

The Hijacking of the Fourteenth Amendment

by Doug Hammerstrom

Constitutional law courses in law schools teach that the Fourteenth Amendment defines the limit beyond which state legislation may not impinge on property rights. They also teach that the Fourteenth Amendment incorporates the Bill of Rights and imposes its limitations upon the states. But what do these legal doctrines have to do with the plain purpose of the Fourteenth Amendment – to assure political rights for the newly-freed slaves? And how did these doctrines arise out of the Fourteenth Amendment?

While society was grappling with bringing former slaves into U.S society, the power and influence of corporations was also on the rise. While very few people were turning their attention and energy to bringing former slaves into society – indeed, far more energy was being put into NOT bringing them into society – corporations were using a great deal of their wealth to hire lawyers to advance their interests in the courts. The Fourteenth Amendment offered an opportunity to advance corporate interests, and the corporate attorneys set out to exploit it.

Of the 150 cases involving the Fourteenth Amendment heard by the Supreme Court up to the *Plessy* case in 1896, 15 involved blacks and 135 involved business entities.¹ The scope of the Fourteenth Amendment to secure the political rights of former slaves was so restricted by the Supreme Court that blacks won only one case. The expansive view of the Fourteenth Amendment that comes down to Constitutional Law classes today is the result of corporations using the Fourteenth Amendment as a shield against regulation. Ultimately the *Plessy* decision left Jim Crow laws in place because of doctrines developed in those corporate shield cases.

How ineffective the Fourteenth Amendment was for blacks in the 19th century is told well by Richard Stiller in his book, *Broken Promises: The Strange History of the Fourteenth Amendment* (1972). Things did not look good for the freed slaves immediately after the Civil War and the assassination of Lincoln. Lincoln's successor, Andrew Johnson, vetoed the Civil Rights Act of 1866. In his veto message he said it was not proper "to make our entire colored population . . . citizens of the United States." Johnson's veto message was a signal for violence and murder all over the South.

Thaddeus Stevens led the successful fight for the Fourteenth Amendment. The first section of the amendment declared blacks to be citizens of the U.S. [the language parallels language in the *Dred Scott* decision and overrules *Dred Scott*²] In July of 1868, when the Fourteenth Amendment was ratified, it looked as if racism sustained by law was dead in the United States.

For a short period of time things went well for blacks. Negroes held office widely in the South. Free public schools, set up for the first time in the south after the Civil War, served black and white children equally. Louisiana's state constitution required

¹ *The Plessy Case: A Legal-historical Interpretation* Charles A. Lofgren (1987)

² 60 US 393 (1857)

integration in the new public schools. In order to preserve this status, a civil rights bill was promoted in Congress. The law was not passed until 1875. It made segregation in public facilities – such as hotels, restaurants, and railroads – a federal offense. In 1873 when the Supreme Court heard the *Slaughterhouse Cases*,³ its first Fourteenth Amendment case, the Court rebuked the attempts of business interests to use the amendment, saying that the Fourteenth Amendment’s “main purpose was to establish the citizenship of the Negro.” Justice Miller added, “We doubt 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.”

By the mid-1870s, however, the mood had turned. Reconstruction was ended in a deal cut to resolve the 1876 presidential election. Some of the Court’s justices were racists. One of these was Stephen J. Field. After the 1873 decision he wrote to a friend: “I belong to the class who repudiate the doctrine that this country was made for the people of *all* races. On the contrary, I think it is for our race – the Caucasian race.”

In *United States v. Cruikshank* (1876)⁴ the Court said that the Fourteenth Amendment “adds nothing to the rights of one citizen against another.” Yet Congress had written the amendment to do just that.⁵ The hearings on the Fourteenth Amendment indicated that most of the abuses being suffered by Negroes were at the hands of individual white persons rather than state governments or those acting under color of law.⁶ Congress had just made its intent evident in the Civil Rights Act of 1875. However, when the Supreme Court ruled on the constitutionality of that act in 1883,⁷ the Court cited *Cruikshank*, amazingly negating Congress’s intent in that act on the basis of the Court’s divination of Congress’s intent in passing the Fourteenth Amendment. Logic would say that Congress might have known its own intent in enacting the Fourteenth Amendment when it drafted the Civil Rights Act just two years later and passed the Act just seven years later.

Meanwhile, the corporate lawyers picked up on a point made in Justice Field’s *Slaughterhouse* dissent; that the amendment was broad enough to protect all of U.S. society from the deprivation of fundamental, natural law rights, and that the Supreme Court had a duty to fashion decisions to protect those rights. Ironically, this was the argument the abolitionists made for ending slavery that was rejected in the *Dred Scott* case. The argument became the basis for what is known as substantive due process.

In what was to become a familiar assertion, railroads in Illinois complained, in the *State Railroad Tax Cases*⁸ that the Illinois tax laws violated due process because corporations were tax differently. In *Munn v. Illinois*⁹ Justice Field continued his crusade for the corporations and the assertion of substantive due process. The majority decision allowed the state to set rates for grain elevators because, even though private property,

³ 83 U.S. 36

⁴ 92 U.S. 542

⁵ R. Carr, *Federal Protection of Civil Rights: Quest for a Sword* (1947)

⁶ Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich.L.Rev. 1323 (1952)

⁷ *The Civil Rights Cases* 109 U.S. 3

⁸ 92 U.S. 575 (1875)

⁹ 94 U.S. 114 (1876)

they were “affected with a public interest” and “affect the community at large.” In his dissent, Field had a laissez-faire fit at this “socialist” ruling. One piece of the substantive due process doctrine became Supreme Court policy when the majority accepted Field’s point that the determination of the reasonable limits of this doctrine was a judicial function.

In *Kentucky Railroad Tax Cases*¹⁰ the assertion was again made that taxes violated a railroad’s due process rights. The assertion was also made – for at least the third time before the Supreme Court – that corporations are persons under the Fourteenth Amendment. The corporate legal campaign to gain “personhood” status finally succeeded when the report of the opinion in *Santa Clara County v. Southern Pac. R.R.*¹¹ contained a statement purportedly made by Chief Justice Waite before oral argument that “The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.” The statement is suspect because the issue *was* argued. The case was decided on other grounds and the Court directly declined to decide the constitutional question. Justice Field cited *Santa Clara* as holding that corporations are persons in a later case¹² and that notion of *Santa Clara*’s holding has stuck.

In the same year – 1886 – the Court again stated that the court might intervene and make its own assessment of the propriety of rate regulations in *The Railroad Commission Cases*.¹³ The substantive due process doctrine reached its full flower in *Lochner v. New York*.¹⁴ The U.S. Supreme Court invoked “substantive due process” to substitute its judgment for that of the New York legislature in holding that a law regulating the working hours of bakers violated the Fourteenth Amendment.

In *Davidson v. New Orleans*,¹⁵ Justice Miller remarked that the due process clause of the Fifth Amendment had rarely been invoked in the near 100-year history of the Constitution. Yet the due process clause of the Fourteenth Amendment was lately being invoked regularly. The author would suggest the difference was the litigation spending of the railroads in the latter period. Yet by 1877 only nine Fourteenth Amendment opinions had been rendered. From 1877 to 1885, 26 additional opinions were issued. In the 13 years before 1912, 409 due process opinions were handed down.¹⁶ From 1886-1912, two cases restrained or annulled state action involving Negroes, 39 cases restrained or annulled state action against corporations.

While the corporations were triumphant in wielding the Fourteenth Amendment as a shield against democratic control, blacks were abandoned by the Supreme Court. Not only was the law not used to protect their constitutional rights, the law was used

¹⁰ 115 U.S. 321 (1885)

¹¹ 118 U.S. 394 (1886)

¹² 134 U.S. 418 (1890)

¹³ 116 U.S. 307

¹⁴ 198 U.S. 45 (1905)

¹⁵ 96 U.S. 103 (1877)

¹⁶ Charles Wallace Collins, *The Fourteenth Amendment and the States* (1912)

affirmatively to degrade them. Ten years after *Plessy*,¹⁷ the Supreme Court ruled that a state could force white people to discriminate against black people even if they did not want to. A private college that had voluntarily educated black and white students together since the Civil War was forced to expel the black students when, in *Berea College v. Kentucky*¹⁸ the Court upheld a Kentucky statute that said black and white students could not be taught in the same school. The white students sent a farewell letter to their former classmates. “Our sense of justice shows us that others have the same rights as ourselves. We hope never to be afraid or ashamed to show our approval of any colored person.”

In response to the *Berea* decision, states and cities of the South rushed to follow the Court’s lead. They passed laws making it a crime for white people to associate voluntarily with black people. In countless cases in the South the sight of a black or white family entertaining visitors of the other race resulted in a call for the police and a threatened arrest.

The results of Jim Crow laws were not just degrading, they were deadly. Dr. Charles R. Drew, whose research on blood plasma led to the development of blood banks and who was the head of the American Red Cross blood banks in WWII, bled to death on his way to the colored hospital, which was further away, because the white hospital refused to treat him. An uncounted number of black accident victims died because they were denied help by “white” ambulances, hospitals and doctors.

Corporations, on the other hand, hijacked the Fourteenth Amendment and have used it to consolidate their power in the U.S. and the world. Corporations have gained many of the inalienable rights of humans guaranteed by the Bill of Rights with their status as “persons” under the Fourteenth Amendment. Through their right of free speech, they have captured our legislatures and regulatory agencies. They have used the key to the courts that the Fourteenth Amendment provides them to invalidate legislation that might have slipped through their control of the legislative process.

150 years of investing wealth in lawyers and using those lawyers to flood the courts with the corporate perspective on the law has led to corporate culture defining the world through law. The provisions of law corporate lawyers *argued for* in U.S. courts in the 19th century they now *write* into international trade agreements. The U.S. economy’s colonization by corporations serves as the model for the colonization of the world by multinational corporations.

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¹⁷ 163 U.S. 537 (1896)

¹⁸ 211 U.S. 45 (1908)