JUSTICE WILLIAM R. DAY: A LEGAL ECONOMIC ANALYSIS

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The object of this study is to test the U.S. Supreme Court opinions of Justice William R. Day on two bases. The first test is the accumulated evidence of the original meanings of constitutional language.\textsuperscript{1} The fact that a commentator today has 90 to 100 years of hindsight over the opinions of Justice Day does not bar such a textualist analysis. Samuel Johnson's dictionary was available to the 55 delegates at the Convention of 1787.\textsuperscript{2} Numerous other documents, journals and newspapers were available to explain 18\textsuperscript{th} century meanings of the English language.\textsuperscript{3}

The second test is that of basic economic analysis. The scope of the national commerce power must be defined in terms of the broadest meaning of "commerce."\textsuperscript{4} In the general use of language in 1789, commerce included all transactions for money or in barter. Consequently, the commerce power included all private transactions, but not most state transactions. The input and output contracts of farmers, manufacturers, ocean transport carriers, banks and all other firms were subject to Congressional regulation.\textsuperscript{5} The large number of commercial shipments of goods at the time of the founding of the nation were reported by Tench Coxe\textsuperscript{6} and John Holroyd Sheffield.\textsuperscript{7}

A significant set of cases in this study concern national regulation of the railroad industry. The structural aspects of partial monopolies led to passage of the Interstate Commerce Act of 1887 followed by the Hepburn Act of 1906 to control monopoly by regulating maximum shipping rates.\textsuperscript{8} Unfortunately, the Congress, unlearned in economics, failed to amend the Sherman Antitrust Act to create an exemption for
railroads. Enforcing these conflicting approaches to oligopoly problems led to confusion that Justice Day and his colleagues could not master.

Justice Day served on the Supreme Court from 1903 to 1922, and he had served on the Sixth Circuit Court from 1899 to 1903. Some historians have concluded that Day was largely biased against federal regulation except for antitrust enforcement and regulation of railroads by the Interstate Commerce Commission. His view of federalism made him more favorable to state regulation. He may have been affected by Supreme Court decisions after 1870 that ignored original meaning of the Commerce Clause and reduced its application. Finding controlling doctrines in earlier Supreme Court opinions is not consistent with the fact that only the Constitution and its amendments were ratified by the people as superior law.

Every law student receives early warning from his constitutional law professor that no Supreme Court majority opinion had the status of a Constitutional amendment, ratified pursuant to Article 5. The appointed judicial elite on the Supreme Court were expected to have limited governing power as compared to the elected branches of government, the legislative and executive. Hence, textual analysis of constitutional language has a structural foundation. Justice Antonin Scalia has reminded us that, while the states, except Louisiana, have a common law heritage, the national government is analogous to a civil law country. Its law is found in a written Constitution and written federal statutes. The contrast with common law is noteworthy. Section 34 of the Judiciary Act of 1789 was passed to remind us that when federal courts took jurisdiction of a common law case by virtue of the diverse citizenship of the parties, the federal judges were required to apply state common law.
Before Justice Day joined the Court, the majority had issued an erroneous doctrine in construing the Sherman Antitrust Act. In *United States v. E. C. Knight Co.*,\(^{12}\) a suit to enjoin agreements to combine almost all the sugar refiners in the United States into one company was dismissed even though the complaint centered on restraint of trade in sales. Although most of the sugar was eventually sold and shipped to other states, the local manufacture of sugar was held not to be part of commerce. In *Knight*, sales transactions by sugar refiners were held exempt from antitrust because they were found to have only “indirect” effects on interstate commerce.\(^{13}\) The same narrow interpretation was applied in dismissing antitrust actions against local stockyards.\(^{14}\)

In 1915, Justice Day adopted this narrow definition of commerce in *Delaware, Lackawanna & Western Railroad Co. v. Yurkonis*.\(^{15}\) The plaintiff miner was injured while mining coal in a mine owned by defendant railroad. All coal was shipped in interstate commerce. The claim was based on common law and a Pennsylvania state statute. Upon defendants’ motion, the action was moved to federal court and judgment rendered for plaintiff. The Court of Appeals affirmed the judgment. Upon appeal, Day dismissed the action for want of jurisdiction. He wrote: “The mere fact that the coal might be or was intended to be used in interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce.”\(^{16}\) In 1920, Justice Day wrote in *Blumenstock v. Curtis Publishing Co.*\(^{17}\) that national advertising contracts were not in interstate commerce because they did not move goods or merchandise in commerce.

Justice Day adopted the same limited view of commerce in *Hammer v. Dagenhart*,\(^{18}\) a leading opinion which was later overruled.\(^{19}\) In this 5-4 decision, the
Federal Child Labor Act of 1916\textsuperscript{20} was held unconstitutional. The Act was drafted in terms of interstate transport because the Court’s opinions had reduced the commerce power to that. It prohibited the shipment in interstate commerce of manufactured articles from factories in which children under 14 years of age were employed in production. Citing the Tenth Amendment, Day erroneously held that the regulation of labor transactions of manufacturers, a key aspect of cost structures, was reserved to the states. The error was compounded by his assertion that commerce begins by “actual delivery to a common carrier for transportation.”\textsuperscript{21} Day then misstated that the congressional power to prohibit interstate commerce was limited to articles in themselves harmful or deleterious, such as lottery tickets, impure food and drugs, and prostitutes. Furthermore, the ruling left such commerce totally unregulated. Day held that Congress could not regulate child labor because it would invade the power of the states. Other states, however, could not regulate receipt of shipments of child-made goods because it would invade the power of Congress.\textsuperscript{22} One could argue that Day’s reasoning was mistaken because the brief of Hammer, the U.S. attorney, did not treat the Commerce Clause; it centered on the Fifth Amendment.\textsuperscript{23} Justice Holmes dissented, noting that the correct textual meaning of the comprehensive power delegated to Congress to regulate domestic and foreign commerce was not subject to limits created by the judiciary:\textsuperscript{24}

In cases where goods were shipped between states, Justice Day was a strong judicial supporter of enforcement of the federal antitrust laws. The Sherman Act of 1890\textsuperscript{25} did not contain an exemption for regulated industries. When maximum rate regulation of railroads was enacted in the Hepburn Act of 1906,\textsuperscript{26} Congress still created no antitrust exemption. This congressional policy was based on the myth of inter-railroad
competition. Transport economists have explained that the railroad industry of the nation was a single coordinated system of carriers. Most shipments had to travel over two or more railroads. The connecting carriers had to cooperate in routing, interchange and joint rate-making. Railroad executives in traffic conferences were not independent decision units of the textbook competitive markets. There were agents of structural oligopolies engaged in necessary cartel pricing.

Unfortunately, the lawyers and judges had little understanding of the economics of the railroad industry. Justice Day joined the Court in time to concur in the majority opinion of Justice Harlan in the 5-4 decision in *Northern Securities Co. v. United States.* The defendant had acquired control of the shares of the Great Northern and Northern Pacific Railroads. This was held an illegal combination in restraint of trade and an attempt to monopolize in violation of sections 1 and 2 of the Sherman Act. The two parallel carriers between St. Paul and Seattle had rail lines more than half of which were 100 miles apart. In 1901 the two carriers had each bought one half of the Chicago, Burlington & Quincy Railroad, giving them joint ownership of a line from St. Paul to Chicago. In fact, 97 percent of the total interstate traffic of the two firms was carried under joint tariffs made in conference with more than 100 other railroads. The dissolution of Northern Securities did not stop the joint rates based on industrial structure. It did prevent the economies that would have resulted from consolidated operation.

Justice Holmes wrote a dissent for the Court minority in *Northern Securities.* He argued on the basis of common law that the two carriers in the Northwest would not
restrain trade or create any greater monopoly than they already had in their charters. In spite of his debatable analysis, subsequent law proved that his conclusion was correct.

The Transportation Act of 1920\footnote{32} provided that railroad consolidation approved by the Interstate Commerce Commission were exempt from antitrust prosecution. In spite of the unique industrial structure of the railroad industry, the effect on competition as measured by antitrust standards was one factor in ICC determination of whether any single merger is in the public interest.\footnote{33} In 1961, the Great Northern, the Northern Pacific, and the Chicago, Burlington & Quincy filed a new petition with the ICC to merge their companies under the Interstate Commerce Act, which the ICC approved in 1968.\footnote{34} The U.S. Department of Justice then filed an action to intervene and challenge the ICC approval. The District Court sustained the ICC and this was affirmed by the Supreme Court.\footnote{35} Finally, the large economies of consolidation were given prime recognition.

Justice Day’s strong support for antitrust enforcement against regulated railroads was restated in *United States v. Union Pac. R.R.*\footnote{36} In 1901 Union Pacific acquired control of Southern Pacific by purchase of 46 percent of the latter’s outstanding stock. The Southern Pacific line was a sea route from New York to New Orleans, and then a rail route from New Orleans to Los Angeles, San Francisco, and Portland. The Union Pacific line extended from Omaha and Kansas City west to Ogden with another U.P. line carrying less than one percent of traffic northwest to Portland. For the rest of the transcontinental traffic, Union Pacific was merely a bridge carrier, receiving freight from eastern railroads and carrying it west to Ogden. There, the cars had to be turned over to the Southern Pacific for movement to San Francisco, since, before 1908, the Central
Pacific branch of Southern Pacific was the only route from Ogden to San Francisco. The necessary continuous cooperation of the two roads in planning rates and service over their joint route precluded competition between them.

The Circuit Court made detailed findings of fact that no substantial competition existed between the two carriers and dismissed the action.\textsuperscript{37} The findings of fact were clearly supported by the manifest weight of the evidence. Not only was joint setting of rates a necessity. The transport time of the U.P.-S.P. joint route by land was much faster than the S.P. route by sea and rail.

Justice Day, for the Supreme Court, in effect reversed the findings of fact of the trial court and held the combination to violate the Sherman Act.\textsuperscript{38} His opinion was more a general condemnation of the aggravated economic power of the Harriman interests than any belief that the two railroads could be made into competitors. He concluded:

Nor does it make any difference that rates for the time being may not be raised and much money spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.\textsuperscript{39}

A Union Pacific proposal to distribute its Southern Pacific shares to the Union Pacific stockholders, the type of remedy approved in the Northern Securities case, was in this instance vetoed by the Supreme Court.\textsuperscript{40}

In 1922, Justice Day wrote for the Supreme Court majority in another antitrust case against a regulated railroad. An important difference was that this opinion was rendered in spite of the antitrust exemption in the Transportation Act of 1920.\textsuperscript{41} United States v. Southern Pac. Co.\textsuperscript{42} was another action in which the Supreme Court reversed a
district-court dismissal of an anti-trust attack on a railroad consolidation. Southern Pacific and Central Pacific had been under common control from the beginning of construction of the Southern Pacific in 1870. In 1885 Southern Pacific, having become dominant, leased all lines of Central Pacific. In 1899, as a result of settlement of the Central Pacific debt to the United States, the stock of Central Pacific was acquired by Southern Pacific. The Justice Department charged that this acquisition violated the antitrust laws. The district court found that the railroads were a single interdependent system and had never competed, and that the government had conceded that their joint operation was legal. Justice Day’s reversal for the Supreme Court treated the Central Pacific line from San Francisco to Ogden as a separate link in another transcontinental route that should have competed with the Southern Pacific route via New Orleans and sea connection to New York. Day thus used the argument that was the basis for decision in the Union Pacific case. And, as in the Union Pacific case, the Supreme Court refused to recognize that each route had a natural economic advantage in its own area of the West.

The divestiture decreed in this case was never carried out. Pursuant to the Act of 1920, the ICC found that dissolution would “disrupt existing routes and service” and result in “increased cost of operation and duplication of capital investment in railroad facilities and increased cost of transportation” to shippers. The new investment required to operate Central Pacific independently would create unneeded excess capacity in rail lines and terminals. The District Court approved this view and relieved the Southern Pacific from operation of the Sherman Act so far as necessary to carry out the ICC plan. In 1996, the Surface Transportation Board approved the merger of the Union Pacific Railroad Co. and the Southern Pacific Transportation Corp.
Justice Day’s support for antitrust enforcement is seen in his opinion for the Court in *Eastern States Retail Lumber Dealers Association v. United States*. This was an agreement to boycott, a per se violation of the Sherman Act. The members of the Association circulated lists of wholesalers who, in part, sold directly to consumers. The trial court had found that the objective was to persuade retailers not to buy lumber from such wholesalers and thereby force them to stop selling to consumers. This is clearly predation and it is effective because there are no costs to the retailers to execute it.

Justice Day dissented in two major antitrust cases in which the Justice Department failed to convince the Court of monopoly power. *United States v. United Shoe Machinery Co.* was an action in equity to dissolve the merger of four companies that made complementary machines for different aspects of shoe manufacturing. Since the machines of the combining firms did not compete, there was no increase in market share. The majority opinion rested on the findings of fact in the circuit court. Justice Day dissented to the ruling against monopoly power and dissented to the approval by the Court majority of the tying clauses in the leases of machines to shoe manufacturers. The lessees were restricted from utilizing machines of any other firm producing shoe machinery, an affirmative act of market domination. Even though the tying clauses were held legal under the Sherman Act in 1918, Day was able in 1922 to write an opinion for the Court holding such agreements illegal under Section 3 of the Clayton Act.

Justice Day’s dissent on the issue of monopolization by United Shoe Machinery was vindicated in the 1953 decision holding the company to have violated Section 2 of the Sherman Act.
The other major antitrust case in which Justice Day dissented to the dismissal of a charge of monopolization was *United States v. United States Steel Corp.* Defendant corporation was created as a holding company in 1901 and controlled approximately 50 percent of U.S. steel output at the time of the lawsuit. The Antitrust Decision of the Department of Justice had charged U.S. Steel with monopolization in the original merger and later acquisitions of other steel producers. It also charged restraint of trade by agreements with independent producers to fix steel prices.

The four-judge District Court dismissed the proceeding in equity for dissolution of U.S. Steel in 1915. The finding that the corporation had never been able to monopolize the steel industry was affirmed by the Supreme Court. The Court held that “the law does not make mere size an offense or existence of unexerted power an offense.”

Justice Day, for the three dissenters, cited as valuable precedents for interpretation of the Sherman Act the opinions in *Standard Oil Co. v. United States* and *United States v. American Tobacco Co.* He concluded that it was the effective power of monopolies to dominate and restrain competition that the statute was designed to limit and control:

Nor can I yield assent to the proposition that this combination has not acquired a dominant position in the trade which enables it to control prices and production when it sees fit to exert its power.

That such an organization, thus fortified and equipped, could, if it saw fit, dominate the trade and control competition, would seem to be a business proposition too plain to require extended argument to support it. Its resources, strength, and comprehensive ownership of the means of production enable it to
adopt measures to do again as it has done in the past; that is, to effectually
dominate and control the steel business of the country. From the earliest
decisions of this court it has been declared that it was the effective power of such
organizations to control and restrain competition and the freedom of trade that
Congress intended to limit and control. That the exercise of the power may be
withheld, or exerted with forbearing benevolence, does not place such
combinations beyond the authority of the statute which was intended to prohibit
their formation, and, when formed, to deprive them of the power unlawfully
attained.

It is said that a complete monopolization of the steel business was never
attained by the offending combinations. To insist upon such result would be
beyond the requirements of the statute, and in most cases practically impossible. In the first Employers’ Liability Cases, he joined
Justice Edward White’s majority opinion in a 5 to 4 decision that invalidated a federal
statute making interstate carriers liable for negligent injuries of any employee. The stated
defect was that the statute included shop workers who were not in interstate commerce.
Congress retreated and passed a similar statute applying only to interstate employers, and this was held constitutional. The overruling of the first statute occurred in 1956.

Adair v. United States concerned Section 10 of the Erdman Act of 1898. Congress prohibited rail carriers in interstate commerce from conditioning employment of workers that they not become or remain members of a labor union. Justice Day joined the mistaken majority opinion of the great Justice John M. Harlan to hold that the statute
was outside the power of Congress under the Commerce power and that it violated a nonexistent constitutional liberty of contract under the due process clause of the Fifth Amendment. This judicial venture into the oxymoron, substantive due process, was overruled in 1949.

Justice Day took the opposite view when it was a state statute that prohibited “yellow dog” contracts. In *Coppage v. Kansas*, Justice Mahlon Pitney, for the majority, followed *Adair*. He reversed the Kansas Court that had upheld a state statute that made it illegal for an employer to coerce or demand a contract from an employee not to join a union. Justice Day correctly dissented: “The law should be as zealous to protect the Constitutional liberty of the employee as it is to guard that of the employer. A principal object of this statute is to protect the liberty of the citizen to make such lawful affiliations as he may desire with organizations of his choice. It should not be necessary to the protection of the liberty of one citizen that the same right in another citizen be abridged or destroyed.” Day distinguished this case from *Adair* because that case rested on a criminal penalty.

One of the most questioned opinions of Justice Day was *Caminetti v. United States*. Contrary to his preference for state regulation, Day led judicial approval of expansion of the scope of the Commerce Clause to non-commercial activity. The Mann Act made it a felony knowingly to transport in interstate or foreign commerce “any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose.” In an earlier case, the Court had upheld the constitutionality of the statute for prosecuting transactions in prostitution. *Caminetti* required the Court to interpret the statutory language “immoral purposes.” The defendants were two young married men
from California who took their mistresses by train to Nevada for a weekend that included sexual relations. There was no evidence that the women were paid, and the indictment did not charge any element of prostitution. Defendants had been convicted solely on counts relating to immorality.

In this crucial case, giving the first authoritative construction of “any other immoral purpose” under the Mann Act, counsel failed to argue, and the court failed to take into account, the interaction between the issues of federalism and the procedure/substance distinction. The statutory phrase “in interstate or foreign commerce” was a jurisdictional clause needed to bring the issue before the federal courts. The substantive regulation referred to transportation of women and girls for prostitution, debauchery or any other immoral purpose. Here the second fundamental issue, determining whether the substance of the statute can be subsumed under a constitutionally enumerated power, comes into play. Only prostitution concerned transactions under the Commerce Clause. Debauchery and immorality were non-commercial. These items were reserved to the states just as much as regulating the making of wills or defining negligence in local auto torts.

*Caminetti* is analogous to the recent case of *United States v. Lopez*. The Gun-Free School Zones Act of 1990 made it a federal crime to possess a firearm knowing it to be within 1000 feet from a school zone. The Supreme Court, by a vote of 5 to 4 held the statute unconstitutional. Chief Justice Rehnquist wrote that the act “neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.” The similarities of *Lopez* and *Caminetti* are striking. These contrary opinions could not prevail in any rational legal system. Since Congress
had removed "morality" from its statute in 1986, *Caminetti* had in effect been overruled before the *Lopez* case.

In 1917, Justice Day dissented in *Wilson v. Ness*. The Court had approved a statutory settlement by Congress of a threatened rail strike through enactment of an – eight-hour day and a time-and-a-half pay for overtime for all interstate railway employees. The national emergency of wartime was cited by the Court but with implication that the power existed in normal times. Day dissented because of the aspect fixing overtime wages. It seems he could not hypothesize the skilled railroad managements adopting three eight-hour shifts and thereby avoiding overtime pay. Citing the due process clause of the Fifth Amendment, he said the law illegally took revenues of the carriers and gave them to the trainmen.

**SUPPORT FOR STATE REGULATION**

Justice Day wrote many opinions supporting state regulatory statutes. The key background was Day’s concurrence in the dissent of Justice Harlan in *Lochner v. New York*. The lower court finding of fact was that the health problems of bakers as they inhaled flour while working was deleterious. This finding was adopted by Harlan to demonstrate that the statement of facts by Justice Peckham for the majority was error. Limiting bakers’ hours of work to 10 per day and 60 per week was a valid partial remedy. Only Justice Holmes in dissent had attacked the legal ruling by Peckham on due process, pointing to the judicial usurpation of state legislative power.

Justice Day was able to concur in subsequent labor regulatory cases that rejected the majority reasoning in *Lochner*. In *Muller v. Oregon*, the Court sustained a state law
delimiting the hours of work for women to 10 per day and sixty per week. Nine years later, in *Bunting v. Oregon*, the Court sustained a state statute limiting hours of work for both men and women. Because this was a general statute, not limited to dangerous occupations, it was presumed by most commentators to have overruled *Lochner, sub silentio*. Conservative Chief Justice Taft joined in this view in 1923.

In *McLean v. Arkansas*, Justice Day delivered the opinion for the Court approving the power of the state to regulate the method of wage payments in coal mining. The Arkansas statute required that coal miners be paid on the basis of unscreened coal sent to the surface. The law made it a crime to base wages on the lesser weight of screened coal. McLean, managing agent of the coal company had violated the statute and the state Supreme Court upheld the conviction. Upon appeal, the objections were invasion of constitutional freedom of contract and that the law being applicable only to mines employing more than ten men violated equal protection of the law.

In upholding the state law, Day concluded:

It is then the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health and welfare of the people…

The legislature being familiar with local conditions is primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for
judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power.\textsuperscript{85}

In \textit{Jeffrey Mfg Co. v. Blagg},\textsuperscript{86} Justice Day wrote an opinion upholding state regulation and explaining the function of the equal protection clause. The constitutionality of the Ohio Workmen’s Compensation Law was at issue. The Law provided that manufacturing companies, employing five or more persons, and that did not subscribe to the Law were deprived in negligence cases of certain defenses. There were (1) negligence of fellow-servants, (2) defense of assumed risk, and (3) defense of contributory negligence. These penalties were designed to induce manufacturers to join the Workmen’s Compensation program and make the required annual payments for the insurance. Jeffrey Mfg. Co. had not joined the program and its employee, Blagg, had been injured because of the negligence of fellow servants. Jeffrey’s defense of violation of equal protection was based on the exemption of manufacturers with less than five employees.

Blagg had recovered in the trial court and the Ohio Supreme Court had affirmed, upholding the statute as constitutional. Justice Day, in affirmance, explained the importance of classification in determining equality:

This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the States the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. That a law may work hardship and inequality is not enough. Many valid laws from the generality of
their application necessarily do that, and the legislature must be allowed a wide field of choice to determining the subject-matter of its laws, what shall come within them, and what shall be excluded. Classifications of industries with reference to police regulations, based upon the number of employees, have been sustained in this court….

Certainly in the present case there has been no attempt at unjust and discriminatory regulations. The legislation was formulating a plan which should provide more adequate compensation to the beneficiaries of those killed and to the injured in such establishments, by regulating concerns having five or more employees. It included, as we have said, all of that class of institutions in the State.\textsuperscript{87}

In \textit{Penna. Gas Co. v. Pub. Service Comm.}\textsuperscript{88} Justice Day wrote for the Court to explain an aspect of the Commerce Clause and state regulation of local markets. The Gas Co. secured natural gas from the earth in Pennsylvania and shipped it via pipelines directly to consumers in that state and in New York. The issue was whether Jamestown, New York, pursuant to state statute, could regulate rates charged consumers in that town. Day noted that a principle had been established in earlier cases that a state may not directly regulate or burden commerce among the several states. Congress had the superior power to regulate local rates that were part of national commerce. Nevertheless, where national and state powers overlapped, until Congress adopted local rate regulation, the state agencies could regulate the retail price of gas.\textsuperscript{89}

Another leading opinion by Justice Day concerned business regulation by state antitrust law. In \textit{Waters-Pierce Oil Co. v. Texas},\textsuperscript{90} Standard Oil Co. of New Jersey had
acquired a major part of the stock of the Texas firm, Waters-Pierce. The latter was charged with increasing the price of oil in Texas and restraining trade in selling of petroleum in Texas. The acquisition by Standard Oil was found to have been an act of monopolizing that tended to lessen competition. Purchase of oil from Texas refineries and purchase of oil in interstate commerce that had been removed from original containers and merged with Texas oil were found to be subject to Texas antitrust law. The jury had found violations of the antitrust law of 1903 and awarded damages of $1,623,500. Day wrote “These findings of facts are conclusive upon us, and show that the conviction was had, for acts and transactions committed and carried out within the State of Texas.”

Rejecting the argument that the fines were excessive, Day concluded: “The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the state. We can only interfere with such legislation and judicial action of the states enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law.”

Justice Day wrote a series of opinions concerning just compensation for property rights of firms in inverse condemnations. In *Mo. Pac. Ry. v. Omaha* Day wrote for a unanimous Court to sustain the ordinance of Omaha requiring the carrier to construct a viaduct over its rail line at a key city street. Supreme Court precedents had held that a state or authorized city could require a rail carrier to construct overhead crossings at its own expense. Here Missouri Pacific had agreed to build a viaduct for all street traffic other than streetcar lines costing a about $46,000. The carrier had argued that being required to spend $50,000 more for a viaduct strong enough for streetcar lines was condemnation in violation of the due process clause of the Fourteenth Amendment.
In affirming the right of Omaha to protect the safety of all members of the public, including those on streetcars, Justice Day concluded:

This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted.\textsuperscript{95}

In \textit{New Orleans Gas Co. v. Drainage Comm.},\textsuperscript{96} Justice Day again had to resolve a question of possible just compensation to a regulated monopoly. The gas company acquired a franchise from the city to supply gas to the people of New Orleans and locate its pipes under the city streets “having due regard for the public convenience.”\textsuperscript{97} The company was later required to move the pipes at its own expense so that a drainage system could be installed under the streets. No mention was made in the opinion that since the city refused to compensate the gas company, the company would have significant capital expenditures and be forced to raise rates to the citizens to pay anyway. Justice Day concluded:

The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of the public health,
it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnnum absque inuria*.

A number of Justice Day’s opinions concerned the validity of state taxation. Some concerned the entry of state agencies into commercial ventures. In *Jones v. Portland*, the city of Portland, Maine created a coal and fuel yard, supported by taxation, for the purpose of selling at cost wood, coal and fuel to its inhabitants. The suit was brought by the taxpayers of Maine to enjoin the establishment of the yard. They contended that creating a municipal wood yard was not a public purpose and therefore was without due process of law. The Maine court had held that the objective of the law was not to engage in commercial enterprise for profit. Rather it was to supply citizens with necessities for life and health. In affirming the validity of the statute, Justice Day concluded:

> While the ultimate authority to determine the validity of legislation under the 14th Amendment is rested on this court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view the judgment of the highest court of the state upon what should be deemed a public use in a particular state is entitled to the highest respect.

A taxation opinion by Justice Day having much greater social impact than the *Jones* case was *Green v. Frazier*. A North Dakota statute created a Commission to
operate public utilities and other enterprises in support of agriculture, the primary activity in the state. Another statute authorized the state to establish a business to operate warehouses, elevators and flour mills. A third statute created the Bank of North Dakota to finance the enterprises and granted it the power of imminent domain. State funds and the power to issue bonds were also authorized. The highest state court upheld these ventures as having a public purpose. Citing his opinion in Jones, Justice Day affirmed, noting the inadequacy of present marketing facilities for agriculture:

Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, if the State sees fit to enter upon such enterprises as are here involved, with the sanction of its constitution, its legislature and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision.102

In Standard Oil Co. v. Graves,103 Justice Day recognized that state inspection fees for dangerous products entering a state were so high that they became a tax that was a direct burden on commerce among the several states. In a 10-year period Standard Oil had shipped petroleum products into the state of Washington. The total state inspection fees were $335,770.104 The state inspection expenses were $80,103. The net revenue to the state was $255,673. Day correctly held this to be a tax in violation of the Commerce Clause.

In Buchanan v. Warley,105 Justice Day wrote a key opinion for the Court on race relations. It held a Louisville city ordinance enforcing racial segregation in the ownership of property unconstitutional. The ordinance, based on the fallacy of race,
used the word “colored” but did not define it. It provided that no colored person could acquire and occupy a residence in a city block where the majority of residents were white. A reciprocal restraint was placed on whites not to occupy a residence in a city block where the majority were colored. This action was by a white owner for specific performance against a “colored” buyer of property in a “white” block. The contract of sale provided that the buyer was excused from performance if the law prohibited his purchase.

The first basis of illegality of the ordinance was the Civil Rights Act of 1866 which protected the right of all citizens to purchase and hold property. The statute was reenacted in 1870 after ratification of the Fourteenth Amendment. Justice Day distinguished *Plessey v. Ferguson* and *Berea College v. Kentucky* because the separate but equal doctrine of those cases was not applicable to this case. Day concluded: “We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case the ordinance cannot stand.”

**CONCLUSION**

It is not useful to generalize in concluding that Justice Day favored state regulation of commerce over federal regulation. While this was true in some instances, it was rejected in others. Day’s support for the national antitrust laws and regulation of railroads by the Interstate Commerce Commission can be described as a fear of big
business or as recognition of the power of Congress to enact such statutes. In Day’s era, the railroads were a much larger part of big business than they are today. His application of antitrust to railroads was based on ignorance of the highly integrated essential character of necessary joint rate making as loaded freight cars were interchanged by carriers. Justice Day’s refusal to accept the trial courts findings of facts in the Union Pacific and Southern Pacific merger cases that merging railroads were not market rivals violated the rules relating to presumptions of manifest evidence in trial courts.

In exercising his approval of most state regulation of business, Justice Day still noted that there was an ultimate limit in substantive due process. This view was overruled by the Supreme Court long after his death. Day upheld laws to regulate methods of wage payments in mining. He explained the function of classification in applying the equal protection clause. He correctly explained the breadth of the commerce clause when national and state regulatory power overlapped, noting the importance of the supremacy clause. This was inconsistent with his erroneous opinion in Dagenhart. In a set of cases, he upheld regulation against charges of taking private property without just compensation. In another set of cases, he upheld state taxation designed to supply essential products for public health and safety. On the other hand he rejected inspection fees that were so high that they burdened commerce among the several states.

Justice Day could be classed as the usual thinker of his times. The majority of justices were misled by common-law thinking that a group of past cases on a topic created doctrine to be followed. Doctrine as precedent became a fallacy when applied to constitutional law in the Supreme Court because it was contrary to the duty to overrule past erroneous opinions. The ratified text of the Constitution and amendments are the
only fundamental law. Only Justice Holmes was a textualist in rejecting judicial curtailment of the commerce clause and rejecting the judicial creation of substantive due process. Sadly, Justice Day and the Court majority could not reason on the intellectual level of Justice Holmes.
Justice Day, footnotes


4. The original broad meaning of "commerce" was articulated in the opinion of Chief Justice John Marshall as he applied it to transport services in *Gibbons v. Ogden*. 22 U.S. (9.Wheat) 1 (1824). Crosskey's thorough study of English usage in 1787 established that the clause was plenary. However, Congress would surely refrain from regulating local commerce that did not affect other states. But regulation of commerce between states and with foreign nations had to be exclusively in Congress to prevent state barriers to trade. A national market with internal free trade was essential to long-term peace among Americans. See Crosskey, *Politics and the Constitution, supra*, note 3 at 17-186.

5. U.S. Const., Art. 1, Sec. 8. As to the function of the dormant Commerce Clause in preventing state economic protectionism, see the opinion of Justice Robert Jackson in *H.P. Hood & Sons, inc. v. DuMond*, 336 U.S. 525, 533-34 (1949));


13. 156 U.S. at 16.

15. 238 U.S. 439 (1915).

16. *Id* at 444.

17. 252 U.S. 436 (1920).


19. *Dagenhart* was overrulled in *United States v. Darby*, 312 U.S. 100 (1941). Justice Harlan F. Stone, for a unanimous Court, upheld the constitutionality of the Fair Labor Standards Act of 1938, 52 Stat. 1060. This statute prohibited interstate shipment of manufactures when the producer violated the prescribed minimum wagers or maximum hours. The Court held that the opinion in *Dagenhart* “cannot be reconciled with the conclusion we have reached, that the power of Congress under the Commerce Clause as plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution…. The conclusion is inescapable that *Hammer v. Dagenhart* was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision…. It should be and now is overruled.” 312 U.S. at 116-117.


24. "The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed – far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused – it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States." 247 U.S. at 280-81.


34. Great Northern Pac. – Merger – Great Northern 331 ICC 228 (1968). On the later Milwaukee Road Bankruptcy, see Michael Conant, *Railroad Bankruptcies and Mergers from Chicago West 1975-2001*, supra, note 8 at ch. 3.


38. 226 U.S. at 86-90.

39. Id., at 88.


41. 41 Stat 482 (1920), as amended, 62 Stat 472 (1948).

42. 259 U.S. 214 (1922).


46. The Union Pacific, due to a set of earlier acquisitions, operated 22,785 miles of road. The Southern Pacific, with acquisitions and trackage rights, operated over 15,581 miles of road. This modern economic approach to railroad consolidation reconfirms that connecting railroads were single operating systems with necessary joint pricing and planning for competent delivery of customers’ goods. See Conant, *Railroad Bankruptcies and Mergers, supra*, note 8 at 117-133.

47. 234 U.S. 600 (1914).


49. 247 U.S. 32 (1918)


51. Justice Day in dissent noted that the mere ownership of sets of patents for the industry did not justify tying clauses. He stated: “That these lease restrictions tend to prevent the free flow of interstate commerce, and the natural course of its activities, and at least tend to monopolize an important trade in interstate commerce seems apparent from a mere statement of their terms, having in mind their natural and necessary effect.” 247 U.S. at 70.


55. United States v. United States Steel Corp. 223 Fed. 55 (D.N.J. 1915)
56. 251 U.S. at 451.
57. 221 U.S. 1 (1911).
58. 221 U.S. 106 (1911).
59. 251 U.S. at 464-465.
61. 35 Stat. 64 (1908).
64. 30 Stat. 424 (1898).
65. 208 U.S. at 174-176. Only Justices Holmes and McKenna dissented. Justice Holmes wrote: “I confess that I think that the right to make contracts at will that has been derived from the word ‘liberty’ in the amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. Where there is, or generally is believed to be, an important ground of public policy for restraint the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think Congress might not reasonably think that the provision in question would help a good deal to carry its policy along.” Id., at 191.
66. 236 U.S. 1 (1915), overruled, Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

67. 236 U.S. at 40. Justice Holmes, dissenting in Coppage, wrote: “Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, but I am strongly of the opinion that there is nothing in the Constitution of the United States to prevent it, and that Adair v. United States and Lochner v. New York should be overruled.” Id., at 28.

68. 242 U.S. 470 (1971). Justice Joseph McKenna dissented with a survey of the congressional hearings to adopt the Mann Act. He demonstrated that the congressman spoke only of commercial transactions for sex. The insertion of "morality" in the statute was an error in drafting that the Court majority should have recognized. Caminetti was in effect overruled in 1986 when the terms “debauchery” and “other immoral purpose” were removed from the statute by Congress. See Child Sexual Abuse and Pornography Act. 100 Stat. 3511-12 (1986).

69. 36 Stat. 825 (1910).


75. 243 U.S. 332 (1917).

76. 39 Stat. 721 (1917).
77. 243 U.S. at 364.


“The Due Process Clause with an “arbitrary and capricious” or “shocking to the conscience” formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, e.g., *Lochner v. New York*. That formula, based on subjective considerations of “natural justice,” is no less dangerous when used to enforce this Court’s views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like *West Coast Hotel Co. v. Parrish*; *Olsen v. Nebraska ex rel. Western Reference & Bond Assn.*, and many other opinions.”


80. 208 U.S. 412 (1908). This opinion was unanimous.

81. 243 U.S. 426 (1917). The vote of the Court was 5 to 3.


84. 211 U.S. 539 (1909).

85. *Id.* at 547. See *Rail Coal Co. v. Ohio Industrial Comm.*, 236 U.S. 338 (1915).
86. 253 U.S. 571 (1915).
87. *Id.* at 576-577. See *Barrett v. Indiana*, 229 U.S. 26 (1913) (Justice Day upheld the Indiana statute requiring entrances to mines to be a specified width).
88. 252 U.S. 23 (1920).
89. *Id.* at 31.
90. 212 U.S. 86 (1909).
91. *Id.* at 107.
92. *Id.* at 111.
93. 235 U.S. 121 (1914).
94. See *Northern Pacific Railway v. Duluth*, 208 U.S. 586 (1908).
95. 235 U.S. at 127.
96. 197 U.S. 453 (1905).
97. *Id.* at 459.
98. *Id.* at 462. The final phrase is translated as loss without legal injury.
100. *Id.*, at 221.
102. *Id.*, at 242-43.
103. 249 U.S. 390 (1919).
104. *Id.*, at 393.
105. 245 U.S. 69 (1917).
107. 14 Stat. 27 (1866).

108. 16 Stat. 144 (1870).

109. 163 U.S. 537 (1896).

110. 211 U.S. 45 (1908). Justice Day joined the dissent of Justice Harlan in this case.


111. Buchanan, 245 U.S. at 82.

112. 226 U.S. 61 (1912).

113. 259 U.S. 214 (1922).