Reconstruction toward Industry

Intent vs. Application

In 1976, writing in a then widely used American constitutional history textbook, the late Professor Alfred H. Kelly declared: "The Reconstruction era closed with state-federal relations on much the same plane as they had occupied before 1860…. There was now a federal guarantee against any state's impairing the right to vote because of race, color, or previous condition of servitude, a guarantee which […] meant little in actual practice…. The Union remained essentially the same [as it had been before the Civil War]…. In 1876 something like a constitutional revolution was in the making, but it had comparatively little to do with the great issues of the Reconstruction period. It was associated, rather, with the remarkable industrial revolution under way in the North. It was to be in part based upon judicial interpretation of the Fourteenth Amendment, but it had little to do with the original intent of that Amendment or with the constitutional controversies of […] Reconstruction." On the basis of what you know about American legal and constitutional history during the period 1860-1917, to what extent would you agree with Professor Kelly? Why?

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History 151

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The Reconstruction Era was a period during which a nation torn by war was rebuilt. It was not only a time of reconstructing homes and families frayed by the brutalities of war, but it was also an age of restructuring the state and federal governments. The most significant changes were those found in the Reconstruction 13th, 14th, and 15th Amendments, which contained two declarations. First, the laws intended to bring about a revolution "securing […] full civil rights for former slaves in order to make them equal citizens of the Republic."[1] Second, they asserted federal jurisdiction over the states, making legislation of Congress "paramount."[2] Though these admissions embodied their intent, the application of the laws was not as anticipated. Judicial interpretation focused less on the civil rights issue and more on the significance of federal and state relations. Although the civil rights intent was unsuccessful in application, the jurisdictional implication laid a new foundation of federal supremacy whereupon the United States acted as it moved from the Reconstruction era toward the Industrial Revolution.

In writing that "the Reconstruction era closed with state-federal relations on much the same plane as they had occupied before 1860," Professor Alfred H. Kelly implied that in the years 1860 to 1876, there had been no significant changes. He was correct in that the "federal guarantee against any state's impairing the right to vote because of race, color, or previous condition of servitude […] meant little in actual practice," but he was incorrect in regards to "state-federal relations." Within the Reconstruction Amendments, Congress was given "power to enforce […] by appropriate legislation" the articles preventing the states from "mak[ing] or enforc[ing] any law which shall abridge the privileges or immunities of the citizens of the United States, […] or depriv[ing] any person of life, liberty, or property, without due process of law."[3] Using this "new source of power, […] Congress passed a

series of Civil Rights statutes and authorized lower federal courts to enforce the provisions."[4] Although these statutes did not always succeed in their intent, the authorizing of lower federal courts was only the beginning toward a stronger federal presence.

The Civil Rights Act of 1875 is one of these statutes, when "Congress tried to secure by law some semblance of racial equality that could be protected by the government and the courts."[5] It failed to do so when the *Civil Rights Cases* were decided in 1883, in that the Supreme Court placed "private discrimination beyond the reach of legislation" stating "in the absence of positive state action, Congress could not initiate legislation."[6] This "state action doctrine" had been used in 1875 in the case of *United States v. Cruikshank*. Although the Supreme Court decision in *Cruikshank* did nothing in helping the freedmen, the fact that state action or inaction was under federal jurisdiction was extremely significant. Furthermore, in conjunction with *United States v. Reese* (1875), the *Cruikshank* decision pointed out that the 15th Amendment did not give the right to vote, but that it prevented the states from denying a person the right to vote based on "race, color, or previous condition of servitude."[7] The argument in *Cruikshank* was that "it [did] not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race."[8]

With the idea that laws could prevent former slaves from voting through restrictions other than race, various states looked for ways to separate the whites from the blacks. These segregation laws were found Constitutional in cases such as *Louisville, New Orleans & Texas Railway v. Mississippi* (1890) and, perhaps a more commonly known case, *Plessy v. Ferguson* (1896). States throughout the South found ways of passing Jim Crow laws, "the legal and systematic segregation of the races,"[9] which were upheld in cases like *Berea*

College v. Kentucky (1908) where blacks were segregated from whites in private schools. Finally, "poll taxes and literacy tests effectively deprived the vast majority of blacks of the right to vote,"[10] and, indeed, "a federal guarantee against any state's impairing the right to vote […] meant [very] little in actual practice."

In regards to "state-federal relations," Professor Kelly was incorrect in insinuating no change had taken place during Reconstruction. He touched upon the answer of how changes had taken place when he stated "in 1876 something like a constitutional revolution was in the making, but it had comparatively little to do with the great issues of the Reconstruction period. It was associated, rather, with the remarkable industrial revolution under way in the North." The failure of the Constitutional revolution that he alluded to was shown in the cases cited above, where civil rights legislation was ultimately unsuccessful. Although the intention of extending civil rights had failed, state-federal relations were drastically altered after the Civil War. Justice Harry A. Blackmun once observed, "taken collectively, the Reconstruction Amendments, the Civil Rights Acts, and these new jurisdictional statutes, […] marked a revolutionary shift in the relationship among individuals, the States, and the Federal Government."[11] This shift of power from state to federal jurisdiction laid the foundation whereupon rulings during and after Reconstruction were based.

Immediately following the Civil War, one of the most influential areas in which federal jurisdiction was enlarged was in the judiciary branch. The process of "[removal] permitted many cases that had been begun in state courts to be taken out of them and tried in federal courts."[12] Various pieces of legislation increased federal jurisdiction through removal, such as "the Habeus Corpus Act of 1863, […] the Internal Revenue Act of 1866, and the 1871 Voting Rights Act,"[13] which allowed federal courts to issue writs of certiorari

bypassing the need for state judges to agree on removal. Perhaps the most noteworthy statute of removal is found in the Jurisdiction and Removal Act of 1875, which "permitted any party to remove, […] allowed removal of all diversity actions, […] and […] permitted removal of all federal question suits."[14]

Although the option of a removal statute was to give the "federal courts new responsibilities for protecting the rights of Negroes, […] it was later used by corporations seeking to evade the hostility of Granger juries in state courts."[15] At first, as in *Munn v. Illinois* (1877), the federal courts seemed to uphold state regulation powers.[16] In time, however, Congress began to pass legislation to compensate for "state failure to regulate the nation's railroads," and "in 1886, the Supreme Court, in *Wabash, St. Louis, and Pacific Railway Co. v. Illinois*, seriously retarded the states' ability to control rates"[17] in regards to interstate commerce. After the *Wabash* decision, the Interstate Commerce Commission (ICC) was formed to "hear complaints, examine railroad records, hold hearings, and issue cease-and-desist orders"[18] to violators. The Supreme Court worked to limit the powers of the newly organized federal ICC in cases such as *ICC v. Cincinnati, New Orleans and Texas Pacific Railway Co.* (1897), which ensured that "the ICC could do little more than investigate rates and declare them unreasonable."[19] The federal courts, however, also found the need to limit state regulatory powers, as evident in *Chicago, Milwaukee and St. Paul Railway Co. v. Minnesota* (1890), where the Court took upon itself "the question of the reasonableness of the rate […] for judicial investigation."[20]

As the United States launched into a new era of an Industrial Revolution, federal jurisdiction explored the powers that were passed down from Reconstruction. The trials coming out of interstate commerce and railroad parameters were only the beginning of a

growing trend toward federal regulation of economic matters. This can be seen first in the formation of the federal income tax. The first income tax ever to be initiated was during the Civil War, the period that Professor Kelly insinuated of having mostly the same federal-state relations as before the war. Wars are costly, and Congress needed to find a way to finance it. The federal income tax assigned a percentage based on the amount of income an individual earned. By the end of the war, "the income tax provided between 15 and 20 percent of the federal government's revenue."[21] Although the tax was eventually repealed, demands for further federal revenue brought the income tax back and before the Supreme Court in *Pollock v. Farmers' Loan & Trust Co.* (1895). The Supreme Court had already "sustained the constitutionality of the 1864 income tax" in *Springer v. United States* (1880), but in *Pollock*, the Court overturned precedents of previous cases and consistently thereafter ruled against governmental interference of property rights.[22]

At the onset of the 20th Century, the population of the United States had doubled since the beginning of the Civil War.[23] The Industrial Revolution proved to spur economic growth as factories became prominent and labor increased. With the growing challenges of industry, the Progressive Era was ushered in, bringing further possibilities for federal regulation. The federal government became concerned with various areas of economic regulation, including child labor, work day hours, and health & safety laws. In regards to child labor, Congress attempted to pass two Child Labor Acts, but both were struck down in the Supreme Court in *Hammer v. Dagenhart* (1918) and *Bailey v. Drexel Furniture Co.* (1922)[24] as unconstitutional federal intervention. During the Progressive Era, most issues in regards to labor were left to the states, much like during Reconstruction. The difference,

however, is that the cases arising out of state laws were no longer confined to state courts, but, through removal procedures, were heard for the first time in federal courts.

As advocates of an eight-hour workday rallied toward getting labor regulations passed, a federal statute declared, in 1868, that eight hours "constituted a day's work for all laborers," but this statute was "chiefly a directive by the government to its [own federal] agencies and nothing in it prohibited contracting for longer hours."[25] States passed their own measures to limit the number of hours worked in a day or week, but most of these statutes were also mere proclamations, with "no regulation or provision for enforcement."[26] State regulation of such labor and commerce had historically been rejected by state courts before the Civil War, in cases such as *Wynehamer v. People* (1856), where "the New York high court read due process to prohibit certain types of legislative interference with business."[27] After the Civil War, however, removal procedures brought an increasing number of cases pitting state regulation against "substantive rights to protect property" before the Supreme Court.[28] These substantive due process cases allowed the federal government the power to determine whether the substance of a state law permitted or infringed upon the right of due process.

Since the "Court had claimed the right to review the substance of state legislation when it adopted the doctrine of substantive due process,"[29] various cases were brought before the Court to seek federal intervention, but none was as important as *Lochner v. New York* (1905). Two previous cases had affirmed state legislation, *Munn v. Illinois* (1877) and *Allgeyer v. Louisiana* (1897), so "the prospects for [*Lochner*] looked grim."[30] The New York Bakeshop Act was the target, with the prosecution claiming that the state had used its police power improperly and had infringed upon "the right of contract between the employer and

employees." What allowed the *Lochner* case to be heard before the Supreme Court was a Constitutional Amendment that was meant to eliminate states from infringing upon the rights of freed slaves. Despite this intent, the application of the 14th Amendment in the *Lochner* case empowered the federal government to ensure that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens […] without due process of law."[31] This argument of using the 14th Amendment had been rejected in 1873 during the *Slaughter-House Cases*, where the Supreme Court believed "it would radically change the whole theory of state and federal relations."[32] Just a little over 30 years, the Supreme Court ruled in favor of Lochner, deciding, and becoming "the classic statement of substantive due process," that the substance of the New York statute was not one of health and safety, but one of "labor regulation, which [was] viewed as beyond the reach of the state."[33]

By the end of the 19th Century, and moving in to the 20th Century, the laws of the United States were on an entirely different plane than they "occupied before 1860." The Constitution was amended while new laws were structured. Their intent took on different application as history moved from Reconstruction toward Industry. The changes found in the Reconstruction era can be culminated in the Judiciary Act of 1875, which "gave the federal courts the vast range of power that had lain dormant in the Constitution since 1789, […] and became the primary and powerful reliance for vindicating every right given by the Constitution, the laws, and treaties of the United States."[34] Despite the failing intent of the Reconstruction laws to extend civil rights, they were later applied, or "associated, rather, with the remarkable industrial revolution," to the degree that state-federal relations underwent a revolution toward a stronger, paramount federal government which ruled as "the supreme law of the land."[35]

NOTES

[1] Melvin I. Urofsky & Paul Finkelman, A March of Liberty: A Constitutional History of the United States, Volume I: From the Founding to 1890, 2nd ed. (New York: Oxford University Press, 2002), 476.

[2] Robert M. Goldman, Reconstruction & Black Suffrage: Losing the Vote in Reese & Cruikshank (Lawrence, Kansas: University Press of Kansas, 2001), 111.

[3] "Amendment XIV, Constitution of the United States," in A March of Liberty: A Constitutional History of the United States, Volume II: From 1877 to the Present, 2nd ed., Eds. Melvin I. Urofsky & Paul Finkelman (New York: Oxford University Press, 2002), A16-A17.

[4] Daan Braveman, "Enforcement of Federal Rights against States: Alden and Federalism Non-Sense," in American University Law Review, Volume 49:611 (2000), 617.

[5] Melvin I. Urofsky & Paul Finkelman, A March of Liberty: A Constitutional History of the United States, Volume II: From 1877 to the Present, 2nd ed. (New York: Oxford University Press, 2002), 481.

[6] Ibid., 482.

[7] "Amendment XV, Constitution of the United States," in A March of Liberty: A Constitutional History of the United States, Volume II: From 1877 to the Present, 2nd ed., Eds. Melvin I. Urofsky & Paul Finkelman (New York: Oxford University Press, 2002), A17.

[8] Robert M. Goldman, Reconstruction & Black Suffrage: Losing the Vote in Reese & Cruikshank (Lawrence, Kansas: University Press of Kansas, 2001), 105.

[9] Melvin I. Urofsky & Paul Finkelman, A March of Liberty: A Constitutional History of the United States, Volume II: From 1877 to the Present, 2nd ed. (New York: Oxford University Press, 2002), 484.

[10] Ibid., 484.

[11] Harry A. Blackmun, "Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?" New York University Law Review, 1:6 (1985) as quoted in Daan Braveman, "Enforcement of Federal Rights against States: Alden and Federalism Non-Sense," in American University Law Review, Volume 49:611 (2000), 618.

[12] William M. Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1875," The American Journal of Legal History, Vol. 13, No. 4 (Temple University Press), 333.

[13] Ibid., 338.

[14] Ibid., 341-342.

[15] Ibid., 333.

[16] Melvin I. Urofsky & Paul Finkelman, A March of Liberty: A Constitutional History of the United States, Volume II: From 1877 to the Present, 2nd ed. (New York: Oxford University Press, 2002), 523.

[17] Ibid., 526.

[18] Ibid., 527.

[19] Ibid., 528.

[20] Ibid., 530.

[21] Ibid., 540.

[22] Ibid., 539-541.

[23] "A Curriculum of United States Labor History for Teachers," Illinois Labor History Society, <http://www.kentlaw.edu/ilhs/curricul.htm#6> (22 October 2006).

[24] Melvin I. Urofsky & Paul Finkelman, A March of Liberty: A Constitutional History of the United States, Volume II: From 1877 to the Present, 2nd ed. (New York: Oxford University Press, 2002), 550.

[25] Paul Kens, Lochner v. New York: Economic Regulation on Trial (Lawrence, Kansas: University Press of Kansas, 1998), 20-21.

[26] Ibid., 26.

[27] Melvin I. Urofsky & Paul Finkelman, A March of Liberty: A Constitutional History of the United States, Volume II: From 1877 to the Present, 2nd ed. (New York: Oxford University Press, 2002), 504.

[28] Ibid., 504.

[29] Paul Kens, Lochner v. New York: Economic Regulation on Trial (Lawrence, Kansas: University Press of Kansas, 1998), 121.

[30] Ibid., 121.

[31] Ibid., 101.

[32] Ibid., 103.

[33] Melvin I. Urofsky & Paul Finkelman, A March of Liberty: A Constitutional History of the United States, Volume II: From 1877 to the Present, 2nd ed. (New York: Oxford University Press, 2002), 558.

[34] Felix Frankfurter and James Landis, "The Business of the Supreme Court," 6 (1927), as quoted in Daan Braveman, "Enforcement of Federal Rights against States: Alden and Federalism Non-Sense," in American University Law Review, Volume 49:611 (2000), 618.

[35] "Article VI, Constitution of the United States," in A March of Liberty: A Constitutional History of the United States, Volume II: From 1877 to the Present, 2nd ed., Eds. Melvin I. Urofsky & Paul Finkelman (New York: Oxford University Press, 2002), A13.

BIBLIOGRAPHY

Braveman, Daan, "Enforcement of Federal Rights against States: Alden and Federalism Non-Sense," in American University Law Review, Volume 49:611 (2000).

"A Curriculum of United States Labor History for Teachers," Illinois Labor History Society, <http://www.kentlaw.edu/ilhs/curricul.htm#6> (22 October 2006).

Goldman, Robert M., Reconstruction & Black Suffrage: Losing the Vote in Reese & Cruikshank, Lawrence, Kansas: University Press of Kansas (2001).

Kens, Paul, Lochner v. New York: Economic Regulation on Trial, Lawrence, Kansas: University Press of Kansas (1998).

Urofsky, Melvin I. & Paul Finkelman, A March of Liberty: A Constitutional History of the United States, Volume I: From the Founding to 1890, 2nd ed., New York: Oxford University Press (2002).

Urofsky, Melvin I. & Paul Finkelman, A March of Liberty: A Constitutional History of the United States, Volume II: From 1877 to the Present, 2nd ed., New York: Oxford University Press (2002).

Wiecek, William M., "The Reconstruction of Federal Judicial Power, 1863-1875," The American Journal of Legal History, Vol. 13, No. 4, Temple University Press (1969).