Howard Jay Graham, Everyman's Constitution: Historical Essays on the 14th Amendment. . . . .[1968]

"The Conspiracy Theory" of the 14th Amendment

Grahma's two articles in the Yale Law Review in 1937-38 revealed that Conklin's ennunciations before the Court in the San Mateo case of 1882 were unfounded. . .

The Early Antislavery Backgrounds of the 14 Amendment

Graham discusses the quaestions that scholars have evoked in the meaning of the 14th Amendment. Did the framers mean "persons" to include corporate entities? He has pretty well established that they did not . . .But what about other meanings. . .Did section 1 of the Amendment include the whole Bill of Rights. . .This has been a consideration. . .It is his view too that the framers when they drafted the Amendment were talking about an affirmative due process and an affirmative equal protection . . .Not as the Court(see Slaughter House cases and others)later took to mean only any "state action". . .which came to mean inaction for the federal govt. In the Reese and Cruikshank cases the Court stressed "state action" and not state inaction to measures carried out to deprive blacks of their rights--civil and political . .

To examine and answer some of these questions about intent Graham places the Amendment within the context of the antislavery meaning to grapple more meaningfully with the many connotations. . .To come to grips with the intent of the Framers. .

Graham's arguement is based on the fact that the antislavery movement was strong in the Midwest. . . . He discusses Birney, Welds, the Lane University and the students. . . .It is based on Barnes' study of the Midwestern evangeistic raidicals . . .

He belives that these abolitionists way back in the 1830s and 1840s anticipa anticipated the Joint Committee in developing the priveleges and immunities --due process--equal protection phraseology as a bulwark for the rights of free blacks and slaves. The regional strongholds of this early doctrine included constituencies of John Bingham, Stevens, Conkling, Boutwell, Fessenden,etc. . . It is apparant that the abolitionists began to develop the idea of a national citizenship. The federal not only had the power but the duty to protect the fundamental rights of life, liberty, and property wherever and whenever those rights were abridged, either by state action or by flagrant state inaction. To give fullest possible expression to the Lockian doctrine of of human equality and of universal need for legal protection the antislavery theorists also developed and repeatedly employed in their arguments the equal protection concept derived from the "all men are created equal" premise in the Declaration of Independence. . . . These rights were among those of a person. . .and of a citizen of the US . . . These concepts were in the air. . . Hypothecated that Bingham and others could have absored them while in school or law,etc. . .while in the region.

Jackson
Ten Broek

Graham's interpretation of the meaning of due process and equality before

the law rests then on a historical interpretation that chooses to see the meaning in the ethical interpretation of our national origins . . .and not a close case by case study of the meaning beginning in/ with 1867-1868. . . but back into the antislavery agitation period of the antebellum period. . .

What came later was a narrow and pedatically dry effort to read meaning into the Framers' words and motivations during the last years of Reconstruction and the Gilded Age period thru the Court's rulings at a time when the nation had long since given up on the racial question . .believing it already solved and tucked away. . .

The Court's emasculation of the Fourteenth went unchallanged by generation of scholars. . .With the Compromise of 1877 meant that the situation of the blacks with respect to race, citizenship, and protection varied little from what the Dred Scott decision of 1857 tried to establish . . .

Graham, Everyman's Constitution
A Centennial View

"The Waite Court and the Fourteenth Amendment"

Based on a review of MaGrath's book . . .

It was during the Waite Court that the 1883 Civil Rights Cases came up.
The majority(read by Bradley)decision overturned the 14 Th Amednment. . .
Effect called sections 1 and 5 unconstitutional.

Graham's characterization of those who like Bradley bent the Amendment out of shape. These men knew what they were about. . .They were men of their generation who in the last analysis guessed wrong. Who abandoned and betrayed the principles and the constitutional theory which they themselves in many instances had held, understood and approved. The trouble was they did not see as Justice Harlan did, that to defer the problem, above all deny Congress the power to deal with it, was to aggravate it, to let the mores of the slave system and the era harden and consolidate under freedom. He cites Bradley as the truley tragic figure. . . Bradley had supported the meaning of the Fourteenth Amendment. . .That it was to protect blacks in the south . . .

Bradley's opinion was truly a "period piece"-- an accommodation to the national inertai and letdown, to the absurd belief that if the country only would ignore vestigial racism the problems might disappear. . .

He cites a private exchange between Bradley and Justice Woods in 1871 involving a case in Alabama in which Night riders broke up a black meeting and killed some of the Negroes attending. . .The case US vs. Hall was on the Woods circuit. Woods wrote for Bradley's advice. . .
Bradley wrote that the 14th Amenmdnet not only was intended to prohibit states from making laws that deprived blacks of their equal rights and equal protection under the law. . .but that the Amendment also prohibits states from denying all persons within its jurisdiction the equal protection of the laws. . "Denying includes inaction as well as action. And denying the equal protection of the laws includes the ommision to protect as well as the ommission to pass laws for protection."

Graham, Everyman's Constitution

Justice Field and the 14th Amendment

Graham continues with the study ofhe evolution of the 14th--due process and equality clause--from support for "persons"(Negroes and Union whites)to corporations. In this tranformation Justice Field played a key rôle.

He begins by pitting Holmes' judicial philosophy against that of Field's. . . Holmes urged judicial restraint. . .The hypertrophy of the due process cluse allowing the Court to frustrate economic and welfare policies he thought was dangerous to the Court and to the workings of the democratic process. Modern urban society with industrialized base presumed, according to Holmes, the progressive extension of social controls; democracy presumed extension in accordance with popular desires.
To frustrate this effort was only to encourage the thing that Field feared most--a radical alternative. . .

Graham notes that Field during the 1850s while justice and chief justice of the California bench was tolerant of legislative measures toward property and taxation . . He was liberal. . . He was sympathetic to labor also. . . But this changed. ..Graham argues that conditions in the 1870s brought about anxieties and fears that changed Field's liberalism into one of judicial restraint and really reaction . .

He sees the Franco-Prussian War and the Paris Commune as the two historical events that initiated this transformation.
The Paris Commune spelled the advance of socialism and communism to Field. . . and the possible "infection" of the US by the German immigrants. Marx's Manifesto was already a political tract of international repute at this time. Field was futher troubled by the signs of chaos at home--the Tweed Ring and Grant scandals,etc. . .He opposed the Republican party's removal of judicial review in the McCardle Case. . .He hoped the Court would rule the Reconstruction acts unconstitutional . .The federal power was intervening with menacing intent upon the sovereign states of the south,etc.
Field was distressed by the Munn decision of the Court in 1877. . . and the drastic KKK Act of 1871-72 . . .

Their were also some personal reasons that struck hus family. . .See the Introduction.

Even before Field's dramatic statement about the 14 Amendment, Graham points out that Congress and the legal profession was making efforts to protect property against the regulations of states. The Slaughter HouseCases seemed to imply that corporations were protected by the phraseology of the first section of the Amednment. Lawyers took heart. . .In the Continental Insurance Co vs. New Orleans they sought Judge Woods expressed ruling on corporate personality and citizenship. Woods ruled in the 1874 case that corporations were neither citizens nor persons within the meaning of the 14th Amendment.

All this turmpil for Fields seemed to culminate in the Paris Commune. . .

Property was under attack . . .There were the labor unrests in the US. Graham mentions a labor dispute in California in 1870 in which the miners did violebce to the mine equipement. . .

Field's misreading of history overseas and at home pushed him onto the position of looking to the Cpurt--expansion of judicial review--in this time of trial, crisis, and exceedingly anxious time for him . . .

Field's weltschmurz: In the 1870s everything seemed teetering on the abyss. The Grant scandals struck fear in Feild that the public officials and public services could not hold the loyalties of the masses. There followed in swift succession the strain of service on the Electoral Commission and the galling spectacle of the Hayes inauguration(remebering that Field was a states rights Democrat). He was distressed at the election "steal". . . The Granger cases followed by the 1877 Railroad strike. During the 1870s and 1880s Field struggled to reverse the trend of judicial decision. Graham notes his presidential ambitions. . .and his intent(if nominated and elected) to pack the Court to the number of 21 justices with judicial philosophies sympathetic with laissez faire tenets. . .

Field introduced his ideas about euqality before the law and due process in his Ninth Circuit. . .This was in the 1870s and 1880s. Graham examines these cases and what came to be called the Nönth Circuit Doctrine. . .

These decisions of freedom of contract and the revolutionary substantive due process all added to laössex faire. . .His decisions were elaborated upon and gave support to other decisions in the state. . .