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# The Fuller Court and State Criminal Process: Threshold of Modern Limitations on Government

William F. Duker\*

The Fuller Court is notorious for its judicial activism. Mere citation of *Lochner v. New York*<sup>1</sup> by judicial conservatives<sup>2</sup> is sufficient to embarrass defenders of Warren Court activism.<sup>3</sup> Elsewhere I have examined the Fuller Court's "liberty of contract" cases and have argued that the decisions in those cases were dictated by a master idea of individual liberty which, in the Court's view, superseded paternalistic legislation designed to remedy the social problems of the corporate revolution.<sup>4</sup> Social legislation that discriminated among classes was presumptively void. However, this position was sharply contrasted by the position taken in criminal cases coming from the state courts. In this latter area, the Fuller Court's posture was a model of self-restraint.

One way to relax the tension between the two sets of cases is to suggest that the Court was representing the interests of the elite: legislation attempting to ameliorate the unequal bargaining power between employer and employee was commonly struck down; legislation providing swift justice for the criminal defendant was upheld. It thus could be argued that the Court was motivated simply by a desire to protect private property. Such a conclusion, however, fails to take account of the Court's vigorous enforcement of the antitrust laws. The better conclusion is based on the Court's perception of historically proper legislative activity. The "liberty of contract" decisions were a re-

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1. 198 U.S. 45 (1905).

2. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 15 (1978).

3. See generally Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). See also Tushnet, *The Newer Property: Suggestions for the Revival of Substantive Due Process*, 1975 S. CT. REV. 261, 277 (1976).

4. Duker, *Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World*, 1980 B.Y.U. L. REV. 47.

sponse to a new brand of legislation, one attempting a degree of marketplace regulation never before undertaken. Although the Court was willing to allow government to check the growth of artificial monopolies, which, like big government, threatened individual liberty, it otherwise refused to allow government restrictions upon individual liberty of contract. On the other hand, the legislative role in the criminal justice system was well established, and as long as state criminal process was applied equally, the Supreme Court refused to allow federal court intervention.

It is true that this application of federalism and equal treatment, like the application of all "neutral" principles, was not truly neutral, but this should not cast a shadow on the motives of the Court. Its conception of the judicial role, like that of the Warren and Burger Courts, was merely a reflection of its understanding of contemporary constitutional and normative values.

Because it is the value system of another day that reaches back to examine *Lochner* and the Fuller Court decisions in race-related and criminal law cases, it may be felt that the present-day debate over the rightful place of courts is not helped by invoking the Fuller legacy. However, the Fuller Court era occupied a critical moment in American constitutional history—a moment at the threshold of modern constitutional government—and understanding how that Court ensured limited government is essential to understanding the origin of modern limitations on government and the normative values that those limitations reflect.

State criminal cases have been selected for study because they lie at the interface of federalism and process—the former providing the primary means of ensuring individual liberty for those who framed the Constitution; the latter providing the primary means of ensuring individual liberty today. This Article begins by exploring the foundations of Fuller Court federalism and process. It turns next to selected clusters of state criminal cases involving claims of systematic exclusion, cruel and unusual punishment, and self-incrimination.<sup>5</sup>

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5. Other types of claims considered by the Fuller Court will not be given textual treatment for various reasons. Although the Court did decide cases dealing with double jeopardy, see *Brantley v. Georgia*, 217 U.S. 284 (1910); *Keerl v. Montana*, 213 U.S. 135 (1909); *Bassing v. Cady*, 208 U.S. 386 (1908); *Schoener v. Pennsylvania*, 207 U.S. 188 (1907); *Dreyer v. Illinois*, 187 U.S. 71 (1902); *New York v. Eno*, 155 U.S. 89 (1894), and with violations of guarantees against unlawful seizure, see *Consolidated Rendering Co. v. Vermont*, 207 U.S. 541 (1908); *Adams v. New York*, 192 U.S. 585 (1904); *Miller v. Texas*, 153 U.S. 535 (1894), it managed to avoid direct confrontation with the question of the

# I. THE FOUNDATIONS OF FULLER COURT FEDERALISM AND PROCESS

The Founding Fathers envisioned state courts as the primary protectors of individual liberty and the primary agencies of criminal justice.<sup>6</sup> The habeas corpus clause of the Constitution, for instance, was intended to restrict Congress from suspending state habeas corpus for federal prisoners, and the first habeas statute specifically denied federal habeas corpus jurisdiction in state cases.<sup>7</sup> Federal entry into the affairs of state criminal process was narrow. The Bill of Rights, as Chief Justice Marshall observed in *Barron v. Baltimore*,<sup>8</sup> was meant to restrict the activities of only the federal government. The Marshall Court did much to ensure the supremacy of the federal courts where their power was challenged,<sup>9</sup> but it was not until the chief justiceship of Roger B. Taney<sup>10</sup> that the supremacy of the federal judiciary was dramatically displayed. The national protection that the Taney Court lent to slavery—the “peculiar institution”—completed the transformation of the habeas corpus clause of the Constitution. From that time forth, the clause would be interpreted to guarantee federal habeas corpus and the state courts would be denied power to issue writs of habeas

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applicability of those federal constitutional provisions to the states. Both types of cases do provide additional illustration of the Court's unwillingness to interfere with state criminal process, but add little to that found in the examples to be examined. Similarly, cases challenging a state's failure to allow a defendant to confront witnesses, see *West v. Louisiana*, 194 U.S. 258 (1904); *Murray v. Louisiana*, 163 U.S. 101 (1896), and failure to grant a defendant a right of appeal, see *Rogers v. Peck*, 199 U.S. 425 (1905); *Allen v. Georgia*, 166 U.S. 138 (1897); *Kohl v. Lehlback*, 160 U.S. 293 (1895); *McKane v. Durston*, 153 U.S. 684 (1894); *Hallinger v. Davis*, 146 U.S. 314 (1892); *Fielden v. Illinois*, 143 U.S. 452 (1892); *Schwab v. Berggren*, 143 U.S. 442 (1892), contain language expressing the Court's unwillingness to intervene in state criminal process, but again add little to language used in the cases to be treated.

During the Fuller era, the Court also refused to interfere with state contempt proceedings irrespective of the individual right asserted, see *Consolidated Rendering Co. v. Vermont*, 207 U.S. 541 (1908) (self-incrimination); *Patterson v. Colorado*, 205 U.S. 454 (1907) (freedom of press); *Eilenbecker v. District Court of Plymouth Co.*, 134 U.S. 31 (1890) (trial by jury), but since courts traditionally have been reluctant to interfere with the efforts of another court to vindicate its dignity and authority, federalism and process explanations for the decisions may be suspect.

6. See Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953).

7. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73.

8. 32 U.S. (7 Pet.) 243, 250 (1833).

9. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

10. Justice Taney was, ironically, an ardent supporter of states' rights.

corpus for federal prisoners.<sup>11</sup>

The Civil War had a tremendous symbolic effect on the federal structure, but that war did not divide states' rightists from non-states' rightists. Rather, it separated those who espoused dual federalism or states' rights from those who espoused absolute state sovereignty.<sup>12</sup> While wartime measures previewed modern nationalism,<sup>13</sup> commitment to states' rights remained strong. The fourteenth amendment, which has had such a profound effect on modern constitutional adjudication, had little impact during the years immediately following its incorporation. In the *Slaughter-House Cases*,<sup>14</sup> the Court practically read the "privileges and immunities" clause out of the amendment by holding that the only privileges and immunities secured equally to all were those that arose out of the nature and essential character of the *national* government. Justice Miller's reading in that case was influenced by his refusal to believe that the purpose of the fourteenth amendment was to transfer the protection of all civil rights from the states to the federal government. If this were so, "Congress . . . [could] also pass laws . . . limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions," and the Supreme Court would be "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights."<sup>15</sup>

The first substantial test for the "due process" clause of the fourteenth amendment came in *Hurtado v. California*.<sup>16</sup> As permitted by the California constitution, Hurtado had been brought to trial for murder on an information after examination and commitment by a magistrate. On writ of error to the state supreme court, which had affirmed his conviction, Hurtado requested the United States Supreme Court to overturn the state court decision because he had not been indicted by a grand jury. After examination of English legal history, the Court found that indictment by a grand jury was not part of the settled usages

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11. *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

12. Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 S. CT. REV. 39, 45.

13. Benedict, *Contagion and the Constitution: Quarantine Agitation from 1859 to 1866*, 25 J. HIST. MED. AND ALLIED SCI. 177 (1970).

14. 83 U.S. (16 Wall.) 36 (1872).

15. *Id.* at 78.

16. 110 U.S. 516 (1884).

and modes of proceeding of English common law. Even if it were, reasoned the Court, it would be unwise for states to be bound by any fixed set of criminal procedure. In addition, it observed that the fifth amendment, which secured due process at the federal level, provided separately for indictment by a grand jury. Since "due process" meant the same thing in both the fifth and the fourteenth amendments, and since no part of the Constitution was superfluous, the Court concluded that due process did not of itself require indictment by a grand jury.

The concept of equality before the law thus took on more than just the meaning of the equal protection clause:<sup>17</sup> it included the interpretation of privileges and immunities after *Slaughter-House* and the idea of due process after *Hurtado*. Against this background, substantive due process was a natural development. The Fuller Court took one step back from the clauses of the fourteenth amendment and required that legislatures assume a neutral position in the enactment of legislation.

The concept of federalism restraining the fourteenth amendment was affirmed shortly after *Hurtado*. In 1868 the Supreme Court's power under the Habeas Corpus Act of 1867 had been revoked by the Radical Republican Congress because of an unreasonable fear that the Court was about to declare the Reconstruction program unconstitutional.<sup>18</sup> The significance of this 1868 revocation with respect to state criminal cases was that the lower federal courts were left to interpret the Habeas Corpus Act of 1867 without the guidance of the Supreme Court, and these courts were not reluctant to use their power to the fullest extent. For example, in the early 1880's, in a number of cases involving discrimination by Pacific coast states and municipalities against immigrant Chinese, the federal courts released habeas corpus applicants prior to trial or immediately following convictions on the ground that the state statute or ordinance was unconstitutional. The courts were no less hesitant to overturn decisions of states' highest courts. This ready interference with state judicial systems was not well received by the legal community, and congressional action was requested. The request was answered in 1885 in the form of a rescission of the 1868

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17. Civil Rights Cases, 109 U.S. 3 (1883).

18. See generally S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968). *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868), was pending before the Court at the time.

measure; the Supreme Court's jurisdiction was restored,<sup>19</sup> although accompanied by a mandate that federal interference in state criminal proceedings be limited.<sup>20</sup> The Supreme Court had no difficulty understanding the congressional intent and almost immediately responded with the exhaustion doctrine in *Ex parte Royall*.<sup>21</sup> Under that doctrine federal habeas corpus jurisdiction was to be guided by a principle of comity and, except in "special circumstances," not to be invoked until state remedies were exhausted.

Federalism is an instrumental concept. In the formative era of the Republic, federalism was deemed necessary to safeguard individual liberty. Suspicion of centralized government survived the transformation from confederation to federal union, and was evidenced, as noted above, in the habeas corpus clause. To effectuate the Compromise of 1850 and the Fugitive Slave Act there was an upsurge of national power before the Civil War. The nationalism of the Civil War itself was designed to save and not to destroy the federal structure. The Supreme Court's jurisdiction under the 1867 Act was revoked by Congress only to secure its Reconstruction program. The 1885 measure evidenced in turn a recognition that Reconstruction was long over and that the left-over legislation was producing undesirable effects. Federal interference with state criminal process was unwelcome; the availability of such interference as a means for frustrating swift justice was inconsistent with general attitudes toward criminal law—attitudes that stressed crime repression, not due process.<sup>22</sup> Although vigilantism had enjoyed a long history in America,<sup>23</sup> the late nineteenth century witnessed a notable surge in this form of extra-legal violence. These energetic acts of "public spirit" naturally had a feedback effect on the criminal justice system. The legal community in fact reacted by attempting "to bring the regular system of law and order closer to the spirit and practice of vigilantism."<sup>24</sup> Even while lawmakers sought to dis-

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19. Act of March 3, 1885, ch. 353, 23 Stat. 437.

20. H.R. REP. NO. 730, 48th Cong., 1st Sess. 6 (1884).

21. 117 U.S. 241 (1886).

22. Brown, *Legal and Behavioral Perspectives on American Vigilantism*, in *LAW IN AMERICAN HISTORY* 95 (D. Fleming & B. Bailyn eds. 1971).

23. Brown, *Historical Patterns of Violence in America*, in 1 *VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES* 35 (H. Graham & T. Gurr eds. 1969); Brown, *The American Vigilante Tradition*, in 1 *VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES* 121 (H. Graham & T. Gurr eds., 1969).

24. Brown, *supra* note 22, at 106.

suade local officials from cooperating with lynchers by drafting statutes that imposed fines and created means of removing offending officials from office, legal scholars, such as Charles J. Bonaparte, argued that the remedy for lynching lay in making the criminal law more effective and realistic. Bonaparte distinguished "lynch law" from "mere disorder": the former was meant "not to violate, but to vindicate, the law; or, to speak more accurately, the law is violated in form that it may be vindicated in substance, its 'adjective' part (*i.e.*, matter of procedure) is disregarded that its 'substantive' part may be preserved."<sup>25</sup> To effectuate his goal, Bonaparte suggested that the number of capital crimes be increased, that grand juries be abolished, that the right of preemptory challenge be eliminated, that the double jeopardy guarantee be abrogated, that trials be accelerated, and that the executive be stripped of power to pardon.<sup>26</sup> Others endorsed parts of his remedy.<sup>27</sup> Some, such as Supreme Court Justice David J. Brewer, suggested that the right of appeal be abolished.<sup>28</sup> Simeon Baldwin advocated whipping and castration as punishments for crime.<sup>29</sup> This general attitude was reflected in many state criminal statutes and the congressional decision to revoke the 1868 measure. The judicial response to the congressional revocation decision acknowledged the legitimacy of such statutes.

The neutral principles that directed the decisions of the Fuller Court in state criminal cases thus had been formulated before the Court took its place in history, and the focus now shifts to that Court's application of those principles. Cases challenging the composition of state grand and petit juries were determined not by racist predispositions of the individual judges, but by established concepts of federalism and equality—concepts which also determined the disposition of cruel and unusual punishment and self-incrimination challenges.

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25. Bonaparte, *Lynch Law and Its Remedy*, 8 YALE L.J. 335, 336 (1899).

26. *Id.* at 342.

27. See generally Brown, *supra* note 22.

28. Brewer, *The Right of Appeal*, 55 INDEPENDENT 2547 (1903).

29. Baldwin, *Whipping and Castration As Punishments for Crime*, 8 YALE L.J. 371 (1899); Baldwin, *The Restoration of Whipping as a Punishment For Crime*, 13 GREEN BAG 65 (1901).



## II. RACIAL DISCRIMINATION AND SELECTION OF GRAND AND PETIT JURIES

In an otherwise brilliant article, Michael Les Benedict argued that the modern criticism of the Supreme Court under Chief Justice Morrison Waite has failed "to distinguish the position of the Waite Court from its successors, accepting, for instance, the reactionary decisions of the Fuller Court in civil rights cases as logical extensions of the Waite Court doctrines, which they were not."<sup>30</sup> In all fairness, Professor Benedict was examining only the Waite Court's posture toward federalism and not the decisions of the Fuller Court. Had those decisions been examined, Professor Benedict would have found that they were indeed logical extensions of the Waite Court doctrines. The master ideas applied by the Fuller Court in civil rights cases followed directly from *Slaughter-House* and *Hurtado*. But, Professor Benedict might ask, if substantive due process grew naturally from the equality principle at work in *Slaughter-House* and *Hurtado*—a principle that rejected government interference with the liberty of the individual and condemned legislation that discriminated among classes—how could the Fuller Court uphold "Jim Crow" legislation that provided for separate coaches for black and white railway passengers? The answer is that the relationship between liberty and equality is a complicated one. It is apparent to a people schooled in a class presided over by the Warren Court that equal treatment for all often means liberty for only some. However, the individual liberty secured by substantive due process during the Fuller Court era was not equality of outcome, but equality of treatment before the law and equality of opportunity, both of which were thought to be attainable if legislation favored no particular class and artificial monopolies were abolished.<sup>31</sup> The majority in *Plessy v. Ferguson*,<sup>32</sup> for example, asserted that a "statute which implies merely a legal distinction . . . has no tendency to destroy the legal equality of the two races."<sup>33</sup> The statute involved was thus viewed as effecting merely a legal distinction, rather than as a breach of equality before the law.<sup>34</sup> The judicial activism of the

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30. Benedict, *supra* note 12, at 40.

31. Duker, *supra* note 4.

32. 163 U.S. 537 (1896).

33. *Id.* at 543.

34. *Id.* at 551.

Fuller Court was designed to keep government in check, and the petitioner in *Plessy* was requesting the Court to go not only where government ought not, but where it could not go. Although the statute in question was enacted only six years earlier, it was viewed as affirming the natural order, and judicial intervention was viewed as unwelcome governmental interference. In the Court's view, government was simply powerless to eradicate racial prejudice.

It is beyond the scope of this Article to examine the *Plessy* line of cases. It suffices to say that they rested comfortably on the foundation laid by the Waite Court. However, another series of race-related cases—involving the charge of systematic exclusion of blacks from grand and petit juries—is directly relevant. Like *Plessy*, the decisions in these cases were not guided by racial prejudice but by the “neutral principles” of federalism and equality arising from an interaction of social forces—forces that undoubtedly, but only incidentally, included racist elements. The general rule adopted by the Court was one of refusing to allow state prisoners alleging systematic exclusion to bypass the normal state appellate process via federal habeas corpus or removal.

*In re Wood*,<sup>35</sup> for example, brought to the Supreme Court an appeal of a denial of a writ of habeas corpus by the United States Circuit Court for the Southern District of New York. The appellant contended that he had been indicted and convicted in the state court by juries from which blacks had been specifically excluded because of their race. Because he was without counsel and even means of procuring counsel, the appellant had pleaded guilty to the indictment and had failed at trial to challenge the exclusion of blacks from the jury. Motion for a new trial and petition for a writ of certiorari to the state appellate court were unsuccessful.

Justice Harlan, for the Court, affirmed the denial, finding that “such exclusion was not *required* by the laws” of the state.<sup>36</sup> As to whether blacks were excluded *de facto* was a question that the trial court was competent to decide, and its determination could not be revised by the United States Circuit Court without making habeas corpus serve the purpose of a writ of error. The question on habeas corpus was limited to whether

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35. 140 U.S. 278 (1891).

36. *Id.* at 283 (emphasis added).

the trial court had jurisdiction of the matter and of the person. Therefore, even if the challenge had been made during trial and erroneously determined, "such error in decision would not have made the judgment of conviction void, or his detention under it illegal."<sup>37</sup> The proper remedy, observed Harlan, would be to seek out a writ of error to the highest court of the state having jurisdiction of the matter. The issuance of a writ of error, a nondiscretionary writ, far from being seen as an intrusion into the state's process of law,<sup>38</sup> was actually considered part of the state's appellate structure. Unlike proceeding by habeas corpus, the procedure outlined by Harlan avoided the possibility of a decision of the highest court of a state being overturned by the lowliest federal tribunal—an irritant that played a major role in the decision to return the Supreme Court's jurisdiction under the Habeas Corpus Act of 1867.<sup>39</sup>

In *Andrews v. Swartz*,<sup>40</sup> Justice Harlan again wrote for the Court and again affirmed the denial of habeas corpus to a black applicant challenging the exclusion of members of his race from grand and petit juries. In this case, however, the appellant had called the trial court's attention to the discriminatory manner of jury selection and had moved that the court take testimony to prove his allegation, but the court denied his motion and refused to hear testimony. The appellant noted in his habeas corpus petition that an appeal to the state appellate court, as suggested in *Wood*, would be useless because under state law writs of error in

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37. *Id.* at 287. In anticipation of the Court's decision, the appellant had argued that under state statute and common law he was not permitted to challenge the composition of a jury; therefore, the trial court had no jurisdiction. Harlan conceded that the state code of criminal procedure did not permit the defendant to challenge the composition of a grand jury, but he would not exclude the possibility that the state court might allow a seasonably made challenge when the defect deprived the tribunal of the character of a grand jury in a constitutional sense. *Id.* at 288.

38. See *In re Frederick*, 149 U.S. 70 (1893).

39. Justice Harlan's opinion was joined by all the Justices but Gray, who was not present at the argument and who took no part in the decision, and Field, who filed a separate concurring opinion. As he had done in *Neal v. Delaware*, 103 U.S. 370, 405-09 (1880), Field denied that there was anything in the Civil War Amendments that required that blacks be summoned on grand or petit juries in order to secure persons of their race justice and equality in the administration of the law. Even if the issue had been more correctly framed in terms of whether the constitutional amendment allowed blacks to be excluded even de facto from the possibility of serving as jurors solely because of their race, Field apparently would have remained unmoved. As he saw it, the manner of jury selection was entirely a matter of state regulation. See *In re Wood*, 140 U.S. at 370-71 (Field, J., concurring).

40. 156 U.S. 272 (1895).

capital cases were writs of grace rather than writs of right. In response to the first contention, Justice Harlan once more observed that the only issue cognizable on habeas was jurisdiction. As to the second contention, he noted the rule of *McKane v. Durston*,<sup>41</sup> which held that appellate review was not a *sine qua non* of due process. Even if the writ of error were denied by the state appellate court—a possibility which Harlan would not anticipate—the proper remedy was still to carry the case to the highest court of the state having jurisdiction, thence to the Supreme Court on writ or error.

Removal proved no more successful in such cases than habeas corpus. In *Gibson v. Mississippi*,<sup>42</sup> the plaintiff in error, a black charged with the murder of a white, sought removal to the federal circuit court on the grounds that the subordinate officers charged with gathering juries excluded blacks solely because of their race and that the laws regulating jury selection were in this case *ex post facto*. Though his contention indicated *de facto* rather than *de jure* discrimination, Gibson attempted to avoid the holding of *In re Wood* that such a problem was within the competency of the state courts by arguing that the very distinction between *de facto* and *de jure* discrimination violated the spirit of the fourteenth amendment:

Such a State through its people in its organic law, or Legislature, may enact the finest kind of laws, and spread them upon its constitution or statutes, merely to avoid Federal interference; and yet permit its officers (who are of the white race, the dominant race) to try white persons touching their life, liberty and property, strictly in accordance with the laws of the State, and try negroes touching their same interests contrary to the laws; thus accomplishing in an indirect manner the very deprivation which the people of the United States sought to prohibit by the enactment of the Fourteenth Amendment.<sup>43</sup>

But Justice Harlan would not predict the ultimate actions of the state courts. Through his opinion the Court held that the removal statutes did not embrace those cases where a right was denied by judicial action or, as in this case, by actions of subordinate officers of the trial court charged with gathering a jury. The Court considered removal an appropriate remedy only

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41. 153 U.S. 684 (1894).

42. 162 U.S. 565 (1896).

43. *Id.* at 575.

where the state constitution or laws deprived one of some fundamental right guaranteed other citizens of the state. Relief in other instances was available on appeal.<sup>44</sup>

In *Murray v. Louisiana*,<sup>45</sup> the Supreme Court, in an opinion by Justice Shiras, upheld a state supreme court's affirmance of a trial court's disregard of a petition by the accused to have the case removed to federal circuit court upon an allegation that blacks were excluded from serving on grand or petit juries. The Court simply cited *Gibson* and noted that the removal request complained of acts of the jury commissioners rather than discrimination in state law. Argument that it was the law regulating jury selection that violated the fourteenth amendment, because it conferred upon jury commissioners judicial power by allowing them to select jurors, was also rejected. The Court observed that the accused was subject to treatment no different than that given others, including white citizens; therefore, no federal question was presented.

The procedure that the Court had been defining as the proper remedy was finally followed in *Carter v. Texas*.<sup>46</sup> There the Court reversed and remanded the case of a black who had challenged the exclusion of members of his race from the grand jury. When the case was called for trial, the defendant Carter, in open court and before arraignment and pleading to the indictment, unsuccessfully moved to quash the indictment. The trial proceeded and Carter was found guilty. Carter then tendered a bill of exceptions asking leave to introduce evidence to prove the allegation, but the trial court refused to hear any evidence. The state appellate court affirmed the trial court's refusal to quash the indictment because the challenge to the composition of the

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44. It was not clear to Justice Harlan that the record actually presented an ex post facto question. Nevertheless, because human life was involved, because the defendant had pleaded not guilty, and because the state attorney general had discussed the question without disputing the Supreme Court's authority to pass on it, the Court decided to examine the allegation. It noted that the only difference between the applied Code of 1892, which took effect after the date of the charged murder, and the Code of 1880, in force at the time of the alleged murder, was the requirement that persons selected for jury service should possess good intelligence, sound judgment, and fair character. This difference, observed Justice Harlan, did not affect "in any degree the substantial rights of those who had committed crime prior to its going into effect." *Id.* at 589. It did not make criminal any act innocent when committed, provide for greater punishment than the law in force during the commission of the crime, or alter the rules of evidence. Rather, the change "related simply to procedure." *Id.* at 590.

45. 163 U.S. 101 (1896).

46. 177 U.S. 442 (1900).

grand jury, made after the indictment was found, had come too late. The state appellate court in fact later abandoned that rationale and instead observed that the contention was merely a tender of the issue without evidence in support. The case then went to the United States Supreme Court on writ of error.

For the Court, Justice Gray observed that Carter was never given an opportunity to challenge the grand jury that found the indictment against him. He noted that the grand jury had been impaneled prior to the time of the offense for which the defendant had been indicted, and that the defendant thus had been denied the equal treatment of the laws:

Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment . . . .<sup>47</sup>

Unlike the earlier cases, *Carter* involved only minimal interference with state criminal process. It also satisfied the Court-established rule that if the Supreme Court directly interfered with state process, it would do so only after regular state channels had been exhausted.<sup>48</sup>

### III. CRUEL AND UNUSUAL PUNISHMENT

In an era when lynchings outpaced legal executions and when those interested in reversing that trend were suggesting an increase in the number of crimes labeled capital, the Court never entertained the challenge that capital punishment *per se* was

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47. *Id.* at 447.

48. Where race was not a factor in challenges to jury composition, the Court likewise refused to interfere. The exclusion of a juror because he was not a freeholder, *Leeper v. Texas*, 139 U.S. 462 (1891), or because he had formed an opinion on the merits of the case, *Howard v. Kentucky*, 200 U.S. 164 (1906), or the failure to exclude an alien, *Kohl v. Lehlback*, 160 U.S. 293 (1895), did not deprive one of due process, since treatment before the law was not unequal, and so did not present questions that the state courts could not conclusively decide. Additionally, selection of a jury according to statutory provisions for a struck jury was held not to be a deprivation of fundamental rights. *Brown v. New Jersey*, 175 U.S. 172 (1899). Finally, in *Rawlins v. Georgia*, 201 U.S. 638 (1906), the Court rejected a request to overturn the conviction of an individual who had been indicted by a grand jury constituted under rules excluding certain professional groups. Justice Holmes observed that the exclusion was not based upon race and was a common practice, *i.e.* equal treatment had been afforded.

cruel and unusual. However cruel, capital punishment was certainly not unusual. But the era did witness the invention and employment of a novel means of execution, the electric chair, which as a statutorily authorized tool was challenged as cruel and unusual in *In re Kemmler*.<sup>49</sup> The New York State Legislature enacted the capital punishment statute at issue in *Kemmler* in 1888—to take effect the next year—in response to the 1885 annual message of the governor asking the legislature to replace death by hanging with a “less barbarous manner” of execution. However unusual, electrocution was viewed as less cruel by the democratic branches.

*Kemmler* came to the Supreme Court after state appellate and collateral remedies had been exhausted. It was argued that the state statute violated the due process and privileges and immunities clauses of the fourteenth amendment. The Court rejected the argument, noting that the fourteenth amendment had not been designed to radically alter the relationship between the federal and state governments and that the states, not the federal government, were the primary protectors of life, liberty, and property.

[T]he amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offences. But it was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order.<sup>50</sup>

The Court could have relied solely on this understanding of federalism and thereby avoided defining “cruel and unusual,” but it did not. It stated in *dicta* that punishments were cruel only when they involved torture or lingering death, and that capital punishment itself was not cruel.<sup>51</sup> Shortly afterwards, *Kemmler* became the first person to be executed by electrocution.

Earlier that year, the Court in *In re Medley*<sup>52</sup> had examined a capital punishment statute and determined that its solitary

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49. 136 U.S. 436 (1890).

50. *Id.* at 448-49 (footnote omitted).

51. *Id.* at 447.

52. 134 U.S. 160 (1890).

confinement provision made it *ex post facto* because it imposed an additional punishment. Although in striking down the statute the Court relied exclusively on this identified *ex post facto* feature, Justice Miller took the occasion to trace the history of solitary confinement in an examination which revealed its inhumanity. He concluded his survey by noting the preamble of 25 George 2, c. 37, which termed solitary confinement "a further terror and peculiar mark of infamy," and 6 & 7 William 4, c. 30, which abolished solitary confinement in England in response to a revolt of public opinion. A challenge similar to that raised in *Medley* was made in *Holden v. Minnesota*,<sup>53</sup> but in that case the solitary confinement aspect of the state's capital punishment statute, enacted after the crime charged was committed, was found not to have been imposed.<sup>54</sup> It was only in *McElvaine v. Brush*<sup>55</sup> that the issue of the constitutionality of solitary confinement came directly before the Court. With Justice Miller no longer on the Bench, the Court, speaking through Chief Justice Fuller, held that neither the eighth nor the fourteenth amendments prohibited the punishment under examination. The eighth amendment was held to operate exclusively on the federal government. The fourteenth amendment question was considered settled by *Kemmler* and *Holden*—which, of course, it was not.

The Fuller Court never again addressed the issue of the constitutionality of solitary confinement. The confinements challenged in *Rooney v. North Dakota*<sup>56</sup> and *Rogers v. Peck*<sup>57</sup> were found to be "closed," rather than solitary, confinements, which the Court viewed as identical to simple confinement or custody, *i.e.*, "only such custody, as will safely secure the production . . . of the prisoner on the day appointed for his execution."<sup>58</sup> The cases thus involved no fundamental right warranting federal interference with a state in the administration of its domestic affairs.

The only possible challenge remaining under the constitutional standard articulated by the Court was that the punishment imposed in an individual case was more severe than that

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53. 137 U.S. 483 (1890).

54. See also *Rooney v. North Dakota*, 196 U.S. 319 (1905).

55. 142 U.S. 155 (1891).

56. 196 U.S. 319 (1905).

57. 199 U.S. 425 (1905).

58. 196 U.S. at 325.



normally imposed—a challenge raised specifically in *Howard v. Fleming*.<sup>59</sup> That case involved the conviction of three persons for conspiracy. One was sentenced to seven years imprisonment, the others to ten years. The latter two contended that they were denied the equal protection of the laws because other offenses, which most would consider more grievous, received a lesser punishment. The Court's most conservative and outspoken member on criminal justice, Justice David Brewer, stated that "[u]ndue leniency in one case does not transform a reasonable punishment in another case to a cruel one."<sup>60</sup> In fact, said Brewer, if the sentence works to deter, the state ought to be congratulated and not condemned.<sup>61</sup>

For the Fuller Court, the disposition of an individual convicted of an offense against the laws of a state was a matter left to the state itself. The fourteenth amendment required equal treatment in the disposition of state convicts, but it did not make the eighth amendment applicable to state criminal cases.

#### IV. SELF-INCRIMINATION

The Fuller Court first heard a self-incrimination challenge by a state prisoner in *Adams v. New York*.<sup>62</sup> By admitting certain illegally seized evidence, the trial court was charged with having compelled the defendant to be a witness against himself. The Supreme Court rejected the argument, observing that the accused was not compelled to take the witness stand in his own behalf, to testify concerning the illegally seized papers, or to make any admissions about them. The observation was relevant not because of any direct constitutional guarantee applied to the states, but because the laws of the state itself guaranteed the privilege against self-incrimination. Had it been found that Adams was compelled to testify in violation of that privilege, the finding would have simply suggested a case of deprivation of equal treatment under the applicable New York laws.

The challenge was next heard by the Court in *Barrington v. Missouri*.<sup>63</sup> However, because the constitutional challenge had not been seasonably made, the Court refused to find that state-

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59. 191 U.S. 126 (1903).

60. *Id.* at 136.

61. *Id.*

62. 192 U.S. 585 (1904).

63. 205 U.S. 483 (1907).

ments made by the appellant while in the "sweatbox" of the St. Louis police department compelled him to be a witness against himself. Objection to the admission of the evidence had been made during trial and had been based not upon constitutional grounds but upon the grounds of irrelevancy, immateriality, and failure to lay a proper foundation. The Court observed in passing that the fifth amendment operated only as a restriction on federal power.

The question finally received full treatment in *Twining v. New Jersey*.<sup>64</sup> There, at the trial of a defendant charged with knowingly falsifying trust company records with intent to deceive examiners, the jury was instructed that it might draw unfavorable inferences from the defendant's failure to testify where it was within his power to respond to evidence that tended to incriminate him. It was first argued that the privileges and immunities clause guaranteed the exemption from self-incrimination as a fundamental right of national citizenship. The Supreme Court, however, followed the *Slaughter-House*<sup>65</sup> holding and rejected this argument. The defendant then appealed to the fourteenth amendment's due process clause, and the Court gave the question extensive treatment. It set out three tests for determining whether the requirements of due process were satisfied. The first test asked whether the exemption was a privilege recognized by English common or statutory law before the settlement of the American colonies and shown to be suited to colonial life.<sup>66</sup> The exemption failed this test. The second test questioned whether the exemption was a "fundamental principle of liberty and justice which inheres in the very idea of free government."<sup>67</sup> After cautioning his brethren not to import their own personal views as to what was wise, just, or fitting into the Constitution, Justice Moody set out to answer the second test by examining early American legal history. A survey of early state constitutional provisions and suggested amendments to the Federal Constitution convinced Justice Moody that the exemption "was not conceived to be inherent in due process of law, but on the other hand a right separate, independent and outside of due

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64. 211 U.S. 78 (1908).

65. 83 U.S. (16 Wall.) 36 (1872).

66. This is an American version of the doctrine of Calvin's Case, 77 Eng. Rep. 377 (K.B. 1607).

67. 211 U.S. at 106.

process."<sup>68</sup> The final test guaranteed process designed to check arbitrary government. The Court concluded that since the defendant was given reasonable notice and an opportunity to be heard, he had not been subjected to any arbitrary governmental power.<sup>69</sup> The Court concluded that even under an assumption that the defendant had been compelled to incriminate himself, no federal question was presented because the fourteenth amendment offered no protection from self-incrimination in state criminal cases. That amendment did not effect an alteration in federal-state relations:

The power of . . . [the] people [of the states] ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands.<sup>70</sup>

#### V. CONCLUSION: THE DAWN OF MODERN LIMITATIONS ON GOVERNMENT

Continuing the Jeffersonian tradition—a tradition enhanced by the teachings of Herbert Spencer—the Fuller Court endeavored to protect individual liberty by working to ensure limited government. National power was kept in check by a notion of federalism that prohibited federal interference with state law and process as long as each was equally applied. This concept of federalism and equal treatment not only explains the Fuller Court's passive posture toward state criminal cases, but also accounts for the Court's contrastingly vigorous and more famous responses to state efforts to regulate the market place by paternalistic measures. In cases where the equality required by the Fuller Court's understanding of the fourteenth amendment was violated, the normal constraints of federalism were simply dropped and national intervention justified and even required.

With the nexus between the Fuller Court's understanding of federalism and its interpretation of equal treatment, it was natural that the eventual success of the progressives to undermine substantive due process would also bring down the nineteenth

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68. *Id.* at 110.

69. *Id.* at 111-12.

70. *Id.* at 114.

century conception of legitimate federal-state relations. Such a traditional notion of federalism would only frustrate the new bulwarks of individual liberty—the process-oriented rights of the Bill of Rights. To accommodate the spirit of limited government that prevailed in the age of substantive due process and yet acknowledge the idea of social democracy that brought that age to an end, the Supreme Court gradually began to expand process-oriented rights. The expansion itself climaxed during the Warren era. Where the judiciary was once passive, it became active; where it was once active, it became passive. Substantive due process was turned inside out.

The progressive program of this latter period sought to solve the problems of the corporate revolution with increased governmental intervention. Government itself grew with the corporate state. To protect individual liberty in the twentieth century required that the courts restructure large-scale organizations. The injunction became a tool of social reform used to restructure school, police, and prison systems;<sup>71</sup> habeas corpus became an instrument to restructure the criminal justice systems. Once again, however, substantive due process, though in its modern context, has come under attack. The Burger Court has reacted by circumscribing process and denying substantive claims. We appear to be at another threshold, but at this point it is unclear what will provide tomorrow's bulwark of individual liberty.

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71. See generally O. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978).