Mr. Justice Horace Gray: Judicial Philosophy and Supreme Court Jurisprudence

Nick John Peter Meros, University of Virginia - Main Campus

Available at: https://works.bepress.com/nick_meros/1/
Mr. Justice Horace Gray:

Judicial Philosophy and Supreme Court

Jurisprudence

Nicholas J.P. Meros

44 East Range

Charlottesville, VA 22903

(850) 510-1844

meros@virginia.edu

Acknowledgements

This article is an extension of my undergraduate Senior Thesis under the same name for the University of Virginia’s Corcoran Department of History. I must thank University of Virginia Law Professor Barry Cushman for his assistance with developing and orienting my research focus through the intricacies of political economy jurisprudence.
Author Biography

Nick Meros is a 2nd year graduate student in the Woodrow Wilson Department of Politics at the University of Virginia. His research focuses on international relations, international law, and the causes of war. He can be reached at meros@virginia.edu

Mr. Meros graduated from the University of Virginia with a Bachelors of Arts with Distinction in American History and a Bachelor of Arts with Distinction in American Government in 2009. He then worked in Washington, D.C. as a research intern for the British American Security Information Council, a nuclear weapons and arm control think-tank. He will attend law school in the fall of 2012 and study International Law.

Abstract

The vast majority of contemporary biographic paradigms of Supreme Court Justice Horace Gray classify him as a ``nationalist,” or ardent supporter of the federal
government’s interest and sovereignty over state and local governments. Legal historians and scholars cite decisions and opinions in which he promoted "substantial and effective national government power" over interstate commerce and upheld state government’s police powers as evidence for his "nationalism."

My research, however, reveals that Justice Gray repeatedly ruled against the federal government and for state and local interests. Moreover, Gray’s opinions in favor of the federal government highlighted not its superiority over state and local governments, but the legislature’s preeminence. Therefore, I argue that Justice Gray supported the federal government during his tenure on the Court not out of "nationalism," but deference to legislative authority. Accordingly, I encourage legal historians and scholars to revise their description of Justice Gray from a "nationalist" to a supporter of "legislative power."

This article makes two contributions to the literature. First, it discards previous descriptions of Justice Gray’s jurisprudence and proposes a revised, more nuanced characterization based entirely on his Court opinions and decisions. Second, it admonishes scholars of the Court to resist simple and sweeping generalizations for these complex legal minds.
Introduction

The majority of contemporary biographic paradigms of Supreme Court Justice Horace Gray classify him as a “nationalist,” or supporter of the federal government’s interest and sovereignty over state governments. Legal historians and scholars cite Gray’s decisions and opinions where he supported the federal government’s interests and promoted “substantial and effective national government power” as evidence for their characterization.¹ These jurisprudential analyses focus on many of the same Court decisions, the most common being 1) United States v. Lee, where Gray held that citizens of the United States could not bring suit against the federal government, 2) Julliard v. Greenman, where Gray upheld Congress’ power to pass statutes making treasury notes legal tender during peacetime, 3) Fong Yue Ting v. United States, where Gray upheld a Congressional statute requiring Chinese laborers to obtain residency certificates in order to work in the country and deporting those who failed to do so, and 4) Logan v. United States, where Gray upheld Congress’ power to

legislate for the punishment of persons who violated the civil rights of citizens in custody of federal marshals.

Although Gray supported the federal government in each of these paradigmatic cases, my research has revealed that he did not do so because he felt that the federal government’s interests were paramount or supreme. Instead, I will argue that these and other opinions in which he seemed to favor the national government are, in reality, an expression of his judicial philosophy of deference to legislative authority.

Close examination of Justice Gray’s jurisprudence, for example, reveals that he repeatedly and consistently sided with the legislative power in cases where Congress legislated under its enumerated powers, where state legislatures regulated intrastate activity under its police powers, and in cases juxtaposing state legislatures’ attempts to regulate interstate commerce against the federal government’s exclusive authority over interstate commerce. He also deferred to legislative authority by preventing the Interstate Commerce Commission (ICC) from regulating interstate commerce under its regulatory powers codified in the Interstate Commerce Act of 1887.

Accordingly, I begin my jurisprudential analysis by presenting cases where Justice Gray upheld Congressional legislation under one or more of its enumerated powers. Next, I describe Gray and the Court’s mistrust and denial of ICC attempts to regulate commerce, highlighting Gray’s vote in each case and his role in reducing the
commission to a ward of the Court. I then introduce cases where Gray upheld state legislation regulating individual intrastate activity and curtailing their Fourteenth Amendment rights under its police powers. I conclude my analysis with cases where Gray struck down state legislation regulating interstate commerce by deferring to the dormant commerce clause and cases where he upheld state regulation of interstate commerce under their police powers.

These decisions will demonstrate that characterizations of Justice Gray as “nationalist” are not only far too simplistic, by describing his complex jurisprudence with a sweeping, basic generalization, but also misguided, by misconstruing his support for the federal government as “nationalism,” instead of as an expression of his true judicial philosophy of deference to legislative authority.

Furthermore, I will argue that these decisions demonstrate the need to revise Gray’s biographical framework and discard the characterization of sweeping, unfettered support for the national interest most often attributed to him. Accordingly, I propose that the term “legislative power” replace “nationalism” as the characterization for Gray’s judicial career because, as I will argue, his Court decisions not only belie his characterization as a “nationalist,” they also disclose his deference to legislative authority.
National Power

The first examples of Gray’s deference to legislative authority appear in Court opinions where he upheld Congressional statutes regulating individual, state, and national actions under Congress’ constitutionally enumerated powers. The four most common examples of these decisions are also those most often invoked as evidence of his nationalism. These are Julliard v. Greenman, United States v. Lee, Fong Yue Ting v. United States, and Logan v. United States. The first case, Julliard v. Greenman, examined a congressional statute that tendered notes towards the defendant’s payment to the plaintiff as “lawful money and a legal tender in payment of all debts, public and private, within the United States.” Gray, in the Court’s majority opinion, upheld the statute under Congress’ power to pass a statute in a time of peace making treasury notes legal tender. He argued that “impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conductive, and plainly adapted to the execution of the undoubted powers of Congress” and that this means is “necessary

---

2 May 31, 1878, c. 146. 20 St. 87.
3 Williston, Great American Lawyers, 179.
and proper for carrying into execution the powers vested by this constitution in the
government of the United States.”

The second case, United States v. Lee, concerned the jurisdiction of a
United States Circuit Court trying the title of the United States to an Arlington estate
in an action of ejectment against officers of the United States in possession of the
estate. While the Court’s majority upheld the Circuit Court’s jurisdiction—thereby
curtailing the federal government’s power—Gray dissented against the ruling and
argued that the Circuit Court did not have jurisdiction to try this case because it was
an action against the United States, which is a “direct encroachment upon the
[powers of the] legislative and executive departments.”

The third frequently invoked case, Fong Yue Ting v. United States, dealt
with writs of habeas corpus filed by Chinese laborers who were arrested and held
for not having certificates of residence, as prescribed by the 1892 Geary Act. This
act “prohibit[ed] the coming of Chinese persons into the United States” and required
Chinese laborers already in the country to obtain residency certificates within a year
and a half or risk arrest and deportation. The Chinese laborers alleged that the

---

4 110 United States Reports, 421:429–430 (1884).
5 Williston, Great American Lawyers, 179.
7 52d Cong. et seq. (1892).
8 149 United States Reports, 698: 699 (1893).
Greary Act was unconstitutional because it denied them their due process rights. Gray, however, ruled in the majority opinion that the Greary Act was constitutional and, as a result, dismissed the laborers’ writs. Gray, resting on Justice Field’s majority opinion in Chae Chan Ping v. U.S, argued that since Chinese laborers were not citizens of the United States, the federal government’s ability to exclude them from U.S. territory is “a proposition which we do not think open to controversy.” Moreover, Gray held that “[j]urisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence.”

The last common case is Logan v. United States, which involved four men arrested under two sections of the Revised Statutes of the United States penal code for conspiracy, and for murder in the prosecution of the conspiracy, to injure and oppress citizens of the United States while in the “free exercise and enjoyment of the right to be secure from assault or bodily harm” and while in custody of a U.S. marshal. The question submitted to the Court was whether Congress had the power to protect U.S. citizens in custody of a U.S. marshal from “lawless violence,” or if that protection could only be bestowed upon citizens by their state legislatures. Gray ruled in the majority opinion that although the Constitution does not specifically grant

---

9 130 United States Reports, 581 (1889); 149 United States Reports, 698: 699-700 (1893) quoting 130 United States Reports, 581:603-604 (1889).
10 149 United States Reports, 698: 700 (1893) quoting 130 United States Reports, 581:603-604 (1889).
Congress the power to punish citizens for their crimes, Congress undoubtedly has complete power to punish those convicted of crimes against the United States, whether committed in one of the several states or within a United States territory. Moreover, to accomplish these ends, Gray ruled that Congress must have sole authority to enact laws for holding the accused in safe custody until indictment and trial. Gray bestowed these powers upon the federal government because he argued that each is “exclusive custody of the United States” and, as a result, “is not subject to the judicial process or executive warrant of any state.”

Although cited less often, the Court’s decisions in Gibson v. Shufeldt and Ex Parte Yarbrough also demonstrate Gray’s support of national power. The Court in Gibson v. Shufeldt, for example, examined a federal statute that increased the sum or value in dispute between two parties in a case necessary to give the Supreme Court appellate jurisdiction to $5,000. Gray, in the majority opinion, dismissed all of the defendant’s appeals to the plaintiffs except the one where the plaintiff’s debt exceeded $5,000. By doing so, Gray upheld both the federal statute and Congress’s established rules of Supreme Court appellate jurisdiction. Specifically, he argued “neither party can appeal from a decree [from the circuit court] upon a bill by a single plaintiff to enforce separate and distinct liabilities against several defendants, if

12 144 United States Reports, 263: 269 (1892).
13 February 16, 175, c. 77, § 3, 18 St. 316.
the sum for which each is alleged or found to be liable is less than the jurisdictional amount.\textsuperscript{14}

Similarly, the Court in \textit{Ex Parte Yarbrough} evaluated a congressional statute that prescribed the treatment of prisoners held in federal custody.\textsuperscript{15} The plaintiffs claimed that their detention, trial, conviction, and sentence handed down by the United States Circuit Court for Georgia was unconstitutional because it violated their Fourteenth Amendment rights of due process. The Court, however, ruled with Gray that the statute in question was constitutional because the federal government has complete constitutional authority to prevent fixing of representative elections—which the detainees stood convicted of. Without this power, the Court argued, the country would be in grave danger because “its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines, are at the mercy of the combinations of those who respect no right by brute force on the one hand, and unprincipled corruptionists on the other.”\textsuperscript{16}

\textbf{Delegation of National Power}

\textsuperscript{14} 122 United States Reports, 27: 29 (1887).
\textsuperscript{15} §§ 5508, 5520 Rev. Stat.
\textsuperscript{16} 110 United States Reports, 651: 659 (1884). Nicol v. Ames 173 United States Reports, 509 (1899): The Court, similar to its decision in \textit{Ex Parte Yarbrough}, upheld, with Gray in the majority, the treatment of the prisoners Nicol and Skillen and the “\textit{War Revenue Act}” under the power of Congress to prevent the corruption of representative elections (June 13, 1898. 30 Stat. 448).
Although Gray repeatedly upheld congressional legislation invoking its constitutionally enumerated powers, he struck down any attempts to delegate that authority to outside commissions. The most lucid example of this jurisprudential facet is the Interstate Commerce Commission (ICC), established with the Interstate Commerce Act of 1887 (ICA). This commission, charged with regulating and overseeing the countries’ railroad companies, was to be composed of five members appointed by the President with the advice and consent of the Senate who would serve staggered terms of no more than 6 years. No more than three of these members, however, could be from the same political party—precluding the possibility of commission partisanship—and none could “have a pecuniary interest in common carriers subject to the act or sit in any proceeding involving a business in which he had an interest.”

The commission, under the Interstate Commerce Act, had the power to examine the management and business of all common carriers and to observe the manner and method in which they were conducted. It could subpoena witnesses for testimony, prescribe a uniform system of accounting for railroad companies’ annual reports to the commission, and could initiate proceedings and act upon grievances. The ICA also required the commission to submit an annual report to Congress with recommendations for further legislation.

---

Although provided numerous enumerated powers over the country’s railroads, the Interstate Commerce Commission fought the Supreme Court at every turn throughout the 1890’s for control over national railroad regulation. The commission’s cases before the Court during this period reveal a general pattern of conduct on both sides. The ICC asserted administrative authority over issues where the ICA was vague and simply ignored the act’s provisions that were specific but “contrary to a progressive view of regulation.”¹⁹ The Court, on the other hand, “assert[ed] judicial supremacy” wherever the act was unclear and “demand[ed] strict adherence” to clauses that were specific.²⁰

The Court, in addition, showed little to no respect for the commission’s investigations and findings. For example, the Court openly declared that it was not constrained by the commission’s conclusions, that it could admit additional evidence into the trial, and that it could altogether dismiss the commission’s findings.²¹ These steps “effectively nullified the commission’s value” both as a board of experts able to gather and analyze relevant material and as a public advocate for “aggrieved parties.”²² These actions also reduced the commission’s role to an arbitrator of

---

¹⁹ Skowronek, Building a New American State, 154.
²⁰ Skowronek, Building a New American State, 154.
²¹ Cincinnati, N.O.& T.P. RY. Co. et al. v. Interstate Commerce Commission; Interstate Commerce Commission v Alabama Midland RY. CO. et al. (1897) 168 United States Reports, 144.
²² Skowronek, Building a New American State, 155.
“meaningless preliminaries,” which encouraged parties to an ICC hearing to withhold information until appearing in court.\textsuperscript{23}

The Court not only undercut the commission’s quest for authority by disregarding its investigations and its findings, it also rejected the commission’s “pretensions to function as a policymaking, rule-setting, and supervisory institution.”\textsuperscript{24}

For example, it denied the commission’s attempt to set a national policy in \textit{Texas v. Interstate Commerce Commission},\textsuperscript{25} where a railroad company charged a lower rate for shipments sent directly from Europe to a point within the United States than for domestic goods originating at the same point in the U.S. where the European goods were transferred from ship to rail and intended for the same final destination. The commission ruled that since it had only to consider conditions within the United States on discrimination rulings, or so it believed, this rate was unreasonable because it discriminated against American goods. The railroads, however, appealed the commission’s ruling to the Supreme Court, arguing that it must consider the world commercial market while setting its rates. The Court, with Gray in the majority, agreed with the railroads and found the discrimination valid.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{23} Ibid.
\item \textsuperscript{24} Ibid.
\item \textsuperscript{25} 162 United States Reports, 197 (1896).
\end{itemize}
\end{footnotesize}
The Court also precluded the commission’s attempts to set national policy through an ambiguous clause of the Interstate Commerce Act, whereby railroad companies could not charge more for a long haul than a short haul “under substantially similar circumstances and conditions.”

The commission wanted to use this clause to set the general standards for judging railroads and local towns and to determine the criteria for permitting long and short-haul discrimination. The Court, however, denied this concocted administrative rule-making authority in ICC v. Alabama-Midland RR Co. by declaring that “the existence of competition itself, whether between trade centers or railroads, must be considered a factor in determining the similarity of circumstances and conditions.”

The Court, in doing so, effectively erased the demand for an administrative body charged with determining the rules and exceptions for deviating from equal rates.

Lastly, the Court stymied the commission’s efforts to supervise and direct the railroad industry by rejecting its prescriptions of specific railway rates. The ICC knew that the Interstate Commerce Act did not give it the power to set rates—railroad carriers set their own rates, subject to a judicial review of their reasonableness. Nonetheless, the commission assumed that its authority to ensure just and reasonable rates implicitly gave it the power to correct a rate deemed unjust or unreasonable.

26 Skowronek, Building a New American State, 156.
27 Ibid.; 168 United States Reports, 144 (1897).
This level of authority was also consistent with the practices of state commerce commissions—which the ICC took as its model—and was even the commission’s position for nine years without complaint from the Court. This changed in 1896, however, when the Court ruled unanimously in Cincinnati, N.O. & T.P. Ry. Co. et al v. Interstate Commerce Commission that the Interstate Commerce Act did not confer upon the ICC the power to fix rates. The Court, in this decision, rested upon Justice Jackson’s majority opinion in Interstate Commerce Commission v. Baltimore & O.R. Co., where he argued that the ICA “leaves common carriers as they were at the common law—free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.”

The Court in these three cases and throughout its struggles with the ICC effectively made the commission a ward of the Court with the power only to “pass on the reasonableness of a past action,” rather than an arm of the legislature, and denied it any pretense to exercise substantive power.

28 162 United States Reports, 184 (1896).
29 162 United States Reports, 184: 191 (1896) quoting 145 United States Reports, 263 (1892).
State Police Power & the Fourteenth Amendment

Gray’s deference to legislative authority appears again in cases where the Court examined state legislation regulating intrastate activity that endangered the public safety, health, and morals through its police power. Gray deferred to legislative authority in these cases by upholding the legislation as a legitimate exercise of the state’s police power.

Gray and his fellow justices agreed, for the most part, that despite its frequent contestation throughout the U.S. Court system, a state’s police power enabled it to regulate “everything essential to the public safety, health, and morals” and to “destroy or abat[e], through summary proceedings, anything regarded as a public nuisance.”\(^{31}\)

Gray and his contemporaries also felt that the police power allowed states to interfere “wherever the public interest demands it” and vested their legislatures with sufficient discretion to “determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.”\(^{32}\)

The Court’s decisions in these cases fall into four loose categories, grouped according to the type of state legislation enacted: regulations on the hours workers may work, regulations setting maximum rates and taxing businesses, regulations

\(^{31}\) 152 United States Reports, 133: 134–135 (1894).

\(^{32}\) Ibid., 135.
restricting or authorizing individual acts, and regulations stipulating acceptable business conduct.

The first group—those regulating the hours laborers are permitted to work—consists solely of Holden v. Hardy. The Court in this case examined a Utah statute regulating the number of hours employees in underground mines, smelters, and ore reduction factories could work. The plaintiff in this case claimed that such a regulation statute denied him equal protection under the law and deprived him of his liberty and property without due process of law. The Court and Gray, however, upheld this regulation as a valid exercise of the state’s police power. Specifically, the Court argued that because state legislatures could adopt any means to protect their citizens, they may also legislate to protect their health and morals because ensuring public health benefits all citizens.

The second group dealt with regulations setting maximum rates for transportation and taxing individual businesses. The two cases involved are Budd v. People of State of New York and Massachusetts v. Western Union Telegraph Company. The Court in Budd examined a New York statute that fixed the maximum rate for elevating, receiving, weighing, and discharging grains through floating

---

33 191 United States Reports, 207 (1903); 169 United States Reports, 366 (1898)
34 Utah Laws 1896, p. 218.
35 169 United States Reports, 366 (1898).
36 143 United States Reports, 517 (1892); 141 United States Reports, 40 (1891).
and stationary elevators.\textsuperscript{37} The plaintiff argued that the act went beyond New York’s police power and that the elevators were precluded from rate regulation because they were not businesses affected with a public interest. The Court and Gray, however, ruled that the statute was a legitimate exercise of New York’s police power because elevating grain is a business affected with a public interest and those involved are analogous to common carriers, both of which are subject to rate regulation.

The issue in Massachusetts v. Western Union Telegraph Company was a Massachusetts statute that taxed the Western Union Telegraph Company.\textsuperscript{38} Western Union claimed that the tax deprived it of its property without due process of law. Gray, however, wrote in the Court’s majority opinion that the tax did not deprive Western Union of its property without due process of law. Gray based his opinion on Justice Miller’s majority opinion in Telegraph Co. v. Massachusetts, where Miller decreed that the Massachusetts constitution permits its legislature to “impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident and estates lying within Massachusetts” and to “impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities” within the state.\textsuperscript{39}

\textsuperscript{37} 581 N.Y. Stat. 1888.
\textsuperscript{38} 54 Mass. Stat. 13.
\textsuperscript{39} c. 1 §1, art. 4.
The third set of cases involves state legislation restricting or authorizing individual actions. Two examples of this legislation appear in Head v. Amoskeag Manufacturing Company and Lawton v. Steele.\textsuperscript{40} The Court in Head examined the New Hampshire “General Mill Act,” which “authoriz[ed] any person to erect and maintain on his own land a water mill and mill dam upon and across any stream not navigable, paying to the owners of lands flowed damages assessed in a judicial proceeding.”\textsuperscript{41} The plaintiff argued that the act deprived him of his property without due process. The Court and Gray, however, upheld it as a “constitutional exercise of legislative [police] power” because, they argued, it “ha[d] regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water-power of running streams, which without some such regulation could not be beneficially used.”\textsuperscript{42}

Similarly, the Court in Lawton v. Steele examined a New York statute that prohibited killing or taking fish from Henderson Bay and Lake Ontario by any means other than hook and line.\textsuperscript{43} The plaintiffs claimed that the act went beyond New York’s police power by depriving it of their property without due process of law. The Court and Gray disagreed, however, and affirmed the statute because it believed that

\textsuperscript{40} 125 United States Reports, 530 (1888); 152 United States Reports, 133 (1894)
\textsuperscript{41} July 3, 1868 N.H. Stat. 1868, c. 20.
\textsuperscript{42} 113 United States Reports, 9: 16 (1885).
\textsuperscript{43} 317 N.Y. Stat. 1883.
a state’s power to preserve its fisheries from extinction by prohibiting exhaustive methods of fishing was as “clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food” under its police power.™ Moreover, the Court argued that “there can be no valid objection to a law regulating the manner in which fishing in these waters shall be carried on” because the waters included in it were wholly within the state of New York.

The final group deals with regulations on intrastate business activity. Four examples of this legislation appear in St. Louis v. Mathews, Spencer v. Merchant, Powell v. Commonwealth of Pennsylvania, and Dayton v. Barton.™ In St. Louis the Court analyzed a Missouri statute that decreed that every Missouri railroad corporation was responsible in damages for the property of any person injured or destroyed by “fire communicated by its locomotive engines,” every corporation has an insurable interest in the property along its route, and all corporations may insure such property for protection against damages.™ The plaintiff argued that the act was an “arbitrary, unreasonable, and unconstitutional exercise of legislative power” because it imposed an “absolute and onerous liability of the consequences of doing a lawful act” and that the act deprived it of its property

44 152 United States Reports, 133: 136 (1894).
45 Ibid.
46 165 United States Reports, 1: 3 (1897); 125 United States Reports, 345 (1888); 127 United States Reports, 678 (1888); 183 United States Reports, 23 (1901).
47 Rev. St. 189, § 2615.
without due process of law and denied it equal protection under the law.\textsuperscript{48} Gray, however, wrote in the Court’s majority opinion, that the act was a “constitutional and valid exercise of the legislative power of the state” and that it neither deprived the plaintiff of his property without due process or denied him equal protection under the law because it “appli[ed] to all railroad corporations alike.”\textsuperscript{49}

The Court in \textit{Spencer v. Merchant} examined a New York statute that assessed and directed the expenses for regulating, grading, and preparing a New York street for travel. The plaintiff claimed that the act deprived him of his property without due process of law and that it was an attempt by the New York legislature to validate a void assessment without giving property holders along the street an opportunity to be heard upon the whole amount of the assessment.\textsuperscript{50} Gray, however, ruled in the Court’s opinion that the act was a legitimate exercise of New York’s police power because its state legislature had the power to “fix the sum necessary to be levied for the expense of a public improvement and to order it to be assessed...upon the lands benefited by the improvement.”\textsuperscript{51} This power, Gray argued,

\begin{flushend}
\begin{quote}
\textsuperscript{48}165 United States Reports, 1: 3 (1897).
\textsuperscript{49} Ibid., 15.
\textsuperscript{50} 4 N.Y. Stat. 1869.
\textsuperscript{51} 125 United States Reports, 345: 346 (1888).
\end{quote}
\end{flushend}
authorized state legislatures to “determine both the amount of the whole tax, and the class of lands which will receive the benefit.”\textsuperscript{52}

Alternatively, the Court in Powell v. Commonwealth of Pennsylvania addressed two Pennsylvania statutes that required oleomargarine butter be marked or stamped to distinguish it from natural butter and cheese products.\textsuperscript{53} The plaintiff contended that the act denied him equal protection under the law and deprived him of his property without due process of law. The Court and Gray, however, rejected the plaintiff’s claims by arguing that the act placed the same restrictions, penalties, and burdens upon all those who manufacture, possess, or sell the prohibited articles.

The final example is Dayton v. Barton, which examined a Tennessee statute requiring all in-state businesses to redeem their store orders or coupons for labor performed in cash upon the workers arrival.\textsuperscript{54} The defendant company claimed that the act denied it equal protection under the law and deprived it of its property without due process of law. The Court and Gray, however, again rejected the plaintiff’s claim. This time the Court affirmed the act as a legitimate exercise of Tennessee’s police power by referring to its opinion in Knoxville Iron Co. v. Harbison, where it argued that this type of regulation was “neither prohibitory nor penal; not special, but

\textsuperscript{52} Ibid.
\textsuperscript{53} Laws Pa. 1878, p. 87; 1883, p. 43.
\textsuperscript{54} 183 United States Reports, 23 (1901).
general; tending towards equality between employer and employee in the matter of wages; intended and well calculated to promote peace and good order, and to prevent strife, violence, and bloodshed.”

State Police Power & the Dormant Commerce Clause

The final examples of Gray’s deference to legislative authority are his decisions in cases challenging state regulation of commerce. Although Gray often upheld state legislation regulating intrastate activity under its police power, he frequently struck down state legislation through the dormant commerce clause. He did, however, uphold state regulations of commerce through its police power when he felt the actions took place within a state’s borders.

Deference to National Legislative Authority

Although decisions where Gray struck down state legislation seemingly contradict his judicial philosophy of deference to legislative authority, these decisions are actually another expression of that deference. In order for these cases to reinforce his philosophy, however, we must conceptualize the dormant commerce clause as a silent Congressional statute, an interpretation known as the “silence of Congress.” This view of the dormant commerce clause argues that Congress, by being silent on a particular

55 183 United States Reports, 23 (1901) quoting 95 Tenn. 245 (1901).
subject, has implicitly passed a statute precluding state regulation of that subject. Striking down state regulation of this action through the dormant commerce, therefore, is deference to legislative authority because the Court does so by deferring to Congress’ implicit statute.

For example, the plaintiff in Asher v. Texas was arrested for using samples to solicit trade of rubber stamps and stencils in the house where he worked without a license, which was required by Texas law. The statute stated that there “shall be levied on and collected from every commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax of thirty-five dollars, payable in advance.” The plaintiff filed a writ of habeas corpus claiming that the act regulated commerce among the several states. The Court and Gray agreed and struck down the statute for regulating interstate commerce, arguing that a state restricting citizens or inhabitants of other states from selling or seeking to sell goods in their state affects the very foundation of interstate trade. Although the Court struck

---

56 128 United States Reports, 129 (1881). Similar to Asher v. Texas, the plaintiff in Brennan v. City of Titusville 153 United States Reports, 289 (1894) was arrested for violating an ordinance imposing a license tax for conducting business in the city of Titusville, PA. The Court, also similar to Asher v. Texas and joined by Gray, struck down the ordinance for regulating interstate commerce because it held that no state can levy a tax on interstate commerce in any form, whether by way of duties on the transportation, through receipts derived from that transportation, or from the business of carrying it on.

57 110, c.5, tit.4, Pen. Code Tex.
down this act through the dormant commerce clause, it nonetheless deferred to the legislative power by using Congress’ implicit statute to strike down the legislation.

This form of deference to legislative authority also appears in Corson v. Maryland, State of Minnesota v. Barber, and Illinois Central RR Co. v. Illinois. In Carson officials arrested the plaintiff for violating the Code of Maryland, which stated that “no person or corporation other than the grower, maker, or manufacturer shall barter or sell, or otherwise dispose of, or shall offer for sale, any goods, chattels, wares, or merchandise within this state, without first obtaining a license in the manner or herein prescribed.” The plaintiff, however, claimed that the Code of Maryland regulated commerce among the several states. The Court agreed and struck down the act for regulating commerce among the several states. Gray, concurring with Justice Field, agreed that the statute was unconstitutional, but argued that it was because its “charge for the privilege to the non-resident is measured by his capacity for doing business all over the United States, and [was] without any reference to the amount done or to be done in Maryland.”

The Court in State of Minnesota v. Barber dealt with a Minnesota statute proclaiming that all animal products in other states must be inspected and certified by

---

58 120 United States Reports, 502 (1887); 136 United States Reports, 313 (1890); 146 United States Reports, 387 (1893).
59 120 United States Reports, 502: 502 (1887).
60 Ibid.
a Minnesota state inspector before they can be slaughtered and shipped into Minnesota. The plaintiff, Henry Barber, claimed that the statute regulated commerce among the several states. The Court and Gray agreed and struck down the act for regulating interstate commerce and for ignoring the rights people in other states have to commerce with Minnesota and the rights of people of Minnesota to “bring into that state, for purposes of sale, sound, and healthy meat, wherever such meat may have come into existence.”

The plaintiff in Brimmer v. Rebman 138 United States Reports, 78 (1891), William Rebman, was arrested for violating a Virginia statute similar to the one invoked in State of Minnesota v. Barber. The Court in this case also struck down the statute for regulating interstate commerce. Similarly, the Court and Gray in Voight v. Wright 141 United States Reports, 62 (1894) referred to both previous decisions to strike down a similar Virginia statute; Gen. Laws Minn. 1889, p. 51, c. 8.

While the Court upheld the statute as a legitimate exercise of Illinois’ police power, Gray dissented and argued that the act regulated commerce between the several states because it revoked the

---

61 The plaintiff in Brimmer v. Rebman 138 United States Reports, 78 (1891), William Rebman, was arrested for violating a Virginia statute similar to the one invoked in State of Minnesota v. Barber. The Court in this case also struck down the statute for regulating interstate commerce. Similarly, the Court and Gray in Voight v. Wright 141 United States Reports, 62 (1894) referred to both previous decisions to strike down a similar Virginia statute; Gen. Laws Minn. 1889, p. 51, c. 8.

62 136 United States Reports, 313 (1890).

63 Similarly, the Court and Gray in Northern Pacific Ry. v. Washington 142 United States Reports, 492 (1892) struck down a state’s writ of mandamus forcing a railroad to place a station in a county seat after the railroad had decided that it would create its own town four miles away and to stop its trains there in order to make more money. The Court argued that this act was a regulation of interstate commerce.
railroad companies’ power to operate their business as they chose and because it was not passed through the state’s reserved power.

**Deference to State Legislative Authority**

Gray, however, did more than simply strike down all state legislation of commerce. He also upheld state regulations of intrastate commerce and actions that Congress had not yet regulated under its police power. Gray’s decisions in these cases fall into three categories according to the type of regulation enacted. The first group involves taxes on commerce, the second involves regulations on railroad carriers, and the third involves regulations on business activity during commerce.

The first group includes *Coe v. Errol*, *Robbins v. Shelby County Taxing District*, *Leisy v. Hardin*, *Schollenberger v. Pennsylvania* and *Pullman’s Palace-Car Co. v. Pennsylvania*. The Court in *Coe* addressed a local tax imposed by the city of Errol, New Hampshire on spruce logs owned by the plaintiff and other residents of Maine. The logs were on the banks of Errol waiting to be floated down the Androscoggin River to Maine where they would be manufactured and sold. The plaintiffs sought an abatement of the taxes because they claimed that they

---

64 116 United States Reports, 517 (1886); 120 United States Reports, 489 (1887); 135 United States Reports, 100 (1890); 171 United States Reports, 1 (1898); 141 United States Reports, 18 (1891).
regulated logs that “were in transit in market from one state to another.” The Court and Gray disagreed, however, and upheld the tax. It argued that states have the right to tax all products within its borders that have been prepared and intended for exportation to another state and all those owned by persons living in another state because states “ha[ve] jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction.”

The Court in Robbins v. Shelby County District examined a Tennessee statute which decreed that “all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein, by sample, shall be required to pay to the trustee the sum of ten dollars per week.” The plaintiff claimed that the act regulated commerce among the several states. The Court agreed and struck it down for regulating interstate commerce by taxing the “drummers” of other states. Gray, on the other hand, joined Justice White’s dissent and argued that the act was constitutional because it taxed the business itself, not the “drummers.” Moreover, he argued that it did not matter whether a citizen of the state of Tennessee or the citizen of another state conducted the business, as long as the act did not discriminate against citizens of other states.

65 116 United States Reports, 517: 517 (1886).
66 Ibid., 518.
67 Act 1881, c. 96, § 16.
In Leisy v. Hardin, the Court addressed an Iowa statute that taxed all liquor imported into the state in its original packaging.\textsuperscript{68} While the Court struck down the act for regulating interstate commerce, Gray dissented from its judgment and upheld the act as a legitimate exercise of Iowa’s police power because he argued that Congress’s right to regulate interstate commerce was paramount, but not exclusive—meaning state legislatures could regulate it in the absence of congressional laws. This case led Congress to pass the Wilson Act of 1890, which taxed all intoxicating liquors transported into a state.

In Schollenberger v. Pennsylvania, the Court examined a Pennsylvania statute that prohibited manufacturing oleomargarine in place of butter and possessing oleomargarine with an intent to sell.\textsuperscript{69} The Court struck down the act for regulating interstate commerce because it felt that the state cannot prevent the introduction of all articles in order to prevent the introduction of impure or adulterated articles. Gray, on the other hand, wrote in the Court’s minority opinion that the act did not regulate interstate commerce because the state may regulate the sale of oleomargarine within

\textsuperscript{68} Cpat. 6, tit. 11, Code 1873.
\textsuperscript{69} Similar to its decision in Schollenberger v. Pennsylvania, the Court in Collins v. New Hampshire 171 United States Reports, 30 (1898) struck down a New Hampshire statute prohibiting the sale of oleomargarine as a substitute for butter unless it is pink in color because it claimed that the act regulated interstate commerce. Gray, similar to his stance in Schollenberger, dissented from the Court, but in this decision did not offer an opinion. Also similar to Schollenberger in issue and decision, the Court and Gray in Plumley v. Massachusetts 155 United States Reports, 461 (1894) upheld a state statute prohibiting the importation of oleo–margarine; Rev. St. U.S. §3243.
its borders—even those in original packages from other states—as its legislature
deems necessary to protect the people from being induced to purchase goods that are
either not fit for consumption or that differ in nature from what they claim to be. He
also argued that the preventative measures required for the protection of the people
are entrusted to the legislative department, not to the judiciary. Moreover, he claimed
that “[t]he fact that, instead of stopping at the state boundary, they cross that
boundary in going out and coming back, cannot affect the power of the state to levy
a tax upon them.”70

The final example is Pullman’s Palace-Car Co. v. Pennsylvania, where the
Court analyzed a Pennsylvania statute that taxed portions of Pullman’s company capital
stock. 71 The plaintiffs argued that the tax regulated commerce among the several
states because it felt that its cars could be taxed only in the state of Illinois, where
it was incorporated and had its principal place of business. The Court and Gray,
however, upheld the taxes because, it argued, a state’s legislative power extends to
all property, personal as well as real, within its borders and because the taxes were
imposed equally on all corporations doing business within the state of Pennsylvania,
whether domestic foreign. Moreover, while Gray conceded that the company’s cars
within the state of Pennsylvania were engaged in interstate commerce, he nonetheless

70 141 United States Reports, 18: 21(1891).
71 May 1, 1868, No. 69,§ 5; P.L. 1868, p. 109; April 24, 1874, No. 31 § 4; P.L. 1874, p. 70; March 20, 177, No. 5, § 3; June 7, 1870, No. 122, § 4; P.L. 1877, p. 8; P.L. 1879, p. 114.
argued that “being so employed does not exempt them from taxation by the state” and that the cars were taxed not because they are engaged in interstate commerce, but because they are within the territory and jurisdiction of Pennsylvania.\textsuperscript{72}

The second category includes \textit{Wabash, St. Louis, and Pacific RR Co. v. Illinois} and \textit{Gladson v. Minnesota}.\textsuperscript{73} The issue presented to the Court in \textit{Wabash} was whether an Illinois statute that prohibited charging lower rates for longer hauls than for shorter hauls regulated commerce among the several states.\textsuperscript{74} The Court struck down the act because it argued that state regulation must confine itself to intrastate commerce regardless of whether or not there was federal legislation in the intended area. Gray, however, joined Justice Bradley’s dissent and upheld the statute. He argued that “the dealing[s] of a state with a railroad corporation of its own creation, in authorizing the construction and maintenance of its road, and the charge of fares and freights thereon, is, in its purpose, a matter entirely aside from that kind of regulation of commerce which is obnoxious to the provisions of the constitution.”\textsuperscript{75}

\textsuperscript{72} 141 United States Reports, 18: 21 (1891).
\textsuperscript{73} 118 United States Reports, 557 (1886); 166 United States Reports, 427 (1897).
\textsuperscript{74} 114 Illinois Rev. Stat. § 112.
\textsuperscript{75} 118 United States Reports, 557: 572 (1886). Using a similar rationale, Gray ruled in \textit{Dow v. Beidelman} 125 United States Reports, 680 (1880) that a state could classify interstate railroads according to the lengths of their lines and could fix varying limits for passenger fares within each class. He argued that this legislation was a constitutional exercise of the state’s police power and did not deny the plaintiff its equal protection under the law or regulate interstate commerce because legislatures have the right to classify railroads according to the amount of business they have done or appear likely to do and have full discretion on what to use in classifying railroads.
The Court in Gladson v. Minnesota examined a Minnesota statute that ordered passenger trains operating in Minnesota to stop for a sufficient length of time at each county seat to take on and discharge passengers.\textsuperscript{76} A passenger on a train operated by the St. Paul & Duluth Railroad Company challenged the statute, arguing that it was an attempt by the state to regulate interstate commerce. Gray disagreed, however, and affirmed the act in the Court’s majority opinion. He argued that it did not regulate interstate commerce because “the train in question ran wholly within the state of Minnesota” and because the statute expressly provided that it “shall not apply to through railroad trains entering this state from any other state, or to transcontinental trains of any railroad.”\textsuperscript{77}

The final category consists of Brass v. State of North Dakota.\textsuperscript{78} The Court in Brass dealt with a North Dakota statute that regulated grain warehouses and the handling of grain, and defined the duties of railroad commissioners as public warehousemen and the buildings and elevators that handled grain as public warehouses.\textsuperscript{79} The plaintiff claimed that the act regulated interstate commerce. The Court and Gray, however, ruled that the act did not regulate interstate commerce because the state legislature had the right to control the business of elevating and

\textsuperscript{76} Laws. Minn. 1893, c. 60 p. 173.
\textsuperscript{77} 166 United States Reports, 427: 429 (1897).
\textsuperscript{78} 153 United States Reports, 391 (1894).
\textsuperscript{79} “An act to regulate grain warehouses and the weighing of and handling of grain, and defining the duties of the railroad commissioners in relation thereto”
storing the grain within its borders, whether carried on by individuals or associations, because elevating and storing grain is a business affected with a public interest.

Conclusion

My research and analysis of Justice Horace Gray’s Supreme Court jurisprudence reveals that characterizations of him as a “nationalist” are far too simplistic, as well as misguided.

Labeling Justice Gray with this sweeping generalization relies upon only a select few of his numerous decisions and votes while Associate Justice of the Supreme Court and thus ignores a substantial part of his decisions, most notably those where Gray favored state governments over the federal government. Moreover, condensing Gray’s entire judicial career into a single, abstract characterization overlooks the intricacies of his judicial thought and reasoning, both highly admired by his fellow justices.

This paradigmatic characterization also misconstrues Gray’s support of the federal government in certain decisions as an indicator of “nationalism.” My jurisprudential analysis reveals, however, that these decisions are actually an expression of his judicial philosophy of deference to legislative authority. Specifically, I found that Gray consistently and repeatedly deferred to the legislative power in cases between the
national and state governments, as well as between state legislatures and individuals and between Congress and the country as a whole.

These decisions and my proposed judicial philosophy, I argue, demonstrate the need for a more complex and accurate biographical framework for Justice Gray’s jurisprudence. Accordingly, I urge biographies of Justice Horace Gray to adopt the term “legislative power” to describe his Supreme Court jurisprudence and to orient their descriptions of him around this revised judicial philosophy because I believe that this term not only incorporates far more of his decisions and opinions, but that it is also a far more accurate characterization of his jurisprudence than the term “nationalism.”

Bibliography

Sources Cited

Articles

Books


United States Supreme Court Cases

*United States v. Lee* 106 U.S. 196 (1882)

*Julliard v. Greenman* 110 U.S. 421 (1884)

*Ex Parte Yarbrough* 110 U.S. 651 (1884)

*Head v. Amoskeag Manufacturing* 113 U.S. 9 (1885)

*Coe v. Errol* 116 U.S. 517 (1886)
Wabash, St. Louis and Pacific Railway Co. v. Illinois 118 U.S. 557 (1886)

Carson v. Maryland 120 U.S. 562 (1887)

Robbins v. Shelby County Taxing District 120 U.S. 489 (1887)

Gibson v. Shufeldt 122 U.S. 27 (1887)

Dow v. Beidelman 125 U.S. 680 (1888)

Spencer v. Merchant 125 U.S. 345 (1888)

Powell v. Pennsylvania 127 U.S. 678 (1888)

Asher v. Texas 128 U.S. 129 (1888)

Chae Chan Ping v. United States 130 U.S. 581 (1889)

Leisy v. Hardin 135 U.S. 100 (1890)

Minnesota v. Barber 136 U.S. 313 (1890)

Brimmer v. Rebman 138 U.S. 78 (1891)

Pullman v. Pennsylvania 141 U.S. 18 (1891)

Voight v. Wright 141 U.S. 62 (1891)

Massachusetts v. Western Union Telegraph Company 141 U.S. 40 (1891)

Northern Pacific Railway v. Washington 142 U.S. 492 (1891)

Budd v. New York 143 U.S. 517 (1892)

Logan et al. v. United States 144 U.S. 263 (1892)
Interstate Commerce Commission v. Baltimore & O.R. Co. 145 U.S. 263 (1892)


Fong Yue Ting v. United States 149 U.S. 698 (1893)

Brennan v. Titusville 153 U.S. 289 (1894)

Brass v. Stoeser 153 U.S. 391 (1894)

Lawton, et al. v. Steele 152 U.S. 133 (1894)

Plumley v. Massachusetts 155 U.S. 461 (1894)

Cincinnati v. ICC 162 U.S. 184 (1896)

Texas v. ICC 162 U.S. 197 (1896)

St. Louis RR v. Mathews 165 U.S. 1 (1896)

Gladson v. Minnesota 166 U.S. 427 (1897)

ICC v. Cincinnati 167 U.S. 479 (1897)


Holden v. Hardy 169 U.S. 366 (1898)

Collins v. New Hampshire 171 U.S. 30 (1898)

Schollenberger v. Pennsylvania 171 U.S. 1 (1898)

Nicol v. Ames 173 U.S. 509 (1899)

Knoxville Iron Co. v. Harbison 183 U.S. 13 (1901)
Dayton Coal and Iron v. T.A. Barton 183 U.S. 23 (1901)

Dugger v. Mechanics' & T. Ins. Co. 92 Tenn. 245 (1901)

Sources Consulted

Books

Cushman, Clare, ed. 1993. The Supreme Court Justices: Illustrated Biographies, 1789-


King, Willard, L. 1950. Melville Weston Fuller, Chief Justice of the United States, 1888-


Semonche, John E. 2005. “Gray, Horace” The Oxford Companion to the Supreme Court


Articles


United States Supreme Court Cases
Spring Valley Water-Works v. Schottler 110 U.S. 347 (1884)

Chicago RR v. Minnesota 134 U.S. 418 (1890)

Chicago, Milwaukee v. Artery 137 U.S. 507 (1890)

U.S. v. E.C. Knight 156 U.S. 1 (1895)

Reagan v. United States 157 U.S. 301 (1895)

Allgeyer, et al. v. Louisiana 165 U.S. 578 (1897)

United States v. Trans-Missouri Freight Association 166 U.S. 290 (1897)

United States v. Wong Kim Ark 169 U.S. 649 (1898)

United States v. Joint Traffic Association 171 U.S. 505 (1898)

St. Louis v. Paul 173 U.S. 404 (1899)

Addyston Pipe v. United States 175 U.S. 211 (1899)