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Book Review

Let Us Now Praise Infamous Men


Reviewed by Stephen A. Siegel*

I. Introduction

During Melville Weston Fuller's tenure as Chief Justice,¹ the Supreme Court handed down more than its share of infamous opinions. Plessy v. Ferguson,² legitimizing racial segregation, and Lochner v. New York,³ voiding maximum hours legislation, are among the most execrated decisions in the Court's entire canon.⁴ United States v. E.C. Knight Co.,⁵

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‡ Hereinafter cited by page number only. This book is the eighth volume in a series of works entitled History of the Supreme Court of the United States. It is being prepared by the Permanent Committee for the Oliver Wendell Holmes Devise, which was created by an act of Congress in 1935 and is being funded in part by the estate of Mr. Justice Oliver Wendell Homes, Jr. James H. Billington, Foreword, at p. xv.
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¹ Melville Fuller was appointed to the Supreme Court as Chief Justice in 1888 by President Grover Cleveland. He served in that capacity until his death in 1910. P. 22.
² 163 U.S. 537 (1896).
³ 198 U.S. 45 (1905).
⁵ 156 U.S. 1 (1895).
proscribing federal regulation of inmanufacturing, *Pollock v. Farmers' Loan & Trust Co.* ⁶ prohibiting federal income taxes, and *Patterson v. Colorado ex rel. Attorney General*,⁷ upholding criminal contempt charges against a newspaper publisher for printing articles criticizing state court decisions, are only slightly less disparaged and spurned.⁸ The Fuller Court also gave us cases like *Hans v. Louisiana*,⁹ extending the states' Eleventh Amendment immunity to suits brought by their own citizens, and *The Chinese Exclusion Case*¹⁰ allowing Congress arbitrary power over immigrants, which still governs us today despite massive criticism.¹¹ Can anything good be said about the Court that gave us this parade of horribles?

Owen Fiss says yes in an extended study that both delights and disappoints. The delights, mainly for the general reader, are that the book lucidly recounts a myriad of complex developments in disparate areas of constitutional law and suffuses them with an interpretive theme that captures current historical thinking about the Fuller Court. Fiss disputes the traditional account of the Court, which presents it as "out of step with the rest of our judicial history," and as "simply using [its] power to further class interests."¹² Fiss says the Fuller Court "should be understood as an institution devoted to liberty and determined to protect that particular constitutional ideal from the social movements of the day."¹³

In addition, Fiss breaks new ground in focusing throughout his study on Associate Justices David Brewer and Rufus Peckham. These neglected Justices,¹⁴ he asserts, are important figures in our constitutional history,
the “true leaders”\textsuperscript{15} of the Fuller Court, “influential within [its] dominant coalition and the source of the ideas that gave the Court its sweep and direction.”\textsuperscript{16} In Fiss’s account, resuscitating the reputation of the Fuller Court necessarily involves resuscitating the reputations of these two Justices, who in the past were noticed only to be maligned.\textsuperscript{17}

The disappointments are mainly for the historian. Fiss has written an old-fashioned legal history, composed almost entirely of close readings of cases leavened with just a dash of analysis of developments outside the Court.\textsuperscript{18} Unlike other Holmes Devise historians, he does not draw from archival or other hard-to-find primary material.\textsuperscript{19} And, in large measure, Fiss asserts an accepted, rather than a pathbreaking, thesis. Furthermore, his novel claim about Justices Brewer and Peckham does not withstand scrutiny.\textsuperscript{20} Most fundamentally, however, Fiss disappoints because his general theme—that the Fuller Court was genuinely, not just rhetorically, committed to protecting the constitutional ideal of liberty—is not new. Fiss announces his theme as if it were innovative, indeed, as if it were a personal discovery,\textsuperscript{21} yet Fiss’s paradigm for the Fuller Court is the new standard history of the period. First stated in the mid-1960s, this revised history coalesced over a decade ago.\textsuperscript{22} Although Fiss’s book is a

\textsuperscript{15} Leon Friedman & Fred L. Israel eds., 1969 (recounting, with a bibliography, a brief biography of Justice Brewer); Richard Skolnik, Rufus Peckham, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, supra, at 1685-1703 (setting forth, with a bibliography, a brief biography of Justice Peckham). Fiss also wrote about Brewer previously in Owen M. Fiss, David J. Brewer: The Judge as Missionary, in THE FIELDS AND THE LAW 53-63 (1986).

\textsuperscript{16} P. 37.

\textsuperscript{17} See, e.g., ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, at 70-72, 89 n.14 (1960) (noting Brewer’s lack of restraint on and off the bench); id. at 72-74 (observing that in an important opinion, then-New York Court of Appeals Judge Peckham “ignored” United States Supreme Court precedent).

\textsuperscript{18} Fiss focuses on events outside the Court, pp. 37-45, and discusses a speech Brewer gave before the New York State Bar Association in Albany, pp. 53-57. On occasion, Fiss draws from these analyses, and, like Napoleon’s “whiff of grapeshot,” gets a lot of advantage from them. See, e.g., p. 339 (comparing Brewer’s Albany speech to his later concurring opinion in United States ex rel. Turner v. Williams, 194 U.S. 280, 295 (1904)). The book does not immerse itself in extra-legal material in order to shed light on legal developments as many current legal histories do. See, e.g., HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937, at 6 (1991) (discussing the interplay between economic theory and legal history); James May, Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918, 50 OHIO ST. L.J. 257, 260-61 (1989) (noting how the political and economic theories of the Gilded and Progressive Eras shaped antitrust jurisprudence).

\textsuperscript{19} On the other hand, Fiss provides more references to the secondary literature than is typical for studies in the Holmes Devise series.

\textsuperscript{20} See infra Part III.

\textsuperscript{21} See, e.g., p. 12 (“I labor uneasily against a scholarly tradition . . . .”)

\textsuperscript{22} The new paradigm’s roots trace back to Alan Jones’s scholarship in the mid-1960s. See Alan Jones, Thomas M. Cooley and the Interstate Commerce Commission: Continuity and Change in the Doctrine of Equal Rights, 81 POL. SCI. Q. 602, 602, 629 (1966) (arguing that Cooley has been
“benchmark study of the Fuller Court,”23 as Holmes Devise editor Stanley Katz says, this is true only because of the book’s breadth. No single work has traced the new standard history into so many areas.

Yet, the overall point remains: The traditional view of the Fuller Court already has been overthrown, and the Fuller Court already has a new standard history. Fiss’s thesis is more orthodox than original. Historians, I believe, are interested less in seeing the revised history rediscovered and propounded anew (even if comprehensively), than in considering refinements and revisions.

In this Review, I will describe Fiss’s book and recount his rendering of the new orthodoxy. Then I will refute his claims regarding Justices Brewer and Peckham, as a step towards refining what is now the conventional wisdom regarding the Fuller Court. Fiss and most proponents of the new standard history tend to depict the Court as united in its defense of traditional norms of liberty. Although I agree with this general claim, in this Review I will emphasize the Court’s divisions and the modern aspects of its decisions in order to suggest a more complex, transitional nature of the Fuller Court. I close with a discussion of why Fiss wrote the book he did.

Whatever my criticisms, Fiss’s book is engaging and rewarding. Consummately explicating doctrinal development and judicial debate, it embraces the new standard history of the Fuller Court, elucidating the paradigm from which further research should proceed. The book is for anyone interested in a perceptive, comprehensive overview of the Fuller Court.

II.

Fiss’s Vision of the Fuller Court

By and large, Fiss does three things in his book. He describes the Fuller Court’s decisions, presents the Court as united in its defense of

23. Stanley N. Katz, Editor’s Foreword, at p. xvii. It is a benchmark also because the Fuller Court is so rarely studied as a Court. CURRIE, supra note 8, at 5 n.28.
constitutional liberty, and rejuvenates the reputation of two Justices, Brewer and Peckham, crediting them with being the leaders of the Fuller Court.

A. Fiss's Description of the Fuller Court Decisions

Fiss does not exhaustively consider the Fuller Court's work product. He does not consider its private law opinions, although they include important corporate-law decisions during a time when corporations were in the midst of significant development. Nor does he consider many areas of constitutional law in which the Court's work was significant. Yet Fiss's inquiry is broad in scope, considering a plethora of cases with constitutional dimensions.

Fiss opens his study with a chapter entitled "The Identity of the Institution," succinctly describing the Court's personnel, the social and political currents swirling around the Court, and the Court's overall response to those currents. In considering the Court's personnel, Fiss swiftly sorts through the twenty men who served on the Court between 1888 and 1910, and identifies a bloc of ten Justices, mostly appointed by Presidents Cleveland and Harrison, "who largely shared the same basic premises and outlook," and who "remained in power for most of the twenty-two years of Fuller's chief justiceship." Just as swiftly, but rather superficially, Fiss describes the rapid succession of social movements—"[p]opulism, imperialism, [and] progressivism"—that shaped the Court's agenda. These movements generated substantially different issues for the Court. "Yet," Fiss says, "all three movements brought to the fore the single issue that unified the Court's work: the scope of governmental power." Recovering the Fuller Court's conception of governmental power, which correlative defined its conception of constitutional liberty, forms the bulk of Fiss's analysis.

Fiss begins his account of the Fuller Court's view of governmental power and constitutional liberty by considering In re Debs, the labor
injunction case, and *Pollock v. Farmers' Loan & Trust Co.*,\(^{31}\) the income tax case, in a section entitled "Class Conflict and the Supreme Court."\(^{32}\) He uses this section to demonstrate the Court's commitment to an expansive judicial power, which served to preserve its conception of the social order from private as well as governmental challenges. Having introduced these themes, Fiss turns to the Court's "Response to Progressivism," in which he analyzes the course of decisions on antitrust, labor legislation, and railroad-rate regulation.\(^{33}\) The following section on "The Concept of the Nation" comprises two chapters. The first dissects the *Insular Cases,*\(^{34}\) the seminal cases determining whether there were constitutional limits on congressional power over America's new colonial empire.\(^{35}\) The second focuses on the struggle over state prohibition laws as a platform to discuss the Fuller Court's development of the dormant commerce clause.\(^{36}\) The book concludes with a section entitled "Liberty Dishonored," which discusses procedural due process, free speech, and race relations.\(^{37}\)

Fiss's recounting of decisions and doctrinal areas is marvelous. He is a consummate prose stylist who describes complex doctrinal development and abstruse arguments between the Justices engagingly and lucidly. I was never (well, hardly ever) confused or uninterested. In discussing, for example, the *Pollock* decision voiding the federal income tax, Fiss explains the easily confounded distinction between a direct and indirect tax and its importance to the federal structure as conceived by the Founders. He explains also how that distinction lost its relevance to the generation coming of age in the late nineteenth century and the problem the Court created by locating its decision in the anachronistic difference between direct and indirect taxes rather than in principles of current importance.\(^{38}\) Fiss's discussion of procedural due process becomes a lens for looking at the Court's (and the nation's) shameful treatment of Chinese immigrants.\(^{39}\) This narrative technique, which elucidates doctrinal development through a single, on-going substantive controversy, sacrifices

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34. The *Insular Cases* refers to a group of cases argued together: Dooley v. United States, 183 U.S. 151 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Dooley v. United States, 182 U.S. 222 (1901); and De Lima v. Bidwell, 182 U.S. 1 (1901). Fiss expands his analysis to include other related cases. See p. 226 n.1.
37. Pp. 293-385. The chapter on race relations is evocatively titled "*Plessy, Alas.*" P. 352.
38. Pp. 87-100.
coverage of the Court’s important criminal-procedure decisions. The sharpened focus, however, more than compensates for its shortcomings. Through this device, Fiss is able to tell part of the procedural due process story through the eyes of the participants, while at the same time rendering the interstices of intricate legal argument and doctrinal developments understandable to the modern reader. Simply put, the book is a very good read, filled with superb analyses of the Court’s opinions on a wide range of topics.

B. Fiss’s Rendering of the New Standard History—The Fuller Court, Defenders of Liberty

Fiss’s masterful description of doctrinal development is the medium through which he delineates and substantiates a vision of the Fuller Court. In his view, the Court strove to define the bounds of the modern state so that traditional notions of liberty and order might survive onslaughts from both the private and public spheres. “Liberty,” he says, “was the guiding ideal of the Fuller Court, the notion that gave unity and coherence to its many endeavors.” This view is the currently accepted account of the Fuller Court.

In the aftermath of the New Deal, a generation of historians developed a standard history of the Fuller Court. According to these historians, the Justices who served on the Fuller Court were “among the worst,” an “arm of the capital-owning class,” whose “rhetoric about liberty and due process . . . [was] cant, a subterfuge designed to camouflage other purposes.” In deciding cases, these historians said, the Fuller Court Justices departed from constitutional text and tradition and improperly read their property-oriented, laissez-faire values into the Constitution.

Over the past thirty years, a younger generation of historians has rebutted this image, portraying the Fuller Court as sincerely dedicated to preserving constitutional liberties. The Court, they say, was “not an embarrassment but part of a long heritage of protection for liberty, as it has

40. Some of the more important decisions include: Weems v. United States, 217 U.S. 349 (1910) (concluding that disproportionate sentencing may violate the prohibition against cruel and unusual punishment); Twining v. New Jersey, 211 U.S. 78 (1908) (holding that the Fifth Amendment’s privilege against self-incrimination does not apply against the states); Maxwell v. Dow, 176 U.S. 581 (1900) (holding that 12-member criminal juries are not required by either the Privileges or Immunities Clause or the Due Process Clause, U.S. CONST. amend. XIV, § 1); In re Kemmler, 136 U.S. 436 (1890) (concluding that the death penalty is not cruel and unusual punishment).
41. P. 389.
42. P. 3.
43. Benedict, supra note 22, at 293 (quoting Arthur S. Miller, Toward a Definition of “The” Constitution, 8 U. DAYTON L. REV. 633, 647 (1983)).
44. Id.
been understood by Americans at different times in our history."45 These revisionist historians have developed a new standard history of the Fuller Court, one in which the Court's decisions emerge from traditions deeply rooted in the American Constitution.

Fiss concurs with the revisionists. His book is a "tightly organized, highly interpretive"46 monograph dedicated to defining clearly the Court's overarching theory of liberty by tracing it into decisions in disparate areas of constitutional law. According to Fiss, the Fuller Court "understood the need for order and control and for the state to monopolize the means of force. Their commitment was to 'ordered liberty,' a phrase Justice Cardozo later coined to denote a middle area lying somewhere between anarchism and absolutism."47 The Court drew its concept of liberty from Lockean social contract theory.48 "Contractarianism," Fiss says, "shaped their conception of liberty as the summum bonum of the Constitution and as the value threatened by all that they saw around them."49 To the Justices on the Fuller Court, contractarianism meant that "political authority [was] analogous to that of a voluntary association—as though the state were a very special kind of club."50 Government was "constitutive" rather than "organic."51

As explained by Fiss, organic authority "emerges from the social relationship and thus seems natural or intrinsic to it," while constitutive authority "is artificially or deliberately created to serve discrete ends."52 Both organic and constitutive authority have limits. The limits on organic authority "are usually few and arise from sources extraneous to the processes by which the authority is created."53 In contrast, constitutive authority is bounded by extraneous sources and by constraints "arising from the very reasons for which that authority is created."54 Constitutive governments have both extrinsic and intrinsic limits. The special force of intrinsic limits is that they "confine the activities of the association to the specific purposes for which it was [established]."55

The national government of the United States is, of course, the paradigmatic example of a constitutive government, "an artificially created

45. Id. at 298. See also supra text accompanying notes 12-13.
46. Stanley N. Katz, Editor's Foreword, at p. xvii.
47. P. 46 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
48. See p. 46 (explaining that the Justices believed in a conception of "liberty" limited by the social contract hypothesized by Locke rather than an extreme and anarchic "liberty").
49. P. 46.
50. P. 158.
52. P. 158.
53. P. 158.
54. P. 159.
55. P. 159.
instrumentality intended to serve a discrete and finite set of purposes,"\textsuperscript{56} such as regulating interstate commerce, maintaining post roads, and tending to foreign affairs. However, under social contract theory, the state governments of the United States also are artificial, constitutive authorities. They have limited purposes and must keep within the purposes for which the people established them.

All this is well known. Conventional wisdom holds that John Locke taught that people in the state of nature organized government to protect their life, liberty, and property and that life, liberty, and property are prior to, independent of, and privileged over state power.\textsuperscript{57} Fiss's contribution lies, in part, in stating clearly the legal analysis by which the Fuller Court fulfilled the social contract ideal. Rather than defining life, liberty, and property and saying the state could not interfere with them, the Fuller Court defined the powers of government by the purposes for which they were created. Liberty of contract, that central doctrine of Fuller Court constitutionalism,

was . . . not a principle from which limits on state power were derived, but rather the space or area left to the individual after the reasons for the creation of state power were exhausted. Liberty of contract was what remained to the individual after the state reached the outer bounds of its authority.\textsuperscript{58}

With state power, as with federal power, constitutional liberties depended upon the definition of governmental power (which turned upon the reasons for governmental power). The Court reasoned from governmental power to civil liberties, not from civil liberties to governmental power. Although life, liberty, and property were prior to governmental power, understanding Fuller Court analysis requires inverting the order. In adjudicating any governmental initiative, the Fuller Court did not ask whether it invaded liberty, but asked whether it was within a power that the branch of government properly had.

Fiss's second contribution lies in tracing this conception into a number of disparate areas of constitutional law, using it as the organizing principle of his entire book. As other scholars have noted, the Court used "constitutive state" theory in deciding industrial regulation cases.\textsuperscript{59} When

\textsuperscript{56} P. 159.

\textsuperscript{57} H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 56 (1993).

\textsuperscript{58} P. 159.

\textsuperscript{59} See, e.g., Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940, 3 RES. L. & SOC. 3, 7, 9-14 (1980) (arguing that a form of legal thought premised on the idea that "the legal system consisted of a set of institutions, each of which . . . had been delegated by the sovereign people a power to carry out its will, which was absolute within but void outside its sphere" had "flourished between 1885 and 1940," and citing Peckham's and Harlan's opinions in an industrial regulation case as examples).
regulatory laws were challenged as a denial of due process, the question in each case was whether the legislation was within the state's police power. To the Fuller Court Justices, liberty of contract was not absolute. Legislation compatible with the purposes for which the police power existed was not an invasion of contractual freedom. To the Fuller Court Justices, liberty of contract was not absolute. Legislation compatible with the purposes for which the police power existed was not an invasion of contractual freedom.60

Fiss traces this analysis into antitrust litigation. Applications of the Sherman Act, Fiss notes, raised two questions: First, was the Sherman Act an invasion of the powers of the states? and second, was it an invasion of the citizens’ liberty of contract?61 He shows that the Court answered both questions by turning to the federal Commerce Clause. Because the national government had been given power to regulate interstate commerce, state power and individual freedom were residues of whatever the power to regulate interstate commerce encompassed. As Justice Peckham wrote in Addyston Pipe & Steel Co. v. United States,62 “we think . . . the liberty of the citizen is . . . limited by the commerce clause of the Constitution.”63 And as Fiss says:

[T]he Commerce Clause [was] central for resolving the liberty of contract or substantive due process issue, because once it was decided that by virtue of the power vested in it by the Commerce Clause, Congress was entitled to [prohibit the activity at bar] . . . there could be no protected liberty interest . . . .64

To Peckham and his followers, liberty of contract was “a residual category, consisting of the prerogatives left to the individual after the limits of governmental authority have been exhausted.”65

Fiss also traces this style of analysis into the income tax cases, explaining that the Fuller Court “viewed the direct tax provision as an important part of the contractual arrangement through which the [federal] power of taxation was simultaneously created and limited.”66 Fiss uses similar analysis when he discusses the litigation that tested the limits of

60. See pp. 158, 158-72 (highlighting the decisions of the Fuller Court in which the Justices tried “to identify the bounds within which the social contract allowed the legislature to operate”).
61. Pp. 117-29. James May has previously made this point. See May, supra note 18, at 305-09 (discussing various Supreme Court antitrust opinions that considered the tension between a state's police powers and individual rights such as freedom of contract); see also James May, Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918, 135 U. Pa. L. Rev. 495, 536-37 (1987) (discussing the general failure of Contracts-Clause-based challenges to state antitrust statutes in cases before the Supreme Court and various state courts).
62. 175 U.S. 211 (1899).
63. Id. at 229.
64. P. 128.
66. P. 91.
federal power over Chinese immigrants. With regard to these latter cases, Fiss argues that the Chinese litigants’ inability to claim citizenship (and its concomitant constitutional privileges and protections) explains why the Court allowed the federal government nearly unlimited power over them. He then perceptively charts the Court’s altered perspective and its increasing willingness to afford Chinese immigrants procedural protections. After 1898, it was possible for a Chinese litigant to be a citizen entitled to the full panoply of rights.

Only the race relations cases involving American blacks give Fiss pause. Plessy v. Ferguson causes Fiss to wonder whether Justice Brown, who wrote for the Court, “genuinely believed blacks were members of the constitutional community, fully entitled to the protection of liberty and all that it implied.” Despite this realpolitik, Fiss points out that Brown “spoke for the Court” in Plessy and formally, at least, pursued a conventional analysis that “ascertain[ed] the purpose of the legislation” at bar, decided “whether that purpose was allowed the state under the police power, and finally ... determine[d] whether the relationship between means and end was sufficiently direct.” This was the same mode of analysis that Harlan used in his famous dissent. In Brown’s view, given the “established usages, customs and traditions of the people,” the statute promoted the permissible state purpose of “preserv[ing] . . . public peace and good order,” while in Harlan’s view, the statute promoted the impermissible purpose of “favor[ing] one group (whites) over another (blacks).” Brown and Harlan, Fiss concludes, disagreed about the application of the same “contractarian framework.” In Fiss’s analysis, both Brown’s and Harlan’s opinions were essays describing constitutional liberty as the sphere of human activity beyond the state’s

67. P. 300.
68. Pp. 300-03. Legislation denied the Chinese the opportunity to become naturalized citizens. P. 300. It was not until the Court’s decision in United States v. Wong Kim Ark, 169 U.S. 649, 694 (1898), holding that the 14th Amendment conferred citizenship on Chinese born in the United States, that any Chinese could claim admission to the American community.
70. Pp. 315 (noting that once the Chinese became part of the constitutional community, they were able to invoke the “protection of liberty”).
71. 163 U.S. 537 (1896).
72. P. 364; see also p. 361 (insisting that the Court in Plessy “found no infringement of liberty, as though blacks were not members of the constitutional community and the Civil War and the amendments it produced had never been”).
73. P. 364.
74. P. 361.
76. P. 365 (quoting Plessy v. Ferguson, 163 U.S. 537, 550 (1896)).
77. P. 363.
police power. Despite their great differences, Harlan and Brown shared the same fundamental perspective on constitutional law.\textsuperscript{79}

C. Fiss's Addition to the New Standard History—David Brewer and Rufus Peckham, Leaders of the Fuller Court

As a complement to his general thesis, Fiss argues a second theme: David Brewer and Rufus Peckham were the "true leaders" of the Fuller Court.\textsuperscript{80} Perhaps Fiss, who participated in the civil rights movement and is an ardent defender of judicial activism on behalf of civil rights,\textsuperscript{81} is intent on demonstrating that in history, people do make a difference.\textsuperscript{82} Whatever the reason, Brewer and Peckham's leadership is an ever-present \textit{leitmotif} in Fiss's account of the Fuller Court. He never misses an opportunity to stress their importance, even remarking, after noting "the odd coincidence"\textsuperscript{83} of Brewer's and Peckham's deaths just months before Fuller's, that "[i]t is almost as though Fuller could not go on without them."\textsuperscript{84}

Early in the book, Fiss asserts that within the Fuller Court, there was a unified bloc that controlled the Court for most of Fuller's tenure.\textsuperscript{85} Fiss sees Brewer and Peckham as the most influential Justices within the

\textsuperscript{79} Fiss also traces the Court's reason for upholding labor legislation benefiting women to the view that women were not full members of the constitutional community and not as protected from the state. See pp. 174-79 (discussing Muller v. Oregon, 208 U.S. 412 (1908)).

At this point, I could improve Fiss's analysis only by suggesting its extension into the area of free speech. Arguably, the analysis would be that the police power encompassed the authority to regulate speech that had some tendency to cause breaches of the peace or incite criminal acts. Criminalizing such speech did not offend the freedom of speech. Free speech, like liberty, was a residue of the police power. See Gitlow v. New York, 268 U.S. 652, 667, 667-70 (1925) ("That a state in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."); Whitney v. California, 274 U.S. 357, 371-72 (1927) (citing the holding in \textit{Gitlow}).

\textsuperscript{80} P. 33. Fiss seems to favor Brewer as preeminent between the two leaders. Perhaps it is because he finds Brewer more eloquent than Peckham, more prone to defend his and the Court's position off the bench, and closer to Chief Justice Fuller. Whatever the reason, Fiss more frequently focuses on Brewer's influential role. See, e.g., \textit{infra} text accompanying notes 90-91 (discussing Fiss's assessment of the significance of Brewer's "Albany Speech").

\textsuperscript{81} See, e.g., pp. 393, 11-12, 19-21, 392-95 (claiming that Brown v. Board of Educ., 347 U.S. 483 (1954) and its progeny gave us reason to believe that state activism was a constitutional duty").

\textsuperscript{82} See pp. 28, 118, 278 (attributing important developments in the Supreme Court's doctrine to changes in the Court's personnel). Consider also that Fiss chose as the frontispiece to the book a quote from Tolstoy: "Many historians assert that the French failed at Borodino because Napoleon had a cold in his head." P. ix (quoting \textit{LEO TOLSTOY, WAR AND PEACE} 874 (Louise Maude & Aylmer Maude trans., 1942) (1869)).

\textsuperscript{83} P. 36.

\textsuperscript{84} P. 37.

\textsuperscript{85} P. 35.
dominant coalition\textsuperscript{86} and as the Justices who "formulate[d] and expound[ed] the ideas that gave this segment of the Court's history its distinctive character."\textsuperscript{87} Of course, Fiss adds that "[t]hese ideas were neither unique nor original to Brewer and Peckham (indeed, no Justice in American history could claim or even would want to claim such originality), but Brewer and Peckham gave these ideas their fullest and perhaps most authoritative expression."\textsuperscript{88}

Fiss never proves this claim through direct evidence, such as statements by fellow Justices about Brewer and Peckham's role and influence.\textsuperscript{89} Rather, he continually asserts and illustrates it through a variety of devices. For example, he prefaces his exploration of the Court's decisions with an analysis of the speech Brewer gave before the New York State Bar Association in 1893 and draws from that speech through the remainder of the book to explicate judicial developments.\textsuperscript{90} In Fiss's view, that speech "provides a key to understanding . . . much of the Supreme Court's work."\textsuperscript{91} Fiss also builds up Brewer's and Peckham's statures by denigrating the abilities of the other members of the Court's governing coalition. Of the eight other Justices in the coalition, Field was senile; Gray was too pedantic; Harlan was too independent; and Brown, Fuller, McKenna, Shiras, and White too ordinary.\textsuperscript{92} Brewer and Peckham, Fiss says, simply "stood out,"\textsuperscript{93} and Chief Justice Fuller buttressed a warm personal regard for them\textsuperscript{94} by allowing them to speak for the Court in many major cases.\textsuperscript{95}

\begin{itemize}
\item \textsuperscript{86} P. 33.
\item \textsuperscript{87} P. 37.
\item \textsuperscript{88} P. 33.
\item \textsuperscript{89} But see p. 187 (presenting a quote in which Harlan intimated that Brewer was influential).
\item \textsuperscript{90} Pp. 53-57; see also p. 411 (noting in an index entry Fiss's many references to Brewer's "Albany Speech").
\item \textsuperscript{91} P. 53. The quoted language continues with language limiting its use to understanding the Court in the 1890s. However, Fiss returns to the speech throughout the book, presenting it as the key to understanding the Court's work in diverse areas of law throughout the period.
\item \textsuperscript{92} P. 31. One might dispute his assessment of White, whose prolix writing style disguised a substantial and original intellect that influenced the Court on a variety of issues. See pp. 148-51 (describing White's influence on the Court's Sherman Act doctrine), 241-45 (noting the influence of White's theory of the incorporation of territories), 279-81 (acknowledging White's cleverness in constructing a coalition within the Court to oppose the Prohibition movement), 288-91 (describing White's role in upholding a federal prohibition on the distribution of alcohol against constitutional challenge); ALEXANDER BICKEL & BENNO SCHMIDT, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, at 38-39 (1984) (discussing Holmes's opinion of White as a "profound thinker"); CURRIE, supra note 8, at 68-70, 81 (noting that White raised provocative objections to Holmes's interpretation of the Full Faith and Credit Clause).
\item \textsuperscript{93} P. 32. Holmes's intellect certainly stood out, but he entirely rejected the coalition's premises and was not a member of it. Pp. 35-37.
\item \textsuperscript{94} P. 34; WILLARD KING, MELVILLE WESTON FULLER 191 (1950).
\item \textsuperscript{95} P. 33.
\end{itemize}
Most of all, Fiss argues his claim by continually pointing to their role in the Court’s work product and internecine arguments. While Fiss’s analysis of the Court’s body of decisions is too substantial to summarize here, a mere listing of Brewer’s and Peckham’s opinions for the Court in major cases is impressive. Brewer, for example, wrote *In re Debs,*\(^{96}\) legitimizing the labor injunction; *Reagan v. Farmers’ Loan & Trust Co.,*\(^{27}\) the first case enjoining state-mandated railroad rates; *ICC v. Cincinnati, New Orleans & Texas Pacific Railway,*\(^{98}\) construing the Interstate Commerce Act to prevent the Commission from regulating interstate railroad rates; and *Muller v. Oregon,*\(^{99}\) upholding state legislation setting maximum hours for women. Peckham, in turn, wrote *United States v. Trans-Missouri Freight Ass’n,*\(^{100}\) *United States v. Joint Traffic Ass’n,*\(^{101}\) and *Addyston Pipe & Steel Co. v. United States,*\(^{102}\) all of which revitalized the Sherman Antitrust Act and expanded federal commerce clause jurisdiction;\(^{103}\) *Lochner v. New York,*\(^{104}\) the landmark case overturning labor legislation on freedom-of-contract grounds; and *Ex parte Young,*\(^{105}\) upholding federal injunctive proceedings against a state official despite the Eleventh Amendment’s proscription against suing states in federal court.\(^{106}\)

These judges were also leaders, Fiss asserts, because even when they did not speak for the Court, their influence was felt. Brewer’s dissents in the rate-regulation and immigration cases, in Fiss’s view, were influential in redirecting the Court and expressed positions to which the Court eventually hewed.\(^{107}\) Brewer and Peckham, Fiss says, maintained such

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96. 158 U.S. 564 (1895).
97. 154 U.S. 362 (1894).
98. 167 U.S. 479 (1897).
100. 166 U.S. 290 (1897).
101. 171 U.S. 505 (1898).
102. 175 U.S. 211 (1899).
103. *See Addyston Pipe & Steel,* 175 U.S. at 228 (“The power to regulate interstate commerce is . . . full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts . . . from the jurisdiction of that body.”); *Joint Traffic Ass’n,* 171 U.S. at 571 (“The prohibition of . . . contracts [in restraint of trade] may in the judgment of Congress be one of the reasonable necessities for the proper regulation of commerce, and Congress is the judge of such necessity and propriety.”); *Trans-Missouri Freight Ass’n,* 166 U.S. at 343 (“Congress having the control of interstate commerce, has also the duty of protecting it.”).
104. 198 U.S. 45 (1905).
106. In his biography of Fuller, Willard King compiled tables showing that Brewer wrote 536 opinions for the Fuller Court and that Peckham wrote 309. Only Fuller wrote more than Brewer, with a total of 840. The Justices who wrote fewer than Brewer but more than Peckham were Harlan, Brown, and White with 471, 452, and 370 opinions respectively. *King,* supra note 94, at 339.
107. Pp. 190-93, 311-13, 321-22; *see also infra* subpart III(A) (discussing the rate regulation cases).
influence over their brethren that “even in dissent their views were central. They set the terms of the debate, and . . . over time their dissenting positions often achieved majority status.” 108

III. Were Brewer and Peckham the Leaders of the Fuller Court?

Fiss’s novel position on Brewer and Peckham’s influence is intriguing and elegantly argued. Nevertheless, I am not persuaded. Brewer and Peckham were interesting, articulate, and significant figures who deserve better reputations than they have acquired. They were important members of the Court’s governing coalition who labored conspicuously to defend constitutional liberty through “constitutive state” analysis. Nevertheless, Fiss overstates, and somewhat misconceives, their role when he promotes them as the Court’s “true leaders,” 109 crediting them with voicing its dominant ideas earlier or better than their brethren, forming its majorities, and giving the Court direction.

In this Part, I will demonstrate that Brewer and Peckham did not lead the Court by showing how frequently they advanced ideas that were spurned by the majority in the centrally important disputes over rate regulation, antitrust, and labor legislation. Indeed, Brewer and Peckham led, and at times composed, a minority faction that was more conservative than their brethren. 110 I give the argument extended treatment because the discussion lays a foundation for refining Fiss’s, and the new standard history’s, vision of the Fuller Court. In particular, it provides a basis for my argument that the Fuller Court was not as unified as Fiss says.

A. Rate Regulation

With regard to rate regulation, the Fuller Court confronted a constitutional framework established by the Waite Court in the landmark case, Munn v. Illinois. 111 Munn, which upheld Illinois legislation regulating the charges of grain elevators, established two principles that allowed government broad power to control prices. First, the Court said that government could control the charges of any property that could be “used in a manner to make it of public consequence, and affect the community at large.” 112 This was the doctrine of property “affected with a public interest” 113 and, as Fiss observes, it “had the potential of reaching

108. Pp. 33-34.
110. See infra text accompanying note 190.
111. 94 U.S. 113 (1877).
112. Id. at 126.
113. Id.
virtually the entire economy." Second, the Court said that governmental regulation of prices was not judicially reviewable. In the Waite Court's view, the Constitution did not require governmentally imposed rates to be "reasonable." The Court's role was exhausted by adjudicating the existence of governmental power to set rates for the property at bar; the Court had no role in reviewing the discretion with which the power was exercised.

Munn's principles were enormously controversial. Even the Waite Court, in its waning days, indicated that it was troubled with the scope of power it had legitimized. Still, Fiss credits the Fuller Court with substantially eviscerating Munn, primarily by confining rate regulation to common carriers and establishing that the Constitution requires judicial review of the reasonableness of governmentally imposed rates. Moreover, he says, "The attack on Munn was, of course, led by Brewer." The Fuller Court certainly did cut back on Munn, and Brewer undoubtedly was a conspicuous part of the attack. Confronting Munn brought out all of his passion and eloquence. Yet in my reading, the Court did not confine Munn as tightly as Fiss claims, and Brewer led the attack only in the sense that he dealt with some of the issues first as a circuit court justice. He neither guided nor substantially influenced the Court's decisions. Brewer favored confining the scope of rate regulation far more tightly than the majority of the Court did. In addition, while Brewer and his brethren agreed that the Court should review the reasonableness of

114. P. 190.
115. Munn, 94 U.S. at 132-33.
116. Id. at 132-34.
118. The Court undercut Munn in another way, which will not be discussed here, when it ruled that the Interstate Commerce Act of February 4, 1887, ch. 104, 24 Stat. 379 (repealed 1978), did not authorize the Commission to regulate rates. See p. 197-98 (discussing ICC v. Cincinnati, N.O. & Tex. Pac. Ry., 167 U.S. 479 (1897)). Brewer wrote the opinion for the Court.
119. P. 190; see also p. 187 (quoting a letter from Harlan to Fuller indicating Brewer's readiness to limit Munn).
120. It was the occasion for his declaring "[t]he paternal theory of government is to me odious," Budd v. New York, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting), a line that has been taken as paradigmatic of the Lochner Court, see, e.g., Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 323 (1985) (linking the rejection of Lochner with the decline of "the condemnation of . . . paternalism as a legitimate legislative goal").
governmentally imposed rates, Brewer's views on the standard of review had few, if any, adherents.

Rate regulation, in Brewer's view, was permissible solely for "[p]roperty . . . devoted to a public use," which encompassed only those few enterprises that "the State . . . has a right to create and maintain." In Brewer's theory, there are certain projects and services—such as roads, canals, and railroads—that are "public dut[ies]." Should the state undertake one of these services, it could fix the price for its use. Brewer allowed that the state did not lose the right to fix the price simply by delegating its responsibility to an individual who voluntarily undertook it. In such cases, the individual entrepreneur acted as an agent of the state and was subject to rate control.

Brewer's position on how far to constrict the scope of rate regulation had some currency off the Court. It was the position taken by Thomas Cooley and Christopher Tiedeman, the most popular and influential constitutional-treatise writers of the time. But on the Court, Brewer's position appealed only to Brewer, Peckham (who voiced it earlier as a judge of the New York Court of Appeals), and Field (whose view it was in the first place). The view never was adopted by a majority of the Court, and Brewer vented it only in a series of dissents.

Fiss acknowledges that Brewer voiced his position in dissent, but argues that Brewer influenced the majority to reformulate the principle of *Munn* so that "the public character of the business was derived entirely from the fact that it was 'incident to the business of transportation and to

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122. *Budd*, 143 U.S. at 549.
123. *Id.*
124. *Id.*
125. See, e.g., 1 CHRISTOPHER G. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES 302-08 (photo. reprint 1975) (1900); Thomas M. Cooley, *Limits to State Control of Private Business*, 1878 PRINCETON REV. 233, 268-69 (both arguing that the state oversteps the limits of its power when it seeks to justify regulation on the grounds that a business is a virtual monopoly).
127. *See Munn v. Illinois*, 94 U.S. 113, 139, 139-40 (1877) (Field, J., dissenting) (suggesting that property is "affected by a public interest"—and thus constitutionally subject to price regulation—only when the rights to such property are conferred or granted, as by privilege or license, by the government). Justice White joined Brewer's dissent in *Brass v. North Dakota ex rel. Stoeser*, 153 U.S. 391, 405 (1894), arguably not because he agreed with Brewer's general principles, but because the grain elevators at bar had no element of monopoly power.
128. *See*, e.g., *Brass*, 153 U.S. at 410, 405-10 (Brewer, J., dissenting) ("If this be a monopoly, justifying public control of prices for service, I am at a loss to perceive at what point the fact of monopoly will cease and freedom of business commence."); *Budd*, 143 U.S. at 549, 548-52 (Brewer, J., dissenting) ("Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity, to wit, the State, has a right to create and maintain, and, therefore, one which all the public have a right to demand and share in.").
that of a common carrier." In effect, Fiss says that, "the majority's position converged with that of Brewer." Moreover,

[w]henever the Court thought it necessary to rationalize or justify that power, the justice who spoke for the Court invoked not the broad *Munn* formula but the theory put forth by Brewer in his *Budd* dissent. This occurred most notably when Harlan... later spoke for a unanimous Court in *Smyth v. Ames* in the late 1890s.

Fiss's analysis is mistaken. I know of no case in which the Court invoked the theory of Brewer's *Budd* dissent instead of *Munn*'s broad formula. Certainly it was not *Smyth v. Ames*, the only case that Fiss cites. In *Smyth*, the issues were whether the state had set a railroad's rates unconstitutionally low and whether the cause should proceed in equity rather than law. In writing for the Court, Harlan assumed the existence of regulatory power and never discussed its rationale.

Moreover, Fiss draws his conclusion from a dubious reading of Justice Blatchford's opinion in *Budd v. New York*, the key text in determining the Fuller Court's treatment of *Munn*. Blatchford's opinion is obtuse, stating all variety of points ambiguously. With equal emphasis or non-emphasis, it mentions: (1) that the elevators at bar "tended 'to a common charge,' and had become a thing of public interest and use" (which

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129. P. 193 (quoting *Budd*, 143 U.S. at 545).
130. P. 193.
131. P. 193.
132. Generally, the post-*Budd* cases did not test the scope of the rate control power and did not provoke discussions of its limits. There were two cases, however, involving services incident to transportation, which raised novel issues for the scope of the power and led to more extensive discussion. *Brass*, 153 U.S. at 391, involved grain elevators that had no monopoly power; *Cotting v. Kansas City Stock Yard Co.*, 183 U.S. 79 (1901), was the first case involving stockyards. Although I think these cases undercut Fiss's claim, there is a modicum of ambiguity that prevents my arguing from them. *Brass* said grain elevators already had been held regulable and that the absence of monopoly power did not affect this conclusion; however, it never clearly said why. *See Brass*, 153 U.S. at 403. *Cotting*, which was written by Brewer, invoked *Munn*'s broad rationale as the governing principle and presented *Budd* merely as its reaffirmation. *See Cotting*, 183 U.S. at 84. Yet Brewer goes on to say:

Tested by the rule laid down in *Munn v. Illinois*, it may be conceded that the State has the power to make reasonable regulation of the charges for services rendered by the stockyards company. Its stockyards are situated in one of the gateways of commerce, and so located that they furnish important facilities to all seeking transportation of cattle. While not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and, therefore, must be considered as subject to governmental regulation.

*Id.* at 85. Fiss might point to the phrase "so located so that they furnish important facilities to all seeking transportation of cattle" as the true rationale of the case. *See infra* text accompanying notes 136-43 (discussing Fiss's reading of *Budd*).
133. 169 U.S. 466 (1898), modified, 171 U.S. 361 (1898).
134. *Id.* at 522-24.
135. *See id.*
136. 143 U.S. 517 (1892).
137. *Id.* at 536 (quoting *Munn v. Illinois*, 94 U.S. 113, 126 (1877)); *see id.* at 545 (noting that
was *Munn*'s original formulation\(^{138}\); (2) that the elevators were "an actual monopoly"\(^{139}\) (another limiting principle then advocated by a number of jurists\(^{140}\)); and (3) that the elevators were "incident to the business of transportation"\(^{141}\) (which is Fiss's limiting reading\(^{142}\)). Fiss's claim that Blatchford's obeisance to *Munn* was "but a grudging concession" and "lip service," that he only "noted" the "actual monopoly" point, and that the "incident to transportation" observation was the "new analysis," is an unlikely interpretation.\(^{143}\) At least, the Court and its contemporaries never read Blatchford's opinion that way.

In the decade after *Budd*, W. Frederic Foster, Christopher Tiedeman, and Ernst Freund all wrote commentaries on the doctrine of property affected by a public interest. Each of these authors argued for different limiting principles. Freund was content that the cases still supported *Munn*'s broad formula, which he said limited rate regulation to enterprises with monopoly power or that dealt with any "commodity . . . [that] is a necessary of life, or that . . . is essential to the industrial welfare of the community."\(^{144}\) Tiedeman acknowledged that *Munn*'s original formulation still governed even though he preferred Brewer's position.\(^{145}\) Foster advocated the existence of "monopoly power" as the outer bounds of the rate control power, but thought the cases tended to go beyond it.\(^{146}\) None of these commentators read Blatchford's opinion in *Budd* as Fiss does.\(^{147}\)”

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138. *Munn*, 94 U.S. at 126, quoted in *Budd*, 143 U.S. at 535-36 (“[A privately owned ferry] ‘doth in consequence tend to a common charge, and is become a thing of public interest and use . . .’”).

139. *Id.* at 545. Significantly, this point was overcome two years later when the Court upheld rate regulation of grain elevators that had no monopoly power in the communities in which they operated. *Brass v. North Dakota ex rel. Stoeser*, 153 U.S. 391 (1894).

140. See, e.g., Spring Valley Water Works v. Schottler, 110 U.S. 347, 354 (1884); *Munn v. Illinois*, 94 U.S. 113, 132 (1877) (both stating that the existence of a virtual monopoly will justify regulation, even absent an explicit grant of franchise from the state).

141. *Budd*, 143 U.S. at 545.

142. See p. 193 (stating that, for Blatchford, the public character of a grain elevator derived entirely from the fact that it was incident to the business of transportation and to the business of a common carrier).

143. Pp. 192-93.


145. See 1 TIEDEMAN, supra note 125, at 308, 304-08 (conceding that *Munn* “has been confirmed by a number of later cases,” but arguing that *Munn*'s focus on the alleged virtual monopoly was ill-founded).

146. See W. Frederic Foster, THE DOCTRINE OF THE UNITED STATES SUPREME COURT OF PROPERTY AFFECTED BY A PUBLIC INTEREST, AND ITS TENDENCIES, 5 YALE L.J. 49, 71, 77-80 (1895) (noting an “antagonism to monopolies” running through the common law).

Neither did the courts. Discussions of legislation that extensively regulated insurance companies most clearly illustrate that Blatchford's contemporaries did not understand Budd to have limited Munn in the manner Fiss indicates. Although some insurance underwriting can be conceptualized as "incident to transportation," most cannot. Yet, in the first decade of the twentieth century, state courts universally upheld insurance regulations, including rate regulation. The Supreme Court similarly ruled when the issue arose there in 1914. Moreover, all of these decisions drew from Munn's broad formulation that insurance was of "public consequence" and "affected the community at large." Brewer's views were ignored, and Fiss's reading of Budd was never imagined.

Although Brewer's work on the second prong of the attack on Munn did not end in dissent, it was not any more effective. As Fiss indicates, Brewer virulently opposed Munn's allowing unlimited legislative discretion
to set rates, and he spearheaded the move to reverse this part of the decision to guarantee regulated businesses a "fair return on . . . investment."\textsuperscript{155} Fiss seems to give Brewer sole credit for this development.

About \textit{Reagan v. Farmers' Loan \\ & Trust Co.},\textsuperscript{154} the first Supreme Court case voiding state rate regulation for allowing too little return, Fiss says

In 1894, in \textit{Reagan v. Farmers' Loan \\ & Trust Co.}, Brewer completed the radical revision of \textit{Munn v. Illinois} . . . . Brewer there formulated a doctrine that assured the entrepreneur a fair return on his investment. There was no doubt that the right he created—the right to a fair return—was entitled to full federal protection . . . . Inspired by the same considerations underlying his . . . speech at Albany, Brewer's opinion in \textit{Reagan}, delivered at roughly the same time, reflected fully and forcefully the intellectual tradition that viewed property as the foundation of civilization.\textsuperscript{155}

Yet, it is wrong to credit Brewer with creating "the right to a fair return" or even exercising much leadership on the issue. Limiting the legislature's unfettered discretion to set rates involved, first, the question of whether to confine state discretion to set rates, and second, the question of what standard to impose. With regard to the issue of whether to confine state discretion, the Waite Court itself had been drifting towards limiting the unfettered legislative discretion it had previously legitimated.\textsuperscript{156} By the time of the \textit{Reagan} decision, the Fuller Court was unanimous on the issue. The reversal of \textit{Munn}'s assertion that rate regulation was an unreviewable legislative prerogative reflected an emergent consensus rather than the influence of any particular Justice.

With regard to the issue of what standard to impose, Brewer stood alone. Brewer certainly should be credited with considering and first enunciating a standard for confining the state's discretion to regulate rates of businesses affected with a public interest. Indeed, he made two attempts, but both were wholly ignored by his colleagues.

With regard to railroads, Brewer suggested a test premised on a rather close analogy to the concept of eminent domain "takings." Under

\begin{itemize}
  \item \textsuperscript{153} P. 202; \textit{see also} pp. 197-210 (analyzing and commenting on Justice Brewer's opposition to \textit{Munn}).
  \item \textsuperscript{154} 154 U.S. 362 (1894).
  \item \textsuperscript{155} P. 204-05 (citation omitted).
  \item \textsuperscript{156} \textit{See} The Railroad Comm'n Cases, 116 U.S. 307, 331 (1886) ("It is not to be inferred that this power of limitation or regulation [over railroad rates] is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation."); \textit{see also} Mugler v. Kansas, 123 U.S. 623, 661 (1887) (expressing a similar concern with regard to the police power generally); Spring Valley Water Works v. Schottler, 110 U.S. 347, 354 (1884) (stating that utility rate-setting tribunals "are bound in morals and in law to exercise an honest judgment").
\end{itemize}
nineteenth-century doctrine, the Takings Clauses of the federal and state constitutions protected landowners from confiscation of their title or possession, but owners were not protected against regulation that worked diminutions of value. Accordingly, Brewer reasoned that states set railroad rates too low when the rates were insufficient to cover appropriate operating expenses and bonded indebtedness. His thought was that unless rates covered these costs, bankruptcy and foreclosure were inevitable, and loss of title and possession were soon to follow. The key facet of Brewer’s test was that the right to a fair return meant “some” return, no matter how small. The regulated entrepreneur was protected from state-compelled losses, but was not entitled to any profit. Consequently, in a case in which legislatively imposed rates allowed a 0.35% return on investment, Brewer voted to uphold the rate.

Although Brewer’s proposed test for permissible rates was an intriguing extension of takings law as it was then understood, it was anachronistic, and no one either on or off the Court took it seriously. Instead, two different theories competed in the literature of the period and on the bench for acceptance, both of which allowed entrepreneurs greater profits. One was the “prudential investment” test, the favorite of conservatives, which allowed a reasonable return on proper investment; the other was the “reproduction cost” approach, favored by liberals, which allowed a reasonable return on the present value of facilities devoted to the public interest. In 1898, in Smyth v. Ames, the Supreme Court adopted the reproduction cost approach. The decision was unanimous—even Brewer abandoned his original position and voted for it. It seems difficult to imagine that Brewer played a leadership role in formulating the rule in Smyth; the Smyth formulation was inconsistent with Brewer’s previously suggested measurement of a “fair return.”

159. Id. at 218 n.135 (discussing Chicago, B. & Q. R.R. v. Dey, 38 F. 656, 663 (C.C.S.D. Iowa 1889)).
160. Id. at 218-19.
161. Id. at 219-23.
162. I have previously developed the ideas in this paragraph in Siegel, Regulation, supra note 117, at 218-32.
163. 169 U.S. 466 (1898), modified, 171 U.S. 361 (1898).
164. Id. at 546-47.
165. Fiss elides the fact that Brewer never proposed an acceptable standard to measure a “fair return” by saying the Court never provided a satisfactory answer either. P. 207. He also derides Harlan’s opinion in Smyth as “no answer,” p. 209, which is the conventional view. Yet Harlan’s contemporaries understood him as providing an answer (the reproduction cost approach) which set the course of rate regulation law for the next half century. Siegel, Regulation, supra note 117, at 228.
The Court's rejection of Brewer's views in *Smyth* did not chill someone as pugnacious as Brewer, and in *Cotting v. Kansas City Stock Yard Co.*, he returned to the lists. *Cotting* involved the constitutionality of state legislation that regulated the rates of the Kansas City stockyard, but no other stockyard in the state. Brewer wrote an opinion voiding the legislation on equal protection grounds, which he prefaced with a discourse on the limits to rate regulation for stockyards. The principles recently adopted in *Smyth*, Brewer said, were appropriate for railroads but not for stockyards. Harking back to his pre-*Smyth* notions concerning when government could regulate rates at all, Brewer drew a distinction between property committed to "public service" and property "in which the public had an interest." Railroads were the archetype of the former, because the provision of highways was a traditional public-sector endeavor. Important undertakings that were not services the state traditionally provided, such as the grain elevators in *Munn* or the stockyards in *Cotting*, were examples of the latter. Brewer argued that although *Smyth* guaranteed property committed to "public service" a reasonable return on investment, the guarantee for property "in which the public has an interest" was a "reasonable" rate for each transaction. For Brewer, the test for "property in which the public has an interest" was not the reasonableness of the aggregate profit, but the reasonableness of each transaction (which when summed up could result in large profits).

In response to Brewer's obiter in *Cotting*, six Justices issued a short concurrence saying they agreed with the equal protection rationale and found it "unnecessary" to consider the disquisition on rate limitation. Only two Justices, Peckham and Fuller (Brewer's most constant allies), remained silent and possibly joined Brewer entirely. Brewer's analysis was never heard again.

**B. Antitrust**

While Brewer attempted to exert leadership in regulated industries law, antitrust was Peckham's bailiwick. In this area, Fiss's assessment of Peckham's leadership is correct, but the leadership lasted only for a limited time. Without a doubt, Fuller relied on Peckham, who wrote a series of important opinions between 1897 and 1899 that resuscitated the Sherman

166. 183 U.S. 79 (1901).
167. *Id.* at 102-12.
168. *Id.* at 85-102.
169. *Id.* at 93, 91-94.
170. *Id.* at 95.
171. *Id.*
172. *Id.* at 114-15 (Harlan, J., concurring with Gray, Brown, Shiras, White & McKenna, JJ.).
Act and gave it an intellectual scaffolding. Yet after 1899, Peckham wrote no significant antitrust opinions. More importantly, the Court very quickly jettisoned the concepts Peckham developed.

The central interpretive issue in early Sherman Act cases was the delimitation of permissible and impermissible restraints of trade. Although the Act literally prohibited “every” restraint of trade, common sense demanded a chancered interpretation. If construed sweepingly, no two people could ever become partners, incorporate, or merge. Peckham resolved the issue by adopting a “direct-indirect” test. Direct restraints on trade were void while indirect restraints were not. Voiced in 1897, the test governed only until 1904 when, in Northern Securities Co. v. United States, a majority seemed to shift to Justice White’s “reasonable-unreasonable” restraint formulation. White’s approach, first broached as a dissent to Peckham’s formulation, became the undoubted rule in 1911, one year after Fuller’s death. Peckham did lead the Court on antitrust, but only for a short season.

173. See Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 246 (1899) (holding that agreements between certain private companies engaged in the manufacture, sale, and transportation of iron pipes functioned as a restraint of interstate commerce because competition among them was avoided); United States v. Joint Traffic Ass’n, 171 U.S. 505, 560 (1898) (“[T]here can be no doubt that [the agreement’s] direct, immediate and necessary effect is to put a restraint upon trade or commerce as described in the act.”); United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 312 (1897) (holding that the Sherman Act applies to railroad carriers if their agreement restrains trade or commerce).

174. P. 122.

175. Trans-Missouri Freight Ass’n, 166 U.S. at 312.

176. 193 U.S. 197 (1904).

177. In Northern Securities, Justice Brewer, one of the five Justices who originally supported Peckham’s direct-indirect test, announced that he now adhered to White’s reasonable-unreasonable formulation. Id. at 360-61, 364 (Brewer, J., concurring); see also pp. 110, 130-31, 141 (discussing the unravelling of Peckham’s majority). Peckham’s formulation already had been ignored as early as 1898 by then-Judge Taft in favor of a test revolving around the concept of “ancillary” restraint. See United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898) (“[No] conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract.”), aff’d as modified, 175 U.S. 211 (1899).

178. See Trans-Missouri Freight Ass’n, 166 U.S. at 344, 343-74 (White, J., dissenting) (“[O]nly such contracts as unreasonably restrain trade are violative of the general law, and . . . the particular contract here under consideration is reasonable, and therefore not unlawful.”).

179. See United States v. American Tobacco Co., 221 U.S. 106, 180 (1911) (“[T]he rule of reason . . . is so plainly required . . . to prevent [the antitrust] act from destroying all liberty of contract and all substantial right to trade.”); Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911) (proposing that the direct-indirect test collapses into a “rule of reason” analysis for examining all alleged restraints of trade); see also pp. 130-54 (tracing the development of the Court’s interpretation of the Sherman Act from White’s dissent in Northern Securities Co. to his creation of a new antitrust doctrine, supported by seven other Justices in Standard Oil Co. and American Tobacco Co.).
C. Labor Legislation and General Regulatory Laws

In labor legislation cases, Brewer and Peckham were only a little more effective than they were in the rate regulation and antitrust controversies. Brewer wrote the decision in Muller v. Oregon183 for a unanimous Court, upholding maximum hours legislation for women. Peckham, of course, wrote for the five-person majority voiding maximum hours legislation for bakers in Lochner v. New York.181 Such leadership was unusual. More frequently, the Court voted with a lopsided majority to uphold regulatory legislation, such as maximum hours for miners182 and workers on public projects,183 antiscrip184 and anti-coal screening laws,185 and prohibitions of margin and future sales of stock and grain.186 In all these cases, Brewer and Peckham silently dissented, almost always joined by no other Justice.187

Fiss never confronts Brewer and Peckham's pattern of silent dissent in regulatory cases. He notes it only in discussing Holden v. Hardy,188 in which the Court upheld maximum hours legislation for miners. Fiss suggests that Brewer and Peckham's "uncharacteristic . . . laconic tack" demonstrated "indifference on their part, indicating they saw the decision as close or not especially troubling."189 While I cannot explain Brewer and Peckham's tactic of silence, I will argue in the next Part that the whole

180. 208 U.S. 412 (1908).
181. 198 U.S. 45 (1905).
183. See Atkin v. Kansas, 191 U.S. 207, 224 (1903) (upholding Kansas's eight-hour day for employees engaged in public works).
185. See McLean v. Arkansas, 211 U.S. 539, 552 (1909) (upholding an Arkansas law requiring employers to compute miners' salaries on the weight of coal before it had been screened).
187. See Holden v. Hardy, 169 U.S. 366, 398 (1898) (Brewer & Peckham, JJ., dissenting without opinion); Atkin, 191 U.S. at 224 (Brewer & Peckham, JJ., dissenting without opinion); Knoxville Iron Co., 183 U.S. at 22 (Brewer & Peckham, JJ., dissenting without opinion); McLean, 211 U.S. at 552 (Brewer & Peckham, JJ., dissenting without opinion); Otis, 187 U.S. at 611 (Brewer & Peckham, JJ., dissenting without opinion); see also Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905) (Brewer & Peckham, JJ., dissenting without opinion). In the first of the Employers' Liability Cases, 207 U.S. 463 (1908), the majority struck down a congressional act that imposed liability on employers whose negligence caused the death of an employee. The majority held the statute unconstitutional because it exceeded the powers granted to Congress under the Commerce Clause. Id. at 504. Although Brewer and Peckham concurred with the Court, they based their decision on the principle that the federal government had no power to regulate the relationship between employer and employee. Id. at 504 (Peckham, J., concurring, joined by Fuller, C.J. & Brewer, J.).
188. 169 U.S. 366 (1898).
189. P. 173.
pattern reveals a dispute between Brewer and Peckham, on the one hand, and their colleagues, on the other, over a matter of fundamental principle, a difference in which Brewer and Peckham formed an isolated minority. Suffice it to say at this point that even if Brewer and Peckham were "indifferent," or saw the cases as "close" or "not especially troubling," there were so many silent dissents that it is implausible to maintain that Brewer and Peckham exercised leadership on the pivotal labor-legislation issue.

IV. Revising the New Standard History

A. The Fuller Court: Monolithic or Fractured? Strictly Conservative or Moderately Progressive?

Fiss's claim that Brewer and Peckham were the Fuller Court's leaders is part of his vision of the Court as a unified, cohesive group. "The Fuller Court," Fiss writes, "was composed of a group of seven or eight justices who largely shared the same basic premises and outlook . . . . Such homogeneity has been seen rarely in the Court's history."¹⁹⁰ Establishing that Brewer and Peckham were not Court leaders is a step towards demonstrating that the Fuller Court was less homogeneous and unified than Fiss maintains.

Fiss's view accords with the writings of other proponents of the Fuller Court's new standard history.¹⁹¹ In seeking to establish the new paradigm, historians have emphasized the commonalities and agreements among the Fuller Court's dominant coalition. If the old historiography presented them all as advocates of business enterprise, the new presents them all as protectors of liberty. Perhaps this is a common problem of paradigm shifts. Perceiving and declaiming a new unity is a substantial accomplishment, exploring diversity within it is the task of those who follow the pioneers.

Yet, the Fuller Court was both monolithic and fractured depending on the level of generality at which one focuses. Fiss and the new standard historians are quite right in emphasizing the Fuller Court's unusual cohesion on the broadest issues of constitutional law. The Court's dominant coalition was unified in attempting to protect liberty, in believing that governmental power was constitutive rather than organic, and in employing a mode of analysis that defined liberty as the residue of what

¹⁹⁰. P. 35.

¹⁹¹. See, e.g., Benedict, supra note 22, at 331 (arguing that laissez-faire constitutionalism arose, not from the Court's desire to protect the privileged, but from a genuine concern about liberty); McCurdy, supra note 22, at 33 (arguing that Lochner-era judges acted out of a belief in freedom of contract, not out of a fear of socialism); see also Hovenkamp, supra note 18, at 171-82 (arguing that substantive due process arose from judicial support of laissez-faire, not judicial class bias).
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was not within governmental power. As Fiss points out, only Holmes, who joined the Court in 1902, rejected these fundamental norms of late-nineteenth-century and early-twentieth-century constitutional adjudication.

On the narrower issue of what these norms implied for the contents of the police power, the Sherman Act, and the interstate commerce power, the homogeneity dissolves. Rival camps emerge within the dominant paradigm. At this less abstract level, the Justices may well have acted individually, each with his own idiosyncratic view and emphasis. Fiss’s own work shows this. He recounts considerable dissent and disagreement in every area he canvasses, but never attempts any explanation of it. In broad outline, however, I see a three-way divide that is important to recapture if we are to understand more fully the Fuller Court’s response to its times and its role in constitutional development.

With regard to the less abstract issues of constitutional law, Brewer and Peckham were the most strictly conservative members of the Court, and Holmes its most liberal. In between these extremes were the mass of Justices who adhered to the constitutive theory as fully as Brewer and Peckham but thought it allowed much more power to the newly emergent regulatory state. Scholars have long noted the Fuller Court’s liberality in upholding regulatory legislation. This is because a loose coalition of


194. Although Fiss recounts much diversity among the members of the Court, he fails to provide a sufficient explanation for the disagreements he so admirably describes, probably due to his focus on the Court’s unified approach to defending liberty in the abstract. For instance, Fiss states that White’s dissent in Northern Securities Co. v. United States, 193 U.S. 197, 364 (1904) (White, J., dissenting), “derived, of course, from John Locke and the social contract tradition,” p. 133, although the majority opinion by Harlan presumably derived from the same tradition as well.


196. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-2 (2d ed. 1988) (noting that regulatory statutes usually survived due process attack from 1897 to 1937); Ray A. Brown, Due Process of Law, Police Power, and the Supreme Court, 40 HARV. L. REV. 943, 945 n.11 (1927) (calculating the Court’s rate of voiding social and industrial legislation as 6% from 1868 to 1912, 7% from 1913 to 1920, and 28% from 1921 to 1927); Melvin Urofsky, Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era, 1983 SUP. CT. HIST. SOC’Y Y.B. 53, 61-62 (“[T]he courts would not second-guess the wisdom of elected representatives.”); Charles Warren, The Progressiveness of the United States Supreme Court, 13 COLUM. L. REV. 294, 295 (1913) (remarking that from 1887 to 1911, the Court had struck down state social justice legislation in only two other cases besides Lochner and concluding that the Court had been “steady and consistent in upholding all state legislation of a progressive type”). As the cited material shows, I mean “liberality” in comparison to some contemporary state courts and commentators and in comparison to the Taft and early Hughes Courts of the 1920s and 1930s.
moderate conservatives controlled the Court for most of Fuller’s tenure.

Despite scholarly notice, the view that a group of moderate conservatives controlled the Fuller Court never has been part of the conventional wisdom. Perhaps this is because the old standard history, which sought to paint the Fuller Court in the darkest colors, highlighted the occasional occurrence of more conservative decisions, decisions which flowed from Brewer and Peckham’s ability to form temporary coalitions in any particular case or issue. Perhaps, also, the view is missed because late-twentieth-century intellects more easily understand Brewer and Peckham’s social and legal philosophy than the philosophy of the moderate middle. The mentalité of the moderate middle is easier to miss because it is harder to grasp. Whatever the reason, with the advent of the new standard history, we have the opportunity to look again at all aspects of the Fuller Court and refine the new account.

Drawing from the prior discussion concerning Brewer and Peckham’s leadership role, I will focus on rate regulation, labor legislation, and antitrust law to argue that the Fuller Court’s governing coalition fractured over matters of principle and that moderate Justices held the balance of power.

1. The Controversy over Rate Regulation.—In addressing the issue of rate regulation, the Fuller Court sought: (1) to determine which enterprises were subject to governmental rate regulation; and (2) to distinguish permissible from impermissible regulations. With regard to the scope of regulatory power, Brewer, with Peckham and Field’s concurrence, advocated more restrictive limits than his brethren who, though troubled by unbridled rate regulation, allowed it a far greater rein. Brewer’s position allowed government to regulate only those few enterprises that required or received governmental permission or special privileges to operate. His colleagues, however, not only reaffirmed Munn in Budd v. New York, but two years later, in Brass v. North Dakota ex rel. Stoeser, went further and upheld a statute imposing rate control on

197. See infra text accompanying notes 223-29 (analyzing Lochner); Melvin I. Urofsky, State Courts and Protective Legislation During the Progressive Era: A Reevaluation, 72 J. AM. Hist. 63, 79 (1985) (arguing that Lochner “ought to be seen as an aberration, rather than as an epitome of the Court’s attitude toward protective legislation”). Brewer and Peckham’s ability to form coalitions may mark them as having influence and, in that sense, as being leaders. But other Justices had the same ability. The point I argue is that they were not “the” leaders of the Court as Fiss maintains.

198. It is more like trying to understand Justices Kennedy, O’Connor, and Souter, who hold the current Court’s balance of power, rather than Justices Rehnquist and Scalia, or Blackmun and Stevens, who form the articulate extremes.

199. See supra text accompanying notes 111-52.

200. 143 U.S. 517, 543 (1892).

201. 153 U.S. 391 (1894).
grain elevators that were subject to competition and had no monopoly power. While the Court never successfully articulated the limits to rate regulation, it was pursuing a fairly liberal line, a line reflecting Ernst Freund's formulation. Had this not been so, had Brewer's views held sway, regulation of insurance companies would have been more difficult, if not impossible, to establish as the Fuller Court came to a close.

On the question of the limits to the exercise of the regulatory power, conflict on the Court was muted because Brewer abandoned his original approach to vote for Harlan's relatively pro-regulatory rule in *Smyth v. Ames*. Yet Brewer's obiter in *Cotting v. Kansas City Stock Yard Co.* must be seen as an attack on *Smyth*, seeking to confine *Smyth*'s reach to enterprises undertaking a "public service" rather than all enterprises "affected by a public interest." For businesses merely "affected by a public interest," Brewer urged a far more pro-business test for the permissibility of imposed rates. That Brewer's long essay in *Cotting* was disclaimed by his brethren (except for Peckham and Fuller) was an important action on behalf of pro-regulatory principles by the Fuller Court's moderate coalition, a coalition that excluded Brewer and Peckham as well as Holmes.

2. *The Controversy over Labor Legislation*.—A similar, but more complicated, story accounts for the course of decisions in labor legislation. I attribute Brewer and Peckham's pattern of silent dissents not to "indifference" but to a difference in fundamental principle, a dispute over whether the police power properly encompasses paternal legislation.

By paternal legislation, I mean a law that protects people from themselves as opposed to a law protecting third parties. Especially with reference to the early *Lochner*-era rulings of state courts, it is clear that some late-nineteenth-century judges and jurists attempted to limit the legislature's regulatory power to the protection of the public's health, safety, and morals, and the prevention of fraud. Government, these
strictly conservative jurists thought, had the power to protect someone from the consequences of his own act only when he was subject to an incapacity, such as infancy or lunacy, or when another party was perpetrating a fraud against which he could not protect himself.  

Other, more moderate laissez-faire constitutionalists thought the state had a broader role that encompassed a duty to protect people from themselves. They thought the police power extended to all acts tending to harm health, safety, and morals as well as to those causing fraud. As broadly as these moderates viewed the traditional ends of police power, however, they nevertheless thought the state’s police power excluded labor legislation per se. Legislatures properly could forbid individuals from concluding agreements only if those agreements harmed their own, or the public’s, health, safety, or morals.

In other words, early, Lochner-era laissez-faire constitutionalists divided into two camps. One camp advocated the “nightwatchman” state and opposed all paternal legislation. The other camp was more moderate and progressive in comparison and voted to sustain many more regulatory initiatives. These two variants of laissez-faire constitutionalism split the state courts.

Inevitably, cases requiring a choice between the strict and moderate versions of laissez-faire constitutionalism reached the Supreme Court. It is not surprising to find the Fuller Court Justices divided over the issue.

unrelated to the protection of public health); Godcharles & Co. v. Wigeman, 6 A. 354, 356 (Pa. 1886) (holding that the state may not infringe upon an employee’s right to sell his labor freely).

211. I say “his,” rather than “her,” because the Fuller Court countenanced paternal legislation for women. See, e.g., Muller v. Oregon, 208 U.S. 412, 416-17, 423 (1908) (upholding a statute that limited to 10 hours the work day for female employees in mechanical establishments, factories, and laundries).

212. See, e.g., State v. Loomis, 22 S.W. 350, 351 (Mo. 1893) (“It is perfectly competent to legislate concerning married women, minors, insane persons, bankers, common carriers, and the like . . . . But the classification for legislative purposes must have some reasonable basis upon which to stand.”); see also Godcharles, 6 A. at 356 (invalidating sections of an act attempting to “prevent persons who are sui juris from making their own contracts”).

213. Siegel, Lochner Era Jurisprudence, supra note 195, at 11-12; see also Carol Chomsky, Progressive Judges in a Progressive Age: Regulatory Legislation in the Minnesota Supreme Court, 1880-1925, 11 LAW & HIST. REV. 383, 402-14 (1993) (discussing the frequency with which the Minnesota Supreme Court upheld state regulations based on the police power); Urofsky, supra note 197, at 66 (stating that even conservatives acknowledged that “a state could override both individual and property rights in order to preserve the health, safety and welfare of the populace”).

214. See p. 167 (discussing, for example, Harlan’s opinion in Adair v. United States, 208 U.S. 161 (1908), in which the Court invalidated a statute that prohibited the discharge of an employee because of the employee’s membership in a labor organization).

215. See Siegel, Lochner Era Jurisprudence, supra note 195, at 11-20 (demonstrating that the moderates of the Court supported labor-related legislation only when it could be justified by a concern for health, safety, morals, or fraud).

The first confrontation was in 1898 in *Holden v. Hardy*,\(^217\) in which an employer challenged maximum hours legislation that protected miners from the consequences of their own agreements. Henry Brown, writing for a seven-person majority, specifically indicated that the Court was firmly in the moderate camp:

The State retains an interest in [an individual,] however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.\(^218\)

This view was anathema to Peckham and Brewer. In *Holden*, Brewer and Peckham dissented silently.\(^219\) But in a prior case, Brewer had specifically opined that "[t]he paternal theory of government is to me odious,"\(^220\) and Peckham exhibited the same belief implicitly in his opinions.\(^221\) That the Supreme Court's governing coalition lined up behind moderate laissez-faire principles in *Holden* may not account for Brewer and Peckham's silence, but it does account for their pattern of dissent as that coalition stuck together in subsequent cases.\(^222\)

*Lochner v. New York*\(^223\) seems to counter this analysis because Peckham wrote for a majority voiding legislation protecting bakers from the consequences of their own acts. In all probability, Peckham was only too happy to write an opinion for the Court that voided protective legislation. Nevertheless, in speaking for the Court, Peckham was careful to reaffirm *Holden*'s commitment to upholding paternal legislation when that legislation sufficiently promoted some permissible police power goal.\(^224\)

To the Court, health was the only legitimate state interest arguably fostered by the legislation at bar. Peckham argued that the legislation did not protect the health of third parties or the general public, but conceded that the law still could be upheld "as a law pertaining to the health of . . .

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217. 169 U.S. 366 (1898).
218. Id. at 397.
219. Id. at 398 (Brewer & Peckham, JJ., dissenting without opinion).
221. See, e.g., People v. Walsh, 22 N.E. 682, 686-87 (N.Y. 1889) (Peckham, J., dissenting) (arguing that paternalistic common-law rules allow for substantial "legislative interference and suppression" and are inconsistent with a "truer conception of the proper functions of government").
222. See supra note 187 and accompanying text.
223. 198 U.S. 45 (1905).
224. See Lochner, 198 U.S. at 54 (saying that in labor legislation cases, the Court "has . . . been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed," and discussing with approval four cases, including *Holden*, in which Peckham and Brewer had been lone dissenters).
The flaw with the statute, Peckham said, was that limitations on the hours bakers worked did not sufficiently promote the bakers' own health to be considered a health law. With the health rationale set aside, the law had no permissible police power purpose supporting it.

In short, two *Lochner* Justices, Brewer and Peckham, would have voted to void the law simply because of its paternalism. For three other Justices, the law's paternalism was not fatal. They joined Brewer and Peckham only because they accepted the view that the law did not sufficiently promote the protected party's health. For them, the problem was in the means-ends nexus and not in the goal of protecting people from their own acts. This is shown, for example, by the fact that Justice Brown, who wrote the opinion in *Holden*, voted with Brewer and Peckham in *Lochner*.

In *Lochner*, then, Brewer and Peckham did not persuade other Justices to adopt their view of the permissible ends of regulatory legislation. Rather, they persuaded a bare majority of the Court to adopt their view on a subsidiary question: the stringency of the means-ends relationship required for regulatory legislation. Even this victory was short-lived. One year after *Lochner*, Justice Brown left the Court to be replaced by Justice Moody. With that change, Brewer and Peckham lost their majority even for their stringent view of the means-ends nexus, let alone for their view of the proper approach to paternal laws. As commentators frequently have noted, after *Lochner*, the Supreme Court resumed its generally liberal and permissive approach to regulatory legislation, a trend that continued beyond the Fuller Court.*Lochner* itself was implicitly overruled in 1917 when White was Chief Justice. It was not until the 1920s under Chief Justice Taft that the Court again required a stringent relationship between legislative means and ends.

In sum, Brewer and Peckham led the Court in labor legislation, but only on the subsidiary question of the stringency of the relation of means to ends, and even then, only for a short time. Except for *Lochner*, and until the 1920s, Justice Harlan's approach typified police-power analysis. Harlan, as Fiss notes, was more liberal than Brewer and Peckham on the

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225. *Id.* at 57.
226. *Id.* at 57-62.
228. *See* Bunting v. Oregon, 243 U.S. 426, 438 (1917) (holding that an Oregon law limiting hours of work was not an unconstitutional exercise of the state's power); *see also* Siegel, *Lochner* Era Jurisprudence, *supra* note 195, at 19-20, 20 n.79 (arguing that Bunting only belatedly illustrated an earlier shift in the Court's stance toward industrial relations because the Court had already relaxed *Lochner*'s stringent means-ends test).
229. *See* RODNEY L. MOTT, *DUE PROCESS OF LAW* 575 (1926) (noting the Court's reversion in 1925 to the view that it must review legislative determination of facts).
question of permissible ends, and was “never much interested” in the question of the relationship of means to those expanded ends.

Thus, with labor legislation as well as rate regulation, we see a fractured court in which Brewer and Peckham were at the conservative end, the end that did not dominate. One has to read only a smattering of strictly conservative state court opinions, such as *In re Jacobs*, *Godcharles & Co. v. Wigeman*, *Ritchie v. People*, and *Ives v. South Buffalo Railway* to see how significant it was that the Fuller Court’s dominant coalition adhered to moderate principles. The *Lochner* era would truly have enforced Herbert Spencer’s *Social Statics* had this not been so.

3. *The Controversy over the Sherman Act.*—The course of antitrust decisions is less clear to me. Certainly, Peckham and White differed vehemently. Their heated exchange may well have followed from a belief that something significant turned on it. Arguably, the conflict reflects the analysis I have been pursuing, that the Fuller Court’s governing coalition was divided into two camps.

Morton Horwitz and James May have suggested that the Fuller Court’s antitrust jurisprudence reflects a struggle between “old conservatives” and “new conservatives.” Old conservatives, imbued with an unmodified Jacksonian perspective, opposed large-scale private enterprise as much as they opposed large-scale government. Old conservatives saw both big business and big government as threats to individual liberty; they understood that the former easily could capture the latter to abet its nefarious efforts. Economic concentration was inherently illicit, old

230. See p. 235 (“On the whole [Harlan] was more permissive than the others in the application of the contractarian tradition . . . ”).
231. P. 363.
232. 98 N.Y. 98, 115 (1885) (declaring state legislation regulating the manufacture of cigars unconstitutional and void for a lack of relation to public health interests).
233. 113 Pa. 431, 437 (1886) (voiding antiscrip laws that the Supreme Court later upheld in *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901)).
234. 40 N.E. 454, 456 (Ill. 1895) (voiding maximum hours legislation for women that the Supreme Court later upheld in *Muller v. Oregon*, 208 U.S. 412, 422-23 (1908)). After *Muller*, the Illinois Court reversed itself. *See W.C. Ritchie & Co. v. Wayman*, 91 N.E. 695, 698-701 (Ill. 1910) (upholding a maximum hours law, but narrowly distinguishing rather than expressly overruling precedents).
235. 94 N.E. 431, 448 (N.Y. 1911) (voiding worker’s compensation laws, which the Supreme Court later upheld in *New York Cent. R.R. v. White*, 243 U.S. 158, 208-09 (1917)).
239. *See id.* at 302 (citing WILLIAM H. TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* 4 (1914) (arguing that the growth of large corporations, many of which had intervened in politics, “threatened us with a plutocracy”)).
conservatives believed, because large-scale enterprise was less efficient than small-scale undertakings and could maintain itself only through improperly obtaining governmental support or through improper means of competition.\textsuperscript{240}

New conservatives, in contrast, were willing to embrace large-scale enterprise because they believed it employed new technologies that promised welcome efficiency gains.\textsuperscript{241} The “new conservatives” may not have embraced the brave new world of large-scale enterprise to the extent that Holmes did.\textsuperscript{242} Nevertheless, they did embrace it more than their “old conservative” brethren. New conservatives, like President Theodore Roosevelt, attempted to distinguish between “good” and “bad” trusts.\textsuperscript{243} Good trusts established themselves to create economies of scale not only for their own profit but for the benefit of consumers.\textsuperscript{244} Bad trusts established themselves through unfair competition and abused the market power they achieved.\textsuperscript{245}

In this context, Peckham’s proscription of all direct restraints on trade was more restrictive than White’s proscription of only unreasonable restraints.\textsuperscript{246} White’s test, after all, used the very same language entrepreneurs used to justify their pools, cartels, and trusts.\textsuperscript{247} The Morgans and Hills of industrializing America said they were acting only to reasonably restrain unreasonable competition. Peckham may well have feared that White’s analysis would be employed to justify the new business practices that he, an old conservative, opposed. That this did not come to pass does not detract from the fact that there was a difference of opinion, seemingly over fundamental principle.

\textsuperscript{240} Horwitz, supra note 237, at 683.
\textsuperscript{241} Id.
\textsuperscript{242} Holmes believed in the inevitably of concentration under modern conditions and thought it futile to oppose it. P. 143; see also Spencer W. Waller, \textit{The Antitrust Philosophy of Justice Holmes}, 18 S. ILL. U. L.J. 283, 321 (1994) (“Holmes viewed the type of industrial and labor combination being attacked under the Sherman Act as both inevitable and desirable.”).
\textsuperscript{243} Horwitz, supra note 237, at 683.
\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{246} See May, supra note 18, at 301 (noting the triumph of White’s interpretation banning only “unreasonable restraints of trade” over Peckham’s “every direct restraint” standard in Standard Oil Co. v. United States, 221 U.S. 1, 63-70 (1911)).
\textsuperscript{247} See United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 328-31, 339-41 (1897) (discussing the defendant’s arguments that the Sherman Act prohibits only unreasonable restraints of trade); GABRIEL KOLKO, RAIlROADS AND REGULATION, 1877-1916, at 84-101 (1965) (reviewing the railroads’ movement for reform, culminating in the passage of the Elkins Act in 1903); May, supra note 18, at 285 (citing the claim raised by “loose” associations in industry that full-blown competition did more harm than good under modern conditions).
B. The Fuller Court: A Continuation or a Break in the American Constitutional Tradition?

With a focus on showing that the Fuller Court drew from a contractarian conception of liberty that emphasized limited government, Fiss and the new standard historians present the Court as part of the constitutional tradition that dominated American legal thought from the late eighteenth century until its collapse in 1937. Nevertheless, to the extent that the Fuller Court embraced and upheld the regulatory state beyond the confines that Brewer and Peckham desired, and to the extent it also was more sympathetic to evolving patterns of economic enterprise in its antitrust cases, another understanding of the Fuller Court emerges: The Fuller Court was more modern than generally appreciated. As previously mentioned, some scholars have noted the Fuller Court's progressiveness. However, prior analyses have drawn almost exclusively from the Court's review of labor legislation and the scope of the police power (as I have just done).

I now turn to other evidence of the Court's modernity by discussing its expansion of the national government's commerce power, its turn to "reasonableness review," and its commitment to a "living constitution." In these areas, the Fuller Court introduced concepts that typify post-, but not pre-, Fuller Court constitutionalism. The Fuller Court transformed not only constitutional law's substantive content, but also its jurisprudence. The Fuller Court was more transitional than generally realized, bridging the chasm between nineteenth- and twentieth-century constitutionalism.

1. The Fuller Court and the National Commerce Power.—Fiss organizes his description of the Fuller Court's antitrust decisions around his thesis that the Court sought to protect its notion of ordered liberty. Without highlighting the point, however, his analysis suggests that while the Court was engaged in this pursuit, it substantially revised Commerce Clause jurisprudence, thereby expanding federal jurisdiction and power.

In Fiss's account, the Fuller Court's first encounter with the national commerce power, United States v. E.C. Knight Co., carried forward the prior understanding that divided regulation of business activity into separate spheres. By this understanding, most business activity was a state concern, and only interstate transport and sales were a national
Because regulation of manufacturing was within the state sphere, the Court in *E.C. Knight* barred the use of the Sherman Act to enjoin stock transfers that placed ninety-eight percent of the nation's sugar-refining capacity in one company.252

Almost immediately, however, the Court began a new tack. In *Addyston Pipe & Steel Co. v. United States*,253 the Court expanded national power to allow the Sherman Act to reach a price-fixing scheme devised by six manufacturers of cast iron pipe. The conspirators controlled two-thirds of the cast iron pipe market in the South and West, and many of their sales transactions required delivery to out-of-state destinations.254 The Court found the manufacturers' bid-rigging was within federal jurisdiction because it "direct[ly] and immediate[ly]" restrained the interstate transport and sale of their product.255

Then, in *Swift & Co. v. United States*,256 the Court made "[a]n even more decisive break"257 by allowing the Sherman Act to reach a price-fixing agreement among livestock dealers in the Chicago stockyards.258 Although the dealers' sales were local, the Court found them within federal jurisdiction because they were part of a "current of commerce" that carried meat from farms in the West to consumers in the East.259 Writing for a unanimous Court, Justice Holmes announced: "[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."260

In Fiss's view, after *Swift*, "the distinction between different types of economic activity no longer defined the bounds of the commerce power. Impact was everything."261 Soon, "there was little life left to the federalism objection: As long as the product was sold in national markets, a manufacturer fell within the regulatory province defined by the Sherman Act."262

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253. 175 U.S. 211 (1899).
254. *Id.* at 235-36.
255. *Id.* at 211, 234; pp. 125-29.
256. 196 U.S. 375 (1905).
257. P. 146.
259. *Id.* at 399. The Court's metaphor has also been rendered as the "stream of commerce." P. 146.
261. P. 146.
262. Pp. 147-48; see also Edward S. Corwin, *The Anti-Trust Acts and the Constitution*, 18 VA. L. REV. 355, 359 (1932) (interpreting *Swift* to signify that "national power is always entitled to take on such additional extension as is requisite to guarantee its effective exercise"); cf. pp. 257-92 (discussing state prohibition laws and showing another expansion of national power, one which chipped away at the traditional notion that state and federal spheres were wholly separate).
Barry Cushman’s recent article on the “current of commerce” doctrine argues that the Fuller Court understood it as a fairly limited intrusion into the traditional regime of dual federalism. His focus, however, is on the Taft and Hughes Courts’ use of the concept in federal initiatives other than antitrust. The conflict between Cushman and Fiss frames an issue for further consideration. At the least, we should recognize that after E.C. Knight, the Fuller Court expanded federal power as the occasion arose and originated the doctrine that, in NLRB v. Jones & Laughlin Steel Corp., precipitated a revolution. For over a generation, E.C. Knight has been taken as the Fuller Court’s approach to the Commerce Clause. In fact, it was a false start, and during Fuller’s tenure, the Court moved some distance from that precedent. The question is how far.

2. The Fuller Court and “Reasonableness Review.”—The history of reviewing legislation for its reasonableness has not been written. When it is, the decisions of the Fuller Court will stand as a transformative moment. Prior to the Fuller Court, the Supreme Court may well have engaged in reasonableness review, but the Court never admitted it, and it structured constitutional doctrine to avoid having to do so. The problem with reasonableness review is that it involves judgments of degree, which ultimately are discretionary questions of more or less. Pre-modern constitutionalism, dating back to Marshall, centered on the norm of nondiscretionary adjudication, which in constitutional cases meant that judges were to determine only whether a branch of government had the power it was exercising. By this norm, judges allocated power and never reviewed its

263. See Barry Cushman, A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones & Laughlin, 61 FORDHAM L. REV. 105, 114-16 (1992); see also Richard A. Epstein, The Proper Scope of the Commerce Clause, 73 VA. L. REV. 1387, 1432-40 (1987) (indicating that Commerce Clause jurisprudence was only moderately expansive before 1937). Dual federalism was an approach to the structure-of-government jurisprudence in which the states and national government generally had exclusive jurisdiction over different subject matters. See Edward S. Corwin, The Passing of Dual Federalism, 36 VA. L. REV. 1, 4 (1950) (attributing the decline of dual federalism to the emergence of constitutional concepts superseding dual federalism’s postulates of a narrowly constrained central government and fully sovereign, independent-minded state governments).

264. See, e.g., Champion v. Ames, 188 U.S. 321, 369-70 (1903) (upholding federal power to ban lottery tickets from interstate commerce).

265. 301 U.S. 1 (1937).

266. Even Cushman sees Swift as an important moment in dual federalism’s gradual unravelling. See Barry Cushman, Rethinking the New Deal Court, 80 VA. L. REV. 201, 258-60 (1994) (noting Swift as one of several instances when the Court modified the principles underlying dual federalism).


268. See Siegel, Lochner Era Jurisprudence, supra note 195, at 24-25, 30-31 (stating that the concept of determining allocation of power but not the reasonableness of its exercise was intended to limit the Court’s discretion).
exercise. Allocating power seemed to involve questions of kind,\textsuperscript{269} while the proper exercise of power seemed to involve questions of degree. The ban on reviewing legislation for its reasonableness was an aspect of the broader ban on reviewing government’s exercise of its allocated power.

The impropriety of reviewing discretionary exercises of power underlay John Marshall’s distinction in \textit{Marbury v. Madison}\textsuperscript{270} between the executive branch’s “political” and “ministerial” acts. Political acts, which were not judicially reviewable, were executive branch decisions involving the exercise of discretion; ministerial acts, which were judicially reviewable, were executive branch decisions carrying out peremptory duties.\textsuperscript{271} The need to avoid “exercise review” also makes sense of the nineteenth-century Court’s total ban on intergovernmental taxation.\textsuperscript{272} Without reviewing the reasonableness of a tax, to permit small taxes necessitated permitting large taxes. It is no accident that in the twentieth century, after reasonableness review became the norm, the law of intergovernmental taxation was revamped.\textsuperscript{273} With the rise of reasonableness review, Justice Holmes easily “brushed away”\textsuperscript{274} the claim that “power to tax involves the power to destroy”\textsuperscript{275} with the assertion “not . . . while this Court sits.”\textsuperscript{276}

Finally, the impropriety of reviewing the government’s exercise of its power is the key to understanding why, in deciding \textit{Munn v. Illinois},\textsuperscript{277} the Waite Court reviewed only whether the Illinois legislature had the power to regulate the charges of the grain elevators but refused to go

\textsuperscript{269} Today it is realized that allocating power as well as reviewing its exercise involves questions of degree because the construction and application of definitions ultimately are questions of more or less. The notion of interstate commerce, for example, now turns on differences in degree and not kind. Interstate commerce no longer denotes commerce that moves across state boundaries as opposed to commerce that remains within a state. It denotes commerce that has a sufficient effect on interstate business activity as opposed to commerce that does not. See \textit{Wickard v. Filburn}, 317 U.S. 111 (1942) (holding that wheat grown for consumption on the farm on which it was grown is within interstate commerce).

\textsuperscript{270} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{271} \textit{Id.} at 164-68.

\textsuperscript{272} See, \textit{e.g.}, \textit{Collector v. Day}, 78 U.S. (11 Wall.) 113, 127 (1871) (holding exempt from federal taxation those state “means and instrumentalities” that are used to carry out state powers because otherwise, the state would exercise its powers “only at the mercy of [the federal] government”); \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 436 (1819) (holding invalid a state tax on the Bank of the United States).


\textsuperscript{274} \textit{Graves}, 306 U.S. at 490 (Frankfurter, J., concurring).

\textsuperscript{275} \textit{McCulloch}, 17 U.S. at 431.

\textsuperscript{276} \textit{Panhandle Oil Co. v. Mississippi ex rel. Knox}, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

\textsuperscript{277} 94 U.S. 113 (1877).
further and review the reasonableness of the rates that had been set. In response to the plea that the Court review the reasonableness of the imposed rates, Chief Justice Waite responded, as tradition demanded, that it was not part of the judicial role. "The controlling fact," he said, "is the power to regulate at all. . . . We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

From this perspective, the Fuller Court's decision in *Chicago, Milwaukee & St. Paul Railway v. Minnesota*, which held that the Constitution mandated judicial review of the reasonableness of governmentally imposed rates, was a revolutionary moment from which much of modern constitutional law springs. *Chicago* involved judicial review of administratively set rates. Twentieth-century commentators have assumed that *Chicago*'s rationale for review was to ensure that agencies acted within the scope of their delegated authority. For this reason, twentieth-century commentators tend to treat the case as the fountainhead only of the modern law of judicial review of administrative action. However, in *Chicago*, the requirement that the agency set reasonable rates sprang not from the state's legislation, but from the Constitution. Judicial review was required to ensure the agency did not infringe upon the substantive constitutional norm that rates be reasonable. In *Chicago*, in a break with tradition, the Court declared that "[t]he question of the reasonableness of a rate of charge . . . involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation."

Unfortunately, Blatchford spoke for the Court in *Chicago* and his opinion contains its usual ambiguities. Nonetheless, his contemporaries

278. See supra text accompanying note 116.
279. *Munn*, 94 U.S. at 132-34.
280. 134 U.S. 418 (1890).
281. *Id.* at 458.
283. See, e.g., Stephen G. Breyer & Richard B. Stewart, *Administrative Law and Regulatory Policy* 38 n.9 (3d ed. 1992) (citing Minnesota's legislation in *Chicago* as an analog at the state level to Congress's rate-setting power); Louis L. Jaffe & Nathaniel L. Nathanson, *Administrative Law Cases and Materials* 42-43 (4th ed. 1976) (stating that *Chicago* precipitated the Court's establishment of principles controlling administrative rate-setting discretion); Monaghan, supra note 282, at 17 (citing *Chicago* as an initial instance of judicial review over administrative discretion). Fiss treats *Chicago* as far less important, discussing it as only one of the significant cases limiting *Munn*. In addition, he sees it as establishing procedural, rather than substantive, rights. Pp. 200-04.
285. *Id.* at 458.
suspected the decision’s full import. Justice Bradley penned an emotional dissent in which he argued that the Chicago majority “practically overrules Munn v. Illinois”286 because of the fundamental principle that had been breached.

Commentators were even more apocalyptic. The American Law Review claimed that Chicago

is an overturning of the fundamental principles upon which all our American governments are founded. Those principles are that the three co-ordinate departments of these governments . . . are independent of each other, within their respective spheres of jurisdiction, and that, within those limits, no power resides in one of these departments to control the other.287

Bradley and the American Law Review read Blatchford’s opinion presciently. Four years later, the Court, without further discussion, began reviewing the reasonableness of ordinances that undoubtedly were within the police power. In Lawton v. Steele,288 the Court upheld a statute providing for the summary destruction of illegal fishing nets, but only after assuring itself that “the means are reasonably necessary for the accomplishment of the [statute’s] purpose, and not unduly oppressive upon individuals.”289 Then, in Reagan v. Farmers’ Loan & Trust Co.,290 the Court relied on Chicago to strike down legislatively imposed rates that compelled a railroad to operate at a loss.291 In the Court’s view, although the legislature had exercised its undoubted power to regulate rates, it had done so “unreasonably.”292

Over three decades after the Chicago decision, when the norms of constitutional law that case had introduced were in full flower, Charles Warren looked back and said:

While it was generally felt that the opinion of the dissenting Judges was the more correct as a matter of strict law, nevertheless, this decision of the Court in 1890 was undoubtedly the more in accord

286. Id. at 461 (Bradley, J., dissenting).
288. 152 U.S. 133 (1894).
289. Id. at 137. The Court’s analysis was that judicially supervised condemnation proceedings were too expensive given the cost of the nets. Id. at 141.
290. 154 U.S. 362 (1894).
291. Id. at 398, 412-13.
292. Id. at 413. Consider also that in Plessy v. Ferguson, 163 U.S. 537 (1896), the Court responded to Harlan’s complaint that allowing the state to separate the races in railroad cars would allow it to separate them on sidewalks, or separate Protestants from Catholics, id. at 557-58 (Harlan, J., dissenting), by saying, “[t]he reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for [sic] the public good, and not for the annoyance or oppression of a particular class.” Id. at 550.
with the general trend of judicial decisions and the temper of the times. 293

A full understanding of why "the temper of the times" called forth Chicago's unprecedented and portentous holding is on our scholarly agenda. Why in the late nineteenth century were the Justices driven, after years of hesitation, to overturn one of the fundamental maxims of judicial review? How did they understand their new departure? Although it is important to understand that the Fuller Court genuinely sought to protect its vision of constitutional liberty, it is also important to understand that it did so, in part, through a revolutionary technique.

3. The Fuller Court and the "Living Constitution."—The Fuller Court's embrace of an expanded national commerce power and reasonableness review reveals its embrace of another facet of modern constitutional law: a living constitution.

As with reasonableness review, prior to the Fuller Court, the Supreme Court may have administered a "living constitution" but never admitted it, and structured constitutional discourse to avoid having to do so. Prior to the Civil War, the American Constitution was conceived of as static. 294 However, with the Court's first encounter with the regulatory state in Munn v. Illinois, 295 a dynamic constitutionalism began to appear. This constitutionalism conceived of the Constitution as collating the fundamental principles of the Anglo-American tradition, principles whose application evolves with "the changes of time and circumstances." 296 Emergent in

293. 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 314 (1922).

294. See PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THOUGHT 32-64 (1992) (characterizing the period prior to the Civil War as a jurisprudence of "maintenance," as opposed to later periods that were marked by "growth" or "community"). McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), does not contradict this remark, despite Chief Justice Marshall's saying that the Constitution was to be "adapted to the various crises of human affairs." Id. at 415 (emphasis omitted). "Adapted" may mean "suitable" as well as "modified." 1 THE OXFORD ENGLISH DICTIONARY 101 (1st ed. 1939) (tracing the former meaning to 1610 and the latter to only 1816). I believe Marshall meant that the national government should have plenary power over the "means" by which it pursued its allocated ends. To Marshall, a static interpretation of the Constitution should be informed by the unimaginable variety of circumstances in which it would have to function. That the Constitution had to function through time helped inform what its timeless interpretation should be. See Epstein, supra note 263, at 1400 n.34 ("In framing an instrument, which was intended to be perpetual, the presumption is strong, that every important principle introduced into it is intended to be perpetual also; that a principle expressed in terms to operate in all future time, is intended so to operate." (quoting Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 355 (1827) (Marshall, C.J., dissenting))); id. at 1406-08 (recognizing the value of Marshall's "formalist" approach to Commerce Clause cases, which relied on categorization, as opposed to a "realist" approach, which measures the economic impact of legislation).

295. 94 U.S. 113 (1877).

296. Id. at 134; see also Hurtado v. California, 110 U.S. 516, 528-32 (1884) (providing examples of the historical evolution of English common-law rights, and stating that the common law "preserved and developed [personal liberty and individual rights] by a progressive growth and wise adaptation to
the Waite Court, the model of "a historically progressing constitutionalism that represented the growth of reasonable governance."\(^{297}\) flowered in the Fuller Court.\(^{298}\)

The Fuller Court's conception of constitutional evolution was not entirely modern.\(^{299}\) In the Fuller Court, constitutional evolution was neither amoral nor random. It was an ordered growth according to inflexible principles immanent in the legal tradition, principles implanted by a benevolent deity that were the racial inheritance of the Anglo-American people.\(^{300}\) As Justice Brown said in \textit{Holden v. Hardy},\(^{301}\) "the law is, to a certain extent, a progressive science,"\(^{302}\) and "the methods by which justice is administered are subject to constant fluctuation."\(^{303}\) Still, he believed that "the cardinal principles of justice are immutable,"\(^{304}\) and it was the Court's function to expound and apply them.\(^{305}\) "[T]he law," Brown believed, may "be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employés, as they arise."\(^{306}\) Notwithstanding this belief, he did not wish . . . to be understood as holding that this power is unlimited. While the people of each State may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede . . . .\(^{307}\)

\(^{297}\) KAHN, \textit{supra} note 294, at 97.

\(^{298}\) Id. at 104.

\(^{299}\) The referent of modern is to the current understanding of constitutional evolution among scholars. On the bench, understanding of constitutional change may well continue to mirror the Fuller Court's understanding. \textit{See} Horwitz, \textit{supra} note 4, at 91, 71-98 (describing the Court's decision in \textit{Planned Parenthood v. Casey}, 112 S. Ct. 2791 (1992) (plurality opinion), as a decision indicating that the present Court will interpret the Constitution differently than prior decisions when "changed circumstances" are present).


\(^{301}\) 169 U.S. 366 (1898).

\(^{302}\) Id. at 385.

\(^{303}\) Id. at 387.

\(^{304}\) Id. at 387; \textit{see also} id. at 389 (limiting a pronouncement of congressional power by pointing out that the Constitution contains certain principles that cannot be compromised, such as those in the Bill of Rights, and calling these principles "immutable principles of justice").

\(^{305}\) Paul Kahn perceptively states that Holmes and his colleagues did not disagree over whether the Constitution should evolve, but over whether legislatures or courts were the chief institutions for determining the speed and course of evolution. He also sees this as the main difference between the Waite and Fuller Courts. KAHN, \textit{supra} note 294, at 104-05.

\(^{306}\) \textit{Holden}, 169 U.S. at 387.

\(^{307}\) Id. at 389.
Constitutional evolution allowed legislatures to adopt innovative initiatives and defend them as new instances of old principles. It also allowed the Court to evolve constitutional guarantees to maintain their vitality under society's altered circumstances.

Rate regulation and reasonableness review illustrate this observation. In *Munn v. Illinois*, Chief Justice Waite surveyed common-law precedents on rate control and upheld rate regulation of grain elevators as "establish[ing] no new principle in the law, but only giv[ing] a new effect to an old one." Yet, concerned about the power he had legitimated, Waite eventually began to warn:

"It is not to be inferred that this power of . . . regulation is . . . without limit. The power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares . . ., the State cannot . . . do that which in law amounts to a taking of private property for public use without just compensation."

Unfortunately, Waite's warning rested uncomfortably on a body of precedent that defined impermissible "takings" as seizures of possession or title. Nontrespassory takings (i.e., regulatory takings) were an oxymoron under nineteenth-century law. Nonetheless, as Justice Brewer argued, rates set unduly low would result in loss of the physical property. Moreover, under modern conditions it was anachronistic to define property as consisting in its physical corpus and not as including its "value . . . in the markets of the world." To function adequately in the new industrial world, the traditional constitutional protection against uncompensated takings had to evolve to protect contemporary understandings of property.

With this acknowledgment, the Court began its drift towards enunciating the rule in *Smyth v. Ames*, a rule that guaranteed railroads the value, not just the possession, of their property by limiting the

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308. 94 U.S. 113 (1877).
309. *Id.* at 134.
312. See Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 399, 410 (1894) ("Is it any less a departure from the obligations of justice to seek to take not the title but the use for public benefit at less than its market value?"); Chicago & N.W. Ry. v. Dey, 35 F. 866, 879 (C.C.S.D. Iowa 1888) (holding that rates must allow for at least some compensation or courts will be justified in striking such regulations down in order to "protect the companies"); Ames v. Union Pac. Ry., 64 F. 165, 177, 176-78 (C.C.D. Neb. 1894) ("The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed."); *suff sub nom. Smyth v. Ames, 169 U.S. 466 (1898), and modified, 171 U.S. 361 (1898).*
government's ability to set rates unduly low.\textsuperscript{315} To late-nineteenth-century jurists, the morally justifiable value of property was set by the profits it made in a competitive market.\textsuperscript{316} The theory of \textit{Smyth} was that, on the one hand, the state could use rate regulation to prevent railroads from using their unique property to gouge the public and obtain monopoly profits. On the other hand, the state could not use rate regulation to compel the railroads to earn less than a competitive return.\textsuperscript{317}

In effect, the Fuller Court evolved the traditional law of takings to guard its modernized understanding of property from novel governmental initiatives. To the Fuller Court Justices, proscription of uncompensated takings was an "immutable principle of justice."\textsuperscript{318} \textit{Smyth v. Ames} altered only the means by which the Court administered justice in order to meet "new conditions."\textsuperscript{319}

The Fuller Court's development of reasonableness review also reflects its evolutionary constitutionalism. Prior Courts sought to determine only whether the official or branch of government at bar had exercised a power that the Constitution allocated to it.\textsuperscript{320} In undertaking allocation review, however, the Court always had to elide the problem that officials or branches could exercise an allocated power as a ruse for exercising another unallocated power. When the Marshall Court announced, for example, that under the Contracts Clause\textsuperscript{321} states could alter contract remedies but not contract rights, it immediately spotted a problem for which it offered no satisfactory resolution: Legislatures could effectively impair contract rights by exercising their discretionary control over contract remedies.\textsuperscript{322}

\begin{itemize}
\item \textsuperscript{315} See Siegel, \textit{Regulation}, supra note 117, at 226, 224-27 (describing the \textit{Ames} decision as holding that railroad owners had a right to a "fair return" on their land).
\item \textsuperscript{316} See id. at 230, 231-32 (explaining that the \textit{Ames} court understood the appropriate measure of "fair value" to be competitive profits rather than the profits which arose out of the railroad's monopolistic position).
\item \textsuperscript{317} See Siegel, \textit{Regulation}, supra note 117, at 221-22, 224-28; 260-61 (describing the Court's adoption of the reproduction cost theory of rate regulation and the theory's inadequacy when applied to large-scale enterprises).
\item \textsuperscript{318} See supra note 304.
\item \textsuperscript{319} See supra text accompanying note 306.
\item \textsuperscript{320} See supra text accompanying note 269.
\item \textsuperscript{321} U.S. CONST. art. I, § 10, cl. 1.
\item \textsuperscript{322} See, e.g., Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 284-85 (1827) (asserting that contract remedies are necessarily a matter of state control; thus, regulation of remedies does not violate the Contracts Clause). \textit{But see id.} at 301-02 (Thompson, J., concurring) (arguing that a state could unconstitutionally impair contract rights by eliminating the remedy for contracts already formed); id. at 351-53 (Marshall, C.J., dissenting) (arguing that regulation of contract remedies can so impair contract obligations as to violate the Contracts Clause). Eventually, the Taney Court adopted a rule voiding remedial changes that unduly burdened the exercise of contract rights. \textit{See Bronson v. Kinzie, 42 U.S. (1 How.) 311, 320, 320-21 (1843)} (overturning changes in contract remedies because they "directly and materially" conflicted with existing contract rights). While the \textit{Bronson} ruling came close to adopting reasonableness review, the Court struggled to prevent it, chiefly by avoiding the question of whether the remedial alteration unduly burdened the right in the instant case. Instead, they asked
\end{itemize}
Likewise, when the Waite Court announced decades later that legislatures could regulate railroad rates, it spotted a problem for which it offered no satisfactory resolution: Under the "pretence" of regulating rates, the legislature effectively could confiscate the entire property.\textsuperscript{323}

A few years after the Waite Court first indicated its uneasiness with unreviewable rate control, Justice Harlan propounded a solution to the problem of "pretence." In upholding the compelled closure of a brewery under a state prohibition law, he paused to say that

the courts are not bound by mere forms, nor are they to be misled by mere pretences. . . . If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.\textsuperscript{324}

\textit{Chicago, Milwaukee & St. Paul Railway v. Minnesota},\textsuperscript{325} which declared that "reasonableness . . . is eminently a question for judicial investigation,"\textsuperscript{326} followed hard upon Harlan's proclamation, as did \textit{Reagan v. Farmers' Loan & Trust Co.},\textsuperscript{327} which said that legislatively set rates allowing a railroad no profit were "unreasonable" and unconstitutional.\textsuperscript{328} \textit{Lochner v. New York},\textsuperscript{329} which voided maximum hours legislation after admitting the law might have some ability to promote employee health,\textsuperscript{330} was the Fuller Court's most notorious example of reasonableness review.

In other words, the Fuller Court developed reasonableness review from the pre-existing commitment to allocate power. The Fuller Court recognized that guarding the Constitution's allocation of power inevitably involved reviewing the relation of means to ends and questions of degree.

\begin{itemize}
\item whether this type of remedial alteration, if taken to its most extreme, could bar any enforcement of the right. \textit{See, e.g., Von Hoffman v. City of Quincy}, 71 U.S. (4 Wall.) 535, 553-54 (1866) (creating categories of acceptable and unacceptable remedial changes). Some contemporary jurists criticized the Taney Court's approach for adopting review of discretionary legislative action. \textit{See Bronson}, 42 U.S. at 329, 329-30 (McLean, J., dissenting) (arguing that Bronson's principle was "too abstract for practical operations"). \textit{But see Beebe v. State}, 6 Ind. 501, 516, 516-17, 520-21 (1855) ("[B]eyond all doubt . . . the Courts will review and decide upon the exercise of legislative discretion, so far as to determine whether, in the given case, the constitution has been violated.").
\item \textsuperscript{323} See supra text accompanying notes 308-17.
\item \textsuperscript{324} Mugler v. Kansas, 123 U.S. 623, 661 (1887).
\item \textsuperscript{325} 134 U.S. 418 (1890); \textit{see also supra} text accompanying notes 280-85 (discussing Chicago).
\item \textsuperscript{326} \textit{Chicago}, 134 U.S. at 458.
\item \textsuperscript{327} 154 U.S. 362 (1894).
\item \textsuperscript{328} \textit{Id.} at 412-13.
\item \textsuperscript{329} 198 U.S. 45 (1905).
\item \textsuperscript{330} \textit{See id.} at 59-61 (speculating that the law might have some ability to promote health, but then concluding that "[t]he act is not, within any fair meaning of the term, a health law" because the regulation's relationship to promoting health was too insubstantial).
\end{itemize}
Adjudicating the Constitution's allocation of power was an "immutable principle of justice," at least in the American system. Reasonableness review represented a new method of advancing that traditional end, a new method whose need was made manifest by societal development.

V. Conclusion

With remarkable sweep and clarity, Owen Fiss presents the Fuller Court as defenders of a Lockean, contractarian tradition of liberty. Unfortunately, his steadfast attention to this theme somewhat distorts his vision and largely limits the significance of his work. In general, Fiss overstates the Fuller Court's unity and Brewer and Peckham's influence upon it. More importantly, he also fails to explore other facets of this complex, transitional Court.

At both the beginning and end of the book, Fiss indicates the reason for his singular focus. Fiss's interest in the Fuller Court stems from the pall it casts on the Warren Court, that is, on how the ghost of *Lochner v. New York* haunts *Brown v. Board of Education*. The Fuller Court turned "judicial activism" into an epithet that restrains the pursuit of social justice in the courts.

Although Fiss acknowledges that history "cannot resolve the question of legitimacy directly or fully," he knows that history has a role in that resolution. His aspiration is, through historical exploration, to separate the Fuller Court's conception of judicial role from the substantive law it enforced; to enable us "to criticize [Lochner's] substantive values and yet leave unimpeached its conception of role—which it shared in common with Brown." In Fiss's view, "[T]he failure of the Fuller Court lay not in the Court's understanding of its place in the American political system but in its attachment to a conception of liberty that consisted almost entirely of a demand for limited government." He wants to reopen "the settlement of 1937," with its celebration of judicial deference, and re-establish "the basic analytic distinction between role and doctrine" so that we "may, with perfect consistency (though not

331. See supra text accompanying note 304.
332. See pp. 9-12, 19-21, 392-95.
333. 198 U.S. 45 (1905).
334. 347 U.S. 483 (1954). For Fiss's view, see p. 12 (explaining that his book will prepare those in the post-Brown era to confront the ghost of *Lochner*).
335. See p. 20 ("It is this image of the Court as guardian of the transcendent values of society that inspires the 'activist' epithet often applied to both the Fuller and Warren Courts.").
337. P. 19.
339. P. 11 (referring to the Court's decision to no longer protect economic rights).
without a touch of bravado), remain attached to Brown and its robust use of the judicial power to further the ideal of equality, yet be happy that Lochner lies dead and buried.

Fiss's aspiration is estimable, despite the present-mindedness it implies. To his credit, Fiss never allows his contemporary concerns to taint his description of Fuller Court precedents. Nevertheless, the linkage between the Fuller and Warren Courts is more varied and ambiguous than Fiss intimates. The Fuller Court began to expand governmental power and national jurisdiction and provided at least a foundation that, despite retrenchment in the 1920s, flowered in the New Deal. By turning to reasonableness review and recognizing constitutional evolution, the Fuller Court originated the very conceptions that undergird much of the Warren Court's work. The Fuller Court's development of substantive due process was a step towards Meyer v. Nebraska, Pierce v. Society of Sisters, and the modern privacy decisions. Free speech and regulatory takings, too, were grounded in substantive due process until they were relocated in the incorporated First and Fifth Amendments.

340. P. 21. Fiss is not alone in his ambition. See, e.g., Tribe, supra note 196, § 8-7 (suggesting that the retreat from the Lochner doctrine need not have given way to complete judicial abdication).

341. See supra text accompanying notes 264-66.

342. See, e.g., T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943, 964-65 (1987) (presenting balancing of interests as the dominant means of reviewing the exercise of legislative power); William H. Rehnquist, The Notion of a Living Constitution, 54 TEX. L. REV. 693, 697-98 (1976) (recognizing and criticizing the notion of a living constitution as the concept that allows the judiciary to take on a legislative role).

343. 262 U.S. 390, 399 (1923) (striking down under the Due Process Clause state legislation that forbade the teaching of foreign language to children before they reached the eighth grade).

344. 268 U.S. 510, 534-35 (1925) (holding that a state law requiring children be sent to public schools violated the parents' due process rights).

345. See Roe v. Wade, 410 U.S. 113, 152 (1973) (citing the history of the concept that liberty rights are protected by the Due Process Clause of the 14th Amendment); Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) (drawing from Pierce and Meyer in recognizing married couples' right to procreative freedom).

346. See Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming for purposes of argument that freedom of speech was protected by the 14th Amendment's Due Process Clause).

347. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (striking down a statute which prohibited mining that would cause subsidence).

348. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 310-11 (1987) (holding that the 5th Amendment, as incorporated by the 14th Amendment, requires compensation for temporary regulatory takings); Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (noting that free speech rights are protected by the 14th Amendment's Due Process Clause); see also Sunstein, supra note 4, at 873-83 (analyzing the evolution of takings analysis from the Fuller Court to contemporary constitutionalism). The Fuller Court's development of reasonableness review was also a step towards "balancing of interests" as a norm of judicial analysis. Judicial balancing is another way of reviewing the discretionary exercise of governmental power. See, e.g., Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 770-71 (1945) (balancing interests to determine if state legislation offends the dormant Commerce Clause); Aleinikoff, supra note 342, at 963-72 (illustrating judicial balancing in many areas of constitutional law such as free speech and procedural due process).
The relationship between the Fuller and Warren Courts is varied and fundamental because in the late nineteenth century, economic, social, political, and intellectual forces transformed the fabric of American life.\textsuperscript{349} A primarily agrarian and commercial country, composed of fairly independent, homogeneous communities, rapidly developed into an urban-industrial nation typified by large-scale enterprise, economic and social interdependence, and ethnic and class diversity. In those years, American institutions charted their first response to the conditions that still circumscribe our lives, making decisions that shape who we are today.

The Supreme Court's initial response to the nation's modernization came during Fuller's chief justiceship, and Fiss has aptly entitled his volume "The Troubled Beginnings of the Modern State." Despite Fiss's vision of a unified Court, his study shows that the Justices on the Fuller Court responded to modernity with varying degrees of understanding and acceptance.\textsuperscript{350} The response of the Justices largely conforms to Thomas Kuhn's description of how professional communities change their beliefs.\textsuperscript{351} Many of the Justices approached new issues with ideas rooted in their inherited notions, while a few, like Holmes, immediately adopted a different view. Those who drew from the past altered its traditions with varying speed.

Nonetheless, the Fuller Court Justices were the first to contend with modern conditions, and some of their innovations survive over a century later. Properly dating the origins of these doctrines helps to understand and assess them. An expanded Commerce Clause, reasonableness review, and an evolving Constitution, for instance, did not originate with the New Deal and Warren Courts. Rather, they were introduced by the Fuller Court, the first Court to apply the Constitution to a society fundamentally

\textsuperscript{349} See, e.g., ALFRED D. CHANDLER, JR., THE VISIBLE HAND 1-12 (1977) (describing the tremendous growth in business during the late 19th century); THOMAS L. HASKEL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE 1-23 (1977) (observing that the last decade of the 19th century was the peak of profound alterations in human society); JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at ix-xii (1978) (noting that the people turned to the government to establish order in a changing political, social, and economic time); STEPHEN SKOWRONEN, BUILDING A NEW AMERICAN STATE (1982) (tracing the development of the American state through institutional innovations that emerged around the turn of the century); ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877-1920 (1967) (asserting that this period was characterized by a fundamental shift in American values).

\textsuperscript{350} Brewer seems not to have understood that large-scale enterprise frequently was more efficient than small-scale undertakings. See Budd v. New York, 143 U.S. 517, 550-51 (1892) (Brewer, J., dissenting) (asserting that competition will destroy monopolies not protected by state privilege). Peckham, too, staunchly opposed large-scale enterprise. See May, supra note 18, at 303 (describing Peckham's alarmed reaction to industrial combination and expansion). White seems to have been more receptive. See supra text accompanying notes 177-82.

\textsuperscript{351} See THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 66-91 (2d ed. 1970) (describing the reaction by scientists to scientific revolution as not uniform, but proceeding haphazardly towards consensus after sufficient proof is found and alternative theories are developed).
unlike that of the Framers' generation, a more culturally diverse society, typified by large economic enterprise and pervasive social and economic interdependence. In this more interdependent society, with its polycentric problems,\textsuperscript{352} the Fuller Court Justices realized adjudication required inquiry into the "proportionateness of measures."\textsuperscript{353} They also realized the need to adapt the Constitution to their times and thought interpretation a superior means to the cumbersome amendment process.\textsuperscript{354}

The Fuller Court responded to modern conditions with a constitutionalism that was both old and new. The New Deal and Warren Courts conceived a second response to the same conditions, a second constitutionalism. It, too, is under challenge. As we assay a third constitutionalism, there are a variety of significant stories to tell about the Court that first grappled with modern times.

The Fuller Court's governing coalition was united in its defense of liberty and the constitutive state. Yet the Justices also struggled with themselves and with each other to decide what that defense specifically entailed. They sought to recast traditional constitutional norms to render them effectual in the new industrial, interdependent, and culturally diverse world. Hesitantly and unwittingly, they began the transition from early to modern American constitutional law.

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\textsuperscript{352} Polycentric problems are problems composed of inseparable and interdependent issues. Any one point for decision relates complexly to all the others, so that innumerable overall solutions exist with no logical preference for one over the others. \textit{See}, e.g., Lon L. Fuller, \textit{The Forms and Limits of Adjudication}, 92 HARV. L. REV. 353, 400, 394-404 (1978) (arguing that adjudication is not institutionally suited for resolving polycentric problems and suggesting instead that such problems "can often be solved . . . by parliamentary methods which include an element of contract in the form of the political 'deal'"); James A. Henderson, \textit{Judicial Review of Manufacturers' Conscious Design Choices}, 73 COLUM. L. REV. 1531, 1536, 1534-39 (1973) (summarizing the notion of polycentricity as delin- eating "many-centered problems, in which each point for decision is related to all others" and in which adjustment of one point necessitates that "a complex pattern of readjustment will occur").

\textsuperscript{353} FREUND, \textit{supra} note 144, at 60, 58-61 (describing the rationale underlying recent Supreme Court cases).

\textsuperscript{354} See Siegel, \textit{Historism, supra} note 300, at 1478-80, 1528 (discussing leading 19th-century scholars).