measured not by its capacity for turning coinage into dollars, but by its power upon the life,"[60] and creating superior human beings whose civilization was productive of "noble sentiments and a higher tone of feeling among men."[61]

§ IV PROGRESS AND AMERICA'S MANIFEST DESTINY

At the same time that he related moral improvement in the individual and the community to the advancement of civilization, Brewer connected the advancement of civilization to America's sense of manifest destiny and the working out of the providential design.[62] The invention of printing, the Protestant Reformation, the

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[59]David J. Brewer, "Address at the Dedication of the Kansas State Normal School at Emporia," 16 June, 1880 in Catalogue of the Officers and Students of the Kansas State Normal School (Emporia, 1879/80) quoted in Lynford A. Lardner, "The Constitutional Doctrines of Justice David Josiah Brewer" (Ph.d. diss., Princeton, 1938), 43.

[60]Brewer, "The Promise and Possibility of the Future," 85, 86.

[61]Bradley, Progress, 15.

[62]The term "manifest destiny" implied a divine sanction for U.S. territorial expansion. The term was coined by newspaper editor John L. Sullivan in the 1840s, who stated in an editorial that America's strongest claim to westward territorial expansion was "by the right of our manifest destiny to overspread and to possess the whole continent which Providence has given us for the... great experiment of liberty." Sullivan, New York Morning News (27 Dec. 1845) cited in Arthur M. Schlesinger,

discovery and settlement of America, and the subsequent rise of the United States as a great nation were all, in his opinion, links in a long chain of events originating in an act of the divine will and demonstrating the operation of a providential design. Thus, Brewer wrote that the United States might in the future advance in territory, in wealth, in inventive skill, and the trappings of high culture. "But grander far, and far more potential over the nations will she be when the beatitudes[63] become the magna carta of her life and her citizens live in full obedience to the Golden Rule."[64] In short, Brewer asserted that the real glory in the destiny of the United States lay not in material accumulations but in the possibility that Americans would fully assimilate Christian values and the Golden Rule into their national life. Brewer's confidence that the United States represented the culmination of Western civilization, "that fabric of civilization which humanity toiling beneath the dome of time has been working into our social and political life" and into the structure and colour of which had passed "all of human thought and feeling; all of human hope and aspiration; all of human self-sacrifice and denial; all of heroic effort and achievement," was shared by his associates on the bench.[65]

Justice Brown, who was not known for his overt religiosity, nevertheless accepted the relationship between moral improvement and the rise of civilization which was an integral part of the Christian Enlightenment. Writing in the American Journal of International Law about the prospects of a proposed international prize court, Brown observed that no intelligent man could review the history of the nineteenth century without becoming aware of the higher tone of political action and

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Jr., The Age of Jackson (Boston: Little, Brown and Co., 1953), 427nn. 11-2.

[63]Matthew 5-7.

[64]Brewer, "Our Duty as Citizens," 70-1.

[65]Brewer, "Legal Ethics," 18 passim.

public sentiment and the gradual elevation in the race. This advance in civilization and refinement must, he predicted, "redound to the general peace of the world."[66]

Both Justice Harlan and Justice Miller saw providence at work in the rise of the United States. Harlan adopted much the same position concerning the moral mission of the United States as Justice Brewer.

> For my own part, I believe that a destiny awaits America such as has never been vouchafed to any people, and that in the working out of that destiny, under the leadings of Providence, humanity everywhere will be lifted up, and power and tyranny compelled to recognize the fact that "God is no respecter of persons," and that He "hath made of one blood all nations of men."[67] Let us have an abiding faith that our country will never depart from the fundamental principles of right and justice, or prove recreant to the high trusts committed to it for the benefit... of all men everywhere.[68]

The justices' belief in progress and the manifest destiny of the United States to be the exemplar of providential design also found expression in their views on international law and the prospects of universal peace. As early as 1849 Justice Bradley stated in his address on progress that, "notwithstanding the quarrels for precedence which so frequently agitate the families of Europe in the present age,"[69] he could hope well for the future. "Civilization has extended her arms around the borders of the globe," and "a far more enlightened public sentiment" prevailed concerning "matters of government," "the rights and duties of nations, in times of

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[66]Henry Billings Brown, "The Proposed International Prize Court," American Journal of International Law 2 (July 1908): 484.

[67]Acts 10: 34, 17: 26.

[68]John Marshall Harlan, "James Wilson and the Formation of the Constitution," Being the Address of Honorable John Marshall Harlan... on the Occasion of the Dedication of the New Law Building of the University of Pennsylvania, at Philadelphia, 21 February 1900, American Law Review 34 (July/Aug. 1900): 503.

[69]Bradley gave this address the year following the widespread revolutionary disorders which broke out in across Europe in 1848.

peace and war," the practice of inhuman customs and punishments, and the existence of tyranny and oppression.[70]

This faith in the ameliorative influence of "enlightened public sentiment" on international relations was reflected in the writings of Justices Brewer and Harlan. When Justice Brewer addressed the Liberal Club of Buffalo, New York, in 1899, it was still unclear what the results of the Spanish-American War would be for American foreign policy. Brewer, however, had already identified some of the questions arising out of the war and launched into a discussion of their moral implications.[71]

Brewer justified American intervention in Cuba in moral terms. He noted that "if the circumstances demanded any outside interference in the affairs of Cuba... then we were so situated that it would seem to have been our special duty to interfere: we were the near Samaritan."[72] Brewer judged that America's intentions had been altruistic and condemned those who believed that national policy should "be guided in all respects by selfishness" and "not by any questions of humanity, but by the mere rule of dollars and cents." In his view, "a nation, although an aggregation of individuals," was not "somehow relieved of all obligations which rest upon an individual." It was "a great moral entity, expressing in its life the sum of all the moral obligations which rest upon its individual citizens."[73]

This assertion echoed the views of moral philosophers such as Francis Wayland. In his Elements of Moral Science, Wayland maintained that civil society was "an institution of God" in which both society and the individuals of which it was comprised remained obligated to follow His laws and the established principles of

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[70]Bradley, Progress, 10, 23.

[71]David J. Brewer, The Spanish War: A Prophecy or an Exception? Address before the Liberal Club, Buffalo, New York, 16 Feb. 1899 (N.p., Anti-Imperialist League, n.d.), 34.

[72]Luke 10: 30-6.

[73]Brewer, The Spanish War, 3.

their natures. In this scheme, Wayland conceived " a government to be that system of delegated agencies" through which society maintained its relations with its members and with other nations; however, as the agent of morally accountable beings, the exercise of governmental power was limited and conditioned by the same moral principles which governed the actions of individuals. In Wayland's view, society had no right to abrogate or to render void the moral obligations of its individual members and to change thereby their moral relations to God.[74]

In this context, Brewer held that the nation, like the individual samaritan, had a duty to respond to a "cry of appeal" from an oppressed people. The nation, he asserted, ought to "discountenance and never follow" those whose views of natural right and duty made the relief of a people from tyranny an exception to the Golden Rule.[75] In the case of Cuba, Brewer felt that the country's actions had been justified; however, he quickly qualified the extent of its moral obligation to relieve suffering in other nations. "It is the wise man," Brewer observed, "that successfully manages his own household," so that "although he may not selfishly ignore the condition of affairs of other households, yet he ought always to remember his primary duty and be cautious about interfering in the affairs of others." Drawing again upon the Biblical parable, Brewer noted that "the good Samaritan did not go down on the road from Jerusalem to Jericho looking for a job."[76]

In the decade following his address in Buffalo, Brewer's caution concerning interventionism grew in the aftermath of the Spanish-American war, America's growing involvement in the Far East, and the acquisition of the Panama Canal zone. By 1910, he openly opposed the increasing internationalism and militarism of

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[74]Francis Wayland, Elements of Moral Science, (1835; reprint, Cambridge, MA: Harvard University Press, 1963), 311, 322, 324. See also Mark Hopkins, The Law of Love and Love as a Law, or Christian Ethics, with an Appendix Containing Strictures by Dr. McCosh, 6th ed. (New York: Scribner, Armstrong & Co., 1873), 268-9.

[75]Brewer, The Spanish War, 3-4.

[76]Brewer, The Spanish War, 4.

American foreign policy. Firing a broadside at the suppositions underlying Alfred T. Mahan's calls for a blue-water navy, Brewer argued that "the pretense current in certain circles that the best way to preserve peace is to build up an enormous navy showed an ignorance of the lessons of history and the conditions of genuine and enduring peace." He condemned the "persistent effort to make of this a great military nation," which "from the football field to the ironclad, from the athlete to the admiral" dominated all thought and talk and which caused "brass buttons and epaulets" to fill the eyes of Americans. Further, Brewer attributed this change in the nation's sentiment to the Spanish-American War. Thus, his original support of the war, the purposes of which he had seen as altruistic, diminished as he came to associate its outcome with "personal ambition and the love of military display."[77]

Like Justice Brewer, John Marshall Harlan developed misgivings over missionary overseas adventures. In an address given in 1900, while American troops were still fighting in the Philippines, Harlan castigated critics of the country's foreign policy and contended that, rather than "entering upon a dark and perilous future," the United States could look forward to a great destiny and that "the American people are pure in heart, and have no desire or purpose other than to maintain the authority of the nation wherever our flag floats."[78] By 1902, however, Harlan had also developed profound misgivings concerning the direction of U.S. foreign policy.

> The question which overshadows all others is whether we are to have what is known as a colonial system, under which the United States... may exercise authority over territories or people, which territories have not been acquired with any view of their becoming States of the Union,

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[77]David J. Brewer, The Mission of the United States in the Cause of Peace, Address of the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States before the New Jersey Bar Association, 12 June 1909 (Boston: International School of Peace), 3, 10-1, 12. Alfred T. Mahan was a leading American naval strategist in the late nineteenth century and wrote The Influence of Seapower upon History (1890), in which he argued that America's expanding commercial interests required a large merchant marine and a powerful navy with overseas bases to protect it.

[78]Harlan, "James Wilson and the Formation of the Constitution," 503.

> and which peoples are not, and may never become, citizens of the United States.... Now, more than at any time in the past, it behooves us to take care that in fulfilling some supposed duty to the world or to any particular peoples, we do not impair those principles of Government which are embodied in the Constitution.[79]

§ V LIBERTY AND RESTRAINT

In an address before the Union League in Chicago in May, 1889, Justice Harlan touched on the theme of liberty within a constitutional form of government. The American system of government represented, in Harlan's view, "the most wonderful work ever struck off at one time by the brain and purpose of man,"[80] because it combined protection for the liberties of the people and a government of ample powers within the restraints of a constitution which reflected the fundamental principles and values upon which an enduring society must depend.[81] Harlan appealed to his listeners to remember that:

> the liberty for which our fathers fought is liberty secured by law, not the liberty of mere license. There is no place in our American system for the unrestrained freedom that respects not the essential rights of life, liberty and property.[82]

Harlan returned to the theme of liberty regulated by law and morality in his opinion for the tribunal of arbitration between the United States and Great Britain constituted in 1892 to protect seal herds in the Bering Sea and to regulate their harvesting by citizens of the two countries. His views in that opinion revealed many of the Court's governing assumptions concerning the liberty of individuals and nations and the institution of property.

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[79]John Marshall Harlan to Sen. John C. Spooner, 14 July, 1902 quoted in Alan F. Westin, "The First Justice Harlan: A Self-Portrait from his Private Papers," Kentucky Law Journal 46 (1958): 360-1.

[80]Harlan attributed this remark to William Gladstone, the British statesman and prime minister.

[81]See Wayland, Elements of Moral Science, 318.

[82]John Marshall Harlan, "Centennial of the Adoption of the Constitution," Chicago Legal News 21 (1889): 302.

On the question whether Great Britain and the United States had the right and power to regulate the harvesting of fur seals on the high seas, Harlan argued that the law of the sea was not lawlessness. "Nor can the law of the sea and the liberty which it confers and which it protects be perverted to justify acts which are immoral in themselves, which inevitably tend to results against the interests and against the welfare of mankind."[83] Liberty, in Harlan's view, was not a license to act immorally. He was not alone in this position, for, in speaking of the obligation to obey the law, Justice Brewer made the same assertion.

> Laws and rules place some restraint on human actions, but it does not follow therefrom that they at all interfere with liberty in its truest sense. For liberty does not imply license, absolute freedom of action, but simply the right to do that which one deems best, subject to the limitation that it does not interfere with the equal rights of other members of the community.[84]

Harlan and Brewer were certainly suggesting nothing new when they maintained that individual freedom must be subject in civil society to a degree of moral and physical restraint. John Locke's Second Treatise of Civil Government (1690) had argued that even persons in a state of nature, where they enjoyed "perfect freedom to order their actions and dispose of their possessions and persons as they thought fit" did so "within the bounds of the law of nature" taught by reason. Locke had maintained, therefore, that liberty was not license.[85] In the eighteenth century, Montesquieu's Spirit of the Laws (1748) had expressed the idea of liberty defined by law. Montesquieu had maintained, like Locke, that liberty did not consist of an unrestrained freedom but rather the power to do what one ought to will, in conformity

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[83]John Marshall Harlan, Opinions of Mr. Justice Harlan at the Conference in Paris of the Bering Sea Tribunal of Arbitration, Constituted by the Treaty of February 29, 1892, between Her Britannic Majesty and the United States of America (Washington, D.C.: Government Printing Office, 1893), 53.

[84]David J. Brewer, American Citizenship: Yale Lectures on the Responsibilities of Citizenship (New Haven: Yale University Press, 1902), 87.

[85]John Locke, Second Treatise of Civil Government (Indianapolis: Hackett Publishing Co. Inc., 1980), § 4, 2 and § 6, 4.

with laws reflecting principles of morality and justice. Liberty unrestrained by law was, in his opinion, meaningless, since without its protection all would have the right to follow the unrestrained impulses of their self-interest and to impose their will on every other individual.[56]

This belief that civil society required that individual liberty must be subject to restraint remained an integral part of nineteenth-century Moral Philosophy. Both Samuel Stanhope Smith and, much later, Francis Wayland asserted that a prudently directed police power was necessary to limit and direct men "in the use of their respective rights in society, so that the exercise of the rights belonging to one citizen, shall not impede or interfere with those belonging to any other.[57]

In the case of the need to regulate the harvesting of the fur seals in the Bering Sea, Harlan argued that the freedom allowed by the law of the sea to order one's actions implied a moral duty to regulate those actions rightly. The hunting to extinction of a valuable population of animals was immoral in itself because it disregarded "the rules of reason, morality, humanity, and justice" derived from the law of nature and "approved by the moral sense of mankind."[58] In this case, the nation had a moral duty to act in preventing the extinction of the seals even in the absence of explicit laws by which to justify its actions.

Harlan inferred from the wording of the treaty, which empowered the tribunal to make "such concurrent regulations 'outside the jurisdictional limits of the respective Governments,' as may be necessary 'for the proper protection and preservation of the furseal,'" that the tribunal had a "plain duty" to create appropriate regulations based upon what he termed "the public law of nations--that is, by those

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[56]Baron de Montesquieu, The Spirit of the Laws, translated by Thomas Nugent (1748; reprint, New York: Macmillan, 1949), Bk. XI, XII.

[57]Samuel Stanhope Smith, The Lectures Corrected and Improved Which Have Been Delivered for a Series of Years in the College of New Jersey on the Subjects of Moral and Political Philosophy, 2 vols. (Trenton: Wilson for Fenton, 1812), 2: 222-3; Wayland, Elements of Moral Science, 319.

[58]Harlan, The Bering Sea Tribunal of Arbitration, 134.

principles common to, and recognized as binding by, all civilized countries in their intercourse and relations."[89]

Harlan's position created controversy between counsel for the two governments, for the position of the United States was that in determining the rights recognized by the law of nations, "the Tribunal... must give effect to, those principles of right reason, justice, humanity, and morality which have their foundation in the law of nature as applied to the institution of property." Harlan expressed the American view, which was later explicitly laid out in Justice Brewer's article on international law, "that the law of nations does exist, can be ascertained, and can be applied, and that there is a body of law which civilized nations have consented should form the rules of their conduct in their relations with each other."[90] Conversely, the British argued that the rights of the two nations should not depend upon "abstract principles" of right and wrong or of sound reason and justice but "determined upon the grounds of positive law."[91]

Harlan argued instead that there were certain rules "ordained by society for its improvement and preservation" and arising out of the necessities of the institution of property, "which are common to the jurisprudence of all civilized nations."

> While these rules may be more frequently found recognized in municipal law, they are so grounded in the well-being of man, and so thoroughly supported by right reason, and natural justice, as to have become universally recognized, and, therefore, must be regarded as part of the common law of civilized countries. Nations, no more than individuals, may disregard those rules, for upon their observance depends the existence of organized society and the security of government among civilized peoples.[92]

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[89]Harlan, The Bering Sea Tribunal of Arbitration, 29-30, 31-2, 133.

[90]David J. Brewer and Charles Henry Butler, "International Law; a Treatise," in Cyclopedia of Law and Procedure, 40 vols. (New York: American Law Book Co., 1901-12), 22: 1700.

[91]Harlan, The Bering Sea Tribunal of Arbitration, 133.

[92]Harlan, The Bering Sea Tribunal of Arbitration, 134.

Harlan amassed an impressive list of authorities to sustain his position that natural law supported the notion that the interests of society, whether composed of individuals or nations, required that absolute liberty be restrained by prudent police regulations which both individuals and nations had a moral and legal duty to follow. Although he cited both English and American case law in his opinion,[93] Harlan emphasized the contributions to natural law theory of legal commentators and moral philosophers and argued

> I think it may be unequivocably affirmed that every doctrine that may be fairly deduced by correct reasoning from the rights and duties of nations and the nature of moral obligations, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations, it may be enforced by a court of justice.[94]

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[93]See Case of The Helena, 4 Robinson's Admiralty Reports (G.B.) 7 per Lord Stowell; Queen v. Keyn, Law Rep., 2 Exch. Div. (G.B.) 214 per Phillimore; Thirty Hogsheads of Sugar v. Boyle, 9 Cranch (U.S.) 191 (1815) per Marshall, C.J.; La Jeune Eugénie, 2 Mason's Reports 449 per Story.

[94]Harlan, The Bering Sea Tribunal of Arbitration, 134. Among the sources cited by Harlan were: Sir William Blackstone Commentaries of England (London, 1765-69); Robert Joseph Phillimore, Commentaries on International Law; Théodore Ortolan, International Rules and Diplomacy of the Sea (Paris, 1845); James Kent, Commentaries or American Law, 4 vols. (1826-30); Francis Bacon, Dissertation on the Advancement of Learning (1605); Samuel Pufendorf, On the Duty of Man and Citizen According to Natural Law, 5th English ed. (1729); Johann Gottlieb Heineccius, A Methodical System of Universal Law: or, The Laws of Nature and Nations (London, 1763); an unspecified work by Laurent Hautefeuille, author of numerous works on maritime law; Emmerich de Vattel, The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns (1758); Jean Jacques Burlamaqui, Principles of Natural and Politic Law (1823 ed.); Georg Friedrich von Martens, The Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe (London: E. Jeffrey, 1802); Henry Wheaton, Elements of International Law (London, 1878); Sir Travers Twiss, Law of Nations (1884 ed.); and John Norton Pomeroy, International Law (1886). See also Brewer and Butler, "International Law," in Cyclopedia of Law and Procedure, 22: 1700n. 4, 5, where Brewer also acknowledged the influence of natural law theorists of the sixteenth and seventeenth centuries such as Grotius, Gentilis; Bynkershoek, Pufendorf, Wolff, Vattel.

Justice Brewer similarly adopted in his article on international law the definition of the state found in Vattel's Law of Nations and that author's application of ethical rules of behaviour to the acts of nations. The application of standards of ethical behaviour to nations was, Brewer noted in a reference to Wheaton's Elements of International Law, an innovation from the definition of the state found in the works of Cicero and other public jurists, which had defined the state as a political body void of moral qualities.[95]

> States as Vattel defines them, "are bodies politic, societies of men united together for the promotion of their mutual safety and advantage by the joint efforts of their combined strength. Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person who possesses an understanding and a will peculiar to herself and is susceptible of obligations and rights."[96]

As in the case of the individual, the moral agency of the state was a product of the exercise of reason and judgment or, in short, of the existence of free will and choice. The state, in effect, possessed a collective understanding and a will, which in nineteenth-century moral theory morally obliged it to make right or virtuous choices based on the nature and purpose of its existence.

> The organization of individuals into a corporate body, whether small or great, local or national, is not a movement outside the domain of morals, does not eliminate the matter of character, does not create a mere machine like a steam-engine unaffected by conscience, but simply puts into an organic whole the combined consciences, character and morality of all the individual members.[97]

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[95]Wheaton, Elements of International Law cited in Brewer and Butler, "International Law," in Cyclopedia of Law and Procedure, 22: 1706.

[96]Vattel, Law of Nations, §§ 1, 2 cited in Brewer and Butler, "International Law," in Cyclopedia of Law and Procedure, 22: 1706.

[97]Brewer, American Citizenship, 40. Brewer had also explored the moral obligations of corporate bodies in his article, The Spanish War: A Prophecy or an Exception?, Address before the Liberal Club, Buffalo, New York, 16 Feb. 1889.

The reliance of Justices Brewer and Harlan upon this theory of statehood strongly suggests that American jurists continued to think about the individual and society in essentially moral, rather than economic, sociological, or pragmatic, terms. Although Justices Harlan and Brewer expressed their views of the state as an entity possessing moral attributes in connection with questions involving international law, the primary influence of this doctrine upon the court lay in what Justice Bradley referred to as "the interior organization of society," in the sphere of its social relations and laws.

§ VI THE INSULAR CASES

Harlan and Brewer's unease over expansionism, in connection with the continued moral well-being and advancement of American society, was due in part to the direction of American foreign policy following the Spanish-American War. However, their apprehension of danger to the nation's moral fibre may also have stemmed from direction taken by the Court in the Insular Tariff Cases (1901) and in Hawaii v. Mankichi (1903) as it worked out the practical effect upon the law of the country acquiring an overseas empire. In these cases, the Court was faced with constitutional questions arising from the acquisition by the United States of the formerly Spanish colonies of Puerto Rico and the Philippines as a result of the Spanish-American War and from the annexation of the Hawaiian Islands in 1898. The legal and constitutional issues presented by these questions created moral difficulties for the Court which were reflected in the voting patterns in the four cases. In each case, the Court ruled by a five to four majority, with Justice Brown writing the Court's opinion. In De Lima v. Bidwell, Justice Gray dissented in a very short opinion, while Justices McKenna, Shiras, and White did so in a separate opinion written by McKenna. In Dooley v. United States, Justice White wrote a dissenting opinion with which Justices Gray, Shiras, and McKenna concurred. In Downes v. Bidwell, White was joined in a concurring opinion by Justices Shiras and McKenna,

while Chief Justice Fuller dissented with Harlan, Brewer, and Peckham.[98] This pattern of divided opinion on the Court was largely repeated in Hawaii v. Mankichi, in which Justice Shiras shifted his support to Brown's opinion, White again submitted a concurring opinion with McKenna. Fuller dissented with Brewer and Peckham, and Harlan wrote a separate dissenting opinion. Thus, in the last two cases, Justice Brown's opinions gathered only two and three votes of nine.[99]

In De Lima v. Bidwell and the related case of Dooley v. United States, the Court faced the question whether imports from the island of San Juan, Puerto Rico, brought into the country after the island had been ceded to the United States by the Spanish government were imports from a foreign country and therefore subject to tariffs. The cases therefore raised the single issue whether territory acquired by the United States by cession from a foreign power remained a "foreign country" within the meaning of the tariff laws.[100]

In De Lima v. Bidwell, Justice Brown ruled that precedent and the history of congressional and executive action concerning newly acquired territories supported the view that any territory acquired by the United States became subject to the powers of the federal government as soon as it was ceded to the United States and in its possession. It followed from this conclusion that, by the ratification of the Treaty of

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[98]De Lima v. Bidwell, 182 U.S. 1 (1901). Majority: Brown, Brewer, Fuller, Harlan, Peckham. Dissenting: Gray. McKenna, Shiras, White. Dooley v. United States, 182 U.S. 222 (1901). Majority: Brown, Brewer, Fuller, Harlan, Peckham. Dissenting: White, Gray, McKenna, Shiras. Downes v. Bidwell, 182 U.S. 244 (1901). Majority: Brown, Gray. Concurring: White, McKenna, Shiras. Dissenting: Fuller, Brewer, Harlan, Peckham.

[99]Hawaii v. Mankichi, 190 U.S. 198 (1903). Majority: Brown, Gray, Shiras. Concurring: White, McKenna. Dissenting: Fuller, Brewer, Peckham. Harlan.

[100]De Lima v. Bidwell, 182 U.S. 1 (1901). See also Dooley v. United States, 182 U.S. 222 (1901).

Paris, Puerto Rico had become a territory of the United States, "although not an organized territory in the technical sense of the word."[101]

This left the question whether Puerto Rico remained a "foreign" country within the meaning of the tariff laws and, more broadly, whether the laws of the United States automatically extended to newly acquired territories. In Brown's view, a country could not remain foreign with respect to the tariff laws until Congress acted to embrace it within the customs union of the United States and yet be a territory of the United States in every other sense--it could not "be domestic for one purpose and foreign for another." The Court ruled therefore that Puerto Rico was not a foreign country within the meaning of the tariff laws but a territory of the United States and was not as a result subject to duties on goods imported from or exported to the United States.[102] Thus, in the first of the tariff cases, Justices Brewer and Harlan voted with Brown, while Justice Gray's eight-line dissent rested on the technical ground that the decision appeared to conflict with an earlier precedent.

In De Lima v. Bidwell the Court had ruled on a relatively narrow issue. In Downes v. Bidwell, the issue stood upon broader grounds. An importer of oranges from Puerto Rico sued the New York port collector for duties levied on his cargo on the grounds that special duties imposed on imports into the United States from Puerto Rico were contrary to constitutional provisions requiring duties to be uniform throughout the United States and forbidding regulations requiring ships bound from one state to "enter, clear, or pay duties in another." This case therefore raised the question whether the provisions of the Constitution automatically applied to new territories and, more importantly, whether the inhabitants of those areas were entitled

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[101]De Lima v. Bidwell, 182 U.S. 1, 195, 196 (1901) per Brown.

[102]De Lima v. Bidwell, 182 U.S. 1, 198, 200 (1901) per Brown. See also Melvin I. Urofsky, A March of Liberty: A Constitutional History of the United States, 2 vols. (New York: Alfred A. Knopf, 1988), 2: 485.

to constitutional protection. Here the court, again speaking through Justice Brown, refused to accept the principle that the Constitution automatically followed the flag.[103]

Brown's opinion stated that neither the Articles of Confederation nor the Constitution explicitly stated that acquired territories were considered part of the United States. These instruments and subsequent constitutional amendments dealt only with states, not territories appurtenant to the Union. Brown held that in previous cases when new lands had been acquired by the United States Congress had assumed that

> the Constitution did not extend to them of its own force, and has in each case made special provisions, either that their legislatures shall pass no law inconsistent with the Consitution of the United States, or that the Constitution or laws of the United States shall be the supreme law of such territories.[104]

In the Court's view, "the practical interpretation put by Congress upon the Constitution" and applied to the continental territories acquired during the course of the century had been "to the effect that the Constitution was applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct."[105]

Brown asserted that the power to acquire territory by treaty implied "not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American empire'." In Brown's opinion, there were serious consequences to the view that the inhabitants of annexed territories, "however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States," or that "their children thereafter born, whether savages or

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[103]Downes v. Bidwell, 182 U.S. 244 (1901).

[104]Downes v. Bidwell, 182 U.S. 244, 250, 251, 257 (1901) per Brown.

[105]Downes v. Bidwell, 182 U.S. 244, 279 (1901) per Brown.

civilized, were such, and entitled to all the rights, privileges, and immunities of citizens."[106]

In Brown's view, the "grave apprehensions of danger" felt "by many eminent men" regarding the potential for "unjust and oppressive legislation" by Congress "in which the natural rights of territories or their inhabitants may be engulfed in a centralized despotism" were unwarranted. There were, he maintained, "certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect" and which operated "by inference and the general spirit of the Constitution" to protect the personal rights of territorial inhabitants from unjust oppressions.[107] Brown adopted the view expressed by Chief Justice Marshall that, while they should not in the meantime be "wantonly oppressed," the incorporation into the Union of people differing markedly in race, habits, laws, and customs must proceed gradually until, in the consideration of Congress, "the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people."[108]

In the meantime, Brown suggested "that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence." In the former class, Brown included personal rights such as freedom of conscience, the right to personal liberty and individual property, to the free and equal protection of the courts by due process of law, and "to other such immunities as are indispensable to a free government." In the latter class, he included the rights "to citizenship, to suffrage, and to the particular methods of

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[106]Downes v. Bidwell, 182 U.S. 244, 279-80 (1901) per Brown.

[107]Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 34 (1890) per Bradley cited in Downes v. Bidwell, 182 U.S. 244, 268 (1901) per Brown.

[108]Johnson v. McIntosh, 8 Wheat. 543, 583 per Marshall cited in Downes v. Bidwell, 182 U.S. 244, 281 (1901) per Brown.

procedure pointed out in the Constitution, which were peculiar to Anglo-Saxon jurisprudence." These particulars, he argued, might be impossible to administer for a time where they were unsuited to the habits and modes of thought of the inhabitants in new lands.[109]

Brown's position, while it had difficulty garnering unanimous support among his colleagues, was not without foundation in moral theory. Francis Wayland's discussion of civil society had also touched on the idea of attributes which were essential to the continued existence of society and others which were merely "accidental." Among society's essential attributes were its obligation to protect the personal rights of its individual members by enforcing the laws of the commonwealth. But, Wayland observed, society's obligation to protect the individual did not render him any less within its physical power. "The real question of civil liberty," he argued, "is not concerning forms of government but concerning the respective limits and obligations of the individual and society." When these were correctly understood and observed, there could be no oppression, and, where they were not, there would be tyranny. Wayland observed, however, that these limits were not exclusive and that men in society were free to define the forms of government that in their estimate best suited the objects of society. These forms were "accidental modifications of society," not essential to its existence, which could not be presumed to exist nor to exist unless explicitly recognized by society. They were not to be mistaken for essential powers of society but were, instead, "matter of concession and mutual adjustment."[110]

Justice Brown's position on which constitutional provisions applied automatically to new lands and which did not accurately reflected Wayland's ideas on the essential and accidental powers of society and its agent, government. This idea that the extension of the particulars of constitutional protection required the explicit action of Congress was expressed more fully in the "incorporation theory" contained

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[109]Downes v. Bidwell, 182 U.S. 244, 282-3 (1901) per Brown. See also Wayland, Elements of Moral Science, 327.

[110]Wayland, Elements of Moral Science, 316-22 passim.

in Justice White's concurring opinion.[111] Where the dissenting members of the Court disagreed with both the majority and concurring opinions was in delineating which constitutional rights were essential and which were "accidental," or incidental.

The decisions rendered by the Court in the Insular Cases suggested that, while new lands acquired by the United States became part of the country for administrative purposes, the Court was reluctant to extend that principle to broader constitutional grounds. In 1903, the doctrines worked out in the Downes case were applied to Hawaii v. Mankichi. In this case, Mankichi had been tried and found guilty of manslaughter by a Hawaiian court but had been released by the Federal District Court upon a writ of habeas corpus on the grounds that, in alleged violation of the Constitution, Mankichi had been tried upon an indictment not found by a grand jury and convicted by the verdict of only nine out of twelve jurors.[112]

In the Newlands Resolution of July 7th, 1898, the Republic of Hawaii had been annexed "as part of the United States, and subject to the sovereign dominion thereof," with the condition that the municipal legislation of the Hawaiian islands "not inconsistent with this joint resolution nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."[113] On June 14th, 1900, the islands were formally incorporated as the territory of Hawaii and "by this act the Constitution was formally extended to these islands." Notwithstanding these events, Brown held that Hawaiian criminal procedure was not contrary to the constitution and denied the writ. He placed the Court's decision "upon the ground that the two rights

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[111]Downes v. Bidwell, 182 U.S. 244, 246 (1901) per White. See also Urofsky, A Mar[illegible] of Liberty, 2: 487.

[112]Hawaii v. Mankichi, 190 U.S. 198 (1903). See the Bill of Rights, Art. V and VI.

[113]Hawaii v. Mankichi, 190 U.S. 198, 209 (1903).

alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure."[114]

In a concurring opinion, Justice White, citing the decision in Downes v. Bidwell, took the position that the provisions of the Fifth and Sixth Amendments of the Constitution were not applicable to Hawaii.

> While the effect of the resolution of annexation was to acquire the islands, and subject them to the sovereignty of the United States, neither the terms of the resolution nor the situation which arose from it served to incorporate the Hawaiian islands into the United States, and make them an integral part thereof.

In White's opinion, the resolution of annexation was not intended to incorporate the islands but, "whilst acquiring them, to leave the permanent relation which they were to bear to the government of the United States to await the subsequent determination of Congress." It was not therefore an open question whether the constitutional provisions as to grand and petit juries were applicable to criminal proceedings in Hawaii.[115]

This case sparked further dissent among the justices. Chief Justice Fuller, with whom concurred Justices Brewer and Peckham, argued that by the terms of the resolution the annexation of the Hawaiian islands as an integral part of the United States had been accomplished and that by the plain and unambiguous language of the resolution no legislation which was contrary to the Constitution of the United States remained in force after July 7th, 1898. This was not, in Fuller's view, "a question of natural rights, on the one hand, and artificial rights on the other, but of the fundamental rights of every person living under the sovereignty of the United States in respect of that government." The Chief Justice believed that those fundamental rights included the common-law rights described in the Constitution as "fundamental principles of civil and religious liberty" and further enshrined in the Bill of Rights.[116]

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[114]Hawaii v. Mankichi, 190 U.S. 198, 211, 217 (1903) per Brown.

[115]Hawaii v. Mankichi, 190 U.S. 198, 219-20 (1903) per White.

[116]Hawaii v. Mankichi, 190 U.S. 198, 223, 225, 226 (1903) per Fuller.

In a separate dissenting opinion, Justice Harlan went further in his analysis of the moral effects of these decisions. Like Fuller, Harlan argued that the Hawaiian islands had been annexed to the United States and made subject to its sovereignty by the resolution of 1898. As a result, only such legislation as was not contrary to the Constitution and was consistent with that instrument was to remain in force until Congress otherwise determined. Further, he rejected the view that further explicit action by Congress was required to extend the provisions of the Constitution to acquired territories.

> I dissent altogether from any such view. It assumes the possession by Congress of power quite as omnipotent as that possessed by the English Parliament. It assumes that Congress, which came into existence, and exists, only by virtue of the Constitution, can withhold fundamental guarantees of life and liberty from peoples who have come under our complete jurisdiction; who, to use the words of the United States minister, have become our fellow-countrymen; and over whose country we have acquired sovereign dominion. In my opinion neither the life nor the liberty of any person, within any territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal acting under its authority, by any form of procedure inconsistent with the Constitution of the United States.[117]

In Harlan's view, subjecting the extension of fundamental rights to new territories to an act of Congress placed Congress above the Constitution, for it meant that the United States might acquire territory by cession, conquest, or treaty and exercise sovereignty over it, outside of and in violation of the Constitution. This, in his opinion, would have disastrous effects upon the moral values and political principles of the American people.

> It would mean that, under the influence and guidance of commercialism and the supposed necessities of trade, this country had left the old ways of the fathers, as defined by a written Constitution, and entered upon a new way, in following which the American people will lose sight of, or become indifferent to, principles which had been supposed to be essential to real liberty. It would mean that, if the principles now announced should become firmly established, the time may not be far distant when, under the exactions of trade and commerce, and to gratify

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[117]Hawaii v. Mankichi, 190 U.S. 198, 233-4, 236 (1903) per Harlan.

> an ambition to become the dominant political power in all the earth, the United States will acquire territories in every direction... over which we will exercise absolute dominion, and whose inhabitants will be regarded as "subjects" or "dependent peoples," to be controlled as Congress may see fit, not as the Constitution requires.... Thus will be engrafted upon our republican institutions, controlled by the supreme law of a written Constitution, a colonial system entirely foreign to the genius of our government and abhorrent to the principles that underlie and pervade the Constitution.[118]

The Insular Cases suggest that the justices were presented with difficulties when required to square their belief in providence and America's manifest destiny to be its chosen instrument with the practical questions arising from the administration of foreign territories. In the opinions of Justices Brown and White, the court leaned toward a narrow interpretation of the fundamental principles enshrined in the Constitution and the view that the moral and social benefits which were assumed to accompany American citizenship could not be distributed carte blanche to the inhabitants, whether savages or civilized, of newly-acquired territories. At the same time, the dissenting opinions in these cases, particularly that of Justice Harlan in Hawaii v. Mankichi, suggest that he and Justice Brewer, at least, perceived in the creation of an "American empire" instigated at the behest of a rampant commercialism dangers to both the nation's character and to the fundamental principles of liberty enshrined in its Constitution.

The faith of nineteenth-century Americans in an immanent deity and in progress was expressed in the writings of the justices and reflected an essentially moral view of the historical process. As Justice Brewer phrased it, moral and material progress did not necessarily mean "giving up all our thought to material development," nor "an inculcation of the merely utilitarian philosophy of selfish morality."[119] Progress, as the justices defined it, had more to do with the creation of a higher civilization based upon natural and divine laws the success of which was

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[118]Hawaii v. Mankichi, 190 U.S. 198, 239-40 (1903) per Harlan.

[119]Brewer, "The Promise and Possibility of the Future," 86.

outwardly manifested by the tokens of material prosperity. In this sense, it was the purpose of moral and legal science to embody the eternal values of natural and divine law in the moral and civil rules of society and to provide practical guidance on the conduct of affairs in accordance with their general principles. In this regard, the Insular Cases and Hawaii v. Mankichi represented efforts by the Court to square a moral theory of society and government with the practical effects of territorial expansion.

CHAPTER VII

MORAL ACCOUNTABILITY, THE FACULTATIVE STATE AND THE POLICE POWER

§ I THE PURPOSE OF GOVERNMENT

Moral Philosophy remained an important component of the antebellum college curriculum until at least the 1860s. Its close ties to American Protestant theology and its formulation of faculty psychology provided a theoretical and practical framework upon which to hang the normative values of American politics and law. In terms of legal theory, Moral Philosophy and faculty psychology particularly influenced the justices' conception of ultimate individual and social values. The doctrine of individualism taken within a voluntaristic and moral rather than a purely political and economic context certainly coloured the justices' understanding of the springs of individual and collective motivation in the economy and their determination of questions involving responsibility and accountability. At the same time, the doctrines of moral science conditioned their views of the relation between society and the individual, of the purpose and instrumentality of public policy, and of the nature and operation of a federal republic, particularly with regard to the separation of powers and of the courts' power of judicial review in that system.

The foundation of the Court's political theory stood upon a bipartite footing. God had ordained that man must labour in order to survive. The logical corollary to that proposition was that man acquired property through his labour. Man was also a social being. The state, the creation of men living in society, was established in order to promote the safety and advantage of both the individual and the group. It followed from these premises that the purpose of the state was the protection of the individual and his property. In Justice Miller's words, these were the basic "principles which

underlie all governments," and "which are essential to the organized existence of mankind in the bonds of social union."[1] The end of government was, as Justice Brewer asserted, the security of the individual.

> Security is the chief end of government; and other things being equal, that government is best which protects to the fullest extent each individual, rich or poor, high or low, in the possession of his property and the pursuit of his business.[2]

Given the voluntaristic moral setting in which they viewed both the state and individuals, the justices believed that government was best which protected to the fullest extent the autonomy of each individual with the minimum amount of legal apparatus and government interference in private decision-making. They believed that while law might be acknowledged as the "potent force" binding society into a single entity and uniting "the protection of the individual with the efficiency of combined action,"[3] that force must be balanced against the demands of man's condition as a moral agent. The law must allow for the operation of individual judgement and the exercise of free will in order for the individual to reach his full potential and attain his greatest happiness. Within this ethical context, the state became a means to a greater end, the fullest secular development of humanity within an individualistic and voluntaristic ethical framework, rather than an end unto itself.[4]

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[1]Samuel Freeman Miller, "The Conflict in This Country between Socialism and Organized Society," Address at the Commencement of Iowa State University, June 19th, 1888, in Charles N. Gregory, Samuel Freeman Miller (Iowa City: State Historical Society of Iowa, 1907), 153. See also Francis Wayland, The Elements of Moral Science (1835; reprint, Cambridge, MA: Harvard University Press, 1963), 318.

[2]David J. Brewer, "The Nation's Safeguard," New York State Bar Association Proceedings 16 (1893): 37-47; reprint, in Alan F. Westin, ed., An Autobiography of the Supreme Court: Off-the-Bench Commentary from the Justices (New York: Macmillan, 1963), 123.

[3]David J. Brewer, "The Ideal Lawyer," Atlantic Monthly 98 (Nov. 1906): 589.

[4]David J. Brewer, "Legal Ethics," Address Delivered at Commencement of Albany Law School, June 1st, 1904, in Albany Law School Catalogue, Addresses and

This conception of the end of government and of its instrumentality informed the justices' understanding of American political values and the higher purpose underlying the principles of constitutional government. In the words of Justice Brewer, the Declaration of Independence was far more than "a collection of glittering generalities." Rather, it expressed in much the same manner as Scripture certain moral truths known to every man. Brewer's identification of scriptural and moral truth with American political values was not simply a metaphorical expression, although religious metaphor clearly abounded in nineteenth-century American discourse. It was, rather, an assertion that both documents expressed a particular kind of absolute truth. Drawing out the analogy between Scripture and the Declaration of Independence, Brewer contended that, if one "subtract from Christianity all that it implies," "what is left is as barren as the sands of Sahara." In the same fashion, "the Declaration passed beyond the domain of logic." It argued, or provided absolute proof of, nothing. Rather, "it appeals to the intuitions of every true man, and relying thereon, declares the conditions upon which all human government, to endure, must be founded."[5]

Thus, the assertion that the pursuit of happiness was the inalienable right of every individual stated a moral truth which antedated human institutions and which was logically prior to their analysis.[6] Providence had ordained that all men had the necessity and the duty to pursue life, liberty, and happiness. In moral terms, it commanded that they exert their faculties and powers in order to sustain life and to improve their own and the condition of others. It required them to exercise their judgement and free will in living a virtuous existence and to seek happiness, not only in obtaining the comforts of this life but as well in preparing for the life thereafter. It

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Papers, Legal Ethics Lectures (Albany: n.p., 1904), 8.

[5]David J. Brewer, Protection to Private Property from Public Attack, An Address Delivered Before the Graduating Classes at the 67th Anniversary of Yale Law School, June 23rd, 1891 (New Haven: Hoggson & Robinson, 1891), 3.

[6]Brewer, Protection to Private Property, 5.

was, in the opinion of many educated Americans, and for reasons not wholly patriotic, the peculiar genius of the American constitutional system to recognize those moral truths and to make of them the foundation for the fundamental laws of the nation. Thus, Justice Miller maintained that the principles upon which the nation's government was founded were best adapted to securing the just rights of all its citizens, because they provided that every individual might safely enjoy the products of "honest industry, careful thrift, judicious economy, and the acquisitions of labor, which are the rewards of merit."[7]

§ II THE TRUST: THE SPECIAL MORAL RESPONSIBILITY OF THE JUDICIARY

The responsibilities and duties inherent in man's spiritual and moral nature applied with special force to "the legislator, the magistrate, the minister of religion, the instructor of youth, and every man of public station." On their shoulders lay an additional responsibility. Like every individual, they were morally responsible for their actions; however, their social prominence and the extended social relations it created also meant that their actions carried extended consequences for society at large.[8]

This additional responsibility or social duty constituted a trust laid on the leaders of society to act with the fidelity and judgement necessary to preserve their charges's "future condition and character," irrespective of present expediency.[9] This idea of preserving a "trust" was important in defining the legal and moral responsibilities of society's elite. In English common and statute law, a private trust was a legal entity governing title to and use of real estate. The trust was created by a grantor for the benefit of designated beneficiaries in which the bequeathed property

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[7]Miller, "The Conflict between Socialism and Organized Society," 152-3.

[8]Henry Ware, An Inquiry into the Foundation, Evidences, and Truths of Religion, by Henry Ware, D.D., Late Hollis Professor of Divinity in Harvard College, 2 vols. (Cambridge, MA: John Owen; Boston: John Munroe & Co., 1842), 1: 202.

[9]Ware, Inquiry, 1: 202.

was administered by a trustee on the beneficiaries' behalf. A charitable or public trust differed from a private trust insofar as the beneficiaries were uncertain, or unspecified, and was generally directed to charitable, educational, religious, or scientific purposes. Both types placed on the trustee the obligation of a fiduciary trust requiring scrupulous good faith, candour, and the complete subordination of his personal interests in carrying out his duties to the beneficiaries. A fiduciary trust was the highest standard of duty imposed by the law and, one could argue, by morality. A key point in Blackstone's discussion of the history of trusts had lain in his assertion that in English law a trust created a jus fiduciarium, or right in trust, for which there was a remedy in conscience or equity (Chancery) whatever might be the technical rule of Black-Letter law.[10] The idea that the courts should provide an equitable remedy for breach of trust remained important in American legal thought throughout the nineteenth century. In 1817, Chancellor James Kent of New York had stated that the court had a right and was bound to interfere and check the abuse of trustees who had failed to meet their fiduciary responsibilities.[11] As late as 1901, it remained a truism of American jurisprudence that "if there is an admitted wrong, the courts will look far to supply an adequate remedy."[12]

The doctrine of the trust and the moral and legal duties that it imposed on society's trustees exercised a powerful influence on the justices and was clearly reflected in their views of the Court's duty to review legislation and to settle disputes

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[10]See Sir William Blackstone, Commentaries on the Laws of England (London: n.p., 1765-69), vol. 2, ch. 18, 271-4 passim.

[11]Attorney-General v. Utica Insurance Co., 2 Johns. Ch. 389 (N.Y. 1817). See also Mark W. Bailey, "Corporations and the Common Law of Contracts: The Earlier History of Contract Law and Its Application to the Artificial Person in the United States (unpublished M.A. thesis, University of Waterloo, 1989), 87.

[12]De Lima v. Bidwell, 182 U.S. 1, 177 (1901) per Brown.

according to the principles of right and justice contained in the Constitution and of the moral duty of every citizen to enforce and to obey the laws.[13]

Justice Brewer, for example, asserted that, if it was true that "he to whom a single talent was given was not excused for leaving that talent idle," it was also true that "the higher the position a man holds, and the greater the influence he possesses, the more important is his good character to the community."[14] Brewer concluded from this that high social position carried with it an element of noblesse oblige and the duty to display an admirable character and to provide society with wise guidance.

> Society each day of its advancing civilization needs and demands a wiser leadership. The welfare of humanity rests not on what has been accomplished, but on the steps forward which it takes.... If those steps are wisely advised and prudently taken then we may confidently look for the coming on of the day of which poets have sung and which prophets have foretold, when peace and righteousness shall fill the earth. While, on the other hand, if illy advised and rashly taken, progress ceases and society resolves itself again into the anarchy and chaos from which it has so slowly risen.[15]

This sense of their responsibility and accountability for the leadership and well-being of society was an integral part of the justices' self-image and defined the character and purpose of judicial life. Justice Brewer declared that, although a position on the Bench might be an object of high ambition to a lawyer, it should not be because the Bench provided a life of wealth, or of ease and comfort, or of political power. Judicial life was, rather, one of self-sacrifice in pursuit of the principles of truth and justice. Brewer quipped that the judge's patience on the bench was often taxed "by that weary speech of the dull advocate, which brings to mind the couplet of

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[13]Wayland, Elements of Moral Science, 331.

[14]Matthew 25: 14-30. David J. Brewer, "Personal Character as a Responsibility of Citizenship," Yale Law Journal 10 (1901): 230.

[15]David J. Brewer, "Better Education, the Great Need of the Profession," Review of Reviews 12 (Nov. 1895): 285.

Tennyson on 'The Brook;' 'Men may come and men may go, But I go on forever."[16] On another occasion, Brewer observed that, notwithstanding the reforms enacted in 1891 which created a circuit court of appeals for each circuit and provided for an additional circuit court judge,[17] the court's workload was taxing, a view supported by earlier articles by Samuel Freeman Miller and William Strong concerning the increasing workload of the Supreme Court and the need for judicial reform.[18] In his Kansas address, Brewer also suggested that the Supreme Court was not a powerful political force and referred by way of comparison to the all-encompassing party "machines", such as New York City's Tammany Hall machine, that dominated urban politics in this era and which, he suggested, made "a ward politician more potent in political struggles than the Chief Justice of our highest Court." Notwithstanding these frustrations, judicial life was, in Brewer's view, a desirable ambition "because it is a life which is the incarnation of the highest thought of our profession; the thought of realizing between man and man the most complete conception of ideal justice."[19] Significantly, he went on to describe the duties of jurists as a trust which he compared

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[16]Alfred, Lord Tennyson, "The Brook." David J. Brewer, "Address before the Bar Association of Kansas City," 19 Dec. 1889, quoted in Warren Watson, "David Josiah Brewer," in Henry W. Scott, ed., Distinguished American Lawyers (New York: C.L. Webster & Co., 1891; reprint, Littleton, Colorado: Frederick B. Rothman & Co., 1989), 80-1.

[17]26 Statutes at Large 826. See Lawrence M. Friedman, A History of American Law (New York: Simon & Schuster, 1985), 387.

[18]David J. Brewer, "The Work of the Supreme Court: Justice David J. Brewer in 'The Kansas Lawyer,'" Law Notes 1 (1898): 167-9. See also Samuel Freeman Miller, "Judicial Reforms," Western Jurist 6 (1872): 49-57; William Strong, "The Needs of the Supreme Court," North American Review 132 (May 1881): 437-50 and William Strong, "Relief for the Supreme Court," North American Review 151 (Nov. 1890): 567-75; and Henry Billings Brown, "The New Federal Judicial Code," Report of the Twenty-Fourth Meeting of the American Bar Association (Baltimore: Lord Baltimore Press, 1911), 339-60.

[19]Brewer, "Address before the Bar Association of Kansas City," in Watson, "David Josiah Brewer," 80-1.

to that performed by the vestal virgins tending the sacred fires of the temple of state in Ancient Rome. Brewer defined this trust as a devotion to principles above all else and recounted by way of illustration an anecdote from the life of the famous English jurist, Lord Mansfield. Mansfield's commitment to his principles was demonstrated, when

> looking into the face of an angry mob surging up against Westminster Hall, he had the courage to scorn its demand and declare, "I wish popularity, but it is that popularity which follows and not that which runs after; it is that which, sooner or later, never fails to do justice to the pursuit of noble ends by noble means."[20]

Brewer's emphasis on principles and the duty incumbent upon the justices to adhere to them was repeated by Justice John Marshall Harlan. At a banquet given by the Cincinnati bar in 1896, Harlan sought to rebut public criticism of the Court following its controversial decision in the Income Tax Cases and stated "that tribunal will, as heretofore, go forward in the path marked out by its own sense of duty."[21] In his view, "no more imperative or sacred duty rests upon the judiciary than to sustain in its integrity the fundamental law of the land."[22] To Harlan, as it was to Brewer, devotion to principle was the "awful responsibility resting upon every member of that court" and the defining feature of judicial life. At the banquet given on December 9th, 1902, to honour his twenty-fifth year of service on the Supreme Court, Harlan stated:

> If my countrymen think that the duties of the great office so long held by me have been discharged with conscientious regard for the law, or what I deemed to be the law and with an eye single to the ends of justice and right and truth, my descendants will have in this estimate of

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[20]Brewer, "Address before the Bar Association of Kansas City," in Watson, "David Josiah Brewer," 86.

[21]Pollock v. Farmers' Loan & Trust Co., 158 U.S. 429 (1895).

[22]John Marshall Harlan, "The Supreme Court and Its Work," at a Banquet Given by the Bar of the 6th Federal Circuit Court at Cincinnati on 3 Oct. 1896, American Law Review 30 (Nov./Dec. 1896): 900, 901.

> my judicial life a legacy more precious than any that I could possibly leave to them.[23]

§ III THE SEPARATION OF POWERS

The doctrine of the separation of powers had been at the core of American political values since the nation's founding. Indeed, the operation of the legislative, executive, and judicial branches of the government in separate but balanced spheres was viewed as one of the great refinements of the American system. In the Federalist Number Forty-Seven, James Madison had stated a truism of American politics.

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that.... the accumulation of all powers, legislative, executive, and judiciary, in the hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny.[24]

The idea that the separation of powers was the best guarantee against political tyranny hardly originated with Madison, who correctly credited Montesquieu's Spirit of the Laws (1748) with "displaying and recommending it most effectually to the attention of mankind."[25] One of Montesquieu's goals in developing a model of a balanced, constitutional government composed of separate departments charged with particular functions had been to counter the centralizing and absolutist tendencies of the French monarchy.[26] The enormous influence of this work, particularly among Anglo-American readers, was partially attributable to Montesquieu's use of England's

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[23]John Marshall Harlan, "Mr. Justice Harlan's Address at the Banquet Given on December 9th in Honor of the 25th Anniversary of his Appointment to the Supreme Court," Albany Law Journal 65 (Jan. 1903): 17.

[24]James Madison, "Federalist No. 47," in Alexander Hamilton, John Jay, James Madison, The Federalist: A Commentary on the Constitution of the United States, with an Introduction by Edward M. Earle (New York: Modern Library, n.d.), 313.

[25]Madison, "Federalist No. 47," 313.

[26]Franz Neumann, "Editor's Introduction," in Baron de Montesquieu, Spirit of the Laws, translated by Thomas Nugent (1748; reprint, New York: Macmillan, 1949), xix-xxix passim.

parliamentary system, which itself had formed the basis for the colonial governments, as the prototype of a constitutional government with separate and balanced departments.[27] Just as important, however, was the analogous structure and operation of Montesquieu's government of separate and enumerated powers and the structure and operation of faculty psychology as it had been developed and applied by the Scottish moral philosophers who later became so influential in the United States.

In Montesquieu's theory of separate and enumerated powers, American political theorists and moral philosophers found a compelling application of the prevailing paradigm in intellectual and moral science to practical political questions of the most fundamental sort. The separation of powers acting as a check upon each branch of government meshed perfectly with the idea in faculty psychology that the desire for power which derived from the individual's self-love and the necessity of acquiring the means to attain his ends must be subject to some limitation lest it pervert the judgement and the will. As Mark Hopkins observed in his Lowell lectures, the tendency of all government was toward the arbitrary exercise of power, because "to the corrupted will the taste of it is like that of blood to the tiger. Under its influence man sets himself up as independent of authority, rejects moral restraint, and in passing to his selfish ends disregards the rights and miseries of men."[28] Faculty psychology's treatment of the desires provided therefore a convincing analogy between the behaviour of individuals and of government, which was, after all, the agent of a society of men.

Drawing heavily upon these theories, the justices viewed the state as a corporate entity composed of all its members and possessing a mind composed of appetites, affections, and desires and of intellect, with its own will and character. They considered it, therefore, as an entity possessing moral agency. In this context,

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[27]Montesquieu, Spirit of the Laws, Bk. 11, § 2. Madison noted Montesquieu's admiration of the English system of government in Federalist No. 47, 313-4.

[28]Mark Hopkins, Lectures on Moral Science, Delivered Before the Lowell Institute, Boston (New York: Sheldon & Co., 1863), 33, 93, 112, 115.

Montesquieu's separation of powers, with its division of government into legislative, executive, and judicial branches was closely analogous to the different faculties and powers of the human mind and body. Each branch of government was understood to correspond to a specific aspect of the nation's collective personality and to operate according to a pre-ordained plan, the Constitution--in the same fashion as the faculties and powers of the individual operated according to the design of providence. Indeed, the justices were in general agreement that both the Constitution and the common law were, in fact, expressions of the divine will.

These views strongly influenced the justices' conception of the Supreme Court's role in the American system of government. What is striking about their statements expressing their view of the Court's function, particularly with regard to their defense of judicial review, was the extent to which the Court was equated with the moral faculty and its powers of perception and approbation. Thus, an understanding of the justices' conception of the function of the moral faculty and its relation to other elements of human character goes far toward explaining their understanding of the Court's constitutional and social role in the late nineteenth century.

Justice Bradley was, perhaps, the member of the Court who developed most fully his ideas concerning the nature of the human character, apparently having read widely on the subject and having devoted considerable effort to developing what he called "fixed principles of action."[29] Bradley clearly accepted the basic premises of faculty psychology. His Miscellaneous Writings contained an undated and unpublished discussion of Thomas C. Upham's work on the mind and its disorders in which Bradley accepted and approved Upham's division of "the mental capacities" into the traditional classifications derived from Locke and the Scottish common sense philosophers, from among whom he specifically identified Thomas Reid (1710-1796)

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[29]Bradley, "Principles Should be Fixed," in Charles Bradley, Miscellaneous Writings of the late Honorable Joseph P. Bradley (Newark: L.J. Hardham, 1902), 303-4.

and Dugald Stewart (1753-1828),[30] of the understanding or intellect, the affections or sensibilities, and the will.[31] These Bradley saw as "entirely distinct in their nature." Each division of the mind had its own function to perform and taken together "seemed to comprehend all of which the human mind is capable."[32] Through perception and understanding the individual was able to perceive things, facts, and truths, among which Bradley included a knowledge of eternal things and of self-consciousness.[33] Perception gave rise to the individual's affections or sensibilities. These elements of the mind represented man's perceptive and passive emotive qualities. Bradley further believed that man was not merely a passive receptacle of knowledge and feeling, for he was also capable of will and volition. He was an active power.[34]

The mind, then, could perceive all that was exterior to the intellect and, with judgement or reflection, achieve knowledge. Knowledge might be purely factual, concerning the physical characteristics of the exterior world, or it could transcend the corporeal world and include moral truths.

> There is an exterior or more transcendental intellect... which is cognizant of ideas that the senses do not reveal, and that the outer world does not even suggest. Those ideas are the spiritual ones on which our moral nature depends--such as justice, purity, faith,

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[30]Thomas Reid was appointed regent in Philosophy at King's College, Aberdeen, in 1751. In 1764, he followed Adam Smith in the post of professor of Moral Philosophy at the University of Glasgow and served in that post until 1780. Dugald Stewart was professor of Mathematics at the University of Edinburgh between 1775 and 1785 and from 1785 until 1810, he was professor of Moral Philosophy.

[31]Bradley, "Upham on the Mind and Its Disorders," in Bradley, Miscellaneous Writings, 318. Bradley was referring to Thomas C. Upham's Outlines of Imperfect and Disordered Mental Action (1840). Upham's other works included Elements of Mental Philosophy: Intellect and Sensibilities (Portland, 1831) and A Philosophical and Practical Treatise on the Will (1834).

[32]Bradley, "Upham on the Mind and Its Disorders," in Bradley, Miscellaneous Writings, 319.

[33]Joseph P. Bradley, "Metaphysics," in Bradley, Miscellaneous Writings, 316.

[34]Bradley, "Upham on the Mind," in Bradley, Miscellaneous Writings, 319.

> sincerity, generosity, or perhaps, personal identity, present existence, etc., belong to this class.[35]

This transcendental intellect represented one aspect of the moral faculty in much the same way that the sense of sight corresponded to the faculty of taste and formed a vital part of the human character. Here, Bradley, like the common sense philosophers, steered away from the idealism of David Hume and accepted instead their assertion that knowledge derived from judgemental perceptions rather than simple ideas. These principles, among which the common sense philosophers included "objective" truths such as that the sun rose each morning, that the sum of the angles of a triangle equalled ninety, and that there was a God, formed the "common sense" of mankind, because they "express something conformable to the nature of things" to the truth of which every mind must acquiesce.[36] Bradley observed that "we certainly have ideas which do not owe their origin immediately to perception or consciousness" and clearly accepted the idea that judgement received, sorted, and placed into context all perceptions prior to the operation of reflection and reason.[37]

> The Moral Faculty is that power of the mind which perceives, approves, and obeys the right as distinguished from the wrong in actions. It has three distinct functions, as indicated by the definition--perception of what is right; approval of it; and a determination to follow it.[38]

The moral faculty operated, then, within the three major divisions of mental activity--perception, understanding, and volition. The perception of right and wrong corresponded to the moral sense or moral consciousness, approval represented

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[35]Bradley, "Upham on the Mind," in Bradley, Miscellaneous Writings, 320.

[36]James Beattie, An Essay on the Nature and Immutability of Truth, 6th ed. (1805) at 21 cited in Donald H. Meyer, The Instructed Conscience: The Shaping of the American National Ethic (Philadelphia: University of Pennsylvania Press, 1972), 40-1.

[37]Bradley, "Metaphysics," in Bradley, Miscellaneous Writings, 318. See also Meyer, The Instructed Conscience, 39.

[38]Bradley, "The Moral Faculty," in Bradley, Miscellaneous Writings, 361.

rectitude or uprightness and represented the affections or sensibilities, while the determination to follow the prompting of one's understanding and sensibilities represented an act of volition or will. This view of the mechanism of morality, of the manner in which the individual came to act in a moral fashion and to live a virtuous life had the profoundest implications for the nineteenth-century understanding of the character of the individual and of the corporate state.

Returning to Justice Bradley's discussion of the moral faculty, it is clear that while he accepted that individuals might possess innate ideas and spiritual values it was also true that the moral sense or conscience was largely a product of perception and reflection upon the individual's surroundings. This led Bradley to an important conclusion.

> A highly civilized and Christian society, like ours, possesses so many means of moral instruction, and so much moral light,[39] that it is not difficult in most cases to know what is right and what is wrong. The conscience becomes insensibly educated to a high standard.[40]

In a society where the proper development of the moral sense was assumed in all but the rarest of instances and given that the social affections prompted good rather than bad actions toward others, immoral actions presumably were the product of individual choice, of the operation of a corrupted will choosing sin over virtue.

That sin might prevail over virtue was not surprising given man's dual nature, for, if man was a spiritual being equipped with an intellect and higher sensibilities, he was also a physical being of base appetites and desires. Thus, sin or evil was the natural by-product of man's physical nature and state of moral trial.[41] "A pure love

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[39]"Light" in this sense meant mental illumination, elucidation, or enlightenment without the aid of revelation or formal education. Concise Oxford Dictionary, 7th ed., s.v. "light."

[40]Bradley, "The Moral Faculty," in Bradley, Miscellaneous Writings, 361-2.

[41]Bradley discussed man's "perverse" nature in Progress--Its Grounds and Possibilities, An Address before the Philoclean and Peithessophian Societies of Rutgers College, New Brunswick, New Jersey (N.p.: Philoclean Society, 1849), 201 passim.

of evil is not an innate sentiment of the human heart. Men do evil not for the love of evil, but because seduced by appetites and passions."[42] The problem, as Bradley and other nineteenth-century moralists defined it, lay in the susceptibility of the will to the corrupting influence of the appetites and the passions rather than to a deficit of moral knowledge in a civilized, Christian society.[43]

The key to individual and social virtue therefore lay in promoting the development of character by strengthening the individual's will and moral rectitude. Citing biblical proverbs, Justice Bradley deemed the development of self-control or temperance the keystone of the cardinal virtues.[44]

> "The will is the man. It is this that determines our actions. Our actions determine our characters and destinies. What we are is answered by what we do. This distinguishes men from each other, the wise and the prudent from the unwise and the volatile--this distinguishes men from brutes.
>
> The highest office of the will is self-control. Brutes are governed by their appetites and impulses. Savages are but little removed in this respect from brutes. Brutish men and course natures are mostly led by their impulses, appetites, and passions. The true nobility of our nature is evinced by self-control, which restrains, governs, and subdues the impulses, appetites, passions, and desires.[45]

Action was equated with volition, with choosing a course of conduct in the full knowledge of its morality. If to will was to act, then it was critical to act correctly for not only did an immoral act signal a corrupted will but a course of habitual immorality contributed directly to further weakening of the will and the eventual predominance of the base elements of the personality. Self-control required constant vigilance to maintain the balance between man's physical and spiritual nature. Any lapse, any failure of the will, was a step toward corruption and disaster.

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[42]Bradley, "The Moral Faculty," in Bradley, Miscellaneous Writings, 362.

[43]Bradley, "The Moral Faculty," in Bradley, Miscellaneous Writings, 362.

[44]Proverbs 16: 32, 25: 28.

[45]Joseph P. Bradley, "Will: Self-Control," in Bradley, Miscellaneous Writings, 300.

> It [the will] requires great and continued attention and habitual effort to bring it to a condition of permanent improvement in strength and firmness. Lax measures will never succeed. The least indulgence of weakness throws all back again to be recovered by repeating the same painful efforts as before. In this respect a naturally weak will is like drunkenness, which, when it has once seduced a man to its bondage, cannot be thrown off by fitful efforts at reformation; but must be utterly crushed out and destroyed by a firm and persistent rejection of every solicitation and approach.[46]

This view of human nature had particular application to the belief in the state as a corporate entity having its own personality and character. This was particularly true of the United States, the nation whose political values most accurately expressed the eternal verities of divine and natural law and whose political institutions allowed the freest expression of the will of the people. The issue for the justices was the fit legislative and judicial expression of the people's will. The challenge facing the Court was the justices' belief that, as Justice Strong observed, American legislation was pre-eminently an expression of popular feeling and impulse rather than of considered opinion. Strong noted that "whatever tends to make an impression upon the common mind, whatever contributes to direct or characterize social conduct, must here..., find expression in the written law."[47] In a political system in which the doctrine of the separation of powers assigned discrete roles to each department of government, the function of the Court lay in determining for the nation the morally correct course of action. This belief in the Court's role as the nation's moral compass meant that the justices could not and did not depart from what they perceived as principles of eternal truth and justice.

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[46]Bradley, "The Moral Faculty," in Bradley, Miscellaneous Writings, 363.

[47]William Strong, "American Legislation," An Oration Delivered before the Phi Beta Kappa Society, Yale College, 27 August 1859 (New Haven: Thomas J. Stafford, 1860), 8. See also David J. Brewer, Two Periods in the History of the Supreme Court, Address Delivered by Justice David J. Brewer of the United States Supreme Court (Richmond, VA: Richmond Press, 1906), 18, where Brewer referred to the law as "a reflex of public opinion."

In his Federalist Number Seventy-Eight, Alexander Hamilton, arguing for the establishment of the federal judiciary, had stated that among the three branches of government the judiciary had the least capacity to annoy or injure the political rights of the Constitution. In contrast to the legislature and executive, the judiciary lacked the active powers to determine events.

> The judiciary... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolutions whatever. It may truly be said to have neither force nor will, but merely judgement; and must ultimately depend upon the aid of the executive arm for the efficacy of its judgements.[48]

By the end of the nineteenth century, Hamilton's rhetoric had become a maxim of American jurisprudence. Significantly, Justice Brown cited both Montesquieu and Hamilton in support of his views concerning judicial independence; however, Brown's was far from the only expression of the belief among his contemporaries that an independent judiciary was not a threat to democracy and freedom but its strongest guarantor.[49] In his lectures on the Constitution delivered before the University Law School of Washington, D.C., Justice Miller viewed it as axiomatic that the judiciary was "the weakest branch" of the government, for it had "neither the purse nor the sword."[50] Justice Harlan asserted and Justice Brewer agreed that the judiciary was

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[48]Hamilton, "Federalist No. 78," 504.

[49]Henry Billings Brown, "Judicial Independence," Report of the Twelfth Annual Meeting of the American Bar Association (Philadelphia: Dando Printing and Publishing Co., 1889), 266.

[50]Samuel Freeman Miller, The Constitution of the United States: Three Lectures Delivered before the University Law School of Washington, D.C., 6, 12, and 19 Feb. 1880 (Washington, D.C.: W.H. and O. Morrison, 1880), 24; Samuel Freeman Miller, Lectures on the Constitution of the United States (New York: Banks and Brothers Law Publishers, 1893), 342 and also Samuel Freeman Miller, "The Weakest Branch," in Samuel Freeman Miller, Lectures on the Constitution (Washington: Morrison 1880; reprint, in Alan F. Westin, ed., An Autobiography of the Supreme Court: Off-the-Bench Commentary from the Justices (New York: Macmillan, 1963), 108.

"the keystone" of the American system of government, the "imperative and sacred duty" of which was to protect the fundamental law of the land and the rights which depended upon it.[51] What is striking is not that the legal profession sought justification for an independent judiciary and for the power of judicial review but the extent to which their position was couched in the language of faculty psychology and its essentially moralistic framework.

The possession by the state of the attributes of personality, including the attribute of moral agency, meant that those qualities which were intended to promote the happiness of its citizens had an equal potential for evil if not properly controlled or governed. The academic moral philosophers placed great emphasis on controlling individual and popular passions and acknowledged that the great danger to democracy was the difficulty of controlling popular passions and will.

Nineteenth-century democracy, functioning in a moralistic context, did not necessarily accept that the will of the majority was invariably correct. Every educated American had been taught that the will was easily corrupted by the base instincts and that the individual lived in a constant state of tension between base desires and higher intellectual and spiritual values. It was not surprising, therefore, that they viewed the democratic state, the system best adapted to voicing the will of the people and of promoting the highest social good, as existing in a state of inner conflict in which the popular passions and a frequently morally weak popular will posed a constant danger to the higher values expressed by the American political system.

Justice Strong judged that this tension had not been unforeseen in the revolutionary period and that the framers of the constitution had given due "solicitude... to suitable checks against the anticipated licentiousness of popular

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[51]Harlan, "The Supreme Court and Its Work," 901; Harlan, "The Courts in the American System of Government." Remarks by Mr. Justice Harlan at the Banquet of the Presbyterian Social Union of Philadelphia, 27 Mar. 190[illegible] in Chicago Legal News 37 (8 Apr. 1905): 271; Brewer, "The Nation's Safeguard," 37-47; reprint, in Westin, An Autobiography of the Supreme Court, 132.

legislation." Strong's suggestion that the legislature, buffeted by waves of popular passion, was prone to ill-considered acts, would have received no argument from Justice Brown. Commenting in his decision in Downes v. Bidwell upon the deliberations of Congress, Brown observed:

> The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts.[52]

The attitudes of both men towards democracy reflected the almost identical language used by Justice Miller in his lectures on constitutional law, where he stated that "the makers of this instrument were perfectly aware of the waves of passion which frequently run through the legislative and executive branches of the government."[53]

> They [the founding fathers] were not insensible to the attendant dangers [of legislatures controlled by the popular will]. They knew that popular impulse was unreasoning, that it was liable to yield to excitement, or to the seductions of present apparent expediency. With large comprehension they foresaw the possible evils of hasty and improvident legislation.[54]

Indeed, the justices viewed the doctrine of separation of powers and the theory behind a bicameral legislature as premised on the need to control the popular will and to forestall thereby "partial and hasty legislation." These checks upon legislative action were necessary even when the result was that "the powers of the legislator are insufficient to accomplish the purpose of society" or such control completely thwarted legislative action. Francis Wayland had warned that it was better to endure the inconveniences resulting from a want of legislative power "than to remedy them on principles which destroy all liberty and thus remove one inconvenience by taking

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[52]Downes v. Bidwell, 182 U.S. 244, 254 (1901) per Brown.

[53]Miller, Lectures on the Constitution of the United States, 342-3.

[54]Strong, "American Legislation," 5-6.

away the possibility of ever removing another."[55] In this regard, William Strong therefore observed that "too much legislation is a greater evil than none,--that it is even better to 'bear those ills we have, than to fly to others that we know not of.'"[56]

The danger of despotism, as Justice Brewer argued, had not disappeared but its source had changed with the American Revolution. "Here, there is no monarch threatening trespass upon the individual. The danger is from the multitude--the majority, with whom is the power."[57] In his view, the danger of political tyranny in America lay in the attitude, "Vox populi vox Dei,"[58] because of which "no restraints are placed on popular action except such as the citizens themselves have imposed," and where the possibility existed that "conscious that these restraints are self-imposed, the people in some time of passion will disregard them."[59] This, he felt, was a growing danger. In an address before the Virginia bar association, Brewer contrasted the antebellum and postbellum periods and argued that, beginning with the three war-time amendments, the latter period had been marked by the enlargement and centralization of federal legislative power and of an attitude of "constructive statesmanship," which term, given his opinions concerning territorial expansionism and the opinions expressed in Budd v. New York concerning state paternalism, could only have been meant in a pejorative sense.[60] In America, where the legislature

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[55]Wayland, Elements of Moral Science, 326, 330.

[56]Strong, "American Legislation," 6. The reference was to Shakespeare's Hamlet, III, i, 56.

[57]Brewer, "The Nation's Safeguard," 123. See also Brewer, Protection to Private Property from Public Attack, 6-7.

[58]Brewer, "The Nation's Safeguard," 132.

[59]David J. Brewer, American Citizenship: Yale Lectures on the Responsibilities of Citizenship (New Haven: Yale University Press, 1902), 24.

[60]David J. Brewer, "Address: Two Periods in the History of the Supreme Court Delivered by Justice David J. Brewer of the United States Supreme Court at the Eighteenth Annual Meeting Held at Hot Springs of Virginia, August 7th, 8th, and 9th, 1906," Virginia State Bar Association Reports 19 (1906): 133; reprinted under

represented the people, Brewer believed that an inherent moral conflict existed between the tendency toward "an unrestrained and absolute legislative freedom" which he felt was manifest in the postwar period and which on another occasion he termed "a despotism of the mob,"[61] and the eternal values of truth, justice, and right expressed in the Constitution.[62]

Certainly these sentiments had been shared by Justice Miller, who had discerned a shift in the balance of power in the American system from the executive and judicial to the legislative branch of government.

> They [the legislators] are extending their borders, and they are making broad their phylacteries[63] in every direction. They pass laws sometimes which are unconstitutional, and they assert powers which are executive and judicial in their nature and character.[64]

This tendency was, in Miller's view, a dangerous threat "to the righteous cause against the encroachments of injustice" because of the vulnerability of the legislature to "waves of passion."[65]

The legislative exercise of the popular will, unhindered by constitutional constraints, resembled, in words gleaned by David Brewer from Thomas Carlyle,

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the same title (Richmond, VA: Richmond Press, 1906), 17. See also Budd v. New York, 143 U.S. 517 (1892).

[61]David J. Brewer, "The Nation's Anchor," Address Presented by David Josiah Brewer at the Marquette Club of Chicago on Lincoln's Birthday, Albany Law Journal 57 (Mar. 1898):166-70. See also the same article in Chicago Legal News 30: 167.

[62]Brewer, Two Periods in the History of the Supreme Court, 16. See also Harlan, "The Supreme Court," 900, where he stated the necessity of an independent judiciary capable of checking arbitrary power, whether in the form of "illegal action by government" or "the lawlessness of mere majorities."

[63]phylactery, n. a small leather box containing Hebrew texts, worn by Jews at morning weekday prayers to remind them to keep the law. To make broad the phylactery is to make an unusually ostentatious display of righteousness and religious observance.

[64]Miller, The Constitution of the United States, 24.

[65]Miller, Lectures, 342.

"shooting Niagara," "a flood which is sweeping law and order and the foundations of society onward to the brink of a destroying precipice." And yet, this energetic power was not wholly negative, for energy had always the potential to be directed toward good. In this regard, Brewer's views typified what Duncan Kennedy has termed classical legal thought's preoccupation with the opposition between freedom "conceived as arbitrary and irrational, yet creative and dynamic."[66]

> But Niagara presents two visions: You stand on the bank and you see an angry flood sweeping onward, and bearing everything on its bosom to the fearful and fatal jump.--You turn your eye in the other direction and you see that mighty flood subdued by the hand of man to the domain of law, and its awful energies transmuted into electrical force.... transmitted into beneficent light and power to illumine the upwards ways of humanity.[67]

While the justices tended to view the public, and those agents of the majority's will, the executive and the legislature, with a healthy degree of suspicion and as prone to acts dictated by unreasoned passion as opposed to principles of justice and truth, this did not mean that all public actions were necessarily immoral. However, in order for public acts to express principles of right and justice, it was necessary, where legislative enactments contravened the principles of natural law and justice contained in the Constitution, that the state adhere to the prompting of its own moral faculty, the Supreme Court. Faced with the difficult question whether it was wrong for the Supreme Court to thwart the will of the people as it had been expressed by the legislature, Justice Brewer confidently answered in the negative.

> Popular government may imply, generally speaking, that the present will of the majority should be carried into effect; but this is true in no absolute or arbitrary sense, and the limitations and checks which are

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[66]Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940," Research in Law and Society 3 (1980): 8.

[67]Brewer, "The Nation's Anchor," 170. See also the same article in Chicago Legal News 30: 222.

> found in all written constitutions are placed there to secure the rights of the minority.[68]

In Brewer's opinion, the whole theory of constitutional government, which implied that all acts of the governing power, or of the majority, must be in accord with the organic law, made it vital that the passions of the people should be subject to some absolute restraint. Brewer argued that "it is a necessity of every organized community that there should be laws and rules to control the actions of individuals. Without them a state of anarchy would exist, each man being a law unto himself."[69] In moral theory, the same held true for the acts of society carried out by government. Where government was free to "exercise one power not delegated," it was free to exercise any other. There "restraint upon encroachment ceases and all liberty is henceforth at an end."[70] Brewer took up this theme in an article in which he described the Court as the nation's safeguard. He maintained that the restraint imposed by the Court upon the people and their government in no way invalidated the idea of government for and by the people.[71] Brewer perceived the Court, with regard to the principles expressed by the Constitution, as fulfilling much the same function regarding the acts of government as conscience did for the individual. The Court was an indispensable moral restraint on the quicksilver changes and licentiousness of popular opinion and the vagaries of popular politics. In imposing this studied restraint, it protected the fundamental values of liberty and justice.

> In these days of newspaper reputation and ofttimes swiftly changing popularity it is well to have some tribunal of stability, one whose judgements do not vary with the varying opinions of the passings hours

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[68]Brewer, "The Nation's Safeguard," 130.

[69]Brewer, American Citizenship, 87.

[70]Wayland, Elements of Moral Science, 330.

[71]Brewer, "The Nation's Safeguard," 130-1.

> and do not, as Mr. Dooley says,[72] simply "follow the election returns." The life tenure of its members does not make it an undemocratic factor in the life of the Republic. It does not govern the nation. The people are always the rulers. More than once they have reversed its judgements; but by reason of its stability and independence it has stood a check upon all hasty action; a brake on the swiftly moving wheels of popular passion.[73]

The justices, in Brewer's opinion, were not in office to execute without question the "hasty opinion" of the popular will. In psychological terms, Brewer distinguished between a judgement, a formal authoritative statement of positive knowledge based upon a careful discernment and comparison of the facts, and an opinion, which lacked those definite and certain qualities. The purpose of the judiciary was not to reflect the passing and changing notions of the populace but to determine rights upon the immutable principles of justice which had passed by "deliberate and well considered thought" into organic and permanent law.[74] In this fashion, the Supreme Court incorporated into the constitutional life of the nation the thoughts and purposes of the people and "makes its action not only reflex but also an indication of the development of popular government."[75]

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[72]Mr. Dooley was a fictional character created by the Chicago journalist, Finley Peter Dunne (1867-1936). The Irish saloon keeper, with his trademark brogue and criticism of current events, leaders, and aspects of the social scene, first appeared in Mr. Dooley in Peace and War (1898).

[73]David J. Brewer, "The Supreme Court of the United States," Scribner's Magazine 333 (Mar. 1903): 284. See also Brewer, "Organized Wealth and the Judiciary," Independent 57 (11 Aug. 1904): 302.

[74]Brewer, Two Periods in the History of the Supreme Court, 1. See also Brewer, "Organized Wealth and the Judiciary," 302.

[75]Brewer, Two Periods in the History of the Supreme Court, 1.

Justice Harlan, in spite of his long standing sympathy for the common man,[76] equated an unrestrained majority with a despotic government. As early as 1859, Harlan condemned the view that the will of the majority was necessarily on the side of right. He rejected "the wider theory of majority despotism, upon the mobocratic idea which levels destruction at all written contracts by which the weak are protected against the strong, that majorities can make and set aside constitutions at pleasure."[77]

This was a durable theme in Harlan's thought. In 1907, he stated that only the pessimist was alarmed by the isolated declarations of those "who hold that, whatever the words of the Constitution, that instrument should be so construed as to make it mean what a majority of the people think, at a given time, it should mean." Nor was he alarmed by those who advanced the theory "that Congress must be permitted to exert any governmental power whatsoever, not expressly denied to it, if that body deems that its exercise will promote 'the general welfare.'" "Such theories of constitutional construction," he asserted, "found no support in judicial decisions or in sound reason."[78] Nor, he might have added, had they any foundation in Moral Philosophy. Francis Wayland, for example, asserted that the power and obligations of the legislator were founded on "the social principles of man, the nature of the relation which subsists between the individual and society," and their particular expression in the Constitution. Beyond this, "it is his duty to leave everything else

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[76]See Harlan's views on the unstinting contributions of common men to the war effort in the Cincinnati Daily Gazette, 28 Jun. 1871; the Louisville Daily Commercial, 29 Jul. 1871; and in War of the Rebellion: Official Records, ser. 1, vol. 7: 89, 90, vol. 20, pt. 1, 140 all cited in Louis Hartz, "John Marshall Harlan in Kentucky, 1855-1877: The Story of his Pre-Court Political Career," Filson Club Historical Quarterly 14 (1940): 24.

[77]John Marshall Harlan, "Speech," Louisville Weekly Journal (3 Jun. 1859) quoted in Hartz, "John Marshall Harlan in Kentucky," 22.

[78]John Marshall Harlan, "Kentucky: United, We Stand; Divided, We Fall," Remarks of Mr. Justice Harlan at the Banquet Given in his Honor by "The Kentuckians," in New York, 23 Dec. 1907, Chicago Legal News 39 (28 Dec. 1907): 158.

undone."[79] In Harlan's view, an independent judiciary invested with authority to protect the rights of both the public and individuals maintained in the American system of government the rights and freedom of all. The elimination of the judiciary as an independent department of government would result in the disappearance of free institutions and in their stead the establishment of a government resting upon mere force and not on the consent of the governed.[80]

At the same time, Harlan recognized that while the Court might judge legislation impolitic or imprudent so long as it did not contravene the ultimate principles contained in the Constitution the Court had no power to impose its judgement on the people and their legislators. Otherwise, he argued, "the will of the people, as expressed by their legislative department, [should] have full operation.[81] Harlan's position was "that in this country the supreme, absolute and uncontrollable power resides in the people at large."[82] If that power was exercised imprudently, the remedy was not to be found before the Court. In his view, "the remedy for evils arising from impolitic and unjust legislation, not in conflict with the fundamental law, is with the people at the ballot box."[83]

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[79]Wayland, Elements of Moral Science, 329, 330.

[80]Harlan, "The Supreme Court and Its Work," 900-1.

[81]Harlan, "The Supreme Court and Its Work," 901.

[82]John Marshall Harlan, "James Wilson and the Formation of the Constitution," Being the Address of Honorable John Marshall Harlan... on the Occasion of the Dedication of the New Law Building of the University of Pennsylvania, at Philadelphia, 21 February 1900, American Law Review 34 (July/Aug. 1900): 490.

[83]Harlan, "The Supreme Court and Its Work," 901. A well-known example was Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 634 (1895) per Fuller, where the Chief Justice commented regarding the need for an income tax: "We are not here concerned with the question whether an income tax be or be not desirable, nor whether such a tax would enable the government to diminish taxes on consumption and duties on imports, and to enter upon what may be believed to be a reform of its fiscal and commercial system. Questions of that character belong to the controversies of political parties, and cannot be settled by judicial decision."

§ IV THE POLICE POWER

The application to government during this period of the doctrine of the separation of powers was most clearly expressed by the Court in cases involving the police power of both the federal and state governments. The late nineteenth-century Court conceived of itself as an important guarantor of individual liberty and personal rights against the predictable encroachments of the majority's legislative power. However, the justices also accepted the premise that the purpose of government was to promote and to protect the interests of society and this duty of the government necessarily required that the police powers of the states limit individual action when it was detrimental to those interests. In this regard, the Court generally supported the legitimate exercise by the states of their power to protect the public health, safety, and morals, and it resisted attempts by business interests and legal counsel to use the Fourteenth Amendment as a blanket proscription against state regulation of business. At the same time, the regulatory efforts of state governments and an increasingly active Congress inevitably came into conflict with the justices' conception of a government of separate and enumerated powers.

State regulations bearing directly upon the health and morals of the people posed lesser challenges to the Court's understanding of the separation of powers. In a series of cases dealing with state legislation concerning intoxicating liquors, cigarettes, and oleomargarine, the Court outlined what was and was not subject to regulation under the police power under the commerce clause of the Constitution and the Fourteenth Amendment.

In Bartemeyer v. Iowa, the case revolved around the question whether Iowa statutes "for suppressing the use of intoxicating drinks" were unconstitutional.[84] Justice Miller noted in his opinion that the argument of the plaintiff in error "had taken a very wide range and was largely composed of the arguments familiar to all, against the right of the states to regulate traffic in intoxicating liquors." Miller nevertheless maintained that such regulations had always been considered "as falling

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[84]Bartemeyer v. Iowa, 85 U.S. 929 (18 Wall. 129) (1874) per Miller.

within the police regulations of the states" and properly left to their judgement. Bartemeyer's argument that the statutes were contrary to the Fourteenth Amendment's provisions protecting the privileges and immunities of citizens of the United States because they deprived him of property without due process of law failed to impress Miller. In his view, the amendment protected only the existing privileges and immunities contained in the federal constitution and did not create new ones. The right to sell intoxicating liquors was not, so far as he was concerned, one of the privileges and immunities growing out of citizenship of the United States.[85]

In noteworthy concurring opinions, Justices Bradley and Field carefully distinguished the grounds of their earlier dissenting opinions in The Slaughterhouse Cases in which they had attempted to work out the legitimate extent of the legislature's police power.[86] There was, in Bradley's opinion, a vital difference between a police regulation intended for the preservation of the public health and the public order and legislation which created "an unconscionable monopoly" under "the mere pretext" of police regulation. Regarding the former, Bradley maintained, and Justice Field, agreed that "no one has ever doubted that a legislature may prohibit the vending of articles deemed injurious to the safety of society," but they emphasized that there must be some legitimate public purpose conducing to the general good of the community to justify such enactments.[87] In their view, what had made the Louisiana statute obnoxious was its special nature.[88] It had favoured the interests of

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[85]Bartemeyer v. Iowa, 85 U.S. 929, 930 (18 Wall. 129) (1874) per Miller.

[86]Slaughterhouse Cases, 83 U.S. 394 (1873).

[87]Bartemeyer v. Iowa, 85 U.S. 929, 932 (18 Wall. 129) (1874) per Bradley. See also Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," Journal of American History 61 (Mar. 1965): 978-9.

[88]Michael Les Benedict, "Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," Law and History Review 3 (1985): 305; David M. Gold, The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism (New York: Greenwood Press, 1990), 138.

one corporation composed of seventeen persons by depriving an entire class of workers of the vested right to pursue a common calling. It had not therefore been a legitimate use of the police power, because it "presents a naked exercise unaccompanied by any public considerations of a grant of exclusive privileges" and contravened the constitutional protection of life, liberty, and property.[89]

The cases of Barbier v. Connolly and Soon Hing v. Crowley involved a regulation passed in 1884 by the board of supervisors of the city of San Francisco restricting the location, equipping, and hours of operation of public laundries and wash-houses.[90] The plaintiff maintained that the statute discriminated against labourers in the laundry business by restricting their hours of employment and deprived them "of the right to labour, and as a necessary consequence, of the right to acquire property."[91]

Justice Field reiterated the views he had expressed in his concurring opinion in Bartemeyer v. Iowa.[92] This was "purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies." In Field's view, "it would be an extraordinary usurpation of the authority of a municipality, if a federal tribunal should undertake to supervise such regulations."[93] He re-asserted his conviction that the Fourteenth Amendment had not been intended to interfere with the power of the states "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." The Fourteenth Amendment "undoubtedly intended not only that there

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[89]Slaughterhouse Cases, 83 U.S. 394, 412 (16 Wall. 36-130) (1873)

[90]Barbier v. Connolly, 113 U.S. 27 (1884) per Field and Soon Hing v. Crowley, 113 U.S. 703 (1885) per Field.

[91]Barbier v. Connolly, 113 U.S. 27, 29 (1884) per Field.

[92]Bartemeyer v. Iowa, 85 U.S. 929, 932 (18 Wall. 129) (1874) per Field.

[93]Barbier v. Connolly, 113 U.S. 27, 30 (1884) per Field.

should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights."[94] This was a key point, for Field argued, in effect, that so long as all persons engaged in the same business were treated alike, so long as "no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances," so long as "no greater burdens should be laid upon one than are laid upon others in the same calling and condition" the legislation could not be considered "class legislation, discriminating against some and favouring others."[95] For this reason, Field also upheld the regulations in Soon Hing v. Crowley, where, although the regulation bore heavily upon Chinese proprietors of laundries, Field held that the language of the ordinance was of a general nature statute applying equally to all laundry businesses and hence unobjectionable.[96]

Despite the Court's declaration in Foster v. Kansas that the question whether state prohibitions on the sale of intoxicating liquors contravened the Fourteenth Amendment was closed,[97] Justice Harlan was presented in Mugler v. Kansas with the question whether a Kansas statute forbidding the manufacture and sale of liquor within that state and providing that places in which liquor was manufactured or sold should be abated as public nuisances deprived Peter Mugler of the rights, privileges, and immunities of a United States citizen and was, moreover, a deprivation of property without due process of law.[98] Citing Bartemeyer v. Iowa and other earlier cases,[99]

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[94]Barbier v. Connolly, 113 U.S. 27, 31 (1884) per Field.

[95]Barbier v. Connolly, 113 U.S. 27, 31, 32 (1884) per Field.

[96]Soon Hing v. Crowley, 113 U.S. 703, 711 (1885) per Field.

[97]Foster v. Kansas, 112 U.S. 205 (1884).

[98]Mugler v. Kansas, 123 U.S. 623 (1887) per Harlan.

[99]Bartemeyer v. Iowa, 85 U.S. 929 (18 Wall. 129) (1874) per Miller. See also Beer Co. v. Massachusetts, 97 U.S. 33 (1878) and Foster v. Kansas, 112 U.S. 206

Harlan affirmed the states' power to regulate or even forbid the manufacture and sale of liquor. Moreover, he refused to accept the argument that, while the state might prohibit the manufacture of liquor for general use as a beverage, it could not prohibit its manufacture for private use, export, or storage. Acknowledging the views expressed in Munn v. Illinois that while "power does not exist with the whole people to control rights that are purely and exclusively private, government may require 'each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another,'"[100] Harlan stated that the power to define and enforce the scope of private conduct must lay with the police power of the states, or "else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please."[101] He added that "every possible presumption was to be indulged in favor of the validity of a statute," for the courts had "nothing to do with the mere policy of legislation" and could not, "without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives."

> Indeed, it is a fundamental principle of our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the constitution to another department.[102]

Thus, the Court's interpretation of the scope of the police power adhered to its conception of the nature and purpose of government, the necessity of separate and enumerated powers in preserving liberty, and of the Court's function in the federal system. These doctrines allowed the justices to support the power of the states to regulate their internal affairs and to promote the health, morals, and economic

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(1884).

[100]Munn v. Illinois, 94 U.S. 77, 124 (1877).

[101]Mugler v. Kansas, 123 U.S. 623, 660-61 (1887) per Harlan.

[102]Mugler v. Kansas, 123 U.S. 623, 662 (1887) per Harlan.

prosperity of their people. At the same time, when state regulation appeared to infringe upon federal powers the Court drew a solid line. This was clearly evident in the Court's handling of state legislation which in its view attempted to regulate interstate traffic in intoxicating liquors.

In Bowman v. Chicago and Northwestern Railway Company, the question was whether an Iowa statute forbidding common carriers to import into Iowa intoxicating liquors from other states, without first having obtained a certificate from the county to which the liquor was destined certifying that the recipient was authorized to sell intoxicating liquors there, was void, because it was a regulation of interstate commerce.[103] Justice Harlan, with whom Chief Justice Waite and Justice Gray concurred, contended in a dissenting opinion that the law had been "subservient to the general design of protecting the health and morals and the peace and good order of the people of Iowa against the physical and moral evils resulting from... intoxicating liquors" and was therefore a legitimate exercise of the police power.[104] However, Justice Stanley Matthews speaking for a five to three majority which included Justices Miller, Field, and Bradley, declared the statute invalid, because it interfered with the power of the federal government to regulate commerce among the states.[105] This decision formed the grounds of the Court's decision in Leisy v. Hardin, where speaking through Chief Justice Fuller, the Court invalidated another Iowa statute forbidding the sale in the original packages of intoxicating liquors imported from another state as a regulation interfering with interstate commerce.[106]

The Court applied these doctrines to cases involving attempts by the states to regulate other goods, some of which were new in the Court's experience. The

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[103]Bowman v. Chicago and N.W. Rwy. Co., 125 U.S. 465 (1888).

[104]Bowman v. Chicago and N.W. Rwy. Co., 125 U.S. 465, 510 (1888) per Harlan.

[105]Bowman v. Chicago and N.W. Rwy. Co., 125 U.S. 465 (1888) per Matthews.

[106]Leisy v. Hardin, 135 U.S. 100 (1890).

appearance of oleomargarine in the marketplace lead to state regulations concerning its sale. In Powell v. Pennsylvania, Justice Harlan upheld a Pennsylvania statute prohibiting the manufacture or sale of oleomargarine in the state as a lawful exercise by the state of its power to protect by police regulations the public health.[107] In Plumley v. Massachusetts, Harlan upheld a statute of Massachusetts prohibiting the sale of imported oleomargarine artificially coloured so as to give it the appearance of yellow butter.[108] However, in Schollenberger v. Pennsylvania, the Court again drew a line beyond which the police power could not reach. The Court recognized oleomargarine as a lawful article of commerce, which could not be wholly excluded from importation into a state from another state where it was manufactured. If the margarine remained in its original packages, it could be imported and sold, notwithstanding a statute of the state prohibiting such sale. In this case, the Court accepted the findings of the court below that the oleomargarine had been imported and sold in ten-pound packages of the type required by an act of Congress, and was of such "form, size, and weight as is used by producers or sellers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce."[109] The Court adhered, therefore, to the doctrine that, where articles of commerce remained in their original packages, they remained part of the general stream of commerce between the states and were not subject to regulation by an individual state. Only when the original packages had been "opened for the sale or delivery of the separate parcels contained in it" did the contents lose their character as an import and become subject to state regulation.[110]

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[107]Powell v. Pennsylvania, 127 U.S. 678 (1888) per Harlan.

[108]Plumley v. Massachusetts, 155 U.S. 461 (1894) per Harlan.

[109]Schollenberger v. Pennsylvania, 171 U.S. 1 (1898). See also Austin v. Tennessee, 179 U.S. 343, 353-4 (1900) per Brown.

[110]Austin v. Tennessee, 179 U.S. 343, 354 (1900) per Brown. See also May v. New Orleans, 178 U.S. 496, 508 (1900) per Harlan.

The justices were not, however, blindly wedded to a doctrine which gave to the federal regulation of commerce an overriding power over state police regulations. In Austin v. Tennessee, Justice Brown explicitly acknowledged that the rule governing original packages was open to abuse by shippers and refused to give to such activities the Court's approval. In this case, a Tennessee statute making it a misdemeanour to sell or to import to sell cigarettes within the state was challenged on the grounds that it infringed upon the power of Congress to regulate commerce because the cigarettes in question were still in their original packages. The material question was what constituted an original package? In Brown's view, an original package was that "in which bona fide transactions are carried on between the manufacturer and the wholesale dealers residing in different states." In the case of the cigarettes, the manufacturer had deliberately done them up in small packages of ten, with "the express intent of evading the laws of another state, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee." Brown asserted that this was "a discreditable subterfuge, to which this court ought not to lend its countenance."[111]

In Hennington v. Georgia, Justice Harlan upheld a Georgia statute making the operation of a freight train within the state on Sunday a misdemeanour punishable by fine, imprisonment, work in the chain-gang, or a combination of all three.[112] In response to the plaintiff's contention that the statute conflicted with the commerce clause of the federal Constitution, Harlan acknowledged that the legislation had an indirect affect upon interstate commerce; however, the main intent of the law was to promote the domestic peace, order, health, and safety of the people of Georgia and as such was purely an internal police regulation. Harlan quoted with approval the view expressed by Justice Field in Ex parte Newman that such "legislation has given the sanction of law to a rule of conduct which the entire civilized world recognizes as

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[111]Austin v. Tennessee, 179 U.S. 343, 359-60, 361 (1900) per Brown.

[112]Hennington v. Georgia, 163 U.S. 299 (1896).

essential to the physical and moral well-being of society."[113] The utility of such a law, quite apart from its religious significance, was good and sufficient justification for its existence.[114]

The principle that legitimate government action must serve a public purpose led the Court ever deeper into the review of regulatory legislation, for, as Charles McCurdy has observed, this doctrine required a workable definition of the relation between the public and private spheres which demanded that the Court delineate in light of the Civil-War amendments the extent of legitimate public interference with the activities of individuals and, increasingly in the postwar period, of corporations.[115] When the matter at hand was the general interest of the public in health, morals, and safety, the regulation of commerce posed relatively few problems for the Court. However, when the issue involved distinguishing between public or quasi-public enterprises in which the public had an interest and purely private businesses in which there were less obvious connections between regulation and the public interest, there was disharmony among the justices.

In Munn v. Illinois, the Court was called upon to decide the constitutionality of the so-called Granger Laws regulating grain elevator charges in Illinois. Speaking for a seven to two majority, Chief Justice Waite upheld the statute as a legitimate exercise of the state's police power and devoted the bulk of his opinion to defining what comprised a deprivation of life, liberty, or property without due process of law.[116] While he acknowledged that the power of government did not extend to controlling rights which were purely personal and private, he asserted that government had the authority to require that individuals conduct themselves and use

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[113]Ex parte Newman, 9 Cal. (U.S.) 502, 520 (1858).

[114]Hennington v. Georgia, 163 U.S. 299, 305, 306 (1896) per Harlan.

[115]McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations," 981-2; Gold, The Shaping of Nineteenth-Century Law, 139.

[116]Munn v. Illinois, 94 U.S. 77 (1877) per Waite.

their property in such ways as not to injure others. This doctrine had, in Waite's view, particular application to those occupations clothed with a public purpose. Citing Lord Hale's De Portibus Maris and other common-law authorities, Waite stated that

> property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest which he has thus created.[117]

The common law had long acquiesced to the regulation of common carriers and public callings such as bakers and millers, and Waite placed such public conveniences as wharves and warehouses in those categories. In his view, the grain elevators in question represented a "virtual monopoly" upon the storage of grain in the Chicago area, so that standing, as he believed they did, "in the very 'gateway of commerce' and "taking a toll from all who pass" they had become clothed with a public purpose and subject to public regulation. Moreover, since the elevators were situated and their business carried on exclusively within Illinois, Waite could see no reason why, in the absence of legislation by Congress, the state was not free to exercise its jurisdiction over them.[118]

Waite's opinion accepted the principle that the police power justified legislation the end of which was the direct promotion and protection of the common good and clearly stood on the same moral and legal grounds as the Court's numerous decisions concerning state police regulations. However, it also accepted that the police power, broadly construed, allowed the regulation of businesses in which the public had an indirect "interest." The owners of the grain elevators, in devoting their property to a use in which the public had a beneficial interest, had subjected themselves to "a long known and well established principle in social science" which

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[117]Munn v. Illinois, 94 U.S. 77, 84 (1877) per Waite.

[118]Munn v. Illinois, 94 U.S. 77, 86, 87 (1877) per Waite.

rendered their property subject to the power of the legislature to make "such regulations as might be established... for the common good."[119]

Against this view, Justice Field filed a strongly dissenting opinion. Echoing the words he would later use in his decision in Barbier v. Connolly,[120] Field maintained that the defendants had a right to use their private property in whatever manner they chose so long as it was "not inconsistent with the equal right of others to a like use."[121] In Field's view, legislation which set the rates chargeable by a privately owned business which had never received a corporate charter or any other grant from the state government amounted to a taking of private property without compensation. The legislation devalued their property and deprived the them of its beneficial use but lacked any material justification for regulating their business. It contravened, therefore, the provisions of the Fifth and Fourteenth Amendments respecting due process of law.

Field's argument was based upon much broader philosophical grounds than that of the Chief Justice. Regarding property as an "essential condition for the pursuit of happiness," Field abandoned technical interpretations of the state's power to legislate for the common good in favour of a liberal interpretation of the life, liberty and property protected by the due process clauses of the Constitution. In this task, he drew heavily upon the doctrines of Moral Philosophy. In defining the term, "life," Field asserted that "something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed."

> The deprivation not only of life, but of whatever, God has given to everyone with life, for its growth and enjoyment, is prohibited by the

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[119]Munn v. Illinois, 94 U.S. 77, 87 (1877) per Waite.

[120]Barbier v. Connolly, 113 U.S. 27, 31 (1884) per Field.

[121]Munn v. Illinois, 94 U.S. 77, 89 (1877) per Field.

> provision in question, if its efficacy be not frittered away by judicial decision.[122]

The due process clause applied, therefore, not only to life but also to liberty and property and these, too, were broadly construed. Liberty "meant more than mere freedom from physical restraint."

> It means the freedom to go where one may choose, and to act in such manner, not inconsistent with the actual rights of others, as his judgement may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment.[123]

Property meant more than simply its title and possession but its beneficial use in the pursuit of happiness. In Field's opinion, allowing the state to determine the use to which private property must be put and the price which the owner received for its use worked to deprive the owner of his property "as completely as by a special Act for its confiscation or destruction."[124] In his view, the entire doctrine of businesses affected with a public interest was a slippery moral slope, because it was, as Field observed and Chief Justice Waite later conceded,[125] exceedingly difficult to establish the boundary of a legitimate public interest. The doctrine posed a constant temptation to the legislature to overstep the bounds of its authority and to deprive thereby citizens of their fundamental rights. This danger appeared to fulfil the warnings of moral philosophers that the legislator who ignored both the social principles of man and the specific strictures of the Constitution was "the worst of all empirics," for he "offers to prescribe for a malady, and knows not whether the medicine he uses be a remedy or a poison."[126]

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[122]Munn v. Illinois, 94 U.S. 77, 90 (1877) per Field.

[123]Munn v. Illinois, 94 U.S. 77, 90 (1877) per Field.

[124]Munn v. Illinois, 94 U.S. 77, 90 (1877) per Field.

[125]McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations," 997.

[126]Wayland, Elements of Moral Science, 329.

Justice Field's condemnation in Munn v. Illinois of this doctrine was not immediately adopted by the other members of the Court. It was commonly known, for example, that Justice Bradley, with whom Field had dissented in the Slaughterhouse Cases and with whom he appeared to share similar views of substantive due process under the Fourteenth Amendment, had provided Chief Justice Waite with the legal and historical material for the majority opinion in Munn.[127] Moreover, Bradley confirmed his support of the doctrine in Barney v. Keokuk, where he applied it to the regulation of navigation of internal waterways.[128] Over time, Field's assertion of the need for a more definite line between the public and private sectors and his emphasis on greater protection of fundamental rights using substantive due process in order to promote the physical and spiritual development of individuals and society proved to be persuasive.

Initially, however, the Court adhered to the majority's interpretation of state laws regulating the price of services provided by quasi-public corporations. In Stone v. Farmers' Loan and Trust Company and the cases accompanying it, Chief Justice Waite affirmed the doctrines enunciated in Munn v. Illinois and applied them to the operations of an interstate railway corporation operating in Mississippi.[129] The state's railroad commission had the power to limit the amount charged by railroad companies for transportation within the state, and its power to do so was unaffected by the contract clause of the Constitution unless the corporate charter contained a positive grant by the legislature to place in the corporation the unrestricted right to determine rates. Moreover, the state had the power "to make all needful regulations of a police

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[127]Charles Fairman, "The So-Called Granger Cases, Lord Hale, and Mr. Justice Bradley," Stanford Law Review 5 (1953): 587-679. See also McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations," 996 and Harry N. Scheiber, "The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts," Perspectives in American History 5 (1971): 355-60.

[128]Barney v. Keokuk, 94 U.S. 324 (1877). See Scheiber, "The Road to Munn," 352-3.

[129]Stone v. Farmers' Loan & Trust Co., 116 U.S. 307 (1886) per Waite.

character... so long as such regulations do not impair the usefulness of its [the railroad's] facilities for interstate traffic."[130] Waite reiterated the view that "general statutes regulating the use of railroads in a state, or fixing maximum rates of charges, when not forbidden by charter contracts, do not necessarily deprive the corporation... of its property without due process of law,"[131] but he was careful to qualify this grant of power to state authorities, which he had recognized in Munn v. Illinois as subject to abuse,[132] by requiring that such rates be at all times "reasonable."

> From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.[133]

In 1892, over the strident dissent of Justice Brewer, with whom concurred Justices Field and Brown, the Court confirmed in Budd v. New York a statute regulating charges for elevating, weighing, and loading grain.[134] Taking up the torch from Field, Brewer attacked "the main proposition" upon which the verdict rested as "the doctrine of Munn v. Illinois reaffirmed" and as "radically unsound."[135] A public interest in the use of property was not the same thing as a public use of property. In

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[130]Stone v. Farmers' Loan & Trust Co., 116 U.S. 307 (1886) per Waite.

[131]Stone v. Farmers' Loan & Trust Co., 116 U.S. 307, 335 (1886) per Waite.

[132]Munn v. Illinois, 94 U.S. 77, 87 (1877) per Waite.

[133]Stone v. Farmers' Loan & Trust Co., 116 U.S. 307, 331 (1886) per Waite. Justices Field and Harlan dissented in this case; however, they based their objections to the majority opinion on the long-established grounds that the legislation in this particular instance impaired the contract between the railways in question and the state.

[134]Budd v. New York, 143 U.S. 517 (1892).

[135]Budd v. New York, 143 U.S. 517, 549-50 (1892) per Brewer.

the latter, the public had a beneficial interest, and, in the former, it did not. The latter was subject to reasonable regulation by the state, but the former was not.

These decision still left the justices with the problem of determining what constituted reasonable rates and a taking of private property without due process of law. With the creation in various states of railroad commissions possessing authority to set rates for quasi-public corporations such as the railways, the Court was faced with another question touching upon the extent of the police power and the Court's duty to review regulatory statutes.

In Chicago, Milwaukee and St. Paul Railway Company v. Minnesota, Justice Blatchford considered the validity of a Minnesota statute which created a state railroad and warehouse commission and empowered it to determine the reasonableness of rates charged within the state for the transportation of persons and property, to require any common carrier to change its rates to those deemed equal and reasonable by the commission, and, in the event that the carrier failed to carry out the commission's recommendation, to obtain from the state supreme court or its district courts a writ of mandamus to compel compliance with the commission's order.[136]

The railway company complained that the establishing of rates by the commission without the company's consent and the unjust and unreasonable rates so established were a taking of private property without due process of law. It also complained of the refusal by the state supreme court to hear testimony on the issue raised by allegations against the company in the commission's application for a writ of mandamus as to whether the rates fixed by the commission were fair and reasonable.[137]

In his opinion for a six-to-three majority, Justice Blatchford ruled that the legislation was invalid but carefully defined the grounds of the decision. There was

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[136]Chicago, Milwaukee and St. Paul Rwy. Co. v. Minnesota, 134 U.S. 418 (1890).

[137]Chicago, Milwaukee and St. Paul Rwy. Co. v. Minnesota, 134 U.S. 418, 440-1 (1890).

no question that the rates at issue were for transportation wholly within the state, and this point had already been decided by the Court in earlier cases. The company argued that the establishment of a commission to set rates impaired the contract between the state and the railway contained in the corporate charter granted by the legislature. Blatchford quickly dismissed this contention. Citing Stone v. Farmers' Loan and Trust, he pointed out that the corporate charter contained no positive grant to the company of the exclusive power to set its own rates.[138] The question, in Blatchford's view, was whether the mode adopted by the legislature to set rates was a valid one, and the answer, in this instance, was that the mode was unacceptable. The legislation deprived the company of property without due process of law.

> It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice.[139]

There was, in his view, "nothing which has the semblance of due process of law" attributable to the commission's mode of operation. "No hearing is provided for; no summons or notice to the company before the commission has found what it is to find, and declared what it is to declare; no opportunity for the company to introduce witnesses before the commission."[140]

With this result, Justice Miller generally concurred, with the proviso th the procedural law lay not in the commission's lack of judicial machinery but in the refusal by the Supreme Court of Minnesota to hear testimony on the reasonableness of

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[138]Stone v. Farmers' Loan & Trust Co., 116 U.S. 307, 325 (1886).

[139]Chicago, Milwaukee and St. Paul Rwy. Co. v. Minnesota, 134 U.S. 418, 457 (1890) per Blatchford.

[140]Chicago, Milwaukee and St. Paul Rwy. Co. v. Minnesota, 134 U.S. 418, 457 (1890) per Blatchford.

the rates and to give notice to the company of its proceedings. These worked, in his view, a practical denial of due process of law.[141]

At the same time, Justice Bradley dissented on the grounds that the effect of the decision was to "practically overrule Munn v. Illinois." He resisted the view that due process of law always required a court of law and argued that "it merely requires such tribunals and proceedings as are proper to the subject at hand." Bradley conceded that "it may be that our legislatures are invested with too much power, open, as they are, to influences so dangerous to individuals, corporations, and society;" however, "it is a delicate thing for the courts to make an issue with the legislative department" over what was, in his view, a political question. In the case at hand, it was undeniable that the legislature and its commission had the power to regulate the rates of a public carrier and that neither the legislature or the commission had acted arbitrarily or fraudulently in so doing. Since these were the only grounds upon which to maintain that due process of law had been denied, there was no ground to hold the legislation void.[142]

In Reagan v. Farmers' Loan and Trust Company two years later, Justice Brewer further extended the doctrine announced in Chicago, Milwaukee and St. Paul Railway Company v. Minnesota and upheld an injunction issued by the federal district court of western Texas against the state railroad commission barring that body from imposing fines on the International and Great Northern Railway Company for refusing to comply with the rates imposed by the commission until the company's suit was adjudicated in a court of law.[143] Brewer justified exercising the Supreme Court's injunctive power as a court of equity on the grounds that not only did the legislative provision that the commission's [illegible] be "conclusive in all actions" work to deprive

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[141]Chicago, Milwaukee and St. Paul Rwy. Co. v. Minnesota, 134 U.S. 418, 460-1 (1890) per Miller.

[142]Chicago, Milwaukee and St. Paul Rwy. Co. v. Minnesota, 134 U.S. 418, 461, 462, 464, 466 (1890) per Bradley.

[143]Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894).

the company of its right to due process of law but that the penalties imposed upon railroad companies for any violation of the provisions of the act were so excessive as to constitute the virtual crippling or outright destruction of the company and its capital. Brewer defended the Court's authority to exercise its equity jurisdiction in such matters and in doing so echoed the much earlier opinion of Chancellor Kent that a court of equity had a duty to act when it was clear that a wrong had been committed by officers entrusted with administering a beneficial trust. In this case, the legislature and its commission were entrusted with the duty of administering the beneficial interest and use of the railroad-owners capital and of the public's interest in the continued operation of "institutions of such great value to the community as railroads." Brewer argued that

> if, in any case, there should be any mistaken action on the part of a state, or its commission, injurious to the rights of a railroad corporation, any citizen of another state, interested directly therein, can find in the federal court all of the relief which a court of equity is justified in giving.[144]

He met potential criticism head on by asserting that the Court was not, in fact, entrenching upon the legislative or administrative power. Acknowledging "as a general proposition" that "the formation of a tariff of charges... is a legislative or administrative, rather than a judicial function," Brewer nevertheless declared that it was a judicial function to determine the reasonableness of such rates, without necessarily stating what would be reasonable, and, where rates were found to be unjust and unreasonable "and such as to work a practical destruction to rights of property," to restrain the operation of the administrative body.[145]

This was the view adopted by the Court in Smyth v. Ames in 1898.[146] Speaking for a unanimous Court, Justice Harlan upheld a judgement handed down by

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[144]Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 394, 395 (1894) per Brewer.

[145]Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 397 (1894) per Brewer.

[146]Smyth v. Ames, 169 U.S. 466 (1898).

Justice Brewer sitting in federal circuit court enjoining the actions of the Nebraska board of transportation against several railway companies operating within the state and declaring the legislation invalid. In his decision, Harlan regarded several points as settled law. First, a corporation was a person within the meaning of the Fourteenth Amendment and entitled to be protected from deprivation of its property without due process of law and to the equal protection of the law. Second, a state enactment establishing rates under which the corporation must carry out its business and which denied to it fair compensation for its services amounted to a taking of property without due process of law. Finally, the reasonableness of rates could not be conclusively determined by the legislature of the state or one of its appointed bodies but remained subject to judicial inquiry.[147]

In Harlan's view, it was the duty of the judiciary to determine whether legislative enactments or the actions of its agents were in harmony with the fundamental law. Indeed, an independent judiciary was the distinguishing feature of the American system of government upon which the "the perpetuity of our institutions, and the liberty enjoyed under them" depended. For this reason, Harlan maintained that, while determining the reasonableness of rates charged by quasi-public corporations and the fairness of compensation awarded to them for their services "would always be an embarrassing question," each case must be decided upon its own merits in a court of law.[148]

The root of the Court's objection to legislation creating railroad commissions and regulating the rates charged by quasi-public business concerns such as elevator companies and railways lay, therefore, as much in its distaste for legislative entrenchment upon the judicial sphere of government as it did upon the broader

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[147]Smyth v. Ames, 169 U.S. 466, 526 (1898) per Harlan.

[148]Smyth v. Ames, 169 U.S. 466, 527, 546 (1898) per Harlan.

grounds laid out by Justices Field and Brewer of the need to protect the fundamental right of private property.[149]

The grounds of this objection were laid out by Justice Bradley as early as 1877 in his opinions for the Electoral Commission formed to settle the disputed elections returns for the presidential election of 1876. The commission's decision to award the electoral votes of all four disputed states to Rutherford B. Hayes was the subject of excited comment--much of it suggesting that its decision had been motivated by a Republican "political conspiracy." As a member of the majority, Bradley received his share of "public odium" but defended his decision as "the fair result of my deliberations" and as "free from all political or other extraneous considerations."[150] What was noteworthy about Bradley's opinions was the degree to which his specific objections concerning the commission's investigation of the electoral returns reflected the Court's contemporary view of the separation of powers and the importance of due process of law. Bradley considered the electoral returns valid, because, in a government of enumerated powers, a congressional committee had no power to interfere in an explicitly state jurisdiction even when there was reason to suspect fraud and misconduct on the part of state officials. In Bradley's mind, "the question is not whether frauds ought to be tolerated...; but whether... Congress, in exercising their power of counting the electoral votes, are entrusted by the Constitution with authority to investigate them."[151]

> It is unnecessary to enlarge upon the danger of Congress assuming powers in this behalf that do not clearly belong to it. The appetite for power in that body, if indulged without great prudence, would have a

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[149]See also Munn v. Illinois, 94 U.S. 77, 90 (1877) per Field and Budd v. New York, 143 U.S. 517, 548-52 (1892) per Brewer.

[150]Joseph P. Bradley, "Reply to Charges as to Conduct as Member of Electoral Commission," in Newark Daily Advertiser (5 Sep. 1877); reprint, in Miscellaneous Writings, 221.

[151]Joseph P. Bradley, "Opinions and Remarks of Mr. Commissioner Bradley in the Consultations of the Electoral Commissioners upon the Electoral Votes of Florida, Louisiana and Oregon," in Bradley, Miscellaneous Writings, 193.

> strong tendency to interfere with that freedom and independence which it was intended that the States should enjoy.[152]

Even if it were conceded that the law allowed Congress to take such action, Bradley foresaw further difficulties. In his view, "the ordinary power of the two Houses as legislative bodies, by which they investigate facts through the agency of committees, is illy adapted to such an inquiry." The legislature and its committees were not a judicial tribunal. They lacked the machinery of a properly constituted court for "an orderly mode of taking evidence and giving opportunity to cross-examine witnesses, so that a proper inquiry "would require the interposition of law" and the machinery of justice.[153] In this instance, Bradley combined the concerns of Justice Miller's concurring opinion and his own dissent in Chicago, Milwaukee and St. Paul Railway Company v. Minnesota[154] and condemned the Electoral Commission as a blatant entrenchment of Congress upon the powers of the states, the proceedings of which lacked the trappings of due process which characterized the state regulatory commissions.

The justices' view of the nation as a corporate entity possessing its own faculties and powers and being, moreover, morally accountable for its actions supported the conception of the Court as a reactive, or reflexive, body the function of which was to bring popular will into conformity with natural and constitutional law. It was the trustee of the nation's moral values. In this regard, the justices were generally agreed that the Court's function was analogous to that of the individual's moral sense and that its role in forming the nation's moral character was a passive

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[152]Bradley, "Opinions and Remarks of Mr. Commissioner Bradley in the Consultations of the Electoral Commissioners," in Bradley, Miscellaneous Writings, 172.

[153]Bradley, "Opinions and Remarks of Mr. Commissioner Bradley in the Consultations of the Electoral Commissioners," in Bradley, Miscellaneous Writings, 194, 195.

[154]Chicago, Milwaukee and St. Paul Rwy. Co. v. Minnesota, 134 U.S. 418 (1890).

one, for it could offer an opinion only when presented with a legal issue. It could not adopt a role analogous to that of the will and pro-actively determine the character of the nation's actions. That task lay not with the Court but with the executive and legislature. Rather, the Court's function was to uncover the facts and to express the principles of truth, justice, and right. Its rulings represented a statement by the nation's conscience of what was morally correct but which was not necessarily binding on the determination of the will to act in a chosen fashion. Only to the extent that the enlightened values and principles expressed in the Court's opinions reflected the nation's level of moral development and guided legislative action could it promote the future development and improvement of those values. The justices, therefore, perceived themselves as conservative, not in an negative sense, but as preservers and expounders of the principles upon which future moral and secular progress depended.

CHAPTER VIII

LAISSEZ-FAIRE CONSTITUTIONALISM AND THE MORAL ECONOMY

§ I CHARACTER AND THE MORAL ECONOMY

The justices' belief in civil society as a divine institution within a providential natural order and their understanding of faculty psychology and its application to both individuals and society informed their views of the ideal nature and purpose of government and justified their view of the Court's function and duty to serve as the trustee of the nation's moral interests in a government of enumerated and separate powers. Equally importantly, the moral autonomy of individuals and the dictates of faculty psychology justified the justices' acceptance of legal doctrines emphasizing the importance of protection of property, substantive due process, and freedom of contract. These doctrines were seen as all-important to cultivating the highest individual and national character and to promoting and preserving both individual and social happiness and prosperity.

These values, which many historians have identified with "laissez-faire constitutionalism,"[1] were, as Charles McCurdy has suggested, part of a single

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[1]For examples of this identification, see The American Constitution: Its Origins and Development, 5th ed. (New York: Norton, 1976), 468-91 passim; Robert McCloskey, The American Supreme Court (Chicago: University of Chicago Press, 1960), 105, 115-35; Sydney Fine, Laissez-Faire and the General Welfare State (Ann Arbor: University of Michigan Press, 1964), 124-64 passim; Bernard Schwartz, A Basic History of the Supreme Court (New York: Van Nostrand, 1968), 50-3; ; Arnold M. Paul, Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895 (New York: Harper & Row, Publishers, 1969), 15; Morton J. Horwitz, "The Rise of Legal Formalism," AJLH 19 (1975): 251-64; Howard B. Furer, ed., The Fuller Court, 1888-1910 (Millwood, NY: Associated Faculty Press, 1986), ix.

continuum of ideas.[2] However, the paradigm which defined legal thought at the end of the nineteenth century was drawn from Moral Philosophy rather than from classical political economy.[3] The Court's adherence to theories of a moral economy and of "autonomous individualism"[4] rested on the justices' belief in the moral character of all voluntaristic action. The assertion by moral philosophers such as Francis Wayland that it was the duty of American jurists to give practical effect to the ethical principles expressed by the founding fathers in the Constitution concerning the protection of life, liberty, and happiness reinforced the justices' views of the judiciary as the trustees of eternal verities whose duty it was to explain the "true intent" of the laws "without fear, favor, or affection" and "without bias either toward the individual or the state."[5] Theory was not, however, always straightforwardly applied in practice, for the chaotic business of life was rarely amenable to neat intellectual compartmentalization. In this regard, the Court's struggle with determining the legitimate extent of the police power in regulating businesses affected with a public interest or with defining essential and incidental constitutional values in the Insular Cases merely suggested the principles which ought to be applied to questions involving the autonomy of individuals.

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[2]Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," Journal of American History 61 (Mar. 1965): 972.

[3]Michael Les Benedict, "Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," Law and History Review 3 (1985): 297-8; John Braeman, Before the Civil Rights Revolution: The Old Court and Individual Rights (New York: Greenwood, 1988), 117-8; David M. Gold, The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism (New York: Greenwood Press, 1990), 73-4; Herbert Hovenkamp, Enterprise and American Law, 1836-1937 (Cambridge: Harvard University Press, 1991), 68.

[4]Aviam Soifer, "The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921," Law and History Review 5 (1987): 250-1.

[5]Francis Wayland, The Elements of Moral Science (1835; reprint, Cambridge, MA: Harvard University Press, 1963), 331.

Academic moral philosophers stressed the importance of virtue to the permanency of a republican form of government. In their view, there was no "self-sustaining power in any form of social organization" that depended upon individual virtue. Civil society and government was maintained by the "moral power" of the people.[6] In his discussion of the grounds of progress, Joseph P. Bradley acknowledged that efforts to improve habits and manners and to ameliorate mankind's character "are necessary to prevent them from becoming worse."[7] Indeed, Bradley felt that this was the most important function of religion--"to make men better, or rather, to make them good--a word which includes every virtue."[8] In this regard, Bradley compared these efforts to improve the human character "to the means we employ for keeping the body in health and vigor;--always necessary--ruinous to be neglected;--but eventuating in nothing more, than in keeping things in their present state of forwardness and perfection." He attributed this state of affairs to the "sad fact" that "selfishness and perverseness are prominent characteristics of his [man's] moral being." The "essential waywardness" of human nature suggested, in Bradley's judgment, that mankind's "progress in virtue and the true appreciation of their highest good" would always be "subject to the sway of his appetites and his passions,"[9] for their indulgence "is the strongest and most constant tendency of our nature." In Bradley's view, it was the moral duty of all to transcend their physical nature and to pursue to the best of their abilities "goodness, virtue, and moral perfectness" and he

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[6]Wayland, Elements of Moral Science, 328.

[7]Joseph P. Bradley, Progress--Its Grounds and Possibilities, an Address before the Philoclean and Peithessophian Societies of Rutgers College, New Brunswick, New Jersey (N.p.: Philoclean Society, 1849), 18.

[8]Joseph P. Bradley, "Esoteric Thoughts on Religion and Religionism," in Charles Bradley, ed. and comp., Miscellaneous Writings of the late Honorable Joseph P. Bradley (Newark: L.J. Hardham, 1902), 424.

[9]Bradley, Progress, 22, 20.

believed that this transcendent spirit of self-improvement produced moral and social progress.[10]

The justices' understanding of man as a created being placed in a state of trial shaped their opinions concerning the proper role of the state in promoting individual reform. The individual's moral autonomy and accountability meant that the process of self-improvement was necessarily an individual and largely internal struggle which required liberty to choose one's ends and to regulate one's conduct. David J. Brewer asserted that the consequential question in relation to moral advancement was not "how much better you can make a man by force and compulsion, but how much liberty can you give him without injury to others?"[11] In Brewer's opinion, the most important consideration within the individualistic context of moral agency and voluntarism was allowing to the individual the freedom to choose virtue over vice, thereby performing his duty to God, to himself, and to society, and fulfilling his highest purpose by maintaining in himself a high, clean moral character.[12] Legislation might regulate for the common good behaviours or articles the tendencies of which were toward the destruction of society but such regulations did not reach the moral autonomy of the individual. They removed the element of choice and therefore the exercise of moral agency, but the personal duty to pursue one's highest purpose and greatest perfection could not be imposed by a power outside the individual.

> You may, through the agency of the law-making power remove the temptation, to take away the opportunities and inducements to wrong, but you cannot legislate a man out of vice and into virtue. No statute

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[10]Bradley, "Esoteric Thoughts on Religion," and "Experience, or Self-Improvement," in Bradley, Miscellaneous Writings, 426, 301.

[11]David J. Brewer, "Some Thoughts about Kansas," at 68 cited in Lynford A. Lardner, "The Constitutional Doctrines of Justice David Josiah Brewer" (Ph.d. diss., Princeton, 1938), 63.

[12]David J. Brewer, "Personal Character as a Responsibility of Citizenship," Yale Law Journal 10 (1901): 230.

> will write the ten commandments on the human heart or fill the soul with the gospel of love.[13]

§ II HABIT, LEGISLATION, AND THE WILL

Justice Bradley declared that "the will is the man," because its actions illustrated more clearly than any words could do the visible expression of character.[14] High principles alone were considered insufficient to establish character, for moral principles required translation by the will into action. In an address to the Phi Beta Kappa Society at Yale College in 1860, Justice William Strong considered the relationship between legislation and the moral qualities of the community at some length. Strong asserted that legislation was a practical science closely associated "with physical, moral, and intellectual development" and therefore "behind no others in its capabilities to promote human happiness." Legislation, Strong avowed,

> creates and it exhibits the character of a community. It forms the habits of society, advances or retards the material interests of all its members, nor is it without its control over public morals, as well as intellectual improvement.[15]

In the context of moral voluntarism, legislation possessed both proscriptive and prescriptive aspects. Treating the state as a facultative being, the legislature and the executive, those agencies by which society carried out its desires and ends, represented the nation's active principle or will. Administrative decrees and legislation representing deliberate acts of the national will expressed the nation's character. Insofar as legislation influenced or directed the future actions of individuals it had a prescriptive element which contributed to fashioning the values,

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[13]David J. Brewer, "Address at the Dedication of the Kansas Normal School at Emporia," 16 June 1880 in Catalogue of the Officers and Students of the Kansas State Normal School (Emporia, 1879/80) quoted in Lynford Lardner, "The Constitutional Doctrines of Justice David J. Brewer," Ph.D. Diss., (Princeton, 1938), 29-30.

[14]Joseph P. Bradley, "Example," in Bradley, Miscellaneous Writings, 367.

[15]William Strong, American Legislation, An Oration delivered before the Phi Beta Kappa Society, Yale College, 27 August 1859 by Honorable William Strong (New Haven: Thomas J. Stafford, 1860), 3-4.

habits, and character of society. Insofar as it embodied the established customs of society, it had a proscriptive character, encouraging the maintenance of the moral status quo and resisting changes antagonistic to established values and norms of behaviour. An important aspect of legislation lay, therefore, in its institutionalization of the common usages or customs of society and in this respect it both reflected and shaped national character.

In Justice Strong's opinion, the most potent influence on the character of legislation was custom, so that "in every civil community of long standing, continued usage is king." In this regard, Strong equated social custom with individual habit and regarded both as important factors controlling the behaviour and determining the future condition of individuals and men in society.[16] Moreover, Strong explicitly referred to faculty psychology in explaining the influence of custom upon legislation. Moral philosophers viewed habit as important because of its conditioning effect upon the will and ultimately upon character. Repeated acts, whether virtuous or vicious, "produces a tendency to continued repetition" by rendering the performance of the act easier. Thus, "habit has an effect upon the will such as to establish a tendency toward the impossibility to resist it" and the creation of a permanent moral state.[17] In Strong's view, "the same reason which accounts for the control of habit over the man, explains the power of usage over a community."

> Such is our mental constitution that frequent repetition of an act or an event enforces belief in its continued recurrence. In an extended sense, this is a universal truth, applicable alike to the facts of physical and intellectual nature.[18]

In his Inquiry Concerning Religion, Henry Ware had described the operation of this conditioning effect. Men acted upon the presumption that nature followed a regular and permanent course. They expected that the same cause would produce the

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[16]Strong, American Legislation, 9, 11.

[17]Wayland, Elements of Moral Science, 85-6.

[18]Strong, American Legislation, 9.

same effect in the future as it had in the past. From this presumption, it followed that in either the natural or moral world similar motives would produce a similar course of action.[19] Justice Strong drew upon academic Moral Philosophy's analogous treatment of moral and physical laws to describe the effect of frequent repetition of an act or event in establishing the authority of natural laws and social customs and their influence on the will and moral status. Men believed in the reality of physical laws, because all previous experience proved their existence.

> We know that a heavy body will fall toward the center of the earth..., we believe that fire will burn, that heat will change ice to water, but we believe only because observation has taught us that such has been their habits heretofore. The same is true in regard to all expected physical phenomena.[20]

The same was true in regard to mental and moral phenomena. Men accepted the reality and authority of moral laws, because experience demonstrated their existence and operation. Experience repeatedly showed, for example, that "the tendency of a life of indolence and vice is to suffering, or that a course of virtuous action is promotive of happiness."[21]

The power, and the danger, inherent in legislation lay in its influence on the habits of individuals and their effect upon the collective will and moral state, for these ultimately exercised a collective effect on the will and moral state of the nation. The character and function of legislation, to the extent that it expressed normative values and prescriptive principles of action, were analogous to the habits and fixed principles of action for the individual. Wise legislation protected society and individuals from indulging too liberally the appetites and desires and thereby inadvertently sliding into corrupt habits and a course of moral degradation. This was precisely the reason

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[19]Henry Ware, An Inquiry into the Foundation, Evidences, and Truths of Religion by Henry Ware, D.D., Late Professor of Divinity in Harvard College, 2 vols. (Cambridge, MA: John Owen. Boston: John Munroe & Co., 1842), 1: 32-3.

[20]Strong, American Legislation, 9.

[21]Strong, American Legislation, 9.

Justice Bradley emphasized the significance of fixed principles of action in fortifying the morally weak will. Based on a sure knowledge of truth and right, these principles were "to be adhered to without swerving." Bradley warned that "anything that for an instant solicits, or even suggests, a departure from these principles should be instantly repelled without allowing the indulgence of a thought that it can be entertained for a moment."[22]

Properly formulated legislation took into account the principles of human character and of civil society. It ought not to hinder the moral development of the individual and society but act as a bracing influence on morals and virtue. Good legislation respected, therefore, the fundamental principle of American political and legal theory that the state existed for the benefit of the individual and society. Taken within the context of nineteenth-century moral individualism, the state, indeed any social organization, was an instrumentality by which to encourage individuals to develop their physical and intellectual powers to their greatest potential and which should never act as an impediment to the development of the moral faculty, habits, and character and their exercise in fostering a life of virtue and happiness. Within this context, laws were a means of creating the conditions necessary for the successful outcome of the individual moral struggle.

In his reading of the direction taken by American legislation in the period following the Civil War, Justice Brewer emphasized that, although Americans might be "enarmed and entranced by the thought of the power of the nation," the most important duty of government lay in "the protection of the individual, the building up within him of a sense of his personal responsibility." Brewer's choice of words was revealing. In his view, the enduring theme in government was not "to increase and centralize power in the national government, and to that extent diminish the sovereignty of the States as well as the reserved power of the people" but its role in

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[22]Joseph P. Bradley, "Moral Faculty," in Bradley, Miscellaneous Writings, 363-4.

moral improvement.[23] "The test of government is not in the outward mechanical display of order, but in the capacity to develop the best men."[24] This was a point to which Brewer repeatedly returned in his many public addresses. In voicing his faith in the promise and possibilities of the future, Brewer reiterated his belief that the perfection of society required that every individual, "each and every one of every race," should have "the fullest possible scope for his own uprising."[25]

The justices' ideas of personal responsibility and economic individualism were certainly influenced by classical economics, but they drew their fundamental principles from Protestant theology and academic Moral Philosophy wherein individual accountability to the deity for moral actions was a long established doctrine. Francis Wayland had observed that society had no power to alter the moral relation between the individual and God, nor could custom or law be used to lessen his obligations.[26] In this regard, Justice Brewer's choice of the word, "uprising," to describe the process of personal improvement suggests that he accepted the religious and ethical context of economic individualism, for it was a logical corollary of man's moral agency.[27] The concept of the moral autonomy of individuals in society could, and was, applied to larger groups. Brewer's reference to race fit into this moral

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[23]David J. Brewer, Two Periods in the History of the Supreme Court, Address Delivered by Justice David J. Brewer of the United States Supreme Court (Richmond, VA: Richmond Press, 1906), 21, 16.

[24]David J. Brewer, The Spanish War: A Prophecy or an Exception?, Address before the Liberal Club, Buffalo, New York, 16 Feb. 1889 (N.p., Anti-Imperialist League, n.d.), 11.

[25]David J. Brewer, "The Promise and Possibilities of the Future," in David J. Brewer, The United States a Christian Nation (Philadelphia: John C. Winston Co., 1905), 82.

[26]Wayland, Elements of Moral Science, 322, 86-7.

[27]See, for example, Paul's "Epistle to the Romans," 14: 12 and "Epistle to the Galatians," 6: 5; Matthew 18: 23, and 25; Job 19: 4; Jeremiah 31: 30; Ezekial 18: 20. See also Hovenkamp, Enterprise and American Law, 74.

context. He recognized that "no perfect family exists where one is bound down with the lower duties in order that another shall rise,"[28] and in this respect the abolition of slavery and the passage of the postwar amendments protecting the fundamental rights of all citizens represented immense moral improvements in the nation's character. At the same time, Brewer's remark must be read within a narrow ethical context in which special legislation protecting particular individuals or groups of individuals "invariably involved disability."[29] The individual's effort to elevate himself was seen as being carried out in an intellectual and social paradigm in which the Republican ideology of free labour and freedom of contract were necessary corollaries to moral autonomy.[30] In this sense, reform imposed by law was inherently flawed, because such an imposition failed to address the corrupted individual will and the immoral or antisocial behaviour which it produced. This was the true root of individual and social misery identified by moral science. For this reason, the justices took issue with the premise of much of the late nineteenth century's reforming spirit. They did not so much deny the desirability of reform as they objected to a reforming philosophy that seemed to them to ignore the fundamentals of human character and the moral purpose of man's existence.

This was an enduring theme in the justices' thought. On the eve of the Civil War in 1860, Justice Strong, at that time a member of the Pennsylvania Supreme Court, delivered an address at Yale College in which he objected to the modern, or reformist, sentiment which regarded a program of legislated morality as a remedy for all of society's ills and as the only certain source of true progress. The address proved to be a significant harbinger of the Court's opposition following the Civil War

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[28]Brewer, "The Promise and Possibilities of the Future," 82.

[29]A.V. Dicey, Lectures on Law and Public Opinion in England During the Nineteenth Century (London, 1905) at 150n. 1 cited in Goifer, "The Paradox of Paternalism and Laissez-Faire Constitutionalism," 249.

[30]Braeman, Before the Civil Rights Revolution, 121 and J. David Hoeveler, Jr. "Reconstruction and the Federal Courts: The Civil Rights Act of 1875," The Historian 31 (1969): 605.

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to legislative reform of society and the economy. American statute books were, he contended, "a permanent record of numberless schemes of political and social improvement, and of attempted meliorations of those laws which have been established by the common sense and common usage of the people." Yet, in spite of, or perhaps because of, endless and dismally unsuccessful schemes of reform, "of extravagant mental and moral speculation," and of outright "day-dreaming," a large class of the population remained dissatisfied with the established social and political order. These were people

> who regard the government and laws as radically defective, and who are not slow to believe that their own visions of right and policy are essential to the highest social development. They are doubtless true reformers in spirit.... But they are not wise reformers.[31]

These reformers were, in Strong's opinion, naive, because they neglected to consider in their designs that "all members of the community are not equally enlightened." Strong echoed the views of the academic moral philosophers, who observed that "the form of a government will always adjust itself to the moral condition of a people,"[32] and argued "that both mental and moral reform must, in the nature of things, precede positive human law."[33] Where mental and moral reform was lacking, the reformers' reliance upon the coercive power of statutory enactment as the means of securing reform was certain to fail. For this reason, legislation, as an expression of social custom and normative values, could not move successfully far in advance of established custom. As Justice Brewer would later observe, no man might be made good simply by statute,[34] and Strong held that "laws are unmeaning, if

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[31]Strong, American Legislation, 14, 24-5.

[32]Wayland, Elements of Moral Science, 328.

[33]Strong, American Legislation, 25.

[34]David J. Brewer, The Twentieth Century from Another Viewpoint (New York: Fleming H. Revell Co., 1899), 51.

not mischievous, which are not adapted to the character and common habits of those intended to be governed by them."[35]

Justice Brewer outlined the postwar Court's philosophical position concerning the reforming spirit. Realistically, he recognized that "changed conditions and a different social and business life from that which obtained when the Constitution was framed" might require greater exertion of government's powers.[36] He acknowledged therefore that modern business practices could not be likened to the situation of two men alone on an island who needed only the rules of barter and sale.[37] The function of the law in this case was to protect the individual; however, protection did not necessitate nor was it desirable that it involve ever "more exacting police regulations in respect to all the relations in society." It was, in his estimation, a misconception, though hardly a new one, of the spiritual nature of moral laws, of which positive law was ideally a reflection, to believe that "men must be compelled to be righteous, as though the human soul is something which can be coerced into virtue" through commands and prohibitions. State-sponsored coercion had been, in Brewer's opinion, the fatal flaw in earlier efforts such as the Spanish Inquisition and the theocracy of the Puritans to force men into virtue. Instead, Brewer argued, "the strength of our efforts should not be to fill the statutes with prohibitions, but to reach the individual and strengthen his character."[38] Brewer placed his faith "in the liberty of the soul, subject to no restraint but the law of love, and in the liberty of the individual, limited only by the equal rights of his neighbour."[39] This position placed Brewer and the Court in conflict with the general trend of American politics in the last quarter of the century.

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[35]Strong, American Legislation, 11.

[36]Brewer, Two Periods in the History of the Supreme Court, 18.

[37]David J. Brewer, "The Ideal Lawyer," Atlantic Monthly 98 (Nov. 1906): 592.

[38]Brewer, The Twentieth Century, 48-50 passim, 52.

[39]Brewer, Two Periods in the History of the Supreme Court, 24.

§ III ECONOMIC INDIVIDUALISM AND THE QUESTION OF EQUALITY

When viewed in an ethical context, the ultimate test and value of legislation lay in its ability to develop and preserve individual character by allowing the freest possible rein to voluntaristic moral action. Those actions included economic decisions which influenced the individual's social condition. The belief that the nature and purpose of legislation should be legally interpreted in relation to its influence on character and that the moral economy must be allowed to operate freely in accordance with natural economic laws in order for individuals and society to reach their ultimate ends led the Court to certain conclusions regarding the nature of society, the economy, and the extent to which individual choices determined what were, in its eyes, moral outcomes. The justices' preconceptions concerning the economy as a sphere of moral operation conditioned their understanding of the relationship between legislation and political economy; however, it did not necessarily blind them to the social effects of industrialism, the concentration of corporate and financial power, and the rise of labour organizations. Rather, their conception of the economy and society led them to morally-oriented conclusions concerning the dangers these developments presented.

During the last quarter of the nineteenth century, the justices devoted considerable effort to working out the theoretical and practical effects of man's state of moral trial on legal thought and political economy. The intellectual and ethical paradigm provided by moral science provided an unshakeable foundation for the Court's legal and social philosophy. Consider, for example, the all-important question of equality in a free, democratic society. Here, the justices were faced with the difficult task of defining the philosophical and political meaning of the term equality and applying that definition across a broad spectrum of legal issues that included police regulations, substantive due process and the equal protection of the laws, and civil rights.

In an undated essay in his Miscellaneous Writings, Justice Bradley explored the question of what constituted equality in the American system of government. His conclusions had important implications for the economic and racial issues before the

Court, for Bradley altogether rejected the notion that the founding fathers, "the great apostles of our liberty," had meant by the term equality to impose social equality, or equality of condition, on the nation. Rather, he maintained that experience taught that the Declaration of Independence had meant political equality and nothing else.

> "We hold it to be self-evident that all men are created equal." This is our creed as a nation. But the question of importance is, in what respect equal? Not equal in mind, for this experience teaches us to be untrue. Not equal in compared vigor, for this is contrary also to experience. Not equal in the dispensation of Providence, nor equally favored by fortune. In fine, there is scarcely one thing in which we may be said to be equal.[40]

Bradley's sentiments reflected the influence of both Scripture and academic Moral Philosophy. The Bible acknowledged that there were diversities of gifts among individuals,[41] while moral philosophers such as Henry Ware asserted that "the Author and Giver of every good, has dispensed an almost infinite variety of natural capacity and powers. No man can deny this fact without shutting his eyes to the indications which surround him on every side."[42]

Bradley's conclusion that the principle of equality did not, certainly should not, consist of an equal distribution of talent, character, wealth, and cultivation and that it did not imply that men were equal in every respect was accepted as a truism by his contemporaries. Equality did not "consist in the distribution of wealth, and a common possession of the comforts and elegancies of life," nor did it consist in the common possession of an appreciation of culture, for there were many species of luxury, among which Bradley included high culture, "which the great mass of mankind are incapable of enjoying, and of which they ever would be incapable, how equally soever the grosser attendants of prosperity might be distributed." At the same time, Bradley declared that equality did not mean social equality in which "all the

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[40]Joseph P. Bradley, "Equality," in Bradley, Miscellaneous Writings, 90.

[41]See Romans 12: 6 and I Corinthians 12: 4.

[42]Ware, Inquiry, 1: 64.

classes (I do not say orders) of society commingle their intercourse," so that a common cobbler might "take a cup of tea with the gayest belle of the town, or else, perhaps, to debate with grave Senators on the affairs of State." The right to choose their own society was, he asserted, "the last vestige of liberty" with which men were willing to part. Instead, equality consisted, as Francis Wayland had asserted, of equality of right rather than equality of condition. "Every individual," Wayland wrote, "is created with a desire to use the means of happiness which God has given him" in such manner as he thought best and "of this manner he is the sole judge." This right was subject only to the condition that it not be exercised so as to interfere with the equal right of another. This "law of reciprocity" applied "with the same force to communities as to individuals," both in their relations with other nations and in society's relation to the individual.[43] It followed from this equality of right that the political equality to which Bradley referred consisted "in each man having an equal voice in the civil government of his country" by contributing to the majority opinion which governed the country.[44]

This acceptance of inequality of condition echoed throughout Justice Brown's essay on the distribution of property. The Declaration of Independence declared that all men were created equal. However, the varying moral and physical endowments among them forced men "to recognize the fact that this is true only of men in their political capacity."[45] Just as differing degrees of good taste precluded the majority from enjoying life's civilities,[46] so, too, the diversity of physical and mental

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[43]Wayland, Elements of Moral Science, 174, 176, 180, 199.

[44]Bradley, "Equality," in Bradley, Miscellaneous Writings, 90-2.

[45]Henry B. Brown, "The Distribution of Property," Annual Address, American Bar Association Reports 16 (1893) cited in Robert J. Glennon, Jr. "Justice Henry Billings Brown: Values in Tension," University of Colorado Law Review 44 (May 1973): 562.

[46]For a brief discussion of "taste", or the aesthetic sense, see Garry Wills, Inventing America: Jefferson's Declaration of Independence (Garden City, NY: Doubleday, 1978), 193-206. See also Shaftesbury, Characteristics of Men, Manners,

endowments meant that few individuals enjoyed the benefits of wealth. In what resembled a canon of biblical sins and virtues, Brown listed those personal qualities necessary to obtain wealth and success and those certain to preclude attaining those laudable goals.

> One is strong, another weak; one is wise, another foolish; one is cautious, another reckless; one is industrious, another lazy; one is prudent, another improvident; one generous, another parsimonious; and so on through the whole catalogue of personal qualities. Education may do something to equalize men, and to soften the asperities of character, but inherent defects can never be wholly remedied, nor inherent virtues wholly suppressed. In the words of the maxim which so well expresses the popular idea, "Blood will tell." From these differences in our intellectual and physical constitutions the inevitable result is that, in the pursuit of wealth, some are vastly more successful than others, and acquire an amount of riches which makes them an object of envy to those who have been less fortunate.[47]

Brown's list of attributes was noteworthy in that it emphasized the moral as much as the intellectual and physical qualities of the individual. Indeed, the degree to which the justices equated the accumulation of property with virtue and its absence with the presumption of sin was striking. The connection of wealth and the possession of an estate to individual moral qualities suggested to the justices that it must be enjoyed by a relative few individuals of exceptional industry, prudence, and rectitude. Justice Brown declared that the faculty of accumulation was one which perhaps four out of five, perhaps nine out of ten, of the labouring class, did not possess. Accumulating nothing from their labours, they were "forced or tempted to spend as they go. Taking no thought of the morrow."[48] Justice Brewer was similarly emphatic concerning the confluence of good character and wealth.

Opinions and Times (1711) and Francis Hutcheson's An Inquiry into the Original of our Idea of Beauty and Virtue (1725).

[47]Henry Billings Brown, "The Distribution of Property," Annual Address, American Bar Association Reports 16 (1893): 218.

[48]Brown, The Distribution of Property, 231.

> The large majority of men are unwilling to endure that long self-denial and saving which makes accumulation possible; they have not the business tact and sagacity which brings about large combinations and great financial results; and hence it has always been, and... always will be true, that the wealth of a nation is in the hands of a few, while the many subsist upon the proceeds of their daily toil.[49]

Viewed in this light, the justices accepted wealth as an indicator of personal worth and of good character. They accepted, moreover, the definition of capital found in the classical political economists, which stated that "as the wages of the laborer are the remuneration of labor; so the profits of the capitalist are properly the remuneration of abstinence." In his opinion for the Bering Sea Tribunal of Arbitration, Justice Harlan explicitly identified accumulated savings or capital as the embodiment of personal industry and self-discipline in the form of abstinence from immediate consumption.[50] Citing J.S. Mill's Principles of Political Economy (1848) and William Blissard's Ethic of Usury and Interest (1892) in support of this view, Harlan remarked that "abstinence is industry under another name. And this principle of abstinence, or saving, is recognized by all writers upon economic questions as a potent agency in the creation of wealth and in the progress of the world."[51] Although always sympathetic to the condition of the common man, Justice Harlan was also attuned to sound principles of political economy and the needs of capital.

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[49]David J. Brewer, "The Nation's Safeguard," New York State Bar Association Proceedings 16 (1893): 37-47; reprint, in Alan F. Westin, ed., An Autobiography of the Supreme Court: Off-the-Bench Commentary from the Justices (New York: Macmillan, 1963), 123. See also David J. Brewer, "The Movement of Coercion," Address to the New York State Bar Association, January 1893, American Architect and Building News 70 (Nov. 1900): 35.

[50]J.S. Mill's Principles of Economy, 2: 484 cited in John Marshall Harlan, Opinions of Mr. Justice Harlan at the Conference in Paris of the Bering Sea Tribunal of Arbitration, Constituted by the Treaty of February 29, 1892, between her Britannic Majesty and the United States of America (Washington, D.C.: Government Printing Office, 1893), 171.

[51]J.S. Mill, Principles of Political Economy at 2: 484 and William Blissard, The Ethic of Usury and Interest: A Study in Inorganic Socialism (London, 1892) at 26 cited in Harlan, The Bering Sea Tribunal of Arbitration, 171.

> On the hypothesis that all have equal opportunities of social progress, the social destroyers of its wealth deserve condemnation, while those who have served the cause of progress by saving from personal consumption a part of the earth's produce and devoting it to the improvement of the national mechanism have a claim to an award proportioned to their service and to the efforts which they have made in rendering it. These are the conditions of advance in civilization.[52]

Wealth was, then, distributed according to the same fixed moral and natural laws that governed the rest of creation and with the same inevitability. In his discussion of the inherent moral defects of socialism and its deleterious effects on society, Justice Miller described the owner of property as a pious individual of skill, good habits, and industry, who was possessed of the admirable qualities of honest industry, careful thrift, and judicious economy and whose acquisitions were the due reward of merit. Conversely, Miller described "the poor and those less happily situated," namely, those lacking the meritorious possession of property, as those "idle loafer[s]," "lazy vagabond[s]," and "outcast[s]" whose "wicked," "evil," and "criminal" habits consigned them to a lifetime of poverty and misery.[53] Miller and his contemporaries clearly saw the possession of property as presumptive proof of a good character, of the individual's ability to put fully-developed physical, intellectual, and spiritual faculties into practical play.

§ IV THE INSTITUTION OF PROPERTY

The justices' understanding of the close connection between wealth and character strongly influenced their views on the manner in which property was appropriated by labour and the protection which society was obliged to give it. In his trenchant attack in 1888 on socialist ideas, Justice Miller rejected the idea that land was part of the commons in the same manner as air and water. Rather, particular

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[52]Harlan, The Bering Sea Tribunal of Arbitration, 171.

[53]Samuel Freeman Miller, "The Conflict in This Country between Socialism and Organized Society," Address at the Commencement of Iowa State University, June 19th, 1888, in Charles N. Gregory, Samuel Freeman Miller (Iowa City: State Historical Society of Iowa, 1907), 157, 153, 156, 154, 155.

pieces of land were appropriated to the exclusive use of the individual whose toil, whose labour had converted "the originally rugged soil to a state fit for... the agriculturalist."[54]

Justice Brewer likewise argued that the working man's strength and willingness to labour represented a personal property recognized by moral science as a fundamental natural right the sanctity of which superseded municipal law and which was acknowledged by the common law as inalienable. In this respect, the foundations for the institution of property in judicial thought closely resembled those in academic Moral Philosophy.[55] Echoing Samuel Miller and Henry Brown, Brewer asserted that "from the earliest records, when Eve took loving possession of even the forbidden apple,[56] the idea of property and the sacredness of the right of its possession, has never departed from the race."[57] Justice Miller had observed in 1888 that man was an essentially selfish creature motivated by egoism, fond of ease and averse to labour, and who was compelled to it only by necessity and by the desire for continued improvements in the comforts of life. Justice Brown believed that "the desire to

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[54]Miller, "The Conflict in This Country between Socialism and Organized Society," 156. Miller was referring to the ideas of Henry George, the American political economist who advocated the nationalization of land. See also Brown, "The Distribution of Property," 219, where Brown explicitly condemned "the Henry George school" of political philosophy.

[55]See Samuel Stanhope Smith, The Lectures Corrected and Improved Which Have Been Delivered for a Series of Years in the College of New Jersey on the Subjects of Moral and Political Philosophy, 2 vols. (Trenton: Wilson for Fenton, 1812), 2: 188; Francis Wayland, The Elements of Political Economy, new ed. (1837; New York: Sheldon & Co., 1886), 141-2; and Adam Smith, The Wealth of Nations, 2 vols. (1776; reprint, London: J. M. Dent & Sons, 1933) at 1: 110 cited in Wayland, Elements of Political Economy, 175-6 and Francis Bowen, The Principles of Political Economy (Boston: Little, Brown & Co., 1856), 199.

[56]Genesis 2: 6.

[57]David J. Brewer, Protection to Private Property from Public Attack, An Address Delivered before the Graduating Classes at the 67th Anniversary of Yale Law School, June 23rd, 1891 (New Haven: Hoggson & Robinson, 1891), 5.

better one's condition--in other words, to make money--is the greatest incentive to labour," so that "it is impossible to deny to the laboring man the right to determine the number of hours he shall work, and the wages he is willing to accept." Within the context of this theory of labour and property, a just and enduring government must recognize the necessity of labour and the attachment to property which was its result.

> Whatever dreams may exist of an ideal human nature, which cares nothing for possession..,--actual human experience... declares that the laws of acquirement, mingled with the joy of possession, is the real stimulus to human activity.[58]

The accumulation and protection of material wealth distinguished civilized society from simple barbarism. In condemning the "movement of coercion," which he identified with the efforts by organized labour and by legislative enactment to diminish protection to private property, Justice Brewer asserted that the savage lacked material wealth not because he lacked the ability or opportunity to obtain it but because he did not possess the moral qualities of industry, thrift, and self-discipline necessary for its attainment.

> All passions run riot in the savage. He grovels through things of the earth to satisfy the lusts of the body; and the height of his morality is an eye for an eye and a tooth for a tooth.[59] Civilization lifts the soul above the body, and makes character the supreme possession. It reads into human history the glory and value of self-denial. It catches from the Divine One of Nazareth, the nobility of helpfulness, and teaches that the externals are not the man; that accumulations and accomplishments only suggest that which makes both valuable.[60]

What distinguished the "civilized" man from the savage was not the necessity to labour under which all men existed but labour directed toward a goal beyond the mere maintenance of life, toward the accumulation of property and an estate. In

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[58]Brewer, Protection to Private Property, 5.

[59]Colossians 3: 2; Exodus 21: 24.

[60]Brewer, "The Movement of Coercion," 35. See also Brown, "The Distribution of Property," 213.

Justice Brown's view, "the disposition to acquire and the ability to own are the prime distinctions between the civilized man and the savage" and formed the basis of all social progress, which explained why "no people who did not respect the right of private property have ever emerged from barbarism."[61]

Certainly, the justices saw nothing wrong in the pursuit of wealth in an "honest calling," and the right to pursue such a calling and to enjoy the property that was the fruit of one's labour was considered a fundamental individual right. The Court considered this point in the Slaughterhouse Cases and in Munn v. Illinois, where Justice Field's dissenting opinions largely defined the parameters of substantive due process and the protection of all forms of property under the Fourteenth Amendment. The protection conferred to life, liberty, and property by the Fifth and Fourteenth Amendments was construed in the broadest sense, for "the provision has been supposed to secure to every individual the essential conditions for the pursuit of happiness." Similarly, the term liberty included, in Field's view, the freedom of the individual to regulate his own conduct and to pursue whatever course of action, "not inconsistent with the equal rights of others, as his judgement may dictate for the promotion of his happiness." This right, he argued, necessarily included the right "to pursue such callings and avocations as may be most suitable to develop his capacities, and to give them their highest enjoyment."[62]

This opinion, read in the context of Field's Congregational upbringing and of his exposure to Mark Hopkins' course in Moral Philosophy at Williams College, made Field's language all the more revealing of his fundamental premises. Freedom meant, ultimately the exercise of free will by a moral agent--the power to choose one's destiny. Thus, Field's position in this dissent was not based on metaphysical principles because those were the only feasible grounds upon which to dispute the

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[61]Brown, "The Distribution of Property," 226.

[62]Munn v. Illinois, 94 U.S. 77, 90 (1877) per Field. See below Chapter VIII, §§ V, VI.

majority opinion but because he viewed them as the very ground upon which American constitutional principles stood.

The Court's considered and well-supported belief in the economic and, therefore potentially moral, benefits of technological and economic progress suggested that personal and corporate wealth, in and of itself, did not represent either a social injustice or a danger to society. This belief was founded in large part on the conviction that natural and moral laws governed the accumulation and distribution of wealth in society. Justice Brewer's rhetoric regarding the moral qualities of wealth is much more understandable in the framework of a moral economy.

> Who is injured by money? Not the one that earns it day by day, dollar by dollar, and saves until he accumulates a fortune, but he who by the chance discovery of a mine, or an accidental speculation of stocks, finds himself changed from poverty to sudden wealth; and that which is true of the individual is true of the nation. Whatever it accumulates by honest toil is not a curse. Whatever it obtains without giving value may be fruitful of injury.[63]

Justice Brown argued for his part, in a passage cribbed from classical political economy, that immense social benefits were attributable to the existence of private wealth. Rich men were essential to the well-being of the poor and of society. The wealthy undertook large-scale capital investment in buildings, railroads, mines, and great corporations and "in a thousand ways develop the resources of our country and afford employment to a countless army of workingmen." Moreover, their appetite for luxuries and patronage of the arts employed tens of thousands in manufacturing, domestic service, and the arts.[64]

Wealth provided therefore a material aid to progress via its capitalistic endeavours and provided to many others the opportunity to exercise their faculties and powers in honest industry. These were by no means negligible benefits. Justice

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[63]Brewer, The Spanish War, 16.

[64]Brown, "The Distribution of Property," 218-9. See also Adam Smith, The Theory of Moral Sentiments, edited by D.D. Raphael and A.L. Macfie (Glasgow, 1759; reprint, Oxford: Clarendon Press, 1976), 184-5.

Bradley asserted that "the active employment of the faculties alone can make us useful or happy" and for this reason "opportunity is everything. Success depends upon opportunity. Acquirements, learning, aptitude, practical ability, greatness, depend on opportunity." Opportunity, he declared, was the foundation of hope and a sense of self-worth.[65]

§ V THE GERMINATION OF SUBSTANTIVE DUE PROCESS

The questions of equality and the protection of property had profound legal implications throughout this period. The justices' definition of equality in a moral economy of autonomous individuals shaped their responses to a wide range of issues. In terms of working out the effects of the Civil War amendments, particularly the Fourteenth Amendment, the doctrines of equality before the law and of substantive due process gradually assumed greater scope and subsumed matters such as freedom of labour and contract which were apparently unconnected with protecting the rights of the freedmen.

Perhaps nothing exemplified this state of affairs better than The Slaughterhouse Cases, where the Court was called upon for the first time to give construction to the Thirteenth and Fourteenth Amendments.[66] In these cases, the Court was asked to consider the extent to which a Louisiana statute regulating the slaughter of livestock in the city of New Orleans and creating a corporation with a monopoly upon that business infringed upon the provisions of the Thirteenth Amendment against involuntary servitude and upon the Fourteenth Amendment's guarantees against state encroachments upon the privileges and immunities of citizens of the United States and their equal protection by due process of law. The first case involving construction of the Civil War amendments revolved not around the rights of freedmen but around the rights of white butchers to resist a monopoly created by the Louisiana legislature.[67]

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[65]Bradley, "Precept and Example," Bradley, Miscellaneous Writings, 364, 365

[66]Slaughterhouse Cases, 83 U.S. 394 (16 Wall. 36-130) (1873).

[67]Braeman, Before the Civil Rights Revolution, 62.

Thus, legal interpretation of the amendments focused from the beginning less on black civil rights than on the implications of guarantees of equal protection and due process of law in a facultative, federal state possessing a moral obligation to protect the equality of right among all of its citizens. In this case, the issues were joined in such a way as to suggest that a verdict for the butchers' union meant the virtual demise of the old federal system by transferring from the states to the federal government the duty of protecting the vested rights of citizens from government encroachment. As historians have suggested and Justice Brewer's contemporary analysis of the Court's postwar record confirmed, Justice Miller's opinion for the five-to-four majority was careful to limit the effect of the Court's decision.[68] Miller wrote that the principles of construction announced in the judgement extended only "so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination or the right to go."[69]

In his opinion, Justice Miller attempted to limit the scope of the amendments' effects on the relationship between state and federal power. In his view, the state had the authority under its police power to regulate the business of slaughtering animals. The power to regulate unwholesome trades in order to protect the public had always been conceded to the state governments and municipalities.[70] The question was whether the statute in question was subject to the restraints imposed upon the states by the postwar amendments.

Miller asserted that it was not so restrained. In his view, "the one pervading purpose" of all three amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freemen and citizen from the oppression of those who had formerly exercised unlimited dominion

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[68]Loren P. Beth, "The Slaughterhouse Cases -- Revisited," Louisiana Law Review 23 (1963): 493 and Brewer, Two Periods in the History of the Supreme Court, 9-10.

[69]Slaughterhouse Cases, 83 U.S. 394, 405 (16 Wall. 36-130) (1873).

[70]See the discussion of the police power above in Chapter VII, § IV. Slaughterhouse Cases, 83 U.S. 394, 404 (16 Wall. 36-130) (1873) per Miller.

over them." The Thirteenth Amendment meant exactly what its words imported--slavery was abolished in the United States--and had no connection with the legislation before the Court. Moreover, the Fourteenth Amendment had not transferred "the security and protection of all civil rights... from the states to the Federal government" but merely extended the protection afforded to the fundamental rights enumerated by the Constitution to legislation enacted by the states. Miller was unable to see how state legislation regulating the business of butchering in one of its municipalities fell within the prohibition of depriving the plaintiffs in error of property without due process of law. Miller concluded by adding that the clause referring to equal protection of the laws was intended to apply to state laws "which discriminated with gross injustice and hardship against them [Negroes] as a class" and he doubted "very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[71]

While Justice Miller's opinion had been directed toward insuring that the application of the Civil-War amendments did not "radically change the whole theory of the relations of the state and Federal governments to each other and of both of these governments to the people,"[72] the dissenting opinions of Justices Field and Bradley took a much broader and ultimately more significant view of the matter.

In his dissenting opinion, Justice Field acknowledged that the police power of the states extended to "all regulations affecting the health, good order, morals, peace and safety of society" and was necessarily exercised "in almost numberless ways." Regulations passed in pursuit of those goals "when these are not in conflict with any constitutional provisions, or fundamental principles, cannot be successfully assailed." This was a key point for both Field and Bradley. Here, they agreed with the views of the academic moral philosophers. "Society," Wayland had written, "has the right to

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[71]Slaughterhouse Cases, 83 U.S. 394, 406, 409, 410 (16 Wall. 36-130) (1873) per Miller.

[72]Slaughterhouse Cases, 83 U.S. 394, 409 (16 Wall. 36-130) (1873) per Miller.

prevent its own destruction" by regulating or prohibiting altogether those activities which were either positively destructive or mischievous.[73] However, Field and Bradley maintained that "under the pretence of prescribing a police regulation the state cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure."[74] In their view, principles of abstract justice and the fundamental law of the nation barred society from interfering with the free choice of an individual to pursue a common calling. The Louisiana legislation appeared to do exactly that and therefore replaced equality of right with a condition in which the individual was "debarred from all choice excepting that he may do what his fellow man appoints, or else must suffer what his fellow man chooses to inflict."[75]

Field contended that the framers of the Fourteenth Amendment had intended that it afford protection to citizens of the United States from deprivation of their common rights as was indicated by the general language of the amendments. In this regard, he broadly construed the import of the Thirteenth Amendment.

> The abolition of slavery and involuntary servitude was intended to make everyone born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects everyone, and to enjoy equally with others the fruits of his labour. A prohibition to him to pursue certain callings open to others of the same age, condition and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude.[76]

In Field's opinion, the amendment was designed to secure citizens of the United States from state or federal laws which discriminated between classes of persons and deprived one class of their freedom or property or made of them a caste in order to subserve the power, pride, avarice, vanity, or vengeance of others. In this

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[73]Wayland, Elements of Moral Science, 183.

[74]Slaughterhouse Cases, 83 U.S. 394, 412 (16 Wall. 36-130) (1873) per Field.

[75]Wayland, Elements of Moral Science, 184.

[76]Slaughterhouse Cases, 83 U.S. 394, 413 (16 Wall. 36-130) (1873) per Field.

respect, the Fourteenth Amendment was a supplement to the Thirteenth in that it placed the natural and inalienable rights of American citizens under the protection of the federal government.[77]

Field defined the "privileges and immunities" protected by the amendment as "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole."[78] Field averred that among those rights "must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons." In his mind, the adjudged cases since the reign of James I supported the view that the monopoly granted to the slaughterhouse corporation by the Louisiana statute was against public policy and a questionable exercise of the police power, because it conferred special privileges upon that body by restraining the liberty of other citizens to pursue a lawful trade and employment for their own maintenance and that of their families. It interfered, therefore, with the right, "fully recognized" and "completely incorporated into the fundamental law of the country," of every free man "to pursue his own happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affects others." Such a grant of exclusive privileges was, in Field's view, against common right and void.

> This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life... is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex and condition. The state may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society,

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[77]Slaughterhouse Cases, 83 U.S. 394, 413, 414 (16 Wall. 36-130) (1873) per Field.

[78]Slaughterhouse Cases, 83 U.S. 394, 415 (16 Wall. 36-130) (1873) per Field.

> but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations.[79]

Justice Bradley concurred with these views in his dissenting opinion but added a further important observation. Anglo-American law, he asserted, recognized three fundamental rights adhering to the individual--the rights to life, liberty, and property, which "the legislature of a [free] state cannot invade." These rights were, he maintained, recognized in the Declaration of Independence as the inalienable rights of free men. It was also recognized that the individual's right of property, as defined by Blackstone, "consists of the free use, enjoyment and disposal of all his acquisitions, without any control or diminution save only by the laws of the land." Bradley saw as a necessary corollary to the preservation, exercise, and enjoyment of those rights the freedom to adopt the calling, profession, or trade of his choice, which, once chosen, was his property and right. These, in his view, were the rights protected by the due process clauses of the Fifth and Fourteenth Amendments. The monopoly of the slaughterhouse corporation infringed the privileges and immunities clause of the Fourteenth Amendment, because it destroyed the individual's property in his trade and labour. It amounted therefore to a taking of property without due process of law.[80]

The arguments in the Slaughterhouse Cases were significant in that Justice Miller's opinion for the majority and the dissenting opinions of Justices Field and Bradley encompassed in one decision apparently disparate strains of thought in the Court's later decisions concerning the exercise of the police power to regulate quasi-public corporations, the enactment of ameliorative labour legislation, freedom of contract, and civil rights. Justice Miller's opinion suggested on the one hand that the Civil-War amendments should be narrowly construed so as to preserve the federal system as it had existed before the war and to prevent their indiscriminate application

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[79]Slaughterhouse Cases, 83 U.S. 394, 415, 417, 418, 419 (16 Wall. 36-130) (1873) per Field. See Case of Monopolies, 11 Coke 84 (G.B.).

[80]Slaughterhouse Cases, 83 U.S. 394, 420, 421 (16 Wall. 36-130) (1873) per Bradley.

to issues such as the resistance of business to state regulation which were unconnected to protecting the rights of freedmen. On the other hand, the Court proved increasingly reluctant to uphold police regulations that hinted at government interference with the individual's "entire right to use his own body as he will, provided he do not so use it as to interfere with the rights of his neighbor"[81] or, equally repugnant to equality of right, what Justices Field and Brewer described as class legislation unless it was justified by the strongest public considerations.[82] This held true whether legislation was aimed at improving working conditions for labourers and other matters of contract or preserving the civil rights of marginalized classes of citizens.

§ VI FREEDOM OF CONTRACT

Bernard Schwartz has suggested that the nineteenth century was the century of contracts and indeed the United States experienced explosive growth in contract law during the 1800s.[83] The ideology of freedom of contract in the Gilded Age had little to do, however, with society's requirement for a legal formula recognizing and enforcing mutual agreements, particularly between corporations and the states granting their charters, or with the constitutional protection offered such agreements by Article I, Section 10 of the Constitution.

By the last quarter of the century, the Supreme Court had expounded the law on this subject in a series of decisions beginning with Dartmouth College v. Woodward (1819).[84] In cases involving charitable corporations such as Home of the Friendless v. Rouse and St. Anna's Asylum v. New Orleans and in others involving

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[81]Wayland, Elements of Moral Science, 183.

[82]Barbier v. Connolly, 113 U.S. 27, 31, 32 (1884) per Field; Soon Hing v. Crowley, 113 U.S. 703, 711 (1885) per Field; Budd v. New York, 143 U.S. 517, 548 (1892) per Brewer.

[83]Bernard Schwartz, The Law in America: A History (New York: McGraw-Hill Book Co., 1974), 59.

[84]Dartmouth College v. Woodward, 4 Wheat. 518 (1819).

quasi-public corporations such as gas and water utilities, when the legislature had explicitly granted privileges to the corporation in its charter, the Court consistently applied the protection in Article 1, Section 10, of the Constitution against the abrogation of contracts.[85] However, when the state had reserved to itself, either explicitly in the corporate charter or implicitly under the doctrine of public trust, the power to change or to revoke the charter of a corporation, the Court consistently maintained the position that corporations were "creatures of the state," "incorporated for the benefit of the public," and always subject to "the reserved right of the Legislature" to regulate their conduct.[86] Thus, as late as 1892 and during the height of the period in which laissez-faire constitutionalism allegedly dominated the Court's view of government-business relations, Justice Field, that supposed "handmaiden for business needs,"[87] upheld the efforts of the Illinois government to divest the Illinois Central Railroad of immensely valuable properties along the Chicago waterfront on the grounds that the original charter grant had been void and unenforceable. The legislature, he asserted, had not possessed the power to make a perpetual grant of lands which were public highways and therefore held in trust by the legislature.[88]

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[85]Home of the Friendless v. Rouse, 75 U.S. 495 (8 Wall. 430) (1869) per Davis; St. Anna's Asylum v. New Orleans, 105 U.S. 1128 (1882) per Bradley; New Orleans Gas-Light Co. v. Louisiana Light & Heat Co., 115 U.S. 650 (1885) per Harlan; New Orleans Water-Works v. Rivers, 115 U.S. 674 (1885) per Harlan; Louisville Gas Co. v. Citizens' Gas-Light Co., 115 U.S. 683 (1885) per Harlan.

[86]David J. Brewer, "Corporations and the Supreme Court," Outlook 82 (24 Mar. 1906): 636.

[87]McCloskey, American Conservatism in the Age of Enterprise at 85, 74 and Carl Brent Swisher, Stephen J. Field: Craftsman of the Law (1930; reprint, Hamden, CT: Archon Books, 1963), 240-5 both cited in Charles W. McCurdy Jr., "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters ofLaissz-Fraire Constitutionalism, 1863-1897," Journal of American History 61 (Mar. 1965), 972.

[88]Illinois Central RR. Co. v. Illinois, 146 U.S. 387 (1892) per Field cited in McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations," 993.

This stance followed Field's reasoning in Weber v. Harbor Commissioners nearly twenty years earlier.[89] These cases suggest that Field's opinions concerning laissez-faire and the promotion and protection of corporate interests were more influenced by his belief in the ethical obligations and trust imposed on government by the nature of the social compact than the obverse.[90]

The primary importance of freedom of contract in the late nineteenth century judicial thought was not as a component in a conservative ideology of laissez-faire constitutionalism adamantly opposed to regulation of business.[91] Rather, freedom of contract had everything to do with the meeting of two minds sui juris in a moral economy operating according to providential natural laws.[92] In an age when "Americans believed that freedom of action ought to be the rule,"[93] contract represented the meeting of fully competent and autonomous individuals in the marketplace and reflected the fundamental importance of the ethical paradigm in American law. In contract (which included that between employer and employee), the justices saw morally accountable individuals giving effect to their enlightened self-interest. Government interference in this purely private sphere represented the worst sort of meddling, because it interfered directly with the individual's freedom to determine and to pursue his own ends. It was obnoxious to the very idea of equality of right conditioned only by the "law of reciprocity." Within the sphere of personal autonomy, the individual's will "is his sufficient and ultimate reason." In exercising

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[89]Weber v. Harbor Commissioners, 85 U.S. 798 (18 Wall. 57) (1873) per Field.

[90]Gold, The Shaping of Nineteenth-Century Law, 139.

[91]Furer, The Fuller Court, ix and Melvin I. Urofsky, A March of Liberty: A Constitutional History of the United States, 2 vols. (New York: Alfred A. Knopf, 1988), 2: 502.

[92]sui juris. Lat. Possessing full social and legal rights; not under any legal disability, or the power of another, or guardianship. Black's Law Dictionary, 6th ed., s.v. "sui juris."

[93]Gold, The Shaping of Nineteenth-Century Law, xi, 74, 127.

his free choice, "he is still responsible to God; but within that limit he is not responsible to man, nor is man responsible for him."[94] Only when the justices were convinced that one of the parties to the contract clearly suffered a disability which precluded an equal meeting of minds or when the public interest clearly overrode private considerations did the justices modify their stance concerning the right of every individual to regulate his own conduct. This philosophy was expressed in a series of decisions for which the Court has subsequently endured heavy criticism.

In Frisbie v. United States, Justice Brewer upheld an act of Congress setting the fees chargeable by those preparing and presenting pension claims against the federal government.[95] In a case clearly involving the freedom of contract between pension claimants and their counsel as well as the pecuniary interests of the legal profession, one might have expected Brewer to declare the statute void. Instead, he quickly dismissed as untenable the claim that the legislation interfered with the price of labour and the freedom of contract. While he conceded that the liberty of contract, like the liberty to acquire and use property, was "among the inalienable rights of the citizen," Brewer maintained that such rights were always exercised subject to the government's power to restrain actions which were against public policy. In this instance, the authority to grant pensions lay entirely with Congress, which was free to prescribe all the terms under which pensions were granted.[96]

The decision in Frisbie v. United States suggested that freedom of contract was subject to regulation if the circumstances warranted it. In Holden v. Hardy, Justice Brown upheld a Utah statute regulating the hours and conditions of work in the mining and smelting industries. The principal objection to the statute was its limitation on the working day in those industries to eight hours. This, it was contended, abridged the privileges and immunities of citizens of the United States by

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[94]Wayland, Elements of Moral Science, 183.

[95]Frisbie v. United States, 157 U.S. 160 (1895).

[96]Frisbie v. United States, 157 U.S. 160, 166 (1895) per Brewer.

depriving both the employer and the labourer of property without due process of law.[97]

In his opinion for the seven-to-two majority, Brown noted the numerous cases which had come up before the Court since its decision in the Slaughterhouse Cases (1873) involving the application of the Fourteenth Amendment's due process clause to "matters entirely outside of the political relations of the parties aggrieved" and having no relation to "a denial to the colored race of rights therein secured to them."[98]

These cases, he observed, fell into two classes. The first category included class legislation by which a state legislature or court "unjustly discriminated in favor of or against a particular individual or class" or denied them due process of law. In this grouping, Brown included the civil rights cases in which blacks had been allegedly denied representation upon juries, cases involving oppression and undue discrimination against the Chinese, and those involving the rights of women to enter learned professions or to vote.[99] He also included in this class cases involving denial of due process either to particular individuals or as a result of the state having "transcended its proper police power in assuming to legislate for the health and morals of the community." In the second class, he included those cases involving a denial of due process of law as a result of the state changing the particular procedures by which justice was administered.[100]

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[97]Holden v. Hardy, 169 U.S. 366, 381-82 (1898) per Brown.

[98]Holden v. Hardy, 169 U.S. 366, 383 (1898) per Brown.

[99]See Chapter IX for a discussion of the civil rights cases. See also Barbier v. Connolly, 113 U.S. 27 (1884); Soon Hing v. Crowley, 113 U.S. 703 (1885); Yick Wo v. Hopkins, 118 U.S. 356 (1888); Chy Lung v. Freeman, 92 U.S. 275 (1876) regarding discriminatory legislation against Chinese and Minor v. Happersett, 21 Wall. 162 (1875); Bradwell v. Illinois, 83 U.S. 442 (16 Wall. 130) (1873) regarding the civil rights of women all cited in Holden v. Hardy, 169 U.S. 366, 383-4 (1898) per Brown.

[100]Davidson v. New Orleans, 96 U.S. 97 (1877); Hurtado v. California, 110 U.S. 516 (1884); Missouri Pacific Rwy. Co. v. Mackey, 127 U.S. 205 (1888) all cited in Holden v. Hardy, 169 U.S. 366, 384-5 (1898) per Brown.

Brown's examination of all these cases dealing with the explication of the Fourteenth Amendment revealed that "the law is, to a certain extent, a progressive science." While "the cardinal principles of justice are immutable" and "the Constitution of the United States is necessarily and to a large extent inflexible," Brown recognized that important changes and improvements to the particulars of the law had taken and would continue to take place in the future. He recognized, in short, what Justice Bradley had stated many years before, that there was room for refinement in the interior organization of society. Thus, the Fourteenth Amendment was not meant tc preclude all change, nor was it meant to remove from the federal system any room for diversity among the states.[101] Although he acknowledged "the difficulty in defining with exactness the phrase 'due process of law,'"[102] he attempted, nevertheless, to clarify the Court's views concerning the protection offered under that clause of the Fourteenth Amendment to citizens of the United States.

> It is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense.[103]

Brown accepted, moreover, the doctrine asserted by Justice Peckham in Allgeyer v. Louisiana (1897) that the freedom of contract in "pursuing an ordinary calling or trade, and of acquiring, holding, and selling property" was one of the rights protected by the due process clause of the amendment.[104] As Brown observed, the right to possess property implied the right to acquire it and that, in his view, could only take place by mutual agreements between individuals--in short, by contract. In

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[101]Holden v. Hardy, 169 U.S. 366, 385, 386 (1898). See also Bradley Progress, 33.

[102]Holden v. Hardy, 169 U.S. 366, 383, 390 (1898) per Brown.

[103]Holden v. Hardy, 169 U.S. 366, 390-91 (1898) per Brown.

[104]Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897) per Peckham.

his view, a statute which undertook to deprive any class of persons of the general power to possess and acquire property and which was "a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property," was invalid under the due process clause.[105]

Notwithstanding the right of the individual to freedom of contract, Brown maintained that the freedom of individuals to exercise that right "is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers." In this regard, he noted the ever-growing number of acts by the states and of adjudged cases which provided "special precautions" for the public's well-being and safety by regulating the sale of intoxicating liquors and lottery tickets, by ordinances dealing with fire safety in public buildings, the inspection of steam boilers, and industrial safety. These had all been judged valid exercises of the police power, and Brown admitted that "if it is within the power of the legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals.[106] Citing a similar case in Massachusetts,[107] Brown asserted that the legislation was a valid exercise of Utah's police power. The enactment did not apply generally to all labourers but only to those engaged in an admittedly dangerous occupation the special circumstances of which required legislative supervision.[108]

Justice Brewer reiterated the view that special circumstances justified legislative interference with the freedom of contract in Muller v. Oregon. In deciding whether an Oregon statute limiting women's hours of work to ten hours per day was an unconstitutional infringement of freedom of contract, Brewer asserted that the particular attributes of women placed them in a special class apart from men. This

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[105]Holden v. Hardy, 169 U.S. 366, 390-91 (1898) per Brown.

[106]Holden v. Hardy, 169 U.S. 366 391, 393-95 (1898) per Brown.

[107]Commonwealth v. Hamilton Manufacturing Co., 120 Mass 383 (U.S.) (1876).

[108]Holden v. Hardy, 169 U.S. 366, 395-96 (1898) per Brown.

special status had, he contended, long been recognized by the common and statute law and placed the state in much the same position of parens patriæ with regard to women as it held with regard to minors.[109] The state's role in protecting women was justified, in his view, by their inherent "disadvantage in the struggle for subsistence." Echoing the views of Noah Porter on the influence of predominant sensibilities and natural endowments on the involuntary aspects of character,[110] Brewer observed that there were in their disposition and habits of life qualities which operated against a full assertion of their personal and contractual rights, so that "from the viewpoint of the effort to maintain an independent position in life, they are not upon an equality "[111] The status of women as a class separate from men, a division long recognized in common law, justified the Court's distinguishing of the Oregon statute as embodying the views long espoused by Justice Field that it operated equally upon "all under like circumstances in the enjoyment of their personal and civil rights."[112] Since it operated equally upon all members of the same class, the act was a valid exercise of the police power which was further justified by the interest of society generally in preserving the health of women so as "to preserve the strength and vigor of the race."[113]

This decision accurately reflected the Court's view of the status of women throughout the period. In this instance, the justices' perception of women as suffering from inherent disabilities worked in favour of protective legislation in an otherwise free marketplace. In earlier cases, this view had operated against equal rights.[114] In

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[109]Muller v. Oregon, 208 U.S. 412, 421 (1908) per Brewer.

[110]Noah Porter, The Elements of Moral Science: Theoretical and Practical (New York: Charles Scribner's Sons, 1889), 104.

[111]Muller v. Oregon, 208 U.S. 412, 422 (1908) per Brewer.

[112]See also Barbier v. Connolly, 113 U.S. 27, 31 (1884) per Field.

[113]Muller v. Oregon, 208 U.S. 412, 421, 422 (1908) per Brewer.

[114]Kermit Hall, The Magic Mirror: Law in American History (New York: Oxford University Press, 1989), 328.

Bradwell v. Illinois, the Court speaking through Justice Miller denied that the refusal of the state supreme court to grant a license to practice law to Myra Bradwell was an infringement of the privileges and immunities clause of the Fourteenth Amendment. While Justice Miller was content to stand upon his interpretation of the postwar amendments in the Slaughterhouse Cases, Justice Bradley's concurring opinion, with which Justices Field and Swayne joined, asserted that the right to pursue any lawful calling "has never been established as one of the fundamental privileges of the sex." On the contrary, "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres of man and woman." Pursuing this theme, Bradley observed that "the natural and proper timidity and delicacy which belongs to the female sex evidently unfitts it for many of the occupations of civil life." In his view, women were not and could not be sui juris by their nature.[115]

§ VII INDIVIDUAL AUTONOMY AND PERSONAL RESPONSIBILITY

Holden v. Hardy and Muller v. Oregon suggest that the Court was prepared to accept legislation which accorded with its views concerning the privileges and immunities to which all citizens of equal capacity were entitled and the obligation of the state to protect its citizens and the commonwealth. However, it did so subject always to the consideration that individuals must be given the greatest possible freedom of action and that they were fully accountable for their actions. The doctrines of Moral Philosophy and faculty psychology that gave to the will ultimate authority over the individual and a wide sphere of action suggested to nineteenth-century Americans that the burden of personal responsibility was equally broad.

The confluence of liberty and responsibility was especially evident in the Court's treatment of questions concerning liability for accidents. The nation's growing network of railroads were undoubtedly the most fruitful source of liability cases during this period, and the courts received a steady flow of cases concerning the liability of railways for injuries to passengers and passersby as well as to their

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[115]Bradwell v. Illinois, 83 U.S. 442, 446 (1873) per Bradley. See also Slaughterhouse Cases, 83 U.S. 3?4 (1873) per Miller.

employees from the approximately 6,000 to 7,000 deaths and 30,000 to 40,000 injuries annually caused by the roads in the 1890s.[116] In these cases, the justices were presented squarely with the questions of the extent to which the accountability of a free moral agent extended and with the application of the "law of reciprocity," of the mutual responsibility of free moral agents, to the economy.

There was general agreement among the justices regarding the liability of railroads for injuries to their passengers. In 1871, Justice Field's opinion for a unanimous Court stated views that changed little over the following twenty years. He wrote that the roads were held, as common carriers which "undertake... to carry all persons indifferently who apply for passage," to a "very strict responsibility." They were obliged to provide "for the safe conveyance of passengers, so far as that is practicable by the exercise of human care and foresight" by insuring that their roads and equipment were in good and safe condition. "They are also bound to provide careful and skilful servants, competent in every respect" and "are responsible for the consequences of any negligence or want of skill on the part of such servants."[117]

Matters were less clear when the parties were not joined in a commercial transaction. In some cases, the justices were prepared to accept legislative modification of common law rules. Thus, the Court accepted state legislation requiring railroads to erect and maintain cattle fences along their right-of-ways and imposing punitive damages when the roads failed to meet those requirements.[118] These statutes did not, Justice Field asserted, deprive the companies of property without due process of law within the meaning of the Fourteenth Amendment. On

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[116]Hall, The Magic Mirror, 202

[117]Shoemaker v. Kingsbury, 79 U.S. 432 (12 Wall. 369) (1871) per Field. See also Richmond & Danville RR. Co. v. Powers, 149 U.S. 43 (1893) per Brewer and Chicago, Milwaukee & St. Paul Rwy. Co. v. Lowell, 151 U.S. 209, 219 (1894) per Brown.

[118]Missouri Pacific Rwy. Co. v. Humes, 115 U.S. 512 (1885) per Field; Minneapolis & St. Paul Rwy. Co. v. Beckwith, 129 U.S. 26 (1889) per Field; Minneapolis & St. Paul Rwy. Co. v. Emmons, 149 U.S. 364 (1893) per Field.

this occasion, Field observed that "it is difficult, and perhaps impossible, to give to those words a definition at once accurate, and broad enough to cover every case" and that such a definition could only be arrived at, as Justice Miller had earlier suggested, by a "gradual process of judicial inclusion and exclusion... with the reasoning on which such decisions may be founded." He added somewhat acidly that Miller's observation that there was abroad in the nation "some strange misconception of the scope of this provision" was no less pertinent eight years later.[119]

In Continental Improvement Company v. Stead, the Court considered the mutual obligations of railroads and other travellers upon public highways. In this and similar cases, the justices' conception of the law of reciprocity came more clearly into view.[120] The first case involved assigning liability for a collision between a passenger train and Stead's wagon at a level crossing. Justice Bradley speaking for the Court held that "both parties were bound to exercise such care as, under ordinary circumstances, would avoid danger." He defined that standard of care as such that "men of common prudence and intelligence would ordinarily use under the like circumstances" and depending on the risk of danger present. The obligations of both parties were upon an equality and therefore were "mutual and reciprocal." Thus, Stead could receive damages only if "the persons in charge of the train were guilty of negligence or want of due care" and he, himself, was "free from any negligence or carelessness which contributed to the injury." Bradley observed in this instance that the natural "infirmity of the human mind in ordinary men" which caused them "to manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them" had led both parties to lapse in their mutual obligation to exercise due care. It was, he held, therefore a question of fact for the

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[119]Davidson v. New Orleans, 96 U.S. 97 (1877) per Miller cited in Missouri Pacific Rwy. Co. v. Humes, 115 U.S. 512, 519, 520 (1885) per Field.

[120]See also Delaware, Lackawanna & Western RR. Co. v. Converse, 139 U.S. 469 (1891 per Harlan and Northern Pacific RR. Co. v. Freeman, 174 U.S. 379 (1899) per Brown.

jury below to determine whether Stead had contributed to the accident to such a degree that he was the author of his own misfortune and must therefore accept responsibility for his fate.[121]

The doctrine of contributory negligence, the theory that every individual in full possession of his faculties was obligated to exercise the care and caution which men of common prudence and intelligence would do in ordinary circumstances, exerted a powerful influence upon the justices' views concerning employer liability within the context of freedom of contract.

In Hough v. Railroad, Justice Harlan considered the general rules governing the fellow-servant doctrine which exempted the master from liability to one employee for injuries caused by the negligence of a fellow employee engaged in the same employment. Quoting the doctrines announced by Chief Justice Lemuel Shaw of Massachusetts in the influential case of Farwell v. Boston & Worcester Railroad, Harlan wrote that the employee voluntarily assumed the natural and ordinary risks incident to his occupation in return for compensation which took into account the degree of risk involved. The fellow-servant rule was based upon the theory that the contract under which the employee assumed those risks included "the perils arising from the carelessness and negligence of those who are in the same employment," for, the reasoning went, the servant was more likely to know from the course of his duties the risk attendent upon his fellows' habits, conduct, and capacities and to guard against it than the master.[122]

Harlan acknowledged that "very little conflict of opinion is to be found in the adjudged cases" concerning the correctness of that rule; however, he also observed

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[121]Continental Improvement Co. v. Stead, 95 U.S. 403, 405, 406 (1877) per Bradley.

[122]Farwell v. Boston & Worcester RR. Co., 45 Mass. 49 (1842) per Shaw, C.J. cited in Hough v. Texas & Pacific RR. Co., 100 U.S. 612, 614, 615 (1880) per Harlan.

that "the difficulty has been in its practical application... in particular cases."[123] As a result of this difficulty, there were numerous exceptions to the general rule recognized in common and statute law. These exceptions were generally founded upon the Court's estimation of the degree to which the employee could have known the danger of the undertaking and taken due care to avoid it. When the true nature of the danger was hidden from the employee so he could not make a just estimate of the risk undertaken, the Court often bent the strict rule of the fellow-servant doctrine, because, as Justice Davis had earlier asserted, the presumption that the employee had voluntarily assumed the risk "cannot not arise where the risk is not within the contract of service, and the servant had no reason to believe that he would have to encounter it."[124]

In Hough's case, Harlan held that the contract of employment also implied that the master would supply "the physical means and agencies for the conduct of his business" and that in so doing he would exercise proper care. "His negligence in that regard is not a hazard usually or necessarily attendant upon the business." Faulty or defective equipment which the employee might reasonably have expected to be in good repair or which, as in this case, supervisory agents of the company had promised would be repaired was a breach of the contract of employment and placed the liability on the employer. Moreover, when supervisory agents of the company were negligent, their negligence "is the negligence of the corporation," for the corporation could not "interpose between it and the servant, who has been injured without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well as to the servant as to the corporation."[125]

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[123]Hough v. Texas & Pacific RR. Co., 100 U.S. 612, 614 (1880) per Harlan.

[124]Union Pacific RR. Co. v. Fort, 84 U.S. 739, 740 (17 Wall. 553, 557) (1874) per Davis.

[125]Hough v. Texas & Pacific RR. Co., 100 U.S. 612, 615 (1880) per Harlan.

The justices' belief that the contract of employment implied reciprocal duties of care therefore paralleled the cases involving the railroads and travellers on public highways. Both parties were required to exercise reasonable care in the performance of their duties. At the same time, they were reluctant to adhere inflexibly to the fellow-servant doctrine, for "such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations." This result, Justice Davis had observed, was unsupported by reason and could not receive the Court's sanction.[126] This position inevitably narrowed the application of the fellow-servant rule. Thus, Justice Field held in Railroad v. Ross for a five-to-four majority that an engineer upon a train in the full charge of its conductor and who suffered injuries in a train-crash resulting from the gross negligence of the conductor was not the conductor's "fellow-servant" but his subordinate. Although Justice Bradley, accompanied by Justices Matthews, Gray, and Blatchford, dissented on the ground that this verdict abandoned the rule in earlier cases, Field maintained that the conductor was the corporation's supervisory agent for whose negligent acts the company was liable.[127] The Court was not only prepared to narrow common law doctrine on its own initiative but was willing to accept statutory abolition of the fellow-servant doctrine. Thus, Justice Field upheld in 1888 a Kansas statute which made every railroad company liable to its employees for all damages caused by the negligence of its agents and employees unless the injured employee had been guilty of contributory negligence. In Field's view, the statute simply extended the same standard of liability which was imposed upon railroads for injuries to passengers to the employees of the roads. As he had earlier maintained in Railroad v. Humes, the statute did not deprive the

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[126]Union Pacific RR. Co. v. Fort, 84 U.S. 739, 740 (1874) per Davis.

[127]Chicago, Milwaukee & St. Paul Rwy. Co. v. Ross, 112 U.S. 377, 380, 382, 396 (1884) per Field and Bradley.

companies of property without due process of law.[128] As creations of the legislative power, the state had a perfect right, where no limitation had been placed in the corporate charter, to "prescribe the liabilities under which corporations created by its laws shall conduct their business." Moreover, since the statute applied equally to all companies of the same class, it was not objectionable on the ground that it deprived the railroads of the equal protection of the laws.[129]

The justices' view of the contract of service as a product of the meeting of two minds sui juris which imposed mutual obligations upon both parties allowed the justices to exercise a certain liberality, if one might apply that term to the Court in the late 1800s, concerning the interpretation of the fellow-servant rule. However, their willingness to give limited recognition to the economic and social realities of wage-earning employees and the terrific human cost of industrial technologies did not extend so far as to give a license to imprudent behaviour on the part of employees or to a complete abandonment of the fellow-servant doctrine.[130]

The justices continued to adhere to the position that the individual was responsible for his actions. When the injuries suffered by an employee resulted in part from his own negligence, he was generally barred from recovering damages from his employer. This was the position taken by the Court in a series of cases. In Tuttle v. Railroad, Justice Bradley asserted over the dissents of Justices Miller and Harlan that the railroad had not been negligent in the construction of its yard or its operation and held that the death of the plaintiff's husband, a brakeman working in the railyards, had resulted from Tuttle "wantonly assuming the risk" of a practice which his experience as a yardman should have told him was extremely dangerous. Bradley maintained that "it is for those who enter into such employments to exercise all that care and caution which the perils of the business in each case demand." In Tuttle's

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[128]Missouri Pacific Rwy. Co. v. Humes, 115 U.S. 512, 519, 520 (1885) per Field.

[129]Missouri Pacific Rwy. Co. v. Mackey, 127 U.S. 205, 207-9 (1888) per Field.

[130]Hall, The Magic Mirror, 200, 202.

case, the dangers were well known and clearly visible, so he "had only to use his senses and his faculties to avoid the dangers to which he was exposed." He had not done so and therefore his own negligence had contributed to the accident. The railroad was not, therefore, liable for his death.[131] In other cases where employees were shown to have similarly contributed to the accidents in which they were injured, the Court followed essentially the same reasoning and barred the employee from recovery.[132]

The justices' conceptions of the importance of character, of voluntary action and personal accountability, of property in labour, and of freedom of contract doctrines came together in Lochner v. New York (1905), when Justice Peckham, speaking for a five-to-four majority, struck down a New York statute which in part regulated the daily hours of workers in the baking trade.[133] This case has been regarded by historians as the apotheosis of laissez-faire constitutionalism and the subject of much comment and criticism.[134]

What distinguished the Lochner case was less the dissents by Justice Oliver Wendell Holmes and Justice Harlan in which the former deplored the imposition by the Court upon the nation of Herbert Spencer's social statics and in which the latter preferred to leave to the legislature the task of finding wise means to fulfil its obligations to society than the degree to which the majority's view reflected the

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[131]Tuttle v. Detroit, Grand Haven & Milwaukee Rwy. Co., 122 U.S. 189, 191, 194-5 (1887) per Bradley.

[132]Kane v. Northern Central Rwy. Co., 128 U.S. 91 (1888) per Harlan; Aerkfetz v. Humphreys, 145 U.S. 418 (1892) per Brewer; Elliott v. Chicago, Milwaukee & St. Paul Rwy. Co., 150 U.S. 245 (1893) per Brewer; St. Louis & Santa Fe Rwy. Co. v. Schumacher, 152 U.S. 77 (1894) per Brown.

[133]Lochner v. New York, 198 U.S. 540, 543 (1905) per Peckham.

[134]Friedman, A History of American Law, 360; Urofsky, A March to Liberty, 2: 553; Hall, The Magic Mirror, 241.

ethical assumptions that underlay the moral economy.[135] The key to understanding Justice Peckham's opinion can be found in the first few sentences. Regarding the charge against Lochner that he "wrongfully and unlawfully required and permitted an employee to work more than sixty hours in one week," Peckham observed that nowhere in the record was it said that any force or compulsion had been used to obtain the labour of the employee. In his view, the case involved a purely voluntary contract for labour such as any individual had the right to make, and the statute amounted to "the substantial equivalent of an enactment that 'no employee shall contract or agree to work,' more than ten hours per day." This law, he maintained, "seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are sui juris."[136] Peckham acknowledged that the state possessed broad powers to legislate for the general welfare of the public but asserted that there was no reasonable ground for interposing the authority of the state between two equal parties and interfering thereby with their liberty "to make contracts regarding labour upon what terms as they may think best, or which they may agree upon with other parties to such contracts." Statutes which presumed "to limit the hours in which grown and intelligent men may labour to earn their living, are mere meddlesome interferences with the rights of the individual."[137] In his view, this was precisely the case with the New York statute.

> There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgement and of action. They are in no sense wards of the state.[138]

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[135]Lochner v. New York, 198 U.S. 540, 546, 547 (1905) per Holmes and Harlan.

[136]Lochner v. New York, 198 U.S. 540, 540-1, 542 (1905) per Peckham.

[137]Lochner v. New York, 198 U.S. 540, 544-45 (1905) per Peckham.

[138]Lochner v. New York, 198 U.S. 540, 543 (1905) per Peckham.

Peckham's opinion integrated the key elements of substantive due process and freedom of contract with which the Court had been concerned since the Slaughterhouse Cases.[139] There was concern for allowing to the individual the broadest possible scope for voluntary action and the acceptance of personal responsibility. There was the belief that the liberty which under substantive due process was protected by the Fourteenth Amendment was best expressed in the moral economy by freedom of contract and the meeting of two minds sui juris. Finally, there was the belief that the state's moral duty to protect its citizens did not extend to "an unreasonable, unnecessary, and arbitrary interference" with the right of the individual to do as he willed, subject only to the law of reciprocity. The opinion drew a clear line beyond which protective legislation became a tyranny of the majority by interfering with the autonomy of individuals and depriving them of their fundamental rights and by undermining equality of right through class legislation.

Toward the end of his opinion in Lochner, Justice Peckham issued an obiter dictum which voiced the fears of Gilded Age conservatives for the moral order upon which they believed society was founded. Peckham noted that police regulations seemed to be on the increase. However, their remote relation to the public health and welfare led him to add that "it is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are in reality passed from other motives." In Peckham's view, "the real object and purpose were simply to regulate the hours of labor between the master and employees (all being men, sui juris)" in a private business.[140] To the extent that such legislation interfered with individual autonomy and equality of right, it was viewed as class legislation which smacked of a tyranny of the majority and the doctrines of socialism.[141]

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[139]Slaughterhouse Cases, 83 U.S. 394 (16 Wall. 36) (1873).

[140]Lochner v. New York, 198 U.S. 540, 545, 546 (1905) per Peckham.

[141]Alan M. Jones, "Thomas M. Cooley and 'Laissez-Faire Constitutionalism:' A Reconsideration," Journal of American History 53 (1967): 755; Benedict, "Laissez-

As Michael Les Benedict has suggested, legislation which affected the value of a commodity in the marketplace, labour being in this respect a commodity like any other, "was taking the property of one party to the bargain and giving it to another." Class or special legislation which ignored the equality of right upon which society was founded was seen as little more than government-sanctioned theft and odious to the whole theory of government's obligation to protect its citizens.[142] This animus toward class legislation, whether it sprang from condemnation of clever schemes for aggrandizing the fortunes of the rich and powerful or from fear of the mercurial and licentious moods of popular majorities, was founded on a moral rather than an economic theory of society. When nineteenth-century Americans such as Samuel Freeman Miller and David J. Brewer spoke of the dangers of socialism and a movement of coercion, they warned of the threat to morality posed by a theory of society in which the benefits of personal self-discipline and industry were equally distributed in society regardless of individual character and just desert. In this regard, moralists and jurists who stood alike by the ethical doctrines of antebellum moral science saw in protective legislation a socialistic impulse to enlarge the powers of government at the expense of a balanced federal system of government and of individual initiative and enterprise.[143]

Faire and Liberty," 319; Gold, The Shaping of Nineteenth-Century Law, 139.

[142]Benedict, "Laissez-Faire and Liberty," 305; Herbert Hovenkamp, Enterprise and American Law, 1836-1937 (Cambridge: Harvard University Press, 1991), 4.

[143]William Graham Sumner, What Social Classes Owe Each Other (1883; reprint, New Haven, 1925) at 11-2 and Francis A. Walker, "Socialism," in Walker, Discussions in Economics and Statistics (1887; reprint, New York, 1899) at 2: 250 both cited in Benedict, "Laissez-Faire and Liberty," 306.

CHAPTER IX.

THE MORAL ORDER ENDANGERED

§ I THE CIVIL RIGHTS QUESTION

Justice Rufus Peckham's opinion in Lochner v. New York illustrated the justices' strong convictions touching legislation which they construed as dangerous to moral autonomy or as motivated by special class interests.[1] The Court's record on civil rights down to the decision in Plessy v. Ferguson must be viewed as a product of the justices' belief in a federal government of enumerated and separate powers operating within an individualistic and voluntaristic social order to protect the vested rights of every citizen. It is tempting, as John Braeman has noted in his work on the "Old Court," to adopt as the reason behind the Court's decisions the simple explanation that the justices were rascists, or, as Wilbert Ahern has implied, that its failure to provide adequate protection for black civil rights was the result of a conscious decision to allow state governments to retain during the Reconstruction period and after their powers in non-economic areas as a quid pro quo for free reign in implementing laissez-faire constitutionalism.[2] These explanations reveal more about the intellectual assumptions of twentieth-century historians than they do of the principles that guided the justices. It is true that the justices shied away from

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[1]Lochner v. New York, 198 U.S. 45 (1905) per Peckham.

[2]John Braeman, Before the Civil Rights Revolution: The Old Court and Individual Rights (New York: Greenwood, 1988), 58; Wilbert H. Ahern, "John Marshall Harlan, Northern Liberals and the Necessities of Black Freedom, 1877-1908" (Paper delivered at the 1985 Annual Meeting of the Organization of American Historians), 12.

accepting full social equality for blacks; however, social equality was never the real issue in their view. The real issue was equality of right among autonomous individuals and the maintenance of the federal system of government. Early attempts to define and enforce the civil rights of blacks therefore foundered upon the justices' absolute commitment to individual liberty and equality of right and their narrow construction of the separation of powers.

As Justice Brown later observed in Holden v. Hardy (1898), the majority of civil rights cases arising from the postwar amendments had involved alleged class legislation which unjustly discriminated in favour of or against a particular individual or class and which thereby denied either the equal protection of the law or due process of law.[3] This view of the civil rights issue narrowly circumscribed the effect of the amendments so far as they applied to blacks, for while it forbade discrimination in the laws of the states aimed directly at blacks and protected the letter of legal and political equality, it left open the whole question of de facto social inequality and the sphere of private action.

Blyew v. United States, an early case involving the Civil Rights act of 1866, involved the criminal prosecution in the federal circuit court of Kentucky of two white men accused and convicted of murdering an aged black woman named Lucy Armstrong. The only witnesses to the crime were black and barred by the laws of Kentucky from testifying against whites in the state courts. The principal question was whether the circuit court had properly exercised jurisdiction in a criminal case which ordinarily would have been tried in a state court. The defendant in error contended that the circuit court's action had been justified by provisions of the Civil Rights act which allowed the federal courts to take cognizance of causes "affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the state... any of the rights secured to them by the act."[4]

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[3]Holden v. Hardy, 169 U.S. 366, 383 (1898) per Brown.

[4]Blyew v. United States, 80 U.S. 638, 641 (13 Wall. 581-601) (1873) per Strong.

Justice Strong speaking for a six-to-two majority took a narrow view of the separation of powers and the intent of the act of 1866 and ruled that the circuit court had no jurisdiction in the case. The decision was based on the ground that the laws of Kentucky which denied to blacks the opportunity to testify in court against whites did not affect the case in hand. The witnesses were not properly victims of discrimination in prosecuting a case under the laws of Kentucky, because they were not parties with a direct interest in the proceedings. In Strong's view, it would have overreached the intent of the act to allow any cause in which witnesses were barred from testifying because of their race to fall within federal jurisdiction.[5] The act's intent was, rather, "to afford protection to persons of the colored race by giving to the Federal courts jurisdiction of cases, the decision of which may injuriously affect them either in their personal, relative, or property rights." In Strong's view, the witnesses had not been deprived of any rights. Nor was the fact that Lucy Armstrong had been black material to the decision, for, while "she was the victim of the frightful outrage which gave rise to the cause," she was, in Strong's view of the law, "beyond being affected by the cause itself" and not technically a party to it.[6]

Justice Bradley, who later wrote the Court's opinion in the Civil Rights Cases,[7] dissented, with Justice Swayne, from what he considered a too narrow and technical construction of the liberal intent of the Civil Rights act. Echoing his views in the Slaughterhouse Cases,[8] Bradley adopted a broader view of the legislative intent underlying the Thirteenth Amendment and the Civil Rights act which "was primarily intended to carry out, in all its length and breadth, and to all its legitimate consequences," the amendment abolishing slavery and "to place persons of African

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[5]Blyew v. United States, 80 U.S. 638, 641 (13 Wall. 581-601) (1873) per Strong.

[6]Blyew v. United States, 80 U.S. 638, 642 (13 Wall. 581-601) (1873) per Strong.

[7]Civil Rights Cases, 109 U.S. 3 (1883).

[8]Slaughterhouse Cases, 83 U.S. 394 (16 Wall. 36-130) (1873).

descent on an equality of rights and privileges with other citizens of the United States." One purpose of the act was to supply judicial relief in the federal courts to any person denied fundamental rights in the state courts. Bradley maintained that the Blyew case was within the scope of the act, because the Kentucky law deprived a whole class of the community of the right swear out complaints and give evidence against their molesters. The Kentucky laws were class legislation of the worst sort, because they constituted a badge of slavery and denied to the freedmen the "full employment of that civil liberty and equality which the abolition of slavery meant" and in effect deprived them of the equal protection of the laws.[9]

Several civil rights cases came before the Court between 1880 and 1883 and each time the Court considered what constituted equal protection of the laws under the Fourteenth Amendment. The cases arose from questions involving the effects of the amendments and of the Civil Rights acts of 1866 and 1875 upon state provisions governing the participation of blacks in trials by jury in criminal cases and latterly from the act's provisions for punishing persons conspiring to deprive citizens of the privileges and immunities guaranteed by the Fourteenth Amendment.

In Strauder v. West Virginia, Justice Strong speaking for a seven-to-two majority held over the dissenting votes of Justices Clifford and Field that a statute of West Virginia which singled out and barred coloured citizens from sitting as jurors because of their race, when they were qualified in all other respects to sit, was a discriminatory enactment which denied to black defendants the equal protection of the laws and was therefore forbidden by the Fourteenth Amendment.[10] Although he was careful to note that the state retained the power to prescribe the property, age, sex, and educational qualifications of its jurors "and in doing so make discriminations," the provisions in the Civil Rights act of 1875 allowing for the removal of trials from the state to the federal courts in those cases where a coloured defendant was able to

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[9]Blyew v. United States, 80 U.S. 638, 643, 644, 645 (13 Wall. 581-601) (1873) per Bradley.

[10]Strauder v. West Virginia, 100 U.S. 664 (1880) per Strong.

demonstrate that he had been denied and could not enforce his equal rights as a citizen of the United States in the judicial tribunals of the state because of his race properly governed the disposition of the case.[11]

In the cases of Virginia v. Rives and Neal v. Delaware, the Court was careful to qualify the equality of right that had been granted in Strauder v. West Virginia.[12] In both cases, the issues involved the participation of blacks in jury duty and the question whether their exclusion from such duty by the presiding judge in a criminal case involving a black defendant amounted to a denial of the equal protection of the laws. In his opinion for the Court, Justice Strong distinguished the Rives case from his opinion in Strauder v. West Virginia. In that instance, the issue had involved a positive enactment of the state which had operated to deny the defendant the equal protection of the law.[13] In the Virginia case, no such legal disability was in force. By the laws of Virginia all male citizens over the age of twenty-one and not over the age of sixty, who were entitled to vote and hold office, were subject to jury duty. In reply to the argument that both the grand and petit juries had been composed entirely of whites and that this had amounted to a denial of the accused's equal rights, Justice Strong maintained that the accused could not request a removal of his trial to a federal court on the grounds that his rights might be denied during the course of the trial by either judicial officials of the state or by an all-white jury, for he could not positively affirm until after the trial that the equal protection of the laws had not been extended to him. Strong went further and added that, even if the officer of the court responsible for selecting jurors had disregarded both state law and the Civil Rights act and deliberately selected only white jurors, this did not justify removal to a federal court but merely an appeal to the state's appellate court if the trial court did not correct the error in law during the course of the trial. Strong maintained that the

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[11]Strauder v. West Virginia, 100 U.S. 664, 666 (1880) per Strong.

[12]Virginia v. Rives, 100 U.S. 667 (1880) and Neal v. Delaware, 103 U.S. 567 (1881).

[13]Strauder v. West Virginia, 100 U.S. 664 (1880) per Strong.

right to an unbiased selection of jurors by state authorities was not the same thing as a right to a mixed jury. The former was a constitutional right: the latter was not. In the absence of any positive enactment by the state, the mere fact that all the jurors in the case had been white did not justify removing the case to a federal court.[14]

This was essentially the position adopted in Neal v. Delaware. In this case, a black man was charged, tried, and convicted of rape by all-white grand and petit juries and sentenced by the state trial court to death by hanging. Harlan held that the defendant's petition for a removal of his cause to a federal court had been properly disregarded. Neither the constitution nor the laws of Delaware prohibited the service of freemen on juries. Harlan went on to add, however, that the defendant was entitled to a writ of error, since the record from the court below clearly showed that the officials charged with selecting the jury members had, in fact, excluded eligible black jurors on the basis of their race and that the trial court had failed to correct their error. Although Justice Field dissented on the grounds that the defendent could not have averred the wrongs complained of in his petition until after the trial, Harlan held that there were grounds for an appeal.[15]

In his concurring opinion in Virginia v. Rives, Justice Field further qualified equality before the law. Field conceded that the purpose of the Civil-War amendments and the Civil Rights acts which allowed their enforcement were "intended to secure to the colored race the same rights and privileges as are enjoyed by white persons;" however, he immediately added that "there are many ways in which a person may be denied his rights, or be unable to enforce them." Field observed that "the denial or inability may arise from direct legislation," as had been the case in Strauder; however, it might equally arise "from popular prejudices, passions or excitement" caused by "religious antagonisms, political controversies, antagonisms of race, and a multitude of other causes." These had "always operated

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[14]Virginia v. Rives, 100 U.S. 667, 669, 670, 671 (1880) per Strong.

[15]Neal v. Delaware, 103 U.S. 567, 573 (1881) per Harlan.

as impediments, in a greater or less degree, to the full enjoyment and enforcement of civil rights." As the acts of individuals, these latter causes had not been intended by Congress to justify removal to the federal courts. Those acts of Congress were "not designed to relieve them [blacks] from those obstacles in the enjoyment of their rights to which all other persons are subject, and which grow out of popular prejudices and passions." Field strongly asserted that the provisions of the Civil Rights acts concerning the denial of rights or the inability to enforce them applied only to actions of the states. "With respect to obstacles to the enjoyment of rights arising from other causes, persons of the colored race must take their chances of removing or providing against them with the rest of the community."[16]

Field expanded upon the view that the amendments and civil rights acts were intended to apply only to the states in his lengthy dissent in the companion case of Ex parte Virginia. Here, the Court was presented with a petition for a writ of habeas corpus by the state-court judge who had presided in Virginia v. Rives and who had as a result of his behaviour in that case been indicted under the punitive provisions of the Civil Rights act of 1875 for excluding persons from jury duty on the basis of their race. Justice Strong's opinion for the seven-to-two majority held that the judge had acted as an officer or agent of the government in selecting jurors and that being "clothed with the State's power, his act is that of the State." In Strong's view, the punitive provisions of the act must necessarily "act upon persons, not upon the abstract thing denominated a State" and therefore was properly applied to a person acting as the agent of the state. If it did not do so, "the constitutional inhibition has no meaning and the State has clothed one of its agents with power to annul or evade it."[17]

Justice Field rejected this view on the grounds that the indictment itself was defective and, more importantly, that the punitive provisions of the Civil Rights act of

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[16]Virginia v. Rives, 100 U.S. 667, 674 (1880) per Field.

[17]Ex Parte Virginia, 100 U.S. 676, 677 (1880) per Strong.

1875 were unconstitutional and void. In supporting this assertion, Field reiterated his understanding of the intent of Congress in enacting the Thirteenth Amendment. "It was," he recalled, "intended to render everyone within the domain of the Republic a freeman, with the right to follow the ordinary pursuits of life without other restraints than such as are applied to all others, and to enjoy equally with them the earnings of his labor."[18]

The intent of Congress had not been, in Field's view, to confer additional political rights upon citizens of the United States. Nor had the Fourteenth Amendment's protection of the privileges and immunities of American citizens done so. Here, Field distinguished between what Francis Wayland had called necessary and accidental elements of society and government.[19] Civil rights such as the protection of life, liberty, and property or the constitutional guarantee of due process of law were absolute and vested in the individual. Political rights which "arise from the form of the government and its mode of administration" and which "are conditioned and dependent upon the discretion of the elective or appointing power" remained as they had stood previous to the enactment of the amendments. The Fourteenth Amendment prohibited state legislation from infringing upon the civil rights of individuals, but it did not authorize the federal government to entrench upon the powers of the states in "matters of purely local concern," such as "the administration of their governments, and the enforcement of their laws with respect to any matter over which jurisdiction was not surrendered to the United States."[20] The punitive provisions of the Civil Rights act concerning the selection of jurors were, in his view, unconstitutional, because they tended "to destroy the independence and autonomy of the States" and "reduce them to a humiliating and degrading dependence upon the central government."

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[18]Ex parte Virginia, 100 U.S. 676, 685 (1880) per Field.

[19]Francis Wayland, The Elements of Moral Science (1835; reprint, Cambridge, MA: Harvard University Press, 1963), 322.

[20]Ex parte Virginia, 100 U.S. 676, 681, 683, 687 (1880) per Field.

These early cases suggest that the justices' views concerning the protection of civil rights were heavily influenced by their conception of the federal system of government and of the nature and extent of the rights which the Civil-War amendments declared and protected. Their ideas reflected the position of Justice Field in Ex Parte Virginia that "the People, in adopting them, did not suppose they were altering the fundamental theory of their dual system of government" nor that the rights secured to freedmen by the amendments were such as had not previously belonged to all citizens of the nation. This interpretation of the intent of the amendments became abundantly clear in the Civil Rights Cases (1885) and the series of decisions concerning the application of the amendments' protection of civil rights to regulations of commerce that culminated in Plessy v. Ferguson (1896).

These early cases decided the application of the amendments and Civil Rights acts to protecting the right of freedmen to equality before the law and to established notions of due process in the courts. They also decided the constitutionality of the punitive provisions of both the Civil Rights Act of 1875 and of the Enforcement acts of 1870 and 1871 insofar as they applied to the acts of state officials and to private individuals who conspired "to deprive any other person or persons of the equal protection of the laws, or of equal privileges or immunities under the laws."[21] However, as John Anthony Scott has shown, the definitive interpretation of the Civil-War amendments was "fixed for nearly a century to come by the decision of Supreme Court Justice Joseph P. Bradley in the Civil Rights Cases of 1883."[22]

In these cases, the question was not whether blacks had been deprived of due process of law under the laws of a state or denied equal treatment in the courts but whether provisions of the Civil Rights Act of 1875 which sought to guarantee and

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[21]United States v. Harris, 106 U.S. 629 (1883) per Woods.

[22]Civil Rights Cases, 109 U.S. 3 (1883) per Bradley. See John Anthony Scott, "Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughterhouse Case to the Civil Rights Cases," Rutgers Law Review 25 (1971): 552.

enforce the right of blacks to "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement" were a constitutional exercise of congressional power.[23]

Justice Bradley immediately identified the central question. The Fourteenth Amendment's guarantee of the privileges and immunities of the citizen applied only to actions by the states or their agents. "Individual invasion of individual rights is not," he asserted, "the subject-matter of the amendment," and the amendment did not, in his view, authorize congress to create "a code of municipal law regulative of all private rights between man and man in society."

> In this connection it is proper to state that civil rights, such as are guarantied [sic] by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual.[24]

Given this interpretation, the act conflicted with both the justices' view of the facultative state and the operation of the federal system of government and their belief, often stated, that individuals should be allowed the widest possible scope to assert and to protect their powers and vested rights. Thus, Bradley admitted that slander, assault, murder, and "ruffian violence at the polls" were all "an invasion of the rights of the injured party," but none of these were sanctioned by the laws of the states. Assuming that "his rights remain in full force," legal rights that the Fourteenth Amendment did protect, the injured party was obliged to seek redress "by resort to the laws of the state" in the same manner as all citizens.[25]

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[23]Civil Rights Act, 18 Statutes, § 1.

[24]Civil Rights Cases, 109 U.S. 3, 10-1, 13, 17 (1883) per Bradley.

[25]Civil Rights Cases, 109 U.S. 3, 17 (1883) per Bradley.

Bradley also demolished the argument that the Thirteenth Amendment's prohibition of "the badges and incidents of slavery" clothed Congress with "sufficient authority for declaring by law that all persons shall have equal accommodations and privileges" in public facilities, notwithstanding the argument that "the denial of such equal accommodations and privileges is in itself a subjection to a species of servitude within the meaning of the amendment." Bradley refused to accept the view that "a denial by the owner of an inn, a public conveyance, or a theater, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual" was a badge of slavery or mark of servitude.

In this opinion, Bradley adhered closely to the views concerning the nature of equality in American society expressed in his Miscellaneous Writings. Equality did not mean equality of condition or social equality but political and legal equality. Men, he asserted, remained free to choose their own society and would never willingly relinquish this freedom.[26] The amendments arising out of the Civil War and the Civil Rights Act of 1866 had, he argued, been predicated on this understanding of the attributes of freedom and equality. They had secured to all citizens "those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property." But, he wrote,

> congress did not assume, under the authority given by the thirteenth amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.[27]

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[26]Joseph P. Bradley, "Equality," in Charles Bradley, ed. and comp., Miscellaneous Writings of the late Honourable Joseph P. Bradley, Associate Justice of the Supreme Court of the United States (Newark, NJ: L.J. Hardham, 1902), 90-2.

[27]Civil Rights Cases, 109 U.S. 3, 22 (1883) per Bradley.

These rights left it to individual discretion what contracts were made. If "a mere individual, the owner of the inn, the public conveyance, or place of amusement" refused accommodation, it was an "ordinary civil injury" and no proper concern of the state. "It would," Bradley concluded,

> be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of business.[28]

Bradley's view of the legislation as obnoxious to his belief in the autonomy of the individual was clearly expressed in his concluding paragraphs. Blacks had emerged from slavery as a result of the war. They had "shaken off the inseparable concomitants of that state" with "the aid of beneficial legislation"--the postwar amendments and the Civil Rights Act of 1866--which secured to them the equality of rights attaching to full citizenship. This was, he believed, as much as the state could lawfully do, for "there must be at some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected."[29]

Justice Harlan dissented from this interpretation of the law; however, it was revealing that his objection was not based on the principle that the amendments barred all acts of discrimination against blacks and sought "to define and regulate the entire body of the civil rights which citizens enjoy" but upon the ground that "railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and

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[28]Civil Rights Cases, 109 U.S. 3, 24-5 (1883) per Bradley.

[29]Civil Rights Cases, 109 U.S. 3, 25 (1883) per Bradley.

are amenable... to government regulation."[30] Thus, Harlan, too, left open the sphere of individual action and applied the force of the amendments only the actions of states and their agents.

The logical implications of the Court's decision in the Civil Rights Cases (1883) were worked out before 1900 in cases involving state regulations imposing segregation upon common carriers. Although the Court had ruled in Hall v. DeCuir (1878) that a Louisiana statute which prohibited racial discrimination in any form of transportation was void because it interfered with interstate commerce, the Court had by 1890 completely reversed its earlier position.[31] Although Justices Harlan and Bradley dissented on the grounds that the case insufficiently differed from Hall v. DeCuir to justify abandoning that earlier decision, Justice Brewer speaking for a seven-to-two majority held in Railroad v. Mississippi that a statute requiring all railroad companies operating lines within the state to provide separate but equal accommodations for white and black passengers was not a regulation of interstate commerce, since it applied to rail lines operating wholly within the state and therefore subject to the state's police power.[32]

These decisions had involved the question of state regulations that interfered with interstate commerce. In Plessy v. Ferguson (1896), the Court was faced squarely with the question whether a similar Louisiana statute requiring separate but equal accommodation on railway carriages violated the provisions of the Thirteenth and Fourteenth Amendments. Justice Brown speaking for a seven-to-one majority adhered to the opinion expressed in the Civil Rights Cases (1883) that a refusal by the owner of

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[30]Civil Rights Cases, 109 U.S. 3 (1883) per Harlan cited in Stanley I. Kutler, ed., The Supreme Court and the Constitution: Readings in American Constitutional History, 3rd ed. (New York: W.W. Norton, 1984), 205, 207.

[31]Hall v. DeCuir, 95 U.S. 485 (1878) per Waite cited in Kutler, ed., The Supreme Court and the Constitution, 213.

[32]Louisville, New Orleans & Texas Rwy. Co. v. Mississippi, 133 U.S. 597, 593, 589 (1890) per Brewer and Harlan.

a public facility to provide accommodations to blacks was a civil injury for which the injured party must seek redress in the state courts and did not operate as a badge of slavery or servitude upon the applicant for accommodation. More importantly, Brown held that "a statute which implies merely a legal distinction between the white and colored races--a distinction which is founded in the color of the two races, and which must always exist...--has no tendency to destroy the legal equality of the two races."[33]

In connection with the Fourteenth Amendment, Brown observed that "the object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law." He made, however, an important distinction between legal equality and "social, as distinguished from political, equality." Echoing Justice Bradley's thoughts on equality, he argued that the amendments had not been intended to enforce "a commingling of the two races upon terms unsatisfactory to either" or to extinguish by legislative fiat distinctions, such as the those of color, which were founded in "the nature of things." In Brown's view, the flaw in the plaintiff's argument consisted in the assumption that "social prejudices may be over come by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races." Brown rejected this view and asserted that "if the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and the voluntary consent of individuals." In short, men were free to choose their own company, and the states were free to enact reasonable legislation to promote the public's comfort and preserve the public peace which reflected that desire, subject only to the proviso that it did not operate "for the annoyance or oppression of a particular class." So long as the accommodation provided in public facilities was of equal quality, there was, in Brown's view, no implied inferiority of one race to another.[34]

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[33]Plessy v. Ferguson, 163 U.S. 537, 542-3 (1896) per Brown.

[34]Plessy v. Ferguson, 163 U.S. 537, 544, 551, 549 (1896) per Brown.

Justice Harlan's famous dissent in this case was interesting less because of his objections to Brown's opinion than because of the principles contained in it which he did accept. Returning to the points raised in his dissent in Railroad v. Mississippi (1890), Harlan argued that the Court had long held that railroads were public highways and that railroad corporations were quasi-public institutions which by their nature were subject to public regulation. As creations of the state legislatures, they were subject to the same prohibitions contained in the Fourteenth Amendment as applied to the actions of state governments and their agents and any law requiring them to discriminate between their passengers upon the basis of race was necessarily unconstitutional. Moreover, such discrimination between white and black passengers operated as a de facto badge of inferiority upon blacks, which "no one would be so wanting in candor as to assert the contrary." Such a badge of servitude was "wholly inconsistent with the civil freedom and the equality before the law established by the constitution."[35]

Harlan's claim that the "constitution is color-blind, and neither knows nor tolerates classes among citizens" has earned him a reputation as an early champion of black civil rights; however, Harlan's views concerning the social equality of the races were not so very different from Justice Brown's. Although he believed that the constitution did not permit "any public authority to know the race of those entitled to be protected" in the enjoyment of their rights, he nevertheless asserted that "every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper." Harlan was, therefore, as willing as Justices Bradley and Brown to leave free the entire sphere of private action between individuals. Just as importantly, he did not doubt that the white race, which "deems itself to be the dominant race in this country," "will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of

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[35]Plessy v. Ferguson, 163 U.S. 537, 553-4, 557, 562 (1896) per Harlan.

constitutional liberty."[36] Reading these comments, Harlan seemed as prepared to accept the de facto social superiority of white Americans as his companions on the bench. He departed from them only to the extent that he was prepared to accept a broader definition of the public sector and therefore a wider application of the amendments' prohibition against discrimination by the states.

The questions of due process and equality before the law presented difficult questions to the Court because they raised concerns about the autonomy of the individual in society as well as the Court's conception of a facultative state of enumerated powers. To the extent that legislation treated individuals in similar condition in like fashion, the Court was prepared to accept the premise of legislation such as the Civil Rights Acts; however, where such legislation appeared to interfere with individual autonomy or discriminated in favour of particular classes, the justices proved recalcitrant in supporting the intent of the legislatures.

§ II THE CORRUPTING INFLUENCE OF WEALTH

If the justices saw in the civil rights question the danger of special legislation and a threat to the moral autonomy of the individual, they also possessed reservations concerning the moral influence of wealth. They accepted wealth as a means of moral improvement but they also viewed it as a dangerous temptation to both the individual and the nation to a life of ruinous vice.

Justice Brown, whose article on property was, at least superficially, an unquestioning defense of that institution, did not accept the nation's prosperity with complete equanimity. Evaluating contemporary economic developments in terms of the traditional moral economy, Brown admitted that the centralization and combination of large enterprises had contributed to the presence of larger and more numerous fortunes in American society than at any period in the country's history. Brown asserted that "this effect may be epitomized in the single word combination." Echoing Thomas Jefferson's vision of America as a nation of small, independent producers, Brown suggested that the centralization of economic power and the

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[36]Plessy v. Ferguson, 163 U.S. 537, 554, 559 (1896) per Harlan.

concentration of wealth in large corporations had in some respects regrettable social consequences.

> It is better for the country that there should be one hundred small producers of a single article than one great one. In other words, that the profits accruing from the manufacture of a given product should be distributed among a hundred different people rather than be monopolized by one.[37]

He believed, however, that the centralizing tendencies of large corporations were somewhat mitigated in practice by the wide distribution of their stock and by the operation of the laws of political economy. In the former instance, each shareholder in the corporation became, in effect, a small property owner and a producer, "receiving the profits upon his production through the agency of the corporation." The evil effects of corporations lay, in Brown's view, not in their more efficient production of goods and wealth but in their ability to crush out competition and to create an effective monopoly in the marketplace. Fortunately, the natural laws governing the operation of the economy worked against this result by insuring that the influx of capital into profitable ventures, with the consequent increase in competition and the rising cost of skilled labour, would leave little or no profit to the manufacturer.

> This tendency has been already seen in the older countries, where the competition of American and other foreign food products has made serious havoc with the farmers and land-owners, and will ultimately result in the breaking up of the great estates which have represented the largest fortunes of European countries.[38]

At the same time, Brown's view of wealth as a product of personal character assured him that the social and political influence of unscrupulous individuals possessing wealth was merely temporary, for the corrupting influence of wealth was ever ready to take its toll on its possessors by contributing to the corruption of the

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[37]Henry B. Brown, "The Distribution of Property," Annual Address, American Bar Association Reports 16 (1893): 221.

[38]Brown, "The Distribution of Property," 220-1, 222.

habits and the will. "Fortunately for society, the ability and disposition to accumulate do not ordinarily pass to the heirs, and the wealth gathered together by the frugality of the father is usually dissipated by the improvidence of the son or grandson."[39]

Brown's assurance had a strong foundation in Moral Philosophy and Political Economy and was echoed by his contemporaries on the bench. Justices Bradley and Brewer, for example, also saw safeguards in the regular operation of moral and economic laws against the predominance of established wealth. In Bradley's view, the attendance of ease and indolence with prosperity meant that the enjoyment of individual and national wealth was constantly in a state of flux. "Nations and empires have successively waxed old," because they had grown incapable "from luxury and corruption of further advancement in the solemn and manly impulses of human dignity and civilization."[40] "Nothing," he avowed, is more sure to sap the foundations of national strength than habits of luxury and ease."[41] Justice Brewer fully concurred with that opinion. In his view, one of the greatest challenges facing the nation in the coming century would be avoiding the debilitating effects of wealth.

> One of the pressing dangers facing all civilized nations is the enervating influence of wealth and great material development. That was the one thing that sapped the life of the great nations of antiquity and buried them in the tombs of their own vice. In each there was a wonderful accumulation of wealth, marvellous manifestations of material splendor, but the moral character of their citizens was undermined thereby and they declined and fell.... Wealth brought luxury, luxury brought vice and vice was followed by ruin and decay.[42]

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[39]Brown, "The Distribution of Property," 223.

[40]Joseph P. Bradley, Progress--Its Grounds and Possibilities, An Address before the Philoclean and Peithessophian Societies of Rutgers College, New Brunswick, New Jersey (n.p.: Philoclean Society, 1849), 4.

[41]Bradley, "Precept and Example," in Miscellaneous Writings, 365.

[42]David J. Brewer, "The Promise and Possibility of the Future," in Brewer, The United States a Christian Nation (Philadelphia: John C. Winston Co., 1905), 83-4.

As a group, the justices were not naive concerning the potential costs and benefits of the emergence of corporate America and the resulting concentration of capital. Justice Brewer recognized the corporation as a collective body standing half way between individuals and government, with interests occasionally antagonistic to both, but which was "here, and here to stay, a powerful factor in promoting both the material and intellectual advancement of the republic."[43] Brewer saw, too, the moral dangers inherent in the new forms of economic organization, particularly the reduction of competition in the marketplace. He attributed the decline in economic competition, "the greatest solvent of commercial troubles," to technological change, the concentration of capital and the organization of labour.[44] All of these, in his view, had a negative effect on the free operation of economic and moral autonomy.

Brewer recognized that employees accustomed to "only a particular and narrow work" created by the increasing subdivision of labour were frequently obliged to accept the terms which increasingly consolidated manufacturers placed upon their service and that those terms were not infrequently "so severe and stringent" that they constituted the virtual "serfdom of labor." Brewer saw the emergence of large labour organizations as the inevitable results of the subdivision of labour and the concentration and consolidation of capital. Indeed, labour organization reflected the mirror image of the trusts, with the same inherent moral flaws. The element of compulsion inherent to both forms of organization was inconsistent "with the freedom of personal action which for more than one hundred years we have believed was the inalienable right of every individual." At the same time that labourers felt compelled by the overbearing power of capital to organize in protecting their interests, independent businessmen in manufacturing, in the mercantile business, and in

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[43]David J. Brewer, "Legal Ethics," Address Delivered at Commencement of Albany Law School, June 1st, 1904, in Albany Law School Catalogue. Addresses and Papers. Legal Ethics Lectures (Albany: n.p., 1904), 8.

[44]David J. Brewer, "The Supreme Court of the United States," Scribner's Magazine 33 (Mar. 1903): 277 passim.

transportation were "driven to the wall" by combinations of both organized capital and labour and had "no other alternative than to go out of business or surrender." All of these reflected the fact that "combinations, some of them of immense wealth and far-reaching influence have become the order of the day."[45]

Even that supposed champion of corporate America, Stephen J. Field, saw a danger in the influence of concentrated wealth and in the social and political inequities that it produced. Field expressed in a letter written in 1884 his frustration with

> the multifariousness of lying from the inarticulate [Henry Ward] Beecher to Pecksniff [George William] Curtis. The Pharisees of old are the loudest proclaimers of their holier-than-thou virtues. The wealthy and the comfortable wonder as before 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,[46] 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 under fellow a show in this life. It is a shame to put him off to the next world.[47]

The tendency of consolidated wealth to place its own interests before those of the commonwealth made all the more important the Court's duty to "enforce with a firm hand all the guarantees of the Constitution," since "every decision weakening their

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[45]Brewer, "The Supreme Court of the United States," 278.

[46]Mark 10: 17.

[47]Stephen J. Field to Matthew Deady, Oct. 29, 1884, Field Papers (Oregon Historical Society) cited in Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897." Journal of American History 61 (Mar. 1965): 979n. 54.

their restraining power was a blow to the peace of society and to its progress and improvement."[48]

This determination to adhere to the principles contained in the Constitution occasionally resulted in disagreement, high feelings, and harsh words among members of the bench. Justice Miller, who had hardly been reticent in excoriating the poor and destitute for their lack of character, was hardly more complimentary concerning the nation's new class of capitalists. If their freewheeling financial activities had produced the wonders of a national rail system, their behaviour was not otherwise such as to warrant either admiration or emulation and, in his view, represented a threat to the nation's wellbeing.

> I have met with but few things of a character affecting the public good of the whole country that had shaken my faith in human nature as much as the united, vigorous, and selfish effort of the capitalists.--the class of men who as a distinct class are but recently known in this country--I mean those who live solely by interest and dividends.[49]

These financier/capitalists were, Miller judged, largely the products of the late Civil War. Monetary inflation, the creation of a nationally funded debt, exempt from taxation, and the wholesale issuing of bonds by the States, by municipal corporations, and by railway companies had created a new arena in which to invest surplus capital and a new class of investors whose interests were frequently disconnected from those of the community at large.

> The result has been the formation of [a] new kind of wealth in this country, the income of which is the coupons of interest and stock dividends, and of a class whose only interest or stake in the country is the ownership of these bonds and stocks. They engage in no

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[48]Stephen J. Field, "Our Power to Declare Laws Unconstitutional," Address at the Centennial Celebration of the Organization of the Federal Judiciary, 134 U.S. Appendix 6 (1890) reprinted in Alan F. Westin, ed., An Autobiography of the Supreme Court: Off-the Bench Commentary from the Justices (New York: Macmillan, 1963), 116.

[49]Samuel Freeman Miller, letter dated 28 Apr. 1878, cited in Charles Fairman, "Justice Samuel Miller: A Study of a Judicial Statesman," Political Science Quarterly 50 (1935): 21-2.

> commerce, no trade, no manufactures, no agriculture. They produce nothing.[50]

Justice Miller raised several points in this passage illustrating the strength and influence of Moral Philosophy's analysis of society and the moral economy. Miller's hostility toward the new capitalists was partly based on the traditional view that adding to the nation's wealth required the production of physical articles. The "wealth" of the new financiers required no labour for its production and therefore lacked a key quality of property. It did not add to the nation's stock of capital. Indeed, it was entirely incorporeal and ephemeral. Just as importantly, the coupon clipper received none of the benefits to character produced by personal industry and self-discipline.

Not only did the new class of financiers contribute nothing to the country's real wealth, they set a poor moral example by living off the avails of what amounted to gambler's winnings. They were therefore prey to all the vices inherent in the possession of wealth obtained without personal effort, and their wealth, because it was "invested" only in ephemera lacked the redeeming social benefits of generating employment for honest working folk.

§ III PRIVATE INTERESTS AND THE MUNICIPAL BOND CASES

Although fully convinced of the social benefits of railways, Miller was caustic concerning the financial antics of the railroad barons. In a letter written in 1868, he harshly criticized the activities of the railroad interests following the financial panic of 1857. Speculators had gained control of the railroads by purchasing depreciated bonds in the aftermath of the panic and commenced suits of foreclosure upon them which resulted in the roads being placed in the hands of court-appointed receivers. Miller saw these events in the worst possible light and complained that under this arrangement the roads were systematically ruined while the railroad interests took full advantage of the fact that "certain members of the Supreme Court are always in favor

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[50]Samuel Freeman Miller, letter dated 28 Apr. 1878, quoted in Fairman, "Justice Samuel Miller," 21-22.

of enforcing bonds, at the expense of all other rights." He sourly concluded that these wealthy interests "understand above all men I have ever known the art of influencing men" so that "for all that they think worth fighting for they will win."[51]

Miller's animus toward the railroad interests was undoubtedly based in part on his losing battle in the numerous state and municipal bond cases which came before the Court after 1864. In an effort to attract rail lines and the economic growth which often followed them, many states and municipalities had issued bonds to purchase railway stock and to underwrite the construction of local lines. When the anticipated benefits failed to materialize, many cities and towns defaulted on their bonded obligations and suits by bondholders to enforce payment poured into the courts.

In 1864, the case of Gelpcke v. Dubuque, the first of roughly three hundred such cases to come before the Court before 1891, made it onto the docket of the Supreme Court.[52] Miller, who was sympathetic to municipalities seeking to void bonds which had fallen into the hands of speculators, identified Justice Noah H. Swayne as the arch-villain in this case and later described him as "an extremist in upholding all negotiable bonds and especially Rail Road securities."[53]

In Gelpcke, the city of Dubuque had issued bonds "for and in consideration of stock of the Dubuque Western Railroad" under an Iowa statute authorizing cities to underwrite investment in private corporations.[54] Economic growth on the expected

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[51]Samuel Freeman Miller, Letter to William Pitt Ballinger," 27 Aug. 1868, quoted in Charles Fairman, "Justice Miller and the Mortgaged Generation," Iowa Law Review 23 (Mar. 1938): 376.

[52]Gelpcke v. Dubuque, 68 U.S. 519 (1 Wall. 221) (1864). See McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations," 983 and Harry N. Scheiber, "The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts," Perspectives in American History 5 (1971): 387n. 215.

[53]Samuel Freeman Miller, Letter to William Pitt Ballinger, 17 June 1869, quoted in Charles Fairman, Mr. Justice Miller and the Supreme Court, 1862-1890 (New York: Russell & Russell, 1939), 233.

[54]Gelpcke v. Dubuque, 68 U.S. 519, 524 (1 Wall. 221) (1864) per Swayne.

scale did not follow, and the city was forced to raise taxes in order to pay the interest on the bonds. Taxpayers thereupon sued the city asserting that it had acted illegally in issuing the bonds.

In many ways, bond cases such as Gelpcke represented the opposite side of the coin to contemporary cases involving the police power and regulation of business. In both instances, the question involved was the extent to which businesses were clothed with a public interest or purpose and therefore amenable to public superintendence. In cases such as Munn v. Illinois (1877), the Court's determination that grain elevator companies were clothed with a public interest allowed for legislative supervision. Moreover, there was no question in this period that railroads were public highways and that the railroad corporations were common carriers created by public authority to serve a public purpose.

The municipal bond cases stood upon similar ethical and legal foundations. The government's duty to promote the economic well-being of its citizens had led state legislatures to authorize municipalities to issue public bonds in order to finance potentially beneficial railroad expansion. The bonds had been issued in pursuit of a legitimate public purpose and taxation to pay their interest was therefore a legitimate claim on the public purse. If the expected benefits failed to appear, it was nevertheless too late to claim that the bonds had been illegally issued in support of privately-owned businesses.[55]

Although the supreme court of Iowa had reversed the decision of the trial court and ruled that the bonds were invalid, Justice Swayne's opinion for the Court in Gelpcke v. Dubuque upheld their validity. In so doing, Swayne ignored an earlier opinion in which he had written that the Court would follow "the latest settled adjudication" of the state courts. Swayne justified his about-face and the apparent abandonment of a well-settled rule of judicial construction on the grounds that the

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[55]Scheiber, "The Road to Munn " 392; McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations", 372; Sydney Fine, Laissez-Faire and the General Welfare State: A Study of Conflict in American Thought, 1865-1901 (Ann Arbor: University of Michigan Press, 1964), 130.

preponderance of opinion in the Iowa courts upheld the validity of the bonds. "It cannot be expected," he added in reference to the Iowa supreme court's reversal of the trial court's decision, "that this court will follow every such oscillation, from whatever cause arising, that may possibly occur." Moreover, Swayne avowed that "we shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice."[56] The sacrifice was, in short, that the enforcement of the bonds was the price paid by the public for conferring benefits and privileges upon corporations that thereafter became clothed with a public interest.

Justice Miller strongly dissented from Swayne's opinion. In overruling the unanimous decision of the state supreme court, Miller saw a precedent dangerous to the operation of the judicial system. Miller maintained that the Court should have adhered to Swayne's earlier opinion that the Court would be bound in construing state statutes by the latest construction placed upon them by the highest state court.[57] To do otherwise, Miller believed, would throw the judicial system of a federal state into chaos.

Miller delivered an analogy illustrating his argument. All statutes of the state governing the conveyance of real estate were rules of property which properly fell within state jurisdiction. If the deed to a man's homestead failed to comply with the statutes or constitution of the state, the Supreme Court would not have hesitated in holding the deed void according to the latest ruling of the Iowa courts. In other words, the Supreme Court would have properly deferred to the judgement of the Iowa courts concerning the interpretation of state laws. But, Miller protested, "if a gambling stockbroker of Wall Street buys at twenty-five per cent of their par value, the bonds issued to a railroad company in Iowa, although the court of the State... have decided that such bonds were issued in violation of the Constitution," the court

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[56]Gelpcke v. Dubuque, 68 U.S. 519, 525, 526 (1 Wall. 221) (1864) per Swayne. See Leffingwell v. Warren, 2 Black (U.S.) 599 (1862) for his opinion concerning the rule of uniformity.

[57]Leffingwell v. Warren, 2 Black (U.S.) 599 (1862).

would not follow that decision but claim to be protecting a matter of contract and therefore bound by a higher duty to enforce payment on the bonds. Miller could not see why the Court was bound to follow the decision of the state in the former and not in the latter instance. He confessed

> I cannot rid myself of the conviction that the deed which conveys to a man his homestead, or other real estate, is as much a contract as the paper issued by a municipal corporation to a railroad for its worthless stock, and that a bond when good and valid is property.[58]

Gelpcke was followed by numerous bond cases in which the Court upheld the rights of bondholders against municipal corporations.[59] The only deviations from this position occurred in cases where the Court accepted the argument that private enterprises conducted for profit for which bonds had been issued by public authorities did not in fact possess a public purpose.[60] Indeed, Loan Association v. Topeka was one of the few occasions when Miller was able to carry the Court with him and claim on behalf of taxpayers a victory against the monied interests. One victory did not, however, win a war, and Miller cuttingly observed regarding the case of Hitchcock v. Galveston,[61] in which he dissented with Justices Bradley and Field, that

> our court or a majority of it are, if not monomaniacs, as much bigots and fanatics on that subject [enforcement of municipal bond issues] as is the most unhesitating Mahemodan [sic] in regard to his religion. In four cases out of five the case is decided when it is seen by the pleadings that it is a suit to enforce a contract against a city, or town,

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[58]Gelpcke v. Dubuque, 68 U.S. 519, 528 (1 Wall. 221) (1864) per Miller.

[59]See, for example, County of Pendleton v. Amy, 13 Wall. (80 U.S.) 297 (1872) per Strong; Nugent v. The Board of Supervisors of Putnam County, 19 Wall. (86 U.S.) 241 (1874) per Strong, with Davis and Miller dissenting; Town of Coloma v. Eaves, Town of Venice v. Murdock, Town of Genoa v. Woodruff, 92 U.S. 579, 583, 586 (1876) per Strong, with Miller, Field, and Davis dissenting without opinion in each case; Tipton County v. Rogers Locomotive and Machine Works, 103 U.S. 340 (1881) per Harlan; Taylor v. City of Ypsilanti, 105 U.S. 1008 (1882) per Harlan.

[60]See, for example, Loan Association v. Topeka, 20 Wall. (87 U.S.) 655 (1875) per Miller and Osborne v. County of Adams, 106 U.S. 181 (1882) per Harlan.

[61]Hitchcock v. Galveston, 96 U.S. 341 (1878).

> or a county. If there is a written instrument its validity is a foregone conclusion.[62]

Although unable to carry the Court with him on the issue of municipal bonds, Miller's rather negative view of capitalists was shared by other members of the bench. The reluctance of Justices Bradley and Brewer to grant an unqualified endorsement to the new forms of industrial capitalism stemmed at least in part from their conceptions of what constituted wealth. In their view, as in Justice Miller's, real wealth required a physical existence in order to have value. Justice Bradley disagreed, therefore, with the economist, A.L. Perry[63], who argued that political economy ought to concern itself with exchanges, and argued that it ought instead to consider the production of material goods, the creation of wealth in the form of agriculture, manufacturing, or transportation infrastructure to promote commerce.[64] In the same manner, Justice Brewer was embarrassed by the difficulty of discerning the tangible benefit of the legal profession in comparison with manual occupations.

> It adds nothing to the material wealth of the nation; it lives and grows fat on the mistakes and sins of others. The farmer, the miner, the mechanic, the manufacturer, all are adding to the general prosperity. The artist, painter, sculptor, or architect leaves behind him, in statue, painting, or building, tangible evidence of his contribution to the well-being of society. The lawyer does nothing in either of these directions; he is only a burden upon, and not a blessing to society.[65]

Brewer conceded, moreover, that the social effects of capitalism had been a mixed blessing. The wealth it produced brought in its wake the inevitable vices

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[62]Samuel Freeman Miller, Letter to William Pitt Ballinger, 3 Feb. 1875, quoted in Fairman, Mr. Justice Miller, 232.

[63]Possibly a reference to A.L. Perry's Elements of Political Economy (New York, 1866).

[64]Joseph P. Bradley, "Political Economy," in Miscellaneous Writings, 93-4.

[65]David J. Brewer, "The Ideal Lawyer," Atlantic Monthly 98 (Nov. 1906): 588-9.

associated with a "prosperous scoundrelism" operating largely beyond the control of the law.[66]

> The truth of it is, we have lived for a long time, fixing up our parlours and our front yards, and have made them beautiful. We have been very prosperous as a nation. We have done wonderful things in the development of the business and industries of the country and in our railroads and other transportations. We have made a magnificent showing, and we have pointed with pride to what could be seen in our parlours and front yards, but we have forgotten that every house has a kitchen and a backyard to it, and have not been so particular about cleaning them up.[67]

It was in the task of "cleaning up" some of the less desirable elements of the new economy that Justice Brown saw a limited role for legislation designed to insure that workers received fair treatment from their employers, that the police power was exercised when necessary to protect the public health and morals, and that corporations were managed for the benefit of their stockholders and the public. Legislation might, for example, throttle those unrepentant sinners, "those corporate Frankensteins, which, created by the legislature, have misused their powers to corrupt the will and paralyse the arm of their creator."

> It may put a stop to the vicious system of building railroads and other public works through construction companies organized by the directors of the road in their own interest, to whom all the bonds and all the available stock are turned over, and equipping the same through car trust certificates, also issued to the directors, who thus retain to themselves title to the rolling stock--a most cunningly devised scheme by which the stockholders and creditors are first defrauded for the benefit of the bondholders, and the bondholders are then defrauded for the benefit of the directors.[68]

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[66]David J. Brewer, "The Work of the Supreme Court: Justice David Josiah Brewer in 'The Kansas Lawyer,'" Law Notes 1 (1898): 169.

[67]David J. Brewer, Address of Justice David J. Brewer to the Association of the Northwestern Life Insurance Company, July 18th, 1906 (Washington, 1906), 4.

[68]Brown, "The Distribution of Property," 236.

It is interesting that these statements came from members of the Court who were identified as either outright supporters of capital or, at least, not actively unfriendly to its pretensions in the manner of, for instance, the "Great Dissenter," Justice Harlan. The differences between them were more in the tenor of their views than the moral philosophical assumptions which underlay them. As early as November 1892, Harlan expressed dissatisfaction with the capitalist class--a class whose interests were at odds with the majority of the voting public. He blamed them for the dissatisfaction of the agrarian interests "whose lands were under mortgage to 'bloated bondholders' at large rates of interest" and laid responsibility for the recent Homestead debacle largely upon the anti-labour stance of large corporations such as the "Carnegie concerns."[69]

§ IV THE INCOME TAX CASES AND CLASS LEGISLATION

The justices' concerns about the dangers of class legislation and the influence of consolidated capital fully surfaced in the Income Tax Cases (1895).[70] At issue in these cases was the federal government's power to impose a tax on income. During the Civil War, the Lincoln administration had imposed an income tax, the legislation for which was repealed by Congress when the war ended. In Springer v. United States (1881) the Court had unanimously sustained the Civil-War tax based largely on its understanding of the decision in Hylton v. United States (1796) that direct taxes comprised only poll and property taxes.[71] In 1894, Congress included in the

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[69]John Marshall Harlan to William Howard Taft, 13 Nov. 1892, in Alan F. Westin, "The First Justice Harlan: A Self-Portrait from his Private Papers," Kentucky Law Journal 46 (1958): 352. Harlan was referring to the business empire of Andrew Carnegie (1835-1919), who rose from being a penniless immigrant to command of the Carnegie Steel Company, one of the country's largest manufacturing corporations, and to the bloody labour dispute involving an armed clash between striking workers and several hundred Pinkerton guards which took place at Carnegie's Homestead, Pennsylvania, plant in the summer of 1892.

[70]Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895).

[71]Springer v. United States, 102 U.S. 586 (1881) and Hylton v. United States, 3 Dallas (U.S.) 171 (1796).

Wilson-Gorman Tariff act a clause providing for a two percent tax on all individual and corporate incomes, with a four-thousand-dollar exemption for individual incomes.[72] The tax provisions of the bill were almost immediately challenged in the courts. Pollock v. Farmers' Loan and Trust Company (1895) was a collusive, or friendly, suit in equity against a corporation by one of its own stockholders to prevent payment of the tax on the grounds that voluntarily making returns for and paying an unconstitutional tax was a breach of trust or duty on the part of corporate officers.

In the first hearing of the case, during which Justice Jackson was absent because of illness, the Court voted six to two, with Justices White and Harlan dissenting, that the income tax as it applied to land and income derived from land in the form of rents was unconstitutional as a direct but unapportioned tax. It also unanimously invalidated those parts of the act applying to the taxation of income from state and municipal bonds. Justice Field concurred with this decision but extended his objections to the law onto broader grounds. The Court split evenly on the questions whether a tax on income from personal property was a direct tax, whether all of the tax provisions of the act were voided by the unconstitutionality of the section on income from property, and whether the act also failed for want of uniformity in its provisions.

The Court, with Justice Jackson in attendance, heard re-argument of the case the following month. In its second opinion, the Court speaking again through Chief Justice Fuller largely adopted the position taken by Justice Field in his earlier concurring opinion. Justices Harlan, Brown, and Jackson, with White concurring, dissented.[73]

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[72]28 Stat. 553 (act of August 15th, 1894, § 27).

[73]Kutler, ed., The Supreme Court and the Constitution, 304; Lawrence M. Friedman, A History of American Law (New York: Simon & Schuster, 1985), 564-7 passim; Melvin I. Urofsky, A March of Liberty: A Constitutional History of the United States, 2 vols. (New York: Alfred A. Knopf, 1988), 2: 535-8 passim.

The spectrum of opinions expressed by the justices on these issues clearly showed that the Income Tax Cases presented the Court with a difficult question. In the first majority opinion, Chief Justice Fuller acknowledged the responsibility weighing on the Court to determine the constitutionality of the act. Citing Chief Justice Marshall's dictum in Marbury v. Madison (1803), Fuller asserted that "the very essence of judicial duty" was to decide whether the constitution must conform to the law or the law to the constitution and agreed with Marshall that the former "would subvert the very foundation of written constitutions."[74] The difficulty in this case lay in defining the constitutional meaning of a "direct tax" and determining whether the act of 1894 conformed to that definition. Here, the justices parted ways based upon their perceptions of what constituted real and personal property.

Although he indulged himself in a long detour through English and American history, an account of the proceedings in the Philadelphia Convention, and an analysis of the justices' opinions in Hylton v. Ware (1796) concerning what were direct and indirect taxes, Chief Justice Fuller's opinion ultimately rested upon narrow historical and legal interpretations of what constituted property. On the question of taxes on rents or incomes derived from land, Fuller was unable to distinguish any difference between a tax on the land itself and a tax on income issuing out of the land and cited authorities stretching back to Coke on Littleton in support of the view that land was worthless apart from the rents and profits derived from it. Fuller viewed land in its traditional agricultural context, so that, in substance, the tax was a direct imposition on "income received from the land and the growth or produce of the land."[75] The tax was, therefore, unconstitutional and void. Moreover, the provisions of the act pertaining to taxes levied on income obtained from municipal bonds were easily disposed of on the grounds that municipal corporations were representatives and

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[74]See Marbury v. Madison, 1 Cranch (U.S.) 137, 177 (1803) and Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 554 (1895) per Fuller.

[75]Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 580-1 (1895) per Fuller.

instrumentalities of the state governments which the courts had long held the federal government had no power to tax.[76]

Justice Field's concurring opinion went further. Field agreed with the Chief Justice's interpretation of the sources that the provisions of the tax applying to income from land were invalid, because they acted directly upon real and personal property, "without any recourse therefrom to other sources for reimbursement." A tax on the rents and income derived from land was a direct tax on the land itself. This, Field suggested, had been the understanding of the framers of the constitution. Quoting from the works of Alexander Hamilton, he declared that property, and here he did not specify real property, was a fiction without the beneficial use of it so "that whatever affects any element that gives an article its value in the eye of the law, affects the article itself." Field maintained that to assert otherwise was an exercise in semantics and repeated the words of Chief Justice Marshall in Brown v. Maryland (1827) that a general prohibition could not be avoided by varying the form while retaining the substance of the prohibited act.[77] Thus, Field's opinion left open the possibility that the same principles that Chief Justice Fuller had applied to real property could be broadened to include personal property and the income obtained from it.

Field then proceeded to argue that the remainder of the act was void for want of uniformity in its provisions. Concerning that portion of the act which laid taxes upon business corporations, he maintained that its application to businesses of a similar character must be uniform. In his view, "a law containing arbitrary exemptions can in no sense be termed 'uniform.'" Such exemptions inevitably created inequalities by imposing additional burdens upon those who must pay. The tax exemptions extended by the act to certain types of corporations were, he asserted, not uniform. "In my judgement, congress has rightfully no power, at the expense of

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[76]Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 584 (1895) per Fuller.

[77]Putnam's ed. of Hamilton's Works at 3: 34 and Brown v. Maryland, 12 Wheat. (U.S.) 419, 444 (1827) per Marshall both cited in Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 588, 591 (1895) per Field.

others, owning property of the like character, to sustain private trading corporations," among which he included the building and loan associations, savings banks, and mutual insurance companies exempted from taxes in the act, "which advance no national purpose or public interest, and exist only solely for the pecuniary profit of their members." Field saw no essential difference in the character of the exempted corporations from any others engaged in business. Citing the Court's decision in Loan Association v. Topeka and Thomas M. Cooley's treatise on taxation, he observed that they served neither public or benevolent purposes and were not therefore eligible to receive public largesse in the form of tax exemptions. No legitimate tax legislation could "capriciously favour" single individuals or corporations in that manner.

Field applied the same reasoning to the provisions concerning the tax on personal incomes. The personal exemption of four thousand dollars per annum arbitrarily discriminated against high-income earners in favour of the lower classes. It operated, in effect, to transfer the burden of taxation from the majority to a minority. This, in Field's view, "vitiates... the whole legislation," for "the legislation, in the discrimination it makes, is class legislation." If allowed to stand, it would lead "inevitably to oppression and abuses, and to general unrest and disturbance in society."[78]

In the Court's second opinion, Chief Justice Fuller stated that his former conclusions remained unchanged but asserted that "their scope must be enlarged by the acceptance of their logical consequences." The Court was, therefore, prepared to examine whether a tax "upon a person's income--whether derived from rents or products, or otherwise of real estate, or from bonds, stocks, or other forms of personal property" was a direct or indirect imposition.[79] Fuller stated that the majority could perceive no ground why the same reasoning that forbade a direct

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[78]Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 595, 596 (1895) per Field.

[79]Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601, 617, 618 (1895) per Fuller.

unapportioned tax on land and on income from land "does not apply to capital in personalty held for the purpose of income, or ordinarily yielding income, and to the income therefrom."[80] By defining financial instruments and the income obtained from them as personal property which the constitutional provisions concerning apportionment had been expressly designed to protect from "valuation and assessment" by the federal government,[81] Fuller and the majority were able to maintain the conviction of nineteenth-century academic moral philosophers and political economists that property and the income derived from it were the products of personal industry. Whether they were the product of labour or of the capital which was the "remuneration of abstinence" and self-denial was immaterial. In doing so, the majority deftly avoided dealing with the growing economic importance of intangible wealth.

In a letter written following the Court's invalidation of the federal income tax in 1895,[82] Harlan clearly expressed his hostility to the interests of the financiers, his populist sympathies, and his strong feelings over the Court's decision.

> It is a curious fact in my experience that I never knew a very rich man who was not astute in attempting to evade the payment of his proper share of taxes. Those whose business in life is to clip coupons from bonds as a general rule are indignant at the thought of being required to pay taxes. The fury of socialism is equalled by the fury with which mere millionaires, taking them as a class, and corporations, resent any attempt to make them pay their share.[83]

Harlan admitted to glaring while reading his dissent before the Court at Justice Field, whom he characterized as acting "like a mad man during the whole of this

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[80]Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601, 628 (1895) per Fuller.

[81]Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601, 670 (1895) per Harlan.

[82]Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895) per Fuller.

[83]John Marshall Harlan to Augustus Willson, in Westin, "The First Justice Harlan," 358. See also Harlan to James and John Harlan in David G. Farrelly, "Justice Harlan's Dissent in the Pollock Case," Southern California Law Review 24 (1951): 179.

contest about the income tax," for his unseemly and discourteous conduct,[84] but vehemently denied reports in the New York newspapers of him shaking his fist in the face of the Chief Justice and defended his dissent from what he considered the Court's "enormous blunder."[85] He had, he knew, made no friends among the supporters of the majority opinion with his strongly worded dissent.

> The financial gamblers and their agents, and the holders of immense properties who object to paying taxes, are mad at me because my dissent drew the lines sharply and gave the country a true idea of the situation. I read my dissent with all the earnestness that I felt, and my earnestness was quite as sharp as when the flag was fired upon at Sumter. Slave property sought to dominate the freemen of America, and we know the result. Now, the effort of accumulated capital is to escape the burden of just taxation, and put all the burdens of government on those least able to bear it.[86]

Harlan conceded that America must have corporations but cautioned against their enormous power and ability to corrupt the government and its institutions. The power of accumulated capital posed a danger "to the integrity of our social organization."[87] He dismissed the attacks upon the dissenting justices made by the large newspapers, which he characterized as the "organs of financial gamblers whose business in life it is to make corners in the market in order to get money at the expense of the general public, and without regard to the distress which their

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[84]John Marshall Harlan to James and John Harlan, 24 May 1895, Farrelly, "Justice Harlan's Dissent in the Pollock Case," 179.

[85]John Marshall Harlan to Richard Harlan, 21 May 1895, in Westin, "The First Justice Harlan," 357. Harlan equated the enormity of the Court's error with that committed by the Taney court in the Dred Scott decision. See Harlan to John and James Harlan in Farrelly, "Justice Harlan's Dissent in the Pollock Case," 180.

[86]John Marshall Harlan to Augustus Willson, 1 June 1895 in Alan F. Westin, "Mr. Justice Harlan," in Allison Dunham and Philip B. Kurland, eds., Mr. Justice (1956; revised edition, Chicago: University of Chicago Press, 1964), 121. On Harlan's identification of slave interests with capital, see also Harlan to John and James Harlan in Farrelly, "Justice Harlan's Dissent in the Pollock Case," 180.

[87]John Marshall Harlan to Augustus Willson, 1 Dec. 1905 in Westin, "Mr. Justice Harlan," 120.

operations give to those who are affected by it," as efforts "to stampede the popular mind." His dissent, undoubtedly founded on Harlan's understanding of the moral function of the court, was designed to inform the public understanding that those "unmitigated scamps who love money more than all else on earth" aimed to make "the freemen of America the slaves of accumulated wealth."[88]

In his dissent, Justice Harlan argued that the majority's historical and legal analysis had been incorrect. In his view, taxes upon income from land and from personal property touched neither the land nor the personal property from which the income was obtained. The imposition was therefore subject only to the constitutional provision that it be uniform throughout the nation. In deciding otherwise, Harlan charged the majority with denying to the general government the vital power to lay and collect taxes.

> In its practical operation this decision withdraws from national taxation not only all incomes derived from real estate, but tangible personal property, bonds, stocks, investments of all kinds, and the income that may be derived from such property.[89]

In Harlan's view, the Court's decision meant that "such property and incomes can never be made to contribute to the support of the national government" and, moreover, granted to those possessing incomes "from the renting of real estate, or from the leasing or using of tangible personal property, or who own invested personal property" privileges denied to "those having incomes derived from the labor of their hands, or the exercise of their skill, or the use of their brains." Harlan maintained that by failing to distinguish between income derived from capital and the capital itself the majority had committed a grave injustice. By relying upon the rule of apportionment among the states as the means to reach personal property and incomes,

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[88]Harlan to James and John Harlan in Farrelly, "Justice Harlan's Dissent in the Pollock Case," 180. Harlan noted the close relationship between the newspapers and capital. "One of the papers that assails us is really owned by that prince of railroad wreckers and corruptionists, C.P. Huntington, president of the Southern Pacific Railroad Company, and one of the monster swindlers of this age of money getting."

[89]Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601, 671 (1895) per Harlan.

a procedure which Harlan viewed as politically impossible, the Court effectively placed the entire burden of taxation upon the many whose incomes derived from their own exertions and allowed the few owners of capital to evade their share of responsibility for the support of the government. This was, in his opinion, "a new theory of the constitution," and such was Harlan's indignation that he likened the privileges and immunities being accorded to capital to those "originally designed to protect slave property against oppressive taxation."[90]

The case of Pollock v. Farmers' Loan and Trust Company along with the off-the-bench comments of the justices suggest that they were not always unquestioning supporters of the new economic order and experienced conceptual difficulties when attempting to fit the economic realities of late nineteenth-century finance capitalism into the traditional ethical framework of academic Moral Philosophy. Their acceptance of the moral dangers posed by wealth and the methods adopted in getting it could leave them, as in the case of Justice Harlan, unwilling to accept the direction in which the economy and the Court appeared to be headed or, like Chief Justice Fuller, in uneasy alliance with the moneyed class. In both instances, however, their conceptualization of the problem rested upon similar assumptions concerning the ethical foundation of society and the economy. In both cases, they believed that the duty of Court was to protect citizens from arbitrary encroachments upon their fundamental rights. In the Income Tax Cases, they differed largely in their views concerning the direction from which the danger of arbitrary class legislation emanated.

An excellent example of the Court's uneasy relationship with new economy concerned what it termed "wagering contracts." In Irwin v. Williar, the Court had accepted the common-law doctrine that a contract for the sale of goods to be delivered at a future date was only valid "where the parties really intend and agree that the goods are to be delivered by the seller, and the price to be paid by the buyer."

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[90]Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601, 672-3, 685, 684 (1895) per Harlan.

> If, under the guise of such a contract, the real intent be merely to speculate in the rise and fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager."[91]

Justice Matthews held that such contracts were illegal and void as against public policy and stated that "gambling is none the less such because it is carried on in the form or guise of legitimate trade."[92]

In Embrey v. Jemison decided in 1889, five years after The Income Tax cases,[93] a unanimous Court speaking through Justice Harlan again refused to countenance what it considered a wagering contract in a case involving "cotton futures." Upon the principle that laws against wagering contracts were for the protection of the public and in the interest of good morals, Harlan ruled that the agreement, although in form a contract for the sale of goods and their future delivery, was in fact a wagering contract, since neither the broker or the purchaser intended that the cotton be delivered.[94] Harlan reaffirmed this opinion two years later in Pearce v. Rice when he upheld an Illinois statute which forbade contracts "to speculate in the rise and fall of the price of grain" in which no delivery of the grain was ever contemplated and in which "the transactions are to be closed only by the payment of the difference between the contract price and the market price."[95]

The civil rights cases, the municipal bond cases, and Pollock suggest that the Court's adherence to a conception of society and economy based upon the principles of moral science presented difficulties when it conflicted with the realities of race and

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[91]Irwin v. Williar, 110 U.S. 499, 508, 510 per Matthews.

[92]Irwin v. Williar, 110 U.S. 499, 510 per Matthews.

[93]Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

[94]Embrey v. Jemison, 131 U.S. 336, 348, 349 (1889) per Harlan.

[95]Pearce v. Rice, 142 U.S. 28 (1891) per Harlan.

finance capitalism. They suggest that the Court's reluctance to interpret broadly the principles of the postwar amendments in the civil rights cases and their qualified support of capital was based more on the ability of the justices to fit specific cases into the existing ethical framework of Moral Philosophy and classical political economy than on racially motivated hostility towards blacks or an unquestioning support of the new monied classes.

CONCLUSION

The Progressive tradition in the writing of American history, with its acceptance of a deterministic and materialistic conception of history, has viewed the United States Supreme Court at the end of the nineteenth century as an ideological tool of new and powerful economic forces in the United States which restricted attempts by reform-minded Americans to better man's estate through a constructive legislative program. In this regard, the justices have been characterized as the creators and protectors of a form of laissez-faire constitutionalism under which the nation and the Court largely abdicated their responsibilities to protect the common interests of society from the machinations of special economic interests. A more recent trend in history writing, of which this study is a part, has shown that the conservatism of the Court following the Civil War and down to at least the turn of the century had less to do with an unquestioning devotion on the part of the justices to the gospel of wealth than an ultimately unsuccessful attempt to preserve a vision of man and society founded on the beliefs and values of nineteenth-century moral science, particularly as it was expressed in the Moral Philosophy courses of the antebellum colleges.

The historical significance of justices examined in this study was not their judicial conservatism. The very word, conservatism, implies, like other descriptive "isms," an external principle of organization and analysis operating independently of the historical actors and which must always be subjective to some degree. Moreover, the law is an inherently orthodox body of principles, for it must always resemble what Justice Oliver Wendell Holmes, Jr. termed a "magic mirror." Reacting only to issues brought before them in carefully orchestrated contests, the members of the bench must necessarily draw upon existing theories of man and society in reaching their

conclusions. In this sense, the law is descriptive rather than prescriptive, conservative rather than creative. It must, as Justice William Strong observed, give expression to the habits and customs of the people who created it.

The addresses and writings of these men, both on and off the bench, are therefore worth attention, because they illustrate a style of thought and an intellectual view of the world common to Americans educated in the classical antebellum college curriculum. The justices' determined attempt to apply the axiomatic principles of the reigning intellectual and ethical paradigm of their day to the legal and political consequences of sweeping social and economic changes suggest the accuracy of Paul Hamlin's observation that "law is a function of the ideas of those who practice it and their ideas are largely governed by the quality of their education."

The justices' understanding of the law as a branch of moral science encouraged them to approach social, political, and economic issues within a deeply moralistic intellectual context the framework of which parallelled to a remarkable degree the formulation of knowledge and being provided by antebellum Moral Philosophy. These ideas were the determining influences on the intellectual world of late nineteenth-century jurists and provided a rational explanation for the Supreme Court's conservative tenor during the Gilded Age.

Every branch of the law in late nineteenth-century America provides examples of the influence of moral science on legal thought. The justices' faith in a providential natural order led them to accept as axiomatic the beneficent and just operation of natural and moral laws. Their belief in the moral government of creation led them to view progress and the continued rise of civilization as conditional upon adherence to the principles of truth and justice revealed by moral science and expressed in the laws of every enlightened nation.

At a practical level, the justices applied their understanding of human nature and the operation of faculty psychology not only to the behaviour of individuals but as well to the character and operation of the state. Their ideas concerning the separation of powers, the inherent dangers of legislative majorities in a republic, and the duty of the

courts to explicate and protect the fundamental moral values which underlay American society were based in part upon their perception of the analogous organization and operation of society and the mind. Their unshakeable belief in the moral autonomy of the individual profoundly influenced their views about liberty and restraint; the freedom of labour and contract; the assignment of liability and responsibility; and potential solutions to the race question in a voluntaristic society. Their commitment to maintaining the widest possible sphere of moral action while protecting the fundamental rights of the individual conditioned their attitudes concerning legitimate public purposes, the protection of property, and the extent of society's power to regulate private conduct. In all of these areas, American law drew heavily upon the principles of moral science. It is important to remember that in the nineteenth century terms such as freedom, responsibility, substantive due process, and equality before the law were debated and developed in an intellectual context in which the moral outcome of actions, whether those were actions of an individual or a nation, were the predominant concern of educated Americans and their judicial representatives.

APPENDIX I[1]

Justices Appointed to the Supreme Court Between 1862 and 1898
In Chronological Order

NAME	TERM	APPOINTED BY	PARTY	STATE
Noah H. Swayne 1804-1884)	1862-1881	Lincoln	Republican	Ohio
Samuel F. Miller (1816-1890)	1862-1890	Lincoln	Republican	Iowa
David Davis (1815-1886)	1862-1877	Lincoln	Republican	Illinois
Stephen J. Field (1816-1899)	1863-1897	Lincoln	Democrat	California
Salmon P. Chase (1808-1873)	1864-1873	Lincoln	Republican	Ohio
William Strong (1808-1905)	1870-1880	Grant	Republican	Pennsylvania
Joseph P. Bradley (1813-1892)	1870-1892	Grant	Republican	New Jersey
Ward Hunt (1810-1886)	1872-1882	Grant	Republican	New York
Morrison R. Waite (1816-1888)	1874-1888	Grant	Republican	Ohio
John Marshall Harlan (1833-1911)	1877-1911	Hayes	Republican	Kentucky
William B. Woods (1824-1887)	1880-1887	Hayes	Republican	Georgia
Stanley Matthews (1824-1889)	1881-1889	Garfield	Republican	Ohio
Horace Gray (1828-1902)	1881-1902	Arthur	Republican	Massachusetts
Samuel Blatchford (1820-1893)	1882-1893	Arthur	Republican	New York
Lucius Q.C. Lamar (1825-1893)	1888-1893	Cleveland	Democrat	Mississippi

[1]Chief Justices are in italics. Justices considered in this study are underlined.

Justices Appointed to the Supreme Court Between 1862 and 1898
In Chronological Order

NAME	TERM	APPOINTED BY	PARTY	STATE
Melville W. Fuller (1833-1910)	1888-1910	Cleveland	Democrat	Illinois
David J. Brewer (1838-1910)	1889-1910	Harrison	Republican	Kansas
Henry B. Brown (1836-1913)	1890-1906	Harrison	Republican	Michigan
George Shiras (1832-1924)	1892-1903	Harrison	Republican	Pennsylvania
Howell E. Jackson (1832-1895)	1893-1895	Harrison	Democrat	Tennesee
Edward D. White (1845-1921)	1894-1910	Cleveland	Democrat	Louisiana
Rufus W. Peckham (1838-1909)	1895-1909	Cleveland	Democrat	New York
Joseph McKenna (1843-1926)	1898-1925	McKinley	Republican	California

APPENDIX II[2]

Personal Information of the Justices Appointed to the Supreme Court Between 1862 and 1898

NAME	STATE OF BIRTH	RELIGION	COLLEGE	LAW SCHOOL
Noah H. Swayne 1804-1884)	Virginia	Protestant	No	No
Samuel F. Miller (1816-1890)	kentucky	Presbyterian	Transylvania (1838)	No
David Davis (1815-1886)	Maryland	Protestant	Kenyonc (1832)	Yale (1835)
Stephen J. Field (1816-1899)	Connecticut	Congregational	Williams (1837)	No
Salmon P. Chase (1808-1873)	New Hampshire	Episcopal	Dartmouth (1826)	No
William Strong (1808-1905)	Connecticut	Presbyterian	Yale (1828), MA (1831)	Yale (inc.)
Joseph P. Bradley (1813-1892)	New York	D. Reformed/ Presbyterian	Rutgers (1836)	No
Ward Hunt (1810-1886	New York	Episcopal	Union (1828)	Litchfield (n.d.)
Morrison R. Waite (1[illegible]88)	Connecticut	Episcopal	Yale (1837)	No
John Marshall Harlan (1833-1911)	Kentucky	Presbyterian	Centre (1850)	Transylvania (inc.)
William B. Woods (1824-1887)	Ohio	Presbyterian	Western Reserve (1841)	No
Stanley Matthews (1824-1889)	Ohio	Presbyterian	Kenyon (1840)	No
Horace Gray (1828-1902)	Massachusetts	Episcopal	Harvard (1845)	Harvard (1849)
Samuel Blatchford (1820-1893)	New York	Protestant	Columbia (1837)	No
Lucius Q.C. Lamar (1825-1893)	Georgia	Methodist	Emory (1845)	No

[2]Chief Justices are in italics. Justices considered in this study are underlined.

Personal Information of the Justices Appointed to the Supreme Court Between 1862 and 1898

Melville W. Fuller (1833-1910)	Maine	Episcopal	Bowdoin (1853)	Harvard (inc.)
David J. Brewer (1838-1910)	Asia Minor	Congregational	Yale (1856)	Albany (1858)
Henry B. Brown (1836-1913)	Massachusetts	Congregational/ Presbyterian	Yale (1856)	Yale/Harvard (inc.)
George Shiras (1832-1924)	Pennsylvania	Presbyterian	Yale (1856)	Yale (inc.)
Howell E. Jackson (1832-1895)	Tennessee	Presbyterian	West Tennessee (1849)/ Yale	Cumberland (1856)
Edward D. White (1845-1921)	Louisiana	Roman Catholic	Georgetown (inc.)	No
Rufus W. Peckham (1838-1909)	New York	Protestant	No	No
Joseph McKenna (1843-1926)	Pennsylvania	Roman Catholic	No	No

APPENDIX III

LIST OF CASES

Aerkfetz v. Humphreys, 145 U.S. 418 (1892).

Allgeyer v. Louisiana, 165 U.S. 578 (1897).

Attorney-General v. Utica Insurance Co., 2 Johns. Ch. 389 (N.Y. 1817).

Austin v. Tennessee, 179 U.S. 343 (1900).

Barbier v. Connolly, 113 U.S. 27 (1884).

Barney v. Keokuk, 94 U.S. 324 (1877).

Bartemeyer v. Iowa, 85 U.S. 929 (18 Wall. 129) (1874)

Beer Co. v. Massachusetts, 97 U.S. 989 (1878).

Blyew v. United States, 80 U.S. 638, 641 (13 Wall. 581) (1873).

Bowman v. Chicago and N.W. Rwy. Co., 125 U.S. 465 (1888).

Bradwell v. Illinois, 83 U.S. 442 (16 Wall. 130) (1873).

Brown v. Maryland, 12 Wheat. (U.S.) 419 (1827).

Budd v. New York, 143 U.S. 517 (1892).

Case of The Helena, 4 Robinson's Admiralty Reports (G.B.) 7.

Case of Monopolies, 11 Coke 84 (G.B.).

Chicago, Milwaukee & St. Paul Rwy. Co. v. Minnesota, 134 U.S. 418 (1890).

Chicago, Milwaukee & St. Paul Rwy. Co. v. Ross, 112 U.S. 377 (1884).

Chicago, Milwaukee & St. Paul Rwy. Co. v. Lowell, 151 U.S. 209 (1894).

Commonwealth v. Hamilton Manufacturing Co., 120 Mass. 383 U.S. (1876).

County of Pendleton v. Amy, 13 Wall. (80 U.S.) 297 (1872).

Chy Lung v. Freeman, 92 U.S. 275 (1876).

Civil Rights Cases, 109 U.S. 3 (1883).

Commonwealth v. Roxbury, 75 Mass. (9 Gray's Massachusetts Reports) 451 (1857).

Continental Improvement Co. v. Stead, 95 U.S. 403 (1877).

Dartmouth College v. Woodward, 4 Wheat. 518 (1819).

Davidson v. New Orleans, 96 U.S. 97 (1877).

Delaware, Lackawanna & Western RR. Co. v. Converse, 139 U.S. 469 (1891).

De Lima v. Bidwell, 182 U.S. 1 (1901).

Dooley v. United States, 182 U.S. 222 (1901).

Downes v. Bidwell, 182 U.S. 244 (1901).

Elliott v. Chicago, Milwaukee & St. Paul Rwy. Co., 150 U.S. 245 (1893).

Embry v. Jemison, 131 U.S. 336 (1889).

Ex parte Newman, 9 Cal. (U.S.) 502 (1858).

Ex parte Virginia, 100 U.S. 676 (1880).

Farwell v. Boston & Worcester RR. Co., 45 Mass. (U.S.) 49 (1842).

Foster v. Kansas, 112 U.S. 205 (1884).

Frisbie v. United States, 157 U.S. 160 (1895).

Gelpcke v. Dubuque, 68 U.S. 519 (1 Wall. 221) (1864).

Hall v. DeCuir, 95 U.S. 485 (1878).

Hawaii v. Mankichi, 190 U.S. 198 (1903).

Hennington v. Georgia, 163 U.S. 299 (1896).

Hitchcock v. Galveston, 96 U.S. 341 (1878).

Holden v. Hardy, 169 U.S. 366 (1898).

Home of the Friendless v. Rouse, 75 U.S. 495 (8 Wall. 430) (1869).

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