The “Conspiracy Theory” of the Fourteenth Amendment

GRAHAM, The “Conspiracy Theory” of the Fourteenth Amendment, 47 Yale L. J. 371 - 375 (1938): In an argument before the Supreme court of the United States in 1882(1) Roscoe Conkling, a former member of the Joint Congressional Committee which in 1866 drafted the Fourteenth Amendment, produced for the first time the manuscript journal of the Committee, and by means of extensive quotations and pointed comment conveyed the impression that he and his colleagues in drafting the due process and equal protection clauses intentionally used the word ‘person’ in order to include corporations. ‘At the time the Fourteenth Amendment was ratified’ he declared, ‘individuals and joint stock companies were appealing for congressional and administrative protection against individous and discriminating State and local taxes. One instance was that of an express company, whose stock was owned largely by citizens of the State of New York...’ The unmistakable inference was that the Joint Committee had taken cognisance of these appeals and had drafted it’s text with particular regard for corporations.

“Coming from a man who had twice declined a seat on the Supreme Bench, who spoke from first had knowledge, and who submitted a manuscript record in support of his stand, so dramatic an argument could not fail to make a profound impression. Within the next few years the Supreme Court began broadening it’s interpretation of the Fourteenth Amendment, and early in 1886 it unanimously affirmed Conkling’s proposition, namely that corporations were “persons” within the meaning of the equal protection clause(3). It is literally true therefore that Roscoe Conkling’s argument sounded the death knell of the narrow ‘Negro-race theory’ of the Fourteenth Amendment expounded by Justice Miller in the Slaughterhouse cases. By doing this it cleared the way for the modern development of due process of law and the corresponding expansion of the Court’s discretionary powers over social and economic legislation. Viewed in perspective, the argument is one of the landmarks in American constitutional history, an important turning point in our social and economic development.

“Conkling’s argument has figured prominently in historical writing since 1914 when B. B. Kendrick unearthed and edited the manuscript copy of the Journal which Conkling used in court. Checking the record in light of his major propositions, historians became convinced of the fundamental truth of Conkling’s story. Repeatedly, it appeared from the Journal, the Joint Committee had distinguished in it’s drafts in the use of the words ‘person’ and ‘citizen’. Under no circumstances could the terms have been confused. Moreover, as the Committee had persistently used the term ‘person’ in those clauses which applied to property rights and the term ‘citizen’ in those clauses which applied to political rights, the force of this distinction seemed plain: corporations as artificial persons, had indeed been among the intended beneficiaries of the Fourteenth Amendment. Convinced on this point, historians developed an interesting theory: the drafting of the Fourteenth Amendment has assumed something of the character of a conspiracy, with the due process and equal protection clauses inserted as double entendres. Laboring ostensibly in the interests of the freedmen and of the ‘loyal white citizens of the South’, the astute Republican lawyers who made up the majority of the Committee had intentionally used language which gave corporations and business interests generally increased protection against State legislatures.

“What appeared to be corroboration for this viewpoint was presently found in the speeches of Representative John A. Bingham, the Ohio Congressman and railroad lawyer who almost alone of the members of the Joint Committee and been responsible for the phraseology of Section One. Bingham, it appeared both from the Journal and the debates on the floor of House, had at all times shown a zealous determination to secure to ‘all persons’ everywhere ‘equal protection in the rights of property’. Moreover, he had developed and defended it’s phraseology in most vigorous fashion. As no other member of the Joint Committee, or of Congress, gave evidence of a similar desire to protect property rights, and none manifested his partiality for the due process clause, it seemed logical to conclude that Bingham’s purpose had in fact been far more subtle and comprehensive than was ever

appreciated at the time. Bingham had been the mastermind who 'put over' this draft upon an unsuspecting country. The fact that he had tried and failed to secure the inclusion of a 'just compensation' clause in Section One as still another restraint upon State's powers over property, and the fact that in 1871, five years after the event, he declared he had framed the section 'letter for letter and syllable for syllable' merely served to strengthen these suspicions.

"Impressed by this cumulative evidence, and alive to its historical implications, Charles A. and Mary R. Beard, in 1927, developed in their Rise of American Civilization what is still, a decade later the most precise statement of the conspiracy theory. Undocumented, and with conclusions implicit rather than explicit, the Beards' thesis was this: Bingham, 'a shrewd ..and successful railroad lawyer,...familiar with the possibilities of jurisprudence', had had much broader purposes than his colleagues. Whereas they were 'bent on establishing the rights of Negroes', he was 'determined to take in the whole range of national economy'. Toward this end he had drafted the due process and equal protection clauses and forced them upon the Committee by persistent efforts. Quoting Bingham's speeches and Conkling's argument in support o f the view that corporations had been among the intended beneficiaries of the draft, the authors concluded: " 'In this spirit, Republican lawmakers restored to the Constitution protection for property which Jacksonian judges had whittled away and made it more sweeping in it's scope by forbidding states, in blanket terms, to deprive any person of life, liberty, or property without due process of law. By a few words skillfully chosen every act of every state and local government which touched adversely the rights of persons and property was made subject to review and liable to annulment by the Supreme Court at Washington'.

"Thus, while the Beards nowhere expressly state that Bingham was guilty of a from of conspiracy, this is none the less a fair inference from their account, and it is one which has been repeatedly drawn. Numerous writers, accepting the Beards' account and popularizing it, have supplied more explicit interpretations. Thus E. S. Bates, in his Story of Congress, declares that Bingham and Conkling in inserting the due process phraseology, 'smuggled' into the Fourteenth Amendment 'a capitalist joker'.

"Despite widespread acceptance and a prestige which derives from the Beards' sponsorship, the conspiracy theory has not gone unchallenged. Numerous writers have expressed varying degrees of disapproval and skepticism. Constitutional historians in particular appear reluctant to accept its implications, although they, no more than the sponsoring school of social historians, have as yet presented their case in documented detail. One thus observes the curious paradox of a theory which cuts across the whole realm of American constitutional and economic history and which cuts across the whole realm of American constitutional and economic history and which is itself a subject for increasing speculation and controversy, yet which has developed piecemeal, without systematic formulation or criticism".

For further comment on the "conspiracy theory", see Corwin, Liberty Against Government (1948), Appendix II.

NOTE

Not until comparatively recent years did any Justice of the Court question the holdings of the 1886 and 1889 that corporations may claim the benefit of the equal prosecution clause (Santa Clara County v. Southern Pacific R. R. Co., 118 U.S. 394) and the due process clause (Minneapolis & St. Louis R. R. Co v. Beckwith, 129 U.S. 26) of the Fourteenth Amendment. In 1938, Mr Justice Black, dissenting in Connecticut General Life Insurance Co. v. Johnson, 303 U.S. 77, 85-90, stated he did not believe, "the word 'person' in the Fourteenth Amendment includes corporations". He urged, therefore, that the Court "should now overrule previous decisions which interpreted the Fourteenth Amendment to include corporations". Mr Justice Douglas, with Black, J., concurring, developed the same thesis in his dissent in Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576 (1949). Mr Justice Jackson commented on these dissenting opinions in a special opinion in the Glander case. Id. At 574 - 576. See also

Freund, On Understanding the Supreme Court, 30 - 34 (1949); Mendelson, Mr Justice Black and the Rule of Law, 4 Midwest J. of Pol Sci. 250, 251 (1960)

1. See San Mateo County v. Southern Pacific R. R.. 116 U.S. 138...
2. See Waite, J., in Santa Clara County v. Southern Pacific R. R., 118 U.S. 394, 396 (1886). This case involved the same questions as the San Mateo case argued three years before