ON THE FORMATION OF THE AMERICAN CORPORATE STATE: THE FULLER SUPREME COURT, 1888-1910

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1) INTRODUCTION

With the collapse of the American financial system in 2008, and its widespread consequences for the American people and indeed the global economic impact of the collapse, it became apparent that certain corporations became "too big to fail." It aroused widespread interest among the public as to how these corporations ever achieved such a status. This article hopes to return to a historical point in time, the Gilded Age and Progressive era, in order to attempt to locate the seeds of today's "too big to fail" corporations. By focusing on the Fuller Supreme Court, 1888-1910, we can locate the origin of the American corporate state.[1]

The legal support of laissez-faire capitalism set in motion the foundation of current corporate institutions. Although there is not much dispute of the excessive use of laissez-faire doctrine during the Fuller Court, there has emerged in the past couple of decades a group of revisionist scholars willing to explain the Court's actions free from the Progressive school of history. Three major scholars representing three types of schools of thought were selected: Bruce Ackerman, neo-federalist dualist democracy school, James Ely, Jr., neo-liberal conservative school, and Howard Gillman, neo-institutionalist school.

I will attempt to first lay out the use of laissez-faire capitalist doctrine by the Fuller Court, and then I will turn to the revisionist interpretation of the Court. This work will seek to answer two questions: 1) Was the Fuller Supreme Court

[1] The use of the phrase "corporate state" will be taken to mean of a general power over government and society broadly speaking, the corporatization of America, as a matter of default. That is to say, if we can say that the state function of America during the Gilded Age and Progressive era was fragmented (deliberately so by the nature of the Constitution), then we should be able to observe how such a vacuum of political power can be claimed as a matter of default by emerging corporate power. As the nature of rural America changed due to industrialism, it continued to operate under "limited government" principles even though industrialism required direct government intervention in the private sector if it was to control the power of the corporation. That is, the corporate state will refer to the default power as a result constitutional fragmentation and the Founder's creation of a weak Federal government.

justified interpreting and using the Due Process Clause of the Fourteenth Amendment to support laissez-faire capitalism and lay the legal foundation for the modern corporate state? 2) And are modern revisionists correct interpreting the Fuller Court decisions as a product of the Gilded Age and Progressive era?

2) THE FULLER SUPREME COURT

The Fuller Court tilted in favor of the emergent corporate state at the expense of labor. Although this statement is controversial especially without qualifications, given the totality of the body of cases decided by the Fuller Court over the span of twenty-two years, it nevertheless can be justified if we limit the domain of the Court's case considerations to four key groupings: 1) taxation, 2) monopoly/antitrust, 3) labor, and 4) American expansionism cases. The Court set in motion a body of law and a philosophy of corporatism. How did this happen? It happened because in America the Supreme Court functions more as a political body rather than as a legal body. By viewing the Supreme Court as a political body, we are better able to see the fragmentation of the American system of government.[2]

The Corporate State won the battle as to the future of the cultural, economic, and political system of the United States during the Gilded Age and Progressive Era.[3] And the Fuller Supreme Court helped usher it in. The political, economic, and legal battles that were waged over the structure and role of the corporation in America,[4] roughly between 1880-1910, resulted in a corporate victory over the people. The "partnership" form of business[5] prevalent prior to the Civil War was eclipsed by the corporate structure.

[2] Max Lerner, *The Supreme Court and American Capitalism*, *in* ESSAYS IN CONSTITUTIONAL LAW 107-144 (Robert G. McCloskey, ed., Vintage Books 1957) (1933) (a view of the Court as a political body).

[3] THE GILDED AGE (H.Wayne Morgan, ed., revised & enlarged edition, 1970); ALAN TACHTENBERG, THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE (25th anniversary ed., Hill and Wang, 2007); ARTHUR S. LINK & RICHARD L. MCCORMICK, PROGRESSIVISM (1983); JOHN WHITECLAY CHAMBERS II, THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1890-1920 (2nd ed. 1992); ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877-1920 (1967); GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY (1966); OLIVER ZUNZ, MAKING AMERICA CORPORATE 1870-1920 (1990); JACK BEATTY, THE AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA 1865-1900 (2007).

[4] ARTHUR SELWYN MILLER, THE SUPREME COURT AND AMERICAN CAPITALISM (1968).

[5] Although corporations existed prior to the Civil War in the United States, the nature, number, purpose, function, and size of these entities were transformed after the Civil War. *See,* Oscar

Today, we confront the "too big to fail"[6] corporation. The Fuller Court set the corporation free from the historical and traditional state sponsored moorings that anchored it to the political community.[7] The issues of corporate size[8] and free competition --- "bigness" [9] leading to the American empire[10] ---were major issues that confronted the Fuller Court during the Middle Republic.[11] War and industrialism[12] greased the wheels of the modern American corporate state.

The Fuller Court took the Due Process Clause of the Fourteenth Amendment[13] and transformed it into a "bulwark for laissez-faire capitalism."[14] How did it

Handlin, *The Development of the Corporation*, *in* THE CORPORATION: A THEOLOGICAL INQUIRY (Michael Novak & John W. Cooper, eds. 1981).

[6] The "too big to fail" corporation has its origins in the Progressive era and their efforts to bust up monopolies and trusts. WALTER ADAMS AND JAMES W. BROCK, THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY 26-27 (1986).

[7] CARL N. DEGLER, OUT OF OUR PAST: THE FORCES THAT SHAPED MODERN AMERICA 271 (3rd ed. 1984).

[8] ADAMS & BROCK, supra note 6, at 26; *See also*, THOMAS C. COCHRAN & WILLIAM MILLER, THE AGE OF ENTERPRISE: A SOCIAL HISTORY OF INDUSTRIAL AMERICA 181-210 (rev. ed. 1961) (*See, e.g.,* Chapter Nine, "The Rise of Finance Capitalism," the gist of it being consolidation and bigness is good for profits; competition and small business size is bad for profits.)

[9] ADAMS & BROCK, supra note 6. *See also*, WILLIAM APPLEMAN WILLIAMS, THE TRAGEDY OF AMERICAN DIPLOMACY 44 (New Ed. 1988) (The Bigness complex led to pressure for overseas markets, which led to a policy of imperialism. According to Williams, "The McKinley Administration knew that an important and growing segment of the business community wanted prompt and effective action in Cuba and Asia.")

[10] *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (the rights of grand jury indictment did not apply to the territories); *Dorr v. United States*, 195 U.S. 138 (1904) (Philippines case of trial without jury; the right to jury trial not applicable to the territories, a euphemism for colonies.); *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922) (Since Puerto Rico was not incorporated into the United States, the petitioner was not entitled to sixth amendment protection); (additional cases involving the territories decided by the Fuller Court, generally known as the *Insular Cases* are *Kepner v. United States*, 195 U.S. 100 (1904); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Huus v. New York & Porto Rico S.S. Co.,* 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *DeLima v. Bidwell*, 182 U.S. 1 (1901)). *See generally*, JACKSON LEAR, REBIRTH OF A NATION: THE MAKING OF MODERN AMERICA 1877-1920 (2009) and GABRIEL KOLKO, MAIN CURRENTS IN MODERN AMERICAN HISTORY (1984).

[11] I will use terms such as the Middle Republic to refer to the period in American history roughly from post-Civil War (1866) to Great Depression (1929-1940). I will also use term such as the "Lochner-era" to refer to a subset of this broader Middle Republic period. The Fuller Court is yet another subset of this period.

[12] NORMAN WARE, THE INDUSTRIAL WORKER 1840-1860: THE REACTION OF AMERICAN INDUSTRIAL SOCIETY TO THE ADVANCE OF THE INDUSTRIAL REVOLUTION (1964).

[13] The Fouteenth Amendment forbids the states of depriving any person of life, liberty, or property without due process of law. A similar provision is found in the Fifth Amendment with

accomplish this? It gave it a substantive economic interpretation.[15] It relied on the treatises of Cooley and Tiedeman[16] to help fortify the protection of property. Also, Justice Stephen Field[17] served as one of the key players on the Court defending property rights.

The Reconstruction Amendments opened the door for the Court to use the Due Process Clause as a policy instrument for an emerging Industrial America. The Court redirected the Fourteenth Amendment from helping the former slaves[18] to helping build the corporate state.[19] And, it became a given by the

restrictions that apply to the federal government. The Due Process Clause traces its origin to the Magna Carta. For additional research on the Fourteenth Amendment, *See*, CHESTER ANTIEAU, THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT (1981); MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988).

[14] MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 7 (1987); *See generally*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (2006) (a broader critique on the undemocratic nature of the Constitution).

[15] WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 116 (1988) ("Bradley's dissent in *Slaughterhouse* was more far-reaching. In a brief passage, he conjured up the doctrine of substantive due process out of the natural rights tradition…the transformation of the concept of property from tangible objects (e.g., land, wagons, horses) to intangible rights and expectations, such as the abstract right to sell one's labor or the expectation of profit. [P]rocedural due process enabled courts to oversee the rules by which trials were conducted. Substantive due process, on the other hand, protected property rights from legislative impairment.")

[16] JAMES W. ELY, THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER 1888-1910, at 63-64 (1995); *See also,* CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT (Union, N.J.: Law Exchange 2001) (1886); THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES (Union, N.J.: Lawbook Exchange 1998) (1868); James W. Ely, Jr., *Economic Due Process Revisited*, 44 VAND. L. REV. 213 (1991); Louise A. Halper, *Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L. J. 1249 (1990); *See generally*, GEORGE SKOURAS, TAKING LAW AND THE SUPREME COURT: JUDICIAL OVERSIGHT OF THE STATE'S ACQUISITION, USE, AND CONTROL OF PRIVATE PROPERTY (1998) (on the history of the police power and regulatory takings law).

[17] CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW (1930); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 JOURNAL OF AMERICAN HISTORY 970 (1975); HOWARD FURER, THE FULLER COURT 1888-1910 (1986). PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING AMERICAN LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE (1997).

[18] *Civil Rights Cases*, 109 U.S. 3 (1883) (Civil rights for blacks were ignored and economic rights for the emerging corporation were privileged); *See also, Plessy v. Ferguson*, 163 U.S. 537 (1896) (The Fourteenth Amendment does not prohibit private citizens from discriminating against blacks, with regard to hotel, theater, or railroad accommodations. The Court promulgated the

close of the Waite Court that corporations are "persons."[20] Corporations gained the same protections as persons under the Fourteenth Amendment, while African-Americans became less than a person.[21]

Further, the Fuller Court gutted the Wilson-Gorman Tariff Act of 1894 containing the income tax provision.[22] The history of the United States is a history of hostility towards taxation and suspicious of labor. It is a liberal ideology that privileges property owners at the expense of the poor and working class.[23] Property power and economic expansion served American *Manifest Destiny*---a doctrine of colonialism, conquest of Western territories first and later global territories.[24] The failure to sustain the income tax resulted in a very serious loss to public supervision of the emerging corporate state because the public agencies and structures that needed to be built to monitor and supervise the corporation were lacking. Since the government coffers were empty, the corporation was left free of government supervision and only the most perfunctory oversight could be supported given the general philosophy of

doctrine of "separate but equal" in the segregation of black America). For a comprehensive view of the Reconstruction period, *See generally*: ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 (1988).

[19] BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM THE MAGNA CARTA TO THE FOURTEENTH AMENDMENT (2001) (Siegan provides a historical background for the origins of modern property rights leading to the Fourteenth Amendment from a conservative perspective); *See also*, G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 86 (1976) ("[T]he Fourteenth Amendment gradually came to be used by the Court to bar state regulation of industrial enterprises. Implicit in this…were two collateral themes: a disinclination on the part of the Court to protect civil rights of blacks as it became more inclined to safeguard the property rights of entrepreneur[s].")

[20] *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 394 (1886), declare corporations are persons.

[21] WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 99 (1988) ("A narrow construction, such as was suggested by Miller in *Slaughterhouse,* would constrict the ability of the national government to protect blacks' rights, leaving the freedmen's future in the control of the Democratic, racist, ex-secessionist, ex-Confederate Redeemers who were then taking control of the southern state"); *See also*, *Slaughter-House Cases*, 83 U.S. 36 (1873).

[22] *Pollock v. Farmers' Loan and Trust Co.,* 158 U.S. 601 (1895) (Court held income tax to be unconstitutional).

[23] *Loewe v. Lawlor*, (*The Danbury Hatters' Case),* 208 U.S. 274 (1903)(Court decided that a labor boycott of D. E. Loewe & Company by the Hatters' Union was deemed a conspiracy in restraint of trade that violated the Sherman Antitrust Act and awarded threefold damages to the company.)

[24] H. W. BRANDS, THE RECKLESS DECADE: AMERICA IN THE 1890S (1995).

"limited" government. The federal and state efforts to control the corporation were inadequate.[25]

A fragmented state,[26] federalism and separation of powers, allowed the Fuller Court to combat so-called "class legislation" using the Due Process Clause. And to further consolidate property power it embedded the Due Process Clause in a philosophy of natural rights even though natural rights were not supposed to be the preferred method of legal analysis. According to Horwitz,[27] instrumental law eclipsed natural law prior to the Civil War, but it was nevertheless not discarded as a means of underpinning substantive economic due process. That is, the doctrine of natural law was not discarded during the Middle Republic, and it was used to bludgeon labor, taxation policy, and big government in the name of individualism.

The Fuller Court used the Due Process Clause to maintain "limited government" but not limited corporate power. It kept looking for answers in a fading rural America rather than a Corporate-Industrial America. What is clear

[25] Statutory efforts served as a threat but not much more with the passing of the Sherman Antitrust Act and Clayton Act. Some early success at regulatory control, *Munn v. Illinois*, (*The Granger Cases*), 94 U.S. 113 (1877), *Budd v. New York*, 143 U.S. 517 (1892), *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 502 (1910), *Swift and Co. v. United States*, 196 U.S. 375 (1905), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911) (state regulatory and federal monopoly cases showed the government meant business by actively using police power and the Sherman Antitrust Act). But eventually as the Due Process Clause gained economic substance, it became harder and harder to control corporations); *See generally*, VINCENT P. DE SANTIS, THE SHAPING OF MODERN AMERICA 1877-1920, at 12 (3rd ed. Harlan Davidson, Inc., 2000) (Chapter 1, "The Rise of Industrial America"---the role of the holding company in evading antitrust); *See also*, *supra* note 21 at 134-135 (Wiecek says, "Congress in the Clayton Act of 1913 had vaguely attempted to exempt organized labor from antitrust prosecutions by providing that labor was "not a commodity or article of commerce," and had flatly prohibited labor injunctions unless necessary "to prevent irreparable injury to property." The Court nullified these provisions in a series of cases that upheld use of the labor injunction to stop secondary boycotts (*Duplex Printing Press v. Deering*, 1921) and to halt picketing in a printing boycott (*American Steel Foundries v. Tri-City Central Trades Council*, 1921). For good measure, the Court also voided a state statute that prohibited injunctions against peaceful picketing (*Traux v. Corrigan*, 1921").

[26] STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920, at 27 (1982) ("Most notable in this regard was the way nineteenth century courts filled a governmental vacuum left by abortive experiments in the administrative promotion of economic development"); *See also*, Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, *in* AMERICAN SOCIETY AND POLITICS: INSTITUTIONAL, HISTORICAL, AND THEORETICAL PERSPECTIVES 90-111(Theda Skocpol & John L. Campbell, eds. 1995).

[27] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977).

is that the perpetuation of the idea of "limited government" serves and served the corporate interests perfectly. The less government, the more corporation.[28]

The Fuller Court bears an important responsibility for those deleterious conditions that were the result of industrialization. How so? The Justices believed that the private market and individual freedom would come together to rectify the excesses of industrialization. Consequently, the Court adopted laissez-faire approach that left America at the mercy of the emergent corporate state without any checks or controls as to its size, function, aims, and residues of its existence. Even the Court of the Franklin Delano Roosevelt era, the Hughes Court, was not able to break free of the large corporate structure that was set in motion during the Gilded Age and Progressive Era---giantism with regard to corporations.[29] The industrial corporation continued as before[30] and could not be dislodged as the key institution of modern society even under worst Depression conditions America had ever seen---that is how strongly the corporate structure embedded itself in American society during the Middle Republic.

The America of the small farmer and small shop owner came to an end after the Civil War. The Fuller Court was able to lay the groundwork during this gap in time, after the Civil War and the completion of the industrial transformation, to shape the law according to a form of economic liberalism that has marked

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[28] MORTON MINTZ & JERRY S. COHEN, AMERICA, INC.: WHO OWNS AND OPERATES THE UNITED STATES 21 (1971). ("Calvin Coolidge once told us that "the business of America is business." The fashion has been to judge this notion quaint. But the President is owed something better than condescension. He should be thanked for laying down an Orwellian stepping-stone to a perception of our true condition: Big Business *is* government.")

[29] CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 67 (2004) ("For Berle, corporate power was a serious threat to both democracy and economic growth. He believed that corporations had increasingly obtained the status of monopolies and did violence to the old idea of free and open competition"). *See also,* J. LEONARD BATES, THE UNITED STATES 1898-1928: PROGRESSIVISM AND A SOCIETY IN TRANSITION (1976). *See generally*, JACKSON LEARS, REBIRTH OF A NATION: THE MAKING OF MODERN AMERICA, 1877-1920 (2009) (Giantism also leads to imperialism as a regular feature of American foreign policy since the close of the 19th century). *See generally*, RICHARD SENNETT, THE CULTURE OF THE NEW CAPITALISM (2006); STEVEN J. DINER, A VERY DIFFERENT AGE: AMERICANS OF THE PROGRESSIVE ERA (1998) (Diner presents a cogent social history of the period).

[30] PAUL A. BARAN & PAUL M. SWEEZY, MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER (1968); *See also*, JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE (3rd ed., Houghton Mifflin Comp., 1978); IRA KATZNELSON & MARK KESSELMAN, THE POLITICS OF POWER: A CRITICAL INTRODUCTION TO AMERICAN GOVERNMENT 111 (1975) ("[A]nother advantage to investors was that the corporations could be used to reduce the risks of competition.")

the United States ever since. The Fuller Court was not ignorant of the fact that Jeffersonian and Jacksonian America was coming to an end. The question became, as various competitors emerged to supplant small town America---corporations and unions---as to which should serve as the proper inheritor of the Jeffersonian ideal. The Court deemed the working class, with only their labor power for sale, and their unions as neither comporting nor resembling the Jeffersonian model, and they found that the corporate model had a better fit to the Lockean and Marshall Court constitutional interpretation of property rights in America. In other words, the Court favored capital over labor because labor was a dangerous phenomenon. It was dangerous in the Justice's estimation because they could read about labor struggles in daily newspapers and also see a link between labor and socialism in Europe. Given the mental disposition of the Justices (all having been born pre-Civil War) and with their hands on the political power of judicial review, it should not take any stretch of the imagination (or leaps of faith) to infer that they would kill any legislation that had the remotest possibility of being dangerous to American values of freedom and liberty.

Although later Courts, such as the New Deal Court and Warren Court attempted to undo some of the laissez-faire doctrines supported by the Fuller Court, they have only partially succeeded. However, revisionists see the Fuller Court as a passing phase of American history with much of its agenda clipped by the New Deal and Warren Courts. And the revisionists believe the Court can maintain a separation between law and politics. The revisionists miss the fact that the Fuller Court was acting as a political body in the clothing of a legal body. Let us turn to the revisionists now.

3) REVIOSIONISTS OF THE FULLER COURT

Immediately after World War II, there emerged a group of scholars that wanted to revisit the Gilded Age and Progressive era. They came to be called consensus historians, Hartz, Hofstadter , and Boorstin[31] because they believed America was 'born liberal'[32] and free of the class conflict that crippled European

[31] LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955); RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1960), ANTI-INTELLECTUALISM IN AMERICAN LIFE (1962), SOCIAL DARWINISM IN AMERICAN THOUGHT (1955), THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT (Vintage Books, 1989) (1948) and THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON (1968); DANIEL BOORSTIN, THE GENIUS OF AMERICAN POLITICS (1953).

[32] S*ee generally*, L.T. HOBHOUSE, LIBERALISM (Oxford University Press, 1964) (a general analysis of the philosophy of liberalism); JOHN GRAY, LIBERALISM: ESSAYS IN POLITICAL PHILOSOPHY (1991); JOHN STUART MILL, ON LIBERTY AND OTHER WRITINGS (Cambridge University Press,

societies. Since America lacked a feudal past they argued, it lacked the class structure prevalent in Europe. These consensus historians attempted to recast the American past by stripping away slavery, violence, class conflict, imperialism, and native liquidations in order to present a clean history of American development. [33] The consensus historians were reacting to an earlier generation of Progressive historians---Beard, Parrington, Schlesinger, and Turner.[34] They believe these Progressive historians painted a picture of America with too many conflict scenes. And the Progressive movement [35] in general was mostly a middle class movement that wanted to ameliorate the impact of large industry on society.[36] The Progressives[37] did not want to dismantle corporations but rather to bring them under the control of government via regulation.[38] And because Beard[39] emphasized economic and class analysis, he became a favorite target of the consensus historians. Although these Progressives historians left gaps unexplained in the documentary

1989); ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969); LIBERALISM AND ITS CRITICS (Michael Sandel, ed. 1984); DAVID JOHNSTON, THE IDEA OF A LIBERAL THEORY: A CRITIQUE AND RECONSTRUCTION (1994) (for a modern defense of liberalism) and DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005).

[33] These historians believe in American exceptionalism. However, by emphasizing a "clean" history, they overlooked the animal side of the human being. Figures such as Darwin, Marx, and Freud had the insight that animality is at the core of our species. The primal drives that move the human animal are not "conscious" or "rational" forces but instinctual drives and the unconscious. *See,* DAVID RIESMAN, INDIVIDUALISM RECONSIDERED 206-245 (1954) (in particular see the chapter on: "Authority and Liberty in the Structure of Freud's Thought"); *See generally*, SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (W.W. Norton & Comp., 1989) (1930).

[34] CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (The Free Press, 1986) (1913). V. L. PARRINGTON, MAIN CURRENTS OF AMERICAN THOUGHT (University of Oklahoma Press, 1987) (1927). FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY (The University of Michigan Press, 2006) (1893). ARTHUR M. SCHLESINGER, SR., THE NEW VIEWPOINTS IN AMERICAN HISTORY (1922).

[35] In general Progressive activists and intellectuals were from a middle class background and were interested in reform rather than revolution.

[36] One of the early Progressives Herbert Croly accused the Fuller Court of usurping the policy-making role of the legislature through their interpretation of the Due Process Clause; *See,* HERBERT CROLY, PROGRESSIVE DEMOCRACY (Oxford University Press, 1961) (1915).

[37] SIDNEY FINE, LAISSEZ FAIRE AND THE GENERAL WELFARE: A STUDY OF CONFLICT IN AMERICAN THOUGHT 1865-1901 (1964) (in particular, his chapter on "Laissez Faire Becomes the Law of the Land," at 126-164); *See generally*, CLARENCE B. CARSON, THE GROWTH OF AMERICA 1878-1928 (1985) (for a more conservative/libertarian reading of the Gilded Age and Progressive Era period).

[38] GABRIEL KOLKO, TRIUMPH OF CONSERVATISM (1977).

[39] CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES; *see also,* RAYMOND SEIDELMAN, DISENCHANTED REALISTS: POLITICAL SCIENCE AND THE AMERICAN CRISIS 1884-1984, at 60-100 (1985) (Chapter Three, "Science as Muckraking: The Cult of Realism in the Progressive Era").

evidence[40] or were later found to have been mistaken on one point or another, nevertheless, they attempted to note the role of economics in the establishment of political structures.

Since many people of the 1950s were uncomfortable with the use of class[41] analysis, it was helpful for these consensus historians to find in American society evidence of non-class based institutions. It was important to find institutions that reflected American freedom rather than economic exploitation, slavery, and other less democratic features of American history. By looking at the reportage of the muckrakers,[42] during the industrialization of America, one can see a tooth and claw economic doctrine in action--- that left millions of American exposed to waste, filth, dangerous working conditions, low pay, violence, segregation, etc. The consensus historians took note of this unfortunate state of affairs during critical points in American history, but they felt it should not color the whole of American history. They were sure that there existed pockets of history that illustrate the positive aspects of American freedom.

The liberal vision of America as presented by the 1950s consensus historians started to be questioned in 1960s and 1970s by an emerging ideological school

[40] ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION" (1956). FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958). MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789 (1950) (attempted to preserve the Progressive understanding of the Revolutionary era when its premises were being attacked).

[41] SAMUEL P. HAYS, THE RESPONSE TO INDUSTRIALISM 1885-1914, at 37 (1957) ("The stark reality of social conflict deeply stunned Americans who had cherished the view that class divisions did not exist in their country"); *See also*, NORMAN POLLACK, THE POPULIST RESPONSE TO INDUSTRIAL AMERICA (1966); John WHITECLAY CHAMBERS II, THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA 1890-1920 (1992); *See also*, JACK BEATTY, THE TRIUMPH OF MONEY IN AMERICA 1865-1900, at 200 (Beatty says: "In "The Owners of the United States," a writer in the *Forum*, extrapolating from the 1880 census, figured that 25,000 people owned half the wealth and 250,000, 75 to 80 percent of it. "Who owns the United States?" he asked. "The USA is practically owned by less than 250,000 persons." Using the 1890 census, a contributor to POLITICAL SCIENCE QUARTERLY calculating "The Concentration of Wealth" found that "4,047 families possess as much as do 11,593,887 families." "This result," he wrote, "seems almost incredible"").

[42] Here are some of the Muckrakers of the period: LINCOLN STEFFANS, THE SHAME OF THE CITIES (1904). UPTON SINCLAIR, THE JUNGLE (Penguin Classics, 1985). JACOB RIIS, HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK (1906). IDA TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY (Dover Publications, 2003).

of historians (Bailyn, Wood, and Pocock).[43] This school believes Hartz over-emphasizes liberalism. The ideological historians believe liberal consensus historians neglect the "republican"[44] aspect of American development. And they saw the New Deal case law[45] serving as a corrective to excessive economic liberty.

The 1990s generation of revisionists, Bruce Ackerman, James W. Ely, Jr., and Howard Gillman, is making another attempt to free the Fuller Court from the grip of Progressivism. During the 1990s these three prominent scholars sought to revise the Progressive interpretation of the Fuller Court. They represent three schools of thought: 1) Neo-Federalism (liberal republicanism, dualist) School---Ackerman, 2) Classic-liberal conservative School---Ely, and 3) Neo-Institutionalist School---Gillman. They object to the Legal Realist[46] and Progressive interpretation of the Court and post hoc attacks on its formalist jurisprudence. They feel that the formalist jurisprudence used by the Fuller Court was fully consistent with the spirit of the age. Be it electoral primacy (Ackerman), natural rights (Ely), or institutional constraints (Gillman), I hope to show that these revisionists are mistaken in treating the Court as a legal body rather than a political body. They want to re-contextualize the Fuller Court as being in the flow and spirit of the age. However, looking at the matter from a Critical Legal Studies School perspective, the Court was not interpreting law but making law. The Critical School of thought, borrows an important element from the Realists,[47] which suggests that law is politics by other means.

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[43]GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1797 (1969); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: THE FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975).

[44] Republicanism as in small "r" Jeffersonian or Machiavellian variation of republicanism, not the modern Republican Party sense.

[45]Cases that helped curtail the Gilded Age and Progressive era Court's rulings: *Home Building & Loan Association v. Blaisdell*, 280 U.S. 398 (1934); *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Company v. Parrish*, 300 U.S. 379 (1937); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. F. W. Darby Lumber Company*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942).

[46] In short, Legal Realism is a legal philosophy that challenges the view that law is an autonomous and independent practice free from the personal views of judges. It challenges the view that judges can be objective and free from personal, political, social, economic, and cultural beliefs and can objectively judge laws and rules free from these human influences.

[47] *E.g.,* Realisms was not a unified philosophy and involved many variations. Here are some of the Legal Realists: Oliver Wendell Holmes, Roscoe Pound, Jerome Frank, Karl Llewellyn, Robert Hale, Felix Cohen, Louis Brandeis, Benjamin Cardozo, Felix Frankfurter, William O. Douglas, etc.

Further, the revisionists are mistaken in viewing America from the prism of liberal democracy. And although these revisionists recognize that America is not a class free country, they seem to circumscribe economic primacy as a key component of class structure. It has been taken for granted that America is an open society with fluid class structure. There are no fixed classes in America. However true this assertion seems to be, it should not be taken as unqualifiedly true. The philosophy of individualism, along with the consolidation of corporate power, has closed off the upward movement for the majority of Americans from the start of American history.

Given the Progressive interpretation of viewing the Fuller Court as pro-business and anti-labor, pro-capital power and limited government, can these revisionists explain the Court's behavior?

a) <u>The Neo-Federalist (liberal republican, dualist) synthesis School---Bruce Ackerman</u>

Ackerman represents a School of neo-federalism, liberal republicanism[48] that attempts to synthesize liberalism and republicanism, Locke and Machiavelli---he

[48] BRUCE ACKERMAN, 1WE THE PEOPLE: FOUNDATIONS (1991) and 2WE THE PEOPLE: TRANSFORMATIONS (1998); Ackerman drawing support for his Neofederalism thesis in: THE FEDERALIST PAPERS; GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1797 (1969); EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988); HANNAH ARENDT, ON REVOLUTION (1963); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: THE FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); Frank Michelman, *Law's Republic*, 97 YALE L.J 1493 (1988); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J 1539 (1988) and THE PARTIAL CONSTITUTION (1993); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995); critics of Ackerman work include: Michael Les Benedict, *History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution*, 108 YALE L.J 2011 (1999) and *Laissez-faire and Liberty: A Reevaluation of the Meaning and Origin of Laissez-Faire Constitutionalism*, 3 LAW & HISTORY REV. 243-331 (1985); Miriam Galston and William A. Galston. *Reason, Consent, and the U.S. Constitution: Bruce Ackerman's "We the People",* 104 ETHICS 446 (1994); Thomas Landry, *Ackermania!: Who Are We the People?*, 47 U. MIAMI L. REV. 267 (1992); William Fisher, *The Defects of Dualism*, U. CHI. L. REV. 955 (1992); Michael Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992); Eben Moglen, *The Incomplete Burkean: Bruce Ackerman's Foundation for Constitutional History*, 5 YALE J.L. & HUMAN. 531 (1993); Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111 (2003); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 82 GEO. MASON L. REV. 1 (2003); other scholars questioning the neo-federalist approach: Ahkil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657 (1997), *The Bill of Rights as a Constitution*, 100 YALE L.J.

attempts in his revisionism to synthesize the liberal and republican schools of thought to produce a neo-federalism (dualist democracy). He views the Fuller Court as following the election returns. According to him, the repudiation of laissez-faire doctrine was not prevalent until the New Deal.[49] So it is not fair to blame the Fuller Court for endorsing laissez-faire policies.

Clearly, Ackerman, wedded to the rule of law, misses asking the broader question: whose law? Working within the system leads Ackerman to be captivated and captured by the period he seeks to analyze. Ackerman explains the period thus:

> To the contrary: the Justices had just lived through the failed Populist effort to mobilize the American people against the evils of laissez-faire capitalism---a movement that climaxed with the nomination of William Jennings Bryan as the Democratic candidate for the Presidency in 1896. Rather than leading to a Rooseveltian transformation, Bryan's nomination served only to catalyze a decisive popular counterreaction on behalf of William McKinley and the Republican Party.[50]

What he is trying to say is this: the role of property in American society was settled by the 1896 election. The People elected a President that favored business and property over the Populist and Progressive agenda of farmers and workers. So there was nothing unusual about the Court's treatment of labor in general and the Lochner[51] decision in particular. It simply affirmed the right to

1131 (1991) and THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (2000); OWEN FISS, TROUBLED BEGINNING OF THE MODERN STATE 1888-1910 (1993); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT (2006); other scholars using critical and realist analysis challenging the revisionists:WILLIAM EDWARD LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1996); LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996); MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW (1979); CHRISTOPHER TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993).

[49] Ackerman, WE THE PEOPLE: FOUNDATIONS at 100: ("If, then, something was fundamentally wrong with *Lochner*, it has to do with the particular way middle republican courts conceptualized the nature of fundamental rights. It is here, however, where anachronism distorts modern vision in condemning the middle republic's emphasis on private property and freedom of contract. Given the popular repudiation of laissez-faire during the New Deal, it is no longer right for modern courts to interpret constitutional liberty in free market terms. But before the 1930's, things looked very different. Even during the early republic, the courts had marked out contract as a domain of freedom peculiarly appropriate for national protection.")

[50] Ackerman, WE THE PEOPLE: FOUNDATIONS at 101.

[51] *Lochner v. New York*, 198 U.S. 45 (1905) (The Court upheld the freedom of contract doctrine, that the State had no business interfering in privately agreed to contracts); *See also*, PAUL KENS,

contract without government intervention. So those later generations of intellectuals that want to condemn the Lochner-era are mistaken because the People spoke, and they decisively chose McKinley over Bryan.

What is missing here is the critical element that leaves a number of questions and gaps in the literature as to why the Supreme Court was justified in reading the Fourteenth Amendment as pro-business and anti-labor provision based on election returns. Who is 'We the People' that Ackerman has in mind?[52] Does it matter even if 'we are people' capable of empowering such a system? Could patronage interfere with the goals of 'we the people'? Does it matter whether giant corporation are able to displacing these laws if these laws do not suit their interests? Does the existence of a Spoils System[53] matter as far as elections and the electorate is concerned? Ackerman seems to set these questions aside in favor of the big question: was an election held and who was the victor in that election?

The Fuller Court according to Ackerman's dualist constitutional model must reconcile two different historical periods. It must reconcile the Founder's Constitution with a post-Civil War Constitution. However, this view is not plausible because the Fuller Court used the Due Process Clause, not to reconcile the Founding and Reconstruction, but to privilege the Justice's values, preferences, and politics. What the People wanted was beside the point. Rather than embody the values of the American people based on election results, the Fuller Court used the Due Process Clause to privilege those values that were embedded in the Lockean philosophy of property. Ackerman simply accepts the idea that election returns reflect the will of the American people. The Critical Legal Studies School[54] and Legal Realism question whether the

LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL (1998); *See also,* G. EDWARD WHITE, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 BROOK. L. REV. 87 (1997); *See generally*, MICHAEL E. TIGAR & MADELEINE R. LEVY, LAW & THE RISE OF CAPITALISM (1977).

52 Robert D. Marcus, *The Business of Politics: National Party Structure in the Gilded Age*, *in* READINGS IN AMERICAN POLITICAL HISTORY 260-276 (Frank Otto Gatell, Paul Goodman, & Allen Weinstein, eds. 1972) (politicians of both parties did all they could to align themselves with the new elite industrialists.)

53 ALLAN NEVINS, THE EMERGENCE OF MODERN AMERICA 1865-1878, at 178-202 (1927) (see his descriptions of the spoils system and corruption in Chapter VII, "The Moral Collapse in Government and Business").

54 THE POLITICS OF LAW (David Kairys, ed., 3rd ed. 1998); *See, in* THE POLITICS OF LAW the following works: Elizabeth Mensch, "The History of Mainstream Legal Thought"; Joseph William Singer, "Property"; Morton J. Horwitz, "The Rise and Early Progressive Critique of Objective Causation" ;William H. Simon, "Contract versus Politics in Corporation Doctrine"; Karl Klare, "Critical Theory and Labor Relations Law," and Robert Gordon, "Some Critical

type of synthesis (between voters and law) Ackerman seeks to deploy, and it might be seen as more of a strategy to split the electorate or divide the electorate than serve to reflect the common interests of the electorate in challenging the corporation. Critical legal realism sees problems of indeterminacy, objectivity, and fairness baked into the existing liberal-democratic model in representing the common interests of workers and the general electorate. Elections in America are more geared to divide and conquer the electorate rather than reflect its common interests. The Corporate state likes to use a philosophy of individualism as a smoke screen to hide corporate interests in a divided and fragmented American political structure.

The problem with Ackerman's neo-federalism school is that the separation of powers, power of judicial review, and federalism are not consistent with democracy. Ackerman wants to square the Constitution with democratic values. And he knows that the Founders put provisions into the Constitution as deterrence to democracy. As to the political power of judicial review, this power is nowhere to be found in the Constitution and was simply claimed by the Supreme Court. But even if such a power should be placed in the Constitution, should nine individuals be able to determine policy for 300 million Americans? Unfortunately, Ackerman does not see it that way. For him, the Fuller Court took the Due Process Clause of the Fourteenth Amendment and applied it on behalf of property interests because the Court was acting consistently with the electoral results of the 1896 elections. Ackerman is a democrat first and a rights foundationalist second.

Further, Ackerman also downplays the role of Legal Realism in the American legal system. He wants to synthesize the realists approach with his own constructivist approach to reach post-realist interpretivism. Ackerman has little to say about higher lawmaking or natural law as a source of constitutional rights or values. Nor does natural law play a role in American's history, according to Ackerman, because it does not fit his model of dualist constitutionalism.

The protection of democracy was not an issue with these Courts. Democracy was mostly despised by the Founders and the term did not gain good currency

Theories of Law and their Critics"; *See also*, Mark Tushnet, *Critical Legal Studies: An Introduction to Its Origin and Underpinnings*, 36 J. LEGAL EDUC. 505 (1983); Robert Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 57 (1984); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977). Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

until fairly late in the nineteenth century. Consequently modern theorists such as Ackerman, who defend the actions of these Courts, on democratic principles are in fact defending a mythology of democracy.

b) The Classical-Liberal Conservative School---James W. Ely, Jr.

Ely, and other members of the Lockean school,[55] find that laissez-faire[56] capitalism was an accepted philosophy of the Gilded Age. And natural law served as a foundational doctrine for the capitalist market. By anchoring the Due Process Clause in natural law, the justices were able to remove it from democratic demands.

Ely represents a school of classic-liberal conservatism. He points out that the Fuller Court provided continuity and stability to the nation. By appealing to natural law, the justices could remove property from the threat of legislative confiscation.[57] Ely puts it this way: "Evidently influenced by natural law

[55] JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992), THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER 1888-1910 (1995), *Property Rights and Democracy in the American Constitutional Order*, *in* THE JUDICIAL BRANCH (Kermit L. Hall & Kevin T. McGuire, eds. 2005) and *Economic Due Process Revisited*, VAND. L. REV. 213 (1991); FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958); Randy E, Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111 (2003); BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM THE MAGNA CARTA TO THE FOURTEENTH AMENDMENT (2001); Miriam Galston and William Galson, Reason, *Consent, and the U.S. Constitution: Bruce Ackerman's "We the People"*, 104 ETHICS 446 (1994) (Galston's are rights foundationalists first); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism 1863-1897*, 61 JOURNAL OF AMERICAN HISTORY 970 (1975) and *American Law and the Marketing Structure of the Large Corporation 1875-1890*, 38 JOURNAL OF ECONOMIC HISTORY 631 (1978); Paul Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64-79 (October 1963); Alan Jones, *Thomas M. Cooley and the Interstate Commerce Commission: Continuity and Change in the Doctrine of Equal Rights*, 8 POLITICAL SCIENCE QUARTERLY 602-627 (1966) and *Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration,* JOURNAL OF AMERICAN HISTORY 752-771 (1967); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE LAW OF EMINENT DOMAIN (1985) and BARGAINING WITH THE STATE (1993); RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989) and GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2nd ed., 1997).

[56] Ely, GUARDIAN OF EVERY OTHER RIGHT at 88 ("Because judges are influenced by social forces and intellectual currents in general society, the principles of laissez-faire constitutionalism gained currency among Supreme Court justices in the 1880s.")

[57] EDWARD CORWIN, THE "HIGHER LAW" BACKGROUND TO AMERICAN CONSTITUTIONAL LAW (Cornell University Press, 1928) (First printed as Harvard Law Review Article, Edward S. Corwin, *The "Higher*Law" Background of American Constitutional Law, 62 HARV. L. REV. 149 (1928)) ; see also, the liberal defense of property on natural law grounds, JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Laslett ed., 3rd ed., Cambridge University Press, 1988) and

theory, Fuller concluded that private property existed before the creation of political authority and that a principal purpose of government was to protect property rights. He identified property ownership with the preservation of individual liberty."[58] Ely also points out the Court's hostility towards labor.[59] However, the use of natural law and personal antipathy by the Justices towards labor shows the complex dynamic between finding the law and making it. The Fuller Court feared labor and acted accordingly. The association of labor with socialism, given its European context, frightened the Justices into crippling pro-labor legislation. Also Debs and other labor activists were doubly disadvantaged: not only did they confront hostile corporate interests but a judiciary stacked up against them.

Of course the workers and farmers did not go quietly and without struggle. The transformation of America from a society based on rural living to a society of city dwellers and the transformation of farmers into manufacture laborers were not the conditions conducive to a peaceful transformation. Attempts to cloth the new system with old language---the language of democracy, of individualism, of freedom of contract, of work ethics, etc.---ceased to exist under the emergence of the Industrial Revolution. Old beliefs were being applied to changed structural conditions. The Supreme Court was not ignorant of the intellectual, political, and economic debates taking place in businesses, parlors, homes, and streets.[60]

The American response to Industrialism appears to have been the most conservative as compared with the response of the Europeans. One reason as

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Boston: Beacon Press, 1962).

[58] Ely, THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, p. 32; *see also*, WILLARD L. KING, MELVILLE W. FULLER: CHIEF JUSTICE OF THE UNITED STATES, 1888-1910 (1950) and HOWARD FURER, THE FULLER COURT, 1888-1910 (1986).

[59] Ely, THE JUSTICESHIP OF MELVILLE W. FULLER at 102 ("Liberty of contract was invoked in *Adair* to invalidate legislation supportive of labor organizations. Since this was one of a handful of cases in which the Fuller Court applied the liberty of contract principle, it is hard to escape the conclusion that Fuller and his colleagues were uneasy with a growing labor movement. This judicial skepticism readily matched the reluctance of society at large to accept labor unions. It is revealing that Justice Harlan, who had previously been deferential to legislative judgment, wrote the majority opinion. As Loren P. Beth has observed, "Harlan was…a child of his times in many ways; for example, he shared to some degree the rest of the Court's marked antipathy to the rise of organized labor." The *Adair* ruling provoked outrage among supporters of unions and contributed to the anti-labor image of the Fuller Court"); *see also*, *Adair v. United States*, 208 U.S. 161 (1908).

[60] RAY GINGER, AGE OF EXCESS: THE UNITED STATES FROM 1877-1914 (2nd ed. 1975) (Ginger presents a broad picture and social history of the period).

to why this was the case--- given that Europe had more embedded conservative institutions than the New World--- might be this: the fragmentation of American society via racial, ethnic, religion, language, unbounded immigration, and flood of entering immigrants from Eastern and Southern European countries that were mostly of peasant stock, uneducated, poverty stricken, etc. served as a hedge to unifying labor and defusing the need to establish an American Labor Party that could effectively challenge the Bigness of the new Corporation at the dawn of the Industrial Era. "In Europe industrialization uprooted the peasants from the land and brought them to the cities, where they became revolutionary workers. But the uprooted European peasants who settled in American cities remained conservative. In America the farmers who stayed on the land played the role of European workers as a major force challenging industrial capitalism."[61] That is, the continuous flow of immigrants at the dawn of industrialization was able to fragment labor and prevent or blunt the radicalization of the worker. The corporations were able to take advantage of the situation, in further dividing and fragmenting the American populace; so that Labor lacked common interest and ability to coordinate and react to the consolidation of corporate power.

Ely's revisionist defense seems to be that if society at large could not stomach labor unions, could the Court do no other? Like Ackerman, Ely accepts the proposition that the Court was a part of a culture that valued property above all else and could do no other. However, unlike Ackerman, Ely seems to recognize that the Court did start to feel some unease with its property over labor principles.

What are the limitations of Ely's approach and the Lockean School of thought? This School is wedded to the idea that because the Fuller Court viewed property as a precondition to liberty, it was justified in making that equation. That is, Ely and others of the classical liberal school assume Fuller's taming of the Due Process Clause to comport with Lockean philosophy was justified. They share a philosophy of limited government, individualism, free markets, and strong protection of property. Natural law may have served a function in pre-Copernicun times or in Medieval theology, but its continued use could only serve establishment and property interests. The Fuller Court was not unaware that the use of natural law was no longer free of controversy. And the Progressives aptly pegged the Fuller Court for what it was---a stalwart of business and an impediment to labor.

[61] MICHAEL PAUL ROGIN, THE INTELLECTUALS AND MCCARTHY at 187.

c) **The Neo-Institutionalist School---Howard Gillman**

Gillman, and others of the neo-institutionalist school,[62] points out that the Fuller court was not hostile to property regulation per se but to invalid "class" legislation.[63] Gillman attempts to show the Fuller Court jurisprudence as a continuation of rational and consistent doctrine. The Justices were justified to protect property because they worked within the parameters of the Supreme Court's traditions. It is not the case according to Gillman that the Justices had some personal aim to hurt labor and help business. In other words, the Justices were not voting their preferences or policies, but were institutionally constrained by legal tradition and Supreme Court rules.

And Gillman believes that the Realist interpretation does not take full account of the institutional constraints confronting the Justices. Gillman tells us that his method of analysis is:

> In what might be considered a return to what is sometimes derisively referred to as a "traditional" or "prerealist" analysis of judicial politics---more generously referred to as "postbehavioralist" analysis---this study rests primarily on an interpretation of legal texts and related materials in order to demonstrate how federal and state judges shared a common method of evaluating exercises of police powers, and how their decisions were supported by arguments that represented something more than rationalizations of idiosyncratic policy preferences and something different from an ideological commitment to laissez-faire economics or social Darwinism.[64]

In other words, politics, policy, and the personal preferences of the Justices are inadequate to explain court behavior.

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[62] HOWARD GILLMAN, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence *(*1993) and THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell Clayton, eds. 1999); SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACH (Cornell W. Clayton & Howard Gillman, eds. 1999); *See also*, Mark Graber, *The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Judicial Power*, 12 CONST. COMMENT 67 (1995); [for older generation of Institutionalists, *See*, Edward S. Corwin, *The Constitution as Instrument and Symbol*, 30 AM. POL. SCI. REV. 1071 (1936); CHARLES GROVES HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1853 (1944); ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT (1960)].

[63] Gillman, THE CONSTITUTION BESIEGED at 10; *see also*, *Lochner v. New York*, 198 U.S. 45 (1908).

[64] Gillman, THE CONSTITUTION BESIEGED at 12.

Gillman presents a cogent understanding of post-Civil War America and the transformation that was taking place.[65] Yet he believes the Court was not carving out property for special protection from the onslaught of labor, socialists, progressives, populists, and other disgruntled agitators hammering on the walls of liberalism. Gillman tells us the Court was constitutionally obligated to protect property, as it would any other right. The Justices were not amenable to legislation that provided special favors to labor. They saw any special privilege of labor as sign of class legislation and the fear of class warfare.

The limitations of the Gillman's approach, and the neo-institutionalist school, is that it attempts to negate the Legal Realist approach, under the belief that institutional constraints prevent judges from writing their political and policy preferences into the law. The Legal Realists acknowledge the role institutional constraints play in judicial decision-making. But realists carve out a role for politics, personal preferences, and legal innovation that justices and judges utilize in making their decisions. Court rules, norms, and precedent are only partly controlling in judicial decision making. This work acknowledges the role of institutions providing boundaries, but those boundaries are porous and not fixed. Institutional boundaries can constrain personal action, but cannot negate it. Boundaries, institutional constraints, restriction of judicial preferences by group dynamics, norms, etc. are biased toward establishment values. Just because they reflect establishment norms, does not mean that these boundaries are rightly drawn. Also as noted earlier, Critical Legal Studies, taking up some of the doctrines of the Legal Realists, does not separate law from politics.

4) **CONCLUSIONS**

The Fuller Court set the nation on a path toward the corporatization of the American society. It was using political power disguised as legal power to do this. It used a metaphysic of natural law and the Fourteenth Amendment to accomplish this transformation of the legal system. It was partial toward

[65] Gillman, THE CONSTITUTION BESIEGED at 63. ("The unprecedented frequency of depressions dried up the source of wages for millions of people and made commercial competition more cutthroat. By the 1880s the protracted postwar deflationary crisis had resulted in a record rate of business failures and a further consolidation of large-scale enterprise. In all, the last quarter of the nineteenth century witnessed changes that crushed the Lockean state of nature that had inspired many of America's founders and replaced it with a Darwinian social order in which dependence rather than independence was becoming the more common social experience, manifesting most pointedly in a "chronic conflict between employers over the costs of production;" that is, in widespread and violent class conflict.")

corporate power and averse to labor power. The Court supervision of labor curtailed labor leadership from operating freely in organizing workers and used antitrust tools and the Reconstruction's Fourteenth Amendment to block labor. The use of the labor injunction became one of an arsenal of weapons used to block or curtail labor union activity.

The use of laissez-faire doctrine supported a minimalist state and the maximization of the corporate state. The fragmentation of government during this period led to the easy consolidation of power away from government and agencies and into the hands of the private sector. The Court gave its blessing to this new emergent structure called the corporation. It used its political power to insert its view of taxation at the expense of the legislative and executive branches. It further used its power to protect and support the corporation by attempting to minimize any damage the Sherman Act might do in the consolidation of capital. As the American frontier started to come to a close and the United States sought empire status, comparable to the other European powers, the Court followed the flag in the opening of foreign markets to United States trade.

Those closest to the ground, the Progressives and Populists attempted to describe the Fuller Court as a bastion for pro-business protections. However, later generations of theorists and scholars disputed the objectivity and fairness of the Progressive characterization of the Fuller Court. Ackerman, Ely, and Gillman sought to contextualize the decisions of the Fuller Court in accord with the spirit of the times and correct the Progressive class conflict or suggestion that the Court acted out of turn towards the most vulnerable people in American society. These scholars operating within the traditional liberal-democratic paradigm assume a frame of reference for the Court's decisions based on electoral returns, natural law principles, and institutional constraints.

As we can see in the aftermath of the Great Crash of 2008, we can turn our gaze back to the Gilded Age and Progressive era in searching for the legal tools used by the Fuller Supreme Court in building the Corporate state in America. This has lead to an asymmetrical power between the Corporation and the formal political structure. This asymmetry in power has worked beautifully for a small portion of the population, but it has left the vast majority of Americans hanging on the myth of judicial neutrality.

The answers to the questions posed are clearly that the Fuller Court was not justified in using the Fourteenth Amendment to build and defend laissez-faire capitalism and legitimize the corporate structure. The revisionist scholars were

too hasty in their analysis of the Fuller Court. The Progressives were correct in pegging the Fuller Court as deleterious to labor, tax averse, pro-capital consolidation, and accommodation of overseas adventures as a matter of politics rather than law. The Fuller Court helped to legitimize the corporation by unhinging it from its state sponsored origins and set it free, and mostly unaccountable, onto the American public.