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Rhetorical Styles on the Fuller Court

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by WALTER F. PRATT*

"Formalism" is the label regularly used to describe judicial opinions of the late nineteenth century.[1] The label is descriptive when used in contradistinction to "instrumentalism." Use of the label, however, has certain drawbacks. For example, there is little objective or empirical evidence to support the application of the two antithetical terms. In addition, a single term cannot reflect whatever diversity of styles may exist among the judges of a single court. This article describes the results of an attempt to rectify those two drawbacks and to determine whether the Justices of the Supreme Court at the turn of the century—while Melville Fuller was Chief Justice—were as monochromatic as the single term "formalism" would suggest. The article relies upon objective measurements to demonstrate that there was a variety, one might say a richness, of styles among the Justices of the Fuller Court.

The article is based upon a study of a sample of cases from eleven terms, from 1895 through 1905, of the Fuller Court. The sample was made up of the cases involving a challenge to the constitutionality of a statute, including state, federal, and territorial. In all there were 286 cases.[2] The terms were selected because they were the terms during which Justices Brown and Peckham sat together. Those Justices were of interest because preliminary research had suggested that their styles might represent the extremes on the Court. They were also the terms with the most continuity among the

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1. The seminal work espousing that characterizaion is, of course, K. Llewellyn. *The Common Law Tradition: Deciding Appeals* (1960). More recent studies include: *e.g.*, M. Horwitz, *The Transformation of American Law, 1780-1860* (1977); Kennedy, Form and Substance in Private Law Adjudication, 89 *Harv. L. Rev.* 1685 (1976); Nelson, The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America, 87 *Harv. L. Rev.* 513 (1974). Contra J. Semonche, *Charting the Future* 426-27 (1978).

2. Those cases represent almost thirteen percent of the cases decided by the Court during the eleven terms. See W. King, *Melville Weston Fuller* 339 (1950).

Justices; only four Justices were appointed during the period.[3] Cases involving a challenge to a statute were selected because "formalism" takes one of its attributes from such cases. That is, the formalistic style is associated with an anti-legislative bent.[4] Moreover, these cases seemed most likely to produce explanations of judicial philosophy because they involved the Court in a potential conflict with other branches and levels of government.

Analysis of the decisions alone would not have satisfactorily rectified the shortcomings associated with the formalism-instrumentalism dichotomy. There would still be a need for some empirical support for the analysis. Voting patterns could provide some such support, but they reveal little about the content of a Justice's style. Other than the voting patterns, quantifiable information about a Justice can come only from the length of his opinions or from the precedents that he uses. Neither source of information alone is particularly useful, largely because a Justice who writes long opinions would be expected to cite more cases.[5] So, to provide additional empirical support, this article relies upon the average number of cases cited per page of opinion. All citations of authority were counted, including cases from federal, state, and foreign

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3. As it happens selection of the eleven dates has another, independent merit. They are the terms during which the Fourteenth Amendment had its first heavy use. *See* E. Corwin, *The Twilight of the Supreme Court* 77 (1934). Moreover, this period marks the decade immediately after the height of what Arnold Paul has described as the "conservative crisis." *See* A. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (1960).

4. At least in the late nineteenth century, formalism tended to be anti-legislative. *E.g.*, G. Gilmore, *The Ages of American Law* 63 (1977); M. Horwitz, supra note 1, at 259.

5. The average length of each Justice's opinions is shown in the following chart:

Gray	12.24
Harlan	12.16
White	10.20
Peckham	9.94
[Court]	[8.93]
Brewer	8.75
Day	8.15
Brown	7.43
Fuller	6.84
McKenna	5.99
Holmes	3.54

That Holmes wrote the shortest opinions and Gray the longest is of interest. But it is not a statistic that lends itself to speculation about the Justice's beliefs. Instead, it says more about his literary style. The use of rate of citation of cases has the additional advantage of relating to the distinction between formalism and instrumentalism. The formalistic style is associated with frequent citation of precedent, with the string citation.

courts, as well as treatises or other scholarly works.[6] To provide a single standard for comparison of the opinions written by the eleven Justices, the number of cases cited in each opinion was divided by the number of pages in the opinion. The result, the number of cases per page, provided a statistic which allowed for the variation in the length of opinions. The following table summarizes the results for all opinions written by each Justice.

	AVERAGE CASES PER PAGE		
JUSTICE	ALL	FEDERAL	STATE
Holmes	3.35	2.16	1.06
Day	3.19	2.19	0.997
Gray	2.79	1.65	1.02
Brown	2.59	1.72	0.80
Brewer	2.32	1.84	0.48
McKenna	2.23	1.31	0.91
[Court Average]	[1.91]	[1.40]	[0.49]
Fuller	1.88	1.42	0.45
Shiras	1.72	1.37	0.35
Harlan	1.42	1.07	0.33
White	1.41	1.16	0.24
Peckham	1.34	1.08	0.26

Use of the average permits the Justices to be placed along a continuum that is defined by Justice Holmes on one end, with an average of 3.3 cases per page, and Justice Peckham on the other end, with an average of 1.3. The numbers themselves, of course, prove nothing. But they do serve to support what would otherwise be no more than an impression of different concepts of the judicial craft. The various patterns illustrate differences in the Justices' style of argument, if not of reasoning. Judicial rhetoric is probably the best term for what is being described, for it encompasses all that is involved in the process of argumentation and debate.

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6. The average was determined by counting the number and type of citation used in each of the sample cases. The number of cases cited was determined by counting each time a case was mentioned in the opinion. Whenever the same case was cited more than once, each citation was counted (that is, three references to *A* v. *B* were counted as three cases). The number of pages was also counted, compensating for the longer pages in volumes 160-190 (38 lines per page) by computing their length at the rate of 36 lines per page as in volumes 191-202. The number of lines was counted from the notation "Mr. Justice _____ delivered the opinion of the court" to the end of the opinion (including the order of the Court). The statement of facts was not counted unless it formed part of the opinion. The number of cases was then divided by the number of pages to obtain the average number of cases cited per page.

Justices, like all judges, write opinions to explain results and to persuade readers of the correctness of the results. A particular style of reasoning, such as formalism, does not dictate a particular result. Instead, the explanations of a particular result are based upon the writer's judgment that certain arguments will be persuasive for the particular facts. The judgment is based upon both what a Justice thinks is important and what a Justice thinks is likely to persuade those who read the opinion. For the Fuller Court two characteristics can be used to describe the rhetorical styles of the various Justices: the frequency of citing precedents and the degree of deference shown to legislative action.

Taken together, the two factors reveal much about how each Justice perceived his role and that of the Court. Moreover, the comparison also leads to an understanding of what each Justice considered to be most important in determining the outcome of particular cases. On the Fuller Court there was a diversity of perceptions and of primary values. That is not to suggest that the diversity in rhetorical style produced a diversity in result. The Fuller Court was, by today's standards, remarkably homogeneous in its results. Three of every five decisions were unanimous. Even so, that homogeneity conceals a Court whose members were quite different, just as does the single term "formalism."

The Justices on the Fuller Court fall into three groups. The groups can be defined by the two characteristics, one, the use of precedent, the other, the deference to legislative actions. Interestingly, the Justices may be placed along the continuum defined by the use of precedent in roughly the same order as for the degree of deference. Thus, one group, composed of Justices Holmes, Day, Gray, and Brown, showed the most deference toward legislatures and supported their decisions with the most frequent citation of cases. The other group, Justices Shiras, Harlan, White, and Peckham, were least deferential to legislatures and least inclined to rely upon precedent. Overlapping those two groups were the remaining Justices, Brewer, McKenna, and Fuller.[7]

Of the eleven Justices, Justice Holmes had the highest rate of citing cases. Joining the Court in 1902, he sat for only the last four of the eleven terms covered by this article. Nevertheless, his twenty-six opinions are sufficient to provide insight into his rhetorical style.[8] Holmes explained the philosophy underlying that voting pattern in

7. Measurement of the inclination to overturn statutes is based upon both textual analysis and voting patterns. The following chart shows the percentage of votes cast by each Justice to overturn a statute. The percentage was obtained by counting the total number of votes cast to overturn, regardless of whether the vote was in majority or in dissent, or whether the Justice casting the vote wrote an opinion. The total

the first opinion he wrote for the Court. The case, *Otis* v. *Parker*,[9] arose under a provision of the California constitution that declared void all contracts for the sale of corporate stock on margin or for future delivery. Holmes acknowledged that a state could not arbitrarily interfere with private business, but, since "general propositions do not carry us far,"[10] judges were required to investigate every case. In doing so, they were not to invalidate every law that to them seemed "excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree."[11] Instead, because judges were not omniscient, they should show "great respect" for legislative enactments, which represented the "deep-seated conviction on the part of the people concerned" as to what was required by their situation.[12] Any other course would alter the nature of the Constitution from a document "embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities" to one that was "the partisan of a particular set of ethical or economical opinions, which by no means are held semper ubique et ab omnibus."[13]

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number of cases participated in was also counted. The percentage in the chart was obtained by dividing the number of votes cast by the number of possible votes.

Gray	9.2
Holmes	13.6
Day	15.8
Shiras	17.2
Fuller	17.5
[Court]	[20.5]
Brown	20.8
Brewer	20.99
McKenna	21.1
Peckham	23.1
White	26.3
Harlan	26.5

Comparison with the chart showing the average citation rate per page shows that the grouping of Gray, Holmes, and Day remains consistent, as does the grouping of Peckham, White, and Harlan. Justice Brown and Justice Shiras do not fall within the two extreme groups when this measure is used. Textual analysis and shifts in use of precedent place Brown with Holmes, Day, and Gray. Brown's voting pattern does not squarely place him within that group. The same is true for Shiras. The text of the article offers an explanation for the variations. As with the other measure, Justices Fuller, Brewer, and McKenna are near the average for the entire Court.

8. All of his opinions were written to explain a vote to uphold a state statute. He wrote neither to overturn a statute nor to explain a federal statute.

9. 187 U.S. 606 (1903).

10. *Id.* at 608.

11. *Id.*

12. *Id.* at 609.

13. *Id.*

Holmes consistently exhorted the other Justices that they must permit the legislatures great latitude. Just how much latitude Holmes was willing to grant was revealed in *Missouri, Kansas & Texas Railway Company* v. *May*.[14] In 1901 the Texas legislature had passed a statute imposing a penalty on any railroad that permitted either Johnson grass or Russian thistle to go to seed on its right of way. The statute applied to no landowners or corporations other than railroads. As in *Otis* v. *Parker*, Holmes observed that the dispute was not about the definition of a principle but about the application—"whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree."[15] In deciding on which side of the line a statute fell, the courts should defer to the legislature which was the "only judge of the policy of a proposed discrimination."[16] The justification for Holmes' judicial policy lay in the need for flexibility: "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[17] Elsewhere Holmes repeated his admonition. "It is dangerous," he wrote, "to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the Constitution."[18]

All of those thoughts were incorporated into his terse dissent in *Lochner* v. *New York*.[19] Fittingly, this classic example of Holmes' style was provoked by an opinion written by Justice Peckham, whose style was at the opposite end of the spectrum from Holmes. The dissent was an echo of his opinion in *Otis* (from which Peckham had dissented without writing an opinion). Here again were characteristic themes—the accusation that the case was "decided upon an economic theory which a large part of the country does not entertain"; even if there was agreement, the Constitution did not embody any particular economic theory; the admonition that personal views were irrelevant in adjudging "the right of the majority to embody their opinions in law"; and the reminder that "[g]eneral propositions do not decide concrete cases."[20] None of Holmes' other opinions

14. 194 U.S. 267 (1904).

15. *Id.* at 269.

16. *Id.*

17. *Id.* at 270.

18. Louisville & N. R.R. v. Barber Asphalt Paving Co., 197 U.S. 430, 434 (1905).

19. 198 U.S. 45 (1905).

20. *Id.* at 75-76. It may be that the stridency of Holmes' opinion was the result of his perception of a new activism on the Court. Max Lerner has suggested that the tone was in part the result of Holmes' having found his place on the Court and in part the result of the clash of two intellectual universes, a divergence that is supported by the contrast in judicial styles. *See* M. Lerner, *The Mind and Faith of Justice Holmes* 147 (Modern Library ed. 1943).

included such general statements of his philosophy. Nevertheless, he regularly wrote epigrammatical opinions[21] which relied upon citations of cases to demonstrate the acceptance of an idea or the latitude that was granted a state.[22]

Certain elements of Holmes' style were mirrored in the opinions of Justice Day, whose rate of citation was second only to that of Holmes. Day's position on the continuum is based upon only eight opinions written for the Court after he joined the Court in 1903. Those eight cases may not provide sufficient data for an accurate portrayal of his style. Nevertheless, Day did reveal an approach similar to Holmes' in *Leigh* v. *Green*.[23] Like Holmes, he minimized the application of general principles. In upholding a state's power to alter the procedures for foreclosing a tax lien, Day wrote that whether due process had been denied depended upon the "nature of each particular case."[24] In the same case Day alluded to the limited role of the federal courts in responding to challenges to a state's taxing power.[25]

That Day might not have allowed legislatures as wide latitude as Holmes could be inferred from his long dissent in *Security Mutual Life Insurance Company* v. *Prewitt*.[26] Joined only by Justice Harlan, Day argued that a state could not condition a license to sell insurance on the company's agreeing not to remove a case from state to federal court. The dissent emphasized that there was a limit to a state's power to impose restrictions on foreign corporations, and that a state could not compel the surrender of a constitutional right.[27] Any other rule, Day contended, would nullify the Constitution.

Justice Gray came next after Justices Holmes and Day in the rate of citing cases. Holmes' predecessor on the Court, Gray, shared with Holmes a predeliction for English cases.[28] Gray's interest in the

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21. The average length of his opinions was 3.5 pages; for the entire Court the average was 8.9 pages. See footnote 5 supra.

22. See, e.g., Seattle v. Kelleher, 195 U.S. 351, 358-60 (1904); Aikens v. Wisconsin, 195 U.S. 194, 204-06 (1904); Kidd v. Alabama, 188 U.S. 730, 732-33 (1903).

23. 193 U.S. 79 (1904).

24. *Id.* at 87. Holmes expressed similar statements in Seattle v. Kelleher, 195 U.S. 351, 358 (1904), and in Kidd v. Alabama, 188 W.S. 730, 733 (1903).

25. 193 U.S. at 89.

26. 202 U.S. 246 (1906). Interestingly, Peckham wrote the majority opinion in *Prewitt*. In *Lochner*, Justice Day joined Justice Harlan's dissent.

27. 202 U.S. at 262, 266. Day also wrote one majority opinion that held a legislative action was unconstitutional, Dobbins v. Los Angeles, 195 U.S. 223 (1904) (change in area in which gas-works permitted).

28. Both Gray and Holmes cited an average of 0.11 English cases per page; the Court's average was 0.02. Next after Gray and Holmes was Justice Brown, with an average of 0.07. Justice Day, the other member of the quartet with the highest citation rate, cited no English cases.

antecedents of legal rules, however, appears to have been stronger than that of Holmes. Whereas Holmes' primary tenet of interpretation was acquiescence to the preferences of the majority, Gray appears to have made historical pedigree the primary governing criterion.[29]

Gray's first opinion in the selected group was a model of his style.[30] The suit was one of many challenging a state's power to assess and tax property of a foreign corporation. Gray began his opinion by stating the principle that the Constitution limited the states' power to tax foreign corporations. Then he commented that each of the three challenges to the statute appeared "to be governed by previous decisions of this court."[31] There followed a discussion of each of the three arguments and the relevant cases. Finally came the conclusion that the decisions "clearly" established that the statute was valid.

Lowe v. *Kansas* presented a similar resort to precedent.[32] Over a dissent by Justice Brown, Gray upheld a statute that assessed the costs of prosecution against a private prosecutor whenever the jury found that the prosecution had been brought without probable cause and for malicious motives. Lowe had argued that he was denied due process because he had no opportunity to be heard on the issue of his motivation. Gray responded that the libel action could not have been tried without revealing Lowe's motives to the jury. Furthermore, the timing of trying the issue of motive was a "matter of convenient practice, not of constitutional right."[33] Unlike Holmes and Day, who said that due process depended upon the facts of the case, Gray wrote:

> Whether the mode of proceeding, prescribed by this statute, and followed in this case, was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation, in similar cases.[34]

After referring to eleven cases, four statutes, and two abridgments, Gray concluded that the challenged statute possessed the requisite heritage.

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29. For an example of the acuteness of Gray's focus on history see his dissenting opinion in Schollenberger v. Pennsylvania, 171 U.S. 1, 27 (1898).

30. Western Union Tel. Co. v. Taggart, 163 U.S. 1 (1896).

31. *Id.* at 15.

32. 163 U.S. 81 (1896).

33. *Id.* at 87.

34. *Id.* at 85.

Although Gray did not always provide a recapitulation of the history of a doctrine, his interest in history was the dominant characteristic of his opinions. Typically, he began a discussion of the power of a state to impose absolute liability on a railroad for damage caused by fire with these words:

> The argument that this statute is in excess of the power of the legislature may be most satisfactorily met by first tracing the history of the law regarding the liability of persons for fire originating on their own premises and spreading to the property of others.
>
> At common law . . . .[35]

After an exhaustive examination of the history, he concluded that a state's police power permitted imposing liability on the user of a dangerous instrumentality.

In addition to his respect for history, Gray, like the others with high rates of citation, deferred to the choices of legislatures in adapting the law to changing circumstances.[36] As with Justices Holmes and Day, that deference was reflected in a high rate of citation for state cases: Holmes (1.06), Gray (1.02), Day (0.997). The average for the entire Court was 0.49 state cases per page.

With the next Justice, Justice Brown, each indicator of his style supports similar conclusions. His rates of citation for all cases (2.6) and for state cases (0.8) are above the average for the Court. Yet, in an apparent anomaly, of the thirty-nine opinions he wrote, in fifteen he argued that a statute should be overturned. In all, 20.8% of his votes were cast to overturn a statute. That figure placed him at the middle of the Court rather than with Holmes, Day, and Gray. Nonetheless, when Justice Brown wrote for the Court to declare a statute unconstitutional, his sense of value seemed to require greater justification than when he wrote to uphold a statute. He increased his rate of citation from 2.8 for all majority opinions to 4.0 in those

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35. St. Louis & S.F. Ry. v. Mathews, 165 U.S. 1, 5 (1897).

Compare the statement in text with this statement from Capital Traction Co. v. Hof, 174 U.S. 1, 5-6 (1899):

> The decision of this case mainly turns upon the scope and effect of the Seventh Amendment of the Constitution of the United States. It may therefore be convenient, before particularly examining the acts of Congress now in question, to refer to the circumstances preceding and attending the adoption of this Amendment, to the contemporaneous understanding of its terms, and to the subsequent judicial interpretation thereof, as aids in ascertaining its true meaning, and its application to the case at bar.

See also Gulf. Colo. & S.F. Ry. v. Ellis, 165 U.S. 150, 166 (1897) (Gray, J., dissenting).

36. *See* Capital Traction Co. v. Hof, 174 U.S. 1, 44-45 (1899); Bauman v. Ross, 167 U.S. 548, 589 (1897).

five majority opinions that struck down a statute. Although his rate of citation and his concern for deferring to legislatures places him with Holmes, Day, and Gray, his lesser trust in legislatures warrants placing him at the boundary between the rest of the Court and those Justices, and indicates the absence of sharp distinctions between the groups.

Brown's opinions reflect a combination of the characteristics that dominate the opinions of Holmes and Gray. Like Holmes, Brown believed that every effort should be made to find a statute valid and that flexibility was an important value. In one opinion Brown advised his brethren that they should not seek "excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supposed fundamental principles of civil liberty." Instead, "the effort should be to reconcile them [the statutes and the Constitution] if possible, and not to hold the law invalid."[37] That admonition came in *Brown* v. *Walker*, a case in which Brown wrote for a five-man Court to uphold the power of Congress to compel testimony after granting immunity from prosecution. In a phrase that anticipated Holmes, Brown wrote that the Fifth Amendment "should be construed, as it was doubtless designed, to effect a practical and beneficent purpose."[38] At the end of his opinion, almost as an afterthought, he added that any interpretation that permitted a person to refuse to testify would mean that there could be no prosecutions under the Interstate Commerce Act.[39]

The additional comment about the consequences of a particular result was more than an afterthought, it was typical of Brown's opinions. For instance, had the Court struck down Tennessee's law that prohibited the importation of cigarettes into the state, the consequences would have been "far-reaching and disasterous."[40] If a state's railroad commission could not require a single through rate, the commission "would be wholly inefficacious in a large number, if

37. Brown v. Walker, 161 U.S. 591, 596 (1896).

38. *Id.* Brown was not averse to appealing to justice as was evident in his dissent in Lowe v. Kansas, 163 U.S. 81, 91 (1896).

39. For other appeals by Brown to the consequences of a decision see Camfield v. United States, 167 U.S. 518, 527 (1897) (power of Congress to restrict fencing of public land); Robertson v. Baldwin, 165 U.S. 275, 280 (1897) (power of Congress to empower justices of the peace to arrest seamen).

40. Austin v. Tennessee, 179 U.S. 343, 360 (1900). When a similar case came to the Court five years later, Brown wrote that the Court could not provide protection under the commerce clause "without striking a serious blow at the rights of the States to administer their own internal affairs." Cook v. Marshall County, 196 U.S. 261, 273 (1905). See also Pabst Brewing Co. v. Crenshaw, 198 U.S. 17, 44 (1905) (dissenting opinion).

not a majority of cases—in fact . . . the whole purpose of the act might be defeated."[41] In yet another case, Brown explained that "[t]o hold a sale invalid upon these allegations might result in upsetting every sale for taxes made in West Virginia for the past twenty years."[42]

Brown deferred to the legislature to ensure that there was sufficient flexibility to adapt to changing conditions. That deference carried over into his rule for determining whether a classification was reasonable under the Fourteenth Amendment. As he said in *Plessy* v. *Ferguson*, "In determining the question of reasonableness it [the state legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."[43] That theme was repeated in Brown's dissent in *Scott* v. *Donald,* a case involving a challenge to the right of South Carolina to seize liquor while still in the possession of the railroad that had transported it into the state. Brown wrote:

> We cannot fail to recognize the growing sentiment in this country in favor of some restrictions upon the sale of ardent spirits, and whether such restrictions shall take the form of a license tax upon dealers, a total prohibition of all manufacture or sale whatever, or the assumption by the state government of the power to supply all liquors to its inhabitants [as had been done in South Carolina] is a matter exclusively for the States to decide.[44]

Later in the same opinion he warned of the "manifest dangers to the future of the country, which lurk in the inflexibility of the Federal Constitution," and advised that courts should avoid "vexatious interference" with state actions.[45]

In *Holden* v. *Hardy,*[46] Brown emphasized the need for flexibility so legislatures could respond to ever-changing conditions. Holden challenged his conviction under a Utah statute that set an eight-hour day as the maximum for miners. In his Court opinion upholding the law, Brown wrote that "the law is, to a certain extent, a progressive science."[47] He supported that assertion by pointing to changes in procedures since the time of the Constitution. Although the "cardinal principles of justice" were "immutable"

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41. Minneapolis & St. L. R.R. v. Minnesota, 186 U.S. 257, 263 (1902). *See also* Public Clearing House v. Coyne, 194 U.S. 497, 509 (1904).

42. Turpin v. Lemon, 187 U.S. 51, 61 (1902).

43. 163 U.S. 537, 550 (1896).

44. 165 U.S. 58, 103 (1897). See Holden v. Hardy, 169 U.S. 366, 391, 393 (1898).

45. 165 U.S. at 106.

46. 169 U.S. 366 (1898).

47. *Id.* at 385-86.

> the methods by which justice is administered are subject to constant fluctuation, and . . . the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.[48]

Alongside Brown's consistent modification of careful historical argument by concern for flexibility and consequences, his opinions overturning a statute reveal a curiously ad hoc approach. Brown, unlike Holmes, Day, and Gray, balanced his deference with a concern that legislatures might abuse their power. Nowhere was that more apparent than in his dissent in *Florida Central & Peninsular Railroad* v. *Reynolds*.[49] Brown would have held unconstitutional a Florida statute that authorized collecting back taxes for a three-year period. To Brown the statute's flaw was its limited application: only real estate owned by railroads was subject to the act. In a dissenting opinion that cited no cases and offered no other explanation Brown argued that "[t]his kind of discrimination seems to be measurable only by the rapacity of the legislature."[50]

In *Smith* v. *St. Louis & Southwestern Railway*,[51] Brown joined a similar concern about abuse of authority with emphasis on maintaining interstate commerce. Smith had sued the railway to compel it to deliver cattle consigned to him. The railway refused because the governor, based upon a finding of the livestock sanitary commission, had issued a proclamation ordering that no cattle be transported into Texas from Louisiana on account of the possibility of a charbon or anthrax outbreak. Brown thought that the proclamation went beyond the requirements of the case. As a result, it became "a wholly unjustifiable interference with interstate commerce."[52] "The statute thus construed," he warned, "puts a power into the hands of a sanitary commission which is liable to be greatly abused."[53]

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48. *Id.* at 387; *cf.* Bolln v. Nebraska, 176 U.S. 83, 88-89 (1900) (Fourteenth Amendment not intended to limit power of people to amend laws to conform to wishes of people or their needs).

49. 183 U.S. 471 (1902).

50. *Id.* at 483.

51. 181 U.S. 248 (1901).

52. *Id.* at 262.

53. *Id.* Another overly broad statute that Brown would have declared unconstitutional was involved in Compagnie Francaise de Navigation a Vapeur v. Louisiana St. Bd. of Health, 186 U.S. 380 (1902). Acting under that statute, the Board had denied permission to land for the passengers (from various countries including some citizens of the United States) on a ship from Italy. Brown thought that the possibly permanent

Brown voted to strike down other statutes that involved interstate commerce when he perceived an excessive use of power. One such act was passed by the Illinois legislature to require all trains to stop at county seats long enough to discharge passengers.[54] Returning to his concern for the consequences of a statute, Brown reasoned that if a state could require stops at county seats they could compel stops at every station, thereby destroying commerce: "We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic."[55]

Brown's reliance upon historical scholarship links him to Holmes and Gray. All three felt that precedent provided sufficient justification for a decision; all three reflected their respect for state government by citing a large number of state cases in their opinions. At the opposite end of the spectrum was a group of Justices, Shiras, Harlan, White, and Peckham, with markedly different styles. Instead of relying upon precedent they relied upon intuitive reason to support their conclusions. Moreover, they exhibited a greater willingness to overturn statutes. For Shiras and especially Harlan, that willingness was impelled by a desire to protect human rights. For White and Peckham the results could be derived from reason alone. That description is not meant to indicate a sharp distinction between the two pairs, it only illustrates what seems to have been the primary value choice for each Justice.

Justice Shiras cited more cases, on average, than did Harlan, White, or Peckham. In his careful, considered use of precedent his opinions are more like those of Justice Brown. And, like Brown, Shiras belongs on the boundary between the groups. But Shiras' other characteristics, his repeated statements that courts are not to consider the wisdom of a statute and his concern for human rights, serve as a preview of Justice Harlan.[56]

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exclusion without regard to country of origin or condition of health was an unreasonable interference with foreign commerce.

54. Cleveland, C., C. & St. L. Ry. v. Illinois, 177 U.S. 514 (1900).

55. *Id.* at 522. In Norfolk & W. Ry. v. Sims, 191 U.S. 441 (1903), Brown wrote the unanimous opinion which struck down a law that, if enforced, would have eliminated an "important branch" of interstate commerce—catalogue sales by Sears. *Id.* at 446-47. For similar results, also in cases involving commercial transportation, see The Roanoke, 189 U.S. 185 (1903); Houston & Tex. Cent. R.R. v. Mayes, 201 U.S. 321 (1906).

56. One unusual trait was Shiras' tendency to comment upon the regularity with which certain issues came before the Court. He treated that repetition with ambivalence. In American Refrigerator Transit Company v. Hall, 174 U.S. 70 (1899), for example, the court was faced with a challenge to the power of a state to tax a foreign

The difference between the two extreme groups was evident in Shiras' lengthy dissent in *Brown* v. *Walker*.[57] For the Court, Justice Brown had written that Congress could compel testimony by granting immunity from prosecution for the testimony given. Not to conclude that Congress had that power, Justice Brown had reasoned, would be to deny effect to the Interstate Commerce Act. Justice Shiras was joined by Justices Field, Gray, and White in disagreeing with that conclusion. Shiras' "natural impulse" was to rule that the statute was plainly unconstitutional since it tampered with a right that had been removed from the power of the legislature by the Fifth Amendment.[58] Even so, it was the duty of the Court, "as the final expositor as well of the Constitution as of the acts of Congress, to dispassionately consider and determine" whether the statute was valid.[59] He decided that the statute was a patent violation of the Constitution. Terming Brown's argument about the need for an effective Interstate Commerce Act a dangerous one, Shiras concluded that if

> experience has shown, or shall show, that one or more of the provisions of the Constitution has become unsuited to affairs as they now exist, and unduly fetters the courts in the enforcement of useful laws, the remedy must be found in the right of the nation to amend the fundamental law, and not in appeals to the courts to substitute for a constitutional guaranty the doubtful and uncertain provisions of an experimental statute.[60]

Thus, for Shiras the words of the Constitution served as his guide for deciding cases. As he repeatedly emphasized, however, those words were not to be supplemented by the views of individual judges. He reminded his fellow judges of that in *Louisville & Nash-*

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corporation's assests (railroad rolling stock). "The frequency with which the question has arisen," Shiras wrote for the Court, "is evidence both of its importance and of its difficulty," *Id.* at 74. But other cases, among them those involving assessments for public improvements, had also been before the Court many times. Their frequent appearance made lengthy consideration unnecessary. It was sufficient for the Court "to collate our previous decisions and to apply the conclusions reached therein to the present case." French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901). *See also* Caldwell v. North Carolina, 187 U.S. 622, 624-25 (1903); Chadwick v. Kelley, 187 U.S. 540, 543 (1903); Chicago, B.&O. R.R. V. Nebraska *ex rel.* Omaha, 179 U.S. 57, 67 (1898); Scott v. Donald, 165 U.S. 58, 90 (1897).

57. 161 U.S. 591 (1896).

58. *Id.* at 6-11.

59. *Id.*

60. *Id.* at 627. In the same opinion he wrote that "no apology for the Constitution, as it exists, is called for. The task of the courts is performed if the Constitution is sustained in its entirety, in its letter and spirit." *Id.* at 628.

ville Railroad v. *Kentucky*[61] when he wrote that it was "scarcely necessary to say that courts do not sit in judgment on the wisdom of legislative or constitutional enactments."[62] That opinion considered the power of a state to set the rates for intrastate rail transportation. In another case, involving the power of states to alter rights of redemption after foreclosure sales, Shiras expressed a similar thought in these words "We, of course, have nothing to do with the fairness or the policy of such enactments as respect those who choose to contract in view of them."[63] In a third case he linked his dependence upon the Constitution with his disavowal of any concern about the policies involved in the statute:

> The validity of the statute and of the ordinance having been passed upon and upheld by the courts of the State, it is not the function of this court, apart from the provisions of the Federal Constitution supposed to be involved, to declare state enactments void, because they seem doubtful in policy and may inflict hardships in particular instances.[64]

The opinions expressed by Justice Shiras also represented the value preferences that characterized Harlan's opinions. Both Justices found in the words of the Constitution support for the value each placed on human rights; both warned against judges' injecting their own beliefs into those words. But the similarities cannot hide the unique nature of Harlan's position on the Court. One third of his fifty-four written opinions were dissents; only thirteen of his thirty-two majority opinions were unanimous (no other Justice had less that half of his majority opinions be unanimous). Nevertheless, Harlan's rate of citation places him with White and Peckham as the members of the Court who cited the fewest cases.

As did the other members of this group, Harlan repeatedly warned against judges' dealing with the wisdom of a statute. His dissent in *Plessy* v. *Ferguson*[65] contained this typical expression of his view:

> There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristics that the three departments of government are coordinate and separate. Each

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61. 183 U.S. 503 (1902).

62. *Id.* at 512. *Cf.* Lake Shore & Mich. So. Ry. v. Ohio, 173 U.S. 285, 331 (1899) (dissenting opinion) (reasonableness not for courts to consider).

63. Barnitz v. Beverly, 163 U.S. 118, 130 (1896).

64. Chicago, B. & Q. R.R. v. Nebraska *ex rel.* Omaha, 170 U.S. 57, 77 (1898).

65. 163 U.S. 537 (1896).

> must keep within the limits defined by the Constitution. And the courts best discharge their duty by executing the will of the lawmaking power, constitutionally expressed, leaving the results of the legislation to be dealt with by the people through their representatives.[66]

There was another "distinguishing characteristic" of the government that led Harlan to depart from that apparently stringent standard and to vote to overturn statutes more often than any other Justice.[67] He identified that other characteristic in *Smyth* v. *Ames*,[68] one of his majority opinions overturning a statute. In that case the stockholders and bondholders of various railroads challenged the constitutionality of a Nebraska statute that established a Board of Transportation to regulate railroads and set maximum rates. Harlan explained that the Court could not "shrink from its duty to determine" whether the statute infringed upon constitutional rights. That duty, he contended, "distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."[69] Justice Holmes had been willing to share responsibility for preserving the liberties with the legislatures. Harlan was not so willing. For him, the courts were the final protectors of liberties.[70]

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66. *Id.* at 558. The same opinion also included this statement: "However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States." *Id.* at 553. For a similar statement by Justice Shiras, see note 60 *supra*. *See also* W.W. Cargill Co. v. Minnesota, 180 U.S. 452, 469 (1901); New York, N.H. & H. R.R. v. New York, 165 U.S. 628, 632 (1897); Hennington v. Georgia, 163 U.S. 299, 303-04 (1896).

That principle had especial validity when the statute that was challenged was one relating to taxation. As Harlan explained in *King* v. *Mullins*, "[t]he judiciary should be very reluctant to interfere with the taxing systems of a State, and should never do so unless that which the State attempts to do is in palpable violation of the constitutional rights of the owners of property." 171 U.S. 404, 436 (1898).

67. See footnote 7 *supra*, Harlan wrote twentyfive opinions to explain his votes to overturn statutes. Unlike Justice Brown, whose opinions to overturn statutes evidenced an increased reliance upon precedent, Justice Harlan's opinions showed a lower number of precedents cited to support his conclusion. Harlan wrote only four majority opinions in which a statute was overturned. In those cases his rate of citation was 1.16 cases per page. His rate for all opinions was 1.42

68. 169 U.S. 466 (1898).

69. *Id.* at 527-28.

70. Shiras made a similar statement, see text at note 61 supra. The importance Harlan placed on the courts as guardians of liberty may explain his concern for protecting the judicial process from legislative interference. *See, e.g.*, Atchison, T. & S.F. R.R. v. Matthews, 174 U.S. 96, 124 (1899) (dissenting opinion) ("If there is one place under our system of government where all should be in a position to have equal and exact justice done to them, it is a court of justice . . . .").

In resolving the tension between the respect due legislative enactments and the duty of the courts to uphold the Constitution, Justice Harlan called upon all the persuasive techniques used by other members of the Court. He relied heavily upon historical evidence when it supported his position. In *Hennington* v. *Georgia*[71] the challenged statute prohibited trains from running on Sunday. To support his conclusion that the statute was valid, Harlan began by commenting upon the history of similar laws: "From the earliest period in the history of Georgia it has been the policy of that state, as it was the policy of many of the original States, to prohibit all persons, under penalties, from using the Sabbath as a day for labor and for pursuing their ordinary callings."[72] Likewise, in *Fairbank* v. *United States*[73] Harlan criticized the majority for "departing from a rule of constitutional construction by which this court has been guided since the foundation of the Government."[74]

But, if the historical evidence appeared to be against him, he was ready to disregard it, usually in favor of notions of human rights. When the power of Congress to authorize justices of the peace to arrest deserting seamen was challenged as a violation of the Thirteenth Amendment, the majority upheld the statute on the ground that seamen were a longstanding exception to rules against slavery.[75] Justice Harlan rejected that analysis because the value placed on human life had changed. "It will not do," he wrote, "to say that by 'immemorial usage' seamen could be held in condition of involuntary servitude, without having been convicted of a crime." The Thirteenth Amendment already contained one exception, to add another without amending the Constitution amounted to "judicial legislation." Recalling his other rules concerning the implications of overturning an act of a legislature, Harlan commented that it was especially serious to depart from the clear meaning of a provision when it related to the liberty of man.[76]

Other than when he perceived a threat to human rights, Harlan was also willing to intervene in cases involving assessment of property. He wrote the Court's opinion in *Norwood* v. *Baker*,[77] which

71. 163 U.S. 299 (1896).

72. *Id.* at 303.

73. 181 U.S. 283 (1901).

74. *Id.* at 313. Harlan expressed a similar opinion in Maxwell v. Dow, 176 U.S. 581 (1900). There he disagreed with the majority's view that proceeding by information and an eight-man jury did not violate due process. *Id.* at 610-11. *See also* his concurring opinion in Rassmussen v. United States, 197 U.S. 516, 528-31 (1905).

75. Robertson v. Baldwin, 165 U.S. 275, 286-87 (1897) (Brown J.).

76. *Id.* at 301-02.

77. 172 U.S. 269 (1898).

held that a state could not assess property for an improvement without regard to the benefits received from the improvement. As the Court began to modify that principle in later cases, Harlan regularly dissented. He repeated that "[w] e live under a Constitution which is the supreme law of the land. It enumerates the powers of government, and prescribes limitations and restrictions upon legislative authority as to the property of citizens."[78] The courts offered the only haven for protection against the excesses of legislatures.[79] But in their role as protector, the judges were not dependent upon their own views of what was constitutional. Rather, "the will of the people as expressed in the fundamental law must be the will of courts and legislatures."[80]

Those two groups of cases marked the limits of Harlan's intervention. In other cases he adhered to his oft-repeated policy of deferring to the legislature. As he said in a case involving a statute setting the maximun workday for state employees:

> it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.[81]

He would have reached the same conclusion for a statute that regulated the hours of private workers, including bakers.[82]

Harlan's cautions against excessive judicial intervention were echoed by the third member of this group of Justices, Justice White. White wrote two unanimous opinions for the Court dealing with the power of a state to regulate the passing of property on death.[83] In each case he affirmed that the Court was concerned with neither the wisdom nor the policy of a statute.[84] But, like Harlan, White fre-

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78. French v. Barber Asphalt Paving Co., 181 U.S. 324, 367 (1901).

79. *Id.* at 368, 370. See also his dissents in the companion cases of Wight v. Davidson, 181 U.S. 371, 385 (1901) and Tonawanda v. Lyon, 181 U.S. 389, 392 (1901).

80. Robertson v. Baldwin, 165 U.S. 275, 297 (1897) (dissenting opinion).

81. Atkin v. Kansas, 191 U.S. 207, 222-23 (1903).

82. *See* Harlan's dissent in Lochner v. New York, 198 U.S. 45, 65 (1905).

83. Campbell v. California, 200 U.S. 87 (1906); Cunnius v. Reading School Dist., 198 U.S. 458 (1905).

84. 200 U.S. at 95; 198 U.S. at 469. *See also* Northern Cent. Ry. v. Maryland, 187 U.S. 258, 270 (1902).

quently wrote to overturn legislative action.[85] Unlike Harlan, however, White lacked a consistently articulated value preference that would explain his actions. More than any other member of the Court, White seemed to view the cases as exercises in pure logic—he would seek an argument's inherent contradictions before he would grapple with its legal implications. White at least offered an explanation for his demand for intellectual rigor when he wrote that "the departure from the pathway of principle . . . is always marked . . . by confusion and injustice."[86]

White's fondness for philosophical analysis is well illustrated by his dissent in *Adams Express Company* v. *Ohio State Auditor*.[87] The statute challenged in that case assessed taxes on a foreign corporation based upon its total value and not merely upon the value of the property in the state. White thought that such taxation exceeded the inherent powers of government (defined by its territorial limitations) and violated the commerce clause. Couching his analysis of precedent in terms of semantics, he urged that the "great principles of government rest upon solid foundations of truth and justice, and are not to be set at naught and evaded by the mere confusion of words."[88] He admitted that the entire value of a railroad or of a telegraph company could be considered for taxation purposes. But express companies owned movable property, unconnected by rail or wire, in many states. To justify a tax on an express company by reference to railroads "in reality declares that a mere metaphysical or intellectual relation between property situated in one State and property found in another creates as between such property a close relation for the purpose of taxation."[89]

This philosophical bent that characterized White's opinions concealed no other value preference. Once White had demonstrated an inherent flaw in an argument he was content to rely upon precedents to support his conclusion.[90] One instance of that process arose in *Knowlton* v. *Moore*, a case involving a challenge to the power of Congress to tax estates.[91] White first traced the history of estate

85. Thirteen of White's forty-three opinions held legislative action to be unconstitutional. When writing for the Court he increased his rate of citation from 1.4 cases per page to 1.79, apparently evidencing concerns similar to those that motivated Justice Brown.

86. Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 243 (1897) (dissenting opinion).

87. 165 U.S. 194 (1897).

88. *Id.* at 240.

89. *Id.* at 250.

90. *See, e.g.*, Ohio Oil Co. v. Indiana (No. 1), 177 U.S. 190 (1900).

91. 178 U.S.41 (1900).

taxes to establish that they were imposed on the passage of property and not on the property itself. Then he turned to the claim that the power to impose taxes on estates was reserved to the states. One way to refute that claim was to point to the exercise of the power since 1797. He admitted the persuasive force of that evidence, but put it aside to consider the reasoning behind the assertion of a lack of congressional power. As he expressed the argument, the contention was that Congress could not tax the exclusive power of the state to regulate the passing of property at death. But that was fallacious because the "thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate."[92] "It cannot be doubted," he concluded, "that the argument when reduced to its essence demonstrates its own unsoundness."[93]

White had a similar confidence in the ability of judges to recognize excesses in legislative action. That ability enabled them to defer to the legislature on all but the most critical occasions. So, in *McCray* v. *United States*,[94] after formulating a broad description of Congress' power to tax, White concluded that in a case

> where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain *to the judicial mind* that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred.[95]

An abiding faith in the ability of the "judicial mind" to reach the right result was the link between Justice Peckham and Justice White. With the lowest rate of citing cases, Peckham's style more nearly approached that of an essayist than any other Justice. Admittedly, his opinion in *United States* v. *Gettysburg Electric Railway Company* contained the formularistic admonition that courts should not strike down a state law unless it was "palpably without reasonable foundation."[96] But other than that reference in his first term on the

92. *Id.* at 59.

93. *Id.* at 60. *Cf.* Warburton v. White, 176 U.S. 484, 489 (1900) ("fallacy which is involved"); Baltzer v. North Carolina, 161 U.S. 240, 245, 246 (1896) ("reasoning in a vicious circle" and "fallacy contained in the argument").

94. 195 U.S. 27 (1904).

95. *Id.* at 64 (emphasis added).

96. 160 U.S. 668, 680 (1896).

Court, Peckham did not mention the phrase again.[97] Instead he relied upon his own reason to reveal the "right" answer.

Gettysburg Electric was a case brought to dispute the power of the federal government to buy land for Gettysburg National Park. For a unanimous Court, Peckham upheld a broad grant of power to the government to condemn land. One statement in his opinion embodied both elements of his style: to define "public purposes" he referred to Judge Dillon's treatise on municipal corporations in which "many authorities were cited" to support the rule, "and, indeed, the rule commends itself as a rational and proper one."[98] It was enough that the cases were numerous, Peckham did not have to list them. Moreover, the rule was reasonable, it did not require the support of precedent. Characteristically, the precedents which he did mention were used to establish general principles governing the case. In this opinion he listed three earlier cases to support the proposition that Congress had authority to condemn land "whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution."[99] Having established the principle, he referred to but one other case. What followed was an essay on patriotism. For example, he wrote:

> Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid.[100]

The same principle-essay technique was used in a later opinion, *Lake Shore & Michigan Southern Railway* v. *Smith*.[101] That case involved a challenge to a Michigan statute requiring all railroads to sell "one-thousand-mile-tickets," which were valid for two years. By a vote of six to three the Court held that the statute violated both the due process and the equal protection clauses. In the first four pages of his majority opinion Peckham cited seventeen cases to establish the boundaries of the conflict between the police power and due process. In the nine-page essay that followed, he explained

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97. The only modest exception to the statement in text is in Skaneateles Water Works Co. v. Skaneateles, 184 U.S. 354 (1902). That case arose after a city failed to renew its contract with the water company after the first five years of operation. In an innuendo-filled statement, Peckham disclaimed any interest in what "the village ought to do in the moral aspect of the case." *Id.* at 367.

98. 160 U.S. at 680.

99. *Id.* at 679.

100. *Id.* at 681.

101. 173 U.S. 684 (1899).

that once a state established a maximum rate for passengers or freight it could not "then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper."[102] To do so would be an interference with management and a discrimination in favor of the wholesale buyer.[103] In addition, he thought that there had been a denial of due process because the railroad had been compelled to sell its property (service) at a rate below the permitted maximum. Peckham repeated those contentions before reaching his final and most revealing conclusion: "*we* find it neither necessary nor appropriate" for the legislature to enact the statute.[104] For Peckham a majority of the Court was the final arbiter of the statute's reasonableness. If he recognized any values which competed with that view he exhibited no compulsion to discuss them.

A final illustrative case, also involving state regulation of railroads, was *Central of Georgia Railway* v. *Murphey*.[105] Under Georgia law the first of a succession of common carriers was obligated to determine the cause and party responsible for damage to goods in transit. If that carrier failed to do so within a specified time it was made liable for the entire damage. According to the railway, to enforce the statute for damage done on the out-of-state portion of an interstate shipment would violate the commerce clause. The court unanimously agreed. Peckham was convinced that the statute was unconstitutional. Without supporting citations, he wrote, "It is idle to attempt to comment upon the various cases decided by this court relating to this clause of the Federal Constitution. We are familiar with them, and we are certain that our decision in this case does not run counter to the principles decided in any of those cases."[106]

Peckham's principle-essay style was at its purest in *Allgeyer* v. *Louisiana*[107] and *Lochner* v. *New York*.[108] *Allgeyer* arose from a Louisiana statute regulating insurance companies. A company that did "any act" in the state to effect insurance was subject to a fine if it had not first complied with state law. In this instance a fine was imposed for posting a letter to notify the insurance company of a cotton shipment. That notification was required under an insurance

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102. *Id.* at 695.

103. *Id.* at 691.

104. *Id.* at 696 (emphasis added).

105. 196 U.S. 194 (1905). See also Wisconsin, M. & P. R.R. v. Jacobson, 179 U.S. 287 (1900).

106. 196 U.S. at 206.

107. 165 U.S. 578 (1897).

108. 198 U.S. 45 (1905).

contract previously made outside of Louisiana; the insurance company had no agents in the state. Peckham first distinguished this case from those in which the insurance contract was concluded within a state—in those cases the state clearly had the power to regulate the contract. He returned to that jurisdictional argument at the end of his opinion when he referred to other decisions that would deny Louisiana's power in this instance. Between those jurisdictional statements he authored a now well-known essay on liberty. Only two cases were mentioned, both to show that general definitions had been given to "liberty." In part, he wrote:

> The liberty mentioned in that amendment [the Fourteenth] means not only the right of the citizen to be free from the mere physical restraint of his person, . . . but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion on the purposes above mentioned.[109]

The essay in *Lochner* was even longer. A New York statute limited the hours a bakery employee could work in a week. After being convicted for allowing an employee to work more hours, Lochner challenged the statute as a violation of the Fourteenth Amendment. Peckham's opinion began by defining the statute as "an absolute prohibition upon the employer, permitting, under any circumstances, more than ten hours work [a day] to be done in his establishment."[110] As he had done in *Lake Shore*, he utilized precedents to portray the tension between liberty and the police power. Then, after he had defined the topic of his essay (whether liberty limited this particular exercise of the police power), he wrote without citation. Even though he admitted that there could be close decisions,[111] for him there were but two choices:

> Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family.[112]

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109. 165 U.S. at 589.

110. 198 U.S. at 52.

111. As an example he gave Holden v. Hardy, 169 U.S. 366 (1898), an opinion by Justice Brown from which Peckham had dissented.

112. 198 U.S. at 56.

His response to the starkly defined question was unequivocal: "There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker." [113]

To label Peckham an essayist is not to assert that every opinion had the same format. Rather it is to characterize that which was typical in his opinions. He was most assertive when the police power was used to regulate business. Then he was prepared to instruct a legislature about reason. When the police power was used to apprehend more traditional criminals, however, his style was noticeably different. With only three cases involving criminal procedure, the numerical analysis is not of great significance. Nevertheless, the change in style is indicated by his average rate of citing cases (2.2 per page compared with 1.3 overall). He abandoned the essay format and relied instead upon precedents to support his conclusions.

Maxwell v. *Dow* [114] involved the claim that Utah's prosecution by information and trial before an eight-man jury violated the privileges and immunities clause of the Fourteenth Amendment. Reliance upon precedents in responding to that claim changed none of Peckham's certainty. But, instead of emphasizing reason, he pointed to precedent to justify his conclusion:

> We think the various questions raised . . . have in substance, though not all in terms, been decided by this court in the cases to which attention will be called. The principles which have been announced in those cases clearly prove the validity of the clauses in the constitution of Utah which are herein attacked. . . . It will, therefore, be necessary in this case to do but little else than call attention to the former decisions of this court, and thereby furnish a conclusive answer to the contentions of plaintiff in error. [115]

The remainder of the opinion was a mixture of Peckham and precedent, of assertion and authority. Similar usage of precedent occurred in the other two criminal procedure cases, *West* v. *Louisiana* [116] (confrontation of witnesses) and *Jack* v. *Kansas* [117] (self-incrimination and immunity).

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113. *Id.* at 57. That statement should be compared with his assertion about oleomargarine: "In brief, every intelligent man knows its general nature, and that it is prepared as an article of food, and is dealt in as such to a large extent throughout this country and in Europe." Schollenberger v. Pennsylvania, 171 U.S. 1, 10 (1898).

114. 176 U.S. 581 (1900).

115. *Id.* at 583.

116. 194 U.S. 258 (1904).

117. 199 U.S. 372 (1905).

Possibly more surprising than his frequent use of precedents was his willingness to defer to the state legislatures. His deference was explicit in *Maxwell* when he wrote that "we are of opinion that they [the people] are much better judges of what they ought to have in these respects than any one else can be." [118] Elsewhere in the same opinion he explained, "It is a case of self-protection, and the people can be trusted to look out and care for themselves." [119] He seemed to believe that because the criminal law affected everyone, the legislature could be trusted to act reasonably. In Peckham's mind, however, self-interest was apparently not a reliable restraint to the regulation of business.

Peckham was confident of the rightness of his results. His confidence arose from believing that reason was on his side; reason, not precedent, was his favorite ally. When he did utilize precedents he relied almost exclusively upon Supreme Court opinions to the near exclusion of lower federal or state courts and to the total exclusion of English or other foreign cases.

The remaining Justices, Brewer, McKenna, and Fuller, cannot be as easily characterized as those grouped with the two extremes of Holmes and Peckham. Instead, ranged between the two groups, these three Justices share certain of the characteristics of each group while lacking sufficient identity to be classed with either group. Like those grouped with Justice Holmes, Brewer frequently relied upon numerous citations to support his conclusions. Unlike that group, however, Brewer articulated another value—the principle of natural justice. Along with the additional value came a greater insistence that the Court was concerned with the power of legislatures to act and not with the wisdom of their actions. That insistence linked Brewer with the other group of Justices.

Brewer first revealed his concern with values other than precedent in *Gulf, Colorado & Santa Fe Railway* v. *Ellis*. [120] Under the Texas statute involved in that case, attorneys' fees of not more than ten dollars were added to any successful suit against a railroad if the railroad did not pay within thirty days after a claim was filed and the claim was for less than fifty dollars. Writing for a six-man majority, Brewer explained that the statute was a clear denial of equal protection

118. 176 U.S. at 604. In three cases involving irrigation districts Peckham exhibited a similar deference to the legislature. Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 161 (1896) (without irrigation millions of acres of land must be left uncultivated "an effectual obstacle . . . in the way of the advance of a large portion of the State in material wealth and prosperity"); Stanislaus County v. San Joaquin & King's R. Canal & Irrigation Co., 192 U.S. 201 (1904); Clark v. Nash, 198 U.S. 361 (1905).

119. 176 U.S. at 605.

120. 165 U.S. 150 (1897).

because only railroads were subject to the penalty.[121] To supplement the many cases illustrating the enforcement of equal protection, Brewer called upon the "spirit of the Declaration of Independence."[122] That supplement was justified because "[n] o duty rests more imperatively upon the courts than the enforcement of the constitutional provisions intended to secure that equality of rights which is the foundation of free government."[123]

In *Adams Express Company* v. *Ohio State Auditor*,[124] a similar value intermingled with Brewer's realization that changing conditions required changing laws. Brewer undertook to explain the denial of a rehearing for a company to challenge a tax on its intangible property. "In the complex civilization of to-day," he wrote, "a large portion of the wealth of a community consists in intangible property."[125] "To ignore this intangible property," he continued, "or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country."[126] It would thus be a "mockery of substantial justice" "for a corporation, whose property is worth to its stockholders for the purposes of income and sale $16,800,000, to be adjudged liable for taxation upon only one fourth of that amount."[127] Brewer's allusion to "substantial justice" was supplemented by a concluding passage that echoed opinions by Holmes and Brown:

> In conclusion, let us say that this is entirely a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine-spun theories about situs should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such

121. *Id.* at 153, 157, 158.

122. *Id.* at 160. See also his dissent in Magoun v. Illinois Trust & Savings Bank. 170 U.S. 283, 301 (1898).

123. 165 U.S. at 160.

124. 166 U.S. 185 (1897) (on rehearing of case reported at 165 U.S. 194 (1897); see text accompanying notes 87-89 *supra*).

125. *Id.* at 218.

126. *Id.* at 219.

127. *Id.* at 222.

burden of taxation as a fair distribution of the actual value of their property among those States requires.[128]

That Brewer was at times dissatisfied with his mixture of values may be inferred from his opinion for the Court in *Atchison, Topeka & Santa Fe Railroad* v. *Matthews*.[129] Like the Texas statute in *Ellis*, the statute in this case imposed attorneys' fees on railroads that did not settle a claim before trial. Brewer distinguished the two statutes: *Ellis* had involved debts, this statute involved settlement of claims for damage caused by fire. The distinction was vital because there was no difference between a railroad qua debtor and all other debtors though there was a difference between a railroad qua causer of fires and all other corporations.[130] Even though vital, the distinction, which had evaded four members of the Court, was not an easy one to make. The principles that governed the distinction were "not difficult of comprehension or statement, yet their application often becomes very troublesome, especially when a case is near the dividing line. It is easy to distinguish between the full light of day and the darkness of midnight, but often very difficult to determine whether a given moment in the twilight hour is before or after that in which the light predominates over the darkness."[131] Thus, it was not surprising that in doubtful cases "the justices have often divided in opinion. To some the statute presented seemed a mere arbitrary selection; to others it appeared that there was some reasonable basis of classification."[132] After making that distinction, Brewer interposed his disclaimer of any interest in the wisdom of the classification. "It cannot be too often said," he reiterated, "that forms are matters of legislative consideration; results and power only are to be considered by the courts."[133]

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128. *Id.* at 225. The additional value (and its apparent corollary, the disavowal of any interest in policy) was apparent throughout Brewer's opinions. In Hawker v. New York it was mixed with a respect for a legislative judgment about qualifications to practice medicine. The statute made it a misdemeanor for anyone to practice medicine after being convicted of a felony. Brewer wrote that it was "not the province of the courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive to the desired result. These are questions for the legislature to determine." 170 U.S. 189, 195 (1898).

129. 174 U.S. 96 (1899).

130. *See id.* at 102.

131. *Id.* at 103.

132. *Id.* at 105.

133. *Id.* at 103. Even though uncomfortable with the mixture of values, Brewer continued to adhere to them. In Lindsay and Phelps Company v. Mullen he wrote an opinion for the Court to explain the validity of a statute that granted a lien on logs to cover the cost of scaling and surveying those logs. According to Brewer, that was a sensible provision because any other result "would strike a serious blow at the legislation of many of the Northwestern States and an immense volume of business

After the turn of the century Brewer acknowledged that he was troubled by the demands made by changing conditions and the increasing difficulty of drawing lines as he tried to preserve interstate commerce, allowing flexibility, and be true to the demands of justice. In *Austin* v. *Tennessee*[134] he thought that the majority had failed to protect interstate commerce when it decided that Tennessee could prohibit the importation of cigarettes in packages of ten. Unlike his decision in *Matthews*, he admitted to no difficulty in drawing lines: either the state had the power to prohibit importation or it did not. To Brewer the answer was plain: the state did not have the power.[135] Moreover, in a case such as this in which his opinion had no appearance of vacillation, he expressed his regret "that the decision of a great constitutional question like that here presented turns on the shifting opinions of individual judges as to the peculiar facts of a particular case."[136]

Among the greatest demands made by changing conditions were those for increased revenue. Brewer recognized the importance of those demands, but he appealed to higher values when he felt compelled to overturn a taxing statute. In *Fairbank* v. *United States*[137] he wrote for the Court an opinion that declared unconstitutional a ten-cent stamp tax on all bills of lading for export outside of North America. To explain his decision he referred to the "judicial duty of upholding the provisions of the Constitution as against any legislation conflicting therewith."[138] That duty required that constitutional grants of power as well as constitutional limitations "be enforced according to their letter and spirit."[139] The fact that other taxes would also fall if this one did was of little consequence when compared with the Court's duty to adhere to the "true construction of the constitutional limitation."[140]

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that has been carried on under the authority of that legislation." 176 U.S. 126, 138 (1900). To that concern for the consequences of the decision he added that it was "not for the courts to inquire whether any other provision would have been wiser. The only question for us to consider is whether that which has been made was within the power of the legislature." *Id.* at 146. For other statements of this view, *see* Travellers' Ins. Co. v. Connecticut, 185 U.S. 364, 371 (1902); Patton v. Brady, 184 U.S. 608, 619 (1902); Cotting v. Kansas City Stock Yards Co., 183 U.S. 79, 110 (1901); L'Hote v. New Orleans, 177 U.S. 587, 597 (1900); Cleveland, C., C. & St. L. Ry. v. Illinois, 177 U.S. 514, 523 (1900) (concurring opinion).

134. 179 U.S. 343 (1900).

135. *Id.* at 381, 383.

136. *Id.* at 383.

137. 181 U.S. 283 (1901).

138. *Id.* at 286.

139. *Id.* at 300.

140. *Id.* at 305. This statement should be compared with Justice Shiras' statement at note 60 supra.

Other than that decision, however, Brewer was sympathetic to the need for taxation. He characterized taxes not as debts, but as the highest obligation, "a contribution to the support of government."[141] A tax could be increased even after it had been collected because "so long as there exists public needs just so long exists the liability of the individual to contribute thereto."[142] By 1903 Brewer had seen enough taxation cases to enable him to write:

> Few questions are more important or have been more embarrassing than those arising from the efforts of a State or its municipalities to increase their revenues by exactions from corporations engaged in carrying on interstate commerce. There have been many cases, in whose decision some propositions have been adjudicated so often as to be no longer open to discussion.[143]

From the statement it would appear that Brewer departed from his reliance on precedent only when the issues had not been settled. For those unsettled cases he relied upon some other value; but once the process of decisionmaking had run its course he was content to return to reliance upon precedent to support his conclusions. Nevertheless, in 1904 Brewer wrote, "To hold the even balance between the Nation and the States in the exercise of their respective powers and rights, always difficult, is becoming more so through the growing complexity of social life, and business conditions."[144]

The most severe challenge to those views arose in *South Carolina* v. *United States*.[145] South Carolina, whose dispensary law had often been before the Court, challenged the power of the United States to impose a license tax on state-owned liquor stores. Brewer began his opinion upholding the law by recalling that "[t]o preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty."[146] To respond to that duty required the Court to discover what the Constitution meant in 1789, for "[t]hat which it meant when adopted it means now."[147] After a lengthy discussion of the nature of the divided sovereignties he concluded that if South Carolina could exempt this

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141. Florida Cent. & P. R.R. v. Reynolds, 183 U.S. 471, 481 (1902).

142. Patton v. Brady, 184 U.S. 608, 619 (1902).

143. Atlantic & Pacific Tel Co. v. Philadelphia, 190 U.S. 160, 162 (1903). *See also* Michigan Cent. R.R. v. Powers, 201 U.S. 245, 292 (1906).

144. New York *ex rel.* Pennsylvania R.R. v. Knight, 192 U.S. 21, 26 (1904). *See also In re Heff*, 197 U.S. 488, 505 (1905).

145. 199 U.S. 437 (1905).

146. *Id.* at 448.

147. *Id.*

business from taxation it could exempt all business from federal taxation, thereby crippling the federal government.[148] So he concluded with a compromise: to preserve the independence of the states, they could remain free of taxation in the exercise of "strictly governmental" powers, but once they undertook other business, they were subject to the power of federal taxation.[149]

The two Justices, who with Brewer formed the bridge between the two groups, showed none of the internal struggle that had marked Brewer's attempts to reconcile his mixture of values. Neither did their opinions reveal any overriding value preference. Thus, as the Justices who occupied the center of the continuum (McKenna cited 2.23 cases per page; Fuller cited 1.88; the Court's average was 1.91), McKenna and Fuller are appropriately neutral. Their opinions lack the dicta required to identify their judicial philosophies.

The only recurring theme in Justice McKenna's twenty-six opinions was the impossibility of drawing exact lines for the purpose of classification. As he wrote in *Orient Insurance Company* v. *Daggs*,[150] "Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary."[151] In addition, he included the mandatory refrain disclaiming any interest in the policy of statutes.[152]

Because of the paucity of evidence it is difficult to attribute McKenna's approach to a particular set of values. One bit of evidence does indicate that he may have been bored with the repeated cases brought under the equal protection clause. In response to one of those cases he wrote:

> The answer to that charge depends upon the power of the State to classify objects of legislation; necessarily a broad power, and one which this court has so many times decided exists, and so many times has defined and illustrated the limits upon it of the provision of the Constitution of the United States invoked by plaintiff in error, that farther definition would seem impossible, and any new instance of its application not without exact or analogous example in some decided case.[153]

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148. *Id.* at 455

149. *Id.* at 461.

150. 172 U.S. 557 (1899).

151. *Id.* at 562. *See also* Magoun Illinois Trust & Savings Bank, 170 U.S. 283, 296, 298 (1898).

152. *See, e.g.*, Citizens' Bank v. Parker, 192 U.S. 73, 80-81 (1904); Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 293 (1898).

153. Clark v. Kansas City, 176 U.S. 114, 119 (1900).

In one case he did engage in extensive discussion of the power of states to classify,[154] but in a later case he explained that "the somewhat elementary and lengthy discussion in the opinion was induced by the grounds upon which, and the ability with which, the statute was attacked."[155]

Chief Justice Fuller's decisions were equally nondescript. He seemed content to permit others to speak for him since most of his decisions consisted of quotations from other opinions. On occasion he did step from behind the mask provided by others and suggest that a particular outcome was better because of its consequences. For example, in *Henderson Bridge Company* v. *Kentucky*,[156] he wrote an opinion for the Court upholding Kentucky's right to tax the franchise of the bridge company which had erected a bridge across the Ohio River into Indiana. The company contended that various acts of Congress had insulated it from state taxation. Fuller concluded that an act regulating the height of bridges had not granted a franchise, and that an act defining post roads had not taken the company out of the state's taxation power. "The contrary view," Fuller explained, "would withdraw from the taxing power of the States nearly all the railroads and stage routes throughout the country."[157] The only other significant departure from his normal format occurred in his dissent for four members of the Court in the *Lottery Cases*.[158] The dissenters disagreed with the majority's conclusion that lottery tickets were items of commerce and could therefore be regulated by Congress. To the dissenters the distinction was more than formal; to break down the difference between what was and what was not commerce would "take from the States all jurisdiction over the subject so far as interstate communication is concerned. It is a long step in the direction of wiping out all traces of state lines, and the creation of a centralized Government."[159]

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154. Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283 (1898). In that decision he cited 3.5 cases per page, compared with his average of 2.2.

155. Billings v. Illinois, 188 U.S. 97, 101 (1903).

156. 166 U.S. 150 (1897).

157. *Id.* at 154.

158. Champion v. Ames, 188 U.S. 321 (1903).

159. *Id.* at 371. One other case involving the power of states to regulate commerce also provoked a longer than usual discussion by Fuller. *See* Patapsco Guano Co. v. North Carolina Bd. of Agriculture, 171 U.S. 345 (1898). Fuller did not, however, adhere to a dominant value of state regulation of commerce. In Austin v. Tennessee, 179 U.S. 343 (1900), he voted with the dissenters to overturn the statute. He also voted to overturn a Missouri law that created procedures for inspecting beer imported from other states. Since there was no inspection the statute could not be justified under the police powers of the state. *See* Pabst Brewing Co. v. Crenshaw, 198 U.S. 17 (1905).

The assumption of this article is that judges write opinions to do something more than announce a result. Through opinions judges attempt to explain a result in a way that will convince an audience that they too would have reached the same result. Presumably, judges resort to those arguments which they feel will be most persuasive. Thus, because a particular result can often be explained in a number of ways, the choice of argument reflects both what the judge considers to be important and what the judge perceives to be acceptable to the audience. When the choices are made in a case involving a conflict with another branch or level of government, the choices also reveal much about a judge's perception of the proper role of the judiciary.

The Justices on the Fuller Court had different perceptions of their role and of the arguments that would persuade an audience. Those differences demonstrate that the oft-used categories of formalism and instrumentalism are both inconsistent and inadequate to describe the Justices on the Court. They are inconsistent because they permit Justice Holmes to be classified as both a formalist, because he cited many cases, and as an instrumentalist, because he seldom voted to overturn a statute. Likewise, Justice Peckham was a formalist, because he frequently voted to overturn statutes, and an instrumentalist, because he cited few cases. The categories are inadequate because they do not allow for variations among the Justices.

This article has proposed a different measurement to remedy the inconsistencies and inadequacies of the formalism-instrumentalism dichotomy. Instead of inconsistent labeling, the proposed measurement shows that Justices Holmes and Peckham represented the two opposite styles on the Fuller Court. The other Justices can be arranged between the two extremes. In addition to its sensitivity to differences among the Justices, the measurement affords objective data which are adequate to establish the existence of the differences. The methodology explained in this article therefore offers a more complete and more accurate description of styles of judicial decisionmaking.