The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910

David P. Currie†

The Supreme Court's first hundred years virtually ended with the death of Chief Justice Morrison R. Waite in March 1888. Five of Waite's brethren—Stanley Matthews, Samuel F. Miller, Joseph P. Bradley, Samuel Blatchford, and Lucius Q.C. Lamar—left the Court within the next five years, and a sixth—Stephen J. Field—hung on after his powers had faded.¹ By 1894, Melville W. Fuller² presided over an essentially new Court consisting of David J. Brewer, Henry B. Brown, George Shiras, Howell E. Jackson, and Edward Douglass White³ in addition to the three holdovers, John M. Harlan, Horace Gray, and Field. Jackson and Field soon gave way to Rufus W. Peckham and Joseph McKenna; Gray and Shiras, after the turn of the century, were replaced by Oliver Wendell Holmes and William R. Day. William H. Moody and Horace R. Lurton served briefly at the end of Fuller's term, and another massive turnover accompanied Fuller's death in 1910. Thus the personnel of Fuller's twenty-one-year tenure is well separated from that of the preceding and following periods. Moreover, although twenty Justices sat during this time, eleven did the lion's share of the work: Harlan, Gray, Fuller, Brewer, Brown, Shiras, White,

† Harry N. Wyatt Professor of Law, University of Chicago. I thank Karla Kraus and Richard Levy for valuable research assistance, Mitchell Daffner for taming the computer, Richard Helmholz, Richard Posner, and Cass R. Sunstein for helpful comments, and the Jerome S. Weiss Faculty Research Fund for helping to make this study possible.

¹ See WILLARD KING, MELVILLE WESTON FULLER 222-27 (1950); CARL SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW 442-45 (1930). Both recount Field's riposte when Harlan, deputed to suggest it was time Field resign, asked whether Field recalled a similar errand he had run in the case of Justice Grier: "Yes! And a dirtier day's work I never did in my life!" W. KING, *supra*, at 224; C. SWISHER, *supra*, at 444. The source of the quotation is CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 76 (1928).

² A longtime friend and adviser of President Cleveland, Fuller, who had practiced law in Chicago, was little known elsewhere, and his appointment was a surprise. See W. KING, *supra* note 1, ch. 8.

³ For conflicting evidence as to the spelling of White's middle name, see MARIE KLINKHAMER, EDWARD DOUGLAS [sic] WHITE, CHIEF JUSTICE OF THE UNITED STATES 1 n.1 (1943). Cf. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 468 (1983) (discussing the case of Justice Duval[l]).

Peckham, McKenna, Holmes, and Day.⁴

Most of these Justices are not household names, but their decisions are. Under Fuller, the Court first employed the due process clause to invalidate state legislation in such cases as *Allgeyer v. Louisiana*,⁵ *Smyth v. Ames*,⁶ and *Lochner v. New York*.⁷ It struck down barriers to the sale of out-of-state liquor under the commerce clause in *Leisy v. Hardin*.⁸ It invalidated the federal income tax in *Pollock v. Farmers' Loan & Trust Co.*⁹ and held that manufacturing was not "commerce" in *United States v. E.C. Knight Co.*¹⁰ It made constitutional limits on state action more easily enforceable by limiting the immunity of state officers in a series of decisions culminating in *Ex parte Young*.¹¹

Yet it would be a mistake to brand the Fuller Court as generally hostile to either state or federal authority. The states' power

⁴ JUSTICES OF THE SUPREME COURT DURING THE TIME OF CHIEF JUSTICE FULLER (1888-1910)

		1890	1895	1900	1905	1910
Samuel F. Miller	(1862-1890)	—				
Stephen J. Field	(1863-1897)	—	—			
Joseph P. Bradley	(1870-1892)	—				
John M. Harlan	(1877-1911)	—	—	—	—	—
Stanley Matthews	(1881-1889)	—				
Horace Gray	(1881-1902)	—	—	—		
Samuel Blatchford	(1882-1893)	—				
Lucius Q.C. Lamar	(1888-1893)	—				
Melville W. Fuller	(1888-1910)	—	—	—	—	—
David J. Brewer	(1889-1910)	—	—	—	—	—
Henry B. Brown	(1890-1906)	—	—	—		
George Shiras	(1892-1903)		—	—		
Howell E. Jackson	(1893-1895)		—			
Edward D. White	(1894-1921)		—	—	—	—
Rufus W. Peckham	(1895-1909)		—	—	—	
Joseph McKenna	(1898-1925)			—	—	—
Oliver W. Holmes	(1902-1932)			—	—	—
William R. Day	(1903-1922)				—	—
William H. Moody	(1906-1910)				—	—
Horace R. Lurton	(1909-1914)					—

Source: Adapted from GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* app. A, at A-2 to A-4 (10th ed. 1980).

⁵ 165 U.S. 578 (1897).

⁶ 169 U.S. 466 (1898).

⁷ 198 U.S. 45 (1905).

⁸ 135 U.S. 100 (1890).

⁹ 157 U.S. 429, *modified on rehearing*, 158 U.S. 601 (1895).

¹⁰ 156 U.S. 1 (1895).

¹¹ 209 U.S. 123 (1908).

to enforce racial segregation of trains was upheld in *Plessy v. Ferguson*.¹² Congress was found to have inherent power to exclude and deport aliens,¹³ and *In re Debs*¹⁴ upheld the authority of a federal court to enjoin a strike that disrupted commerce, although no statute had granted such authority. The *Insular Cases*¹⁵ authorized Congress to govern possessions acquired after the Spanish-American War without regard to various constitutional limitations. In fact, the Court under Fuller employed a wide variety of techniques to protect economic interests, including both broad and narrow constructions of federal authority and procedural as well as substantive aspects of due process.

The Fuller Court's activism in protecting economic interests contrasts sharply with the judicial restraint of its predecessor, but the differences should not be exaggerated. Most state regulatory laws affecting business passed muster, including limits on the working hours of miners,¹⁶ women,¹⁷ and public works employees.¹⁸ The Sherman Act was found applicable to several business arrangements not falling within a strict definition of interstate or foreign commerce.¹⁹ Congress was allowed to forbid interstate transportation of lottery tickets²⁰ and to impose prohibitive taxes.²¹ The erosion of protection for vested contract rights continued when the Court allowed a state to rescind a grant of submerged land²² and held that a state could not be sued in federal court by its own citizens for defaulting on a bond contract.²³

Amid all these politically charged cases, the Court found time to devote itself seriously to the more prosaic problem of distributing judicial authority among the states in a series of full-faith-and-credit decisions that form the basis of our current law.²⁴ Moreover,

¹² 163 U.S. 537 (1896).

¹³ The Chinese Exclusion Case, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

¹⁴ 158 U.S. 564 (1895).

¹⁵ See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901).

¹⁶ *Holden v. Hardy*, 169 U.S. 366 (1898).

¹⁷ *Muller v. Oregon*, 208 U.S. 412 (1908).

¹⁸ *Atkin v. Kansas*, 191 U.S. 207 (1903).

¹⁹ E.g., *Northern Sec. Co. v. United States*, 193 U.S. 197, 325-27 (1904) (creation of a corporation to hold the shares of two competing railroads violates the Sherman Act).

²⁰ The Lottery Case (*Champion v. Ames*), 188 U.S. 321 (1903).

²¹ *McCray v. United States*, 195 U.S. 27 (1904).

²² *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

²³ *Hans v. Louisiana*, 134 U.S. 1 (1890).

²⁴ See, e.g., *Huntington v. Attrill*, 146 U.S. 657 (1892); *Clarke v. Clarke*, 178 U.S. 186 (1900); *Haddock v. Haddock*, 201 U.S. 562 (1906); *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *Fall v. Eastin*, 215 U.S. 1 (1909).

the cases mentioned are but the tip of an iceberg. In these two decades, the Court waded through nearly a thousand constitutional controversies—more than in the entire preceding century. A great many of these cases required only the application of settled principle. The discretionary writ of certiorari, introduced in 1891,²⁵ had enabled the Supreme Court to keep its collective head above the flood of nonconstitutional cases;²⁶ the extension of certiorari to constitutional cases was long overdue by 1910.²⁷

The present article is devoted to the economic decisions of the Fuller Court; a sequel will discuss the remaining decisions of the time. As in similar studies of the Court's first hundred years,²⁸ the aim of both is to criticize, from a lawyer's point of view, the constitutional work of the Fuller period as a whole.²⁹

I. THE FURTHER DECLINE OF THE CONTRACT CLAUSE

It seems ironic that the Fuller period, best known for giving life to the questionable doctrine that due process guaranteed the right to make contracts in the future, began with two important decisions that diminished the explicit protection that article I, section 10 provided for contracts already made.

A. *Hans v. Louisiana*

The eleventh amendment had made enforcement of a state's

²⁵ Act of Mar. 3, 1891, § 6, 26 Stat. 826, 828.

²⁶ For discussions of the effect of the 1891 Act on the docket, see F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 101-02 (1928); W. KING, *supra* note 1, at 148-51.

²⁷ For a discussion of the belated achievement of this goal, culminating in the Act of Feb. 13, 1925, 43 Stat. 936, see F. FRANKFURTER & J. LANDIS, *supra* note 26, at 203-16.

²⁸ DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS* (forthcoming 1985).

²⁹ Pending publication of the relevant volume in the series *HISTORY OF THE SUPREME COURT OF THE UNITED STATES*, general historical coverage of the Fuller era remains relatively sparse. Charles Warren's treatment of what was to him a recent period was intentionally sketchy. See 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* chs. 37-38 (rev. ed. 1926). Andrew McLaughlin's discussion was almost as brief. See ANDREW McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* chs. 50-51 (1935). Biographies of Justices of the time include FRANCIS BIDDLE, *MR. JUSTICE HOLMES* (1942); CHARLES FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT* (1939); MARK HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882* (1963); MARK HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870* (1957); W. KING, *supra* note 1; M. KLINKHAMER, *supra* note 3; FRANK LATHAM, *THE GREAT DISSENTER: JOHN MARSHALL HARLAN, 1833-1911* (1970); MATTHEW McDEVITT, *JOSEPH McKENNA, ASSOCIATE JUSTICE OF THE UNITED STATES* (1946); JOSEPH McLEAN, *WILLIAM RUFUS DAY* (1946); GEORGE SHIRAS, *JUSTICE GEORGE SHIRAS JR. OF PITTSBURGH* (1953); C. SWISHER, *supra* note 1.

promises difficult by closing the federal courts to actions against states by citizens of other states or of foreign countries, and the Court had convincingly concluded before Fuller's appointment that a state's immunity could not be evaded either by having another state sue on behalf of its citizens³⁰ or by suing to require an individual official to discharge the state's debt.³¹ But the amendment did not forbid suits against states by their own citizens, and it was the Fuller Court that closed that loophole in the 1890 case of *Hans v. Louisiana*.³²

Another chapter in the disreputable history of bond repudiation by Southern states after Reconstruction,³³ *Hans* was an action by a Louisiana citizen against his own state for interest due on its bonds. Although the eleventh amendment itself was inapplicable, the Court said that its adoption showed that the country had disagreed with the decision in *Chisholm v. Georgia*³⁴ that article III's provision extending federal judicial power to "Controversies . . . between a State and Citizens of another State" embraced suits against unconsenting states. In its literal application of the words of article III, Justice Bradley concluded, *Chisholm* had ignored the teaching of "history and experience"³⁵ that "[t]he suability of a State without its consent was a thing unknown to the law."³⁶ Quoting convincing passages from Hamilton, Madison, and Marshall, the Court emphasized that "[a]ny such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people."³⁷ These views were as applicable to *Hans* as they had been to *Chisholm*; the appeal to the "letter" in both cases was "an attempt to strain the Constitution and the law to a construction never imagined or dreamed of."³⁸ It would be ab-

³⁰ *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883).

³¹ *E.g.*, *Hagood v. Southern*, 117 U.S. 52, 67-68 (1886), discussed in D. CURRIE, *supra* note 28, ch. 12; *Louisiana v. Jumel*, 107 U.S. 711, 720-21 (1883). Despite the questionable conclusion in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), that a suit against an officer for restitution or an injunction was not a suit against the state, the Court soundly concluded that an officer was not suable when he himself had done no wrong. See D. CURRIE, *supra* note 28, chs. 4, 12.

³² 134 U.S. 1 (1890).

³³ See D. CURRIE, *supra* note 28, ch. 12.

³⁴ 2 U.S. (2 Dall.) 419 (1793), discussed in D. CURRIE, *supra* note 28, ch. 1.

³⁵ *Hans*, 134 U.S. at 14.

³⁶ *Id.* at 16.

³⁷ *Id.* at 12.

³⁸ *Id.* at 15.

surd to allow suits against one's own state while prohibiting those against others; "[t]he truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States[.]"³⁹ and the suit could not be maintained.

Some later observers have professed to find that *Hans* "construed" the eleventh amendment itself to apply to suits against the plaintiff's own state;⁴⁰ others have written that it invoked a common law principle that could be overridden by statute.⁴¹ But the passages just quoted leave very little doubt that the basis of the decision was that article III's provision extending the judicial power to "Cases arising under this Constitution" was subject to an implied exception for suits by individuals against nonconsenting states.⁴² In favor of this conclusion, as Bradley noted,⁴³ were all the arguments that had made *Chisholm* itself questionable.⁴⁴ Furthermore, implicit state immunities from the operation of express fed-

³⁹ *Id.*

⁴⁰ See, e.g., CHARLES WRIGHT, *LAW OF FEDERAL COURTS* 287 & n.6 (4th ed. 1983); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1893-94 (1983).

⁴¹ See, e.g., *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 313 (1973) (Brennan, J., dissenting); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines* (pt. 1), 126 U. PA. L. REV. 515, 537 & n.81 (1977).

⁴² *Accord* *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 291-92 (Marshall, J., concurring) (*Hans* made it clear that the eleventh amendment restored "the original understanding" of art. III); see also *id.* at 281 n.1 (Douglas, J., for the Court) (*Hans* dealt with "constitutional constraints on the exercise of the federal judicial power"). Bradley had said in an earlier opinion that the Constitution did not support jurisdiction in such cases. See *Virginia Coupon Cases*, 114 U.S. 269, 337-38 (1885) (Bradley, J., dissenting). *Hans* rejected the unnecessary statement in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821), discussed in D. CURRIE, *supra* note 28, ch. 4, that immunity was no bar to federal-question suits against one's own state. See *Hans*, 134 U.S. at 20. Harlan's concurrence observed that, although *Chisholm* had been rightly decided, the suit in *Hans* was "not one to which the judicial power of the United States extends." *Id.* at 21. That Iredell's dissent in *Chisholm*, 2 U.S. (2 Dall.) at 429-50, which *Hans* approved, had been explicitly based on statutory rather than on constitutional grounds does not impair the impact of Bradley's repeated references to the Constitution.

⁴³ 134 U.S. at 15.

⁴⁴ See D. CURRIE, *supra* note 28, ch. 1 (discussing the arguments made in *Chisholm*). Indeed, as Harlan seemed to imply in his concurrence, 134 U.S. at 21, the argument for jurisdiction was stronger in *Chisholm* than in *Hans* because, in the former case, the constitutional text expressly extended federal judicial power to controversies between a state and citizens of another state. The eleventh amendment may well have been drafted narrowly to modify this offending language and not to allow federal-question suits brought by a citizen against his own state.

eral authority were no novelty when *Hans* was decided.⁴⁵ It is nevertheless noteworthy that a Court destined to give unprecedented protection to certain economic interests opted, in a case that could have gone either way, for an interpretation of the jurisdictional provisions that severely impaired the protection of existing contract rights.⁴⁶

⁴⁵ See, e.g., *Collector v. Day*, 78 U.S. (11 Wall.) 113, 128 (1871) (Congress may not tax state judge's salary); cf. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 103, 107-08 (1861) (Congress may not impose duties on state officer despite implicit authority to implement extradition clause); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (state may not tax national bank). Less persuasive was Bradley's additional argument in *Hans* that a statute making federal jurisdiction "concurrent" with state jurisdiction meant that the federal court could act only in cases that state courts would hear. 134 U.S. at 18. For the counterargument, see D. CURRIE, *supra* note 28, ch. 1.

⁴⁶ In *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (Brewer, J.), however, the Court held that a county could be sued on its bonds because a county was not a "state," for eleventh amendment purposes, but a separate corporation with powers of its own. Though in accord with the earlier decision that a county was a "citizen" of a state for diversity purposes, *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118, 121-22 (1869), which *Luning* did not cite on this point, this decision is not easy to reconcile with the conclusion in *North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 313 (1908), that the fourteenth amendment applied not only to "State[s]" but to the actions of their political subdivisions as well—as the purpose of the amendment seemed to require. Compare the implicit immunity of states from federal regulation proclaimed in *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976), *overruled*, *Garcia v. San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005 (1985), which apparently extended to political subdivisions.

In the same spirit as *Hans* was the decision in *Smith v. Reeves*, 178 U.S. 436, 445-49 (1900) (Harlan, J.) (relying on *Hans*), holding that a federal corporation, though not a "Citizen[] of another State" within the eleventh amendment, also could not sue a state in a federal-question case. *Hans* was distinguished, however, in *United States v. Texas*, 143 U.S. 621, 643-46 (1892) (also written by Harlan), in which the Court allowed the United States to sue a state; judicial resolution of controversies "between these two governments . . . does no violence to the inherent nature of sovereignty," *id.* at 646. Furthermore, Harlan noted, "the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine [such controversies]." *Id.* at 645. In reaching this convincing result, Harlan appropriately relied on the Court's longstanding practice, derived from an explicit provision of the Articles of Confederation, of entertaining suits by one state against another. See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 727 (1838) (discussing art. IX of the Articles). The Fuller Court continued this practice, explicitly rejecting the defense of sovereign immunity in such cases. See, e.g., *Virginia v. West Virginia*, 206 U.S. 290, 318-19 (1907) (Fuller, C.J.); *Kansas v. Colorado*, 206 U.S. 46, 82-84 (1907) (Brewer, J.); *South Dakota v. North Carolina*, 192 U.S. 286, 316-18 (1904) (Brewer, J.); cf. *Hans*, 134 U.S. at 15 (discussing interstate suits: "The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States.").

In *Kansas v. United States*, 204 U.S. 331 (1907) (Fuller, C.J.) (alternative holding), however, the Court unanimously held that *United States v. Texas* was a one-way street: a state could not sue the United States without its consent because "[p]ublic policy forbids that conclusion." 204 U.S. at 342. The public policy in question was not identified, and it would seem that "the permanence of the Union" might be equally "endangered" by the want of a tribunal when the state is a plaintiff as when it is a defendant in a controversy "between these two governments." The Court's question-begging explanation that the state had consented to be sued by joining the Union, *id.*, could have been applied as easily to the

B. *Illinois Central* and *Manigault*

Two years after *Hans* the Court undertook a sharp limitation of the substantive protection afforded by the contract clause itself. The Illinois legislature had, under shady circumstances,⁴⁷ granted virtually all the land under Chicago's harbor to a railroad and then attempted to take it back. The case looked for all the world like *Fletcher v. Peck*,⁴⁸ where Marshall had held that a state could not rescind its grant. Yet, in a lengthy opinion, supporting a 4-3 decision, by no less a friend of private property than Justice Field, the Court held that Illinois had validly reclaimed the land.⁴⁹

converse case or to *Hans v. Louisiana*.

That a state could actually consent to be sued even by a private party in federal court, see D. CURRIE, *supra* note 28, ch. 12 (discussing *Clark v. Barnard*, 108 U.S. 436 (1883)), was reaffirmed in *Gunter v. Atlantic Coast Line*, 200 U.S. 273, 292 (1906) (White, J.). *Smith v. Reeves*, 178 U.S. 436 (1900), made it clear, however, that it was not enough for federal jurisdiction that the state had consented to be sued in its own courts and added the peculiar qualification—explained only by a cryptic reference to “the supremacy of the Constitution” and of federal laws—“that the final judgment of the highest court of the State in any action brought against it with its consent may be reviewed or reexamined” in the Supreme Court if the case contains a federal question. *Id.* at 445 (dictum).

Finally, ignoring Marshall's express alternative holding in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 393-94 (1821), discussed in D. CURRIE, *supra* note 28, ch. 4, that the Supreme Court's original jurisdiction in cases “in which a State shall be Party” was limited to those cases in which the only basis of federal jurisdiction is that a state is a party, the Court, in *United States v. Texas*, 143 U.S. 621 (1892), upheld its original jurisdiction over a suit by the United States against a state, concluding that article III, section 2, clause 2 comprehended “all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant.” *Id.* at 644. Within three years, the Court underlined the importance of the word “defendant” by reaffirming *Cohens's* conclusion that the Court had no original jurisdiction of a federal-question suit by a state against its own citizens. *California v. Southern Pac. Co.*, 157 U.S. 229, 257-58 (1895) (apparently restating the rule to allow original jurisdiction whenever federal judicial power was based upon “the character of the parties”).

⁴⁷ *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 451-52 (1892); see 3 BESSIE PIERCE, A HISTORY OF CHICAGO 319 (1957) (reporting that the granting statute “was commonly known as the ‘Lake Front Steal’”). Marshall's refusal to investigate legislative motive in the similar circumstances of *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), made it difficult for the Court to invalidate the grant on grounds of bribery or improper influence, though technically the fact that the state was a party would have served to distinguish Marshall's decisive point in *Fletcher*, which was that it would be “indecent, in the extreme,” to inquire into legislative corruption when the state was not a party to the suit, *id.* at 131. Nevertheless, one cannot know to what extent the result in *Illinois Central* was influenced by the sense that the deal was less than honest.

⁴⁸ 10 U.S. (6 Cranch) 87 (1810), discussed in D. CURRIE, *supra* note 28, ch. 5.

⁴⁹ *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892). Fuller and Blatchford did not participate. *Id.* at 476. For the argument that this decision was another manifestation of the same hostility to special privileges that had led to Field's dissent in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83-111 (1873), see McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 246, 258-59 (L. Friedman & H. Scheiber eds. 1978). For a discussion of the *Slaughter-House Cases*, see D.

The key distinction, in Field's view, was that the land in the Illinois case lay under water. Though the state owned submerged land, it did so as trustee for the public interest in navigation, and it had no power to sell in violation of its public trust. Since the original transfer had thus been invalid, no contractual obligation was impaired when the state rescinded the grant.⁵⁰

The words flow easily off the pen; no fancy reasoning is needed to show that a trustee's powers are limited by the terms of his trust. What powers the people of Illinois had given their legislature, however, would appear to depend upon Illinois' constitution, to which Field never referred. In default of Illinois authority, he invoked a number of decisions from other jurisdictions, not one of which, he conceded,⁵¹ had held a legislative grant of submerged land invalid. The leading Supreme Court precedent cited had expressly declined to decide whether even the King of England possessed the power, as a trustee for the British people, to make such a grant and had added that the validity of a grant made by authority of the people of a state "must . . . be tried and determined by different principles from those which apply to grants of the British crown"⁵² A New York case heavily quoted by Field appeared to suggest that the King could alienate submerged land so long as the public right of navigation was reserved,⁵³ as it had been in *Illinois Central*.⁵⁴ In a dictum significantly omitted from Field's opinion, the New York court had added that the legislature could authorize even the obstruction of navigation.⁵⁵ Justice Shiras, in a

CURRIE, *supra* note 28, ch. 10.

⁵⁰ 146 U.S. at 452-62.

⁵¹ *Id.* at 455.

⁵² *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410-11 (1842), cited in *Illinois Central*, 146 U.S. at 456. The case held that the "proprietors" of New Jersey, under whom Waddell claimed, had no title to convey after surrendering back to the crown in 1702 the political powers the King had originally granted them. 41 U.S. (16 Pet.) at 412-14. Far from claiming that it had no right to convey submerged land, as Justice Thompson pointed out in dissent, *id.* at 420-21, New Jersey had actually proceeded to do so. See also Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 476 (1970) ("[T]he inability of the Sovereign to alienate Crown lands was not a restriction upon government generally, but only upon the King . . .").

⁵³ *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71, 76-77 (1877), quoted in *Illinois Central*, 146 U.S. at 458.

⁵⁴ 146 U.S. at 405 n.1.

⁵⁵ *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71, 77-78 (1877) (citing English authority); see BENJAMIN WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* 149 n.118 (1938) ("Some of the state cases seem definitely to contradict [Field's] point of view."). Indeed, a state's power to obstruct navigation seemed implicit in a long line of Supreme Court cases allowing states to authorize bridges over navigable streams despite their interference with interstate commerce. See, e.g., *Gilman v. Philadelphia*, 70 U.S. (3

brief and telling dissent joined by Gray and Brown, came up with Supreme Court dicta and state-court holdings sustaining the power to convey.⁵⁶

Apart from precedent, Field's argument from first principles itself had serious internal difficulties. He attempted throughout to equate the grant of ownership with the relinquishment of "control" over navigation of the overlying waters.⁵⁷ The New York case on which he relied so heavily had emphasized that a grant of submerged land did not imply a surrender of the public right to navigation or of the state's power to protect that right by legislation.⁵⁸ As already mentioned, the *Illinois Central* grant had been made on the express condition that "nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation."⁵⁹ Field protested that this clause "placed no impediments upon the action of the railroad company which did not previously exist,"⁶⁰ but that only made the dissenters' point stronger: even apart from the explicit limitation, the state had not attempted to abandon protection of navigation.⁶¹

The Court had already held, building upon a dictum by Marshall in *Fletcher v. Peck*, that a state could not contract away its authority to regulate under the police power.⁶² It had done so,

Wall.) 713 (1866); D. CURRIE, *supra* note 28, ch. 10 (discussing *Gilman* and related cases). The closest Field could come to real precedent was a dictum in an opinion signed by one of three participating New Jersey justices but attributed by Field without apparent embarrassment to "the Supreme Court of New Jersey." *Arnold v. Mundy*, 6 N.J.L. 1, 78 (1822) (opinion of Kirkpatrick, C.J.), quoted in *Illinois Central*, 146 U.S. at 456.

⁵⁶ 146 U.S. at 464-76 (citing, *inter alia*, *Langdon v. Mayor of New York*, 93 N.Y. 129 (1883)). Field responded that general statements in these decisions affirming such power should be "read and construed with reference to the special facts of the particular cases," that no grant as extensive as the one before him had ever been sustained, and that the state could convey only "such parcels as are used in promoting the interests of the public" (e.g., for the construction of piers), "or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." 146 U.S. at 453. Even if this served to distinguish the dissenters' cases, it left the majority devoid of authority of its own. Even the foremost modern proponent of the public-trust doctrine does not argue that *Illinois Central* was supported by precedent. See Sax, *supra* note 52, at 489-91. For a somewhat more sympathetic view, see Selvin, *The Public Trust Doctrine in American Law and Economic Policy, 1789-1920*, 1980 Wis. L. Rev. 1403, 1435.

⁵⁷ 146 U.S. at 452-54.

⁵⁸ *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71, 79-80 (1877).

⁵⁹ 146 U.S. at 406 n.1.

⁶⁰ *Id.* at 451.

⁶¹ It was also apparent from *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 531-32 (1848), that, in making the grant, the state had implicitly reserved the power to retake the land itself for public use upon payment of just compensation. See D. CURRIE, *supra* note 28, ch. 7 (discussing *Dix*).

⁶² *Stone v. Mississippi*, 101 U.S. 814, 817 (1880); cf. *Fletcher v. Peck*, 10 U.S. (6 Cranch)

under Field's leadership, with as little concern for the state constitution in question as Field exhibited in *Illinois Central*. But in the Illinois case Field pulled out all the stops in a creative effort to extend the precedents, contrary to Marshall's distinction,⁶³ to a case in which the state had parted only with ownership and not with governmental power, and in which the terms of the grant itself protected the public interest with which the opinion was concerned.

Thirteen years later, in its last significant encounter with the contract clause, the Fuller Court in *Manigault v. Springs*⁶⁴ rendered yet another narrow interpretation, upholding a state law authorizing one proprietor to flood another's land despite a preexisting contract in which he had promised not to do so.⁶⁵ The police power, wrote Justice Brown, was "paramount to any rights under contracts between individuals. . . . [P]arties by entering into contracts may not estop the legislature from enacting laws intended for the public good."⁶⁶ In addition to several inapposite precedents construing particular contracts not to contain promises inconsistent with later legislation,⁶⁷ Brown relied on the more nearly relevant decision in *Stone v. Mississippi*⁶⁸ that a state could not contract away its police power. But no state promise was in issue in *Manigault*, and to hold that *private* contracts were implicitly subject to modification whenever required by the police power⁶⁹ was

87, 135 (1810) (one legislature is always competent to repeal the general legislation of a prior legislature). For discussion of *Fletcher* and *Stone*, see D. CURRIE, *supra* note 28, chs. 5, 11.

⁶³ In *Fletcher*, Marshall emphasized that a legislature may repeal the *general* acts of a prior legislature but that a specific sale of land, made on legislative authorization, was an act that could not be "undo[ne]" by a subsequent legislature. 10 U.S. (6 Cranch) at 135.

⁶⁴ 199 U.S. 473 (1905) (Brown, J.).

⁶⁵ Since the statute provided for payment of compensation, 199 U.S. at 486, the Court could have reached this result on the basis of precedents construing sales of government land to individuals as containing an implicit reservation of the power of eminent domain. See *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 531-32 (1848). But that was not the basis of the Court's decision. See Hale, *The Supreme Court and the Contract Clause* (pt. 2), 57 HARV. L. REV. 621, 674 (1944).

⁶⁶ 199 U.S. at 480. Justice Holmes made a better known statement to the same effect in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908): "One whose rights . . . are subject to state restriction, cannot remove them from the power of the State by making a contract about them." This statement was quite unnecessary to the decision, since the contract in question had been made after a law prohibiting such contracts had been passed; as Holmes said, the contract "was illegal when it was made," *id.* at 357.

⁶⁷ See, e.g., *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 548-49 (1837) (statutory charter granted to one bridge company contains no implicit promise not to grant subsequent charter to another bridge company), discussed in D. CURRIE, *supra* note 28, ch. 7.

⁶⁸ 101 U.S. 814, 817 (1880), discussed in D. CURRIE, *supra* note 28, ch. 11.

⁶⁹ It is the settled law of this court that the interdiction of statutes impairing the obli-

perilously close to saying that states could impair contractual obligations whenever they had a good reason.⁷⁰ A narrow interpretation of the scope of proper police-power measures might have avoided reading the contract clause out of the Constitution altogether,⁷¹ but *Manigault* was at best a life-threatening precedent.⁷²

As one might expect after these decisions, the once mighty contract clause played very little part in striking down state laws during the Fuller period.⁷³

gation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.

Manigault, 199 U.S. at 480. For a discussion of the difference between public and private contracts in this context, see Hale, *supra* note 65, at 671.

⁷⁰ That would be enough to sustain the debtor-relief legislation that had prompted the clause to begin with. See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 204 (1819) (discussing original purpose of the contract clause).

⁷¹ See B. WRIGHT, *supra* note 55, at 211-12 (construing cases to limit contract-affecting police power measures to subject matter of "unusual public importance").

⁷² A few years earlier, the Fuller Court had dealt a similar blow to yet another constitutional provision designed to protect the expectations of creditors—the prohibition in article I, section 10 of the issuance by states of bills of credit. *Houston & T.C.R.R. v. Texas*, 177 U.S. 66 (1900) (Peckham, J.). The challenged notes were "treasury warrants" issued to state creditors in small denominations and promising future payment. Since the Court had long ago drawn a shaky but necessary line between promissory notes and bills of credit, the notes in *Houston & T.C.R.R.* may have been sustainable on the basis of precedent. See *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 432-34 (1830), discussed in D. CURRIE, *supra* note 28, ch. 6. In upholding the validity of the treasury warrants, however, the Court laid principal stress on its conclusion that they had not been "intended to circulate as money" because "the members of the legislature knew that to issue the warrants to circulate as money would be to condemn them from the start"; it was immaterial that the legislature "may have desired to facilitate the[ir] use" among private persons by agreeing also to accept them in satisfaction of obligations to the state. *Houston & T.C.R.R.*, 177 U.S. at 84. As Justice Brown protested in a separate opinion, this seemed to invite the states to evade the prohibition by a simple exercise in labeling. See *id.* at 102-03 (Brown, J., concurring in the Court's alternative ground that the state was estopped to deny the validity of its own warrants).

⁷³ For an attempt to explain this phenomenon, see Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 BUFFALO L. REV. 381 (1982).

Approximately 250 contract-clause cases were decided during Fuller's tenure; in fewer than 10% of them was state action found unconstitutional. Over 90% of the contract-clause cases involved public contracts, and a great many of them concerned the interpretation of particular tax exemptions. Only two not yet mentioned are of interest. One was *Crenshaw v. United States*, 134 U.S. 99 (1890) (Lamar, J.), which allowed the United States to discharge a naval officer before his term, not on the obvious ground that the contract clause applied only to the states, but because of precedents holding that public officers' agreements were not "contracts" within the meaning of the clause, *id.* at 108; see, e.g., *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 416 (1851), discussed in D. CURRIE, *supra* note 28, ch. 7. The other was *Douglas v. Kentucky*, 168 U.S. 488 (1897) (Harlan, J.), which declared that the Supreme Court was free to disregard state-court decisions upholding state authority to make irrevocable grants of lottery privileges, *id.* at 499-500. Harlan, for the Court, relied

II. FEDERAL POWER TO PROTECT ECONOMIC INTERESTS

Fuller's accession to the Court essentially coincided with Congress's first major attempts—in the Interstate Commerce and Sherman Acts—to combat perceived abuses of private economic power. Fuller and his brethren, as we shall see, would have ample opportunities to pass upon the scope of federal authority to do this. But federal power was also exercised during this time to *protect* private economic interests, and from the first the Fuller Court construed federal authority broadly to permit such protection.

A. The Power to Exclude Aliens

The first example was Justice Field's 1889 opinion for a unanimous Court in the *Chinese Exclusion Case*,⁷⁴ which upheld a federal statute barring the entry of Chinese laborers into the country. Underlying the enactment of this law, as Field observed, was the increasing competition between Chinese and American workers.⁷⁵ Acknowledging that denying reentry to individuals who had once lawfully resided in the United States was inconsistent with an earlier treaty, the Court properly invoked precedent indicating that treaties, like statutes, were vulnerable to later contrary congressional action.⁷⁶ The argument that the legislation impaired a vested right represented by a reentry certificate issued when the immigrant had left this country was rejected on grounds familiar from contract-clause jurisprudence: Congress had no power to promise not to exercise its legislative authority.⁷⁷ Most interesting, however, was the ground on which Justice Field defended his cen-

largely on cases reexamining state-court decisions that had *denied* the existence of a contract, although the Court in such cases had done so to prevent states from evading the contract clause; this consideration is absent when the state court has upheld the contract. See D. CURRIE, *supra* note 28, ch. 7 (discussing the Court's approach to such a case in *Piqua Branch of State Bank v. Knoop*, 57 U.S. (16 How.) 369, 391-92 (1854)). Harlan added, as the Court had said in *Stone v. Mississippi*, 101 U.S. 814, 818 (1880), that lottery contracts were not within the clause at all. *Douglas*, 168 U.S. at 504. Support for that interpretation was wanting, however, and most of the *Stone* opinion had dealt with the state's power to contract, which ought to have turned on state law. See D. CURRIE *supra* note 28, ch. 11; *id.* ch. 6 (discussing *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827)).

⁷⁴ 130 U.S. 581 (1889).

⁷⁵ *Id.* at 594-95.

⁷⁶ *Id.* at 600-03 (citing, *inter alia*, *The Head Money Cases*, 112 U.S. 580, 599 (1884)).

⁷⁷ 130 U.S. at 609; *cf.* *Stone v. Mississippi*, 101 U.S. 814, 817 (1880) ("[T]he legislature cannot bargain away the police power of a State."), discussed in D. CURRIE, *supra* note 28, ch. 11. The Court might have added that there seemed to be no consideration for the promise to readmit and that in any event the contract clause was inapplicable to the United States.

tral proposition—he argued that the exclusion of aliens was among the powers granted to Congress by the Constitution.

A commerce-clause argument would have been entirely plausible. Marshall had established in *Gibbons v. Ogden*⁷⁸ that the transportation of persons was commerce, and the Court had struck down state laws excluding aliens on the ground that they encroached upon Congress's power over foreign commerce.⁷⁹ Field elected instead to find the power inherent in sovereignty, in the teeth of Marshall's confirmation of the well-understood principle that the federal government was one of enumerated powers.⁸⁰

Jurisdiction over its own territory to that extent is an incident of every independent nation. . . .

While under our Constitution . . . the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.⁸¹

These observations were reminiscent of equally unnecessary arguments about the "inherent" powers of Congress previously made by Justice Miller in two cases involving domestic federal author-

⁷⁸ 22 U.S. (9 Wheat.) 1, 189-90 (1824), discussed in D. CURRIE, *supra* note 28, ch. 6.

⁷⁹ See, e.g., *Henderson v. Mayor of New York*, 92 U.S. 259, 272 (1876), discussed in D. CURRIE, *supra* note 28, ch. 12; cf. *The Head Money Cases*, 112 U.S. 580, 600 (1884) (upholding, on the basis of the commerce power, a charge on alien immigrants), discussed in D. CURRIE, *supra* note 28, ch. 13; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (in reaffirming Field's conclusion in the *Chinese Exclusion Case*, Justice Gray appeared to rest congressional power to exclude aliens largely on the commerce clause); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-16, at 277 (1978) (relating the power over aliens to Congress's authority "[t]o establish a uniform Rule of Naturalization" under art. I, § 8); Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 YALE L.J. 1578, 1582-1609 (1959) (exploring other possible sources, including the war powers). For discussion of the due process question also resolved in the *Nishimura* case, see *infra* note 301.

⁸⁰ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819), discussed in D. CURRIE, *supra* note 28, ch. 6.

⁸¹ *The Chinese Exclusion Case*, 130 U.S. at 603-04. For a recent criticism of this reasoning, see Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957, 967 (1982). By emphasizing other passages of the opinion describing the power over aliens as one "delegated" to Congress, e.g., 130 U.S. at 609, one observer has argued that the Court must have intended to rely on the commerce clause and that the passage quoted in the text "related not to the question of the extent of constitutional power over the people, but rather to the power under international law." Hesse, *supra* note 79, at 1590. This reading seems an exercise in wishful thinking.

ity,⁸² neither of which was cited,⁸³ and they presaged the much later and more famous dicta of Justice Sutherland about foreign-affairs powers in the *Curtiss-Wright* case.⁸⁴ Three years after the *Chinese Exclusion Case*, in *Fong Yue Ting v. United States*, Justice Gray extended the inherent-powers concept to include authority to *deport* aliens,⁸⁵ which seems harder to fit within the enumerated commerce power: when an alien is resident in this country, he is not part of any "intercourse" with a foreign nation.⁸⁶ In the context of Asian immigration, the Court could certainly not be described as grudging in its interpretation of the scope of federal authority.⁸⁷

⁸² *United States v. Kagama*, 118 U.S. 375, 379-80 (1886) (upholding congressional power to punish crimes committed by Indians on the basis of "the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else"); *Ex parte Yarbrough*, 110 U.S. 651, 666 (1884) ("waste of time" to look for specific constitutional source of Congress's inherent power to pass laws protecting the right to vote); see D. CURRIE, *supra* note 28, chs. 11, 13 (discussing *Kagama* and *Yarbrough*).

⁸³ Heavy reliance was placed instead on diplomatic correspondence, much of it irrelevantly recognizing the right of such countries as France or Mexico to exclude aliens without regard to the ticklish federalism issue raised by our own Constitution. *The Chinese Exclusion Case*, 130 U.S. at 607-08.

⁸⁴ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). The opposing arguments respecting inherent or enumerated powers had been rehearsed in congressional debates on the notorious Alien Act of 1798, 1 Stat. 570. See 8 ANNALS OF CONG. 1954-71, 1973-2006 (1851). Field dismissed the relevance of these debates on the unconvincing ground that the 1798 statute had contained provisions going beyond the mere exclusion of aliens. *The Chinese Exclusion Case*, 130 U.S. at 610-11.

⁸⁵ 149 U.S. 698, 707 (1893). Brewer, Field, and Fuller dissented. For the procedural issues raised by this case, see *infra* note 301.

⁸⁶ See 2 C. WARREN, *supra* note 29, at 696 (terming *Fong Yue Ting* an "extreme decision" that "seemed to justify the old Alien Law of 1798"). The Court later drew the line at Congress's attempt to punish a citizen for harboring an alien prostitute, concluding that it was not within Congress's power "to control all the dealings of our citizens with resident aliens." *Keller v. United States*, 213 U.S. 138, 148 (1909) (Brewer, J.). Holmes, joined by Harlan and Moody, dissented, employing a very liberal test of the relation between legislative means and the legitimate end of regulating immigration. *Id.* at 150.

⁸⁷ Very much in the spirit of the cases about Chinese and Japanese aliens was the dissenting argument of Chief Justice Fuller, joined by the famed civil libertarian Harlan, that children born in this country to Chinese alien parents were not American citizens. *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898) (dissenting opinion). At his most pedantic, Gray took some fifty pages to show for the majority that the law in most of the world was what the fourteenth amendment rather clearly said was our own: "All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . ." *Id.* at 702. As Gray said, the natural meaning of this phrase had been confirmed by *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), which had held that aliens residing in this country were "within [the] jurisdiction" of a state for purposes of the equal protection clause. 169 U.S. at 696. Fuller's best argument was the presumption, supported by two comments made in the debates over the fourteenth amendment, that the amendment was meant to embody the citizenship provision of the 1866 Civil Rights Act, which had excluded persons "subject to any foreign power." *Id.* at 719-22. Gray responded that the language of

B. Delegation of Legislative Power

In 1892, in *Field v. Clark*,⁸⁸ the Court gave a broad reading to federal *executive* power in upholding another measure designed to protect American economic interests. The Tariff Act of 1890⁸⁹ had authorized the President to suspend the free importation of certain goods from any country that he found had imposed "reciprocally unequal and unreasonable" duties on American products. If he did so, a specified tariff schedule would apply.

The problem here was not one of federalism, as in the alien cases, but one of the separation of powers between the President and Congress. Justice Lamar put the objection on the right constitutional peg in a separate opinion joined by Chief Justice Fuller: article I vested the legislative power in Congress,⁹⁰ and that meant that Congress could not transfer legislative authority to anyone else.⁹¹ This, Lamar concluded, was what Congress had done: the

the amendment was different, cited contrary legislative history, and added the striking assertion that the debates were "not admissible . . . to control the meaning" of the text. *Id.* at 688, 698-99. Ironically, it had been Gray who had denied, and Harlan who had supported, citizenship for the children of American Indian tribesmen in the last previous controversy over the meaning of this provision. See D. CURRIE, *supra* note 28, ch. 11 (discussing *Elk v. Wilkins*, 112 U.S. 94 (1884)).

⁸⁸ 143 U.S. 649 (1892).

⁸⁹ 26 Stat. 567, 612 (1890).

⁹⁰ U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); *id.* § 8 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . .").

⁹¹ *Field*, 143 U.S. at 697 (Lamar, J., concurring in the judgment). Since article I speaks only of *federal* legislative power, it was not surprising that the Court has doubted whether the Constitution limits delegations of *state* legislative authority at all. See *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902) (Harlan, J.) (fourteenth amendment due process clause does not require the separation of state powers). The due process argument, however, was not easily dispatched. The developing notion that due process required whatever the Court might think appropriate, see *infra* notes 302-44 and accompanying text (discussing *Smyth v. Ames*, *Allgeyer v. Louisiana*, and *Lochner v. New York*), gave some support to the argument. More substantial support could also be found in the historical association of the clause with Magna Charta's law-of-the-land requirement, which was clearly designed to preclude executive action without legal sanction—and thus arguably, like article I itself, to require that basic policy decisions be made by the lawmakers. See D. CURRIE, *supra* note 28, ch. 8 (discussing *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)). For cases of the Fuller period upholding state laws over delegation objections, see *Ohio ex rel. Lloyd v. Dollison*, 194 U.S. 445, 450 (1904) (McKenna, J.) (even "if a case can exist in which the kind or degree of power given by a State to its tribunals may become an element of due process," a statute need not define such "well known terms" as "wholesale" and "retail" to avoid delegation problem); *St. Louis Consol. Coal Co. v. Illinois*, 185 U.S. 203, 210-12 (1902) (Brown, J.) (allowing "detail[s]" of mine inspections to be left to an executive, citing *Field* and *The Brig Aurora*, 11 U.S. (7 Cranch) 382, 387-88 (1813), without addressing the fact that article I is inapplicable to the states).

In *Michigan Cent. R.R. v. Powers*, 201 U.S. 245, 294 (1906) (Brewer, J.) (dictum), how-

statute "extends to the executive the exercise of those discretionary powers which the Constitution has vested in the law-making department."⁹²

There are contexts in which those invested with authority may lawfully delegate it to others.⁹³ As influential a writer as Locke, however, had denied that the legislative power was thus delegable.⁹⁴ Moreover, although the President, in suspending importation in *Field*, was merely executing a legislative command, indifference to the breadth of discretion left to the executive would run afoul of the accepted wisdom that the framers placed legislative power in Congress in order to assure that fundamental policy decisions be made by the elected representatives of the people.⁹⁵ Accordingly, the majority, speaking through Justice Harlan, conceded without discussion Lamar's formidable premise that the substance of legislative power could not be delegated.⁹⁶

In the majority's view, however, there had been no such delegation in *Field*. Congress, said Harlan, had made the decision that tariffs should be imposed against any country that charged une-

ever, the Court left open the question whether a grant of state legislative power to the executive or judiciary might "work an abandonment of a republican form of Government, or be a denial of due process, or equal protection." The relevance of equal protection, despite suggestive precedent, seems doubtful. See D. CURRIE, *supra* note 28, ch. 11 (discussing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). Further, the Court had not displayed much eagerness to enforce the article IV, section 4 guarantee of "a Republican Form of Government." See D. CURRIE, *supra* note 28, ch. 8 (discussing *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849)); see also *Taylor v. Beckham*, 178 U.S. 548, 578 (1900) (Fuller, C.J.) (alternative holding) (rejecting a guarantee-clause attack on a state legislature's resolution of a contest for governor with the sweeping observation that *Luther* had "settled that the enforcement of this guarantee belonged to the political department").

⁹² *Field*, 143 U.S. at 699-700.

⁹³ As early as 1839, the Court had sustained the authority of a President to delegate to his subordinates a congressional authorization to reserve public lands. *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 513 (1839). Compare the modern trend of allowing trustees to delegate more authority to financial advisers. See Langbein & Posner, *Market Funds and Trust-Investment Law*, 1976 AM. B. FOUND. RESEARCH J. 1, 18-24.

⁹⁴ JOHN LOCKE, *Second Treatise of Government* ch. XI, § 141, in *TWO TREATISES OF GOVERNMENT* (London 1690).

⁹⁵ See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 22 (1965) (Black, J., dissenting) (Congress created on assumption "that enactment of this free country's laws could be safely entrusted [only] to the representatives of the people"); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part) (anti-delegation principle ensures that "fundamental policy decisions" will be made "by the body immediately responsible to the people"); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 160-61 (1962) (objection to delegation rests largely on notion that the more fundamental the decision, the more democracy requires it to be made by an electorally accountable body); Jaffe, *An Essay on Delegation of Legislative Power* (pt. 1), 47 COLUM. L. REV. 359, 360 (1947) ("[T]he objection to indiscriminate and ill-defined delegation . . . expresses a fundamental democratic concern.").

⁹⁶ *Field*, 143 U.S. at 692.

qual and unreasonable duties, and Congress had specified what tariffs should be imposed. The President's only authority was to "ascertain[] the fact" that unequal and unreasonable duties were being exacted. In so doing he was not making law; he was acting "in execution of the act of Congress."⁹⁷ The case was thus governed by *The Brig Aurora*,⁹⁸ in which the Marshall Court had unanimously upheld a statute empowering the President to revive an embargo against England or France upon finding that the other country had "cease[d] to violate the neutral commerce of the United States."⁹⁹ Adding an impressive list of statutory precedents dating back to 1794, Harlan concluded that such a longstanding "practical construction" by Congress "should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land."¹⁰⁰

Lamar was on sound ground in objecting that it was harder to classify the President's job as mere fact-finding in *Field* than it had been in *The Brig Aurora*,¹⁰¹ since the unreasonableness of a tariff seems less subject to objective verification than the infringement of neutrality.¹⁰² Indeed, the neutrality question itself had involved a good deal of independent judgment; the Court's effort to describe the President's duties as ministerial in either case was unconvincing.

Harlan would have done better to argue that the President's power to execute the laws¹⁰³ historically and necessarily included more than mere fact-finding. No legislature can be expected to specify how its policy decisions are to be applied to every conceivable

⁹⁷ *Id.* at 692-93.

⁹⁸ 11 U.S. (7 Cranch) 382, 388 (1813), discussed in *Field*, 143 U.S. at 682-83; see D. CURRIE, *supra* note 28, chs. 4, 6.

⁹⁹ Act of Mar. 1, 1809, § 11, 2 Stat. 528, 530-31.

¹⁰⁰ *Field*, 143 U.S. at 683-92. Lamar responded, without supporting argument, that the legislative precedents were distinguishable, *id.* at 700, but they appeared to be squarely in point. His technically accurate protest that the precedents did not bind the Court, *id.*, hardly reflected the Court's established and persuasive practice of giving enactments by early Congresses considerable weight as evidence of the original constitutional understanding. See D. CURRIE, *supra* note 28, ch. 4 (discussing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816)); *id.* ch. 6 (discussing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

¹⁰¹ *Field*, 143 U.S. at 698-700.

¹⁰² See Jaffe, *An Essay on Delegation of Legislative Power* (pt. 2), 47 COLUM. L. REV. 561, 562, 566 (1947) (exercise of judgment in *The Brig Aurora* "slight"; in *Field* "wide and uncertain").

¹⁰³ "He . . . shall take Care that the Laws be faithfully executed" U.S. CONST. art. II, § 3.

ble fact situation,¹⁰⁴ and the framers cannot be thought to have demanded the impossible. The patent law of 1790 left it to the executive to determine whether an invention was "sufficiently useful and important" to merit protection;¹⁰⁵ the 1795 law authorizing the President to call out the troops left it to him to determine whether or not there was an "imminent danger" of invasion.¹⁰⁶ To label such determinations as merely factual is to obscure the reality that enforcing the laws implies a healthy portion of interstitial policymaking.¹⁰⁷ Twelve years after *Field*, in *Buttfield v. Stranahan*,¹⁰⁸ the Court upheld a delegation to the executive of authority to prescribe "standards of purity, quality and fitness for consumption" of imported tea.¹⁰⁹ Justice White, for a unanimous Court, recast the test in more realistic terms:

[T]he statute, when properly construed . . . but expresses the purpose to exclude the lowest grades of tea This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. . . . Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute.¹¹⁰

White's insistence that executive discretion must be interstitial seems a fair reconciliation of executive necessity with the primacy of legislative policymaking. Judged by this unavoidably slippery standard, the embargo provision in *The Brig Aurora* was not hard to uphold. Not only had Congress, as in *Field*, specified exactly what was to be done; it had provided the President with an intelligible yardstick to apply in deciding whether to do it, for there was a long history of international practice to help define

¹⁰⁴ It was on this ground that Locke, who held that legislative power could not be delegated, embraced an even broader conception of executive power than that here suggested. J. LOCKE, *supra* note 94, ch. XIV, § 160 (executive "prerogative" to act for public good even in absence of legal authority).

¹⁰⁵ Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110 (repealed 1793).

¹⁰⁶ Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424, 424; see *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29-31 (1827) (holding the President sole judge of a sufficient danger under the Act). Additional early examples of delegations by Congress are given in 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3:4 (2d ed. 1978).

¹⁰⁷ See Jaffe, *supra* note 95, at 360 ("[E]very statute is a delegation of lawmaking power to the agency appointed to enforce it.").

¹⁰⁸ 192 U.S. 470 (1904).

¹⁰⁹ Act of Mar. 2, 1897, § 3, 29 Stat. 604, 605.

¹¹⁰ 192 U.S. at 496.

what Congress had in mind.¹¹¹ *Field* and *Buttfield* seem to have been harder cases, for the Court did not make clear whether there were comparable traditions to confine the executive in determining "unreasonable" tariffs or "the lowest grades" of tea.¹¹² Even if there were no confining traditions, the Court retained control over future delegations by emphasizing that Congress had made the basic policy decision to protect the producer from hostile tariffs and the consumer from unpalatable brew. Nevertheless, the breadth of the discretion apparently conferred in both cases showed that the Fuller Court was not prepared to fetter federal protection of American interests by narrowly construing the executive power in the name of protecting legislative prerogatives from the legislature itself.¹¹³

C. The Common Law

Probably more striking than either the alien or the delegation

¹¹¹ See, e.g., Vattel, *THE LAW OF NATIONS*, bk. III, ch. VII (anon. trans. Philadelphia 1829) (1st French ed. London 1758) (discussing the principles of neutrality under the law of nations).

¹¹² See Jaffe, *supra* note 102, at 566-67 (finding *Buttfield* "a much easier case" than *Field* because "the settled judgment of the [tea] trade" was available to guide the administrator).

¹¹³ Other Fuller Court cases rejecting delegation arguments include *Franklin v. United States*, 216 U.S. 559, 568-69 (1910) (Fuller, C.J.) (upholding a statute incorporating existing state laws to define federal crimes on federal enclaves within the states: "There is, plainly, no delegation to the States of authority in any way to change the criminal laws applicable to places over which the United States has jurisdiction."); *St. Louis, I.M. & S. Ry. v. Taylor*, 210 U.S. 281, 287 (1908) (Day, J.) (relying on *Buttfield* without elaboration to uphold a delegation to a private association of power to determine the permissible height of railway couplers under federal law); *United States v. Heinszen & Co.*, 206 U.S. 370, 384-85 (1907) (White, J.) (holding, on the basis of inapposite precedent and without further explanation, that Congress could delegate to the President general legislative authority over the Philippine Islands); *Union Bridge Co. v. United States*, 204 U.S. 364, 385-87 (1907) (Harlan, J.) (upholding a statute empowering the executive to order removal of "unreasonable obstructions" to navigation as authorizing him only to ascertain "the facts" to determine "what particular cases came within the rule prescribed by Congress"); *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1905) (Brewer, J.) (upholding a statute leaving it to the states to make "minor and subordinate regulations" respecting mining claims on federal land and noting that the context was "not of a legislative character in the highest sense of the term" but "savors somewhat of mere rules prescribed by an owner of property for its disposal"); *In re Kollock*, 165 U.S. 526, 532-33 (1897) (Fuller, C.J.) (upholding a statute forbidding sales of margarine except in packages "marked, stamped, and branded as the Commissioner of Internal Revenue . . . shall prescribe" on the ground that the statute left to the Commissioner "a mere matter of detail . . . in execution of . . . the law"); *Stoutenburgh v. Hennick*, 129 U.S. 141, 147 (1889) (Fuller, C.J.) (upholding delegation of lawmaking power to the local legislature of the District of Columbia: "[T]he creation of municipalities exercising local self-government" was sanctioned by "immemorial practice" notwithstanding general rule against delegation of legislative power).

cases was the broad scope the Court afforded to federal executive and judicial powers in the 1895 case of *In re Debs*,¹¹⁴ in which Justice Brewer, for a unanimous Court, upheld the power of a federal court to enjoin, at executive request, the obstruction of interstate rail traffic during the great Pullman strike of 1894. The subject was federal, Brewer intoned, because article I gave Congress authority to regulate commerce among the states. Since Congress had "assumed jurisdiction" over interstate railroads by passing several laws to regulate them, it was the duty of the federal executive to keep them free from interference. As in the case of any other public nuisance, this executive power included the right not only to abate the obstruction by force but also to seek appropriate judicial relief.¹¹⁵

To modern eyes, what may be most startling about *Debs* is the Court's failure to identify the source of the law on which the injunction was based. Presidents have constitutional power to enforce the laws,¹¹⁶ but not to make them—as Justice Black later emphasized when President Truman seized the steel mills to assure military supply.¹¹⁷ Brewer nowhere argued that Congress had prohibited private obstructions to interstate rail traffic.

The invocation of public-nuisance cases suggests that the injunction was based upon judge-made law. Only seven years earlier, however, in refusing to allow a federal injunction against a bridge

¹¹⁴ 158 U.S. 564 (1895).

¹¹⁵ *Id.* at 579-86. The Court also invoked Congress's authority to "establish Post Offices and post Roads," U.S. CONST. art. I, § 8, and held that the sixth amendment jury guarantee had not been violated since equity traditionally could enjoin crimes when the legal remedy was inadequate to prevent irreparable harm, 158 U.S. at 594-96. Much of the vigorous criticism of *Debs* centered on this question. See, e.g., Lewis, *A Protest Against Administering Criminal Law by Injunction—The Debs' Case*, 33 AM. L. REG. (n.s.) 879, 881 (1894); Patterson, *Government by Injunction*, 3 VA. L. REG. 625, 628 (1898). For an approving view, see A. McLAUGHLIN, *supra* note 29, at 766 n.10 ("[T]he mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction.").

¹¹⁶ U.S. CONST. art. II, § 3.

¹¹⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952). See also Justice Jackson's insistence, concurring in this conclusion, *id.* at 640-41, that the reference to "executive Power" in article II vests the President with only those powers thereafter listed; the President, like Congress, possesses only enumerated powers. These statements went beyond the needs of the case since the majority found that Congress had implicitly prohibited the seizure. *Id.* at 586. Compare *In re Neagle*, 135 U.S. 1, 63-68 (1890) (alternative holding), an uncharacteristically wordy Miller opinion affirming the broad doctrine that the President's duty to execute the laws entitled him to assign an officer to protect a Supreme Court Justice from physical assault while on duty, even absent statutory authorization to do so. See 2 C. WARREN, *supra* note 29, at 697 ("This was the broadest interpretation yet given to implied powers of the National Government . . ."). Neagle had been prosecuted by the State of California for having murdered an assailant of Justice Field. For the lurid facts, see *Neagle*, 135 U.S. at 42-53; C. SWISHER, *supra* note 1, at 345-59.

that interfered with interstate and foreign shipping, the Court had unanimously held that "there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers" ¹¹⁸ That case might have been distinguished by arguing that the grant of jurisdiction in cases to which the United States was a party, like that in admiralty cases, ¹¹⁹ gave the courts authority to make law in the face of legislative silence. ¹²⁰ Yet the Court made no effort either to do so or to distinguish the longstanding precedents holding the federal courts to be without authority to punish nonstatutory crimes even when the United States was prosecutor. ¹²¹ If Brewer meant that the federal executive had authority to enforce *state* common law, ¹²² he never said so. Neither did he examine the law of any particular state, as this theory would seem to require, nor explain why the President's enforcement authority was not limited to federal laws. ¹²³

¹¹⁸ *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 (1888). *Debs* relied on *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852), see *Debs*, 158 U.S. at 588, but as the Court said in *Willamette*, 125 U.S. at 15-16, *Wheeling* had been based on the violation of federal statutes and of an interstate compact, sanctioned by Congress, to preserve free navigation of the Ohio River.

¹¹⁹ See *infra* note 245.

¹²⁰ The Court has often found authority to create common law in such cases, though not explicitly on this ground. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943) ("The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. . . . In the absence of an applicable act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."). The Fuller Court itself expressly held that the arguably analogous grant of jurisdiction over suits between states contemplated the application of federal common law. *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907) (Brewer, J.) (noting that the Court could not appropriately apply the law of either state to resolve a contest between them); *Missouri v. Illinois*, 200 U.S. 496, 519-20 (1906) (Holmes, J.) (where Congress has provided no substantive law, grant of original jurisdiction to Supreme Court implies Court is to select applicable legal principles). For an approving contemporaneous view, see 21 HARV. L. REV. 132 (1907). On the question of federal common law in *Debs*, see 73 HARV. L. REV. 1228 (1960).

¹²¹ See *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812); see also D. CURRIE, *supra* note 28, ch. 4 (discussing *Hudson* and *Coolidge*). Brewer might have argued that the presence of admiralty jurisdiction in *Coolidge* showed that the difficulty was peculiar to criminal cases, but he did not.

¹²² This possibility, which was present in the interstate case of *Wheeling Bridge*, had been unavailable in *Willamette*, where jurisdiction had been based only on the argued existence of a federal common law of nuisance, see *Willamette*, 125 U.S. at 15; *supra* note 118.

¹²³ At one point, the opinion seemed to flirt with the suggestion that the commerce clause itself forbade the strikers' activities: "If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?" *Debs*, 158 U.S. at 581. The radical implication that constitutional provisions limit private as well as official action, theretofore recognized only in respect to the rather unambiguous thirteenth amendment, comports poorly with the language and history of a provision dividing regulatory authority between nation and states, and Brewer did not de-

Thus, in the alien cases, the Fuller Court allowed Congress to exercise authority without arguing that it was necessary and proper to any of the enumerated powers. In *Field v. Clark*, it allowed Congress to leave to the President a broad range of judgment in determining whether federal taxing power should be asserted. In *Debs*, it allowed the executive and the courts to protect federal interests in the absence of any relevant legislation.¹²⁴ In short, when the protection of economic interests was at stake, the Court was anything but miserly in its interpretation of federal power.¹²⁵

III. FEDERAL POWER TO IMPAIR ECONOMIC INTERESTS

Despite the cases considered in the preceding section, the Fuller Court was by no means uniformly sympathetic to the exercise of federal authority. Indeed, among the decisions for which it is best remembered are two debatably *narrow* interpretations of federal power rendered in the same Term as *Debs*: its holding that the Sherman Act did not apply to the sugar trust and its invalidation of the income tax.

A. *United States v. E.C. Knight Co.*

The complaint in the first case sought to undo acquisitions that had given one manufacturer all but two percent of the sugar market, on the ground that they constituted a "combination . . . in restraint of trade or commerce among the several States" and a monopolization of such trade.¹²⁶ Chief Justice Fuller's answer for

velop it. If he had, he might have had difficulty explaining why the Court had held that the equal protection clause did not outlaw private discrimination. See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883), discussed in D. CURRIE, *supra* note 28, ch. 11.

The Court in *Debs* expressly declined to treat the United States simply as proprietor of the mails suing to protect its property rights. The decision was based in substantial part on the sovereign interest in preventing obstructions to commerce. 158 U.S. at 583-86.

¹²⁴ See also *Baltimore & O.R.R. v. Baugh*, 149 U.S. 368, 371-72 (1893) (Brewer, J.) (applying the rule of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), discussed in D. CURRIE, *supra* note 28, ch. 8, to hold, over an impassioned dissent by Justice Field, that the scope of the fellow-servant rule in a diversity case was governed by the "general law," despite the Rules of Decision Act, 1 Stat. 73, 92 (1789)). For a defense of Field's position, based on the perception that *Swift* had held an action under the law merchant not to be a "trial[] at common law" within the Rules of Decision Act, see Conant, *The Commerce Clause, the Supremacy Clause and the Law Merchant: Swift v. Tyson and the Unity of Commercial Law*, 15 J. MAR. L. & COM. 153, 158-59 (1984).

¹²⁵ But see BENJAMIN WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 91 (1942) (the more legislation tended to threaten laissez-faire economics, the less liberal was the Court's interpretation of legislative power).

¹²⁶ Sherman Act, ch. 647, §§ 1, 2, 26 Stat. 209, 209 (1890) (current version at 15 U.S.C.

the majority was straightforward: manufacturing was not commerce, so the statute did not reach its monopolization.¹²⁷ This conclusion was supported with authority of constitutional dimension. The Court had already held that the commerce clause did not prevent state regulation of liquor manufacture, on the express ground that commerce began only after manufacture was completed.¹²⁸

The distinction between manufacturing and commerce was fair enough. Nevertheless, as Justice Harlan protested in a lonely dissent, the complaint did not attack the monopolization of manufacturing as such but rather the concomitant monopolization of interstate sales.¹²⁹ By eliminating competition among manufacturers, Harlan argued, the acquisitions had obstructed "freedom in buying and selling articles manufactured to be sold to persons in other States," and "Congress may remove unlawful obstructions, of whatever kind, to the free course of trade among the States."¹³⁰

The necessary and proper clause, which Harlan invoked¹³¹ and the majority ignored, lent him additional support. As construed by Marshall,¹³² the clause seems to mean that Congress may regulate what is not itself interstate commerce in order to effectuate the framers' purpose of protecting commerce from interference. In-

§§ 1, 2 (1982)).

¹²⁷ *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895).

¹²⁸ *Kidd v. Pearson*, 128 U.S. 1, 21 (1888), *quoted in E.C. Knight*, 156 U.S. at 14; *see also* *McCready v. Virginia*, 94 U.S. 391, 396-97 (1877) (commerce clause does not forbid state regulation of oyster planting: "Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade."). The Court in *E.C. Knight* also relied on *Coe v. Errol*, 116 U.S. 517, 527 (1886) (commerce clause does not prohibit a state tax on logs intended for interstate shipment but not yet shipped). 156 U.S. at 13-14.

¹²⁹ *E.C. Knight*, 156 U.S. at 34 (Harlan, J., dissenting); *see also id.* at 3-4 (reporter's summary of averments in complaint); Guy, *The Anti-Monopoly Act: A Review of the Decisions Affecting It*, 1 VA. L. REV. 709, 719 (1896) (calling attention to the lower court's finding, *see* 156 U.S. at 6, that "[t]he object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country"); Morawetz, *The Supreme Court and the Anti-Trust Act*, 10 COLUM. L. REV. 687, 706 (1910) ("The only constitutional question was whether Congress could prohibit the purchase of control of competitive businesses . . . when the purpose or effect of the transaction was to monopolize interstate commerce . . .").

¹³⁰ 156 U.S. at 33 (Harlan, J., dissenting). *But see* G. SHIRAS, *supra* note 29, at 147 (arguing that the government neglected to present available evidence as to the effect on interstate sales); 2 C. WARREN, *supra* note 29, at 733 (blaming the decision on "the unfortunate manner in which the facts were alleged and proved"); *cf.* McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304, 328 n.94 (1979) (arguing that the Court would have come out the same way even if such evidence had been presented).

¹³¹ 156 U.S. at 39-40 (Harlan, J., dissenting).

¹³² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21 (1819), *discussed in* D. CURRIE, *supra* note 28, ch. 6.

deed, over fifty years before the sugar-trust case, the Taney Court, in upholding a federal statute outlawing the theft of shipwrecked goods, had expressly declared that the commerce power "extends to such acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation."¹³³ If stealing from commerce was subject to congressional prohibition, it is difficult to see why monopolizing it was not. In fact, within four years after *E.C. Knight*, the Court, in *Addyston Pipe & Steel Co. v. United States*,¹³⁴ unanimously upheld Congress's power to forbid an agreement among manufacturers not to compete in interstate sales; the acquisition of competing sugar refineries in *E.C. Knight* eliminated competition for such sales more effectively than the agreement in *Addyston Pipe*.¹³⁵

Fuller protested that the effect of the sugar acquisitions on commerce was "indirect."¹³⁶ Perhaps it was.¹³⁷ Behind this characterization, moreover, lay a legitimate concern. As Fuller said, if every effect on interstate commerce were enough to trigger federal authority, there would be nothing that Congress could not regulate,¹³⁸ and that result would contradict the careful enumeration of limited congressional powers.¹³⁹ Yet Fuller's argument was unper-

¹³³ *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838), discussed in D. CURRIE, *supra* note 28, ch. 7. See also Fuller's own opinion for a unanimous Court in the *Danbury Hatters' Case* (*Loewe v. Lawlor*), 208 U.S. 274, 301 (1908), which expressly held immaterial the fact that union members charged with a boycott restraining interstate trade were "not themselves engaged in interstate commerce." For an early argument invoking *Coombs* to sustain congressional power over external restraints on commerce, see Humes, *The Power of Congress over Combinations Affecting Interstate Commerce*, 17 HARV. L. REV. 83, 97 (1903). By requiring only that the prohibited acts be "in restraint of" or "monopoliz[e]" interstate commerce, the Sherman Act itself appeared to apply to actors not themselves in commerce.

¹³⁴ 175 U.S. 211, 240 (1899).

¹³⁵ Fuller's objection in *E.C. Knight* that "[t]here was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce," 156 U.S. at 17, seems disingenuous, since the effect of the removal of competitors on competition could hardly have escaped the parties. See *id.* at 43-44 (Harlan, J., dissenting). Intent also seems irrelevant to the underlying constitutional issue since, even if the statute implicitly required intent, no reason appears why Congress's power to protect commerce should be limited to the removal of intentional obstructions.

¹³⁶ *E.C. Knight*, 156 U.S. at 16.

¹³⁷ In *Addyston Pipe*, 175 U.S. at 238-40, Justice Peckham relied on the "directness" criterion in distinguishing *E.C. Knight*. It was fair enough to say that the effect on commerce of an agreement about sale prices was more immediate than that of an acquisition of competing sellers. Just what "indirect" meant, however, was already in some doubt in the wake of decisions upholding state laws impinging "indirectly" on commerce. See, e.g., *Peik v. Chicago & N.W. Ry.*, 94 U.S. 164 (1877); *Sherlock v. Alling*, 93 U.S. 99 (1876), discussed in D. CURRIE, *supra* note 28, ch. 12.

¹³⁸ *E.C. Knight*, 156 U.S. at 16.

¹³⁹ *Id.* at 13. Recall Marshall's insistence in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), that the necessary and proper clause must be applied with an eye to the

suasive, for he did not explain why the directness of the effect on commerce was relevant to the scope of congressional authority.¹⁴⁰

The truth is that there was no logically convincing place to draw the line.¹⁴¹ What logical extension of the necessary-and-proper argument offends the spirit of enumerated powers is a question of degree, and thus any line the Court drew would very likely have appeared arbitrary.¹⁴² Nevertheless, *E.C. Knight* found a peculiar place to draw it,¹⁴³ and the Court's willingness to insulate a manufacturing combination from congressional grasp¹⁴⁴ contrasts sharply with decisions upholding broad federal power to protect American producers.¹⁴⁵

"spirit" of the Constitution. See D. CURRIE, *supra* note 28, ch. 6 (discussing *McCulloch*); see also FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 103 (1961) ("[A]s an exercise in ratiocination the commerce clause could absorb the states. But the purposes of our federalism must be observed, and adjustments struck between state and nation."). For one instance of failure to heed this counsel, see *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (upholding, on commerce clause grounds, a federal ban on racial discrimination as applied to a restaurant, not shown to have served interstate travelers, on the basis of Congress's finding that refusal to serve blacks reduced interstate food shipments to restaurants).

¹⁴⁰ See Farage, *That Which "Directly" Affects Interstate Commerce*, 42 DICK. L. REV. 1, 1-2 (1937).

¹⁴¹ A legislature may set eighteen years as the age at which a person is mature enough to vote; a court would be embarrassed by its inability to distinguish the seventeen-year old. Compare the Court's awkward distinction, under the fourteenth amendment, between juries of five and six members in state criminal trials. *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (rejecting five-member juries); *Williams v. Florida*, 399 U.S. 78, 103 (1970) (upholding six-member juries).

¹⁴² THOMAS REED POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* 34 (1956), argues that arbitrary lines may be better than none at all: "It may be better for two cases to go in opposite directions than to have them both go in the same direction and so tip that side of the scales."

¹⁴³ See *id.* at 58 (branding the decision a "most unwarranted judicial offense" in "par[ing] the Sherman Act] down to the minimum that [its] language would warrant").

¹⁴⁴ See McCurdy, *supra* note 130, at 308, 335-36 (arguing that far from representing the triumph of laissez-faire, *E.C. Knight* was an effort to preserve state authority to act against trusts despite the effect of the "dormant" commerce clause in limiting the states' authority to regulate matters affecting interstate commerce).

¹⁴⁵ See *supra* notes 74-113 and accompanying text. *E.C. Knight* also contrasts sharply with *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 681 (1896) (Peckham, J.), in which the Court unanimously upheld the construction of a monument to the Battle of Gettysburg as necessary and proper to, *inter alia*, the power to raise armies, essentially because it would instill feelings of patriotism that would make better soldiers in the future: "The greater the love of the citizen for the institutions of his country the greater is the dependence properly to be placed upon him for their defence in time of necessity . . ." *Id.* at 682; see 2 C. WARREN, *supra* note 29, at 706 (*Gettysburg* showed the Court's support for Congress's power at its broadest). In *Felsenheld v. United States*, 186 U.S. 126, 132 (1902) (Brewer, J.), moreover, the Court held, over Peckham's dissent, that Congress could forbid placing advertising coupons in tobacco packages bearing federal tax stamps for the flimsy reason that people would take the stamp as a representation that the package contained only tobacco.

B. *Pollock v. Farmers' Loan & Trust Co.*

The second great 1895 decision narrowly interpreting congressional power, also written by Chief Justice Fuller, held the federal income tax unconstitutional.¹⁴⁶ The principal ground was that the tax was primarily a direct one not apportioned among the states by population as required by sections 2 and 9 of article I.¹⁴⁷

This conclusion must have caused great surprise.¹⁴⁸ Not only had the Justices repeatedly suggested in dicta that only capitation and taxes on land were "direct";¹⁴⁹ twice in the preceding twenty-five years they had upheld income taxes, most recently on that precise ground.¹⁵⁰ The dicta were dismissed as such in *Pollock*.¹⁵¹ The holdings were distinguished because one case had involved an excise tax calculated according to income¹⁵² and the other involved a taxpayer whose income was derived essentially from professional earnings, not property,¹⁵³ though neither of these facts had been offered as bases for the original decisions.

The tax in *Pollock*, Fuller noted, did apply to income from

With reasoning like this there seems little that could not be brought within congressional authority.

¹⁴⁶ *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, modified on rehearing, 158 U.S. 601 (1895) (invalidating Act of Aug. 27, 1894, ch. 349, §§ 27-37, 28 Stat. 509, 553-60). The first decision struck down the tax as applied to income from real property, 157 U.S. at 583, and from state or municipal bonds, *id.* at 586. Harlan and White dissented on the former point. Only eight Justices participated—Jackson was ill—and the Court was evenly divided as to the validity of the tax in other respects, *id.* at 586. On rehearing, Jackson having been roused from his sickbed for the last time, the statute was struck down in its entirety, 158 U.S. at 637, though Jackson joined Harlan, White, and Brown in dissent. There has been much insignificant controversy over which Justice deserted the pro-tax forces between the first and second decisions, since otherwise the addition of Jackson would have given them a majority. See 2 C. WARREN, *supra* note 29, at 700 (saying it was Shiras); G. SHIRAS, *supra* note 29, at 160-83 (denying it); W. KING, *supra* note 1, at 217-21 (adding that the Justices' votes largely lined up with the per capita wealth of their home states; only Justice Brown of Michigan joined three Southerners in voting to uphold the tax).

¹⁴⁷ *Pollock*, 157 U.S. at 582-83; 158 U.S. at 637.

¹⁴⁸ See F. FRANKFURTER, *supra* note 138, at 93 (decision in *Pollock* "unexpected[]"); A. McLAUGHLIN, *supra* note 29, at 762-63 ("That the law would be upheld . . . appeared to be a reasonable expectation . . .").

¹⁴⁹ See *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.); *id.* at 183 (opinion of Iredell, J.); *Pacific Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433, 444-45 (1869); *Springer v. United States*, 102 U.S. 586, 602 (1881).

¹⁵⁰ *Springer v. United States*, 102 U.S. 586, 602 (1881); *Pacific Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433, 446 (1869); see EDWARD CORWIN, COURT OVER CONSTITUTION 204 (1938) ("[T]he decision in the *Pollock* Case was the most disabling blow ever struck at the principle of *stare decisis* in the field of constitutional law . . .").

¹⁵¹ *Pollock*, 157 U.S. at 571-72.

¹⁵² *Id.* at 576.

¹⁵³ *Id.* at 578-79.

real and personal property.¹⁵⁴ A tax on personalty was as direct as one on realty, and a tax on the income from property was effectively one on the property itself.¹⁵⁵ Finally, Fuller concluded that the remaining tax on earned income would not have been enacted had Congress known it could not tax property income as well.¹⁵⁶

This opinion was clever but not persuasive. To begin with, it was internally inconsistent. In equating taxes on personalty with taxes on realty, Fuller relied implicitly on a literal interpretation of the word "direct";¹⁵⁷ in equating income with property taxes, he ignored the fact that in the same literal sense an income tax reaches property only indirectly.¹⁵⁸ More important, one cannot determine whether taxes on either income or personalty are constitutionally distinguishable from taxes on land without knowing what it is about the latter that makes them "direct," and Fuller made no effort to explain this. Perhaps most interesting was his failure to rely on the strongest argument for his position—Adam

¹⁵⁴ *Id.* at 580.

¹⁵⁵ *Id.* at 580-81; 158 U.S. at 627-28.

¹⁵⁶ 158 U.S. at 635-37. The intent-based inseparability argument manifests a healthy shift away from the automatic inseparability rule of *United States v. Reese*, 92 U.S. 214, 221 (1876), discussed in D. CURRIE, *supra* note 28, ch. 11. The unanimous additional conclusion that the law could not constitutionally reach the income from state or municipal bonds, 157 U.S. at 583-86, was convincingly based on the intergovernmental-immunity principle of *Collector v. Day*, 78 U.S. (11 Wall.) 113, 125-26 (1871), *overruled in part*, *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939) (salaries of government officials subject to income taxation). Compare the converse case of *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 469 (1829) (striking down state tax on interest from federal obligations); see D. CURRIE, *supra* note 28, chs. 6, 8 (discussing intergovernmental tax immunities). Apart from *Pollock*, however, the Court was not inclined to press intergovernmental immunity very far at this time. See *South Carolina v. United States*, 199 U.S. 437, 463 (1905) (Brewer, J.) (United States may tax state liquor business since it is proprietary, not governmental); *Snyder v. Bettman*, 190 U.S. 249, 254 (1903) (Brown, J.) (United States may tax bequest to state); *Plummer v. Coler*, 178 U.S. 115, 134-38 (1900) (Shiras, J.) (state may tax bequest of federal bonds); *United States v. Perkins*, 163 U.S. 625, 630 (1896) (Brown, J.) (state may tax bequest to United States); *Reagan v. Mercantile Trust Co.*, 154 U.S. 413, 416-17 (1894) (Brewer, J.) (state may regulate rates of railroad, despite federal charter, in absence of express contrary congressional intent). For discussion of these cases, see T. POWELL, *supra* note 142, at 117-18. See also Field's concurrence in *Pollock*, 157 U.S. at 604-05, arguing that the article III ban on reducing judges' salaries forbade taxing the income of federal judges already appointed. For the later fate of this interesting argument, see *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939) (taxation of income of federal judge is not an article III diminution), and cases cited therein.

¹⁵⁷ *Pollock*, 158 U.S. at 628. As Harlan observed in dissent, 158 U.S. at 670, Fuller's argument also failed to account for the fact that the carriage tax upheld in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), had been a tax on personal property.

¹⁵⁸ See *Pollock*, 157 U.S. at 645 (White, J., dissenting); 158 U.S. at 692-93 (Brown, J., dissenting); E. CORWIN, *supra* note 150, at 186-87; Jones, *Pollock v. Farmers' Loan & Trust Company*, 9 HARV. L. REV. 198, 210 (1895).

Smith's observation, quoted by Justice Paterson in the carriage-tax case in 1796, that *all* income taxes were "direct": "[T]he state, not knowing how to tax directly and proportionably the revenue of its subjects, endeavors to tax it indirectly, by taxing . . . the consumable commodities upon which it is laid out."¹⁵⁹ Nor, though Fuller referred to foreign authorities that defined income taxes as direct,¹⁶⁰ did he give significant weight to their historically respectable reasoning that direct taxes were those whose burden could not be passed on to someone else in the price of goods or services.¹⁶¹

In short, as in its contemporaneous *E.C. Knight* and *Debs* decisions, the Court in *Pollock* went out of its way to protect business or property,¹⁶² this time by another unexpectedly narrow interpretation of congressional authority. In doing so, Fuller made the task unnecessarily difficult by ignoring traditional criteria that would have helped to support his conclusion.

C. Later Cases

E.C. Knight was not alone among decisions of the period in giving a niggardly interpretation to Congress's power over interstate commerce. In the same spirit were the holdings that neither a restraint on stockyard sales of out-of-state cattle¹⁶³ nor the right of an interstate railway employee to join a union¹⁶⁴ came under Congress's commerce clause powers. The first of these conclusions, however, was effectively abandoned when, a few years later, Justice Holmes, for a unanimous Court, described stockyard transactions

¹⁵⁹ ADAM SMITH, *THE WEALTH OF NATIONS* 821 (Mod. Lib. reprint 1937, E. Cannan ed. 1904) (1st ed. London 1776), quoted in *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 180 (1796); see D. CURRIE, *supra* note 28, ch. 2 (discussing question of "direct" taxation in *Hylton*). Fuller did quote in passing a statement of Albert Gallatin referring to Smith's definition, *Pollock*, 157 U.S. at 569-70, but he did not place any particular weight upon it.

¹⁶⁰ *Pollock*, 157 U.S. at 572 (income taxes classified as "direct" in British law); 158 U.S. at 630-32 (reviewing British and Canadian cases).

¹⁶¹ See e.g., JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 823-29 (W. Ashley ed. 1926) (1st ed. London 1848). At one point Fuller did say that this was the "[o]rdinar[y]" test, but he added that it did not necessarily govern the meaning of article I, and he did not discuss whether the burden of income taxes could be passed on. *Pollock*, 157 U.S. at 558.

¹⁶² For discussion of the hostile reaction to these three decisions, see 2 C. WARREN, *supra* note 29, at 702-04.

¹⁶³ *Hopkins v. United States*, 171 U.S. 578, 590-91 (1898) (Peckham, J.) (adding nothing to *E.C. Knight's* reasoning).

¹⁶⁴ *Adair v. United States*, 208 U.S. 161, 178 (1908) (Harlan, J., over dissents by McKenna and Holmes) (alternative holding) ("[W]hat possible legal or logical connection is there between an employé's membership in a labor organization and the carrying on of interstate commerce?"). For criticism, see T. POWELL, *supra* note 142, at 62 (calling the decision "unreason run riot"); 2 C. WARREN, *supra* note 29, at 715.

as part of "a current of commerce" from the rancher in one state to the diner in another.¹⁶⁵ The second conclusion was difficult to square with the Court's contemporaneous acknowledgment that Congress could abrogate the fellow-servant rule for railway employees injured in interstate commerce¹⁶⁶ and prevent union members from boycotting goods shipped from one state to another.¹⁶⁷ The "indirect effect" test of *Knight* itself, moreover, seems to have been limited by the divided decision in the *Northern Securities* case, which upheld application of the Sherman Act to the establishment of a holding company that eliminated competition between two interstate railroads.¹⁶⁸ For although, as Justice Harlan stressed, interstate railroading (unlike manufacturing) was itself interstate commerce,¹⁶⁹ the immediate effect of the combination, as

¹⁶⁵ *Swift & Co. v. United States*, 196 U.S. 375, 399 (1905); see LOREN BETH, *THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877-1917*, at 43-44 (1971) ("Holmes . . . did not feel the need to explain why a sugar refinery was not part of a similar flow.").

¹⁶⁶ *The Employers' Liability Cases* (*Howard v. Illinois Cent. R.R.*), 207 U.S. 463, 495 (1908) (White, J.) (dictum) ("[W]e fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce . . ."); cf. *Adair v. United States*, 208 U.S. 161, 189 (1908) (McKenna, J., dissenting) ("A provision of law which will prevent or tend to prevent the stoppage of every wheel in every car of an entire railroad system [by preventing strikes traceable to the discharge of union members] certainly has as direct influence on interstate commerce as . . . the rule of liability for personal injuries to an employe."). The Court in the *Employers' Liability Cases* went on to hold, rightly enough, that Congress had gone too far in extending its legislative power to injuries of employees whose activities had no relation to interstate commerce apart from the fact that their employer was also engaged in interstate trade, 207 U.S. at 500-01, and it struck down the statute even as to injuries in the course of interstate commerce itself in reliance on the questionable notions of inseparability first announced in *United States v. Reese*, 92 U.S. 214, 221 (1876). See *supra* note 156 and accompanying text; see also D. CURRIE, *supra* note 28, ch. 11 (discussing *Reese*).

¹⁶⁷ *Loewe v. Lawlor*, 208 U.S. 274, 305-09 (1908) (Fuller, C.J.); see *Adair v. United States*, 208 U.S. 161, 186-89 (1908) (McKenna, J., dissenting) (arguing that the ban on firing union members was a means of preventing the "disastrous interruption of commerce" by labor disputes of the kind that the Court, a few pages later, in *Loewe*, would hold Congress could outlaw directly); see also B. WRIGHT, *supra* note 125, at 120 (some basis for strongly expressed union belief in Court's unwillingness to uphold pro-labor statutes under commerce clause); Roche, *Entrepreneurial Liberty and the Commerce Power: Expansion, Contraction, and Casuistry in the Age of Enterprise*, 30 U. CHI. L. REV. 680, 699 (1963) ("The Supreme Court was only excluding from the commerce-police power pro-labor legislation."); cf. *In re Garnett*, 141 U.S. 1, 12 (1891) (Bradley, J.) (holding that the necessary and proper clause, together with the grant of federal judicial power over maritime cases, empowered Congress to enact a statute protecting American shipowners by limiting their liability); *Butler v. Boston & Savannah S.S. Co.*, 130 U.S. 527, 557 (1889) (Bradley, J.) (same).

¹⁶⁸ *Northern Sec. Co. v. United States*, 193 U.S. 197, 342-54 (1904) (Harlan, J.) (plurality opinion). Four Justices dissented, and Brewer concurred specially, but he took no issue with this aspect of Harlan's opinion.

¹⁶⁹ *Id.* at 353.

in the sugar case, was not on commerce itself but on the ownership of stock.¹⁷⁰ Even in the context of activities arguably ancillary to actual interstate intercourse, then, the Fuller Court was not uniformly hostile to federal regulatory power in its construction of the commerce clause.

In the 1903 *Lottery Case*,¹⁷¹ moreover, a bare majority of the Court gave a broad interpretation to the commerce power in quite a different context, upholding a federal statute that prohibited interstate transportation of lottery tickets. Except for an ill-considered insurance case that the majority inexcusably failed to discuss,¹⁷² there was no real doubt that this was literally a regulation of interstate commerce.¹⁷³ The serious question was whether the commerce power could be exercised in order to protect the public morals or was limited, in accordance with its motivating cause, to preventing obstructions to commerce.¹⁷⁴ The constitutional text

¹⁷⁰ See *id.* at 368 (White, J., dissenting) ("[T]he question in this case . . . is . . . whether the [commerce] power extends to regulate the ownership of stock in railroads, which is not commerce at all."). Fuller, Peckham, and Holmes joined White's dissent, and Holmes added another dissenting opinion.

¹⁷¹ *Champion v. Ames*, 188 U.S. 321, 354-55 (1903).

¹⁷² *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869) (issuing policies of insurance not a "transaction of commerce"), discussed in D. CURRIE, *supra* note 28, ch. 10. *Paul* was relied on with some justice by the dissent in the *Lottery Case*, 188 U.S. at 367-68. See T. POWELL, *supra* note 142, at 62 (criticizing the *Lottery Case* majority for failing to address the dissent's reliance on *Paul*).

¹⁷³ The objection that prohibition was not regulation, put forth in Fuller's dissent, 188 U.S. at 371-75, and dismissed by the majority, *id.* at 354-56, had been rejected fifty years earlier in an opinion by Justice Daniel, the most extreme defender of states' rights ever to grace the Court. *United States v. Marigold*, 50 U.S. (9 How.) 560, 566-67 (1850) (Congress may prohibit importation of counterfeit coins as a "regulation" of commerce). Harlan, for the Court, neglected to cite *Marigold*. For approval of the Court's conclusion, see Parkinson, *Congressional Prohibitions of Interstate Commerce*, 16 COLUM. L. REV. 367, 371-76 (1916). Fuller's argument that power over foreign commerce (involved in *Marigold*) was broader than that over interstate commerce, 188 U.S. at 373, was not dignified by a response. For discussion of the relationship among the interstate, foreign, and Indian commerce powers, see Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289, 300-02 (1919).

¹⁷⁴ In his dissent in the *Lottery Case*, Fuller argued that "the purpose of Congress . . . was the suppression of lotteries," 188 U.S. at 364, insisted that the states had not given Congress police powers, *id.* at 365, and declared it the Court's duty to invalidate laws passed by Congress "under the pretext of executing its powers" but actually "for the accomplishment of objects not entrusted to the Government," *id.* at 372 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819)); see 2 C. WARREN, *supra* note 29, at 736 ("The practical result . . . was the creation of a Federal police power—the right to regulate the manner of production, manufacture, sale and transportation of articles and the transportation of persons, through the medium of legislation professing to regulate commerce between the States."). Marshall's position that the purpose of a state law determined whether it was a regulation of commerce, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) (dictum), discussed in D. CURRIE, *supra* note 28, ch. 6, lent oblique support to the dissenters' position.

suggested that the power was plenary, and Justice Peckham had already stated as much in *Addyston Pipe*: "The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself."¹⁷⁵

In other contexts, as illustrated by the familiar example of blood-letting in the streets of Bologna,¹⁷⁶ the purpose of a provision has quite reasonably been held to limit its scope. In *Addyston Pipe*, Peckham gave no reason for refusing to look to the purposes of the commerce clause, and he inconsistently joined the dissent in the *Lottery Case*. The historical materials do not seem to refute the reasonable textual inference that the framers' mistrust of the states led them to give Congress control of the whole subject of interstate commerce.¹⁷⁷ But in the face of a challenging dissent, Harlan made essentially no effort to explain.¹⁷⁸

Fuller's dissent, however, needed to be squared with his earlier opinion for the Court in *In re Rapier*, 143 U.S. 110, 134 (1892) (upholding the exclusion of lottery material from the mails: "It is not necessary that Congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality."). Cf. *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 416-18 (1866) (upholding prohibition of liquor sales to Indians); *United States v. The William*, 28 F. Cas. 614, 621 (C.C.D. Mass. 1808) (No. 16,700) (upholding Jeffersonian embargo on ground that Congress's power over foreign commerce could be exercised not merely to protect commerce itself but to serve "general policy and interest"); cf. also Cushman, *National Police Power Under the Postal Clause of the Constitution*, 4 MINN. L. REV. 402, 420 (1920) (distinguishing *Rapier* on the ground that government ownership may make the postal power broader); Cushman, *supra* note 173, at 300-02 (discussing the possible differences among the various commerce powers).

¹⁷⁵ *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 228 (1899). The question addressed in *Addyston Pipe* was the power to prevent *private* obstructions of commerce; it had been argued that the purpose of the commerce clause was only to prevent obstructions by the states. Compare the controversy over whether the second amendment's "right of the people to keep and bear Arms" is limited by its express explanation that "[a] well regulated Militia" is "necessary to the security of a free State." See D. CURRIE, *supra* note 28, ch. 2 (discussing the *ex post facto* clauses).

¹⁷⁶ See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *60 (reporting that a law forbidding the drawing of blood in the streets was held "not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit").

¹⁷⁷ See, e.g., Corwin, *Congress's Power to Prohibit Commerce—A Crucial Constitutional Issue*, 18 CORN. L.Q. 477, 482-84, 503-04 (1933) (supporting this conclusion).

¹⁷⁸ Harlan's opinion was filled, in the execrable style of the day, with general quotations from a myriad of commerce-clause precedents that had nothing to do with the issues in the case. *Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465 (1888), which Harlan cited only for the inconsequential proposition that liquor was an article of commerce, *Lottery Cases*, 188 U.S. at 360, had actually given him substantial help by holding that a state could not bar entry of interstate liquor shipments for health reasons because Congress's power over interstate commerce was exclusive, *Bowman*, 125 U.S. at 498-99. See D. CURRIE, *supra* note 28, ch. 12 (discussing *Bowman*); T. POWELL, *supra* note 142, at 64-65 ("It might seem that after condemnation of a state law as a regulation of interstate commerce, an identical act of Congress

Just as *E.C. Knight* did not signal a generally narrow approach to the commerce power, the *Pollock* decision did not lead to a general judicial assault on federal taxation. The Fuller Court upheld a variety of federal taxes over the objection that they were direct but unapportioned.¹⁷⁹ In *Knowlton v. Moore*¹⁸⁰ it held that the constitutional requirement that indirect taxes be "uniform throughout the United States"¹⁸¹ did not outlaw progressive taxation. The Court persuasively relied on consistent congressional practice to support the textual inference that the uniformity required was geographical alone.¹⁸² Most significantly, the generous approach to federal authority reflected in the *Lottery Case* prevailed again the following year in *McCray v. United States*,¹⁸³ which upheld a prohibitively high tax on colored oleomargarine, relying partly on precedent¹⁸⁴ and partly on the question-begging ground that "a wrongful purpose or motive" was no justification

must perforce be . . . held valid . . .").

¹⁷⁹ *Thomas v. United States*, 192 U.S. 363, 370-71 (1904) (Fuller, C.J.) (stamp tax on sales of shares of stock); *Patton v. Brady*, 184 U.S. 608, 621-23 (1902) (Brewer, J.) (tax on tobacco); *Knowlton v. Moore*, 178 U.S. 41, 83 (1900) (White, J.) (tax on legacies of personal property); *Nicol v. Ames*, 173 U.S. 509, 518-19 (1899) (Peckham, J.) (stamp tax on sales at board of trade). Most of these taxes, as the Court said of death duties in *Knowlton*, 178 U.S. at 55-56, could be regarded as taxes upon the occurrence of an event rather than upon the ownership of property itself, and all seemed to fit the traditional definitions of duties or excises, which the Constitution distinguished from direct taxes. See, e.g., *Patton*, 184 U.S. at 618; *Knowlton*, 178 U.S. at 78-79. Nevertheless, *Knowlton* seems to depart from the reasoning of *Pollock*, since a legacy tax, though—like an income tax—indirect in form, is effectively a tax on the underlying property. Compare the Court's similar distinction with respect to governmental immunity, permitting state taxation of legacies of government bonds but prohibiting taxation of income from the same bonds. See *supra* note 156. The Court in *Knowlton* had the benefit of a highly relevant precedent, *Scholey v. Rew*, 90 U.S. (23 Wall.) 331, 346-348 (1875), which had upheld a tax on succession to real property. *Scholey* had rested on the ground that a succession tax was no more direct than an income tax, 90 U.S. (23 Wall.) at 347, which, before *Pollock*, was thought to be "indirect" for constitutional purposes. The *Knowlton* Court concluded that *Pollock* had overruled the rationale of *Scholey* but not its ultimate conclusion. 178 U.S. at 79-81.

¹⁸⁰ 178 U.S. 41 (1900) (White, J.).

¹⁸¹ U.S. CONST. art. I, § 8, cl. 1. For a detailed analysis of this constitutional provision, see Comment, *The Uniformity Clause*, 51 U. CHI. L. REV. 1193 (1984).

¹⁸² *Knowlton*, 178 U.S. at 83-106 (citing *The Head Money Cases*, 112 U.S. 580, 594-95 (1884) (dictum)); cf. *Binns v. United States*, 194 U.S. 486, 492-96 (1904) (Brewer, J.) (Congress may lay taxes limited to Alaska to fund local-government expenses under its power to govern the territories; the uniformity clause applies only to taxes raised for national purposes). For further discussion of the scope of the uniformity requirement, see Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889-1910* (forthcoming) (discussing *Downes v. Bidwell*, 182 U.S. 244 (1901)).

¹⁸³ 195 U.S. 27 (1904) (White, J.).

¹⁸⁴ The Court relied especially on *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869), where, as *McCray* conceded, 195 U.S. at 58, the conclusion relied on had been an alternative holding. See D. CURRIE, *supra* note 28, ch. 9 (discussing *Veazie*).

for judicial interference with "the exercise of lawful power."¹⁸⁵ This decision was a far cry from *E.C. Knight*, and it was not surprising that Fuller and two others dissented.¹⁸⁶ After *McCray*, it seemed that Congress could forbid anything under the guise of taxing it,¹⁸⁷ notwithstanding the framers' plan of a federal government with limited, enumerated powers.¹⁸⁸

IV. OBSTRUCTIONS TO INTERSTATE COMMERCE

Long before the adoption of the fourteenth amendment, the Supreme Court had developed the debatable thesis that the clause giving Congress power to regulate interstate and foreign commerce implicitly limited state authority to interfere with business that transcended state lines.¹⁸⁹ Since no Justice had ever taken the extreme position that the states lacked authority to affect interstate commerce altogether, a number of conflicting theories had grown up to explain when the states could affect commerce and when they could not. Marshall had distinguished between the regulation of commerce as such and the exercise of the states' reserved police powers;¹⁹⁰ Curtis had said that the states could regulate commerce in matters not requiring uniformity;¹⁹¹ some later Justices had said that the states could pass laws having "indirect" or "incidental" effects on commerce.¹⁹² The failure of Congress to enact legislation

¹⁸⁵ *McCray*, 195 U.S. at 56.

¹⁸⁶ *Id.* at 64 (without opinion). For resolution of another constitutional issue respecting federal taxation, see *Twin City Bank v. Nebeker*, 167 U.S. 196, 203 (1897) (Harlan, J.) (statute that imposed a tax earmarked for the costs of printing bank notes was not a "Bill[] for raising Revenue" required by art. I, § 7 to "originate in the House of Representatives": "There was no purpose . . . to raise revenue to be applied in meeting the expenses or obligations of the Government."); accord *Millard v. Roberts*, 202 U.S. 429, 437 (1906) (McKenna, J.) (tax levied to defray cost of building a railroad station not a revenue bill, but merely a "means to the purposes provided by the act").

¹⁸⁷ See A. McLAUGHLIN, *supra* note 29, at 784; 2 C. WARREN, *supra* note 29, at 738; Beck, *Nullification by Indirection*, 23 HARV. L. REV. 441, 442-45 (1910). The only constitutional limits suggested by the *McCray* opinion concerned "freedom and justice" and due process, not federalism. 195 U.S. at 62-64.

¹⁸⁸ The *Lottery Case* itself had not gone so far; much remains outside congressional power even if the authority to regulate interstate commerce may be exercised for police purposes. See Cushman, *The National Police Power Under the Taxing Clause of the Constitution*, 4 MINN. L. REV. 247, 249, 255 (1920) (adding the argument that the power "[t]o lay and collect Taxes . . . to . . . provide for the . . . general Welfare," U.S. CONST. art. I, § 8, cl. 1, meant the power to raise money to be spent for general welfare).

¹⁸⁹ See D. CURRIE, *supra* note 28, chs. 6, 7, 10, 12 (discussing the growth of the doctrine of the "dormant" commerce clause).

¹⁹⁰ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203-05, 209 (1824).

¹⁹¹ *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319-20 (1852).

¹⁹² See, e.g., *Sherlock v. Alling*, 93 U.S. 99, 102-04 (1877) (Field, J.).

had been interpreted sometimes to permit,¹⁹³ and sometimes to forbid,¹⁹⁴ state action.

It was not until after the Civil War that the commerce clause was unambiguously employed to strike down state legislation, but in the remaining years of the Court's first century it was wielded with increasing frequency to protect commerce against state interference. Prediction of the fate of any state law became extremely hazardous. None of the Court's tests suggested clear solutions to particular controversies, and the Justices compounded the confusion by employing different tests in successive cases. Nor were the results easy to reconcile on any theory; by the time Fuller's term began, there were precedents to justify almost anything the Court might choose to decide.¹⁹⁵

In the ensuing twenty years, the Court added greatly to the stock of decisions in this field. In so doing, without much fanfare, it managed both to shift the overall tendency of the decisions and to make a modest start toward reducing the doctrinal confusion.

A. *Leisy v. Hardin*

Once upon a time, John Marshall had said in dictum,¹⁹⁶ and the Court had later held,¹⁹⁷ that state laws passed in the legitimate pursuit of health, safety, or other noncommercial "police power" goals were valid without regard to their impact on interstate commerce.¹⁹⁸ Though an important 1876 Miller opinion¹⁹⁹ had purported to reject this entire theory in favor of the uniformity test first enunciated by Curtis in *Cooley v. Board of Wardens*,²⁰⁰ the police-power criterion sprang up again almost immediately²⁰¹ and was the basis of an important 1888 decision upholding state exami-

¹⁹³ See, e.g., *id.* at 104.

¹⁹⁴ See, e.g., *Welton v. Missouri*, 91 U.S. 275, 282 (1876).

¹⁹⁵ See D. CURRIE, *supra* note 28, chs. 10, 12.

¹⁹⁶ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203-04, 209 (1824) (dictum), discussed in D. CURRIE, *supra* note 28, ch. 6.

¹⁹⁷ *New York v. Miln*, 36 U.S. (11 Pet.) 102, 137-41 (1837), discussed in D. CURRIE, *supra* note 28, ch. 7.

¹⁹⁸ In the absence, that is, of any conflicting federal statute. See *Gibbons*, 22 U.S. (9 Wheat.) at 210.

¹⁹⁹ *Henderson v. Mayor of New York*, 92 U.S. 259, 271-73 (1876), discussed in D. CURRIE, *supra* note 28, ch. 12.

²⁰⁰ 53 U.S. (12 How.) 299, 319-20 (1852).

²⁰¹ *Railroad Co. v. Husen*, 95 U.S. 465, 472 (1878) (dictum) (holding struck down a police-power measure unnecessarily obstructing interstate commerce), discussed in D. CURRIE, *supra* note 28, ch. 12.

nation and licensing of interstate railway engineers.²⁰² It therefore required considerable gymnastic ability for the Court to conclude, just before Fuller's appointment, in the teeth of a forty-year-old decision that had allowed states to bar the sale of liquor imported from other states,²⁰³ that the police power did not justify a state ban on importing such liquor in the first place.²⁰⁴ It remained for Fuller himself, in one of his first constitutional opinions, to overrule the old precedent and hold that no state could forbid the sale of out-of-state liquor in its original package.²⁰⁵

As an omen of what sort of opinions one could expect from the new Chief Justice, *Leisy v. Hardin* was not exactly cheering. The opinion commences with a hackneyed and useless background recitation of the type we have come to associate with legal encyclopedias. After two pages of this, in which he recited Curtis's and Marshall's conflicting theories in consecutive sentences with no apparent appreciation of their incompatibility,²⁰⁶ Fuller turned to *Brown v. Maryland*.²⁰⁷ In *Brown*, the Court, through Chief Justice Marshall, had held that a state could not tax goods imported from foreign countries while still in their original package;²⁰⁸ Marshall added that a state equally could not tax imports from other states of the union.²⁰⁹ Omitting to note that this dictum had been squarely repudiated in *Woodruff v. Parham*,²¹⁰ Fuller proceeded to quote hemorrhagically from *Bowman v. Chicago & Northwestern Railway Co.*,²¹¹ the recent decision that had struck down a state ban on the importation of liquor, where the Court had expressly distinguished power over importation from power over sales.²¹²

²⁰² *Smith v. Alabama*, 124 U.S. 465, 480 (1888).

²⁰³ The License Cases, 46 U.S. (5 How.) 504 (1847), discussed in D. CURRIE, *supra* note 28, ch. 7.

²⁰⁴ *Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465, 488-91 (1888), discussed in D. CURRIE, *supra* note 28, ch. 12.

²⁰⁵ *Leisy v. Hardin*, 135 U.S. 100 (1890).

²⁰⁶ *Id.* at 108-09.

²⁰⁷ 25 U.S. (12 Wheat.) 419 (1827), discussed in *Leisy*, 135 U.S. at 110-11.

²⁰⁸ 25 U.S. (12 Wheat.) at 445.

²⁰⁹ *Id.* at 449.

²¹⁰ 75 U.S. (8 Wall.) 123, 139 (1869), discussed in D. CURRIE, *supra* note 28, ch. 10. *Woodruff* flatly held that the imports clause, U.S. CONST. art. I, § 10, cl. 2, which had been the principal basis of *Brown*, was wholly inapplicable to imports from other states and declared that the commerce clause forbade only *discriminatory* taxation of sister-state goods even while they remained in their original package. 75 U.S. (8 Wall.) at 140. Contrary to Fuller's statement in *Leisy*, 135 U.S. at 110, the commerce clause itself seems not to have figured significantly in the *Brown* decision. See D. CURRIE, *supra* note 28, ch. 6 (discussing *Brown*).

²¹¹ 125 U.S. 465 (1888).

²¹² *Id.* at 498-99.

Fuller did not explain why the two cases were similar.²¹³ He did recite, ad nauseam, the arguments that Chief Justice Taney had used to uphold a similar law in the *License Cases*,²¹⁴ adding only that Taney had not appreciated the subtleties of the uniformity test developed in later cases²¹⁵ but not disclosing why liquor sales required uniform regulation. Instead, he launched into a five-page enumeration of the results of previous decisions striking down or upholding various state laws without ever venturing to say which ones *Leisy* most closely resembled.²¹⁶ There follows the unexplained conclusion that the law was unconstitutional.²¹⁷

Fuller's lamentable opinion notwithstanding, *Bowman's* heavy reliance on decisions striking down taxes on sales of out-of-state goods²¹⁸ made *Leisy* almost a foregone conclusion.²¹⁹ *Leisy* thus seemed to suggest not only the primacy of *Cooley's* uniformity standard but also a continuation of the Waite Court's tendency toward vigorous protection of commerce from state obstruction.²²⁰

²¹³ *Leisy*, 135 U.S. at 111-15.

²¹⁴ See *id.* at 115-18 (citing *The License Cases*, 46 U.S. (5 How.) 504, 576, 578-79, 586 (1847)).

²¹⁵ See *Leisy*, 135 U.S. at 118.

²¹⁶ *Id.* at 119-23.

²¹⁷ *Id.* at 124-25.

²¹⁸ *Bowman*, 125 U.S. at 495-98; see also *id.* at 499 (implicitly casting doubt on the result in the *License Cases* because "the very purpose . . . of . . . transportation[] is . . . sale").

²¹⁹ A wordy dissent by three Justices, none of whom had joined the decision in *Bowman*, suddenly found merit in the unconvincing argument of the *Bowman* majority, 125 U.S. at 498, that, in forbidding importation, the state had attempted to regulate conduct beyond its own borders. *Leisy*, 135 U.S. at 155-56 (Gray, J., joined by Harlan and Brewer, JJ., dissenting). The dissenters' police-power argument, *id.* at 158-60, had been substantially refuted by *Bowman*, and they did not explain their less-than-obvious conclusion that the *Cooley* requirement of uniformity was more significant for importation than for sales, *id.* at 157-58. The dissent could have derived some support from cases allowing state taxation of goods that had come to rest after an interstate journey, see *Brown v. Houston*, 114 U.S. 622, 632-33 (1885), or that had not yet begun one, see *Coe v. Errol*, 116 U.S. 517, 524-25 (1885). Indeed, *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (discussed *supra* notes 126-45 and accompanying text), coming five years after *Leisy*, cast doubt on the proposition that local sales of out-of-state goods fell within the commerce power at all. Gray's *Leisy* dissent did mention *Kidd v. Pearson*, 128 U.S. 1 (1888) (Lamar, J.), which had suggestively held that a state could prohibit the distilling of liquor for export on the ground that manufacture preceded commerce, see *id.* at 25-26, but Gray failed to notice its usefulness to his argument. *Leisy*, 135 U.S. at 157 (dissenting opinion). On the other hand, *Welton v. Missouri*, 91 U.S. 275, 282 (1876), which invalidated a local sales tax that discriminated against sellers of out-of-state goods, showed the danger of this approach. Cf. *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 140 (1869) (upholding a nondiscriminatory tax); D. CURRIE, *supra* note 28, ch. 12 (discussing *Welton* and *Woodruff*).

²²⁰ Indeed, in the companion case of *Lyng v. Michigan*, 135 U.S. 161, 166 (1890) (Fuller, C.J.), the Court applied *Leisy* to hold that a state also could not tax the sale of sister-state liquor in its original package, on the ground that "no State has the right to lay a tax on

B. *Rahrer* and *Plumley*

Near the end of his *Leisy* opinion, the Chief Justice tossed off the following remarkable dictum:

[T]he responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.²²¹

Congress snapped at the opportunity in a trice, subjecting all imported liquors to state police-power laws "upon arrival" to the same extent as if they had been locally produced.²²² Though *Cooley* had flatly said that Congress could not empower the states to do what the commerce clause forbade,²²³ Fuller and his brethren dutifully upheld Congress's action in *In re Rahrer*²²⁴—and had the temerity to declare, in plain contradiction of the facts, that the statute "imparted no power to the State not then possessed."²²⁵

The state law in question had been enacted before Congress spoke, and Justice Curtis had conceded in *Cooley* that Congress might be able to adopt existing state laws as its own.²²⁶ Far from distinguishing *Cooley* on this basis, however, Fuller assumed that the state could have reenacted its law after Congress acted and rejected the argument that it was *required* to do so.²²⁷ Rather, the Chief Justice argued that Congress had enacted a uniform regulation of its own "divest[ing]" imported beverages of their "charac-

interstate commerce in any form." Though the tax in fact discriminated against out-of-state goods, *id.*, the Court did not rest its decision on this fact. The decision thus seemed to undermine the basis of *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 140 (1869), which had upheld a nondiscriminatory tax on the local sale of goods, and which was not cited by the *Lyng* Court.

²²¹ *Leisy v. Hardin*, 135 U.S. 100, 123-24 (1890).

²²² Act of Aug. 8, 1890 (Wilson Act), ch. 728, 26 Stat. 313. *Rhodes v. Iowa*, 170 U.S. 412, 426 (1898) (White, J.), undermined the apparent purpose of the Act—which was to return effective control of liquor to the states—by holding that liquor did not "arriv[e]" until received by the consignee, so that while a state could forbid resale in the original package, it could not forbid importation. See 2 C. WARREN, *supra* note 29, at 731-32; see also *Scott v. Donald*, 165 U.S. 58, 100 (1897) (Shiras, J.) (confirming the apparent statutory requirement that the state not discriminate against foreign liquor); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 449-52 (1898) (White, J.) (interpreting the nondiscrimination requirement).

²²³ *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 318 (1852).

²²⁴ 140 U.S. 545 (1891).

²²⁵ *Id.* at 564.

²²⁶ *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 317-18 (1852).

²²⁷ *Rahrer*, 140 U.S. at 565.

ter" as "subjects of interstate commerce . . . at an earlier period of time than would otherwise be the case."²²⁸ If this meant that Congress was to be sole judge of the meaning of the commerce clause, it was contrary to *Marbury v. Madison*,²²⁹ if it meant that Congress could authorize state regulations that the Constitution itself forbade, it left the *Cooley* argument unanswered.²³⁰

The opinion seemed to be on the right track when it observed that some of the express limits on state authority in article I, section 10 could be removed by Congress.²³¹ But Fuller failed to develop the argument that, in light of its purpose of permitting Congress to determine the extent to which commerce should be regulated, the implicit commerce-clause limitation should be analogized to these removable limitations rather than to such express limitations as are immune from congressional action.²³² Congress, as Fuller said, had made the decision "that the common interests did not require entire freedom in the traffic in ardent spirits,"²³³ and this decision seems to have satisfied the framers' reasons for giving the power to Congress.

Thus, despite the flaws in his reasoning, Fuller seems to have reached a defensible result in *Rahrer*. His opinions in *Leisy* and *Rahrer* together, moreover, show a consistent commitment neither to the police power nor to freedom of commerce but to the more neutral institutional principle that Congress should determine the balance between them.

It is not so easy, however, to find consistency between *Leisy* and the 1894 case of *Plumley v. Massachusetts*,²³⁴ which held that, although Congress had not spoken, a state was free to forbid the sale of out-of-state colored oleomargarine in its original package.²³⁵

²²⁸ *Id.* at 561-62.

²²⁹ 5 U.S. (1 Cranch) 137, 177-79 (1803); see Biklé, *The Silence of Congress*, 41 HARV. L. REV. 200, 209-10 (1927).

²³⁰ Fuller hinted, correctly enough, that, to the extent that the state's inability to act was based on an implicit congressional prohibition, the inability could be cured by a federal statute. *Rahrer*, 140 U.S. at 559-60, 562. Apart from inherent difficulties with the argument from congressional inaction, however, there were too many decisions basing the invalidity of state laws on the commerce clause itself for this explanation to be convincing.

²³¹ *Id.* at 560. Article I, section 10 provides, in part, that "[n]o state shall, without the Consent of Congress, lay any Duty of Tonnage, Keep Troops, or Ships of War in time of Peace, [or] enter into any Agreement or Compact with another state" (emphasis added).

²³² See D. CURRIE, *supra* note 28, ch. 7 (discussing this issue in connection with *Cooley*); T. POWELL, *supra* note 142, at 161.

²³³ *Rahrer*, 140 U.S. at 561.

²³⁴ 155 U.S. 461 (1894).

²³⁵ *Id.* at 478-79.

Fuller appropriately dissented.²³⁶

Harlan, who had dissented in *Leisy*, wrote for the Court. He argued that the only reason for coloring margarine yellow was to deceive buyers into thinking it was butter and that it was within the state's police powers to prevent such deception.²³⁷ This argument might have been persuasive enough before *Leisy*. To distinguish *Leisy*, Harlan said only that there had been no effort to pass off the beer in that case as anything but beer;²³⁸ he did not say why the state's interest in guarding its citizens from confusing one healthful product with another was more deserving of constitutional protection than its interest in guarding them from consuming substances destructive of health.²³⁹

The truth was that not one Justice who voted to uphold the state's power over margarine had denied its power over liquor. Four Justices who had voted with the majority in *Leisy* had left the Court,²⁴⁰ and their successors voted in *Plumley* with two of the *Leisy* dissenters.²⁴¹ The distinction between the cases, to borrow Thomas Reed Powell's phrase, seemed to be "the intervening change in the composition of the Court."²⁴²

C. Later Decisions

Although the Court soon suggested that cigarettes were still

²³⁶ *Id.* at 480-82. Oddly, he neglected to cite *Leisy*.

²³⁷ *Id.* at 467-68. The dissenters responded with some force that there was no chance of deception since both state and federal law already required explanatory packaging and labeling. *Id.* at 481. But the only precedents suggesting that a state had to exercise its police powers in the manner that was least restrictive of interstate commerce had been in the context of regulations discriminating against foreign goods, see, e.g., *Railroad Co. v. Husen*, 95 U.S. 465 (1878), while the Massachusetts law was facially neutral: it prohibited the sale of all colored oleomargarine. The Court seemed unconcerned by the possibility that the law might have had the discriminatory effect of protecting the local butter industry from outside competition.

²³⁸ *Plumley*, 155 U.S. at 474.

²³⁹ See Carman, *Comments on Federal Trust Legislation*, 12 POL. SCI. Q. 622, 634 (1897) (distinction between *Leisy* and *Plumley* "untenable"). That the Court did not take the health interest lightly had been made clear by the Court's unanimous and ringing depiction of the evils of drink in upholding a prohibition law against due-process objections in *Mugler v. Kansas*, 123 U.S. 623, 662-63 (1887). *Mugler* makes it hard to explain the contrast between *Plumley* and *Leisy* on the ground that the Justices were an ardent bunch of wets. See D. CURRIE, *supra* note 28, ch. 11 (discussing *Mugler*).

²⁴⁰ Miller, Bradley, Blatchford, and Lamar.

²⁴¹ The successors, Brown, Shiras, Jackson, and White, voted with Harlan and Gray.

²⁴² T. POWELL, *supra* note 142, at 110. Justice Brewer, who joined the dissent in *Leisy*, also joined the dissent in *Plumley*. For reasons already suggested, there were several plausible grounds for concluding, as Brewer seems to have done, that *Leisy* was the stronger case for allowing state regulation.

governed by the *Leisy* rule,²⁴³ later decisions of the Fuller period confirm *Plumley's* implication that *Leisy* was a misleading indicator of what was to come. In the first place, *Cooley's* uniformity test, which had figured so prominently in *Leisy* as well as in earlier opinions,²⁴⁴ practically disappeared for the time being.²⁴⁵ Furthermore, on balance the new Justices seemed, if anything, less inclined than their predecessors to protect commerce from state obstruction.

In 1878, for example, the Court had held that a state law for-

²⁴³ *Austin v. Tennessee*, 179 U.S. 343, 350 (1900) (Brown, J.). The Court held, however, in order to prevent evasion of state laws, that retail-sized ten-cigarette packets were not "original packages" for purposes of the *Leisy* doctrine, when they had been shipped interstate in large baskets. *Id.* at 360-61. Brewer, Shiras, Peckham, and Fuller dissented. For a perceptive contemporaneous criticism of both the Court's reasoning and the original-package doctrine itself, see Miller, *The Latest Phase of the Original Package Doctrine*, 35 AM. L. REV. 364 (1901).

²⁴⁴ Two early cases of the period invoking the uniformity rationale were *Western Union Tel. Co. v. James*, 162 U.S. 650, 660 (1896) (Peckham, J.) (liability for nondelivery of interstate telegrams was not "so extensive and national in character, that it could only be dealt with by Congress"), and *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204, 221-22 (1894) (Brown, J.) (invalidating state regulation of interstate bridge tolls).

²⁴⁵ At the same time that the *Cooley* test was disappearing from the commerce-clause cases, it cropped up as a test for determining when state laws were preempted by the extension of federal judicial power to "Cases of admiralty and maritime Jurisdiction," U.S. CONST. art. III, § 2. Building in part on Justice Bradley's assertion that there was a federal common law in this field because the framers had sought "uniformity and consistency," *The Lot-tawanna*, 88 U.S. (21 Wall.) 558, 575 (1875), the Fuller Court refused to recognize state laws that immunized municipalities from maritime tort liability, *Workman v. New York City*, 179 U.S. 552, 557-63 (1900) (White, J.), or that created maritime liens for materials and services provided to an out-of-state vessel at the request of an independent contractor, *The Roanoke*, 189 U.S. 185, 195-99 (1903) (Brown, J.). In both cases, however, a more obvious ground was also given: the state laws contradicted federal common law. See *The Roanoke*, 189 U.S. at 196; *Workman*, 179 U.S. at 558, 563.

Confusion arose when Justice Holmes failed to deal adequately with either the supremacy or the uniformity criterion in upholding the application of a state wrongful-death statute to a maritime accident. *The Hamilton*, 207 U.S. 398, 404-06 (1907). The Court had already held that, in the absence of congressional legislation, a state wrongful-death action might apply to a maritime accident without unduly disrupting the freedom of trade guaranteed by the commerce clause. *Sherlock v. Alling*, 93 U.S. 99, 104 (1876). Thus, it was reasonable enough to conclude that such an action might be maintained without offending the similar and equally shaky uniformity thesis that the Court had enunciated under the admiralty clause. *The Hamilton*, 207 U.S. at 404-05. In his usual breezy way, however, Holmes did not stop to distinguish *Workman* and *The Roanoke*, though he might have done so on the ground that the absence of a federal common law death remedy reflected not a federal policy opposing such relief but only the traditional notion that such actions could be created only by statute, *The Harrisburg*, 119 U.S. 199, 213-14 (1886); see D. CURRIE, *supra* note 28, ch. 12 (discussing *Sherlock*). Another ground of distinction might have been that a state remedy that merely extended liability for the breach of a preexisting federal duty of care did not subject the owner to uncertainty as to his standard of conduct. See Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 SUP. CT. REV. 158, 172, 186-88.

bidding racial segregation in public conveyances could not be applied to a ship traveling interstate;²⁴⁶ in 1890 it upheld a state requirement that interstate trains provide separate cars for blacks and whites.²⁴⁷ Before Fuller's appointment, the Court had held that no state could tax the gross receipts of interstate transport;²⁴⁸ thereafter it displayed increased receptiveness to apportionment formulas that required interstate commerce to pay its way while relieving it of the most obvious multiple burdens.²⁴⁹ Moreover, while the Court displayed a tendency to declare that the states had no power at all to regulate interstate commerce itself,²⁵⁰ it managed to uphold a number of significant restrictions of such com-

²⁴⁶ *Hall v. DeCuir*, 95 U.S. 485, 488-90 (1878), discussed in D. CURRIE, *supra* note 28, ch. 12.

²⁴⁷ *Louisville, N.O. & T. Ry. v. Mississippi*, 133 U.S. 587, 592 (1890) (Brewer, J.). Harlan and Bradley sharply dissented: "It is difficult to understand how a state enactment, requiring the separation of the white and black races on interstate carriers of passengers, is a regulation of commerce among the States, while a similar enactment forbidding such separation is not . . ." *Id.* at 594. The majority responded that the state court had construed the statute to apply only to intrastate commerce, *id.* at 591, but the state court had applied the law to intrastate passengers on interstate trains, which apparently were the only kind that the defendant was running. See *Louisville, N.O. & T. Ry. v. State*, 66 Miss. 662, 675 (1889). The complaining passenger in the 1878 case had been traveling locally as well, and the Court had noted that the "disposition of passengers taken up and put down within the State . . . cannot but affect . . . those taken up without and brought within." *Hall v. DeCuir*, 95 U.S. 485, 489 (1878). The Court in *Louisville* stressed that the power of the state to require actual segregated seating was not in issue but only the expense of adding a separate car for blacks—an expense no greater than that under "statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the State." *Louisville*, 133 U.S. at 591. For criticism of the decision, see 9 A. BICKEL & B. SCHMIDT, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 751-52 (1984).

²⁴⁸ *Philadelphia & S.S.S. Co. v. Pennsylvania*, 122 U.S. 326, 341-44 (1887) (domestic corporation); *Fargo v. Michigan*, 121 U.S. 230, 243-44 (1887) (out-of-state corporation); see D. CURRIE, *supra* note 28, ch. 12.

²⁴⁹ See, e.g., *Fargo v. Hart*, 193 U.S. 490, 499 (1904) (Holmes, J.) (upholding apportioned tax on express company property); *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 226 (1897) (Fuller, C.J.) (same); *Maine v. Grand Trunk Ry.*, 142 U.S. 217, 228-29 (1891) (Field, J.) (upholding privilege tax measured by gross receipts apportioned by mileage); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 26 (1891) (Gray, J.) (upholding property tax on railroad cars apportioned by mileage). Arguably out of line with the Court's apparent concern for avoiding the competitive disadvantage of multiple burdens was the decision allowing a railroad's home state to tax the total value of its rolling stock, though the above decisions seemed to say that such property was also subject to taxation in other states on an apportioned basis. *New York ex rel. New York Cent. & H.R.R.R. v. Miller*, 202 U.S. 584, 597 (1906) (Holmes, J.) (avoiding the problem by doubting that any cars in question were "so continuously in any other State as to be taxable there"). The holding of the *Grand Trunk* case with respect to privilege taxes was soon qualified by the suggestion that the payment of such a tax could not be made a condition of doing interstate business. *Postal Tel. Cable Co. v. Adams*, 155 U.S. 688, 698 (1895) (Fuller, C.J.) (dictum).

²⁵⁰ See, e.g., *Crutcher v. Kentucky*, 141 U.S. 47, 57-60 (1891) (Bradley, J.).

merce by labeling them as the "indirect" effects of regulating something else.²⁵¹

More interesting than the results was the growing consensus on the applicable criteria. Outside the tax field, the dominant theme was that of the police power.²⁵² But Marshall's *Gibbons* test²⁵³ had undergone a significant evolution: the Court increasingly insisted that exercises of the police power that affected interstate or foreign commerce be "reasonable."²⁵⁴ Reasonableness, in turn, tended to depend upon how seriously the measure impinged on commerce and how necessary it was to accomplish the police-power goal. In quarantine cases, for example, where a similar calculus had been applied as early as 1878,²⁵⁵ the Court continued to inquire whether the state had gone further to restrict commerce than the need justified.²⁵⁶

The quarantine cases generally dealt with measures that targeted out-of-state goods for unfavorable treatment. But in the Fuller period the Court applied the same test not only to cases in which facially neutral rules had disproportionate effects on outside producers²⁵⁷ but also to cases in which there was no suggestion of

²⁵¹ See, e.g., *Rasmussen v. Idaho*, 181 U.S. 198, 202 (1901) (Brewer, J.) (upholding temporary ban on importation of sheep from area where disease was prevalent); *Erb v. Morasch*, 177 U.S. 584, 585 (1900) (Brewer, J.) (upholding six-miles-per-hour speed limit for trains in city); *Chicago, M. & St. P. Ry. v. Solan*, 169 U.S. 133, 137-38 (1898) (Gray, J.) (upholding ban on railroad's right to contract out of liability for negligent personal injury); *New York, N.H. & H.R.R. v. New York*, 165 U.S. 628, 631-32 (1897) (Harlan, J.) (upholding prohibition of heating stoves in railroad cars); *Hennington v. Georgia*, 163 U.S. 299, 308-09, 317-18 (1896) (Harlan, J.) (upholding ban on running freight trains on Sunday); *Louisville & N.R.R. v. Kentucky*, 161 U.S. 677, 701 (1896) (Brown, J.) (upholding prohibition on consolidation of in-state with out-of-state railroads).

²⁵² See, e.g., cases cited *supra* note 251; ERNST FREUND, *THE POLICE POWER* §§ 136-138 (1904).

²⁵³ See *supra* notes 196-98 and accompanying text.

²⁵⁴ E.g., *Reid v. Colorado*, 187 U.S. 137, 152 (1902) (Harlan, J.) (upholding state ban on importation of diseased livestock); *Gladson v. Minnesota*, 166 U.S. 427, 430-31 (1897) (Gray, J.) (upholding state statute that required intrastate trains to stop at county seats); *New York, N.H. & H.R.R. v. New York*, 165 U.S. 628, 631 (1897) (Harlan, J.) (upholding state railroad safety regulations); *Illinois Cent. R.R. v. Illinois*, 163 U.S. 142, 154 (1896) (Gray, J.) (striking down state statute that required fast interstate mail trains to stop at county seats); see also cases cited *infra* notes 256-59; Shenton, *Interstate Commerce During the Silence of Congress*, 23 DICK. L. REV. 78 (1919).

²⁵⁵ *Railroad Co. v. Husen*, 95 U.S. 465, 473-74 (1878) (striking down overbroad state prohibition of shipment of cattle from area where disease was prevalent), discussed in D. CURRIE, *supra* note 28, ch. 12.

²⁵⁶ See, e.g., *Smith v. St. Louis & S.W. Ry.*, 181 U.S. 248, 255, 257 (1901) (McKenna, J.) (upholding a temporary ban on importation of cattle from area at risk of disease; Harlan, White, and Brown dissented).

²⁵⁷ See, e.g., *Brimmer v. Rebman*, 138 U.S. 78, 82-84 (1891) (Harlan, J.) (striking down requirement of inspection of meat shipped over 100 miles).

either facial discrimination or disparate impact. In a revealing series of decisions, for example, the Court permitted states to inflict "reasonable" burdens on commerce by requiring some interstate trains to make stops at specified stations,²⁵⁸ but drew the line whenever it concluded that adequate service had already been provided.²⁵⁹ And even *Plumley* itself was confined by the Court's determination that deception could be effectively prevented without banning the sale of *all* margarine²⁶⁰ or requiring that it be colored pink.²⁶¹

The opinions of the Fuller period did not always acknowledge that the question was one of reasonableness. Justice Brewer protested in at least one concurrence that the reasonableness of a "direct" burden on interstate commerce was an irrelevant consideration.²⁶² An exercise of the state's police power, Justice White said on another occasion, was an impermissible regulation of commerce if its effect on interstate commerce was direct.²⁶³ But the "directness" of an effect seemed to have less to do with the immediacy of its impact than with its severity. In one of the last decisions of the period, for example, reaffirming its view that the effect of a safety measure determined whether it was a forbidden regulation of com-

²⁵⁸ See, e.g., *Lake Shore & M.S. Ry. v. Ohio*, 173 U.S. 285, 300-03 (1899) (Harlan, J.).

²⁵⁹ See, e.g., *Herndon v. Chicago R.I. & P. Ry.*, 218 U.S. 135, 156-57 (1910) (Day, J.); *Cleveland, C., C. & St. L. Ry. v. Illinois*, 177 U.S. 514, 521 (1900) (Brown, J.). This is not to say that the results of these decisions were wholly consistent. Compare *Illinois Cent. R.R. v. Illinois*, 163 U.S. 142, 153-54 (1896) (state cannot require fast interstate mail train to detour seven miles from main line to serve a single county seat), with *Lake Shore & M.S. Ry. v. Ohio*, 173 U.S. 285, 300-03 (1899) (state may require six interstate trains per day to stop at every town with 3000 or more inhabitants), and *Mobile, J. & K.C.R.R. v. Mississippi*, 210 U.S. 187, 203 (1908) (McKenna, J.) (state may require a state-chartered railroad company to construct an interstate line so as to pass through a county seat).

²⁶⁰ *Schollenberger v. Pennsylvania*, 171 U.S. 1, 14-15, 17-18 (1898) (Peckham, J.).

²⁶¹ *Collins v. New Hampshire*, 171 U.S. 30, 33 (1898) (Peckham, J.). These decisions suggest a ground on which *Plumley* and *Leisy* might be reconciled after all: the burden of the ban on yellow margarine was less than that of liquor sales because it did not block access to margarine entirely. Cf. *Houston & T.C.R.R. v. Mayes*, 201 U.S. 321, 329-31 (1906) (Brown, J.) (acknowledging legitimate police-power purpose in assuring adequate provision of freight cars but holding that absolute requirement of furnishing cars on customers' demand was unreasonable).

²⁶² *Cleveland, C., C. & St. L. Ry. v. Illinois*, 177 U.S. 514, 523 (1900) (concurring opinion).

²⁶³ *McNeill v. Southern Ry.*, 202 U.S. 543, 561 (1906) (striking down a state administrative order requiring delivery of railroad cars to a private siding). Justice Peckham had a marked tendency to label the effect on commerce of any law he struck down as "direct." See, e.g., *Central of Ga. Ry. v. Murphey*, 196 U.S. 194, 203-04, 206 (1905) (striking down requirement that initial carrier trace freight lost by connecting road); *Louisville & N.R.R. v. Eubank*, 184 U.S. 27, 36 (1902) (striking down statute that prohibited railroads from charging a higher rate for short hauls than for long hauls).

merce, the Court dismissed a challenge to a law that required trains to stop for cross traffic because the number of crossings had not adequately been alleged.²⁶⁴ A large number of stops would have a more serious impact on commerce than a small number, but not, in any literal sense, a more direct one. In short, despite continuing efforts to cloak what was going on in more formalistic terms, the decisions themselves suggest that the Court had agreed in substance to what Justices Harlan and Brown were the most candid in revealing:²⁶⁵ the test of whether a measure subjected interstate commerce to impermissible burdens was whether the effect on commerce was unreasonable in light of the state's asserted interest.²⁶⁶

This is of course the modern test.²⁶⁷ It makes perfect sense in

²⁶⁴ *Southern Ry. v. King*, 217 U.S. 524, 536-37 (1910) (Day, J.).

²⁶⁵ See, e.g., *Reid v. Colorado*, 187 U.S. 137, 148, 151 (1902) (Harlan, J.); *Smith v. St. Louis & S.W. Ry.*, 181 U.S. 248, 262-63 (1901) (Brown, J., dissenting); *id.* at 260 (Harlan, J., dissenting); *Cleveland, C., C. & St. L. Ry. v. Illinois*, 177 U.S. 514, 517-18, 522 (1900) (Brown, J.); *Lake Shore & M.S. Ry. v. Ohio*, 173 U.S. 285, 300 (1899) (Harlan, J.); *New York, N.H. & H.R.R. v. New York*, 165 U.S. 628, 631-32 (1897) (Harlan, J.).

²⁶⁶ The Court also continued its effort to avoid the special disadvantage of multiple taxation. See *supra* note 249. Outright discrimination against interstate operations continued to be struck down in most instances. See, e.g., *I.M. Darnell & Son Co. v. City of Memphis*, 208 U.S. 113, 125-26 (1908) (White, J.) (property tax exempting local products); *Voight v. Wright*, 141 U.S. 62, 66-67 (1891) (Bradley, J.) (inspection of out-of-state flour). Indeed, on occasion the Court would look behind a measure that was nondiscriminatory on its face to find an unjustified preference for local interests. See, e.g., *Brimmer v. Rehman*, 138 U.S. 78, 82-84 (1891) (Harlan, J.) (inspection requirement for meat shipped over 100 miles); *Minnesota v. Barber*, 136 U.S. 313, 322-23 (1890) (Harlan, J.) (ban on sale of meat not inspected within state before slaughter). Occasionally, however, the Court was unable to perceive discrimination where in fact it seemed to exist. See, e.g., *Williams v. Fears*, 179 U.S. 270, 278 (1900) (Fuller, C.J.) (upholding tax on agents hiring persons to work outside state); *New York v. Roberts*, 171 U.S. 658, 662-63 (1898) (Shiras, J.) (upholding a general corporate franchise tax that exempted corporations that carried on all of their manufacture within the state, on the irrelevant ground that an out-of-state corporation that carried on all of its manufacturing operations within the state would also be exempt). Two famous decisions, moreover, expressly upheld discrimination against interstate commerce on the shaky and unexplained ground that the commodities to be shipped out of state were owned by the people of the state. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) (Holmes, J.) (water); *Geer v. Connecticut*, 161 U.S. 519, 532 (1896) (White, J.) (birds), *overruled*, *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). For a prior similar holding under the privileges and immunities clause, see *McCready v. Virginia*, 94 U.S. 391, 396-97 (1877) (state may limit right to use its oyster beds to its own citizens), *discussed in* D. CURRIE, *supra* note 28, ch. 12. The pedigree of the ownership theory was doubtful; as Field observed, dissenting in *Geer*, 161 U.S. at 539-40, many natural-law authorities of the sort cited by the majority seemed to say that wild game was owned by nobody. Moreover, the relevance of ownership to the purposes of the commerce clause was not made clear. For a thorough modern discussion, see Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981).

²⁶⁷ See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142-45 (1970); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 781-82 (1945).

light of the Court's longstanding perception that the clause directed the courts to protect the interest in unobstructed trade without denying the states all power to promote their traditional concerns. Very likely, as Justice Stone would later say,²⁶⁸ the Court had really been balancing state and federal interests in commerce-clause cases all along; Stone himself was to make the process far more visible than the Fuller Court had done.²⁶⁹ Despite the bad start in *Leisy v. Hardin*, the Fuller Court, if not always explicitly, took a significant step in the right direction.

V. DUE PROCESS AND EQUAL PROTECTION

To modern readers, perhaps the most memorable fourteenth-amendment decision of the Fuller years was Justice Brown's 1896 opinion in *Plessy v. Ferguson*²⁷⁰ upholding a state law requiring "equal but separate" rail accommodations. At the time, however, despite Justice Harlan's celebrated and impassioned dissent, the outcome should have appeared pretty well predetermined by the unanimous but, oddly enough, uncited 1883 decision in *Pace v. Alabama*²⁷¹—which Harlan had joined—endorsing the same principle in the context of interracial sex relations.²⁷² In any event, *Plessy* was a reliable symbol of the times. The Fuller Court did little to further the fourteenth amendment's central goal of racial justice;²⁷³

²⁶⁸ *Di Santo v. Pennsylvania*, 273 U.S. 34, 44 (1927) (dissenting opinion).

²⁶⁹ *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 781-82 (1945).

²⁷⁰ 163 U.S. 537 (1896).

²⁷¹ 106 U.S. 583 (1883), discussed in D. CURRIE, *supra* note 28, ch. 11.

²⁷² For discussion of the relationship between *Pace* and *Plessy*, see Roche, *Civil Liberty in the Age of Enterprise*, 31 U. CHI. L. REV. 103, 112-13 (1963). The fact that *Pace*'s reasoning was not repeated in *Plessy*, taken together with Justice Brown's declaration that the fourteenth amendment had not been intended "to enforce social, as distinguished from political equality," *Plessy*, 163 U.S. at 544, led Professor Schmidt to the interesting conclusion that *Plessy* was not based upon the "equality" of black and white accommodations at all. See A. BICKEL & B. SCHMIDT, *supra* note 247, at 755-56. Later in the opinion, however, "social equality" was employed in contrast to "equal rights before the law" in a context suggesting that Brown may have meant only that the state was not responsible for the practical inequality resulting from the attitudes of private citizens. 163 U.S. at 551-52.

²⁷³ See *Berea College v. Kentucky*, 211 U.S. 45 (1908) (Brewer, J.) (ignoring an equal-protection argument in upholding a statute forbidding private schools to teach blacks and whites together on the ground of the state's control over its corporations); *Hodges v. United States*, 203 U.S. 1 (1906) (Brown, J.) (reaffirming that private conspiracy against blacks did not come within the fourteenth amendment); *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899) (refusing to enjoin spending solely for white high school while questioning whether equal protection denied); *Williams v. Mississippi*, 170 U.S. 213 (1898) (McKenna, J.) (refusing to find that state laws limiting jury service to literate taxpayers discriminated on racial grounds). But see *Carter v. Texas*, 177 U.S. 442 (1900) (Gray, J.) (states may not exclude blacks from grand juries); cf. *Giles v. Teasley*, 193 U.S. 146 (1904), and

it was in the economic arena that Fuller and his brethren made fourteenth-amendment history.

Two of the most significant conclusions of the Court before Fuller's appointment had been that the due process clauses imposed substantive limits on legislative power and that the equal protection clause was not restricted to racial classifications.²⁷⁴ Neither of these conclusions had been adequately explained, and neither had been applied unequivocally as the Court's sole reason for invalidating government action.²⁷⁵ Fuller and his brethren never made up for the failure of their predecessors to justify their debatable dicta, but they transformed both conclusions into law. Indeed, it is for the aggressive invocation of substantive due process that the Fuller period is best known today. But an examination of the entire body of cases reveals that, even in those days, most laws passed muster under the due process and equal protection clauses; the exceptions should not be taken to have established the rule.

A. Rate Regulation

In 1877, in *Munn v. Illinois*,²⁷⁶ the Court, over Justice Field's dissent, had upheld state regulation of grain-elevator rates while implying that the regulatory power was limited to businesses "affected with a public interest."²⁷⁷ A few years later the Court

Giles v. Harris, 189 U.S. 475 (1903) (finding procedural roadblocks to damage and injunctive relief, respectively, for the alleged disfranchisement of black voters).

There were two significant thirteenth amendment cases during this time. In *Robertson v. Baldwin*, 165 U.S. 275, 281-83 (1897), a learned opinion by Justice Brown relied largely on history and necessity to uphold a statute forbidding desertion by merchant seamen: "[T]he amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional . . ." Brown added more generally and more disturbingly that servitude pursuant to an uncoerced contract was not "involuntary." Justice Harlan dissented. The narrow definition of involuntariness espoused in *Robertson* was abandoned in *Clyatt v. United States*, 197 U.S. 207, 215 (1905) (Brewer, J.) (upholding a federal statute outlawing "peonage" even where a debtor had agreed to work for his creditor: "peonage, however created, is compulsory service, involuntary servitude"). For general discussion of the Fuller Court's treatment of racial issues, see A. BICKEL & B. SCHMIDT, *supra* note 247, at 751-60, 837-41, 923-27; Schmidt, *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 *Tex. L. Rev.* 1401, 1462-72 (1983).

²⁷⁴ See D. CURRIE, *supra* note 28, ch. 11 (discussing, inter alia, *Mugler v. Kansas*, 123 U.S. 623 (1887); *Missouri Pac. Ry. v. Mackey*, 127 U.S. 205 (1888)).

²⁷⁵ For cases in which due process figured in decisions striking down federal laws, see D. CURRIE, *supra* note 28, chs. 8, 9 (discussing *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870)).

²⁷⁶ 94 U.S. 113 (1877), discussed in D. CURRIE, *supra* note 28, ch. 11.

²⁷⁷ *Munn*, 94 U.S. at 130-32.

warned in dicta that "confiscatory" rate regulation would deprive the owners of even such a business of property without due process of law.²⁷⁸ Under Fuller, the Court continued to adhere to *Munn's* fundamental principle,²⁷⁹ but for the first time it struck down several state rate provisions on due process grounds.

The story begins with the famous *Milwaukee Road* case,²⁸⁰ decided only two years after Fuller's appointment. This was apparently the first case in which the Court invalidated a state law under the due process clause. The flaw the Justices perceived was a procedural one: the statute made rates set by a commission, without hearing, conclusively reasonable in a judicial proceeding to enforce them. Precisely what was wrong with that was left somewhat unclear by Justice Blatchford's brief and conclusory opinion. The bulk of the argument seemed to suggest that the due process clause guaranteed that a court determine the reasonable rate:

[The statute] deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. . . .

. . . . The question of the reasonableness of a rate . . . is eminently a question for judicial investigation, requiring due process of law for its determination.²⁸¹

Blatchford failed to identify just what the property was of which the company had been deprived, saying only that it had lost "the lawful use of its property."²⁸² As to why due process required

²⁷⁸ Railroad Comm'n Cases (*Stone v. Farmers Loan & Trust Co.*), 116 U.S. 307, 331 (1886).

²⁷⁹ See, e.g., *Budd v. New York*, 143 U.S. 517, 543 (1892) (Blatchford, J.). *Budd* is a wordy opinion that illustrates Justice Blatchford's practice of substituting long summaries of prior cases for analysis. Cf. *supra* notes 206-17 and accompanying text (discussing Fuller's similar style in *Leisy v. Hardin*). Two new Justices—Brewer and Brown—joined Field in arguing that *Munn* should be overruled. 143 U.S. at 548-50. See also *Brass v. North Dakota ex rel. Stoesser*, 153 U.S. 391, 403, 409-10 (1894) (Shiras, J.) (extending *Munn*, over four dissenters, to a case in which there was no "practical monopoly").

²⁸⁰ *Chicago, M. & St. P. Ry. v. Minnesota*, 134 U.S. 418 (1890).

²⁸¹ *Id.* at 457-58.

²⁸² *Id.* at 458.

a judicial investigation, he invoked only the mysterious "wisdom of successive ages"²⁸³—suggesting the purely historical test that had been repudiated in *Hurtado v. California*²⁸⁴—without either citation or supporting reasons. Furthermore, he proceeded to cast doubt on whether he really meant that due process required a court decision by explaining why it was that the commission could not be "regarded as clothed with judicial functions":

No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law²⁸⁵

In short, the trouble was that the rate had been conclusively determined without a hearing before *any* governmental body;²⁸⁶ the case holds neither that rates must be set in the first instance by a court nor, as has sometimes been said,²⁸⁷ that administrative ratemaking must always be subject to judicial review.²⁸⁸

The right to a hearing had frequently been described as essential to due process²⁸⁹ and could easily have been fitted into the *Hurtado* test of fundamental procedural fairness.²⁹⁰ Even this narrow reading of the majority opinion, however, received a serious and unanswered challenge in a dissent by that honest former railroad lawyer, Bradley: since the state legislature could have set

²⁸³ *Id.* at 457.

²⁸⁴ 110 U.S. 516, 537 (1884), discussed in D. CURRIE, *supra* note 28, ch. 11.

²⁸⁵ 134 U.S. at 457.

²⁸⁶ See Porter, *That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court*, 1976 SUP. CT. REV. 135, 148.

²⁸⁷ See, e.g., L. BETH, *supra* note 165, at 179; GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 509 n.8 (10th ed. 1980).

²⁸⁸ See *Reetz v. Michigan*, 188 U.S. 505, 507 (1903) (Brewer, J.) (allowing a state to give an administrative agency final say in medical licensing: "[W]e know of no provision in the Federal Constitution which forbids a State from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. . . . Due process is not necessarily judicial process."); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (Gray, J.) (unanimously allowing Congress to dispense with judicial review of an executive determination to deny an alien entry to the United States). Other decisions of the period, indeed, tended to establish that the allocation of authority among branches of state government in general was not of federal constitutional concern. See *supra* note 91 (discussing delegation of legislative power). For an excellent discussion of the question whether the Constitution requires judicial review of *federal* administrative action, see LOUIS JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* ch. 9 (1965).

²⁸⁹ See, e.g., *Davidson v. New Orleans*, 96 U.S. 97, 105 (1878) (dictum).

²⁹⁰ *Hurtado*, 110 U.S. at 535.

rates without a hearing, why should a different rule apply to a commission?²⁹¹

Forty years later, the Court would suggest that the legislature's broad representative basis provided an adequate substitute for the safeguards of an administrative hearing.²⁹² When administrative action is legislative rather than judicial in character, however, the Court has nevertheless refused to require a hearing.²⁹³ In regard to the Court's reasons for this distinction, the action in *Milwaukee Road* was difficult to classify. That the rates applied only to a single railroad reduced the effectiveness of the political checks that constrain legislative rulemaking; that many potential customers were affected made it impracticable to give all those interested a quasi-judicial hearing.²⁹⁴ Blatchford did not go into any of this, and, within six years, the Court undermined the argument that might have supported him by holding that the setting of rates for a single railroad was beyond the power of the Interstate Commerce Commission because it was a legislative and not a judicial function.²⁹⁵

The best explanation of the *Milwaukee Road* decision was suggested by the dependable Miller in a brief concurring opinion.²⁹⁶ What Blatchford said was "judicial" was not ratemaking itself but the question of whether the rate set was reasonable. An unreasonably low rate, the Court had already announced, would take property without due process.²⁹⁷ And, Miller said, a court

²⁹¹ *Milwaukee Road*, 134 U.S. at 463-64 (Bradley, J., joined by Gray and Lamar, JJ., dissenting). Within two years, Blatchford himself wrote to uphold legislatively determined rates without justifying the distinction. *Budd v. New York*, 143 U.S. 517, 546-47 (1892) ("What was said in [*Milwaukee Road*] as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed directly by the legislature.").

²⁹² *Southern Ry. v. Virginia*, 290 U.S. 190, 197 (1933) ("In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public.").

²⁹³ *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (Holmes, J.) (a rule of conduct that applies to "more than a few people" need not be formulated pursuant to judicial-type hearing); see BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* §§ 5.6-5.9 (2d ed. 1984).

²⁹⁴ In *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915), Holmes emphasized the impracticability problem and the effectiveness of the political check. See also *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1306-07 (10th Cir. 1973) (upholding administrative rulemaking applicable to a single company, without quasi-judicial hearing).

²⁹⁵ *ICC v. Cincinnati, N.O. & T. Pac. Ry.*, 167 U.S. 479, 499, 506, 511 (1897) (Brewer, J.). Only Justice Harlan dissented.

²⁹⁶ *Milwaukee Road*, 134 U.S. at 459-61 (Miller, J., concurring).

²⁹⁷ *Railroad Comm'n Cases* (*Stone v. Farmers Loan & Trust Co.*), 116 U.S. 307, 331

could not be required to enforce a legislatively determined rate without a prior judicial determination of its constitutionality.²⁹⁸ This conclusion seems compelled by the supremacy clause, which requires state courts to follow the Constitution, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding";²⁹⁹ for the state court to accept the commission's determination of that issue was contrary to the principle of *Marbury v. Madison*.³⁰⁰

The Court badly mangled the difficult procedural problem presented by the *Milwaukee Road* case, but it still had not struck down a state-set rate on substantive grounds.³⁰¹ It did just that in a series of decisions culminating in *Smyth v. Ames*³⁰² in 1898, a

(1886).

²⁹⁸ *Milwaukee Road*, 134 U.S. at 460 (Miller, J., concurring).

²⁹⁹ U.S. CONST. art. VI, cl. 2.

³⁰⁰ 5 U.S. (1 Cranch) 137, 178 (1803) ("If, then, the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."); cf. *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) ("whenever the judicial power is called into play, it is responsible directly to the fundamental law"); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1872) (legislature may not forbid the Court "to give the effect to evidence which, in its own judgment, such evidence should have").

³⁰¹ In other due-process decisions, the Fuller Court did not display a marked tendency to insist upon procedures satisfying modern notions of fair play. See, e.g., *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 340-43 (1909) (White, J.) (upholding statute authorizing fines to be levied, without a hearing, against companies landing illegal aliens, on the ground that Congress had "absolute power . . . over the right to bring aliens into the United States"); *Patterson v. Colorado*, 205 U.S. 454, 463 (1907) (Holmes, J.) (allowing judge to try defendant for impugning judge's own honesty through articles and cartoons); *Ballard v. Hunter*, 204 U.S. 241, 260 (1907) (McKenna, J.) (upholding service of process by publication on a nonresident landowner); *Felts v. Murphy*, 201 U.S. 123, 129-30 (1906) (Peckham, J.) (holding it permissible to try a deaf person for a crime without repeating testimony into his ear trumpet); *Fong Yue Ting v. United States*, 149 U.S. 698, 729-30 (1893) (Gray, J.) (upholding a statute placing the burden on a Chinese alien to show he was not deportable and disqualifying Chinese witnesses on the ground that Congress had detected a problem of false testimony among Chinese). The Court had not yet adopted fairness as the test of due process, but neither did it say that all of the above procedures were sanctioned by history. But see *Ex parte Young*, 209 U.S. 123, 145-48 (1908) (Peckham, J.) (holding that the necessity to risk prohibitive penalties in order to test the validity of a rate regulation was the equivalent of denying a hearing entirely); see also *Lawton v. Steele*, 152 U.S. 133 (1894) (Brown, J.), and *North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908) (Peckham, J.) (upholding, respectively, the seizure of illegal fish nets and the destruction of spoiled food without prior hearings, relying in the first case on history, in the second on precedent, and in both on necessity; and making clear in both that the owner was entitled to a hearing in a subsequent tort suit against the offending officer).

³⁰² 169 U.S. 466 (1898). *Smyth* had been preceded by *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 397-99 (1894) (Brewer, J.), a diversity case in which the precise source of the law applied was not clarified and in which due process was mentioned only in a quotation from an earlier case, and by *Covington & Lexington Turnpike Rd. Co. v. Sandford*, 164 U.S. 578, 591-92 (1896) (Harlan, J.), which held it error to dismiss a complaint alleging that

Harlan opinion reaffirming dicta to the effect that a rate not permitting a reasonable return on the value of railroad property was unconstitutional. It did so after a painful reexamination of the complex financial record³⁰³ that boded ill for the future state of the docket. It did so, moreover, without serious consideration of the fundamental question whether the due process clause had anything to do with the reasonableness of rates set by the states for railroads. Substantive due process had come of age without having been properly born.

B. *Allgeyer v. Louisiana*

The year before *Smyth*, in 1897, the Court had unanimously taken another long step toward giving the due process clause a substantive dimension and had given the term "liberty" in that clause a broad construction in the bargain.³⁰⁴ The suit was brought by the state to collect a penalty for violation of a statute that prohibited acts taken within the state to insure property then in the State through "any marine insurance company which has not complied in all respects with the laws of this State."³⁰⁵ The act in question was the mailing of a notice advising a New York insurer of a shipment of cotton from New Orleans to be insured pursuant to an existing contract.³⁰⁶ The opinion consisted of a pair of bare conclusions by Justice Peckham, a newcomer who was to make quite a name for himself in this field. The result was that the state law could not constitutionally be applied.

Peckham first concluded, solely on the basis of prior conclusory dicta, that the freedom to give notice under an insurance policy was within the "liberty" protected by the fourteenth amendment:

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that

rates had been set below costs, and which explicitly invoked due process.

³⁰³ *Smyth*, 169 U.S. at 528-50.

³⁰⁴ *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

³⁰⁵ *Id.* at 579.

³⁰⁶ *Id.*

purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.³⁰⁷

This, of course, is not what was provided in Magna Charta, from which the due process clause had been derived,³⁰⁸ but Peckham did not pause to justify his momentous and latitudinous interpretation; thus liberty of contract found its way into the Constitution by bald fiat.³⁰⁹

On the question whether the Louisiana statute afforded "due process of law" in depriving the defendants of that liberty, Peckham did no better:

Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. . . .

. . . [A]lthough it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction; nor can the State legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the State.³¹⁰

One searches the opinion in vain for either reasons or authority in support of this edict. It is clear enough that what moved the

³⁰⁷ *Id.* at 589.

³⁰⁸ See 2 EDWARD COKE, INSTITUTES 50-55 (London 1642) (discussing the derivation of the term "due process" from Magna Charta); Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 495 (1908) (to construe the term "liberty" to include liberty of contract is "to disregard the whole juristic history of the word"); Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses of the Federal and State Constitutions Which Protect "Life, Liberty, and Property"*, 4 HARV. L. REV. 365, 372-73 (1891) ("liberty" in Magna Charta referred only to freedom from imprisonment).

³⁰⁹ Contrast the Court's almost contemporaneous decision that a public office was not "property" within the due process clause. *Taylor v. Beckham*, 178 U.S. 548, 576-77 (1900) (Fuller, C.J.) (relying on contract-clause precedents).

³¹⁰ *Allgeyer*, 165 U.S. at 591-92. The first sentence of this passage is circular, since the due process clause itself was the only provision invoked as the source of the constitutional right to contract.

Court was what it perceived as the extraterritorial application of state law and not the substance of the law in general.³¹¹ Apparently, the due process clause had become the constitutional peg on which to hang Justice Story's territorialist choice-of-law views,³¹² which had occasionally crept into pre-fourteenth-amendment constitutional decisions without any pretense of textual pedigree.³¹³ Unfortunately, the Court did not say why a theory that limited states to the regulation of acts within their borders forbade Louisiana to attach consequences to the mailing of a letter from New Orleans.³¹⁴ More important, Peckham never bothered to explain why he thought the due process clause had anything to do with territorial theory or with choice of law in general.³¹⁵

The Court might have made a plausible case by analogy to *Pennoyer v. Neff*,³¹⁶ which had said that due process of law incor-

³¹¹ In addition to the reservation in the quoted passage. See *id.* at 586-88 (distinguishing *Hooper v. California*, 155 U.S. 648 (1895), in which the Court had upheld a similar law as applied to contracts made within the state).

³¹² See generally JOSEPH STORY, *CONFLICT OF LAWS* (Boston 1834).

³¹³ See, e.g., *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 654-55 (1829) (Story, J.) ("The legislative and judicial authority of New Hampshire were bounded by the territory of that state, and could not be rightfully exercised to pass estates lying in another state.").

³¹⁴ All that Peckham said was that the mailing of the notice was "collateral" to the contract. *Allgeyer*, 165 U.S. at 592.

³¹⁵ *Allgeyer's* territorial thesis was appropriately invoked, though without citation of the case itself, in explaining the Fuller Court's related principle that due process forbade extraterritorial taxation as well. See *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 204 (1905) (Brown, J.) ("Not only is the operation of state laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation."). For the latter reason, such a tax was also held to be an uncompensated taking of property. *Id.* at 202-03. From the standpoint of territorial theory, it is interesting that the Court in *Union Refrigerator* focused exclusively on the situs of the property, relying in part upon the risk of multiple taxation, in spite of the fact that the taxpayer was a domestic corporation. *Id.* at 210-11. Justice Holmes's dissent seems, after *Allgeyer*, to have come too late: "It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment . . ." *Union Refrigerator*, 199 U.S. at 211 (Holmes, J., dissenting).

Also of lasting significance was the split decision in *Western Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 34-38 (1910) (Harlan, J.), which held on the authority of cases respecting surrender of the right to remove cases to federal court, e.g., *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445 (1874), that a state had no power to condition the right to do local business on the payment of an extraterritorial tax. Justice Holmes again dissented, invoking contrary authority and arguing that the company had made a voluntary agreement. *Western Union*, 216 U.S. at 52-56; cf. D. CURRIE, *supra* note 28, ch. 13 (discussing the issue of unconstitutional conditions on public employment and Holmes's own famous remark, in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892), that there was "no constitutional right to be a policeman."); GERARD HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* 132-47 (1918).

³¹⁶ 95 U.S. 714, 733-34 (1878) (dictum), discussed in D. CURRIE, *supra* note 28, ch. 11.

porated traditional territorial limits on service of process.³¹⁷ It might also have made something of the relation between due process and Magna Charta's "law of the land" provision, the text and purpose of which arguably required that cases be decided according to the law applicable at the time and place of the transaction.³¹⁸ The point is not that *Allgeyer* was obviously wrong, but that Peckham made not the slightest effort to justify his path-breaking and by no means inevitable conclusions.³¹⁹

C. *Lochner v. New York*

In any event, *Allgeyer* was a choice-of-law decision, not, strictly speaking, a substantive one. In a series of decisions during the ensuing eight years, the Court emphasized the distinction by upholding a great variety of state and federal laws despite the argument that they unduly restricted the newly minted liberty of contract: limitations on the hours to be worked by miners³²⁰ and by employees of public contractors,³²¹ prohibitions of various con-

³¹⁷ The force of this argument, however, had been impaired by rejection of a strict historical test of due process in *Hurtado v. California*, 110 U.S. 516 (1884), discussed in D. CURRIE, *supra* note 28, ch. 11. *Dewey v. Des Moines*, 173 U.S. 193 (1899) (Peckham, J.), provides an interesting bridge connecting later tax cases like *Western Union Tel. Co. v. Kansas ex rel. Coleman* (discussed *supra* note 315) with the established principle that due process restricted the application of judicial power to persons within the state. In *Dewey*, the Court struck down the personal assessment of taxes against a nonresident landowner, citing *Pennoy* to invalidate the assessment "judgment" and generalizing that "jurisdiction to tax exists only in regard to persons and property or upon the business done within the State." *Dewey*, 173 U.S. at 203.

³¹⁸ Both of Peckham's conclusions in *Allgeyer* had been anticipated by the dissenting Justices in *Hooper v. California*, 155 U.S. 648, 661-63 (1895) (Harlan, J., joined by Brewer and Jackson, JJ., dissenting). These dissenters gave no reason for their conclusions either. For an effort to explain *Allgeyer* in terms of modern governmental-interest analysis, while rejecting its "conceptualism," see BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 241-42 (1963).

³¹⁹ For the Court's indifference to the plausible argument that due process required application of the law governing at the time of the transaction, see *United States v. Heinszen & Co.*, 206 U.S. 370 (1907) (White, J.) (allowing Congress retroactively to ratify a tariff that the President had imposed without authority). Similar considerations of protecting legitimate expectations argue against both extraterritoriality and retroactivity, but to hold that due process barred all retroactive laws would make the ex post facto clause of article I, section 9 redundant. For the argument that, prior to ratification of the fourteenth amendment, state decisions had established that due process limited retroactivity but not extraterritoriality, see Whitten, *The Constitutional Limitations on State Choice of Law: Due Process*, 9 HASTINGS CONST. L.Q. 851, 902-04 (1982). On the ex post facto clauses themselves, see the Court's grisly inquiry into whether a statute that retroactively lengthened the period of imprisonment prior to hanging increased or decreased the punishment in *Rooney v. North Dakota*, 196 U.S. 319, 325 (1905) (Harlan, J.) (upholding the law).

³²⁰ *Holden v. Hardy*, 169 U.S. 366 (1898) (Brown, J.).

³²¹ *Atkin v. Kansas*, 191 U.S. 207 (1903) (Harlan, J.).

tracts in restraint of trade,³²² of charging more for shorter than for longer rail journeys,³²³ of speculation in grain futures³²⁴ and of margin sales,³²⁵ and of paying sailors wages in advance of service.³²⁶ A few relatively trivial state actions, to be sure, were struck down on what were unmistakably substantive due process grounds,³²⁷ but as late as 1905 that doctrine seemed to pose no great threat to state or federal legislation.³²⁸ Then the Court decided *Lochner v. New York*.³²⁹

Once again it was Peckham who wrote, reversing *Lochner's* conviction under a statute that prohibited employing a baker for more than sixty hours in one week. The statute failed as a health measure because the baking trade was not sufficiently unhealthy to

³²² *Smiley v. Kansas*, 196 U.S. 447, 456-57 (1905) (Brewer, J.) (contract in restraint of trade); *Aikens v. Wisconsin*, 195 U.S. 194, 204-06 (1904) (Holmes, J.) (conspiracy to injure business maliciously); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 228-29 (1899) (Peckham, J.) (market division); *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 572-73 (1898) (Peckham, J.) (conspiracy to fix rail rates).

³²³ *Louisville & N.R.R. v. Kentucky*, 183 U.S. 503, 510-16 (1902) (Shiras, J.).

³²⁴ *Booth v. Illinois*, 184 U.S. 425, 430-31 (1902) (Harlan, J.).

³²⁵ *Otis v. Parker*, 187 U.S. 606, 609-10 (1903) (Holmes, J.).

³²⁶ *Patterson v. The Bark Eudora*, 190 U.S. 169, 174-75 (1903) (Brewer, J.). The Court had similarly allowed significant restrictions of *property* rights by substantive legislation. See, e.g., *St. Louis Consol. Coal Co. v. Illinois*, 185 U.S. 203, 207, 209-11 (1902) (Brown, J.) (state may inspect mine at owner's cost); *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 210-11 (1900) (White, J.) (upholding criminal penalty imposed on owners of gas wells for wasting gas); cf. *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905) (Harlan, J.) (upholding compulsory vaccination).

³²⁷ *Dobbins v. Los Angeles*, 195 U.S. 223, 239-40 (1904) (Day, J.) (invalidating prohibition without reason of gas works authorized by permit); *Lake Shore & M.S. Ry. v. Smith*, 173 U.S. 684, 698-99 (1899) (Peckham, J.) (invalidating requirement that railroad sell 1000-mile ticket at cut rate); *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896) (Gray, J.) (invalidating order allowing others to build grain elevator on railroad property: "The taking . . . of the private property of one person . . . for the private use of another, is not due process of law . . ."); see also *supra* notes 276-303 and accompanying text (discussing the rate cases); cf. *Norwood v. Baker*, 172 U.S. 269 (1898) (Harlan, J.) (invalidating as an uncompensated taking a special assessment not apportioned to benefits, after the Court had held that the due process clause made the taking clause applicable to the states).

³²⁸ For a survey of pre-*Lochner* state decisions upholding regulations, see Seager, *The Attitude of American Courts Towards Restrictive Labor Laws*, 19 Pol. Sci. Q. 589 (1904). In *Barney v. City of New York*, 193 U.S. 430, 437-41 (1904) (Fuller, C.J.), the Court had cut back sharply on the protection afforded by due process in its original sense by holding, contrary to the thrust of the old jury cases of the 1880's, see D. CURRIE, *supra* note 28, ch. 11 (discussing *Virginia v. Rives*, 100 U.S. 313, 318 (1880) (dictum); *Ex parte Virginia*, 100 U.S. 339, 347 (1880)), that action of a state officer unauthorized by state law was not state action for purposes of the fourteenth amendment. See also the peculiar and unexplained holdings in *Northwestern Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (Harlan, J.), and *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907) (Harlan, J.), that, although a corporation had long been held a "person" within the fourteenth amendment, it had no "liberty" protected by the due process clause.

³²⁹ 198 U.S. 45 (1905).

justify regulation³³⁰ and as "a purely labor law" because there was "no contention that bakers as a class are not equal in intelligence and capacity to men in other trades . . . or . . . not able to assert their rights and care for themselves."³³¹

In light of the precedents, it was not surprising that four Justices dissented. Holmes called attention to the decisions sustaining the eight-hour workday for miners and the ban on margin sales, in both of which, as in the ancient example of usury laws, individuals had been protected against the risk of their own improvidence.³³² Harlan, joined by White and Day, graphically demolished the Court's unsubstantiated conclusion on the health question by documenting the dangers of constant physical exertion under exposure to extreme heat and flour dust and by reporting flatly that bakers "'seldom live over their fiftieth year.'"³³³

The Court made only the most perfunctory attempt to deal with precedent,³³⁴ and it was obvious that it was applying a far stricter level of scrutiny than it had applied in previous cases.³³⁵

³³⁰ *Id.* at 59.

³³¹ *Id.* at 57. Peckham and Brewer had dissented from *Holden v. Hardy*, 169 U.S. 366 (1898), where a similar law for miners had been upheld. For an example of contemporaneous approval of *Lochner*, see 21 CENT. L.J. 402, 403 (1905) ("The Supreme Court . . . in exalting the individual's right of contract has once more, indeed, justified its right to be called the great 'bulwark of the liberties of the people.'").

³³² *Lochner*, 198 U.S. at 75. Holmes cited *Otis v. Parker*, 187 U.S. 606 (1903) (margin sales), and *Holden v. Hardy*, 169 U.S. 366 (1898) (eight-hour day for miners), and added the famous aphorism, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Other precedents allowing similar protection from one's own freedom of contract outside the area of health or safety included *Louisville & N.R.R. v. Kentucky*, 183 U.S. 503, 510-16 (1902) (upholding prohibition of higher shipping rates for short than for long hauls), and *Patterson v. The Bark Eudora*, 190 U.S. 169, 174-75 (1903) (upholding prohibition of prepayment of sailors' wages). Peckham attempted to distinguish neither these cases nor *Otis*.

³³³ *Lochner*, 198 U.S. at 70-71 (quoting from a study of workers' diseases); see Hand, *supra* note 308, at 502 ("It seems very strange that a court should have decided that the limit of eight hours had in fact no such relation" to health.).

³³⁴ *Holden v. Hardy*, 169 U.S. 366 (1898), the eight-hour day for miners case, was distinguished on the grounds that the New York law had no emergency provision—an objection *Lochner* should have lacked standing to raise since he alleged no emergency defense—and that *Holden* had decided only that the nature of mining was such as to make regulation appropriate. Peckham did not say why; presumably he meant mining was more dangerous than baking. *Atkin v. Kansas*, 191 U.S. 207 (1903), which upheld an eight-hour day for those employed by or on behalf of the state, was distinguished on the conclusory ground that the state had the right to declare the conditions of work done under public contracts. *Lochner*, 198 U.S. at 54-55.

³³⁵ See Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737, 749 (1922) (saying of the decisions of the *Lochner* period, "The time-honored doctrine that laws are presumed to be valid until proved beyond all reasonable doubt to be otherwise seemed to be forgotten or ignored."); Dodd, *The Growth of Judi-*

To quibble over the result of the particular case, however, is to miss the main point. Harlan himself had contributed as much as anyone else to the rise of substantive due process with his 1887 opinion upholding a state liquor law only because it was a reasonable exercise of the police power.³³⁶ Once it had been established in dictum that unreasonable laws would offend due process, it was only a matter of opinion which laws were unreasonable.

Thus, although on its facts *Lochner* was a notable break with precedent, in the larger sense it was the predictable outgrowth of a long and consistent development. By the time the case was decided, nobody argued that due process was not a limitation on the legislature, that it related only to procedure, or that it applied only to punishment for crime.³³⁷ All the Justices agreed that the Constitution made the Court what Miller had so vehemently denied in *Davidson v. New Orleans*:³³⁸ censor of the reasonableness of all laws.³³⁹ They did so, moreover, without ever justifying their improbable conclusion.

It is important to emphasize that *Lochner* did not usher in a reign of terror for social legislation. Apart from Harlan's own conclusion, in *Adair v. United States*,³⁴⁰ that a state could not forbid the discharge of an employee for belonging to a union, the Court not only continued to uphold most challenged regulations³⁴¹ but

cial Power, 24 POL. SCI. Q. 193, 194 (1909) (presumption of constitutionality, after *Lochner*, just "a mere courteous and smoothly transmitted platitude"). Compare *Lochner* with, e.g., *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (Harlan, J.) (accepting a flimsy health justification in upholding a ban on the sale of margarine), discussed in D. CURRIE, *supra* note 28, ch. 11.

³³⁶ *Mugler v. Kansas*, 123 U.S. 623 (1887), discussed in D. CURRIE, *supra* note 28, ch. 11; see also *L. BETH*, *supra* note 165, at 178 ("after *Mugler* the Court had accepted the whole concept of substantive due process"). Harlan had also written *Smyth v. Ames*, which struck down railroad rates on substantive due process grounds. See *supra* notes 302-03 and accompanying text.

³³⁷ There were powerful arguments for each of these positions. See D. CURRIE, *supra* note 28, chs. 8, 9, 11.

³³⁸ 96 U.S. 97, 104-05 (1878), discussed in D. CURRIE, *supra* note 28, ch. 11.

³³⁹ See Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 670-71 (1909).

³⁴⁰ 208 U.S. 161, 172-76 (1908) (alternative holding). McKenna and Holmes dissented. The majority opinion contains no reasoning worth mentioning. *Adair's* alternative commerce-clause holding is discussed *supra* note 164 and accompanying text.

³⁴¹ For comments challenging the "laissez-faire" characterization of the Fuller Court, see Dodd, *Social Legislation and the Courts*, 28 POL. SCI. Q. 1, 5 (1913); Porter, *supra* note 286, at 140-41; Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913). For a statistical summary of the Court's work in this area, see 1 C. WARREN, *supra* note 29, at 741-42. Numbers, of course, do not tell the whole story: "a single decision may decide the fate of many measures." F. FRANKFURTER, *supra* note 139, at 106. Numerous state-court invalidations of social legislation before and after *Lochner* are

went so far as to sustain a maximum-hour law for women in *Muller v. Oregon*.³⁴² Substantive due process had finally shown that it had teeth,³⁴³ but two serious bites in twenty years should not obscure the fact that most laws passing through its den during the Fuller period did not get bitten at all.³⁴⁴

D. Suing State Officers

Lochner itself reached the Supreme Court on review of a state criminal conviction. To test the constitutionality of a law by violating it, however, is a risky business, rightly compared by a later ob-

discussed and criticized in Pound, *Liberty of Contract*, 18 YALE L.J. 454, 462-84 (1909); see also Dodd, *supra*, at 16 (Supreme Court "has on the whole been more liberal than the state courts in dealing with new social and industrial legislation").

³⁴² 208 U.S. 412, 421 (1908) (Brewer, J.) (relying on the "disadvantage" at which "woman's physical structure and . . . maternal functions place her" and the importance of healthy mothers "to preserve the strength and vigor of the race"). This was the case in which the original "Brandeis brief" was filed. Encouraged perhaps by Harlan's use of medical treatises in *Lochner*, it figured prominently in the Court's opinion. See *Muller*, 208 U.S. at 419.

³⁴³ The equal protection clause was more sparingly used. Most attacks on economic classifications were dismissed perfunctorily with, at most, a reference to the reasonableness of the classification. The rare exceptions striking down such laws merely illustrated the capriciousness of the Court's criteria. Compare *Gulf, C. & S.F. Ry. v. Ellis*, 165 U.S. 150 (1897) (Brewer, J.) (state may not impose attorney fees only upon railroads in actions for livestock losses), with *Atchison, T. & S.F. Ry. v. Matthews*, 174 U.S. 96 (1899) (Brewer, J.) (state may impose attorney fees only upon railroads in actions for fires); compare *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79 (1901) (Brewer, J.) (state may not limit rate regulation to larger stockyards), with *St. Louis Consol. Coal Co. v. Illinois*, 185 U.S. 203 (1902) (Brown, J.) (state may limit inspection to mines employing more than five workers); compare *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902) (Harlan, J.) (state may not exempt agricultural producers from its antitrust law), with *Tullis v. Lake Erie & W.R.R.*, 175 U.S. 348 (1899) (Fuller, C.J.) (state may abolish fellow-servant rule for railroads only). Of over 100 cases attacking nonracial classifications during the Fuller period, *Ellis*, *Cotting*, and *Connolly* are virtually the only ones in which a denial of equal protection was found. For the argument that these cases "roughly tracked" the simultaneous development of substantive due process, see Kay, *The Equal Protection Clause in the Supreme Court, 1873-1903*, 29 BUFFALO L. REV. 667, 668 (1980).

³⁴⁴ One of the most interesting cases not yet mentioned was *Sentell v. New Orleans & C.R.R.*, 166 U.S. 698 (1897) (Brown J.), in which the Court upheld a law that denied a tort remedy against those who killed unlicensed dogs on the strange ground that dogs, unlike cattle, were not really property. The Court thus seemed to imply that the due process clause imposed an affirmative duty on the state to protect anything that *was* really property. This is an idea of freedom that has made much headway in West German constitutional law but has been basically rejected in our own, see, e.g., *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.) ("[T]he Constitution is a charter of negative rather than positive liberties."), *cert. denied*, 104 S. Ct. 1325 (1984). Compare, e.g., Judgment of Feb. 25, 1975, Bundesverfassungsgericht, Federal Republic of Germany, 39 BVerfG 1 (interpreting provisions requiring government to "protect . . . the right to life" to require that abortion be made in most instances a crime), with *Harris v. McRae*, 448 U.S. 297 (1980) (state has no duty to subsidize abortions that it may not forbid).

server to determining whether a mushroom is poisonous by eating it.³⁴⁵ If substantive due process was to be given full scope, a more adequate remedy had to be found. Brushing aside the maxim that equity would not enjoin criminal proceedings³⁴⁶ as inapplicable in cases of irreparable harm, the Court found the solution by allowing suits to enjoin government officers from enforcing unconstitutional laws.³⁴⁷

The constitutional obstacle to this course was sovereign immunity, embodied in part in the eleventh amendment and, as we have seen, found by the Fuller Court in *Hans v. Louisiana*³⁴⁸ to be implicit in article III as well.³⁴⁹ Ever since Marshall, the Court had held these limitations inapplicable to suits against state or federal officers whose actions were such as to make them personally liable for harm.³⁵⁰ But a series of contract-clause decisions in the Waite years had made it clear that an officer could not be sued unless he personally had committed a wrong, and *In re Ayers* had squarely held that an attorney general who sued to enforce an unconstitutional debt to the state committed no personal wrong.³⁵¹

Ayers had been decided in 1887. Within seven years, in *Reagan v. Farmers' Loan & Trust Co.*,³⁵² the Court began to ignore it.³⁵³ Affirming an injunction against proceedings to enforce rates

³⁴⁵ See *Declaratory Judgments: Hearings on H.R. 5623 Before a Subcomm. of the Senate Comm. on the Judiciary*, 70th Cong., 1st Sess. 75 (1928) (statement of Prof. Borchard).

³⁴⁶ See, e.g., *In re Sawyer*, 124 U.S. 200, 209-11 (1888) (Gray, J.).

³⁴⁷ See, e.g., *Ex parte Young*, 209 U.S. 123, 161-65 (1908); *Smyth v. Ames*, 169 U.S. 466, 515-19 (1898). The right to an injunction was significant also because the seventh amendment seemed to preclude de novo reexamination of a jury finding that a prescribed rate was reasonable. Cf. *Chicago, B. & Q.R.R. v. Chicago*, 166 U.S. 226, 242-46 (1897) (Harlan, J.) (jury finding that compensation for taking under eminent domain power was "just" cannot be reexamined on appeal).

³⁴⁸ 134 U.S. 1 (1890).

³⁴⁹ See *supra* notes 30-46 and accompanying text.

³⁵⁰ See, e.g., *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824); *United States v. Lee*, 106 U.S. 196 (1882); *Poindexter v. Greenhow*, 114 U.S. 270 (1885).

³⁵¹ 123 U.S. 443, 504-06 (1887). For discussion of this and earlier cases, see D. CURRIE, *supra* note 28, chs. 6, 12.

³⁵² 154 U.S. 362 (1894).

³⁵³ Indeed, as early as 1891, in reaffirming the governing principle that officers could be sued if they "commit acts of wrong and injury to the rights and property of the plaintiff," the Court unanimously twisted it by upholding an injunction against an officer who was about to sell land that had already been contracted to someone else. *Pennoyer v. McConaughy*, 140 U.S. 1 (1891) (Lamar, J.). The ground given was that the officer's acts were "violative of [the plaintiff's] contract," *id.* at 18, though *Ayers* had made clear that an officer could not be liable for breach of the state's contract, to which he was not a party. The result can be reconciled with *Ayers* on the ground that the officer had committed a tort by interfering with the plaintiff's equitable title to the land. See D. CURRIE, *supra* note 28, ch. 10 (discussing the similar case of *Davis v. Gray*, 83 U.S. (16 Wall.) 203 (1873)).

set by a railroad commission, Justice Brewer argued that the suit was no more against the state than a suit "restraining the collection of taxes,"³⁵⁴ without acknowledging that *Ayers* had been just such a suit. He reduced the force of this conclusion by adding that the state had waived its immunity.³⁵⁵ Without even citing *Reagan*, however, Justice Harlan followed its broader assertion in the similar 1898 case of *Smyth v. Ames*.³⁵⁶ With one notable exception,³⁵⁷ later decisions of the Fuller period continued to follow this line without recognizing its inconsistency with *Ayers*,³⁵⁸ until the textbook 1908 case of *Ex parte Young*.³⁵⁹

Young was yet another suit to enjoin a state officer from enforcing allegedly confiscatory rate provisions; this time, in a long and lonely dissent,³⁶⁰ Justice Harlan rediscovered *In re Ayers*. It was, of course, too late. Harlan had never protested while the Court repeatedly disregarded that decision, and he had written the contrary opinion in *Smyth v. Ames* himself.³⁶¹ Forced to justify a

³⁵⁴ *Reagan*, 154 U.S. at 390. Brewer added, rightly enough in light of the underlying theory, that it was immaterial whether the statute setting up the commission was constitutional: if the commissioners "go beyond the powers thereby conferred, . . . the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts." *Id.* at 391; see also *Scully v. Bird*, 209 U.S. 481, 490 (1908) (McKenna, J.) (allowing an injunction against a state officer in a diversity case, with no mention of any constitutional claim, on the ground that the officer had acted "in dereliction of duties enjoined by the statutes of the State").

³⁵⁵ *Reagan*, 154 U.S. at 391-92. Brewer relied on a statute authorizing suit against the commission "in a court of competent jurisdiction in Travis County, Texas," which the Court construed to embrace federal as well as state courts. Later cases would require more explicit consent to be sued in federal courts. See, e.g., *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577 (1946).

³⁵⁶ 169 U.S. 466 (1898). Saying only that it was "settled doctrine . . . that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State," *id.* at 518-19, Harlan slid right over the clear distinction drawn in the contract-clause cases between seizure of the plaintiff's property, which was a tort, and suit against the plaintiff, which was not.

³⁵⁷ *Fitts v. McGhee*, 172 U.S. 516, 525-29 (1899) (Harlan, J.) (following *Ayers*); see also *Smith v. Reeves*, 178 U.S. 436, 445 (1900) (Harlan, J.) (holding suit for a refund from state treasury to be a suit against state because it sought "to compel an officer . . . to perform or comply with the promise of the State").

³⁵⁸ See, e.g., *McNeill v. Southern Ry.*, 202 U.S. 543, 559 (1906) (White, J.); *Prout v. Starr*, 188 U.S. 537, 542-43 (1903) (Shiras, J.). At the same time, in *Belknap v. Schild*, 161 U.S. 10, 25 (1896) (Gray, J.), the Court seemed inconsistently to cut back on prior decisions permitting officers to be sued by holding that the United States was an indispensable party to a suit to enjoin federal officers from using government property in infringement of a patent, though the Court conceded that the officers could be held personally liable for damages.

³⁵⁹ 209 U.S. 123 (1908).

³⁶⁰ *Id.* at 168-204.

³⁶¹ He had also dissented in *Ayers*, 123 U.S. at 510.

position that, in time-hallowed fashion, he refused to concede was new,³⁶² Justice Peckham acknowledged that the officer must be personally liable for some wrong but asserted, without explanation, that the threat of suit under an unconstitutional statute was "equivalent to any other threatened wrong or injury to the property of a plaintiff."³⁶³ The new rule was that officers clothed with enforcement duties "who threaten and are about to commence proceedings . . . to enforce . . . an unconstitutional act . . . may be enjoined by a Federal court of equity."³⁶⁴

The parties in *Young* were not of diverse citizenship; jurisdiction was based on the theory that the case was one arising under the Constitution.³⁶⁵ To modern eyes, this theory seems obviously correct since the complaint alleged that the defendant threatened to deprive the plaintiff of property without due process of law. In explaining why the suit was not one against the state, however, the Court enunciated a thesis wholly inconsistent with this approach:

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.³⁶⁶

If the officer was "stripped of his official . . . character," he could

³⁶² *Ayers* was distinguished, without revealing its facts or reasoning, on the basis of the misleading half-truth that the relief sought there would have "constitute[d] a performance by the State of the alleged contract of the State," 209 U.S. at 151. This had been equally true in *Poindexter v. Greenhow*, 114 U.S. 270, 279-80 (1885), where suit had nevertheless been allowed; the true difference was that the seizure of the plaintiff's property in *Poindexter* was a tort and the threatened suit in *Ayers* was not. *Fitts v. McGhee*, 172 U.S. 516 (1899), the one later decision that followed *Ayers*'s reasoning, was distinguished on the basis of unfortunate language in the *Fitts* opinion that seemed unnecessarily to rest the decision on the fact that the officer sued had no particular duties under the challenged statute. *Young*, 209 U.S. at 156-58; see C. WRIGHT, *supra* note 40, at 288 (*Ayers* "would seem to be decisive of the *Young* litigation").

³⁶³ 209 U.S. at 158; see also *id.* at 160 ("It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment . . ."). But even today only *malicious* prosecutions are actionable, and at the time of *Young*, the tort had apparently not been extended to civil cases at all. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 120, at 889-92 (5th ed. 1984) (collecting cases).

³⁶⁴ 209 U.S. at 156. For the hostile reaction to *Young*, see 2 C. WARREN, *supra* note 29, at 717.

³⁶⁵ 209 U.S. at 143-45.

³⁶⁶ *Id.* at 159-60.

not violate the due process clause, which applies only to state action.³⁶⁷ Peckham did not attempt to justify this contradiction.³⁶⁸ The alternative argument—that the fourteenth amendment was relevant only to defeat the defense of official authority³⁶⁹—would have been insufficient to sustain federal jurisdiction under the rule of *Louisville & Nashville Railway v. Mottley*,³⁷⁰ which held that the federal nature of the case must appear from the plaintiff's statement of his own claim.³⁷¹

Thus Peckham bungled the jurisdictional questions in *Ex parte Young* as badly as he had the more substantive issues in *Allgeyer* and in *Lochner*, and significant new doctrine was established without explanation. And thus the economic decisions of the Fuller Court ended as they had begun, with a groundbreaking pronouncement on the ancillary question of sovereign immunity. As *Hans* had gone beyond the eleventh amendment to help bury an explicit constitutional safeguard for economic interests with which the Court had little sympathy, *Young* rejected sound precedent to help realize a new and more flexible safeguard that the Court manufactured out of whole cloth.³⁷²

³⁶⁷ The Civil Rights Cases, 109 U.S. 3, 11 (1883) (fourteenth amendment applies only to state action); see C. WRIGHT, *supra* note 40, at 289-90 (noting the anomaly in *Young*); Note, 50 HARV. L. REV. 956, 960-61 (1937) (same).

³⁶⁸ There was no such contradiction in the original theory; the officer was suable not because he had violated the Constitution but because he had committed a common law tort.

³⁶⁹ This theory may be inferred from the Court's statement that "[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Young*, 209 U.S. at 160.

³⁷⁰ 211 U.S. 149, 153 (1908). This rule was at least as old as *Houston & T.C.R.R. v. Texas*, 177 U.S. 66, 78 (1900) (Peckham, J.). See Note, *supra* note 367, at 961 n.40 (arguing that *Young* and its progeny may create an implied exception to the *Mottley* rule).

³⁷¹ Indeed, in one of the *Virginia Coupon Cases*, the Court had already held that an analytically similar claim invoking the contract clause did not come within the provision of the Civil Rights Act, now 42 U.S.C. § 1983 (1982), that creates a cause of action for deprivation of rights secured by the Constitution. *Carter v. Greenhow*, 114 U.S. 317, 322-23 (1885), discussed in D. CURRIE, *supra* note 28, ch. 12.

³⁷² On the same day *Young* was decided, the Court also held, with Harlan alone protesting, that a state could not invoke sovereign immunity to close *its own* courts to a suit to enjoin an officer from committing a wrong under color of an allegedly unconstitutional statute. *General Oil Co. v. Crain*, 209 U.S. 211, 228 (1908) (McKenna, J.) ("It being then the right of a party to be protected against a law which violates a constitutional right, . . . a decision which denies such protection gives effect to the law, and the decision is reviewable by this court."). Prior decisions cited by the Court itself, however, had unmistakably held that a want of jurisdiction under state law was an adequate and independent ground for refusing relief and thus precluded Supreme Court review. *Id.* at 221-24; cf. *id.* at 232-34 (Harlan, J., concurring); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 634-35 (1875) (enunciating independent-and-adequate-state-ground rule). The *Crain* Court supported its conclusion with an argument from intolerable consequences: "If a suit against state officers is precluded in the national courts by the Eleventh Amendment . . . , and may be forbidden

CONCLUSION

The center of constitutional battle during the Fuller period was the clash of economic interests, and it was characterized by striking contrasts. While the sugar-trust case gave the commerce power an artificially narrow reading, the Court invited Congress to regulate anything it pleased under the guise of a tax, upheld congressional authority over aliens without reference to the enumeration of powers, and allowed the courts to issue injunctions not authorized by statute. The due process clause was employed for the first time to invalidate unreasonable rates, extraterritorial legislation, and the bakers' ten-hour workday law; but the Court upheld most similar measures and cut back sharply on the protection afforded by the contract clause. Sovereign immunity was broadened to forbid suits by citizens against their own states and narrowed to permit more suits against state officers.

Some of the apparent inconsistencies suggest a tendency to favor business interests, as when the Court held that the Sherman Act could validly reach labor boycotts but not combinations of manufacturers.³⁷³ As a guardian of business, however, the Fuller Court cannot be described as very successful; the great bulk of business-limiting measures that it addressed were upheld.

The economic decisions of the Fuller years were not characterized by great respect for precedent. *Leisy v. Hardin* overruled the *License Cases*. *In re Rahrer* evaded *Cooley's* express declaration

by a State to its courts, . . . an easy way is open to prevent the enforcement of many provisions of the Constitution . . . " 209 U.S. at 226. The most obvious flaw in this contention was that *Young* had just reaffirmed that a federal suit was *not* precluded; even if the substantive constitutional provisions invoked by the plaintiff implied that some court must be open to grant an injunction, they seemed satisfied by the availability of a federal remedy. See Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 STAN. L. REV. 1033, 1096 (1983). Moreover, the notion that the Constitution gave a "right . . . to be protected" by injunction was a giant step beyond *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), discussed in D. CURRIE, *supra* note 28, ch. 3, which had held only that a court had to obey the Constitution when it had jurisdiction. Indeed, the Court had implicitly rejected *Crain's* thesis in *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1858) (holding that a state did not have to permit itself to be sued in its own courts to redress a violation of the contract clause, although sovereign immunity evidently would have barred a federal remedy as well). By emphasizing *Marbury's* explanation that judicial review was indispensable to the effectuation of constitutional limitations, 5 U.S. (1 Cranch) at 178, and the inadequacy of having to wait to challenge a state law as a defendant in an enforcement proceeding, one might make a respectable argument for overruling *Beers*. Cf. D. CURRIE, *supra* note 28, ch. 9 (discussing *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869)).

³⁷³ *Loewe v. Lawlor*, 208 U.S. 274, 308-09 (1908); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895); see ROBERT McCLOSKEY, *THE AMERICAN SUPREME COURT* 127 (1960) ("[T]he Court's chief concern was to defend the principle of laissez faire[,] and . . . both nationalist and localist doctrine were being pressed to subserve that end.").

that Congress could not allow states to regulate commerce. The *Income Tax* case essentially overruled two earlier decisions. *Ex parte Young* was inconsistent with *In re Ayers*. And, without fanfare, the Court basically abandoned the uniformity test that had, for half a century, figured so prominently in cases regarding state power over commerce. Typically, the Justices seldom acknowledged that they were departing from precedent. Even *Leisy* blamed the demise of the *License Cases* on an intervening decision—one in which the Court had done its best to pretend that it was not disturbing the prior law.

Nor were the critical economic decisions of this time characterized by a meticulous concern for persuasive reasoning. *Illinois Central* seems to have manufactured a historical limit on state power to convey land largely out of decisions supporting the opposite position. *Debs* in essence allowed the executive branch to regulate railroads where Congress had not acted, on the ground that regulation of railroads was within congressional power. *Knight* mischaracterized an indictment involving interstate sales as one involving manufacturing. The *Income Tax Case* was internally inconsistent and overlooked strong arguments that would have supported the decision. *Leisy* was an unfocused collation of general statements and quotations. *Allgeyer's* two critical holdings were bare conclusions. *Lochner* ignored overwhelming facts about the perils of baking. And the Court accepted the dicta of its predecessors respecting the meaning of due process and equal protection without stopping to justify them.

There were some bright spots: Bradley's thorough exposition in *Hans*, White's reconciliation of legislative and executive powers in *Buttfield*, the efforts of Harlan and Brown to make sense of past decisions on state power and the commerce clause, and Harlan's dissents in *Plessy v. Ferguson* and *E.C. Knight*. In general, however, the great economic controversies of the turn of the century produced few great opinions. How the same Justices performed in cases more remote from the tensions of economic policy will be the subject of the next installment in this series.